



## Jonathan Adler and Stephen Vladeck Debate the use of the “Shadow Docket” on the Roberts Court

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**[0:00:00.2] Julie Silverbrook:** From the National Constitution Center in Philadelphia, this is We The People.

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**[0:00:07.9] Julie Silverbrook:** I'm Julie Silverbrook, Chief Content and Learning Officer. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. In this episode, we explore a part of the Supreme Court's work that has drawn growing public attention, its emergency or shadow docket, sometimes referred to by the Justices as the interim docket. Most cases the Court decides are on its merits docket, with full briefing participation from amici friends of the Court and oral argument before the Justices and the public. But the Court also acts on emergency applications. These cases move quickly, with shorter filings, limited outside input, and typically no oral argument. The resulting orders are often brief, sometimes just a sentence or two. Decisions on the emergency docket can have immediate and far reaching effects shaping how laws are implemented and how disputes are resolved in real time. Understanding how and when the Court acts is essential to understanding its role in our constitutional system. To help us explore the Court's use of the emergency docket and the debates surrounding it, we're joined by two leading constitutional scholars. Jonathan Adler is a professor of law at William And Mary Law School. He is the author of seven books, including, *Business and the Roberts Court*. He is a regular contributor to the popular legal blog *The Volokh Conspiracy*. Jonathan welcome back to We The People.

**[0:01:27.8] Jonathan Adler:** Good to be here.

**[0:01:28.8] Julie Silverbrook:** And Stephen Vladeck is a professor of law at Georgetown University Law Center. He's the author of the New York Times bestselling book, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*. He's also the editor and author of *One First*, a popular newsletter about the Supreme Court. Steve, it's great to welcome you back to We The People.

**[0:01:49.7] Stephen Vladeck:** Good to be back, Julie, thank you.

**[0:01:51.9] Julie Silverbrook:** To begin, Steve, define for our audience what the Supreme Court's

emergency or call it shadow or interim docket, what that is, how it originated, and what role it has traditionally played in the Court's work?

**[0:02:04.8] Stephen Vladeck:** Sure. I mean, so all appellate Courts have some kind of process by which they have the power to basically suspend the effects of a lower Court ruling or to provide what the lower Court didn't to the party that lost below for the duration of the appeal. And so these have historically been thought of as emergency appeals because there's usually some emergency that justifies having the appellate Court step in sooner rather than later to suspend our usual preference for decisions after final judgments. In the Supreme Court, historically, that power existed for as long as we have the Supreme Court, but it was really exercised first, not that often, and second, almost always by individual Justices sitting as circuit Justices, basically with geographic responsibility for one part of the country, really all the way up to about 1980. It's actually very hard to find more than a handful of full Court rulings on emergency applications that predate that shift. In the 1980s, the Court shifts toward more full Court rulings where the norm is to not have explanations, to not have oral arguments, to not have full briefing, but at first only in capital cases, only with regard to last minute requests for stays of execution or from states to unstay executions.

**[0:03:24.9] Stephen Vladeck:** That expands a bit in the '90s to encompass some election cases. But really, Julie, as late as the early 2010s, it was still very, very unusual for the Supreme Court as a full Court, to get involved in nationwide or even statewide policy disputes at the emergency application stage. It's not that there weren't litigation emergencies. It's that the Court's approach was to either have the Circuit Justice handle things on their own or to take up the whole case as soon as possible, to basically have expedited merits review. And instead, what we've seen over the last 10, 15 years is more and more of these cases where it's a little bit from column A, a little bit from column B, where it's expedited, it's the full Court, but it's not with full briefing, usually not with oral argument, usually not with an opinion. And I think that's part of why it has become something of a lightning rod.

**[0:04:17.1] Julie Silverbrook:** Jonathan, you've emphasized, as Steve just noted, that emergency orders are not, in fact, new. How should we understand today's debate over the shadow docket in light of that longer historical practice?

**[0:04:32.5] Jonathan Adler:** Well, I think a good way to think about this is to think about the role the Court plays in our broader constitutional structure, both as the judicial branch, but also as the top of the judicial branch. The Supreme Court, more so than the other branches, is a reactive institution. It responds to things that are filed by litigants. It responds to things that are going on or that have occurred in the lower Courts or that occur elsewhere in the legal system. And in some respects, that is more true now than in the nation's history because the Court today also has a degree of control over its docket that it did not have before. And so what I think we see in the rise of what we refer to as the shadow docket, or the part of the shadow docket that has prompted so much attention and concern, is a reflection of what's going on more broadly. That is to say, Congress is less active at legislating, less aggressive or proactive in defending its own institutional prerogatives, less involved in revisiting and monitoring the enforcement and application of the statutes it enacts, and the executive branch filling that vacuum. What then, Professor Elena Kagan referred to as presidential administration, but in some respects, presidential administration on steroids and involving a degree of executive unilateralism that is not unique, but certainly more present and

widespread than in the past. And then a response in the judicial system of a tremendous amount of litigation taking the place of political deliberation. So issues are being thrust to the Courts to a degree and to an extent that is something we had not seen, I think, before in our nation's history, generating the controversies and the conflicts which bubble up to the Court. And so a lot of what we're seeing on the Court in what we refer to as the shadow docket, I think has to be understood in the first instance as a reflection and a reaction to things that are occurring in the broader system. And then we can, of course, evaluate whether we think it's a positive reaction, negative reaction, et cetera. But I think as an initial matter, we have to first understand its inherently reactive posture and what's occurring as a reflection or result of things that are occurring elsewhere in our political and legal system.

**[0:07:05.6] Julie Silverbrook:** So, Steve, I wanna go to you because obviously the title of your book is reflective of deep concern over the Court's shadow docket. So I agree with Jonathan's assessment that this is reactive. This has to do with things that are happening in the other two political branches. But the Court doesn't have to necessarily decide the way that it does in these cases. So what concerns you about the way that the Court is deciding, and does that feel like a departure from what it's historically done in this space?

**[0:07:39.8] Stephen Vladeck:** Yeah, I mean, I think Jonathan is right and I think folks like he and I have agreed about this for a long time, that the rise of this high-stakes government by litigation is directly attributable to Congress's abandonment of institutional responsibility. I think there's a step missing, though, from that point on which we agree to a much more active emergency docket in the Supreme Court. And that step is a sense that lower Courts aren't correctly, properly calibrating how to deal with the litigation that's following. Because part of the sort of, yes, there's more input on the high-volume, high-importance cases, but you only need the Supreme Court to grant emergency relief when the lower Courts either haven't or have done it wrong. And I think that's part of the problem here, is that if there are consistent mistakes that lower Courts are making, fine. I mean, that's the Supreme Court's job. Where I really start getting exasperated and concerned is that the Court is intervening so much more often than ever before, Julie, not just in a quantitative sense, but in a way in which it's not usually explaining itself. Very, very few of these decisions come with opinions of the Court.

