FIX THE COURT

The "Shadow Docket": Problems and Solutions

What is the "shadow docket"?

The shadow docket is a term coined by University of Chicago Law Prof. Will Baude in 2015 for the significant and increasing volume of orders and decisions the Court issues without full briefing and oral argument.
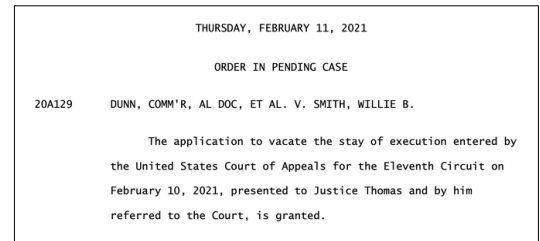
Why is it problematic?

The shadow docket becomes problematic when it is used by parties, or the justices themselves, to evade regular judicial process or to elide public scrutiny of a case.

The Trump administration, seeing the Supreme Court as friendly audience, sought to use the shadow docket as a means to bypass the regular judicial process and get an expedited ruling from the justices. The justices, in turn, frequently facilitated this strategy by deciding cases without a full briefing, oral argument or explanation. Though the Trump administration may be no more, the newly expanded conservative bloc may still choose to dispose of cases via the shadow docket when doing so can produce ideologically conservative outcomes while largely avoiding public scrutiny.

What are some solutions?

1. The Court should record how each of justice votes in each of the shadow docket cases. Sometimes, none of the justices' votes are recorded (*see right*); other times, a few are left out. In any event, rendering an opinion with the imprimatur of the Supreme Court behind it shouldn't be done without the public knowing where each justice stands.

> THURSDAY, FEBRUARY 11, 2021
>
> ORDER IN PENDING CASE
>
> 20A129   DUNN, COMM'R, AL DOC, ET AL. V. SMITH, WILLIE B.
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> The application to vacate the stay of execution entered by the United States Court of Appeals for the Eleventh Circuit on February 10, 2021, presented to Justice Thomas and by him referred to the Court, is granted.

2. Another obvious one: the justices should explain the reasoning behind their votes.

3. The Court's homepage should have an overlay when a shadow docket opinion is handed down. Nowadays you must be an insider to know how to locate one. For example, to find a Feb. 11 death penalty ruling, one must search the SupremeCourt.gov docket for "Willie B.

> Application (20A128) denied by the Court. JUSTICE THOMAS would grant the application. JUSTICE KAGAN, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE BARRETT join, concurring in denial of application to vacate injunction. (Detached Opinion) JUSTICE KAVANAUGH, with whom THE CHIEF JUSTICE joins, dissenting from denial of application to vacate injunction. (Detached Opinion)

Smith," a common name; figure out which of the eight hits is the right petition; and then, after scrolling through, locate a "detached opinion" (*see above right*) elsewhere. (Fittingly, only seven of the nine justices' views were included in that opinion.)

4. Justices read their press, so we should praise them when they do record and explain their votes. That Justice Kagan, in the above opinion wrote "I concur in the Court's decision [...], and I write to explain why" is extraordinary, though it shouldn't be. Contrast that with the order in the case led by Texas to overturn the 2020 election results in Pennsylvania. That came with almost no explanation, save one unsigned sentence and one half-thought.

How is the shadow docket emblematic of other transparency shortcomings at the Court?

The Supreme Court maintains a wide transparency deficit as compared to the other branches. Whether it's financial disclosure obligations, live broadcast or ethics, the Court lags way behind Congress and the Executive.

The Court's power is derived entirely from its perceived legitimacy, and yet time and again it's declined to show the public that this legitimacy is deserved. To the most powerful, least accountable part of government, what's the use in an issue being fully briefed or presented in oral argument? What's the benefit to those on high to explaining their reasoning to the masses?

The Supreme Court surely doesn't see any. So it should come as no surprise that an institution that finds even modest democratic measures of accountability to be anathema would be attracted to exercising power in the shadows.