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Testimony Before the Presidential Commission on the Supreme Court of the United States “Case Selection and Review at the Supreme Court”

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The Presidential Commission on the Supreme Court of the United States
“Case Selection and Review at the Supreme Court”

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I. Introduction

I am honored to be invited to testify before the Presidential Commission on the Supreme Court of the United States. For this session our topic is “Case Selection and Review at the Supreme Court.”

Two facts about case selection should be in our minds. The first fact is that the Supreme Court takes far fewer cases than it used to, say 100 years ago, before Congress expanded the use of the certiorari process; or even 50 years ago, when the Court granted certiorari far more often. The second fact is that the Supreme Court is now more likely to issue high-profile orders in cases that it has not fully “taken,” cases in which it has not granted a petition for a writ of certiorari. Putting these two facts together, we can say that there are fewer cases on the Court’s “regular docket,” and there seem to be more cases on what is called its “shadow docket.”¹

II. Fewer Cases on the Regular Docket

The second of these developments, the apparent increase in the shadow docket, is more recent. It is likely to receive more attention at this hearing. I myself will devote most of my attention to this development.

But a focus only on the shadow docket would be a mistake. The first development is more consequential. Among other things, the declining

¹ “Shadow docket” is the term coined in William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1 (2015). I use the term with special reference to the portion of the orders list that is substantive, not including the mere grant or denial of a petition for a writ of certiorari.

number of cases on the regular docket is related to a shift in how we think about precedent at the Supreme Court. When the Supreme Court was deciding 200 cases a year, it was easy not to invest one decision with all the weight of settled precedent. And conversely, a single decision going the other way wasn't a fully decisive reversal. Precedent needed to be a line of cases, not a single oracular announcement. As Chief Justice Rehnquist once said, "One swallow doesn't make a summer."²

Now, of course, we tend to treat a single statement of the Court as "the law." Not, as in the older formulation, evidence of the law—evidence that might be stronger or weaker, and accumulate in force with time. This shift has many consequences for the institution of the federal judiciary and for the development of legal doctrine. It has consequences for how we think about precedents like *Employment Division v. Smith* or *Roe v. Wade*. And it has consequences even for how we formulate technical doctrines like the *Marks* Rule. Only because we need every Supreme Court decision to produce a "rule," almost like the act of a legislature, do we need to have something like the *Marks* Rule about how to generate that from a split decision at the Court.

In other words, the Supreme Court is hearing fewer cases, and we have a legal culture that expects each case to simply do more. That explains some of the political tensions that attend the Supreme Court now, where the Court's decisive single pronouncements in the month of June are a subject of hope and fear.

Even so, it is not new for the Supreme Court to be at the center of great moral and political questions in our nation. And there has long been controversy about whether one of those questions can be settled by a single pronouncement of the Supreme Court. That issue was central in the debates between Abraham Lincoln and Stephen Douglas concerning the *Dred Scott* decision. And in his first inaugural address, our greatest president said:

² *United States v. Virginia*, 518 U.S. 515, 561 (1996) (Rehnquist, C.J., concurring in the judgment).

the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.³

Lincoln was not naïve about political influences on the Court. But his point is that the Court decides cases for parties; and that although those decisions in time have the capacity to settle great issues, it is not in the nature of the Court to be able to do so merely by saying so.⁴

There is great wisdom in Lincoln’s position. And what I am suggesting today is that Lincoln’s position is related to the topic of case selection and judicial review. When the Court takes relatively few cases, it is easier to see each case as the resolution of a question—the final, decisive “precedent” or “precedent reversal.” But when the Court takes more cases, it is easier to see each case as a dispute between the parties (a resolution that of course has implications for the disputes of other parties).⁵

The first fact I began with—that the Court decides fewer cases, i.e., there are fewer cases on its regular docket—is the more important fact, but it is also the one that is harder to do anything about. These habits of taking fewer cases

³ Abraham Lincoln, *First Inaugural Address*, Mar. 4, 1861, in 6 JAMES RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1902, at 5, 9–10 (1903).