**[0:08:55.3] Stephen Vladeck:** Some of them are completely unexplained other than a boilerplate order. And to be clear, the Court has the power to do that. This is not me saying it's beyond the Court's authority to issue a summary ruling. The problem is that the summary rulings have this really unfortunate tendency, one, to look inconsistent in cases that otherwise seem very similar but for their partisan valence, where the Trump administration, for example, does very well in immigration cases and the Biden administration doesn't. But also, Julie, now we have this added phenomenon of the Court expecting lower Courts to divine the tea leaves of unsigned, unexplained orders and going so far, as Justice Gorsuch did last August in the *NIH* case, of accusing lower Court judges of defying the Supreme Court for not properly reading between the lines. And so it seems to me that you can think that the Supreme Court is justified in intervening in these cases, many, all, some of them. But the way that the Court, I think, could dispel the charge that it's doing so and playing partisan political favorites in the process, is if it were providing coherent applications of neutral legal principles that were then accessible to lower Courts, to people like Jonathan and me and you. Right? Like, where we could actually talk about do we think the Court is following these

principles correctly versus which principles do we think the Court was relying upon in this ruling? And so I think a big part of where we are right now is not the existence of the emergency docket. It's not the volume. It's that the Court is using it so often in cases with such dramatic consequences and so seldom telling us why.

**[0:10:37.2] Julie Silverbrook:** Jonathan, do you agree with that assessment?

**[0:10:39.6] Jonathan Adler:** In part. I think there is a piece there that I think needs to be put on the table, which is the District Courts are not acting the way they have historically, and litigants are not acting the way they have historically. And that puts the Supreme Court in a position where I think the tradeoff is a little sharper than maybe suggested. And let me just explain what I mean by that. Well, first of all, the sort of relief that litigants are seeking and obtaining in District Courts against the federal government is more expansive and more common than we've seen previously in the nation's history. One example of this, the Supreme Court has tried to address is the nationwide injunction, or so-called universal injunction. There was a great review of this data by the Harvard Law Review pointing out that between 1963 and 2023, there were 127 universal injunctions. But over 80% of those came since 2000. Six were entered against the George W. Bush administration, 12 against the Obama administration, 64 against the first Trump administration, 28 against the Biden administration. What this means is that a single District Court judge that is handpicked by the litigants, by the plaintiffs, often handpicked by politically motivated litigants like state attorneys general, to get relief on a nationwide basis on a very salient policy issue.

**[0:12:11.2] Jonathan Adler:** And that creates a really problematic situation for the system as a whole because it means that nationwide policy is being dictated not by nine Supreme Court Justices, not by the executive branch, not by Congress, but a single District Court judge handpicked by politically motivated litigants. As Elena Kagan noted in 2022, she said it can't be right that one District Court, whether it's in the Trump years, people used to go to the Northern District of California, and in the Biden years they go to Texas, and it just can't be right that one district judge can stop a nationwide policy in its tracks and leave it stopped for the years that it takes to go through the normal process. I think she was right about that. And I think... Let me just give some numbers and then Steve will tell me where I'm wrong, and that's great. So this dynamic has been occurring at a rate in which historically we just did not see. Prior to the *CASA* decision, there were more universal injunctions against the Trump administration, second Trump administration, than there had been against the Johnson, Nixon, Ford, Carter, Reagan, and Bush 41 administrations combined. Now, I think Steve and I would agree part of the reason for that is that the Trump administration is being far more aggressive than prior administrations. I agree with that, and I think we agree congressional.

**[0:13:35.4] Stephen Vladeck:** Fecklessness.

**[0:13:36.2] Jonathan Adler:** Inaction is part of it. Yes, I think we agree on that. But I think we also agree, would agree, or I hope, states are far more aggressive at litigating and turning policy battles into legal battles. They get far more leeway from the Courts in terms of asserting Article III jurisdiction than they were given historically, and I think that that's part of the problem. And that a lot of the District Court decisions that we're getting, whether it's a decision in *Texas* about Mifepristone or a decision in *Massachusetts* about some immigration policy or abortion policy,

whatever else, are outliers. And it is a systemic problem if the only choice the Supreme Court has is to let that order stay in effect for an extended period of time for the Court to fully consider, brief, and evaluate the question, or not act at all. I don't think that's really a good choice. And so I again view the Court as a reactive institution responding to this and saying, hey, wait a second, this is no way to run a railroad. And in a large number of these cases, the Court has said, we're gonna press pause, or we're going... And we're not going to wait for the time it takes to write it all up. And I think there are some good reasons for that. And whether the Court's gotten the perfect balance or not, I don't know. But I think that the tradeoffs there are sharper than it may first appear.

**[0:15:03.7] Stephen Vladeck:** So I just have just two thoughts in response. I think, again, I largely agree that the inputs are being caused by the factors that Jonathan has articulated. But to the first point about nationwide injunctions, we're now ten and a half months past the *CASA* decision, where the Court effectively limited nationwide injunctions to a small number of circumstances. I don't think anyone would suggest the emergency docket has gotten quieter. And so the notion that what was really driving the emergency docket was the unprecedented number of emergency, nationwide injunctions, I think is rather belied by our experience since then. The second thing I would say is, again, one can think that the uptick in applications to the Court is not the Court's fault and is justifiable by external circumstances and still be very critical of how the Court is handling them. And part of the problem is that what we see is we see the Court granting what is effectively nationwide relief to the Trump administration in circumstances in which it didn't grant relief to the Biden administration. And we see people saying, well, that's because the Court's focused on the merits, and obviously this Court is gonna be much more sympathetic to the Trump administration on the merits.

**[0:16:16.6] Stephen Vladeck:** So, first of all, we don't know that, because in some of these cases, the administration's seeking emergency relief on a combination of standing, jurisdictional, and merits grounds, and the Court is saying nothing about which one it's granting. But two, in some of the cases where the Court ruled against the Biden administration that look so much like these Trump cases, it then ruled for the Biden administration on the merits, including the *US versus Texas* case, the immigration enforcement priorities case, where it denied a stay of a nationwide injunction five to four and then ruled for the government eight to one. So, Julie, part of the problem is that even if you are much more willing to give this Court the benefit of the doubt than I tend to be, there's still the gap that is caused by the Justices' both non-explanations and seeming inconsistency in when they will and won't grant relief in a way that sure looks like it's mapping on more than it ought to to the valence of the dispute. And so I think, again, I think part of the problem here is that the Court itself isn't saying the things Jonathan has said, isn't saying the things Will Baude at the University of Chicago, the guy who coined the term shadow docket, you know, they say these things, right, that there are principled defenses of much of the Court's behavior if only the Court could be troubled to provide them. Right? And then it would be easier to say, well, the Court is doing neutral principles of law so that in a future Democratic administration we can have faith that similarly adverse rulings by handpicked district judges will meet with a similar fate. When we have evidence to the contrary from the Biden administration.

