경북대학교 법학연구원『법학논고』
제75집 (2021.10) 115~136면.
Kyungpook Natl. Univ. Law Journal
Vol.75 (Oct 2021) pp.115~136
http://doi.org/10.17248/knulaw..75.202110.115

Substantive Changes in the Shadow Docket of the U.S. Supreme Court

Erin E. Murphy*

〈국문초록〉

지난 10년간 미국 연방대법원에서는 '그림자 소송(shadow docket)'에 따른 판결이 증가해왔다. '그림자 소송'은 법원에서 통상의 절차를 거치지 않은 결정(order)이나 약식 판결(summary judgment)로 구성되어 있다. '그림자 소송'의 법원 판결(opinions) 과정에서는 법관의 서명이나, 변론준비서면(briefing), 법정조언자(amicus)의 참여, 구두변론 등의 절차가 요구되지 아니하고 각 사건의 법률적 판단 근거에 있어서 재판부의 정식적인 심리 내용도 상세히 제공되지 아니한다.

본 논문에서는 법원이 이러한 방식으로 판결을 할 수 있도록 한 입법적인 배경과 '그림자 소송'에 관한 법원 관할의 문제 그리고 사안의 긴급성과 같은 이유로 이러한 비정상적인 결정에 따른 사건을 제한해 왔던 그동안의 법원 선례들을 살펴보고, 최근에 나타난 '그림자 소송' 유형의 변화에 관하여 상세히 살펴보고자 한다.

연방대법원에서는 2021년 한해에만 '그림자 소송'으로 상당수의 판결을 생산해냈는데, 이에 따라 법원의 선례가 새로이 창설되기도 하고 공중보건에 관한 규범이 뒤집히거나 수십 년간 견지되어 온 헌법상의 보호조치가 번복되기도 하였다. 물론 이 판결들은 모두 통상의 법정절차를 거치지 아니한 것들 이었다. 그럼에도 최근까지 이러한 '그림자 소송'에 관한 심도 깊은 연구가 진행된 바 없었는데, 그 이유로는 그동안 실무적으로 논란의 여지가 있을 만한 중대한 사안들이 그리 많지 않았기 때문인 것으로 보인다.

그러나 최근 연방대법원 사건에서 이민자, 극빈자, 여성 등 사회적 취약계층의 권리를 제한하는 판결이 다수 나타나면서, 이에 대한 관심이 크게 증가하였다. 연방대법관 중에서는 보수적인 성향을 지닌 법관들이 최근 일련의 '그림자 소송'에 있어서 재판부의 당파성을 부인하면서도 이러한 판결 방식에는 우호적인 입장을 밝힌 사례도 있었다. 그러나 정작 연방대법원의 '그림자 소송'에 관한 선례들을 각각 분석해보면 보수적인 이데올로기에 부합하는 사건에 있어서 특히 이러한 긴급한 권리구제를 선호하는 경향이 사법부 내에 존재한다는 점을 명확히 알 수 있다.

법원의 사법운용에 있어서 '그림자 소송'에 따를 경우 피해 당사자나 이해관계인은 최고법원에 대한 권리구제 자체가 허용되지 아니한다. 또한 '그림자 소송'은 그동안 일관성이 결여된 체로 특별한 기준 없이 적용되어 오면서도 법원의 긴급

* Professor of Law, Yeungnam University Law School, Gyeongsan, South Korea; B.S SUNY Brockport, JD Georgetown University Law Center.

한 판결이 절실히 요구되는 경우를 대비해 마련되어 있는 절차적인 안전보장장치(procedural safeguards)들도 제대로 준수해 오지 않았다. 즉 연방대법원은 그동안 '그림자 소송'을 활용해 법의 주요 내용에 있어서 실체적인 수정을 가하면서도 특별한 잡음 없이 신속한 변경이 가능하도록 이를 이용해 온 셈이다. 이러한 방식의 사법 운용은 시정되어야 한다.

