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On March 16, 2016, President Obama said he planned to nominate Merrick Garland, then chief judge of the US Court of Appeals, to fill the Supreme Court vacancy created by Justice Scalia's death. Following the president's announcement of Garland's impending nomination, Senate Majority Leader Mitch McConnell said he would refuse to consider any nominee to the Supreme Court until the next presidential inauguration--yet the elections were eight months away, which meant ten months to the next presidential and congressional inaugurations.

"The next justice could fundamentally alter the direction of the Supreme Court and have a profound impact on our country," McConnell offered as his rationale, claiming he wanted voters to decide. The justices took note; they've been singing from the same hymnal ever since.

A few weeks later, sixty-eight former Garland law clerks sent a letter, signed by all sixty-eight, urging the judge's confirmation. The Washington Post summarized the letter as painting "a portrait of Garland as a careful judge, a hardworking public servant, and a devoted family man." The senators ignored the missive.

On May 2, eight former US Solicitors General, half of them Republican, endorsed Garland as "superbly qualified," and on June 21, the American Bar Association's Committee on the Federal Judiciary weighed in and conferred Garland its "well-qualified" rating, adding, "Most remarkably, in interviews with hundreds of individuals in the legal profession and community who knew Judge Garland, whether for a few years or decades, not one person uttered a negative word about him." Most Republican senators stood with McConnell, who refused to budge.

Over 150,000 people signed a "We the People" petition that appeared in November 2016 on the White House website. It urged President Obama to independently appoint Garland, theorizing that the Senate had waived its "advise and consent" role. The petitioners received an official White House response, but the President did not act on the suggestion.

In a confirmation in September 2020, President Trump nominated Judge Amy Coney Barrett for the seat vacated by Ruth Bader Ginsburg's passing. Eight days before the 2020 election, on October 26, the Senate confirmed Barrett's appointment. Democrats as well as commentators objected that Republicans violated the precedent they established for Garland. The senators didn't blink an eye.

To understand how the Supreme Court functions, it's not enough to follow its reasoned decisions on the merit docket; we must also understand the shadow docket. This docket is supposed to be reserved for reviews and responses to emergency appeals, as when a prisoner on death row asks

for a stay of execution, writes legal scholar Stephen Vladeck in his 2023 "The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic**.** The shadow docket does not require lawyers' appearances before the Court, neither do the justices seat themselves on the bench. On the shadow docket, the justices rarely explain why they decide as they do.

During the Trump administration, the Supreme Court's shadow docket inflated exponentially. The President unabashedly asked for emergency rulings one after the other—and the justices complied. The one-term Trump administration sought emergency relief from the Supreme Court a whopping 41 times while, during the 16 years of the George W. Bush and Barack Obama administrations combined, solicitors general sought emergency relief a total of eight times, once every two years.

While the merits docket includes extensive briefings, comprehensive oral arguments, and written opinions that detail their reasoning and are signed by the justices, the unsigned and unexplained decisions issued through the shadow docket offer no such guideposts. These rulings often leave lower courts and the legal community in confusion, especially when an "emergency" order dilutes or even deletes a law or legal precedent. These rulings often affect millions of people, observes Vladeck. Because they are unsigned and almost always unexplained, shadow docket orders are supposed to be limited. And yet, "dozens of times each term," today, shadow docket orders "fly in the face of those understandings," he notes.

"Unsigned and unexplained orders are now routinely used to determine whether state and federal policies affecting all of us, and perhaps even the exercise of our constitutional rights, will or will not be enforced."

Vladeck shows that the trend to rely on the shadow docket "accelerated precipitously" after the death of Ruth Bader Ginsburg. While the merit docket has become "a small sliver of the Supreme Court's overall output," in recent years, "the shadow docket made up almost 99 percent of the Court's actual decisions."

