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NEWS

Justice Alito says nothing 'shadowy' about Supreme Court emergency orders during talk at Notre Dame

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SOUTH BEND — The Supreme Court has increasingly ruled on “emergency applications” recently, but it’s not because of some “sinister or sneaky” motive to avoid fully written briefs and oral arguments, and journalists and politicians should dispel such notions among the public, Justice Samuel Alito said Thursday in a speech at the Notre Dame Law School.

Alito said it’s “natural” for people to be disappointed when the nation’s highest court rules against their policy preferences in these cases, and does so very quickly without the court’s usual process.

“I don’t really criticize ordinary people for thinking that way, but it would be helpful if that were counteracted by the media and by people who do spend a lot of time thinking about the courts,” Alito told a crowd in the law school’s McCartan Courtroom.

Alito’s defense of the emergency docket, dubbed the “shadow docket” by critics, marked the third time in as many weeks that the Supreme Court’s most conservative justices have traveled the country making speeches seemingly aimed at defending the court, now controlled 6-3 by conservatives after former President Donald Trump’s appointments of Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett.

On Sept. 12, 10 days after the court refused to immediately block a new Texas law banning abortions after six weeks of pregnancy, Barrett, speaking at the University of Louisville, said her goal that day was to “convince you that this court is not comprised of a bunch of partisan hacks.” Barrett made the remarks at a center named for Senate Republican leader Mitch McConnell, who was sitting on stage near her and had orchestrated the effort, a little more than a month after the death of liberal Justice Ruth Bader Ginsberg, to push through Barrett’s Senate confirmation just days before the 2020 presidential election.

Barrett was confirmed on a 52-48 vote, the first in modern times with no support from the minority party.

On Sept. 16, Justice Clarence Thomas, also in a speech at Notre Dame, criticized federal judges with lifetime appointments, like himself, for increasingly basing decisions on their personal feelings or religious beliefs. Thomas said too many federal judges are “venturing into areas we should not have entered into... The court was thought to be the least dangerous branch and we may have become the most dangerous. And I think that’s problematic.”

More: Supreme Court Justice Samuel Alito to speak at Notre Dame

In a poll released last week, Gallup found public approval of the court had dropped to 40%, down from 49% in July and hitting its lowest level since the polling organization started tracking the measure 20 years ago.

Alito said the term “shadow docket” was coined by a law professor in 2015, but the practice is not new. It happens when parties in a legal case feel they will suffer irreparable harm if the courts don’t grant an immediate injunction or stay while a case is pending, and a majority of the justices feel the moving party is “likely” to ultimately prevail.

The digital age has made it easier for the Supreme Court to quickly handle such actions, allowing the full court to decide the matters instead of a single justice as happened in the past.

Alito said the court has issued emergency orders more in recent years partly because so many district judges were ruling against Trump initiatives, and partly because of the urgent, unprecedented nature of the pandemic.

“In a nutshell, we do the best we can under the time constraints imposed by the situation,” he said.

He drew an analogy to how emergency medical personnel make different decisions when treating an accident victim compared to a person who undergoes a “complicated, non-emergency surgery” in a hospital.

“You can’t expect the EMTs and the emergency rooms to do the same things that a team of physicians and nurses will do when they’re handling a matter where time is not of the essence in the same way,” Alito said.

Alito said the court typically receives emergency applications at the last minute, such as death row inmates appealing executions. Also in civil cases, the court is asked to rule in a

matter of hours, as happened when the Texas abortion law was to take effect at midnight on Sept. 1.

Alito concluded his talk by saying he's not suggesting that the court's current practice is "perfect and possible changes should not be considered." He referenced the recently published book by liberal Justice Stephen Breyer, "The Authority of the Court and the Peril of Politics." One of Breyer's themes in the book, Alito said, was that court must "just do the job and do not seek or expect popularity."

"Our job is clear," Alito said. "Just do the job and I am confident that is what the court will do in the upcoming term and the years ahead."