Introduction

Ahead of the 2022 midterm elections, the Supreme Court, without hearing oral arguments or issuing a signed opinion, paused a lower court decision regarding racial gerrymandering in Alabama. The Court's action reinstated the state's congressional map that included just one majority-Black district (out of seven districts) despite Black residents representing a quarter of the total population. After the election, the Court went on to hear oral arguments in the case, *Allen v. Milligan* (previously *Merrill v. Milligan*), ultimately siding with the lower court. Yet the damage was done for the 2022 election. This is a prime example of the exploitation of the orders list, known informally as the shadow docket.

Traditionally used for routine matters of decision, the Supreme Court has increasingly used the orders list to decide cases and outcomes that do not ordinarily rise to the requisite level of emergency or severity warranting SCOTUS intervention. Often, these cases involve critical decisions affecting our everyday lives, yet the orders list provides

Definitions of Legal Terms

- **Certiorari:** An order by which a higher court reviews a lower court's decision. In this report, certiorari is mainly used in the context of the Supreme Court reviewing a lower court decision.
- **Emergency relief:** A request by a party for the Supreme Court to stay the ruling of a lower court while the appeals process continues. For example, if a lower court deemed a policy unconstitutional, the federal government could appeal for emergency relief from the Supreme Court to allow the government to enact the policy while the case was on appeal.
- **Merits docket:** A list of the cases resolved before the Supreme Court with full briefing and oral argument. Justices hold a recorded vote and write detailed opinions describing their reasoning.
- **Orders list:** A list of actions and decisions by the Supreme Court that are not encompassed by the merits docket, including applications for emergency relief. It is mainly used to announce the granting or denying of certiorari, changes in the Court's schedule, or other motions before the Court.
- **Shadow docket:** A phrase used to describe the rise of controversial decisions and actions presented on the Supreme Court's orders list.

little to no transparency. The Court has long been an obstacle to equality and progress; in the past decade alone, the Supreme Court has issued rulings stripping the Voting Rights Act of vital provisions, eliminating worker protections, restricting access to abortion and bodily autonomy, and making it harder to fight climate change. While public attention on the Court has understandably focused on merits docket cases, the Supreme Court has been issuing equally destructive rulings on the less scrutinized shadow docket. This scrutiny becomes even more important with news of ultraconservative justices receiving lavish gifts and vacations from right-wing mega-donors and the potential influence on their rulings.

What is the Shadow Docket?

First coined in 2015 by Professor William Baude, the Faculty Director of the Constitutional Law Institute at the University of Chicago Law School, the shadow docket references the controversial use of the Supreme Court's orders list. Rulings made via the Court's shadow docket represent a sharp departure from the usual procedure for deciding broad impact. These rulings are often issued with little to no explanation. Further, cases considered via the shadow docket are decided without briefing or oral argument, and they are often unsigned. While the shadow docket lacks the rigor and transparency demanded of cases on the merits docket, decisions are equally binding, and the consequences are just as serious.

Until recently, orders from the shadow docket with major substantive implications were generally few and far between. Emergency relief is intended to be rare. To prevail on an application for emergency relief, often a request to put the lower court's decision on hold, the applying party must show that the lower court's ruling would cause "irreparable harm" if allowed to stand. Over the last few years, the frequency of decisions made on the orders list has accelerated considerably.

Arguably, the Court exploits the rules governing emergency review when it grants relief in cases where irreparable harm has not been established. Justice Elena Kagan explicitly chided her colleagues on the overuse of the shadow docket after a 2021 ruling that blocked implementation of the Clean Water Act:

> By nonetheless granting relief, the Court goes astray. It provides a stay pending appeal, and thus signals its view of the merits, even though the applicants have failed to make the irreparable harm showing we have traditionally required. That renders the Court's emergency docket not for emergencies at all. The docket becomes only another place for merits determinations—except made without full briefing and argument.

The Supreme Court has reduced the number of cases it heard on the merits to around 60 annually, while increasing the number of cases it decide on the shadow docket. The absence of opportunities for detailed briefing, oral argument, or amicus briefs from interested third parties further exacerbates the lack of transparency. This omission of documentation is even more problematic as orders typically lack substantive explanation of the justices' decisions.

The absence of transparency and explanation can also cause confusion for lower courts attempting to interpret these rulings with little guidance. This can lead to contradictory decisions and an inconsistent application of the law across jurisdictions.

