



Shadow Docket

When the U.S. Supreme Court sets its formal docket, at least four justices ([rule of four](#)) must agree to hear any appeals case. Appeals that the Court agrees to hear lead to a [writ of certiorari](#) being granted by the Court, which formally indicates that the Court will hear the case at some future point.

Yet during [her 2020 confirmation hearing](#), Supreme Court nominee and U.S. Circuit Judge Amy Coney Barrett was involved in a somewhat surprising exchange:

Sen. Richard Blumenthal (D-Connecticut): "Are you aware of the Supreme Court's-as it's called-shadow docket?"

Amy Coney Barrett: "The shadow docket has become a hot topic in the last couple of years."

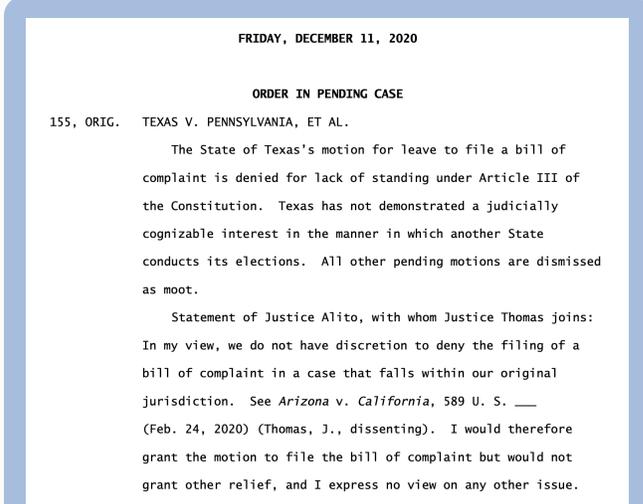
But why was this such a surprising exchange, and why has the so-called 'shadow docket' become such a 'hot topic' lately? Well, in simple terms, the shadow docket generally refers to emergency rulings issued by the Supreme Court that bypass the traditional appeals process of the 'regular' docket.



For example, opinions issued by the Court as part of the shadow docket will likely not be a result of traditional oral arguments before the Court. Rather, these unsigned opinions will be based on short written briefs submitted by petitioners.

More importantly, these opinions may be little more than brief orders without any clear reasoning explaining the outcome or indicating how and why each justice voted. Taken together, these characteristics of the shadow docket tend to cause legal scholars, transparency advocates, and even partisan politicians alike significant concerns. But why?

The Court has had a sort of shadow docket [since at least 1790](#). But since the early 2010s, the number of orders issued through the shadow docket has [greatly increased](#). Many observers are concerned about the very polarizing and controversial issues decided outside of the formal regular docket process, particularly in light of the increase in orders issued through the shadow docket. For example, the Supreme Court [has issued shadow docket rulings](#) on COVID-19 restrictions, abortion restrictions, the death penalty, election issues, and Trump administration policies in the form of emergency orders that overturn lower court rulings. While these emergency orders theoretically are temporary (in force only until a [writ of certiorari](#) is filed), they often lead to outcomes that can be seen as particularly divisive and hard to implement since the Court's reasoning can be unclear or confusing. At the same time, it can be a mystery about which justices, if any, dissented from the order [unless they publicly choose to state they did](#).



'Recent order from a shadow docket case. Note that it may have been a 5-4 decision or a 7-2 decision. Only two justices noted dissents.'

Recognizing that the shadow docket can be problematic on areas of transparency and understanding, a [bipartisan group](#) of members of Congress are contemplating ways to address the issue. It is not completely clear what, if anything, Congress can do about changes to the ways in which a co-equal branch of government does its business, but the Constitution does state in Article III, Section Two that Congress has some say in how the Court [approaches cases](#): "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Some proposals involve requiring justices to state how they voted (which is not what happens on shadow docket cases), while others speed up the appeals process in certain types of cases to avoid the necessity of emergency orders or restrict the ability of lower courts to issue broad injunctions against government actions that ending up forcing cases onto the shadow docket.

Ultimately, how the Supreme Court approaches pressing issues of national importance is key to ensuring that its rulings are seen as legitimate and understandable. Questions remain about how that can happen as long as multiple cases are decided through the shadow docket. The term "shadow docket" itself raises concerns about decisions made 'in the dark of night, when bad things can happen.'

To Think and To Do: Does the existence of the shadow docket threaten the way in which the Supreme Court is perceived by legislators and the general public? Why or why not?

Learn MORE about the shadow docket and the procedures of the Supreme Court. Free registration may be required.

- [Symposium on the Shadow Docket](#), from SCOTUSblog
- [House Hearing on Shadow Docket and Case Load](#), from C-SPAN
- [Procedures of the Supreme Court](#), from the U.S. Supreme Court



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