⁴ Cf. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 96 (3d American ed., trans. Henry Reeve, 1839) (“Moreover, although [a law] be censured [by a court as unconstitutional], it is not abolished; its moral force may be diminished, but its cogency is by no means suspended; and its final destruction can only be accomplished by the reiterated attacks of judicial functionaries.”).

⁵ Cf. Randy J. Kozel & Jeffrey Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENTARY 221, 222–223 (2016) (“The natural mode of decisionmaking for a Court that confronts an onerous docket is not wide-ranging rulemaking, but fact-specific adjudication.”).

and treating each case resolution as “the law” are tied in with many other practices at the Supreme Court. Things like the central role of circuit splits in case selection, the length of opinions, somewhat paradoxically the number of clerks, and the careful marking out of each section, paragraph, or footnote that is or is not joined by another justice.⁶

Now with all of these developments it is hard to have any certainty about causation. Debates about the judicial role have been at the center of our constitutional tradition for at least 164 years. A smaller caseload and the other things I just mentioned are not simply “causes” or “effects” of the changes in thought. But they have a kind of entrenchment effect. They make it harder to reset.

For this first fact, that there are fewer cases on the Court’s regular docket, the Commission might well consider proposing an expansion of direct appeals to the Court. In addition, I suggest an important point of framing and constitutional rhetoric. In its report, the Commission should embrace departmentalism and reject claims of a judicial monopoly on constitutional interpretation. That is to say, the Commission should emphasize the line of argument taken by President Lincoln against *Dred Scott*: the supremacy of the Supreme Court lies in the finality of its decision of a particular case. It is not supreme because it has a power in a particular case to finally and forever decide a constitutional question. It does not have that power. Nor does the Court’s supremacy lie in its being the only authoritative interpreter of the Constitution. It is not.

The Congress and the President are duty-bound to conform their actions to the Constitution, and that necessarily requires them to interpret it. Our constitutional tradition includes President Jefferson’s opposition to the judicially approved Alien and Sedition Acts, President Jackson’s opposition to the Court’s *McCulloch* decision, President Lincoln’s opposition to the Court’s *Dred Scott* decision, and President Roosevelt’s opposition to the Court’s New Deal decisions. In our constitutional tradition, the duty of the political

⁶ On the shift toward seeing judicial opinions as statute-like, see Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187 (2007).

branches to interpret the Constitution sometimes means interpreting it differently than the Supreme Court of the United States. The Commission's report should say this.

III. More Cases on the Shadow Docket

The second fact I began with is that there are more cases, or at least more high-profile cases, on what is called the Court's shadow docket. Most observers consider this a development of the last decade, though careful claims about the rise of the shadow docket usually put the rise in qualitative terms.⁷ A number of the high-profile cases on the shadow docket have involved Supreme Court stays of lower-court national injunctions. During the last administration, the issuance of a national injunction was "the most common ground" given by the Solicitor General when seeking emergency or extraordinary relief.⁸

In discussing the shadow docket, I want to make explicit my limitations. My substantive expertise related to the shadow docket is primarily on the law of remedies, and especially national injunctions. I am not an expert, for example, on the law and procedure of the death penalty. So my evaluation will not be fine-grained, considering how the shadow docket affects each area of substantive law. Rather, I will consider the shadow docket as a whole, but with more detail for the subset of cases that involve the national injunction.

A. Causation

The national injunction cases typically involve a single federal district judge giving an injunction that controls the behavior of the federal government

⁷ See, e.g., Testimony of Stephen I. Vladeck, "The Supreme Court's Shadow Docket," Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary *3-4 (Feb. 18, 2021) ("[T]he shadow docket has become increasingly prominent over the past four years.").

