

IN THE DEAD OF NIGHT:

The Supreme Court's Use of the Shadow Docket to Enact a Radical and Hyper-Partisan Agenda



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Introduction

Over the course of two weeks at the end of the summer, in a series of hastily decided and highly partisan rulings released in the dead of the night, the Supreme Court's ultraconservative majority attacked the constitutional rights and basic economic security of millions of vulnerable people including asylum-seekers, put working families at risk of eviction due to COVID-19, and gutted the constitutional right to an abortion for millions of people of reproductive age in Texas. Far from an anomaly, these rulings are part of a long term and accelerating trend in which the Court's ultraconservative bloc uses its authority to enact a radical and unpopular policy agenda, threatening the Court's legitimacy and undermining the rule of law in the process. The cases speak for themselves.

On August 24, a Supreme Court majority refused to block a ruling in Texas's lowest federal court forcing President Biden to reinstate former President Trump's unlawful "remain in Mexico" policy, dangerously interfering with the President's foreign policy powers and putting the lives of thousands of vulnerable asylum-seekers at risk. 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."

Two days later, on August 26, the same ultraconservative majority ruled to end the nationwide eviction moratorium enacted during the COVID-19 pandemic, leaving over six million people on the brink of homelessness as the Delta variant surges across the United States.

Finally, on September 1, the Court gave Texas the green light to move forward with a law effectively overturning *Roe v. Wade* in the state by banning abortions after six weeks – a time before most people even know that they are pregnant. The ruling, which was unsigned and just one paragraph in length, ignored nearly 50 years of established legal precedent recognizing people's constitutional right to an abortion.

These rulings were made on the increasingly prominent "shadow docket," a once procedural mechanism that has emerged as a channel for the Court to rule on pressing, controversial legal issues with wide-ranging implications.

What is the Shadow Docket?

The Supreme Court has two dockets—a merits docket and an orders docket, first referred to as the shadow docket in 2015 by William Baude. The merits docket includes the 60-70 cases the Court hears each term and includes the Court's best-known cases, like *Brown v. Board of Education*, *Loving v. Virginia*, *Roe v. Wade*, and *Obergefell v. Hodges*.

In merits cases, Justices are fully briefed: They read the arguments of both parties and amicus briefs, which “[bring] to the attention of the Court relevant matter” not supplied by parties but key to the Court's decision-making. The Justices hear public oral arguments, ask litigating attorneys questions, deliberate as a group, vote, and write lengthy opinions justifying their decisions. Opinions are released publicly on weekday mornings when the Court is in term.

While it wasn't created to decide controversial cases, the shadow docket has existed since the Court's inception. The docket includes thousands of decisions each term, on almost exclusively procedural issues—setting litigation timelines, granting requests to hear a case on the merits docket, and dividing up oral arguments—as well as requests for emergency relief. Rather than multiple rounds of briefing, Justices receive one round of briefing at most. Instead of having *amicus curiae* provide additional facts and perspectives, *amici* parties are discouraged from submitting briefs and often do not have notice to do so. There are no public oral arguments or opportunities for Justices to ask parties' attorneys questions. Rather than a vote followed by the writing of a carefully crafted majority decision, the Court offers unsigned decisions that offer little or no explanation. Instead of an opinion released during the day, shadow docket decisions can be released at any time of day and are often released at night.

Until a few years ago, when the docket started being regularly used for substantive and controversial matters, the lack of procedures above usually didn't have significant consequences for the American people. But that has changed.

Professor Steve Vladeck, an expert on the shadow docket, has tracked the way that the Justices' use of the docket has changed over time. According to Professor Vladeck, the Court's merits docket has diminished—it's now the smallest it's been since the Civil War—as the shadow docket has grown.



The shadow docket has also shifted to include more controversial legal issues. During the George W. Bush and Obama administrations, shadow docket decisions almost never included dissents; during the Trump administration, the majority of orders included a public dissent.

There has also been a sharp increase in the number of shadow docket cases decided on strict ideological lines, with the Court's ultraconservative Justices winning out. The ultraconservative makeup of the Court has been reflected in other ways as well; according to Professor Vladeck and Ian Millhiser of Vox, during the Trump administration, the Court showed extreme deference to the Trump administration by issuing 28 orders protecting Trump policies and blocking lower court decisions to halt them, deference the Biden administration has not received thus far.



Implications

In the last five years, the Court has been making shadow docket decisions that impact the lives of millions of people on issues such as public health, LGBTQ+ rights, civil rights, and the death penalty. The American public must be informed about how the Court, too often in the dead of night and without appropriate briefing or argument or transparency, has negatively impacted the lives of millions of people.

1. THE COURT UNDERMINED THE HEALTH AND LIVES OF PREGNANT PEOPLE.



In September 2021, the Court denied a request to enjoin enforcement of a Texas law banning abortions after six weeks. 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 choose, especially people of color, low-income people, and immigrants. According to a study by the Guttmacher Institute, the average distance a pregnant Texan will need to travel to access abortion will increase from 12 miles to 248 miles due to the law.

