

US Law Week

Kagan Urges Caution in Supreme Court Use of ‘Shadow Docket’ (1)

July 24, 2025, 2:07 PM CDT; Updated: July 24, 2025, 3:13 PM CDT

Supreme Court Justice Elena Kagan called on her colleagues to exercise caution when issuing emergency orders in legal challenges without explaining their reasoning, a day after she sharply criticized the use of the shadow docket in a dissent.

One “should be hesitant about” making decisions that disrupt lower courts without the benefit of legal briefing, oral argument, and consultation with each other, “unless we really have to,” Kagan told judges and lawyers at the US Court of Appeals for the Ninth Circuit’s judicial conference in Monterey, California, on Thursday.

The Shadow Docket and H...



WATCH: Law professor Steve Vladeck helps Bloomberg Law explain what the Shadow Docket is, why it exists, why it's in the news so often now, and how to make it more transparent.

She noted that the justices “don’t usually meet about shadow docket matters and discuss them in the way we do with merits cases.” And when the justices block, or green light, policies without explaining themselves, it puts lower courts in a difficult position, she said.

“As we have done more and more on this emergency docket, there becomes a real responsibility that I think we didn’t recognize when we first started down this road to explain things better,” Kagan said.

Kagan made her remarks shortly after the close last month of the Supreme Court’s term, which saw rulings narrowing the authority of trial court judges to block policies nationwide, backing a state ban on gender-affirming care for transgender minors, and upholding federal regulations on build-at-home “ghost gun” kits.

The justices have continued to issue emergency orders that have allowed the Trump administration to implement its policies. The administration has filed 20 emergency requests with the court since taking office in January.

On Wednesday, Kagan raised concerns about the emergency docket in a dissent from a ruling that allowed President Donald Trump to temporarily remove three Democratic members of the Consumer Product Safety Commission. She accused the court’s conservatives of once again using the court’s emergency docket “to destroy the independence of an independent agency, as established by Congress.”

Kagan previously raised concerns during last year’s Ninth Circuit conference about the high volume of emergency petitions the Supreme Court receives.

“Our summers used to actually be summers,” she said in July 2024. She said the justices have “gotten into a pattern where we’re doing too many of them.”

Democrats proposed legislation last year to bring more transparency to the shadow docket by requiring the justices to provide reasoning for their rulings on emergency requests, but the bill failed to gain traction in the Senate.

Justices Brett Kavanaugh and Clarence Thomas have raised concerns about the growing emergency docket and how it limits the court’s ability to hear more merits cases. But in continuing to rule on these requests, critics say it invites litigants to keep rushing to the court.

‘Step Beyond’

Kagan also raised concerns about increasing threats to judges’ personal safety, and called on the bench to, in the face of that criticism, “do the law in the best way that they know how.”

She criticized efforts by House Republicans to impeach individual federal judges who ruled against the Trump administration, also recently rebuked by Chief Justice John Roberts.

"Judges are fair game for all kinds of criticism. Strong criticism, pointed criticism. But vilifying judges in that way is a step beyond and ought to be understood as such," Kagan said.

And she lamented her frequent position on the losing side of the Supreme Court's 6-3 ideological splits, following a string of divided rulings favoring the Trump administration.

"I don't enjoy that. I find it frustrating. I find it disappointing. I find it sometimes even maddening," Kagan said, though she added that she respects her colleagues and believes they operate in good faith.

Her liberal colleagues have expressed stronger feelings of frustration about their position. Justice Sonia Sotomayor said last year there have been days after cases are announced that she "closed my door and cried," and Justice Ketanji Brown Jackson said earlier this month that the state of US democracy keeps her up at night.

— With assistance from Lydia Wheeler.

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