Further, Supreme Court justices are not required to sign the orders, which can often lead to confusion as to who is in the majority and why. Referencing a decision to deny a stay of execution in 2014, Justice Ruth Bader Ginsburg said, "When a stay is denied, it doesn't mean we are in fact unanimous." Even on the occasions when a justice does publish an opinion describing their thinking about an item on the orders list, only the author is required to sign their name, while the public remains in the dark as to who concurred.

Increasing Use of the Shadow Docket

Professor Stephen Vladeck, the Charles Alan Wright Chair in Federal Courts at the University of Texas Law School, has called 2017 "an inflection point" for the use of the shadow docket. Unlike the Bush and Obama administrations, the Trump administration sought emergency relief 41 times, with the Supreme Court granting relief in 28 of those cases. In contrast, Bush's Solicitor General only sought emergency relief five times, while Obama's sought emergency relief three times. The Trump administration's aggressive strategy of using emergency review to combat unfavorable injunctions that blocked Trump's harmful policies accounted for part of the rise in emergency requests to the Court.

During his 2021 testimony before the House Committee on the Judiciary, Vladeck said the increasing use of the shadow docket was due to a "confluence of factors," including the Court's change in ideological composition.

"Indeed, it is no coincidence, in my view, that the brakes have truly come off since the retirement of Justice Kennedy and the death of Justice Ginsburg. Nor can it be denied that this uptick has enormous real world consequences," Vladeck told House Committee members.

During the Trump administration, the Supreme Court worked in lockstep to enable an extreme agenda through increased use of the shadow docket, notably in immigration policy. During a single four-year term, the Trump administration banned travel from several majority-Muslim countries, blocked migrants from asylum eligibility, and created the "Remain in Mexico" policy that illegally prevented asylum seekers from entering the country while waiting for a hearing in U.S. immigration court. In all three examples, lower courts blocked the harmful policies, citing their capriciousness and cruelty—only for the Supreme Court to overturn the rulings on the shadow docket.

Harmful shadow docket rulings regarding immigration have continued into the Biden administration, although now SCOTUS has begun refusing the Biden administration's requests for emergency relief. First, the Supreme Court forced the Biden administration to reinstate the "Remain in Mexico" policy. Then, in 2022, the Supreme Court blocked a lower court ruling that ended the use of Title 42, a Covid-era pandemic policy that allowed the United States government to expel migrants under the guise of stopping the spread of Covid-19. In this case, Chief Justice Roberts refused to grant emergency relief, and allowed the policy to continue while the case is ongoing—a disastrous outcome for migrants and their communities.

Supreme Court History:

A Bulwark Against Progress

Though it attempts to maintain a veneer of impartiality, in practice, the Supreme Court is a political body whose rulings have directly harmed the material well-being of Black and brown people and the project to build a just, multiracial democracy. From the infamous Dred Scott ruling to Korematsu v. United States to Citizens United v. FEC, the history of the Supreme Court is rife with examples of the Court threatening or directly attacking Black and brown communities. While the audaciousness of the current ultraconservative majority is particularly concerning, it is a continuation of a deliberate trend, not a fluke. The Supreme Court is the least democratic branch of government. And with the notable exception of the Warren Court, the Court has largely served to represent and protect the interests of the elite and wealthy instead of the people.

For more information on the Supreme Court's anti-democratic origins and opposition to racial equality, read Nicolas Bowie's statement to the Presidential Commission on the Supreme Court of the United States.

Timeline:

Some of this Court's most harmful recent rulings have come through the shadow docket. From restricting abortion to preventing states from stopping the spread of Covid-19, these rulings have had an outsized impact on Black and brown communities. For example:

Aug 2021

Removing the Covid-19 eviction moratorium: One of the strongest measures the federal government took to safeguard vulnerable people during the Covid-19 pandemic was to institute an eviction moratorium. In *Alabama Association of Realtors v. Department of Health and Human Services*, the Supreme Court ended the moratorium, clearing the way for millions of people, many of them Black and brown, to be evicted while the pandemic was still ongoing.

Sept 2021

Permitting Texas abortion ban to take effect: In *Whole Women's Health v. Jackson*, the Supreme Court overturned decades of precedent protecting an individual's right to an abortion. This decision was devastating for millions of people who can become pregnant. This decision came months before Roe v. Wade was officially overturned, and has led to sweeping abortion bans, disproportionately cutting off abortion access for poor, working class, and Black and brown people.