이처럼 통상적이지 않은 사법 운용 방식을 바로잡기 위해서는 연방대법관 수를 증원하거나 긴급한 사정(exigent circumstances) 및 공공의 이익(public interest)에 관한 심리를 요건으로 하는 절차적 보호장치들을 성문화하고, 그 밖에 긴급 청원(emergency petitions)에 관한 심리 절차에 있어서 보다 투명한 사법 시스템을 고안하는 등 다양한 방안들을 고려해 볼 수 있을 것으로 생각된다.

주제어 : 미국 연방대법원, 그림자 소송, 투명성, 사법심사, 긴급구제, 선례, 판례

• 투고일 : 2021.10.10. / 심사일 : 2021.10.23. / 게재확정일 : 2021.10.27.

Ⅰ. Introduction

The October 2020 Supreme Court of the United States term ended after granting an unprecedented number of applications for Emergency relief (including seven emergency injunctions against state laws).[1] These were both the highest totals for any term in history. These types of rulings are included in the body of Supreme Court decisions that fall outside the "merits' decisions and until recently, have had very little academic or public attention. They are part of a group of decisions known as the "shadow docket," a term coined by University of Chicago Professor William Baude, referring to a class of decisions decided without or with minimal briefing, without public oral arguments and released with no reasoning or information regarding the voting of the Justices.[2]

Historically, due to the lack of frequency and the lack of controversy

1) Steve Vladeck (@steve_vladeck), TWITTER (Oct. 4, 2021, 8:46 PM), https://twitter.com/steve_vladeck/status/1444992332227620877 Professor Vladeck is a leading scholar regarding the current state of the Federal Judiciary and has been compiling contemporaneous data regarding the Court's docket.

2) Professor Stephen I. Vladeck, Testimony before the Senate Committee on the Judiciary, September 29, 2021, p. 2.

attached to those cases, in particular the emergency relief denials, which often would result in later briefings and hearings, most of these cases have not been scrutinized in the public eye. On their face, they are not problematic, as this procedure has most frequently been utilized in cases that require exigency (such as death penalty executions) and do not widely affect the American public with sweeping changes to substantive law. This recently has changed, with the increased usage of these rulings in highly controversial cases, that are highly unpopular with the majority of Americans and that appear to be decided upon partisan lines, advancing conservative goals at a rapid pace (without public hearing or rationale provided).

The rise of non-transparent, unexplained decisions that have been ordered by utilizing this "emergency" procedure is a continuation of the attempt to quietly shift federal power through passive action, which I previously outlined in a prior publication.[3] It is also in line with the repeated drumbeat of fear and necessary immediacy that permeates modern politics and motivates populist discourse.

In this article, I will focus on the recent shift in decisions, providing an overview of the Supreme Court procedure. I will outline the recent increase in emergency injunctions, the partisan results, the danger of the trend for all sides of the political spectrum regarding the legitimacy of the court, identify remedies that could increase transparency and legitimacy and lastly, consider restructuring the Court to reduce increasingly unchecked power.

Ⅱ. Extraordinary and Emergency Jurisdiction

The system for judicial review before the Supreme Court is a long and arduous process, often taking many years.[4] The typical Supreme Court

3) Erin E. Murphy, *The Dangers of Decentralization by Neglect and Destruction,* The Journal of Law & Politics Research, Vol. XVIII No. 4, December 2018, pp. 229-255.

4) U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit. https://www.uscourts.gov/sites/default/

case has worked its way through the lower courts and has reached the Court after multiple rulings on the merits by the federal appellate court or alternatively, the court of last resort within its state or territory. This route, though familiar and routine, is not constitutionally required. Article III of the Constitution allows the Court to exercise broad appellate jurisdiction that is not limited to review of final rulings.[5)]

It makes sense that there are alternate ways to get before the Supreme Court, as sometimes a controversy is in need of more immediate redress. It is undisputed that the shadow docket is one way to provide this relief. There must be a way for courts to hear a case where without immediate action, irreparable harm will occur.