**[0:17:50.9] Julie Silverbrook:** So, Jonathan, how can you or how do you account for the differences in decisions between the Trump and the Biden administration? Where are you seeing inconsistencies?

**[0:18:02.2] Jonathan Adler:** Well, I think there are two things to account for that. And then I wanna say a little bit about *US* versus *Texas* because I think it helps highlight some of what's at issue here. One issue is I think the sorts of claims each administration has made. And the Trump administration has in general, especially on the emergency docket, brought claims to the Court that were more tailored to what it expected from the Court and has been more selective. So I think that's important. And I think that there's kind of two things there, right? One is the substance of what they've argued, and the second is how selective they've been. And to highlight how selective they've been, right, since the second Trump administration has been in office, according to the Just Security tracker I checked, last checked on May 1st, over 750 cases against Trump administration actions. Of those, there have been over 250 orders stopping the Trump administration in some way, enjoining or staying some aspect of what the federal government was doing. The Trump administration has brought 20% of those to the Supreme Court. The 20% that's brought to the Supreme Court are not a random distribution of those 250 orders against them.

**[0:19:12.0] Jonathan Adler:** And equally important, those 250 orders against the Trump administration are not a result of litigation brought in a random selection of District Courts, right? Those 250 orders against the Trump administration are disproportionately from a handful of districts picked by plaintiffs because they are likely to be most hostile to the Trump administration. And then the SG's office has, from those 250, picked the 20% of outliers where the issues are most likely to appeal to the current Supreme Court and where the Trump administration has the strongest arguments, right? So it brings up cases related to, say, removal or immigration. It doesn't bring cases to the Supreme Court about, say, the ridiculous executive orders relating to law firms, right? And so I think that degree of selectivity and strategic behavior we've seen far more of in the Trump administration than we did in the Biden administration. Another example of that, when the Biden administration raised concerns about universal vacatur and universal injunctions, it did so in cert petitions that also raised the merits. The Trump administration wanted a clean shot at universal injunctions under background equitable powers. So in the *Trump* versus *CASA* decision, it filed a petition that only asked the Court to deal with that remedial question.

**[0:20:24.0] Jonathan Adler:** And that's why it got a clean shot at it. So that is, I think, a very important factor that I don't think gets accounted for. I also think it's a reason why we should expect, as the cases that the Trump administration has not been quick to bring to the Supreme Court eventually get to the Court, the Trump administration's gonna win much less often, much like it did in the first Trump administration when it was also less strategic. Now let me say a beat on *US* versus *Texas* because I think it highlights this tradeoff, right? As Steve noted, on the emergency application for relief, the Court, five to four, voted in favor of relief, then ultimately, eight to one, ruled the other way on the merits. I think that highlights why a demand that the Court always give an explanation when it issues the initial order has a real downside, which is it is likely to lock the Court into certain positions prematurely that, with the time to consider and reflect and engage and deliberate, the Court might realize it would be a bad outcome. More broadly, it's a way of recognizing that if we ask the Court to make snap judgments about very charged issues, the Justices, being people, are more likely to rely upon and be influenced by their jurisprudential and perhaps even their political priors.

**[0:21:54.5] Jonathan Adler:** It is only by giving the opportunity for deliberation and exchange and

really thinking through the intricacies and the details of cases that we get outcomes like the Court eight to one in *US versus Texas* in a way... In a political outcome that we would not have expected. And so I think we have to recognize that if we demand the Court write even just several paragraphs every time it issues one of these orders responding to an outlying District Court opinion, we do risk enshrining and cementing decisions that actually don't reflect the sort of careful consideration I think we generally want from Supreme Court decisions. Now, it doesn't mean the Court should never write anything. I'm a professor like Steve. I like opinions that I can read and that I can pick over and that I can tear apart. When I get these long opinions and these 20-page, 40-page concurrences, great, that's fun for me. But it can be problematic for the legal system because that takes time. And the choice the Court faces is snap decision where we write something that might not reflect deliberation and careful judgment, or allowing a single District Court to set national policy for an extended period of time. That's a really tough choice to give the Court. And I think the Court instead saying, okay, we're gonna issue an order, we're not gonna say a lot because we wanna have free rein when we reach the merits, isn't clearly the worst of the possibility... Or the possible responses.

**[0:23:28.7] Stephen Vladeck:** Well, I feel like the last two things Jonathan said are completely inconsistent with each other. Because it seems to me that a world in which people like me say the Court is being inconsistent and Jonathan's response is, "Well, if they were consistent, they might have to explain themselves," seems to me to actually underscore what the problem is, not what the defense is. So take *US versus Texas*, had the Court actually written something when it initially denied the Biden administration's application for a stay, it might have actually had to grapple with the jurisdictional question the Biden administration was pressing, on which eight of the nine Justices ultimately agreed. Like that's what's missing here, is like Jonathan, I think, is exactly right that without having to write, the Justices are inclined to just vote their instincts. That's bad. That should not be what's happening. And even if you think it's okay for that to be happening, at the very least, then we should give up the ghost on these having any precedential value. Because it seems to me that if the Justices want their snap judgments to have effects in anything but the cases in which they're being made, that's when they ought to have to explain themselves entirely.

**[0:24:39.9] Stephen Vladeck:** Because, Julie, the explanations are what's gonna force them to do more than just vote their instincts. To the lock-in point, Justice Kavanaugh has made this argument. I find it remarkably counter-historical. If what the Court writes at the emergency application stage is a brief opinion that simply says, "Here's why we think the equities support intervention now," or "Here's why we think the equities don't support intervention now, but we're not reaching a final conclusive judgment on the merits," I think everyone would understand that. And my favorite example of that is the Alabama redistricting cases, where the only Justice who wrote an opinion in support of the original stay was also the only Justice who changed their vote between the original stay and the final decision, and that was Justice Kavanaugh. And so it seems to me that we are sort of backfilling justifications for behavior that might be prompted by understandable pressures that aren't the Supreme Court's fault, but for behavior that I think is just institutionally unhealthy. Like either write something or don't write, but then don't expect lower Courts to have to follow your non-writings in other cases. I feel like we're actually in the worst of both worlds when we have both a lack of writing and at least some precedential effect.

**[0:25:58.0] Jonathan Adler:** If I could just jump in, I don't think anyone's really putting unfair

expectations on lower Courts. District Courts have not been... Had cases removed from them. Judges have not been sanctioned. Cases have not been reassigned. Justice Gorsuch wrote one concurrence saying you should have read our order in some cases more carefully. And I think we would agree the case he chose to write that concurrence in was probably not the best example because it was a four, one, four case. But I do think it is, for example, fair to say that the D.C. Circuit did ignore the little bit of writing the Supreme Court did in *Wilcox* in the way it balanced equities in subsequent removal cases. And I think it's reasonable for the Justices to be frustrated by that. But the only outcome of that is that they issue another order. So I don't think the Supreme Court is being unfair to District Court judges. And I think, again, let's assume, I don't fully accept this, but let's assume that some percentage of the orders that we've seen reflect the Justices applying, I guess what I'd characterize as their shallow jurisprudential priors, because that's all that time allowed.

