

THE SUPREME COURT'S SHADOW DOCKET

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Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee:

Thank you for the invitation to testify today. As you know, I hold the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law, where my research and writing focus on the intersection of constitutional law, national security law, and the federal courts. In addition to teaching about the Supreme Court, I also practice before it (I've argued three cases over the last four Terms), and help CNN cover it (as its Supreme Court analyst).

In light of that background, I'm especially heartened that the Subcommittee is taking a close look at the Supreme Court's so-called "shadow docket" — which has become such an increasingly significant and visible part of the Justices' workload. To help illuminate the conversation, my testimony today has five objectives: (1) To introduce the shadow docket and describe what it comprises; (2) to document the rise in significant shadow docket rulings since 2017; (3) to identify some of the possible explanations for this uptick; (4) to outline why, in my view, the rise of the shadow docket is not a salutary development; and (5) to sketch out some potential reforms that both the Court and Congress might consider.

I. WHAT IS THE "SHADOW DOCKET"?

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

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

Although it's only of recent vintage, the “shadow” metaphor is entirely appropriate given the contrast between such orders and merits decisions. The latter receive at least two full rounds of briefing; are argued in public at a date and time fixed months in advance; and are resolved through lengthy written opinions handed down as part of a carefully orchestrated tradition beginning at 10:00 a.m. EST on pre-announced “decision days.” It is impossible to miss these 60–70 cases, which, on top of the attention they receive from the Court, also tend to be the subject of numerous professional and academic Term “preview” events (before they're argued) and “recap” events (after they're decided).

In contrast, rulings on the “shadow docket” typically come after no more than one round of briefing (and sometimes less); are usually accompanied by no reasoning (let alone a majority opinion); invariably provide no identification of how (or how many of) the Justices voted; and can be handed down at all times of day — or, in some exceptional cases, in the middle of the night. Owing to their unpredictable timing, their lack of transparency, and their usual inscrutability, these rulings come both literally and figuratively in the shadows.²

These shortcomings aside, scholars and court-watchers did not pay much attention to the shadow docket historically, because nearly all of the Justices' decisions on the shadow docket were anodyne — denying petitions for certiorari in un-controversial cases; denying applications for emergency relief in cases presenting no true emergency; granting parties additional time to file briefs; dividing up oral arguments; and so on. That's not to say that there were *never* controversial rulings on the shadow docket; from the execution of the Rosenbergs³ to Justice Douglas halting Nixon's bombing of Cambodia⁴ to the stay of the Florida recount in what became *Bush v. Gore*,⁵ there certainly have

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

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

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

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

been significant rulings on the shadow docket across the Court's modern history.

But the shadow docket rulings that provoked public attention were sufficiently few and far between that scholarly focus tended to focus on their substance — rather than their procedure. At most, each Term tended to bring with it perhaps three or four significant shadow docket rulings, and a majority of those involved either election-related disputes or last-minute appeals before executions were carried out.

And because the Court so rarely settled divisive disputes through the shadow docket (outside of the election and death penalty contexts, anyway), the most frequent litigants before the Court did not tend to rely upon it. To take just one example, from 2001–17, across two very different two-term presidencies, the Justice Department only sought emergency relief from the Supreme Court (a common source of shadow docket orders) eight times — once every other Term.⁶ Although the Court granted four of those requests and denied four,⁷ only *one* of the eight orders in those cases provoked any of the Justices to publicly dissent.⁸ Compared to what we have seen over the past four years, the contrast is striking.

II. THE RISE OF THE SHADOW DOCKET SINCE 2017

There's no perfect way to measure the rise of the shadow docket over the past four years. It's a large dataset to begin with, and it's often 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 — at least quantitatively. That said, there is simply no dispute, even anecdotally, that the shadow

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

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

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

docket has become increasingly prominent over the past four years. In this part, I first identify at least six distinct respects in which the past four years have seen qualitative changes in the scope and size of the shadow docket before turning to possible explanations for the uptick.

a. DESCRIBING THE RISE OF THE SHADOW DOCKET

First, excepting ordinary grants of certiorari, there are a lot more cases in which the Justices are using the shadow docket to change the status quo — where the Court’s summary action disrupts what was previously true under rulings by lower courts. Consider, in this respect, one of the Court’s most recent high-profile shadow docket rulings — the order handed down at 10:44 p.m. EST on Friday, February 5 in “*South Bay II*,” in which the Court enjoined most of California’s COVID-based restrictions on indoor religious services.⁹ Neither the district court nor the Ninth Circuit had blocked California’s rules, so it was the Justices, in the first instance, who put them on hold.