⁸ Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 134 (2019). Professor Vladeck also notes that "even if nationwide injunctions are behind much of this development, they cannot be behind all of it." *Id.* at 153.

toward everyone, not just the plaintiffs.⁹ These injunctions are also called “nationwide injunctions,”¹⁰ “defendant-oriented injunctions,”¹¹ or “universal injunctions.”¹²

There has been a vigorous debate about these injunctions among judges and scholars. Some think they are consistent with our history and allow the judiciary to prevent violations of the Constitution, wherever and whenever they happen.¹³ Others think national injunctions are novel and inconsistent with the judicial role under our Constitution, and that they clash with traditional principles of equity and numerous doctrines of civil procedure and federal courts.¹⁴ There are similarly two views on whether national injunctions are supported by the Administrative Procedure Act.¹⁵

⁹ See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017).

¹⁰ See, e.g., Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018).

¹¹ See, e.g., Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J. LAW & PUB. POL’Y 487 (2016).

¹² See, e.g., Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335 (2018); see also Howard M. Wasserman, *Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent*, 91 U. COLO. L. REV. 999, 1004-1012 (2020).

¹³ See, e.g., Frost, *supra* note 10; Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020). For judicial opinions, see, e.g., *City of Chicago v. Sessions*, 888 F.3d 272, 287-293 (7th Cir. 2018), *reh’g en banc granted in part, opinion vacated in part*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); *D.C. v. U.S. Dep’t of Agric.*, 444 F. Supp. 3d 1, 46-55 (D.D.C. 2020), *appeal dismissed sub nom. D.C. v. United States Dep’t of Agric.*, No. 20-5136, 2020 WL 9596420 (D.C. Cir. Nov. 5, 2020); *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 66-72 (D.D.C. 2019), *rev’d and remanded sub nom. Make The Rd. New York v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

¹⁴ See, e.g., Bray, *supra* note 9; Morley, *supra* note 11. For judicial opinions, see, e.g., *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 599-601 (2020) (Gorsuch, J., concurring in the grant of the stay); *Trump v. Hawaii*, 138 S. Ct. 2392, 2424-2429 (2018) (Thomas, J., concurring); *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 255-263 (4th Cir. 2020), *reh’g en banc granted*, 981 F.3d 311 (4th Cir. 2020); *City of Chicago*, 888 F.3d at 296-300 (Manion, J., concurring in the judgment in part and dissenting in part); *Doe #1 v. Trump*, 957 F.3d 1050, 1092-1098 (9th Cir. 2020) (Bress, J., dissenting).

¹⁵ Compare John Harrison, *Section 706 of the Administrative Procedure Act Does Not Call for Universal Injunctions or Other Universal Remedies*, 37 Y. J. REG. BULLETIN 37 (2020) (no) with Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121 (2020) (yes).

The stakes are high. For the last seven years, national injunctions have stopped most major executive initiatives—whether of President Obama, President Trump, or President Biden. The novelty of the national injunction can be seen in the fact that this is true of the last seven years, but wasn’t true of the preceding 225 years.¹⁶

The rise in national injunction cases on the shadow docket can be explained in terms of the dramatically changing behavior of the lower federal courts. It was the federal district courts, starting in the final years of the Obama administration, that transformed the national injunction from a remedy that was marginal and contested, at least outside of suits under the Administrative Procedure Act, to being pervasive, widespread, and the central point of conflict between the President and the federal courts.

It is a truism that the Supreme Court cannot be understood in isolation. The Court is part of a dense web of institutions, networks, and practices. It is affected by what happens in the other branches, in the states, and within the rest of the federal judiciary. If we are trying to discover why the Supreme Court has issued orders staying lower court national injunctions, one part of the answer is rather obvious: it is the novel rise of the lower court national injunctions. Some federal district court judges sneezed, and the Court caught a cold.

B. Evaluation

I think the best way to understand the shadow docket is to think about it by analogy to a preliminary injunction. This analogy will help us see which criticisms of the shadow docket are sound and which are unsound.