**[0:27:05.9] Jonathan Adler:** If the choice is between nine Justices doing that or a single District Court judge doing that, I'll go with the nine Justices every time if it's being done for the nation as a whole. And if the response is, "Well, the District Court judge wrote a long opinion," I'm sorry, some of the opinions we're talking about in some of these cases may have taken time and may fill a lot of pages, but don't represent the sort of work we generally expect and want from our judicial system and are archetypal examples of why we have appellate review in the first place. Last thing I'll note is that during the Biden administration, the Circuit Courts were much better about catching these cases than they have been in the second Trump administration. And the best example of that is when we look at suits against executive orders that require agencies to take actions. Traditionally, we recognize you have to wait for the agency to act before you can sue. You can't sue after the executive order. Some District Court... A District Court got that wrong with the Biden administration social cost of carbon EO. The Fifth Circuit, of all circuits, caught that and said, "Wait a second, you don't have jurisdiction to go after that." Eighth Circuit said the same thing. When we see almost mirror-image executive orders by the Trump administration, we see District Court judges entering orders against executive orders before or without concern for the specific agency actions that are implementing that. And we see Circuit Courts not stepping in. And that's also a problem. The Supreme Court shouldn't have to be acting in some of these cases. The lower Courts should be more restrained in the sort of relief they offer, where they assert jurisdiction, so we don't have as many of these cases giving the Supreme Court a set of unsatisfactory options to choose from.

**[0:28:58.2] Stephen Vladeck:** Again, we're shifting the conversation from the Supreme Court's behavior to the inputs. And I guess we're never gonna agree on the inputs. I mean I think you just... Jonathan was just rather remarkably cherry-picking two examples when the data actually is entirely to the contrary about how Circuit Courts ruled during the... I mean, you look at the emergency applications from the Biden administration, virtually all of them came from the Fifth and Eighth Circuits because those circuits weren't catching most of those cases. But Julie, again, I think the larger point here is, do we think the Supreme Court is acting in a way that is principled and healthy for the legal system? Jonathan says it's not disrespectful to District Courts. I'll just say the District Courts themselves are all disagreeing with that. We are hearing more public criticism of the Supreme Court from District Courts who are writing into their opinions that it's unreasonable for the Court to expect them to divine the meanings of these cases. We're hearing District Courts say, "We're killing ourselves to write 100-page opinions with preliminary injunction records, and then you can't be bothered to explain why we're wrong." I don't understand why it is so hard to say that

the Supreme Court owes an explanation, if not to us, then at least to them. I mean that's... I don't know why this has become such a sort of divisive question when I think 10, 15, 20 years ago, people would have been very surprised that the Supreme Court could just wipe away all this work by lower Courts without saying a word.

**[0:30:19.3] Julie Silverbrook:** I wanna take a step back a little bit because we're getting into the weeds and this may not be as familiar for some of our listeners. And so, Steve, you have argued that in some of these cases, the Court is actually effectively deciding the merits. And so I want each of you to help for our listeners distinguish between a more procedural intervention and a decision that in practice is really resolving the substantive legal question.

**[0:30:47.8] Stephen Vladeck:** I mean, I'll just give one really visible example from April. So we have the *Texas* redistricting case that the Court decided in December on the emergency docket. So this was Texas's redistricting in 2025 to create five new putatively safe seats for Republicans. A three-judge District Court in a divided ruling by a Trump-appointed district judge, after holding detailed evidentiary hearings and making a whole bunch of factual findings, blocked the new maps on the ground that they were an unconstitutional racial gerrymander. Texas asked the Supreme Court to stay that ruling. In December, the Court stayed that ruling and wrote, I think, five paragraphs, Julie, two of which could fairly be described as analysis, one of the merits and one of the stay factors. So just a couple of weeks ago, the Court summarily reversed on the merits the three-judge District Court "For the reasons provided" in those five/two paragraphs. So that's just, I think, the most visible example of how what the Court is doing on the emergency docket is turning into merits rulings. We're also seeing the Court decide questions substantively on the emergency docket that it then cites in subsequent cases as if they are substantive holdings and not just emergency docket-laden holdings. So the point is not that those rulings are final from the Court's perspective, although the *Texas* ones ended up being. It's that the Court is treating even the sort of cryptic two, three-paragraph discussions in these orders as establishing legal principles that apply in other cases. And that is, if not sort of merits decisions, it is certainly driving merits outcomes in lower Courts in subsequent cases.

**[0:32:37.1] Julie Silverbrook:** Jonathan, do you distinguish between those things the same way, or do you view what the Court is doing in some cases as weighing in on the merits?

**[0:32:47.0] Jonathan Adler:** Well, I mean, in most of the cases in which the Court is being asked to intervene, the merits correctly and traditionally play some role in the assessment the Court is supposed to provide. You generally don't offer relief if you're very convinced that party is going to lose and isn't going to suffer any irreparable injury in the interim while... Or an irreparable injury that they shouldn't otherwise have suffered. So yes, the Court is influenced by its view of the merits. It's not only influenced by its view of the merits, but it certainly is. And I think that's unavoidable. And are there instances in which, like the *Texas* case, would I have loved the Court to have said more about that? Sure. Would I have perhaps even liked it in that particular case to say, okay, we're issuing the order now because elections are approaching, but we're gonna give a more fulsome explanation later? Sure. If it were up to me, I'd be happy if it were to do that.

**[0:33:46.1] Jonathan Adler:** I think in a lot of other contexts, because the merits play a role in the assessment the Court is supposed to be engaged in and does engage in, I don't think it's really a

criticism to say, yes, the merits played a role, and what the Court does in one case is an indicator of the way it sees the merits in this type of case and is going to influence what the Court does in subsequent cases. I mean, that seems to be, well, yes, of course. And if we're concerned about consistency, we would want that to be the case, right? So I'm not as concerned about that. I mean, I agree with Steve that where the Court is clarifying or changing or filling in or deciding legal questions that were previously unclear, all else equal, I would prefer a fulsome opinion explaining the reasons for that. The problem is because of the inputs that we've been quibbling over, all else often isn't equal, and there are trade-offs involved if the Court is gonna give that fulsome answer. But if those trade-offs weren't there or they could be lessened, happy to have more writing explaining more of why the Court's doing what it's doing.