In both absolute and relative terms, there have been far more of these kinds of rulings in cases seeking emergency relief — granting injunctive relief; granting stays of lower-court rulings; or, as in a surprising number of capital cases, *lifting* stays of lower-court rulings — than at any prior point in the Court’s history. In that respect, part of the significance of the shadow docket of late has been in how often the Justices are using it to disrupt the state of affairs as a case reaches the Court.

Second, perhaps most dramatically, the shadow docket has seen a remarkable increase in action from the Solicitor General. In contrast to the eight applications for emergency relief filed by the Justice Department between January 2001 and January 2017, the Trump administration filed *41* applications for such relief over four years — asking the Justices to intervene at a preliminary stage of litigation more than 20 times as often as either of its immediate predecessors.¹⁰ Emergency applications became such a central feature of the Office of

9. *S. Bay United Pentecostal Church v. Newsom* (“*South Bay II*”), No. 20A136, 2021 WL 406258 (U.S. Feb. 5, 2021) (mem.).

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

the Solicitor General during the Trump administration that it even led to a restructuring of the Office's staff.¹¹

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

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

And expanding the focus beyond applications from the federal government, there has been a sharp increase in the number of shadow docket rulings that have provoked four public dissents. During the October 2017 Term, for instance, there were exactly *two* such rulings. In the next two Terms, there were 20. Indeed, during the October 2019 Term, there were almost as many public 5-4 rulings on the shadow docket (11) as there were on the merits docket (12).¹²

Even so far *this* Term (the Court's first without Justice Ginsburg), there have already been two shadow docket rulings that were publicly 5-4.¹³ What's more, virtually all of the divisions in these cases are

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

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

13. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *Agudath Israel v. Cuomo*, No 20A90, 2020 WL 6954120 (U.S. Nov. 25, 2020) (mem.).

occurring along conventional ideological lines — with the progressives on one side, one bloc of conservatives consistently on the other, and one or two of the conservative Justices occasionally voting with the progressives. None of the “strange bedfellows” that we sometimes see on the merits docket have shown up on the shadow docket in recent years; the divisiveness of the shadow docket has been even more homogenously ideological than the divisiveness of the merits docket.

Fourth, although it has long been a criticism of the shadow docket, especially denials of certiorari, that the public usually has no idea how many Justices voted for a specific outcome (let alone *which* Justices), that concern has become that much more pronounced as the *public* tally has increasingly reflected multiple dissents. Consider, in this respect, the Court’s order last Thursday night refusing Alabama’s request to vacate a lower-court injunction in order to allow a scheduled execution to proceed.¹⁴ Four Justices concurred in the order — and joined an opinion explaining the basis for their concurrence.¹⁵ Only three Justices noted dissents.¹⁶ So we know that either (or both) of Justices Alito and Gorsuch joined the majority to block the execution. But we have no idea which of them, or if they both did, or why. Stealth votes aren’t new, but as the shadow docket grows in both absolute terms and divisiveness, the stealth votes are increasingly the *dispositive* ones — which, among other things, complicates efforts to decipher the potential impact of the Court’s ruling beyond the instant case.

Fifth, accompanying the rise of the shadow docket has been the rise of new (and unusual) forms of relief. Consider again the *South Bay II* decision handed down on February 5, in which the Court enjoined California from enforcing at least some of its COVID-related restrictions on indoor worship services. The following Monday, the Court issued an order in another California case in which a plaintiff had sought an injunction — treating the application for an injunction as a petition for a writ of certiorari *before judgment* (itself an unusual

14. *Dunn v. Smith*, No. 20A128, 2021 WL 517473 (U.S. Feb. 11, 2021) (mem.).

