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Book Review: The Shadow Docket: How The Supreme Court Uses Stealth  
Rulings To Amass Power And Undermine The Republic**

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Stephen Vladeck, the University of Texas Law School's Charles Alan Wright Chair in Federal Courts, presents in *The Shadow Docket* one of the best books I've read about the Supreme Court. It's timely, well-written, and important. On page 25, Vladeck states that the book's goal is to "... demonstrate that the rise of the shadow docket risks doing serious long-term institutional harm to the Court and, as such, the country."

These days, a lot of cases—sometimes very important ones—are decided on the shadow, or emergency, docket without a written opinion, a complete briefing, or an oral debate. These cases are filed with the court by states, businesses, or individuals who have lost cases in lower courts, frequently very early on. The loser is now requesting that the Supreme Court stay the lower court's decision while the case moves through the lower court's lengthy appeals process. The medication used in most abortions performed in the United States today, mifepristone, would have been much harder to get had lower court rulings been blocked by an emergency order issued by the Supreme Court. It's a lofty goal, but one that is met and even exceeded.

The court did not release a written opinion in this case, as is customary in these shadow docket cases; nonetheless, Justice Alito, one of the two dissenters, angrily explained why he disagreed with the majority.

These shadow docket actions were uncommon until pretty recently. The numbers, which Vladeck compiled, reveal the tale. The federal government, which is the most frequent defendant in the Supreme Court, only sought the justices for emergency relief eight times, or once every two years, on average, over the 16 years of the Bush and Obama administrations. In just four out of the eight instances did the two administrations obtain their wish, while in every other case the court spoke with one voice and without disagreement. The reader will discover what kinds of Supreme Court decisions make up the "shadow docket;" that the Court's composition affects the number of decisions made in shadow, the scope of the influence these decisions have, and, perhaps surprisingly, an illustration of how the shadow docket's use has altered the Supreme Court's institutional structure.

William Baude (2015) coined the term "shadow docket" to describe the Court's other, less widely known decisions in addition to the merits docket. Since then, the word has gained popularity to the point where Justice Samuel Alito discussed the harm it has caused to the Court in 2021, claiming that the description implied the justices had turned into a "dangerous cabal" (xii). However, Vladeck remains steadfast and observes that since Baude's piece, The Supreme Court began using these rulings more frequently, and they frequently supported the divisive policy proposals of then-President Trump. This is a crucial point in the book since these choices have an institutional effect. "The justices are not only failing to provide guidance to lower courts and government actors but also exacerbating charges of political partisanship" (xiii) because the decisions made in the shadow docket, in contrast to the merit docket cases, do not come with opinions outlining the legal basis.

Most readers are aware that one factor in justiciability is whether or not a case is "ripe" for a ruling by the Supreme Court. Crucially, the justices will take this into account when evaluating cert. Vladeck points out that in shadow docket cases, this is not the case—in fact, it's the opposite. One sort of shadow docket ruling known as "injunctions pending appeals" (p. 18, my emphasis) "answers complicated (and in some cases, hypothetical) questions of statutory or constitutional law at the outset of litigation" in place of a case that goes through the legal system. Vladeck is mainly concerned about the dramatic rise in these cases, particularly since Justice Amy Coney Barrett joined the

bench. It is noteworthy, in my opinion, that this also calls into question the constitutional clause stating that the Supreme Court resolves disputes and cases.

Throughout the book, Vladeck imparts a number of significant historical lessons. The first chapter, "Certiorari's Rise," chronicles the Taft (both president and Chief Justice)-era initiatives that led to the reforms allowing the justices to determine which cases they hear. This is crucial for two reasons. First, Vladeck maintains that these cert. decisions should be considered part of the shadow docket as their reasoning is rarely made public. More crucially, this chapter provides a history of the Supreme Court's modern establishment and makes the case that Chief Justice Taft's justification for the change was, at most, feigned.

Vladeck provides a more thorough analysis of the effects of the Supreme Court's use of the shadow docket on issues involving same-sex marriage and the death sentence in the second and third chapters. Because of the 2014 cert, for instance. Nevertheless, "the Supreme Court's unsigned, summary, and inexplicable judgments to refrain from interfering in matters of marriage... eleven states that directly legalized same-sex marriage (p. 75).