**[0:34:57.1] Julie Silverbrook:** Well, let's talk about the trade-offs between speed and deliberation. These are emergency applications, right? So let's kind of unpack that. Where is there a need for speed, and where are there cases where you'd say, ah, maybe you wait for a merits case or you deny hearing the case?

**[0:35:15.7] Jonathan Adler:** So I was gonna say, I mean, I think the reason for speed in a lot of contexts is because in a disproportionate number of cases, a single District Court is issuing an order that applies to the nation as a whole. And rather than allowing percolation throughout the nation, rather than allowing what we often saw in the 20th century of questions where different agencies could actually consider whether to engage in non-acquiescence to district and Circuit Court rulings outside of those jurisdictions, we instead see a single cherry-picked Court making a decision for the nation as a whole. And in our current world, where so much policymaking occurs through the administrative law process that is very time and resource-intensive, it's a question of can litigants run out the clock on an administration by tying up their policy initiatives in Court until that administration leaves office? That is what Justice Kagan was referring to, that problem in her 2022 remarks. So where there isn't a single District Court affecting a policy for the nation as a whole, I think that's the paradigmatic example of what creates the need for urgency. It's not the only example, but I think it's where the lion's share of cases come from. And even before the current round of Trump administration initiatives, when we see things like the Juliana litigation and so on, it's a similar sort of dynamic. It's a single District Court doing something particularly aggressive that has implications far beyond just the litigants to the case that creates pressure for the Supreme Court to determine whether or not that change to the status quo is something that can be allowed to stay in place while waiting for the legal process to go forward.

**[0:37:07.7] Julie Silverbrook:** I wanna let Steve weigh in, but I just wanna add a subsequent question, which is, to what extent does *CASA* change that dynamic?

**[0:37:17.6] Jonathan Adler:** Not much yet, but perhaps it will.

**[0:37:20.1] Stephen Vladeck:** So I'll just say I think there are two different ways in which the emergency piece of this has become both operationalized and lost. So the first is, in theory, that this is why the balancing of the equities is supposed to be a critical part of emergency applications. That it's not just that the District Court or the Court of Appeals did something wrong, it's that what it did was so wrong and is causing so much damage that we can't wait for the ordinary appellate process to run its course, which is what we did for most of American history for plenty of District Court

rulings that were wrong. And so the question is, how are we assessing that damage? Right? How are we assessing what the Courts call irreparable harm? And Julie, here it seems to me that we have to be a little more specific, that it is not all District Court rulings respecting nationwide policies inflict equal amounts of irreparable harm. So contrast, for example, a District Court or, as we saw not that long ago, a Fifth Circuit ruling that effectively on a nationwide basis immediately halts the prescription of Mifepristone, at least outside of in-person doctor visits, which affects not just governments but affects millions of Americans all over the country immediately, versus a District Court decision that temporarily blocks a Trump administration policy about passports for transgender, non-binary individuals who now, if they have a new passport, if they're applying to renew a passport, the passport has to say their biological sex at birth. Right?

**[0:38:52.8] Stephen Vladeck:** Blocking that policy versus taking Mifepristone off the shelves are not the same thing. And we should be able to have a serious conversation about how those harms are different. And one of those harms, to my view, is substantially greater than the other. The Court has stopped doing this. I mean, one of the things that I think I've done a pretty good job of documenting is that the Court really has stopped balancing the equities in Trump cases where the government shows up and says, "We want emergency relief. We are irreparably harmed because something we wanna do has been blocked by a District Court," no matter what it is, and the Court just waves its hands at the irreparable harm on the other side. That suggests to me, Julie, that whether it's an emergency is now entirely one-sided, right? Is it an emergency for the applicant, not would we be causing an emergency if we intervened? On the timing piece of it, I mean, this, I think, also goes back to the question about writing. The Court isn't treating most of these applications as if they are true emergencies. The average time to decision for an application filed by the Trump administration is close to four weeks. Now, four weeks is less than six months, but it's more than four days, right? And four weeks, we've seen the Court deal with high-profile merits cases faster, like the *TikTok* case in early 2025. And so we have this weird, again, sort of not too hot, too cold, Goldilocks-like problem where the Court is not actually treating these as if they're real hair-on-fire emergencies in most cases, but is still relying upon the irreparable harm to one side and not the other in ways that I think are deeply distorting what emergency relief is supposed to be about.

**[0:40:37.1] Julie Silverbrook:** Jonathan, do you agree with that assessment? And then I wanna get a little bit into the emergence of more concurring and dissenting opinions on the emergency docket.

**[0:40:47.9] Jonathan Adler:** Yeah, I mean, I don't agree with that. And I think that the nationwide relief part of it is the biggest reason, right? Historically, we did not see District Courts entering nationwide relief on a regular basis on pretty much anything. In fact, I've argued, and I will confess I am an outlier on this, I've argued that even in the context of administrative law under the APA, we actually, through most of the 20th century, didn't truly have universal vacatur other than as a consequence of forum selection rules that Congress had written into statutes. That is to say, in cases where agencies were sued outside of the D.C. Circuit, the general practice was not to universally vacate a regulation, but rather to only give relief to the parties, such that you would have a single question where different regulations adopted by different administrations at different times were in effect in different parts of the country. And the best, most recent example of that is the Waters of the United States rule, where at one point, I think you had either four or five different WOTUS rules applying in different parts of the country because the lower Courts, I think properly, were not providing relief beyond the parties.

**[0:41:52.0] Jonathan Adler:** And if lower Courts do that, the ability to wait increases dramatically. And I don't think we want the Court to replace factors like, has the executive branch been blocked from doing something that it should presumptively be able to do, with things that are more malleable and subjective, right? In the context of abortion litigation, do we want the Justices weighing access to abortion drugs to the termination of fetal life, and do we want the Justices deciding how much to weigh each of those? I would much rather them rely upon things that are more neutral than relying on those sorts of factors. And I think that is what would generate more consistency over time. And if Courts were less prone to offering nationwide relief, it would be easier to maintain that. And I think if Steve wants to say, well, what about the *Texas* Court that offers nationwide relief or the Fifth Circuit that offers nationwide relief in a Mifepristone case, I'd agree with him.

**[0:42:55.5] Stephen Vladeck:** I know you do.

**[0:42:56.6] Jonathan Adler:** I don't think they should be offering nationwide relief in those cases. But I think that's what creates the pressure, and I think that's a huge new variable, both the frequency of that and the ability of litigants to strategically pursue it. Because it's not just that Courts are giving that relief more often, the ability of litigants to figure out how to try and get it has increased dramatically. To go back to your earlier question, Julie, *CASA* is a small piece of restraining that. In my view, if the Court is really concerned about this input, it's got to do something about state standing. It's got to enforce forum selection more aggressively. And ultimately, Congress is going to have to, I think just on the procedural side of things, say more about what sort of relief you can get in what Courts under what sorts of circumstances, so that we have a very clear set of rules about those questions.