¹⁶ For example, on the complete absence of the national injunction during the New Deal litigation, despite thousands of challenges to the enforcement of federal laws, see Bray, *supra* note 9, at 434-435; see also Barry Cushman, *The Judicial Reforms of 1937*, 61 WM. & MARY L. REV. 995, 1001 (2020) (noting how “intervention by lower federal courts could substantially frustrate the implementation of regional and even national programs for relief, recovery, and reform,” even though the 1930s was “a world without universal injunctions”); cf. Sohoni, *supra* note 13, at 1001-1002 & n.531.

A preliminary injunction is a kind of interlocutory relief. It is given before judgment—hence “preliminary.” But it is a real order to the defendant, one that is enforceable with contempt—hence “injunction.” The test for a preliminary injunction that is used in federal court has four factors.¹⁷ A critical factor is irreparable injury, which in the preliminary injunction context is a phrase with a specific and technical meaning: is the injury to the moving party something that cannot be remedied by a win on the merits?¹⁸ For example, if the plaintiff argues that she needs a preliminary injunction, because without one the nuisance caused by the defendant will cost the plaintiff money every day, that’s not a strong argument. That injury may exist, but because it can be rolled into a monetary remedy at the end of the suit, the injury is reparable, not irreparable.

A preliminary injunction is meant to prevent irreparable harm to the moving party (usually the plaintiff), and, at least as important, to secure the court’s ability to decide the case.¹⁹

One of the most important concepts for the preliminary injunction is that it is meant to preserve the status quo.²⁰ By preserving the status quo, a preliminary injunction serves these dual functions. If the status quo is preserved, the defendant won’t inflict irreparable injury on the plaintiff; and if the status quo is preserved, the court will still be able to hear the case. In other words, the preliminary injunction is not supposed to decide the case—that’s what the ordinary process leading to judgment is for—but it is supposed to allow that process to work, to shield that process from disruption, to maintain or even restore some kind of equilibrium.²¹ And because that is what the

¹⁷ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

¹⁸ DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 113 (1991); EMILY SHERWIN & SAMUEL BRAY, *AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS* 653 (3d ed. 2019).

¹⁹ *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (“The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.”).

²⁰ *See generally* *O Centro Espirita Beneficente Uniao Do Vegetal*, 389 F.3d 973, 1011-1018 (10th Cir. 2004) (McConnell, J., concurring), *aff’d and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

²¹ On mandatory preliminary injunctions as “requiring parties to *restore* the status quo ante,” see *id.* at 1013.

preliminary injunction does, it is given without the usual procedural formality.²² It's of course true that the grant of a preliminary injunction might effectively end the litigation. It's also true that there will be disagreement about what the status quo is. Moreover, some scholars have criticized the focus on the status quo. But it remains the case that courts routinely talk about and think about the status quo in deciding whether to issue a preliminary injunction.²³

Now the reason I think the analogy works is that the Court seems to be using the shadow docket to preserve what it sees as a prior equilibrium.²⁴ When the Court stays a national injunction, it is doing so in order to preserve the executive branch's ability to act against non-parties. Or consider another subset of cases on the shadow docket, the COVID cases. In some of these cases, the Court enjoined the application of a state public health measure to the plaintiffs, preserving their right of free exercise of religion until there could be a final decision on the validity of the regulatory measures. For the synagogue and churches that sought emergency relief, an eventual win would not be enough. Without interim protection via the shadow docket, they would have no way to get back the lost Saturdays and Sundays and religious festivals.

I recognize that these judgments inevitably have a normative tinge. I know that it is a choice to see the national injunction as the disruptive force, not the executive policy or rule that prompted the national injunction. I know it is a choice to see the state public health measures as the disruptive force, not the worship services that ran up against the public health measures. Because my legal education was at the University of Chicago, you'll forgive me if I say that we all know from Ronald Coase that it takes two sides to have a nuisance.