15. *Id.* at *1 (Kagan, J., concurring).

16. *Id.* at *2 (Kavanaugh, J., dissenting).

procedural vehicle)¹⁷ and issuing a “GVR,” *i.e.*, granting the petition; vacating the district court’s order; and remanding “for further consideration in light of” *South Bay II* — itself an unsigned order that was not accompanied by an opinion of the Court.¹⁸ What about the Court’s summary ruling in *South Bay II* was the district court supposed to consider? To similar effect, on January 15, the Court granted another petition for certiorari before judgment in a federal death penalty case — and, unlike the “GVR” order in *Gish*, summarily *reversed* the district court on the merits,¹⁹ something else that, at least according to my research, it has never before done in that posture (cert. before judgment).

Finally, as the *Gish* order makes clear, the dramatic increase in significant shadow docket rulings has brought with it novel questions about how lower courts are supposed to give precedential effect to rulings that the Supreme Court has *itself* suggested are of little precedential value.²⁰ For instance, a panel of the Fourth Circuit split sharply in August 2020 over what to make of how the Supreme Court had handled emergency applications in different cases brought by different parties challenging the same underlying governmental policy.²¹ And D.C. district judge Trevor McFadden has even drafted a

17. Unlike cases arising in state courts, the Supreme Court may grant a petition for certiorari to review a lower *federal* court decision as soon as that case is “in” the Court of Appeals. See 28 U.S.C. § 1254(1). Granting a writ of certiorari “before judgment” thus allows the Court to take up a case before it has been *decided* by the Court of Appeals — and has, at least traditionally, been reserved for cases presenting extremely exigent circumstances and timing. See Vladeck, *supra* note 6, at 128–30.

18. *Gish v. Newsom*, No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021) (mem.).

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

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

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

paper, together with one of his former clerks, attempting to taxonomize the different kinds of shadow docket rulings and what their value as precedent should — and should not — be.²²

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

b. EXPLAINING THE RISE OF THE SHADOW DOCKET

There is no single explanation for the source of this uptick. Rather, my own view is that the surge in high-profile shadow docket rulings can best be traced to a confluence of four factors: (1) subtle procedural changes that have made it easier for the Court to act collectively even when the Justices are physically dispersed; (2) a subtle but significant shift in how a majority of the Justices *apply* the traditional four-part standard for emergency relief pending appeal; (3) the effects of the changing composition of the Court on both the substance and procedure of these disputes; and (4) repetition — where what used to be extraordinary has increasingly become routine.

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

de Maryland en banc. See Casa de Maryland, Inc. v. Trump, 981 F.3d 311 (4th Cir. 2020).

22. See Trevor McFadden & Vetan Kapoor, *Symposium: The Precedential Impact of Shadow Docket Stays*, SCOTUSBLOG, Oct. 28, 2020, <https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays/>.

Second, even *within* the DOJ slice, less than half of the Trump administration’s applications for emergency relief involved nationwide injunctions. Rather, the theory on which the Trump administration routinely (and usually successfully) litigated most of its applications was that *any* injunction of a government policy created the kind of irreparable harm that justified emergency relief. That’s why, after staying a “nationwide” injunction against the “public charge” rule,²³ the Court *separately* (and later) voted to stay an Illinois-only injunction against the same rule;²⁴ the geographic scope of the injunction just wasn’t the central consideration.

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

But two shifts starting in the 1980s moved away from this practice. First, the Court stopped formally adjourning for its summer recess — so that the Court was technically *always* “in session,” even when the Justices were scattered across the globe.²⁵ This made it easier for the full Court to act on especially contentious cases — and took significant authority away from the individual Circuit Justices. Second, and related, although individual Justices often heard argument in chambers in shadow docket disputes (especially on matters they perceived to be of public importance²⁶), the full Court, as a matter of practice (but no formal rule) did not.²⁷ Thus, the Court slowly

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

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

25. See STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 1.2(F) (11th ed. 2019).

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

27. SHAPIRO ET AL., *supra* note 25, § 17.2.

normalized the practice of issuing orders, even in contentious cases, by the full Court, without meeting in person, and without any opportunity for oral argument.

