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United States

Alito decries 'sinister' portrayal of U.S. Supreme Court 'shadow docket'

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Erin Schaff/Pool via REUTERS

NOTRE DAME, Indiana, Sept 30 (Reuters) - Conservative Justice Samuel Alito on Thursday defended the U.S. Supreme Court's increasing use of its emergency "shadow docket" to decide major political and social issues without public deliberation, saying the process has wrongly been portrayed by critics as sinister.

Using this process, the court has ruled on major matters - including allowing a **Texas law imposing a near-total ban on abortion** to take effect on Sept. 1 - without the public oral arguments used in its customary consideration of cases.

During a speech at the University of Notre Dame in Indiana, Alito took issue with recent commentary by legal experts and critics on **the shadow docket process** that he said portrays the justices as "a dangerous cabal" deciding important cases in secret.

"This picture is very sinister and threatening but it is also very misleading," said Alito, part of the court's 6-3 conservative majority.

The shadow docket process - intended for emergency actions by the court - has altered the way the justices have done business in recent years.

They now use it to make substantive decisions in major cases, often hurriedly and sometimes late at night, in a process that critics across the ideological spectrum have said lacks transparency. The shadow docket process in recent years has yielded some lopsided wins for conservatives.

"The truth of the matter is there was nothing new or shadowy about the procedures we followed in those cases," Alito said.

Alito complained that some critics of the Texas abortion decision said the court had effectively overruled its landmark 1973 Roe vs. Wade ruling that legalized abortion nationwide.

"Put aside the false and inflammatory claim that we nullified Roe v. Wade. We did no such thing," Alito said.

The justices will hear a case in December in which the state of Mississippi is asking for Roe v. Wade to be overturned.

Alito acknowledged that the court is handling more emergency applications than in the past, but said that is because it receives more applications that must be decided. This is "not part of a nefarious strategy," Alito said.

He also said it is "rank nonsense" to suggest that the court deliberately issues some of its decisions, like the Texas one, late at night.

Alito became the latest justice to defend the Supreme Court's practices even as its public approval has declined in recent public opinion surveys.

The U.S. Senate Judiciary Committee held a hearing on Wednesday examining the implications of the Republican-backed Texas abortion law and the court's use of the shadow docket. The committee's Democratic chairman, Dick Durbin, said the court "has started to use the shadow docket for more political and controversial decisions, with results that appear on the face ideologically driven."

Republican former President Donald Trump's administration won 28 of the 41 cases it brought via the shadow docket. His administration made greater use of the emergency process and scored more wins than his two predecessors combined.

In August, the court handed Democratic President Joe Biden's administration two major defeats using the shadow docket. It ended a COVID-19 pandemic-related federal moratorium on residential evictions. It also denied Biden's bid to rescind an immigration policy implemented by Trump that forced thousands of asylum seekers to stay in Mexico while awaiting U.S. hearings.