**[0:43:51.2] Stephen Vladeck:** But that doesn't answer the question about irreparable harm. I mean, I just don't know if you just don't wanna answer that question, but it seems to me that the Supreme Court is both not actually balancing the equities and not treating as sort of different cases in which the irreparable harms are, whether you wanna call it subjective or malleable, I think just descriptively so completely at odds with each other. I mean, take *Vasquez Perdomo*, right, where Justice Kavanaugh writes a little bit to talk about the harm to the government from not being able to arrest people based on racial profiling criteria and never accounts for the harms to people who have a constitutional right to not be subjected to racial profiling. Or the passports case, where the Court never accounts for District Court fact findings about the harm that transgender, non-binary, and intersex people would suffer from this rule. And the Supreme Court, it's not that they say those are outweighed by the government's sort of paper interest in its policies, the Court just never touches on them at all, Jonathan. And so it seems to me that those have to be part of the story. Why is that acceptable when it's an application from the Trump administration and not when it's anything else?

**[0:44:58.8] Jonathan Adler:** Well, so I do... First of all, I think the Court has been consistent in requiring the government, requiring the moving party to demonstrate irreparable harm in any case seeking emergency relief. And I think when the government does it, it gets irreparable harm. And I think that is something the Court has been clear and consistent upon going back...

**[0:45:17.5] Stephen Vladeck:** Except the Biden administration.

**[0:45:19.2] Jonathan Adler:** No, I disagree with that. The irreparable harm is the threshold inquiry for the applicant, and then a balancing of the equities occurs after that. I do think when the question is one that implicates whether federal Courts have the jurisdiction at all in the first place, to skip over that and say, oh, but people are gonna be... Is actually really systematically problematic. So let's...

[overlapping conversation]

**[0:45:39.9] Stephen Vladeck:** That wasn't the passport case or *Vasquez Perdomo*.

**[0:45:42.2] Jonathan Adler:** No, let's take the racial profiling, the idea that you can get an injunction against the behavior of police in the enforcement context is something that the Court has been very clear going back to *Lyons* is something that Courts should not be in the business of doing because they don't have the jurisdiction to do it.

[overlapping conversation]

**[0:45:59.2] Stephen Vladeck:** That's not true. That's literally not true. *Lyons* specifically says that you can have cases. *Lyons* has a whole discussion about how the problem in that case was that there was no reason to believe that the plaintiff would himself be subjected to a chokehold again. One of the plaintiffs in *Vasquez Perdomo* had record evidence that they had already been stopped twice. I mean, I just, again...

**[0:46:20.3] Jonathan Adler:** So affected once versus affected twice doesn't change the underlying view. We understand that *Lyons*...

[overlapping conversation]

**[0:46:26.1] Stephen Vladeck:** It does...

**[0:46:26.2] Jonathan Adler:** The idea of giving prospective injunctions against the government that are more than, the government should follow the law, which it's already under obligation to do, we've always understood that that is problematic. That is the sort of thing that goes beyond the Article III jurisdiction of Courts and that they should not be engaged in. You and I may disagree on that, but I think that's what the Court majority believed. Whether Kavanaugh's separate concurrence adequately relied upon that or was saying something else is, I think, separate. I think we wanna understand what the Court was doing there, it was saying, this is just something District Courts should not be doing, and no amount of fact finding is going to excuse a District Court exercising power that it has no power to exercise.

**[0:47:03.8] Stephen Vladeck:** Okay, good. So back to *United States versus Texas* from the Biden administration, the case that you suggested could be defended. What did the majority hold in that case? It held eight to one that the District Court never had jurisdiction. And so it seems to me that if your position is jurisdictional objections supersede all other equitable factors, that only further proves that the Court is behaving inconsistently across administrations.

**[0:47:26.3] Jonathan Adler:** Well, because what case is it allowing a District Court to do things where it's...

[overlapping conversation]

**[0:47:30.3] Stephen Vladeck:** *US versus Texas*, where an eight to one majority said the District Court didn't have jurisdiction to issue the universal injunction that it refused to stay.

**[0:47:37.7] Jonathan Adler:** The Court... Because the Court initially didn't realize that, right? The Court initially thought... And that happens. I mean, we expect Courts to sometimes, when they... To look carefully at questions, to reach conclusions that the Justices might not have thought that they were going to reach, right? So let's take another example, the *Alliance for Hippocratic Medicine* case. There are a lot of people, I think very wrongly, thought that the claims for standing in that case were plausible. I suspect that when the Court first took that case, some of the Justices thought the claims for standing were plausible. Some of the reasons why there was no standing in that case were sufficiently subtle that folks' priors might overcome that. But after hearing that case on the merits, the Court decided nine zero no standing, I think correctly. Sometimes getting the right decision, especially in politically charged cases, takes deliberation. And if we want the Court to be able to deliberate and think through these cases, we don't want District Courts loading the dice by making nationwide policy unilaterally as often as they're doing. And I think if you lessen that factor, then the amount of instances in which the Supreme Court is doing things that we can second guess would decline precipitously.

**[0:48:46.3] Jonathan Adler:** Now, if you wanna say Congress should act too, we agree. That the executive branch should act less, we agree. But in terms of the Supreme Court looking at the Article III house, looking at what the judiciary is doing, the Supreme Court would be derelict in its responsibility and, I would argue, threatening the long-term viability of Article III itself if it does not aggressively police the assertion of jurisdiction on a nationwide basis by District Courts. That is something that is new. That is something that is, particularly in our divided time, really problematic and something that is, I think, driving everything else. All the other concerns we have, I think, are downstream effects of that primary dynamic.

**[0:49:26.7] Stephen Vladeck:** If only the Court would say that.

**[0:49:28.8] Julie Silverbrook:** Let's get into some potential reforms here, both at the lower Court level Congress could do this or internal reforms to the Courts that may provide some greater clarity or constraint to the emergency docket. So I think both of you have articulated what some of these reforms could look like. Let's talk about them. Steve, we'll start with you on this one.

**[0:49:56.8] Stephen Vladeck:** Well, I mean, if you accept the theory that the only reason why this is happening is because of an uptick in District Courts exercising jurisdiction they don't have, or in parties shopping for judges, which by the way, is actually pretty one-sided. There are almost no examples of litigants challenging the Trump administration who have filed in a single judge division, but if you think that those are the only problems, those are both easily fixed by statutes. You can have a statute that actually requires suits seeking any kind of nationwide relief to be filed

in a three judge District Court, or to have a randomized lottery to decide which judge decides those. You could have statutes that are more... That provide more clarity about when District Courts do and don't have jurisdiction over particular kinds of cases. Heaven forbid, Julie, you could have the Supreme Court write an opinion that provides that kind of clarity. I know that's a crazy idea. I'll just say that it has been a common retort of those who are more defensive of the Court than I am for the better part of eight years now that really the only thing that was provoking the emergency docket was nationwide injunctions.