Vladeck highlights the evident influence that the Court's national ban on the death sentence in *Furman v. Georgia* and the lifting of that restriction in *Gregg v. Georgia* had on politics and policy at large. However, the effect on the Court itself is less evident. The Court itself became the solution for death row convicts seeking immediate relief since the *Gregg* decision necessitated substantial judicial scrutiny. But the formal summer recess was abolished by the justices in 1980, making all of the Supreme Court's members accessible to decide on urgent cases. The emergency relief was subject to proceedings by a single justice prior to 1980. Ironically, "by moving from in-chambers resolution of emergency applications to resolution by the full Court, the justices as a whole came to provide less process—and less reasoning—than individual justices had previously" (page 107), there were no hearings between 1980 and 2022.

The development of the shadow docket during the Trump administration and its effects in the years following Trump's exit are the main topics of chapters four through seven. Vladeck provides a clear explanation of the institutional changes to the Supreme Court,

the Office of the Solicitor General, and much of this eruption originates from the past president. The fourth chapter starts off with a discussion of the "travel ban," ultimately put into effect by a number of executive orders. The majority of the justices' eventual acceptance of the travel ban "set the tone" for the status of the shadow docket during Trump's presidency (p. 137). A portion of this was the judges' reconsideration of the function of judicial restraint, an idea that dates back to the Franklin Roosevelt administration and is associated with statute law rather than executive orders. Notably, in the past, this constraint was not applied to issues pertaining to individual rights; the Court violated both of these standards (p. 134). But the deliberate efforts of the Solicitors General under Trump were partially responsible for the reshaping of the Court's influence. In summary, "Trump's solicitor general requested emergency relief from within four years." the Supreme Court 41 times in total—a rise of more than 20 times over the combined number of Secretary Generals under Bush and Obama (page 144).

### **The Unsavory Secret**

Vladeck mentions the legal opposition to President Trump's contentious use of military construction funding for the construction of his border wall. Following a hearing on the matter, a federal district court judge declared the diversion to be unlawful and prohibited the administration from utilizing the funds for purposes other than those approved by Congress. In a matter of weeks, the Trump administration filed an emergency appeal with the Supreme Court in an attempt to overturn the decision of the lower court. The justices upheld the money diversion by a vote of 5 to 4, without a written judgment from the majority or dissent. These emergency orders, as professor Vladeck notes, are meant to be provisional, allowing the cases to proceed through the lower courts' appeals procedure. However, under the Trump administration, things drastically changed thanks to a revitalized conservative majority on the court. The Trump Justice Department filed an unprecedented 41 requests for emergency relief with the court in just four years, and in 28 of those cases, the court granted all or part of the requests and then perhaps come back later for the Supreme Court's full deliberation.

On the other hand, "the dirty secret is that later never comes," he claims. "By the time the border wall case," and "all kinds of other challenges to Trump policies make their way back to the Supreme Court, at the far end of the normal litigation process, President

Biden is in office and those policies have been discontinued, and the cases are thrown out." To put it briefly, the Trump administration not only actively pursued the use of the emergency docket, frequently bypassing the appeals courts completely, but it also found success in doing so.

In "The Shadow Docket: How The Supreme Court Uses Stealth Rulings To Amass Power And Undermine The Republic," the author delivers a compelling critique of a little-known yet profoundly influential aspect of the U.S. judicial system. The book meticulously dissects how the Supreme Court's use of the shadow docket—decisions made without full briefing or oral arguments—has shifted from a procedural tool to a powerful mechanism for far-reaching judicial action. By highlighting specific cases and providing a thorough analysis of the implications, the author argues persuasively that this practice undermines transparency and accountability in the judiciary. The book serves as both a warning and a call to action for greater scrutiny and reform of the Court's processes. Through clear, insightful writing, it underscores the need for maintaining the balance of power that is fundamental to a healthy democracy. "The Shadow Docket" is an essential read for anyone interested in the integrity and future of the American judicial system.