The Court has the power to review cases in much more expansive situations, such as under, 28 U.S.C. § 1254 (1), which states "cases in the courts of appeals may be reviewed by the Supreme Court…[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." This allows the Court to step in, prior to a case making its way through the juggernaut of appellate review. This is the typical source of jurisdictional power that allows the Supreme Court to "jump in" at any time after the case reaches the court of appeals.

In addition, more statutory authorization allows the Supreme Court to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[6)] The All Writs Act[7)] is interpreted to allow SCOTUS to issue writs directly to the trial courts, even in cases where appeals must go through the court of appeals.[8)] These writs are usually writs of mandamus, prohibitions, or injunctions, which instruct government officials to do or to stop doing a particular action.

---

files/data_tables/jb_b4a_0930.2017.pdf

5) Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 HARV. L. REV. 123 (2019), *See. e.g.*, Ortiz v. United States, 585 US ___ (2018).

6) 28 USC § 1651.

7) Id.

8) Ex Parte United States, 242 U.S. 27 (1916).

The Court has the power to provide emergency relief as well, which is the main focus of this article. This power is ordinarily utilized by issuing stays or lifting stays of lower courts where there is a final judgment that is subject to review by the Supreme Court on writ of certiorari. The All Writs Act and 28 USC § 2101(f) provide that the Court or ANY ONE Justice may "stay the execution and enforcement of such judgment or decree…for a reasonable time to enable the party aggrieved to obtain a writ of certiori from the Supreme Court."[9] This, along with the long standing writ of habeas corpus, also a statutory power, gives the Supreme Court "extraordinary" authority to supervise the entire federal judicial system.

This power, to grant extraordinary relief, historically, was described as "drastic and extraordinary remedies."[10] The procedural rules and precedent was previously clear that the relief should be used "only where appeal is a clearly inadequate remedy"[11]

Supreme Court Rule 11controls pre-judgment certiorari and states that it should only be granted "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court."

Supreme Court Rule 20 controls the procedure for "extraordinary writs" (which includes both writs of mandamus and emergency writs of injunctions, which are the most extraordinary and unusual form of relief) is clear that these remedies should be issued "of discretion sparingly exercised" and sets forth that a petitioner must demonstrate "exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form."[12]

In cases of stays and lifting of stays, which more common than pre-judgment certiorari and extraordinary writs, are also reserved for

---

9) Vladeck at 129.

10) *Id.* at 130. Ex parte Fahey, 332 U.S. 258, 259-60 (1947); *see also, e.g.,* Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004); Bartlett v. Stephenson, 535 U.S. 1301, 1304 (Rehnquist, Circuit Justice 2002).

11) *Id.* At 130.

12) SUP. CT. R. 20.

"extraordinary cases."[13] The Court can rule as a whole, or as an individual Justice in chambers, but in both circumstances there are three factors that the Court considers "(1) 'a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari…';(2) 'a fair prospect that a majority of the Court will conclude that the decision below was erroneous'; and (3) a likelihood that 'irreparable harm [will] result from the denial of a stay."[14]

It is uncontested that the Supreme Court has the jurisdictional authority to grant emergency or extraordinary relief, it is also not contested that the Supreme Court has the authority to issue judgments without a full briefing, argument, amicus participation and transparent written rationale. But, when the decisions being handed down without those procedural safeguards, under the guise of an emergency or extraordinary situation, change the status quo in regards to fundamental rights and litigants are left with little to no recourse, the authority must be revised.

Ⅲ. The Extraordinary Becomes Ordinary

As stated previously, the shadow docket has not been a hotbed of academic or political debate until recently. Professor Vladeck, in his article analyzing the Solicitor General and the Shadow Docket[15], his testimony before Congress and through his thoughtful and thorough Twitter account, has, for the last four years, compiled data measuring the rise of the shadow docket. He has focused on orders that change the status quo (either through staying a lower-court decision or mandate pending appeal, vacating a stay imposed by a lower court, granting an emergency writ of injunction pending appeal and vacating a lower-court's grant of an emergency injunction).

---

13) Conkright v. Frommert, 556 U.S. 1401, 1402 (Ginsburg, Circuit Justice 2009) (quoting Rostker v. Goldberg, 448 U.S. 1306, 1308 (Brennan, Circuit Justice 1980)).
14) *Id.* at 1402.
15) Vladeck at 123.