As the Court's procedures shifted subtly, its composition shifted dramatically. It's not just that the two most recent appointments have moved the Court rightward; it's that they also appear to have provided a fifth (and sixth) vote for a particular (and idiosyncratic) view of *when* the Court should issue emergency relief. As I've explained in detail elsewhere, there now appears to be a majority of Justices who believe that, when *any* government action is enjoined by a lower court, the government is irreparably harmed, and the equities weigh in favor of emergency relief *no matter* the consequences to those who might be injured by allowing the policy to remain in effect.²⁸ Not only did Justice Kennedy never expressly endorse this view (which may help to explain why the uptick has accelerated since his departure), but the underlying justification for this approach does not actually hold up to meaningful scrutiny; it just gets repeated as if its logic is beyond dispute.²⁹

The upshot is that emergency relief now appears to rise and fall entirely on the merits — with virtually no regard for whether the *other* factors that are usually required are in fact satisfied. Once again, *South Bay II* stands out. Although there were four statements from the six Justices in the majority,³⁰ *none* of them purported to apply the four-factor test the Court traditionally follows when considering whether to grant an injunction. Instead, all of the discussion, and all of the Justices' analysis, was focused on the merits of the First Amendment dispute. That's increasingly the norm in these contexts — which may

28. Vladeck, *supra* note 6, at 131–32.

29. This view appears to originate with then-Justice Rehnquist, who traced the idea to the “presumption of constitutionality” that accompanies (most) government action. See *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977); see also *Maryland v. King*, 567 U.S. 1301, 1303 (Roberts, Circuit Justice 2012) (endorsing Rehnquist's formulation). But the presumption of constitutionality (1) is principally about *statutes*, not executive action; (2) is supposed to yield when constitutional rights are implicated; and (3) is, in any event, not a justification for declining to take into account the harm caused by *allowing* the policy to remain in effect pending appeal. See Vladeck, *supra* note 6, at 132 n.60.

30. See *South Bay II*, 2021 WL 406258, at *1 (notation of Alito, J.); *id.* (Roberts, C.J., concurring); *id.* (Barrett, J., concurring); *id.* (statement of Gorsuch, J.).

also help to explain why it's happening so much more often. The more that the Justices issue emergency relief on the shadow docket, especially in cases in which it might not previously have been available, the more the standard for such relief is necessarily diluted — making it easier for the next applicant to make out a case for such relief, and so on.

As the merits have become the all-but exclusive consideration in shadow docket cases, it is hardly surprising that positions likely to resonate with the Court's conservative majority are faring better. But the shift in the Court's composition has also had *procedural* consequences, not just with respect to emergency relief such as stays or injunctions, but also with respect to summary reversals of lower courts — for which there is at least a norm (if not a rule) that *six* votes, not five, are required (on the theory that any four Justices could grant plenary review, and so it takes six to prevent that from happening). Thus, the Court's novel January 15 ruling in *Higgs* — a summary reversal on a petition for a writ of certiorari before judgment — seems possible only *because* there are no longer four Justices who would dissent from such a procedural move.

Simply put, if a majority of the Justices are now of the view that the merits are the predominant consideration in considering emergency applications, and if six Justices are willing to summarily dispose of the merits even in novel procedural contexts, then that not only explains why we've seen such a dramatic uptick on the shadow docket in the last few years, but it also suggests that this shift is here to stay even if the Biden administration is less aggressive in pursuing (or the Justices are less solicitous in providing) such relief going forward. Instead, the focus will likely shift to cases in which *states* are parties, or cases in which those *challenging* federal policies are asking the Justices to intervene to freeze a lower-court ruling in favor of the federal government — as with the Clean Power Plan late in the Obama administration.³¹

Finally, it's worth noting that, whatever the cause of this uptick, it has almost nothing to do with Congress — which hasn't touched the Court's jurisdiction or procedures in any meaningful way since 1988. Even the change in the Court's Term — from one that formally ended

31. See *West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.).

with the summer recess to a “continuous” Term — was accomplished via an amendment of Rule 3 of the Court’s rules. Everything else has come, by all appearances, through unexplained shifts in how the Court applies its own standards for emergency relief under statutes that Congress has not disturbed.

