

Shadow Docket Written Material

Inside the Shadow Docket

The term “shadow docket,” refers to the decisions and orders of the Supreme Court outside of the traditional cases with formal briefings, oral arguments, and reasoned, lengthy opinions. Over the last few years, the Court has increasingly used these decisions to address high-profile and politically-charged issues such as immigration, election disputes, pandemic restrictions, and abortion bans.

In this interview, Professor Stephen Vladeck (University of Texas Law School) breaks down this shift in power at the High Court and offers detailed analysis and a critique of the increased use of the shadow docket and what it might mean for the Supreme Court’s already-tarnished prestige.

About Professor Vladeck

[Steven Vladeck](#) is a professor of law at the University of Texas School of Law and is a nationally recognized expert on the federal courts, constitutional law, national security law, and military justice. Professor Vladeck has argued over a dozen cases before the U.S. Supreme Court, the Texas Supreme Court, and various lower federal civilian and military courts; has testified before numerous congressional committees and Executive Branch agencies and commissions; has served as an expert witness both in U.S. state and federal courts and in foreign tribunals; and has received numerous awards for his influential and widely cited legal scholarship, his prolific popular writing, his teaching, and his service to the legal profession.

Vladeck is the co-host, together with Professor Bobby Chesney, of the “[National Security Law Podcast](#).” He is CNN’s Supreme Court analyst and a co-author of Aspen Publishers’ leading [national security law](#) and [counterterrorism law](#) casebooks. He is editor and author of “[One First](#),” a popular weekly newsletter about the Supreme Court. And he is currently writing [a book on the rise of the Supreme Court’s “shadow docket.”](#) to be published by Basic Books in May 2023.

Topic Outline

1. Intro of Guest
2. What is the shadow docket?

3. Trends and Structure of Shadow Docket Cases
4. Why have shadow docket cases increased?
5. Shadow Docket Structure and Types of Orders
6. Benefits of the Use of the Shadow Docket
7. The critique of the Shadow Docket
8. Conclusion and Ideas for Reform

CASES AND LAWS DISCUSSED

- [Dobbs v. Jackson Women's Health](#) was a 2022 Supreme Court case authored by Justice Samuel Alito, which struck down *Roe v. Wade* and *Planned Parenthood v. Casey* and upheld a Mississippi law banning abortions after 15 weeks of pregnancy. The case (decided on the merits docket) effectively reversed the position that there is a constitutional right to abortion.
- [Obergefell v. Hodges](#) was a 2015 Supreme Court case in which the Court held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The case arose from a legal challenge brought by a group of same-sex couples who had been denied the right to marry in their home states. They argued that the exclusion of same-sex couples from the institution of marriage violated the Constitution's guarantees of equal protection and due process. While *Obergefell* was decided on the merits docket, a number of critical same sex marriage cases were decided on the shadow docket.
- [Nicola Sacco and Bartolomeo Vanzetti](#) were two Italian-born anarchists who were executed in Massachusetts in the late 1920s for a robbery-murder. Their trial was controversial and many believed it was unfair due to their political beliefs and ethnicity. Despite worldwide protests, they were executed in 1927, becoming symbols of injustice

and a call for civil liberties protection. Appeals of executions are often raised to the Supreme Court and they are decided on the shadow docket as emergency orders.

