Only the Shadow Knows: What Lies Behind the Shadow Docket?

By Barbara Engstrom, Executive Director

As with so many other facets of our government that we've only recently internalized are grounded in norms, traditions, or political will (I'm looking at you, enforcement of the Hatch Act) rather than hard and fast law, the current Supreme Court's increased employment of the shadow docket has taken many by surprise. When most of us think of a case coming before the Supreme Court, we imagine the long slow, deliberative journey through the trial and appellate courts and, if the case is granted cert, the briefing, oral argument, and considered reasoning of the final opinion. With the shadow docket, once the case hits the Supreme Court, (cue the sound of the record scratch) we get the black hole of an unsigned order with no explanation of the reasoning behind it, and just to add further mystery, sometimes released in the middle of the night.

What is the Shadow Docket?

Professor William Baude of the University of Chicago Law School is credited with coining the term "shadow docket" in a 2015 law review article. While the merits docket gets the lion's share of attention in legal scholarship and analysis, he posits (way back in 2015) that the court's non-merits work deserves scrutiny as well. In the article he distinguishes the merits docket, the traditionally briefed and argued cases, with the orders docket – the grants of emergency stays and injunctions where this is no indication of the legal basis of the decision, who signed off on it, or to what extent the other justices agreed with the decision. He also highlights the opaque processes for deciding which lower court cases are selected for summary reversals.

> People criticize the Court's merits cases for being political, unprincipled, or opaque. But those criticisms may be targeted at the wrong part of the Court's docket. It is the non-merits work that should most raise questions of consistency and transparency. That said, I should emphasize that my ultimate normative assessments are modest and tentative. I do not cast my lot with those who think that the Court's work is all politics rather than law, who demand term limits for the Justices, or who think it important that the Court televise its proceedings or publish more of its internal work-product.
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> My point is just that the Court's non-merits orders do not always live up to the high standards of procedural regularity set by its merits cases, and that it may be possible for its performance to be improved. Even if it cannot be, a better understanding of the orders list should make us skeptical of some efforts to reform the Court's merits processes…..As the orders list comes to new prominence, understanding the Court requires us to understand its non-merits work — its shadow docket.[1]

When did the Shadow Docket Originate?

As Steve Vladick notes in his book *The Shadow Docket*, the shadow docket has been around as long as there has been a Supreme Court. He notes that traditionally the shadow docket was a tool to help manage the court workload. Procedural orders like extending time to submit a brief or clarifying the logistics of oral argument would all happen on the shadow docket. While, historically, the sheer number of shadow docket orders may have dwarfed the number of merits decisions, the shadow docket orders were generally procedural, court management tools. As Vladeck notes, that has changed in recent

[1] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J. of Law & Liberty 1, 4-5 (2015).

years.

> Since the mid-2010s, there has been a radical shift in how (and how often) the justices use the shadow docket – not just to manage their workload, but to change the law both on the ground and on the books. From immigration to elections, from abortion to the death penalty, from religious liberty to the power of federal administrative agencies, the Supreme Court has, with increasing frequency, intervened preemptively, if not prematurely, in some of our country's most fraught political disputes through decisions that are unseen, unsigned, and almost always unexplained. In the process, these rulings have run roughshod over long-settled understandings of both the formal and practical limits on the Court's authority. Because they are unsigned and unexplained, shadow docket orders are supposed to be exceedingly limited in what they can accomplish. And yet, dozens of times each term, we're now seeing shadow docket orders that fly in the face of those understandings.[2]

Shadow Docket By the Numbers

In July of this year, Erwin Chemerinsky wrote an interesting post on the statistics of the Supreme Court's October 2024 term. It included a breakdown of the size of the merits dockets in the most recent Supreme Court terms compared to the merits dockets of past Supreme Court terms.

> The court decided 56 cases with signed opinions after briefing and oral argument. This seems to be the new normal for the court. Last year, the court decided 59 merits cases. In each of the two years prior to that, the court decided 58 cases. The term before that it was 54, and the year before that it was 52, which was the smallest number since 1862.
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> To put this in perspective, in the 1980s, the court was deciding over 160 cases a year. The smaller docket began when William Rehnquist was chief justice. In his last year, October Term 2004, the court decided 85 cases. When John Roberts went before the Senate Judiciary Committee in the summer of 2005 for his confirmation hearing, he was asked about the smaller docket. He lamented it. He had been a Supreme Court litigator and said that the court should decide at least 100 cases a year. Never in his 20 years as chief justice has the court come close to the 85 merits cases of Rehnquist's last term. On the other hand, as discussed below, the size of the emergency docket has increased enormously.[3]

He then compared the dwindling number of merits cases to the explosive growth of the shadow docket, or as he terms it, the emergency docket.

> A year ago, the Supreme Court decided 44 matters on its emergency, or as it is often called, "shadow docket". This term, the court has 113 matters on the emergency docket (and that surely will increase over the summer as the term officially continues until the next term begins in October). That is a stunning increase in just one year. Of course, the easiest explanation is the number of applications involving challenges to President Donald Trump's actions.[4]

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[2] Stephen Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books 2023) p. 12-13

[3] Erwin Chemerinsky, *By the Numbers*, SCOTUSblog (July 1, 2025) available at https://www.scotusblog.com/2025/07/by-the-numbers/

[4] Id

In the post, Chemerinsky questions what if any precedential weight the emergency docket orders carry.

Wait, Aren't There Rules About This?