Although one scholar has argued that the uptick in the Court’s grants of certiorari before judgment can be tied to an amendment Congress enacted in 1988,³² that category of cases is, frankly, the smallest and least troubling subset of the cases discussed herein. After all, at least until the January 2021 ruling in *Higgs*, certiorari “before judgment” was primarily a mechanism for getting a merits case to the Court *faster*, not for summarily altering the status quo. Even if Professor Morley is correct about the 1988 reform (a debatable proposition given the lack of any increase in grants of certiorari before judgment prior to 2017), that doesn’t explain — or justify — any of the far more significant shifts in other shadow docket rulings.

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

The uptick identified above is not simply an assessment of volume. Rather, the Supreme Court’s significant shadow docket rulings in recent years have had dramatic real-world impacts — from allowing controversial immigration policies affecting millions to go into effect³³ to clearing the way for the first federal executions in 17 years;³⁴ from blocking state-wide COVID restrictions³⁵ and rulings by lower federal courts extending access to the polls in the 2020 election³⁶ to staying out of cases after the election seeking to overturn the result.³⁷ Reasonable minds will surely disagree about the merits of each (and all) of these

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

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

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

35. *See, e.g., S. Bay United Pentecostal Church v. Newsom* (“*South Bay II*”), No. 20A136, 2021 WL 406258 (U.S. Feb. 5, 2021) (mem.).

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

37. *See Texas v. Pennsylvania*, No. 155, Orig., 2020 WL 7296814 (U.S. Dec. 11, 2020) (mem.); *Kelly v. Pennsylvania*, No. 20A98, 2020 WL 7221757 (U.S. Dec. 8, 2020) (mem.).

rulings. But it seems important to me to highlight some of the many ways in which handing down significant rulings via the shadow docket is problematic *even* to those who think the Court is generally getting the merits of most (or even all) of these disputes “right.”

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

2. The anonymity of the vote. The uncertainty over which Justices voted which way, especially on contentious issues, also perpetuates uncertainty among parties and lower courts — who have been instructed by the Supreme Court to generally give weight to the “narrowest” view that commands the support of a majority of the Justices.³⁸ When, as in the *Dunn v. Smith* ruling last Thursday, we don’t even know *who* the fifth (and perhaps sixth) votes were in support of a shadow docket ruling, that only further complicates efforts to figure out exactly what the Court has commanded.

3. The unpredictable timing of decisions. Another issue that has arisen with the rise of the shadow docket has been the proliferation of what Bloomberg News’s Supreme Court reporter Greg Stohr has called the “night Court” — with decisions often coming down late in the evening (or very early in the morning), especially on Friday nights.³⁹ In July 2020, for example, the Court handed down a pair of *major* rulings clearing the way for the first federal executions in 17 years in a pair of 5-4 decisions that were handed down the first night at 2:10 a.m. EST,

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

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

and two nights later at 2:46 a.m. EST. Executions raise unique timing concerns with respect to last-minute stay applications (or applications to lift stays), but even cases with no comparable urgency have led to late-night rulings — such as the decision in *South Bay II*, which came at 10:44 p.m. EST on a Friday night *six days* after briefing had been completed. Likewise, the Court’s significant ruling blocking New York’s COVID-based restrictions on certain religious services in *Roman Catholic Diocese of Brooklyn v. Cuomo* was handed down at 11:56 p.m. EST on Wednesday, November 25 — the night before Thanksgiving. There’s a reason why the Court follows a longstanding protocol for when it hands down rulings in argued cases. Among other things, it increases public access to and awareness of the decisions. Indeed, the hand-down announcements are even recorded and eventually published. Here, in contrast, the rulings are handed down in a manner that makes them that much more *inaccessible*.