²² See *Camenisch*, 451 U.S. at 395 ("Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.").

²³ Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 389 (2005).

²⁴ Cf. Baude, *supra* note 1, at 15 (recognizing that some shadow docket orders could be "motivated by a common-sense desire to preserve the status quo").

But these are the judgments the Court is making. I also think they are, by and large, good judgments about what is disrupting the constitutional balance.

Let me be specific about why I think the Court is right to see the national injunction as the disruptive force. Before 2016, the national injunction was marginal. Absent from most of our national history, it developed in the late twentieth century, and it remained controversial.²⁵ But in 2016, state attorneys general began seeking national injunctions to shut down President Obama's agenda on numerous fronts. They succeeded. And ever since then, whenever there is a major executive order or agency rule, there is a good chance that it will be shut down by a single federal judge's national injunction. The government has to win every case, but for the government to lose it takes only one judge, in one carefully selected forum, issuing a national injunction.

This interloper, the national injunction, is a major distortion of our legal system. It is a distortion of the judicial role under Article III of the U.S. Constitution, because once a court decides a case for the plaintiff, and gives the plaintiff her remedy, there is nothing for the court to do—the plaintiff's "case or controversy" has been decided, and there is no other.²⁶

²⁵ See Bray, *supra* note 9, at 437–445. For competing views of the history, see Christopher J. Walker, *Legal Historians Weigh in on the Nationwide Injunction Debate*, NOTICE & COMMENT (Nov. 20, 2018).

²⁶ See *Gill v. Whitford*, 138 S. Ct. 1916, 1933–1934 (2018) ("The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it. . . . A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."); *Lewis v. Casey*, 518 U.S. 343, 349 (1996) ("It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally."); *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 488–489 (1923) ("Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess."); see also *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute.").

It is a distortion of traditional equitable practices. The traditional practice of the English and American courts of equity was to give remedies that protected the plaintiff or the plaintiff class. Those remedies might be broad, deep, intensive, and managerial—the ability to do this, in order to protect the rights of the plaintiff, is one of the great benefits of equity. But those remedies were broad and deep to protect the plaintiff or plaintiff class. Not to protect other people who weren’t represented in the case.

And the national injunction is a distortion of the Federal Rules of Civil Procedure and the practice of the federal courts. It is an end-run around the requirements of a class action—a way to try get the benefits of a class-action remedy without meeting the requirements of a class action.²⁷ Or, to take another example, the national injunction is inconsistent with the rule that offensive nonmutual collateral estoppel does not apply against the federal government.²⁸

Again, I want to be clear that a normative judgment is required to see what the district courts are doing, when they issue national injunctions, as fundamentally disruptive. One could instead see as a disruption the shift of so much of our lawmaking away from Congress and to the executive branch, through agency rulemaking and through executive orders.

And I do think that the shift to government by executive action is also a disruption of our federal system. Indeed, the best defense of the national injunctions given by the lower courts—against the Obama administration, the Trump administration, and the Biden administration—is that the judges are fighting disruption with disruption. But every time we accept that argument, every time we say that presidential overreach justifies judicial overreach, every time we say two constitutional wrongs make a right, it becomes harder to go back. Seeking balance, we make it harder to restore balance.

Once we think of the shadow docket in terms of an analogy to the preliminary injunction, how should we evaluate it? Should we be concerned—

²⁷ Cf. George Rutherglen, *Universal Injunctions: Why Not Follow the Rule?* (SSRN draft of April 20, 2021).

²⁸ See *United States v. Mendoza*, 464 U.S. 154 (1984).

should we be a little concerned, or really, really concerned—about the increased use of the shadow docket?