If you've never had the occasion to read the treatise *Supreme Court Practice*, I highly recommend taking a look. In the first edition, published in 1950, the authors' stated purpose was "to set forth in a single volume…as close as possible to everything, outside the field of substantive law, that a lawyer would want to know in handling a case in the Supreme Court."[5] Steve Vladeck praised *Supreme Court Practice* as eminently readable in a way that most treatises are not. With its deep and comprehensive dive into the rules, laws and norms that guide the court, *Supreme Court Practice* sheds light on why and how the court is currently functioning the way it is.

> But as much as any other source, it provides a fair amount of evidence and a whole bunch of clues—from the Court's quiet move to a "continuous" Term in 1979 (which allowed the full Court, rather than a single Justice, to resolve contentious applications even during the summer); to the increasing frequency with which all contentious applications have been referred to the full Court; to the slow but steady decline of in-chambers arguments and opinions; to the subtle shift in how at least some of the Justices have applied the traditional four-factor test for emergency relief. To their credit, the authors do not draw specific conclusions from these individual data points. But they make it possible for others to do so—and to attempt to draw broader lessons from patterns that would be all-but impossible to even see without their efforts.[6]

Much of the way the Supreme Court currently functions is due to the wrangling of President William Howard Taft. The only former president to serve as Chief Justice of the Supreme Court, Taft wanted to elevate the stature of the court from Hamilton's "least dangerous branch" to a "constitutional court that could operate above and apart from the fray of ordinary judicial business, not a supreme court of appeals that sits just to resolve whichever individual disputes litigants bring before it."[7] Taft did this by sheparding through the Judiciary Act of 1925 which allowed the Supreme Court to expand its power by having the discretion to decide which cases ***not*** to hear through the certiorari process. In the intervening years Congress has further conceded broad discretion to the Court to manage its inner workings and dockets.

What's the Solution?

Professor Baude quotes both Justice Ginsburg and Justice Scalia as discussing the importance of having one's name and reputation tied to one's decisions.

> When Justice Ginsburg was still Judge Ginsburg she wrote that "[d]isclosure of votes and opinion writers . . . serves to hold the individual judge accountable" and "puts the judge's conscience and reputation on the line." Similarly, Justice Scalia has noted the effect of individual accountability on the Justices: "Even if they do not personally write the majority or the dissent, their name will be subscribed to the one view or the other. They cannot, without risk of public

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[5] Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett & Dan Himmelfarb, *Supreme Court Practice*, Preface vii (11th ed. 2019)

[6] Steve Vladeck, *Bringing the Supreme Court Out of the Shadows*, JOTWELL (November 26, 2020) (reviewing Stephen M. Shapiro, Kenneth S. Geller, Timothy S. Bishop, Edward A. Hartnett, and Dan Himmelfarb, *Supreme Court Practice* (11th ed. 2019)), https://courtslaw.jotwell.com/bringing-the-supreme-court-out-of-the-shadows/

[7] Supra 2 at pp 29-30

> embarrassment, meander back and forth — today providing the fifth vote for a disposition that rests upon one theory of law, and tomorrow providing the fifth vote for a disposition that presumes the opposite." And if the Justices are right about the effect of individual accountability in the merits cases, maybe there is something to be said for a little more accountability in the orders too. Even if the orders cannot and should not attempt to imitate full dress merits opinions, maybe they shouldn't always come out naked.[8]

In order to sign one's name to an opinion, there has to actually be an opinion. On April 4, in a speech at the Reagan Presidential library, Justice Amy Coney Barrett advised the audience to read the Court's opinions before judging whether the decisions are politically motivated. "On April 6, Justice Barrett joined a five-Justice majority in reinstating a major rule that had been issued by the Trump administration and vacated by a court at the request of the Biden administration. Notably, the majority took that significant action without writing any opinion in which it explained why it so acted."[9]

> When those decisions don't produce substantive effects, the absence of a principled justification seems immaterial: no one loses sleep over the Court's refusal to explain why a party received more time to file a brief; no lower court is left to wonder what to do in the next case. When those decisions do produce substantive effects, however, the absence of a principled justification becomes a much more serious problem. And in the shadow docket context, specifically the fact that so many of the decisions producing substantive effects break down along ideological, if not strictly partisan, lines only compounds the problem, for it bolsters a narrative that the only principle explaining the justices' votes in these cases is their own political preferences.[10]

Those who are concerned about the shadow docket worry that reliance on unexplained, unsigned orders to resolve substantive issues of law ultimately serves to undermine the public's confidence in the legitimacy of the Supreme Court. As Justices Ginsburg and Scalia note, having one's name associated with one's decisions is good for predictability and accountability over time. And as Justice Barrett posits, the best way to shine a light on whether an opinion is merely political nature is to read the opinion. Perhaps addressing these two shadow docket issues is a good place to start.

Want to Learn More?

I highly recommend reading **Steve Vladik's** book ***The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic.*** If this article piques interest in the inner workings of the Supreme Court, I'd also recommend the ***Supreme Court Practice*****, (Eleventh Edition 2019)**. Both books are available at KCLL. Search our catalog here: https://kcll.bywatersolutions.com/ Vladick's *The Shadow Docket* is also available in multiple formats at Seattle Public Library and the King County Library System.

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[8] Supra Note 1 at pp 12-13

[9] Richard Pierce, Justic Barrett Says: Read the Opinion" -- Justice Kagan says: Where is the Opinion?" Notice and Comment: Blog from Yale Journal on Regulation. (April 12, 2022) https://www.yalejreg.com/nc/justice-barrett-says-read-the-opinion-justice-kagan-says-where-is-the-opinion/

[10] Supra Note 2 at pp. 245-246