**[0:50:57.8] Stephen Vladeck:** And as I said already, we've had 11 months of evidence, and that's not true. So it seems to me that what we're gonna find out if we pursue some of these reforms is, oh look, lo and behold, that wasn't all that was causing the Supreme Court to do this. Seems like the real reforms here are about persuading the Court, not commanding or cajoling the Court, that part of its obligation to us and to lower Court judges and to the people is to provide principled justifications for its decision-making. It's not a new idea. The Supreme Court has long defined its legitimacy by reference to its ability to provide persuasive analyses. Julie, not because we'll necessarily be persuaded by the Justices' principles, but that we'll at least be persuaded that there are principles. Justice Barrett herself has made a huge point of this on her book tour that folks should not read the press, they should read the opinions before deciding whether the Justices are partisan political actors. Seems to me that when there are no opinions to read, that makes it all harder. So there are things Congress can do to address the input problem. And I think actually there's probably a fair amount of consensus about what would be good reforms. It's just the problem of whose ox is being gored. I just don't think that that's the actual problem. I think that that is a separate problem. The actual problem, right, is I think the Court feeling like it doesn't have to actually explain itself, feeling and acting like it isn't and ought not to be accountable. And I don't know how you solve that externally. I think you solve that by persuading the Justices that they're wrong.

**[0:52:31.0] Julie Silverbrook:** Jonathan.

**[0:52:31.7] Jonathan Adler:** Yeah, so. Well, yeah, I'll give us some reforms, but first, just really quickly, on the issue of whether we've seen the sort of forum shopping we saw in the past, in the second Trump administration, 35 of the first universal injunctions against the Trump administration were from just five judicial districts. That's not an accident. Yes, they weren't single judge districts, but it was not an accident that they were all coming from a handful...

[overlapping conversation]

**[0:52:55.1] Stephen Vladeck:** Yeah, forum shopping and judge shopping are different things. I agree with that.

**[0:52:57.9] Jonathan Adler:** Okay, but in forums where all the judges are in the same disposition.

[overlapping conversation]

**[0:53:01.5] Stephen Vladeck:** That's not true... No, no. That's not...

[overlapping conversation]

**[0:53:04.5] Jonathan Adler:** That's one of...

**[0:53:05.4] Stephen Vladeck:** D.C. District Court.

**[0:53:06.7] Jonathan Adler:** That's one of the five. But as you know for example...

**[0:53:07.5] Stephen Vladeck:** That's the most... That's the one where the most cases have been filed. And you're gonna say that the D.C. District bench is comprised of judges who all view things the same way?

**[0:53:16.4] Jonathan Adler:** I'm saying it's not just... I think the D.C. District bench is lopsided. I think the D.C. Circuit is lopsided, and there's a whole history there. And I think a lot of the, if you look at the other four districts, they're districts where one would expect to find favorable rulings and favorable judges, which is again why 35 of 40 were from just five Judicial Districts. On the past 11 months, *CASA* has not constrained universal injunctions as much as universal relief as much as I think some of the Justices perhaps naively hoped. We still have the possibility of class actions. States as litigants are able to claim the need for universal relief in ways that are compliant with *CASA*, and I think have tried to exploit that. Right, so that could be Louisiana claiming that the only way it gets relief from harms caused by mail-order Mifepristone is a nationwide... Is nationwide relief against that. That sort of thing still continues, and universal vacatur under the APA remains. So there is still a lot of universal relief by District Courts, and so I think the Court, if it thought it was solving the problem in *Trump* versus *CASA*, I think it was naive to do so.

**[0:54:27.4] Jonathan Adler:** In terms of what should happen going forward, some of the legislative reforms that Steve mentioned I think are good ideas. Three District... Special three judge panels, anytime a party asks for nationwide relief I think is the sort of thing that Congress could do. I think, especially in the context of universal vacatur, having more statutes contain rules about where you have to challenge what sorts of things would make sense. So, for example, under the Clean Air Act, if you're challenging a local action by the EPA, you sue locally. If you're challenging a rule with nationwide application and effect, you have to sue in D.C., and that eliminates a lot of the forum shopping. We have some things like the multi-circuit lottery which help, but there are reforms like that can do. I think the Court should do some things as well, and maybe Steve and I agree on this. I think the Court needs to cut back on state standing. I think the special solicitude that was invented in *Massachusetts* versus *EPA* was a horrible mistake. I think the sorts of creative standing theories that states are coming up with are very destabilizing and fuel a lot of conflict in these cases.

**[0:55:29.7] Jonathan Adler:** And I think the Court needs to cut back on that. I think the Court needs to be more explicit about the sort of situations in which lower Courts should offer emergency relief, especially injunctive relief. I think some of the Justices think they've been doing that going back to, say, *Winter* versus *NRDC*, but I think they need to be more explicit on doing that as well. And hopefully they will find cases to do that. They waited too long, in my view, to issue an opinion like *Trump* versus *CASA*. I was one... I was calling on them to address those questions during the Biden administration. I think the Court should be more proactive in making clear things that it maybe thinks it was clear on, but lower Courts don't think it was, what the parameters should be for

how District Courts handle some of these sorts of cases.

**[0:56:16.7] Julie Silverbrook:** I wanna ask both of you what we should make of the leak to the New York Times about the, although there's now debate over the proper birth date of the modern shadow docket, what should we make of the fact that someone with the kind of access to documentation that was shared with the New York Times, somebody who has significant access, made the decision to leak that material to the press?

**[0:56:43.3] Stephen Vladeck:** Well, I'll start with the controversial view that I don't think the leaker is the story, which I know is probably not where Jonathan's gonna end up. But it seems to me that there has been an interesting reaction from the Court's defenders to the substance of the story. One is that there's no news here because we already knew all of this, to which my response is no, we didn't. Right, I wrote a post for my newsletter about a year and a half ago guessing about how we think the Court processes emergency applications, the whole point of which is we don't know any of it. Now we do. That's news, Julie. Right? And the second part is I think the short shrift that the Chief Justice gave to the other side of the balance of the equities in both of his memos is pretty striking and actually rather consistent with the conversation Jonathan and I were just having. Right? That it seems like it's one thing if you're gonna intervene in a way that you've literally never intervened before, and I think no one has actually identified an example of the Court issuing a stay of administrative action in that posture before the Clean Power Plan cases. But to suggest that we're gonna intervene in this respect and not look at all at the harm that the intervention causes to the government, which apparently is only irreparably harmed when it's applying for emergency relief, and to the environment, seems a rather one sided view of the emergency docket, which, again, might be consistent with this broader conversation.

**[0:58:06.7] Julie Silverbrook:** And let me say, we could spend all day trying to figure out who. I actually think the why, why someone would leak, is the more significant factor from my perspective, which is someone has deep concerns about the shadow docket, and I have to assume that that was part of the motivation for releasing these documents.