The best sketch of the criticisms of the shadow docket is found in the testimony provided by Professor Steve Vladeck (who is my friend, and who is also testifying here today) about four months ago before a committee of the U.S. House of Representatives.²⁹ He offered an eight-point critique of the shadow docket. This builds on published work by Professor Vladeck and others, including Professor Will Baude. The eight criticisms are:³⁰

- (1) “The absence of reasoning”;
- (2) “The anonymity of the vote”;
- (3) “The unpredictable timing of decisions”;
- (4) “The lack of merits briefing, *amicus* participation, and/or oral argument”;
- (5) “The problems with predictions”;
- (6) “Prematurely (and unnecessarily) resolving constitutional questions”;
- (7) “Distorting the Supreme Court’s workload”; and
- (8) “Undermining the Court’s legitimacy.”

I’ll also add one more criticism, which was made by the Solicitor General of the District of Columbia, Loren AliKhan, at that same congressional hearing. This criticism is that the precedential effect of shadow docket orders can be uncertain or disputed, with the result that they give insufficient guidance to the lower courts.³¹ We can call this:

- (9) Failing to guide the lower courts.

²⁹ Vladeck, *supra* note 7.

³⁰ *Id.* at *13-17.

³¹ Testimony of Loren L. AliKhan, “The Supreme Court’s Shadow Docket,” Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary *12-13 (Feb. 18, 2021).

Once we understand the shadow docket as functioning by analogy to the preliminary injunction, it helps to filter out the unsound objections from the ones that are sound. Of these nine criticisms, I would submit that five are weak, three have real force, and one is actually a benefit rather than a problem. Let me explain.

Five of the criticisms summarized in Professor Vladeck's prior testimony are, I think, not very substantial. These are numbers 1, 2, 3, 7, and 8.

If we think of these orders from the shadow docket as trying to preserve the status quo against a disruption, as being jurisprudentially "preliminary," then it does not greatly matter if they aren't accompanied by reasoned opinions (no. 1), or if the justices don't say how they voted (no. 2). It is common in our legal system for preliminary orders, rather than merits decisions, to have different norms of justification and attribution. An example is the different practices of "motions panels" and "merits panels" in some of the federal courts of appeals, including the Ninth Circuit.³²

I think no. 3, about orders released late at night, is a criticism that borders on the trivial. I understand that it might make life more difficult for some attorneys and reporters. But the connection between this and any kind of public awareness is hard to discern. Most people in the United States have only a passing familiarity with the Supreme Court's work. Their ability to follow the Court's decisions is not really changed by whether they are released at 10 pm or 10 am.

Criticism no. 7, that the rise of the shadow docket has suppressed the Court's merits docket, is interesting but hard to prove. The big declines in the Court's regular docket were from the 1880s to the 1990s³³—that stretch of time obviously could not be affected by a rise in the shadow docket in the 2010s. It could be that the shadow docket is distracting the Court from the merits cases. But again it is hard to prove.

And criticism no. 8, about legitimacy, is not freestanding; it is a conclusion based on the other criticisms.

³² See FEDERAL APPELLATE PRACTICE: NINTH CIRCUIT § 12:8 ("Motions panel and dispositive motions") (2020 Edition).

³³ See Vladeck, *supra* note 7, at 16.

But three of the criticisms summarized by Professor Vladeck are valid and even weighty. These are criticisms 4, 5, and 6. These criticisms are put into sharper focus by thinking of the shadow docket by analogy to the preliminary injunction.

The fact I want to emphasize about the shadow docket is that what happens in the shadow docket doesn't stay in the shadow docket. My point here is not about precedential force—more on that in a moment. Rather, my point is about the psychological effect on any judge of predicting what the outcome of a case will be. It is natural for human beings to defend the positions they have taken, for the words to come first and the commitment to follow after.³⁴ In fact, although not by design, a preliminary injunction can almost be seen as a kind of judicial precommitment, which has the effect of preventing what social scientists call “weakness of will,” the kind of vacillation from the position taken at time 1 that can result in a different choice at time 2.³⁵ “Weakness of will” sounds negative, but it is also a kind of judicial virtue: a willingness to consider, and reconsider, each case on its own merits.

