LEAGUE OF WOMEN VOTERS® OF THE UNITED STATES | Federal Judiciary Study

Shadow Docket
a.k.a., petitions for accelerated appeals; emergency relief

What is the Shadow Docket?

The US Supreme Court issues rulings in two ways: written opinions and **orders**.

The Supreme Court's written rulings represent only about 1% of the Court's total output in any year. That is generally no more than 70 written opinions.[1] These cases are usually referred to as "merits cases." The other 99% are issued as orders that, by tradition, are unsigned and unexplained.

Some say orders now constitute a **shadow docket** that is being used to substantively block or unblock everything — from national and state policy concerning immigration, vaccinations, reproductive rights, affirmative action, racial gerrymandering, and voting rights.

Background

Supreme Court orders are issued in one of two contexts:

1. G ranting "emergency relief": freezing a policy or ruling during an appeal, or;
2. Denying "*certiorari* before judgement": refusing to hear an appeal.

The Court receives about 7,000 petitions for emergency appeals each year. Federal statute grants the Supreme Court power to hear accelerated appeals in a national emergency.

Under Supreme Court Rule 11, a minimum of four of the nine justices can grant "*certiorari* before judgement. This mechanism allows federal district court cases to bypass federal courts of appeal, and instead, seek an expedited ruling from the Supreme Court.

Recently, the Supreme Court's use of orders has dramatically increased.

- Between 1988 and 2004, the Court granted "*certiorari* before judgement" three times.
- From 2005 to 2019, none were granted.
- Since 2019 the Court has granted at least 21 petitions for accelerated appeals.

[1] As an aside this is approximately one-third the number compared to a generation ago.

The frequency of this practice—never publicly justified—has resulted in the much scrutinized "shadow docket."

This "shadow docket," named by University of Chicago law professor William Baude, is intended to address ***applications for emergency relief*** filed by parties in cases outside the Court. These applications generally seek to bar enforcement of either a challenged statute or restrain enforcement of a court order granting or denying emergency relief during the litigation. The Court will entertain such applications only if they have been presented to any lower court authorized to grant relief.

The Supreme Court has few formal rules governing applications for emergency relief and stays. SCOTUS blog summarizes the process this way:

- The "cases are handled on an expedited basis with limited briefing";
- There is "no oral argument"; and
- The court "often resolves them in unsigned orders with little or no explanation."

Because the cases are being litigated elsewhere and are typically in an early stage of the litigation process:

- There is no formal record of proceedings in a trial court;
- There are likely not any findings of fact from a trial court;
- There is often no legal ruling on the merits from a trial or appellate court; and
- Votes of individual justices are not reported. The Court typically issues unsigned orders in its name without stating reasons for the outcome or the legal standards that were applied to grant (or deny) emergency relief. Few written dissents are filed or noted.

The impact of shadow docket rulings is not limited to individual emergencies in minor cases. Rulings on emergency applications for injunctions or stays often influence the direction and precedential value of cases dealing with major issues: reproductive rights, voting rights, free exercise of religion, environmental rights, and capital punishment. [Vladeck, 2023]

Two recent decisions on abortion illustrate the stark differences in the court's two approaches to handling cases. In *Whole Woman's Health v. Jackson* (September 1, 2021), the Court issued an emergency order that refused to apply *Roe v. Wade* to block a Texas law (SB8) that banned all abortions after the sixth week of pregnancy. The one-paragraph court order spanned less than two pages; the four dissents, 10 pages.

In his dissent, Chief Justice Roberts objected to the shadow docket process itself:

> *"We are at this point asked to resolve these novel questions—at least preliminarily—in the first instance, in the course of two days, without the benefit of consideration by the District Court or Court of Appeals. We are also asked to do so without ordinary merits briefing and without oral argument. These questions are particularly difficult …"*

In her dissent, Justice Kagan objected as well:

> *"Without full briefing or argument, and after less than 72 hours' thought, this Court greenlights the operation of Texas's patently unconstitutional law banning most abortions."*

Regardless, by the Supreme Court's order, the Texas ban was allowed to go into effect. *Roe* had been standing law for decades.

Less than a year later, in *Dobbs v. Jackson Women's Health Organization* (June 24, 2022), the Court decided a case from its merits docket that had been argued almost six months earlier. The Opinion of the Court covered 79 pages plus two appendices totaling 29 pages; three concurring opinions totaling 31 pages; and a dissenting opinion, 66 pages. *Dobbs* overruled longstanding precedent from *Roe v. Wade* (1973).

Effects of Increased Use of the Shadow Docket

Georgetown Law professor Steven Vladeck has carefully documented the expanded use of the shadow docket since 2016. He concludes that there have been abuses, mostly in the form of votes along partisan lines for or against requests for emergency relief. Voting rights, same-sex marriage, abortion rights, COVID restrictions free exercise of religion, the *Clean Water Act*, and death penalty cases were primary targets.

One consequence of granting emergency relief is that justices are forced to forecast whether the underlying case has merit, with limited background. An emergency injunction against enforcing a statute requires a finding that a party show its right to relief is "indisputably clear" under the federal *All Writs Act*. [Vladeck, 2023, p. 172]. Staying a lower court's order uses a somewhat lower standard, that the moving party has "a reasonable likelihood of success on the merits." Though slightly different, both standards force the justices to consider the case from a merits docket perspective without having the benefit of a record of lower court proceedings, opinions, briefs, documents, oral argument, collegial discussion, and an opinion-writing process.

Some observers and scholars point out that shadow docket treatment of applications for emergency relief creates the conditions for an artificial rush to snap judgments. They argue that abandoning time-honored legal processes and substituting intuitive, often partisan and biased shadow docket processes imperils procedural foundations of the rule of law.

Improper use of the shadow docket, this power to grant "emergency relief," also tends to delegitimize the Court.

Professor Vladeck's recent research indicates that most of the speedy rulings where the Court "does so much but says so little" have come in the biggest and most politically consequential cases, changing long-standing law concerning immigration, abortion,

elections, the death penalty, religious liberty, and the power of administration agencies. These decisions are unseen, unsigned, and almost always unexplained.

This lack of transparency has contributed to the perception of a politicized Court and undermined its authority. To Vladeck's thinking, the Court's shadow docket decision-making has become increasingly more unreasoned, inconsistent, and impossible to defend.

Moreover, orders lacking written explanation also leave potential future litigants without a clear understanding of what the law is or how it has changed.

When properly utilized, the power to grant "emergency relief" gives the Supreme Court greater legitimacy. Historically, "emergency relief" was rarely granted, because Supreme Court Rule 11 states that this procedure will be followed "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."

For example, in 1974, the Court granted "*certiorari* before judgement in the case of *United States v. Nixon*, a landmark decision in which the Court unanimously ordered President Richard Nixon to deliver tape recordings and other subpoenaed materials related to the Watergate scandal to a federal district court. *United States v. Nixon* is considered a crucial precedent limiting the power of any US president to claim executive privilege.

Supreme Court Rule 11 is designed to provide an emergency trigger for accelerated appeals. When used judiciously, it is a tool that can harmonize differing opinions in the 13 geographic districts across our far-flung federal judicial system and guide our nation in real emergencies.

Principles to Consider

LWVUS positions on the Congress and the Presidency, the other two branches of government, pay little attention to specific policy approaches; instead, they focus on principles. Those principles were designed for evaluating future policy proposals and ensure a durable foundation for advocacy. Principles that pertain to the shadow docket and its effects include the following:

- Judicial independence
- Judicial restraint
- Nonpartisanship
- Fairness/impartiality
- Transparency
- Legitimacy
- Stability of law

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