April 2022

Siding with fossil fuel companies to allow harmful water pollution: In *Louisiana v. American Rivers*, a 5-4 shadow docket decision, the ultraconservative majority *ruled* to reinstate a Trump-era policy that made it easier for companies to pursue projects that pollute our waters. In addition to the damaging environmental effects, water pollution can cause serious health concerns including cancer and various skin conditions. Sadly, Black and brown communities disproportionately will bear the effects of this decision. Over *40 percent of oil refineries* are located in communities that are primarily people of color or are considered low-income.

June 2022

Permitting a congressional map ruled to be discriminatory ahead of midterm elections: Racial gerrymandering deprives Black and brown communities of full political power and representation. In *Ardoin v. Robinson*, the Supreme Court reinstated the congressional map drawn by the Louisiana legislature ahead of the 2022 midterm elections, although a lower court ruled it violated the Voting Rights Act. The six-district map included only one majority-Black district even though a third of Louisiana's population is Black and the Black population had increased from the previous cycle. This is one of several cases the Supreme Court has decided on the shadow docket that allowed the use of racially gerrymandered maps in the 2022 midterms, in addition to several cases on the merits docket that gutted the Voting Rights Act and suppressed Black and brown political power.

Dec 2022

Reinstating Title 42: In one of the most recent shadow docket decisions, the Supreme Court blocked a lower court decision that ended the use of Title 42, a harmful Trump-era rule that allowed the United States government to expel migrants under the guise of stopping the spread of Covid-19. Title 42 has had a devastating effect on immigrant communities and has been used over 2 million times to deport migrants and asylum seekers, the vast majority of whom are Black and/or Latinx.

The Use of the Shadow Docket to Subvert Norms

It is true that due to the abnormalities of a case or time pressure, occasionally the Supreme Court is forced to use the orders list to decide motions outside of normal briefing and argument procedures. However, that alone cannot account for the increased frequency with which the justices are now regularly using the orders list to decide cases. Instead, it is further evidence of the lengths the ultraconservative majority will take to achieve their policy agenda.

In addition to granting emergency relief, the justices have increasingly used controversial legal arguments and procedures on the shadow docket to achieve desired policy outcomes. These include:

Summary reversals: In a summary reversal, the Supreme Court grants certiorari and then overturns the decision of the lower court without any written briefs or oral arguments. Intended for cases where lower courts' decisions were clearly incorrect under existing precedent, the practice has been abused in recent years to decide more controversial cases on the merits without full briefings and oral arguments. One example of this trend with grave consequences for Black and brown communities is the Court's use of the shadow docket to summarily reverse lower court rulings related to qualified immunity.

> Qualified immunity is a controversial legal doctrine that shields police officers from accountability for police brutality. Under Chief Justice Roberts, the Supreme Court has summarily reversed 10 cases in which lower courts denied qualified immunity to law enforcement officers. It is already rare for the courts to side against law enforcement in qualified immunity cases. The effect of these summary reversals is to declare police untouchable. This sort of summary reversal on the shadow docket allows the Supreme Court to avoid contentious and public merits cases while instructing lower courts to enable police violence and misconduct by effectively overturning all measures of accountability.

Granting certiorari before judgment: The Supreme Court often describes itself as the "court of review, not first view." Typically, the Supreme Court only reviews cases that have been decided by an appellate court. However, according to the Rules of the Supreme Court, the Supreme Court may review a decision of a lower federal court prior to the Court of Appeals judgment if "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Since 2000, the Supreme Court has granted certiorari before judgement 21 times—18 of those have come since 2019.

Alongside the Court's escalated use of the shadow docket, justices have increasingly resorted to public dissent. Generally, orders are unsigned and issued without substantive explanation. However, as more controversial and politically salient cases are decided on the shadow docket, there has also been an increase in signed opinions, and particularly signed dissents from the more liberal Justices. Justice Sonia Sotomayor publicly dissented from a February 2020 grant of stay to the Trump administration, admonishing the Supreme Court's increasing use of the shadow docket:

> Yet the Court's concerns over quick decisions wither when prodded by the Government in far less compelling circumstances—where the Government itself chose to wait to seek relief, and where its claimed harm is continuation of a 20-year status quo in one State. I fear that this disparity in treatment erodes the fair and balanced decision-making process that this Court must strive to protect.

Death Penalty Cases

Due to the nature of the appeals process of death penalty cases, the Supreme Court is often tasked with deciding last minute appeals through its shadow docket. Many legal issues that could prevent an execution, like whether the defendant is deemed mentally competent or the constitutionality of execution methods, cannot be litigated until an execution date is set—providing a very short window for the appeals process.