**[0:58:29.5] Stephen Vladeck:** Yep.

**[0:58:30.7] Jonathan Adler:** I mean, I don't think we can know the why without knowing the who, and I don't think we have more than speculation to offer on either. In terms of what we learned, and I think the memos confirmed what a lot of us suspected. It certainly confirmed things that I wrote at the time about why the Court acted, about why such an... The Court was convinced to take such an unprecedented step. I think the exchange among the Justices shows them considering the sorts of things we'd expect them to consider. The memos are written in a way we would, I think, expect memos to be written among judges or Justices on a Court. They're certainly similar to equivalent memos I saw when I clerked on the D.C. Circuit, where you don't go through everything you might put in a public opinion because there are certain things everyone that's part of the conversation kind of knows and understands, and both the initial proposals and the objections are all occurring in that context. I think it's really just kind of serendipitous, or whatever the opposite of serendipity is, that we didn't get greater confirmation of why the Court acted until now because Justice Scalia died and the Court did not get to hear the Clean Power Plan on the merits until many years later in *West Virginia versus EPA*, when it arose or came back to the Court on a somewhat different posture. I

think all of the Justices expected, in fact, they said as much in their memos, that they expected the case on the merits to be back to them relatively quickly.

**[0:59:56.1] Jonathan Adler:** And I think they expected there would have been the opportunity to address a lot of this in more detail and more depth than. That didn't happen because Justice Scalia died, and then Donald Trump was elected. And so the case kind of went on this bizarre detour for a long period of time. I think the fact of the leak, though, should concern us because I think these sorts of leaks are an additional factor, like the time pressure we've talked about earlier, that can really undermine the ability of the Court to deliberate and especially to deliberate across jurisprudential divides. We want the Justices to be able to have frank, meaningful exchanges with their colleagues who do not share their jurisprudential priors. We want them to be able to convince each other. We want there to be cases in which Justices think initially they're gonna come out on something five, four, and end up coming out eight, one. And that can only happen if the Justices feel comfortable and able to engage with each other privately and substantively. And I think if the Justices are afraid that those communications are going to be leaked, are going to be disclosed prematurely, then their ability to engage in that sort of dialogue and deliberation is undermined. And I think we're all worse off for it because it means the ability of the Court to act as a less political branch than the other branches will be compromised. And or compromised perhaps even more than we... If one thinks the Court is already too political, then it will only get worse. And I think that is something that the leak portends, and I think that's very unfortunate.

**[1:01:44.0] Julie Silverbrook:** So I think that most people would say in most instances leaks are bad, but leaks do happen at the Court, and it's usually in fairly extraordinary cases. Right? And so the leaks are telling us something too, right, about the breakdown of the way that the institution is functioning. And I don't wanna discount that in the way that we're considering the significance of the leak.

**[1:02:14.5] Stephen Vladeck:** And I'll just say, I mean, I think we have plenty of evidence of the breakdown in the way the institution is functioning. Justice Sotomayor's, I think, unfortunate and since apologized for remarks about Justice Kavanaugh at the University of Kansas, some of the things the Justices are saying publicly, the remarkable exchange between Justices Jackson and Kavanaugh at the Flannery lecture in D.C. In April. I mean, Julie, I think the leaks are just the latest sign that things are not rainbows and unicorns inside the Supreme Court. And I think it's worth suggesting that the Court's behavior on the emergency docket appears to be part of the reason why. I mean, these are, whatever you think of the Court's behavior, I think no one can deny that these are high-profile, high-pressure, deeply divisive cases. The Court is awash in them to a degree it never has been before. It granted emergency relief 31 times during the October 2024 term. It handed down 31 non-unanimous merits decisions. I mean, right, the emergency docket has swallowed the merits docket. And I think whatever you think of the Court's behavior, and I think Jonathan and I have aired out two slightly different views, this is not good for the Court in the long term to have so much of its work involve these kinds of late-breaking, fast-moving, high-profile, high-stress, ideologically charged cases. And the Justices may not be responsible for that volume, but they are not powerless to do something about it. And it seems like if we're gonna talk about where the Court is, where it's going in the reform conversation, there are plenty of things the Justices can do themselves if they really think this is not a healthy way to run a railroad. I just don't think that they've reached consensus on that yet.

**[1:04:00.3] Julie Silverbrook:** Jonathan, I'll let you have the last word.

**[1:04:03.1] Jonathan Adler:** Well, I think, I mean, to try and end on a point of some agreement, I think Steve and I agree that the Court is awash in these sorts of cases. I think we agree that the sort of pressures these sorts of cases place on the Court are unhelpful for the Court and make it difficult for the Court to live up to the ideal version of the Court that we generally want and expect. And I think we would agree that the Court, insofar as it recognizes this as a problem, needs to take more initiative than it has to make the problem go away. Now, Steve and I might disagree on how the Court should go about doing that and how far perhaps it should go, but I think it's certainly true that the Court needs to be less passive about getting Article III's house in order to make some of these problems go away. And while I would hope Article I and Article II would assist in the Court letting the Court do what we primarily want and expect and need the Court to do in terms of its job in our system, the Court needs to do more so that it is not awash in these cases, so litigants don't think the game is to figure out how to get their particular policy concern to the Justices as quickly as possible as a result of some clever strategic litigation. That dynamic needs to be tamped down upon, and the Court needs to do more to make that happen.

**[1:05:32.3] Julie Silverbrook:** Jonathan, Steve, thank you so much for a lively conversation on the shadow docket. It is most certainly not going to be the last conversation we need to have about it. I appreciate you taking time to speak with our audience on We The People today.

**[1:05:44.0] Stephen Vladeck:** Thanks, Julie.

**[1:05:45.7] Jonathan Adler:** We didn't even talk basketball, but thank you.

[laughter]

**[1:05:46.7] Stephen Vladeck:** Let's go Knicks.

**[1:05:49.1] Jonathan Adler:** Trust the process.

[music]

**[1:05:55.5] Julie Silverbrook:** This episode was produced and mixed by Bill Pollock with production support from Charles Sahm. Research was provided by Anna Salvatore, Trey Sullivan, and Tristan Worsham. Please recommend We The People to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional education and debate. I am excited to share that the National Constitution Center will publish a book on May 12th, *The Promise of America: Reflections on Our Enduring Ideals*. For more information, visit [constitutioncenter.org/promiseofamerica](https://constitutioncenter.org/promiseofamerica). And as always, remember that the National Constitution Center is a private, nonpartisan nonprofit, and we rely on your generosity, passion, and engagement for all of our programming, including this podcast. Please consider donating today at [constitutioncenter.org/donate](https://constitutioncenter.org/donate). On behalf of the National Constitution Center, I'm Julie Silverbrook.