Vladeck cites the dispute over Alabama's congressional redistricting. In 2021, in response to the 2020 Census, Alabama adopted new maps for its seven US House seats. Two different federal district courts blocked the maps, contending that the new districts were drawn to dilute the voting power of Black Alabamans in violation of the Voting Rights Act (VRA) of 1965. The courts based their rulings on the Supreme Court's prior interpretation of the VRA regarding standards that applied to prove voter dilution claims. Alabama appealed to the Supreme Court, arguing that the Court would or should revisit its interpretation of the VRA.

In the ordinary course of events, the justices would have taken up the appeal and set it for plenary consideration sometime in the fall of 2022. During that time, the district courts' rulings that required redrawing the maps, would have remained in effect, which was important in light of the 2022 primary and general elections. The redrawing, notes Vladeck, would almost certainly have created a second Democratic seat in Alabama's 6-1 Republican-majority House delegation.

But Alabama asked the justices to short-circuit that process by applying for "emergency relief" in the form of a stay that would "freeze the effect of both district court rulings so that the state could continue to use the invalidated maps during the 2022 election cycle," writes Vladeck. By shadow-docket decision, the conservative justices granted Alabama's request.

Remarkably, Chief Justice Roberts, who had written for a 5-4 majority in a 2013 decision that substantially weakened the VRA, wrote a rare dissent, in which he criticized the other five Republican-appointed justices for freezing the district courts' orders. Roberts pointed out that the lower courts "properly applied existing law in extensive opinion with no apparent errors for our correction." Alabama might persuade the Court to change the meaning of the VRA on appeal but, because the law as it stood supported the lower courts' rulings, Alabama couldn't come close to making the case for an emergency stay while the appeal unfolded. Emergency interventions are supposed to be for emergencies; lower courts faithfully following existing precedents did not qualify as an emergency, wrote the Chief Justice.

Justice Kagan also wrote a dissent, and the two more liberal members of the Court, Justices Breyer and Sotomayor, concurred. "Accepting Alabama's contention would rewrite decades of this Court's precedent about Section 2 of the VRA," wrote Kagan. Such a change "can properly happen only after full briefing and argument, not based on the scant review this Court gives matters on the shadow docket." By overriding the district courts even temporarily, "today's decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to . . . make changes in the law without anything approaching full briefing and argument."

Alarmingly, the Supreme Court's interference in the Alabama cases produced immediate effects not just in Alabama but elsewhere, observes Vladeck. Just ten days after the ruling, a Georgia district court held it could not block Georgia's proposed redistricting maps, even though they suffered from the same legal infirmity as Alabama's. The district court wrote that the Supreme Court's unexplained order in the Alabama ruling made it likely the Court would keep Georgia's unjust maps in effect also.

A few months later, a Louisiana district court blocked Louisiana's proposed congressional maps as violating the VRA, much as the Alabama district courts had done. Given the Supreme Court's action in the Alabama instant, the judge in Louisiana wrote a 152-page opinion that carefully explained why it was appropriate to require Louisiana to revise its maps even if it hadn't been appropriate in the Alabama and Georgia cases. On Louisiana's appeal to the Fifth Circuit, "by any measure the most conservative federal appeals court in the county," observes Vladeck, its judge wrote 33 pages that left the lower court's decision intact. The Supreme Court intervened in Louisiana also, which put the blocked maps back into effect without a single word of explanation for why the analyses of the lower courts were wrong.

Vladeck conclusion: These rulings all but guaranteed that three House seats that would likely have been safe seats for Democratic candidates in the 2022 midterm elections, instead were safe seats for Republicans. "A subsequent New York Times report concluded that the rulings were likely to impact which party controlled as many as seven House seats, if not the House itself," reports Vladeck, validating his assertions with a footnote citation. The Supreme Court's

"politicians in robes," wrote another observer, acted on a political agenda when they provisionally ruled in an "emegency" that wasn't.

On June 8, 2023, the Supreme Court finally ruled on Alabama's appeal, which had been argued on October 4, 2022. In a 5-4 Opinion from Chief Justice John Roberts, the Court affirmed the district court's determination that Alabama's 2021 redistricting violated Section 2 of the Voting Rights Act.