

Alito Responds to Critics of the Supreme Court's 'Shadow Docket'

In a speech at Notre Dame, the justice addressed recent emergency rulings on abortion, asylum and evictions, saying they followed longstanding procedures.



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WASHINGTON — In a combative speech on Thursday, Justice Samuel A. Alito Jr. defended several of the Supreme Court's recent rulings on what critics call its “shadow docket,” saying the news media had created the impression that “a dangerous cabal is deciding important issues in a novel, secretive, improper way in the middle of the night, hidden from public view.”

He addressed the recent decisions in unusual detail, rejecting, for instance, what he said was the “false and inflammatory claim that we nullified *Roe v. Wade*” in early September by allowing a Texas law that bans most abortions after six weeks to come into effect.

“We did no such thing, and we said so expressly in our order,” he said, quoting from it. Indeed, the majority in the 5-to-4 ruling said it based its decision on procedural grounds and did not address the constitutionality of the Texas law.

The effect of the ruling, however, has been to deny abortions to most women in Texas. In dissent, Justice Elena Kagan wrote that the majority's unsigned order “illustrates just how far the court's ‘shadow docket’ decisions may depart from the usual principles of appellate process.”

“Without full briefing or argument, and after less than 72 hours' thought,” she wrote, “this court greenlights the operation of Texas' patently unconstitutional law banning most abortions.”

Justice Alito's speech, at the University of Notre Dame, was largely devoted to addressing the “shadow docket,” which he called a loaded and misleading phrase.

“The catchy and sinister term ‘shadow docket’ has been used to portray the court as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways,” he said. “This portrayal feeds unprecedented efforts to intimidate the court and to damage it as an independent institution.”

Justice Alito used a different term to refer to cases decided by the court in response to emergency applications: the “emergency docket.” He said the court had long considered such applications after only thin briefing and without oral arguments, often resolving them with little or no reasoning in late-night orders, because prompt action was needed.

Justice Alito compared the court’s procedures to the ones used by emergency medical technicians called to the scene of an accident. “You can’t expect the E.M.T.s and the emergency rooms to do the same thing that a team of physicians and nurses will do when they are handling a matter when time is not of the essence in the same way,” he said.

He acknowledged that the court had been issuing many such rulings, attributing the spike to applications from the Trump administration after lower courts blocked its programs and three kinds of cases prompted by the pandemic: changes to election rules, requests from prisoners fearing exposure to the virus and restrictions on houses of worship.

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Justice Alito said the court had applied its usual standards “in the controversial cases that have come up in the last few weeks,” discussing recent emergency rulings rejecting the Biden administration’s policies on asylum and evictions and allowing the Texas law to come into effect.

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The Texas abortion law. After the court let Texas effectively outlaw most abortions in a 5-4 decision, the justices heard arguments that could allow it to reverse course. The case puts Justice Brett Kavanaugh in the spotlight as the most likely member to switch sides.

The court’s three liberal members dissented in all three cases. They were joined in dissent in the Texas case by Chief Justice John G. Roberts Jr.

Justice Alito addressed many of what he said were the most common criticisms of the court’s procedures in addressing emergency applications. It was “rank nonsense,” for instance, he said, to argue that the court often issued its orders late at night to avoid attention.

He added that there was not enough time for the court to issue full opinions. Still, he said, “I submit that in the three recent cases that have stimulated most of this criticism, perceptive and fair-minded readers can easily understand the grounds for our rulings in all of those cases.”

Justice Alito said rulings on emergency applications did not create precedents. In April, however, the Supreme Court chastised the federal appeals court in California for failing to follow its earlier rulings on emergency applications concerning restrictions on religious gatherings during the pandemic.

In the weeks leading up to the court’s return to the bench on Monday, three of its other members — Justices Clarence Thomas, Stephen G. Breyer and Amy Coney Barrett — have also made public remarks. They spoke in general terms, often defending the court against charges of partisanship. Justice Alito’s comments were considerably more pointed.