



PRESIDENT
RAKIM BROOKS

CHAIR
PAULETTE MEYER

September 28, 2021

The Honorable Richard Durbin
Chairman
Senate Judiciary Committee

Dear Chairman Durbin:

On behalf of Alliance for Justice (AFJ), a national association representing over 130 public interest and civil rights organizations, I write to thank you for holding this crucial hearing: *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket*. The Supreme Court's recent abuse of the shadow docket has rolled back rights and legal protections for millions of Americans, and has done so without public deliberation or transparency. We are confident this hearing will draw necessary attention to the threat the shadow docket poses to the legitimacy of our judicial system, the health and reproductive care of millions of people, and the rights of countless Americans.

As you know, the Supreme Court's shadow docket has existed since the Court's inception. The docket, also called the orders docket, exists to decide procedural issues and requests for emergency relief before a full hearing on the merits can take place. And because the shadow docket is not supposed to decide the merits of a case, the docket's procedures are bare bones—again, assuming more substantive procedures and decisions will take place once the case has been fully briefed and argued.

But today, the orders docket's purpose has been corrupted. The Supreme Court, led by its most right-wing members, is using the shadow docket to effectively decide the merits of many cases, including those that are most controversial, with limited or nonexistent briefing, no oral argument, and unsigned decisions published, usually, without explanation. In the last five years alone, the Court has used the shadow docket—too often in the dead of night and without full briefing or argument or transparency—to advance a partisan and ideological agenda. For example, the Court showed extreme deference to the Trump administration by issuing 28 orders protecting its policies and blocking lower courts that ruled against them. The Biden Administration has not received similar deference from the Court.

Substantively, the Court's ideological use of the shadow docket has undermined the rights of millions including undermining the constitutional right to an abortion, eroding our democracy by making it harder for Americans to vote, and limiting the ability of government officials to protect the public's health in the middle of a worldwide pandemic. The following examples show just how out of control the Court's use of the shadow docket has become:

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- The Court has used the shadow docket to undermine the health and lives of pregnant people. The Court's recent Texas order, which was unsigned and just one paragraph in length, ignored nearly 50 years of established legal precedent recognizing the constitutional right to an abortion. Because 85 percent to 90 percent of people who access abortions in Texas are at least six weeks pregnant, the law makes abortion virtually impossible for people in the state. Because people now must travel out of state to access abortion, the state's most vulnerable people of reproductive age will now face enormous barriers to exercise their constitutionally protected right to an abortion, especially people of color, low-income people, and immigrants. According to a study by the Guttmacher Institute, the average distance a pregnant Texan must travel to access abortion will increase from 12 miles to 248 miles due to the law.
- The Court has used the shadow docket to make it harder for people of color and low-income people to vote. As just one example, in April 2020, during the earliest days of the COVID-19 pandemic, the Court used the shadow docket to block an extended mail-in ballot deadline for Wisconsin voters and force voters to risk their livelihood to vote in-person or sit out the election. The consequences were dire; looking at COVID-19 rates in the state after Election Day, one study found that case rates spiked in counties across the state that had more in-person voters per polling location.
- The Court has used the shadow docket to undermine public health and the safety of incarcerated people. For example, in November 2020, the Court refused to reinstate a trial judge's order requiring a Texas prison for elderly people to implement basic cleaning measures. After the Court blocked the safety measures, 40 percent of incarcerated people at the prison contracted COVID-19 and 20 died.
- The Court has used the shadow docket to put thousands of vulnerable asylum-seekers at risk. On August 24, a Supreme Court majority enabled a reinstatement of President Trump's unlawful "remain in Mexico" policy, dangerously interfering with the President's foreign policy powers and leaving asylum-seekers in grave danger. The decision was a marked reversal from the Court's posture during the Trump Administration, when the Court consistently held that President Trump had broad constitutional authority on foreign policy issues such as the infamous "Muslim ban."
- The Court has used the shadow docket to threaten millions with homelessness as the Delta variant surged. As COVID-19 cases spiked in August 2021, the Court ruled to end the nationwide eviction moratorium enacted to stop the spread of the virus. When countless Americans are facing unemployment and financial instability through no fault of their own, the decision left at least 6 million people on the brink of eviction and greater risk of contracting COVID-19.
- The Court used the shadow docket to attack LGBTQ+ equality. In 2019, the Court's ultraconservative Justices allowed President Trump's ban on transgender service members to go into effect, jeopardizing the careers and safety of thousands of transgender people who had committed their lives to serving our country and protecting our national security through military service.
- The Court has used the shadow docket to allow the execution of people on death row with unresolved constitutional issues. In one such case in 2020, Wesley Ira Purkey's execution was halted by a district court the day he was scheduled to die. Purkey had schizophrenia and Alzheimer's, and executing someone deemed incompetent is a violation of the Eighth Amendment. Later that day, the district court's decision was upheld by an appellate court. At 2:45am the next day, the Supreme Court ruled without explanation that Purkey's execution should proceed anyway. He was killed a few hours later at 8:19am.

Indeed, the flagrant violation of the Court's norms has become so pronounced that several members of the Court have begun to issue public dissents to a majority of Court's orders—shadow docket decisions almost

never included dissents in the George W. Bush and Obama Administrations.

There is no reason to believe the abuse of the shadow docket will stop anytime soon. So thank you again for holding this hearing to shed further light on the shadow docket. The Court's procedures of the merits docket are in place for a reason: They work to ensure the highest-quality legal analysis, increase transparency, and thwart the politicization of the Court. The Court's sidelining of these procedures and embrace of the shadow docket to render its decisions is a dire threat to the legitimacy of the Court and the rule of law in the United States. AFJ applauds your examining a practice that has eroded the public's trust in the Supreme Court. We look forward to working with you in the coming years to restore a court system truly committed to equal justice under law. The stakes for our institutions—and the American people—could not be higher.

Sincerely,

A handwritten signature in black ink that reads "Rakim Brooks". The signature is written in a cursive, slightly slanted style.

Rakim Brooks
President, Alliance for Justice