While death penalty cases decided through orders is itself not unusual, the way the current ultraconservative majority is conducting itself is. During Trump's final year in office, the federal government resumed executions for the first time in over 17 years, executing 13 people—with the support of the Supreme Court. In seven of the 13 cases, the Supreme Court granted emergency relief and overturned a lower court decision to prevent the execution. Many of these decisions baffled legal scholars and advocates who believed under prevailing norms that the Supreme Court should not have overturned the decisions.

Though under President Biden the federal government has enacted an execution moratorium, the death penalty is still authorized in 27 states—and it is disproportionately deployed against Black and brown people. In April 2022, the NAACP Legal Defense Fund reported that of all the people facing the death penalty known to LDF, 41 percent were Black and 14 percent were Latinx. Sadly, the final word on whether many of these executions take place will be decided by the current ultraconservative Supreme Court, whose shadow docket rulings show they are willing and eager to enable executions, even through dubious legal reasoning.

Solutions

The Supreme Court has been allowed to exercise and abuse its power largely unchecked by Congress. Even more troubling, it is wielding its power disproportionately against Black and brown communities, and further entrenching white, wealthy, minority rule.

As the Court continues to promote an extreme agenda through the shadow docket, Congress must act to prevent them from doing so. Expanding the Supreme Court by four seats is an important step to rebalancing the Court packed with justices all too eager to disregard precedent and defy norms to achieve a regressive, far-right agenda, and to ensure the sitting justices respect the rule of law and will review the law in good faith. Congress must also consider reforms targeted at the shadow docket to increase transparency and prevent inappropriate use of the orders list.

Court Expansion

For over 50 years, conservatives have waged a terrifyingly successful campaign to pack the federal judiciary with ultraconservative partisans to the detriment of civil and human rights. The current crisis of the shadow docket is the direct result of the recent packing of the Supreme Court with far-right idealogues dedicated to an oppressive agenda.

Unless Congress steps in, the ultraconservative majority will continue to break the rules to enact partisan policies that harm Black and brown communities most. Court expansion is the first step to rebalance the Court from far-right control and stop the harmful rulings on the shadow docket and elsewhere. Congress can unrig the Supreme Court by adding four seats through simple legislation, bringing the total number of justices to 13. This expansion is not unprecedented—the current nine-member Court was created in 1869 to correspond to the nine federal circuit courts that

existed at that time. The current federal court system has 13 federal circuit courts. Logic would follow that a 13-member Court is in step with the federal judiciary as a whole.

Stopping the ultraconservative majority and safeguarding the rights of Black and brown people and other impacted communities requires transformative action. Court expansion is the simplest and most effective way to mitigate the power of conservative court-packing and prevent exploitation of the institution, with respect to and beyond the shadow docket.

Read more about the current Court's assault on democracy, the decades-long conservative takeover of the Court that brought us here, and the need for expansion to rebalance the Court in Demos' How the Stolen Supreme Court is Defeating Democracy and Why Expanding the Court Can Save it.

Other Congressional Interventions

To curb the misuse of the shadow docket, Congress must exercise its grant of authority in the Constitution to provide much-needed checks on the nation's highest court. Congress holds the power to determine the Supreme Court's docket and appellate jurisdiction. It can also institute needed ethics reforms currently absent from the Court.

Article III, section 2 of the Constitution states, "In all cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Congress can determine the cases and circumstances under which the Supreme Court's jurisdiction applies. Congress has used this power several times in moments of crisis and could do so again to restrict the Court's ability to exploit the shadow docket. Congress could, for example, provide a clear standard for the Supreme Court to overrule lower courts' stays on death-penalty cases and lower-court denials of qualified immunity on the shadow docket.

By providing greater guidance on which cases the Supreme Court should consider, Congress can exercise its lawful power to end the Court's abuse of the shadow docket. However, these reforms on their own are unlikely to stop this ultraconservative Court in its tracks. With a supermajority of the current justices willing to break all norms and rules, we must rebalance the Court first or risk the justices ignoring or invalidating these constraints in bad faith.

Conclusion

The Supreme Court's shadow docket can no longer remain in the dark. As long as the ultraconservative justices retain a majority, we can expect to see pernicious orders that damage the political rights, economic well-being, and, in some cases, the lives of Black and brown people—unless Congress steps in to stop it. With simple legislation, Congress can expand the Supreme Court by four seats and restore balance to the bench, and then enact reforms that reduce future Court exploitation of the shadow docket. Black and brown communities will continue to bear the impact of the Supreme Court's harmful shadow docket rulings unless Congress acts now.