- [Gateway City Church v. Newsom](#) was a 2021 Supreme Court order that granted a California church's request to lift attendance limits on indoor services during COVID-19. The court found that the restrictions likely violated the First Amendment's Free Exercise Clause. This was a temporary order decided on the shadow docket.
- [South Bay United Pentecostal Church v. Gavin Newsom](#) was a case in which a church in California challenged COVID-19 restrictions on the number of people allowed to attend religious services. By a 6-3 majority, the California Governor were enjoined from enforcing the Tier 1 ban on indoor worship services against the churches in California but were not enjoined from enforcing the ban on singing and chanting during indoor services. The Court also upheld capacity restrictions that would come into effect where indoor services were permitted. The Supreme Court ruled in favor of the church, finding the restrictions discriminatory and a violation of its First Amendment rights.
- [Dunn v. Smith](#) was a 2021 case in Alabama where an inmate requested his pastor be present during his execution and initially was denied the request. After Smith lost his case in the district court, the United States Court of Appeals for the Eleventh Circuit ruled in his favor. The Supreme Court vacated an injunction allowing the execution to proceed with the pastor present at the late night of February 11, 2021 the same date of Smith execution date after Alabama appealed. Several justices expressed concerns about the initial denial of the request and its impact on religious freedom.
- Title 42 orders are restrictions on immigration to the US to prevent the spread of communicable diseases. During the COVID-19 pandemic, these orders limited entry to certain non-US citizens.
- [Arizona v. Alejandro Mayorkas](#) is a 2022 Supreme Court case about the use of Title 42 to bar entry into the United States to protect against contagious diseases. The case involves a dispute between federal judges in Louisiana and D.C. over whether the Biden administration followed proper procedures in extending the policy. Several states with

Republican attorneys general tried to intervene in the D.C. case to defend the policy, but were rejected by the U.S. Court of Appeals for the D.C. Circuit.

- [SB-8](#) also known as the The Texas Heartbeat Act is a law in Texas that banned abortions after the detection of a fetal heartbeat, which can occur as early as six weeks into a pregnancy. Under the Act, a person who performed an abortion after the detection of a fetal heartbeat could be charged with a state jail felony, punishable by up to two years in jail. The Act also includes provisions allowing individuals to sue abortion providers or those who facilitate abortion for damages and to seek injunctions against them.
- [Whole Women's Health v. Jackson](#) is a 2021 case where abortion providers challenged Texas law SB-8 that bans abortions after six weeks and allows private individuals to sue anyone who aids or abets an abortion. In September 2021, the Supreme Court declined to block the law, but agreed to hear arguments in October 2021. The Supreme Court upheld the law ruling that abortion providers did not have standing to challenge the law in federal court. The decision has been criticized for effectively allowing states to restrict access to abortion without federal court review
- "GVR" Grant Vacate Remand Order is a type of decision made by the United States Supreme Court in which the Court grants a petition for certiorari (review), vacates the decision of a lower court, and remands the case back to the lower court for reconsideration or further proceedings. The GVR order does not necessarily indicate any opinion or decision on the merits of the case by the Supreme Court, but rather suggests that there may be some procedural or other issue that requires further consideration by the lower court. GVR orders are often used by the Court to address issues that may have been overlooked or not fully considered by the lower courts, and to provide guidance to those courts on how to proceed with the case.
- "Certiorari Before Judgement" is a legal process that allows the Supreme Court to review a case before it is fully adjudicated by the lower courts. It is rare and typically reserved for cases of great national importance or urgency. The procedure enables the Court to resolve important legal issues promptly and prevent irreparable harm or injustice.

- [Tandon v. Newsom](#) was a 2021 case where the Supreme Court lifted California's COVID-19 restrictions on indoor worship services, ruling that the restrictions were unconstitutional and violated the plaintiffs' First Amendment rights. This was an order decided on the shadow docket.
- Migrant Protection Protocols (MPP), also known as the "Remain in Mexico" policy, required non-Mexican asylum seekers to stay in Mexico while their U.S. immigration cases were processed. It was highly controversial and faced legal challenges. In 2021, the Biden administration halted new enrollments, but the Supreme Court later ruled that the program must be reinstated, stating that the administration failed to follow proper legal procedures when ending it.
- [Biden v. Texas](#) was a case before the Supreme Court that considered the constitutionality of the Biden administration's decision to pause the Migrant Protection Protocols (MPP) program. The Court ruled 6-3 that the administration had not followed proper legal procedures and upheld the MPP program, effectively reinstating it. However, the decision was limited to procedural grounds and did not address the program's constitutionality.