In other words, I am saying that preliminary injunctions change the field of future legal results, not because they are precedential on the merits (they aren't—they don't decide the merits), but because they change the judge who is deciding the merits. In the same way, a decision on the shadow docket changes the field of future legal results, not because it is precedential on the merits (it might be, but that question is complicated³⁶), but because it changes the very justices who will be deciding the merits.

What I have just described is, I think, the real premise behind the three telling criticisms offered by Professor Vladeck. No. 4, about briefing and argument and the lack of deliberation, matters to the extent a shadow docket decision affects other, future decisions (on the shadow docket or the regular

³⁴ THEODORE DREISER, *SISTER CARRIE* 193 (Modern Library 1997) (1900) (“By the natural law which governs all effort, what he wrote reacted upon him. He began to feel those subtleties which he could find words to express.”).

³⁵ See JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 8-11 (2000).

³⁶ See generally Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J. L. & PUB. POL'Y 827 (2021).

docket). No. 5, on predictions being inaccurate, matters because of how a “preliminary” decision on the shadow docket can lock in the justices’ positions. And no. 6, on prematurely or unnecessarily resolving constitutional questions, matters because the Court’s shadow docket orders are preliminary decisions, anticipatory ones that might have proved unnecessary.

I think these are sound criticisms. All else being equal, decisions on the shadow docket are rushed. They lack the deliberation and percolation through the lower courts that should attend the decisions of the Supreme Court. And the justices would be only human if their decisions today, even simply their predictions of what they will do tomorrow, turn out to have a gravitational pull on what they actually do tomorrow.

But this brings us to the nub of the evaluative problem. The criticisms I have just endorsed are also criticisms that can be made of the preliminary injunction. It, too, is rushed. It, too, lacks the deliberation of the full process culminating in judgment. It, too, has a gravitational pull on the judge who has already identified and announced publicly what she is likely to hold on the merits. And yet the preliminary injunction is too valuable for our legal system to give up. There are disruptions of the prior equilibrium that need to be stopped to prevent irreparable injury and to preserve the court’s ability to decide the case. And the same compelling reasons can support orders in the shadow docket.

There is simply no way to get the sweet of stopping disruption quickly, without the bitter of moving quickly. Perhaps the risk of judicial precommitment could be lessened. For example, in considering a request for a stay, the justices could place less emphasis on the likelihood of success on the merits and more emphasis on avoiding irreparable injury and preserving the status quo. But just as with the preliminary injunction, the value and drawbacks of the shadow docket are inevitably intertwined.

Once we see the shadow docket in these terms—as having the same inherent dangers and the same inherent justifications as the preliminary injunction—then we will be able to sort the shadow docket cases and make a more discriminating evaluation.

The national injunction is precisely the kind of systemic disruption that warrants shadow docket treatment. It has thwarted major parts of the agenda of the last three presidents—and none of the preceding presidents. The Court was right to step in. And the Court should demonstrate its continued willingness to stay and reverse national injunctions now that they are constraining the Biden administration.

The COVID cases are more complicated, and they inevitably depend on the weight one gives to the value of “the free exercise of religion.” In my view, the No Religious Test Clause, the First Amendment, and the Fourteenth Amendment commit us as a nation to vigorous protection of religious observance.³⁷ And so the Court was correct in framing the public health regulations—as reasonable as some of them were—as disruptions of a fundamental constitutional right.

We can also see this emphasis on the status quo in the shadow docket orders related to election law. There is plenty of room for debate about how to apply the *Purcell* principle,³⁸ which urges federal courts not to change the rules right before an election (and I won’t venture an opinion on the substance, because it is well outside my expertise). Still, it is not an accident that a majority of the Court would invoke that status-quo-preserving principle in favor of its shadow docket orders.