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

5. The problems with predictions. The above concerns all go to the transparency of the Court’s decisions and the opportunities of interested parties to help shape them. But even on their merits, shadow docket rulings suffer from multiple flaws, including the difficulties of making predictive judgments about the merits of a dispute so early in the progress of litigation. Consider, in this respect, the Court’s shadow docket ruling issuing a partial stay of two district court injunctions against the second iteration of President Trump’s travel ban.⁴⁰

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

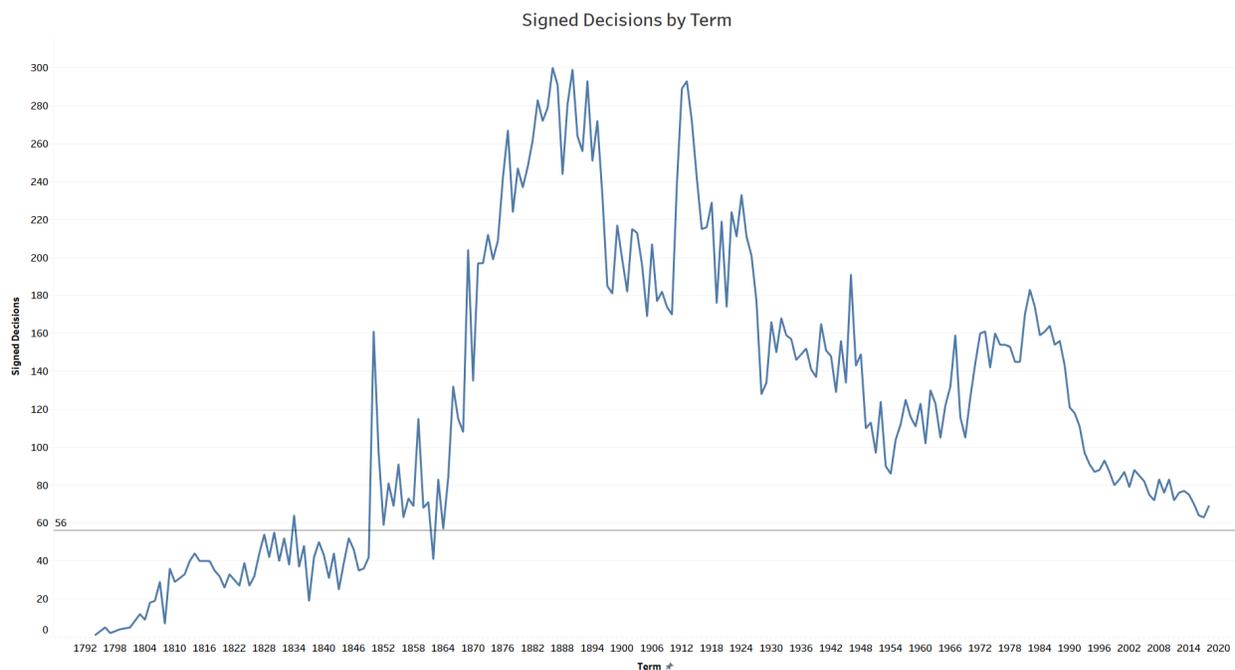
Presumably (although we'll never know), that decision reflected a judgment by a majority of the Justices that they would uphold that policy if and when it reached them for plenary review. But right before the Court was set to hear argument, the Trump administration withdrew the second iteration, and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

6. Prematurely (and unnecessarily) resolving constitutional questions. The increasing prominence of the shadow docket also means that the Justices are more frequently deciding significant questions of constitutional law at an incredibly early stage of litigation — including in contexts in which such constitutional analyses turn out to be premature and/or entirely unnecessary. Consider, in this respect, the decision in *Roman Catholic Diocese of Brooklyn*, in which a 5-4 majority enjoined New York COVID restrictions that were *no longer in effect* on the ground that they likely violated the First Amendment. Although the dispute certainly appeared to be moot, the majority (in a rare — but unsigned — opinion for the Court) justified such an intervention because "*if*" the state were to re-apply the challenged restrictions on religious worship, such a hypothetical move would "*almost certainly* bar individuals in the affected area from attending services before judicial relief can be obtained."⁴¹ In other words, the Court used a shadow docket ruling to resolve major First Amendment questions about a policy that wasn't even in effect — and did so before the litigation had a

