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Moving in the Shadows: Creating New Legal Precedent While Avoiding Transparency

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Moving in the Shadows: Creating New Legal Precedent While Avoiding Transparency

By: Ryan Davis, Staff Editor, Vol. 110



What do issues involving COVID-19, abortion, housing, and immigration, all have in common? Well, besides their controversial nature, they all have been recently dealt with on the Supreme Court's "shadow docket."^[1] And lately, the conversation surrounding the shadow docket has been raging.^[2] Many critics have been raising alarm, arguing that the Court is improperly using the "shadow docket" to subvert established appellate procedure and create new legal precedent without full transparency.^[3] Those critics are correct.

The Shadow Docket and its Issues:

The term "Shadow Docket" is used to describe the Court's emergency docket, where usual rules of appellate procedure are altered in order for the Court to hear certain cases more quickly.^[4] Under this unique process, cases come to the Court via emergency applications.^[5] Parties submit an emergency application to a single Justice, and then that Justice usually refers it to the full Court.^[6] As the name implies, the goal is quickness and efficiency. And in order to meet those goals, there is limited briefing and often no oral argument.^[7]

The need for such a docket is well documented. Some issues, like death penalty appeals,^[8] must be disposed of quickly because it's literally a matter of life and death. Other issues, like the recent OSHA vax or test mandate,^[9] must be decided quickly so employers and employees can have some sense of certainty in planning their economic livelihoods.

There are two major issues, however, with the way the current emergency docket is handled. The first issue is the significant lack of transparency. Specifically, the Court lacks transparency by avoiding oral arguments on many emergency docket issues.^[10] Public oral arguments increase transparency.^[11] They allow the public to hear what the Justices are thinking and the positions the parties are advocating for. While some Justices don't need oral arguments to decide a case,^[12] they serve as a type of civic education. Without oral argument, the average citizen will get little insight into the judicial process, and thus be less knowledgeable about the way our government works and the issues that affect their day-to-day lives. More transparency, not less, should be the Court's goal.

The second, and most important, issue with the emergency docket is the Court's tendency to use it to create new substantive legal precedent. Cases on the emergency docket arrive at the Court via emergency application.[13] In deciding these types of cases, the Court should just be deciding the specific issue before them, not creating new legal precedent.[14] But lower courts often look to the Supreme Court for guidance,[15] even if that guidance is unofficial. When these lower courts see the Supreme Court ruling one way on an emergency application, they are likely to follow if similar issues come before them. [16] These decisions thus create new law, without the transparency of oral arguments or full merits briefing. This lack of transparency is why the Court is said to be moving in the shadows.

Conclusion:

In sum, the Court's emergency docket has its place for disposing issues that need to be decided quickly. The problem arises when the Court creates new legal precedent with a significant lack of transparency. The Court often uses their "Shadow Docket." Thus, anyone who is interested or concerned with the Court's procedures should watch this space for future developments, especially when it comes to possible legislation.[17]

[1] Nat. Fed'n of Indep. Bus. v. Dep't of Lab., No. 21A244, 2021 WL 6061696 (U.S. Dec. 22, 2021); Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021); Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 210 L. Ed. 2d 856 (2021); Biden v. Texas, 210 L. Ed. 2d 1014 (Aug. 24, 2021).

[2] See, e.g., Steve Vladeck, *The Supreme Court's 'shadow docket' helped Trump 28 times. Biden is 0 for 1.*, Wash. Post (Aug. 26, 2021, 12:24 PM), <https://www.washingtonpost.com/outlook/2021/08/26/shadow-docket-supreme-court-biden-mexico/>.

[3] See *Id.*

[4] Adam Liptak, *Alito Responds to Critics of the Supreme Court's 'shadow docket'*, N.Y. Times (Sept. 30, 2021), <https://www.nytimes.com/2021/09/30/us/politics/alito-shadow-docket-scotus.html>.

[5] See Sup. Ct. R. 22

[6] *Id.*

[7] *The Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 18 (2021) (statement of Steven Vladek, Charles Alan Wright Chair in Federal Courts, University of Texas Law School).

[8] See *United States v. Higgs*, 141 S. Ct. 645, 208 L. Ed. 2d 582 (2021).

[9] Nat. Fed'n of Indep. Bus. v. Dep't of Lab., No. 21A244, 2021 WL 6061696 (U.S. Dec. 22, 2021).

[10] Joanna R. Lampe, Cong. Rsch. Serv., LSB10637, *The "Shadow Docket": The Supreme Court's Non-Merits Orders 2* (2021).

[11] Nancy S. Marder, *The Supreme Court's Transparency: Myth or Reality?*, 32 Ga. St. U. L. Rev. 849, 851 (2016).

[12] Emily Newburger, *Justice Thomas Speaks at Harvard Law School*, Harvard L. Today (Feb. 11, 2013), <https://today.law.harvard.edu/justice-thomas-speaks-at-harvard-law-video/>.

[13] Vladek, *supra* note 6, at 4.

[14] Mike Fox, *Supreme Court Shadow Docket Leaves Reasoning in Dark, Professors Say*, Univ. of Va. Sch. of L. News (Sept. 22, 2021), <https://www.law.virginia.edu/news/202109/supreme-court-shadow-docket-leaves-reasoning-dark-professors-say>.

[15] *Id.*

[16] *Id.*

[17] Vladek, *supra* note 6, at 33–34.

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