In another substantive area, the death penalty cases, the implications of the preliminary injunction analogy are different. The Court has sometimes acted via the shadow docket to lift lower-court stays of execution. But there is no symmetry between an erroneous execution and an erroneous non-execution. If proper attention is given to irreparability and the need to preserve the judiciary’s ability to decide a case, then the justices should be much more willing to give shadow docket orders that *delay* an execution than shadow docket orders that *accelerate* an execution.

I understand the objection—from the Court’s point of view, when it jumps in to lift a lower-court stay, allowing an execution to proceed, it is because the

³⁷ See, e.g., *Trinity Lutheran Church of Columbia v. Comer*, 137 S.Ct. 2012, 2019 (2017).

³⁸ See, e.g., Richard L. Hasen, *Reining in the Purcell Principle*, 43 FLA. ST. U. L. REV. 427 (2016).

lower court has abused its discretion, perhaps even acted lawlessly. And yet if we think of the shadow docket in terms of an analogy to the preliminary injunction, it's not enough to say the lower court is getting it wrong. In the status quo, the prisoner is alive. The Court's orders in the shadow docket should preserve, not end, that status quo.

IV. The Solicitor General's Office and the Production of Precedent

I would like to make two concluding points about precedent.

First, a key part of the debate over the shadow docket, and in particular the Trump administration's success in getting wins in the shadow docket, is the role of the Solicitor General.³⁹ One claim that has been made is that the Solicitor General has an unfair advantage in asking for stays or certiorari before judgment in the Supreme Court. And the Solicitor General has been more successful than any other litigant.

But the United States Government is not an ordinary litigant. A key part of the Solicitor General's role is what might be called being a cooperative partner in the creation of precedent. This is well known from how the Supreme Court seeks and obtains the views of the Solicitor General on petitions for a writ of certiorari, and also in how the United States Government can settle cases instead of appealing them. I see the Solicitor General's vigorous use of the shadow docket in the last administration as being one more example of this.

It remains to be seen if the Biden administration will follow suit. If it does, and vigorously requests emergency relief in the shadow docket, then the executive branch's practice will not be specific to the previous administration. Some of the criticisms may not last. If, however, the Solicitor General's Office in the Biden administration does not make vigorous use of the shadow docket, then much of the intensity of this topic will seep away.

The key point here is that for the national injunction cases, dramatic use of the shadow docket requires two institutional actors to concur—the Supreme

³⁹ See generally Vladeck, *supra* note 8.

Court, and the executive branch as represented by the Solicitor General (or Acting Solicitor General). If this Presidential Commission did not want to put the Solicitor General to the choice—the choice between allowing national injunctions to stand during the entire pendency of the appellate process, or seeking emergency relief—there is an easy solution. This Commission could endorse legislation to end the national injunction. The best legislation to do so is H.R. 43, called the “Injunctive Authority Clarification Act of 2021.”

And one more point about precedent. Recall criticism no. 9, that the shadow docket decisions have unclear precedential effect and thus offer limited guidance to lower courts. That is descriptively correct.⁴⁰ But I think it is a good thing. If the shadow docket works (and fails to work) in the same way as the preliminary injunction, then we want to tamp down the precedential effects, not ramp them up.

And in an odd sort of way, the recent rise in the shadow docket is a kind of answer, a somewhat mediocre answer, to the problem I started with: the decline, over more than a century, in cases on the Court’s regular docket. The Court should be deciding more cases. In effect, it is—on the shadow docket. We should give each case less precedential force, looking for a cumulative pattern and not a single Delphic utterance. And something like that is actually happening on the shadow docket.

V. Conclusion

In conclusion, I urge the Commission to emphasize the case-specific nature of the judicial role, rejecting any claim that the Supreme Court has a monopoly on interpretation of the Constitution. I also encourage the Commission to go to the root cause for why there have been so many shadow docket orders about the national injunction—namely, the national injunction itself. The Commission should support legislation ending the national injunction.

Thank you for the honor of testifying before you today.

⁴⁰ See generally McFadden & Kapoor, *supra* note 36.