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

chance to make its way through the courts on the merits. The Court is fond of saying that it is “a court of final review and not first view,”⁴² trumpeting the virtues of percolation, of developments of factual records, and of the benefit of having several rounds of lower-court briefing (and rulings) in the record before deciding weighty constitutional cases. Except on the shadow docket.

7. Distorting the Supreme Court’s workload. In addition to these procedural and substantive concerns, the shadow docket also appears to be increasingly competing with merits cases for the Justices’ attention. During its October 2019 Term, the Court handed down signed opinions in only 53 merits cases — the fewest since the Civil War. Some of that can be blamed on COVID, which led the Justices to postpone arguments in 10 cases from the March 2020 and April 2020 sessions to October 2020. But so far this Term, the Court is on pace to hand down signed opinions in only 56 merits cases — which would be the *second*-lowest total since the Civil War. As the shadow docket has grown, the merits docket has shrunk (graphic credit: Adam Feldman):



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

8. Undermining the Court’s legitimacy. All of the above concerns tie together in respect to the final, and most significant objection: That the rise of the shadow docket, especially at the expense of the merits docket, has negative effects on public perception of the Court — and of the perceived legitimacy of the Justices’ work. If the Court is handing down a higher number of decisions affecting Americans in unsigned, unreasoned orders, both in absolute terms and relative to merits rulings, that necessarily exacerbates charges — fair or not — that the Justices are increasingly beholden to the politics of the moment rather than broader jurisprudential principles. As Justice Sotomayor has warned, all of these developments in the aggregate “erode[] the fair and balanced decisionmaking process that this Court must strive to protect.”⁴³

IV. POTENTIAL AVENUES FOR REFORM

Of course, just as the rise of the shadow docket has largely been the result of judge-made shifts in judge-made norms and procedures, the first place where reforms to address these concerns should be pursued is at the Supreme Court itself. Hopefully, the mere fact that the Subcommittee is holding this hearing will bring additional light to the concerns I and others have raised — and perhaps the Justices will take those into account as they approach shadow docket rulings going forward.

I should also note that I’m one of those who is generally opposed to undue congressional interference in the workings of the federal courts in general, and the Supreme Court in particular. To that end, I don’t think that the concerns that I and others have identified can or should be addressed through reforms designed to *prohibit* the Court from doing what it’s doing — or, for example, to mandate that the Justices publicly disclose their votes on all (or even some) orders, etc. Even if such legislation doesn’t raise constitutional concerns (and some of it might), I fear that it could open up a can of worms that could lead to intrusions on norms of judicial independence going forward.

That’s not to say, however, that Congress is entirely powerless to address the rise of the shadow docket. Rather, I think there’s a

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

meaningful conversation to be had about shadow-docket inspired legislative reforms, which I see as falling into two basic camps:

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

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

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

- Codifying the traditional four-factor test that the Court applies in considering applications for emergency relief.⁴⁴

44. Congress has, in at least some prior cases, prescribed standards of review even for injunctions against unconstitutional governmental action. *See, e.g., Miller v. French*, 530 U.S. 327 (2000) (upholding provision of the Prison Litigation Reform Act that prescribes a standard of review for injunctions against unconstitutional prison conditions).

- Encouraging the Justices to provide at least a brief explanation of any order with respect to a stay or injunction that alters the status quo vis-à-vis the lower courts.
- Encouraging the Court to hold (and funding) oral arguments on applications where there is at least a reasonable likelihood that the Justices will alter the status quo.

V. CONCLUSION

But no matter which of these reforms the Subcommittee pursues, if any, perhaps the most important thing we can do is to help bring this increasingly important source of significant Supreme Court rulings out of the shadows. In that respect, today's hearing strikes me as a salutary first step.

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

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