2. THE COURT THREATENED MILLIONS WITH HOMELESSNESS.



In August 2021, as the Delta variant surged and cases spiked, the Court ruled to end the nationwide eviction moratorium enacted to stop the spread of COVID-19. The decision leaves between 6 and 17 million people on the brink of eviction, with Black communities and other communities of color facing the greatest threat. At a time when millions of Americans are facing unemployment and financial instability through no fault of their own, millions of families may soon be driven into homelessness where they will be at even greater risk of COVID-19 transmission.

3. THE COURT HAMSTRUNG FEDERAL, STATE, & LOCAL OFFICIALS' ABILITY TO STOP COVID.



In a series of shadow docket cases during the COVID-19 pandemic, the Court handcuffed the ability of government officials to protect the health of their constituents. In *Tandon v. Newsom* in April, the Court struck down California's public health order restricting large at-home gatherings to stop the spread of the COVID-19 pandemic; the majority claimed that the order discriminated against religious worship—like at-home Bible study—even though non-religious at-home gatherings were also banned. The Court made similar decisions in the deadliest months of the pandemic during winter 2021. In *South Bay United Pentecostal Church v. Newsom* and *Roman Catholic Diocese of Brooklyn v. Cuomo* the Court blocked a California law that closed indoor worship in high-infection areas and halted a New York law that enforced capacity restrictions in houses of worship, leaving millions in those states at higher risk of contracting COVID-19.

4. THE COURT ATTACKED LGBTQ+ EQUALITY.



In 2019, the Court's ultraconservative Justices allowed President Trump's ban on transgender service members to go into effect, implicating thousands of transgender people who had committed their lives to serving our country and protecting our national security through military service.

5. THE COURT CONDONED RELIGIOUS BIGOTRY.



In 2017, the Court used the shadow docket to allow Trump's "Muslim Ban" to take effect before its constitutionality could be litigated by lower courts. As a result, millions of people from predominantly Muslim countries who had jobs, family, or otherwise needed life-saving medical treatment in the United States were barred from entering.

6. THE COURT PUT INCARCERATED PEOPLE'S RIGHTS—AND THEIR LIVES—IN JEOPARDY.



In two decisions, the Court blocked incarcerated people from receiving basic health and safety protections during the COVID-19 pandemic. In August 2020, the Court halted a lower court ruling requiring the Orange County Jail to take basic measures to stop the spread of the virus, including social distancing, quarantining of sick individuals, and providing masks and soap. At the time, incarcerated people were more than five times more likely to be infected with COVID-19 than the general population.

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 people at the prison tested positive for COVID-19 and 20 people died of the disease.

7. THE COURT UNDERMINED VOTING RIGHTS.



In April 2020, during the earliest days of the COVID-19 pandemic, the Court used the shadow docket to make it harder for Wisconsinites to safely vote in a move that was widely viewed as an effort to suppress democratic turnout in an important state supreme court election. With the state infection rate and death toll rising, a lower federal court extended the deadline for mail-in ballots to enable voters to participate without risking their livelihoods by going to the polling place. Hours before Election Day, the Supreme Court reversed the lower judge's extension, forcing voters to either stay home or vote in person risking infection. The consequences were dire; looking at COVID-19 rates in Wisconsin after Election Day, one study found that case rates spiked in counties across the state that had more in-person voters per polling location.

In a July 2020 order, the Court prevented hundreds of thousands of predominantly Black individuals with felony convictions from voting in one of the most important presidential elections in the nation's history by leaving Florida's "pay to vote" law in place.

**8. THE COURT
ALLOWED
EXECUTION
OF PEOPLE
WITH MAJOR
UNRESOLVED
LEGAL ISSUES.**



In the final months of the Trump administration, the Court used the shadow docket to execute seven people who challenged the constitutionality of their executions. In one such case, 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 the Court of Appeals. At 2:45am the next morning, the Supreme Court ruled without explanation that Purkey's execution should proceed anyway. He was killed a few hours later at 8:19am.

Conclusion

The procedures of the merits docket are in place for a reason—they work to ensure the highest-quality legal analysis, hold Justices accountable to their votes, increase transparency, and thwart the politicization of the Court. The Court's sidelining of these procedures is a dire threat to the legitimacy of the Court and the rule of law in the United States, which requires separation of the branches, respect for the democratic process, an impartial judiciary, and equal administration of justice.

It's no surprise that the Court's legitimacy has already been threatened in the eyes of most Americans. The Court's actions, including its shadow docket orders, have negatively impacted the lives of millions of people, especially people of color, women, members of the LGBTQ+ community, formerly incarcerated people, and working families. The Court has taken away the right to vote, and in some instances, people's lives. There is no reason to believe the ultraconservative bloc has any plans to stop and the stakes for our institutions—and the American people—couldn't be higher.





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