He testified and provided the following table documenting the frequency of those types of relief since Chief Justice Roberts's first Term. It clearly shows the increase in grants of Emergency Relief in the past decade. It also shows an increase in the requests for the more extraordinary requests to grant or vacate injunctions (which were not present until 2013 on this chart).

Table 1. Total Grants of Emergency Relief by Supreme Court Term (OT2005–Present)[16]

Term	Grant Stay	Vacate Stay	Grant Injunction	Vacate Injunction	Total
OT2020[17]	7	5	7	1	**20**
OT2019	15	4	0	1	**19**
OT2018	12	3	0	0	**15**
OT2017	9	0	0	0	**9**
OT2016	10	1	0	0	**11**
OT2015	11	1	1	0	**13**
OT2014	7	2	1	0	**10**
OT2013	4	2	2	0	**8**
OT2012	1	0	0	0	**1**
OT2011	6	0	0	0	**6**
OT2010	6	0	0	0	**6**
OT2009	3	1	0	0	**4**
OT2008	8	0	0	0	**8**
OT2007	7	0	0	0	**7**
OT2006	1	0	0	0	**1**
OT2005	6	0	0	0	**6**

16)

16. The data were collected by running a series of different searches through Westlaw's Supreme Court database. Given the different terminology that the Court (and individual Justices) use in describing emergency relief in some of these contexts, there may be slight variations compared to any official data source (if one exists).

Though it does seem As Professor Vladeck testified, the quantity of the

16) Table Compiled by Professor Stephen I. Vladeck, accompanied testimony before Congress, September 29, 2021.

cases is not the concern, it is the type of cases and the affect that the rulings have in terms of substantive law and procedure, that is of great concern. His testimony pointed out that the change was not merely quantitative, but also qualitative. The increase in granting the truly "extraordinary" injunctions that disrupt the status quo being the largest concern. In the next section, three cases will illustrate the shift in the distinction of what the Roberts' Court views as "extraordinary," the lack of consistency in analysis of what is an emergency and how this is a dangerous trend that must be changed.

Ⅳ. Substantive Impact of the Shadow Docket

The previous shadow docket emergency injunctions, the most extraordinary and unusual form of relief, were mainly involving executions at the 11th hour and the necessity for emergency action was clear (a person would be executed if the Court did not act). Those types of rulings had a great impact but not a wide reaching impact. The more recent rulings, starting with Trump's travel bans, challenges to the border wall, the "Remain in Mexico" asylum policy, Tandon (Covid-19 regulations and church gatherings), Alabama Association of Realtors (Eviction Moratoriums) and Whole Woman's Health (Ban on Abortion after six weeks) are directly enjoining statewide or federal policies, having a larger impact substantively. I will discuss the latter three, which illustrate the illogical application of emergency rulings and also the lack of consistency and rationale as to measuring irreparable harm.

A. Tandon v. Newsom[17)]

The Supreme Court issued a 5-4 decision that enjoined California's COVID-related ban on religious gatherings in private homes. This unsigned,

17) Tandon v. Newsom, 141 S. Ct. 1294, 1297 - 98 (2021) (per curiam).

per curiam opinion was handed down at 11:34 PM EDT on Friday, April 9, 2021. The decision was issued seven days after the application for injunctive relief was filed.

With this ruling, the Court created new law under the Free Exercise Clause of the First Amendment. The Court cited prior decisions in their issuing of the injunction,[18] but newly interpreted the Constitution to apply the concept of the "most favored nation" theory. This theory applies in cases where the State has made an otherwise neutral law that might incidentally burden some kind of religious expression (in this case public health regulations). If there are any exceptions for what the court believes is "comparable "secular" activity, the regulation is constitutionally suspect.

This case created a new level of scrutiny without as much as a public hearing. In addition to a new protection for religious liberty, the Court also enjoined the State of California, issuing the most extraordinary and unusual relief.

The Supreme Court creating new law and issuing an injunction pending appeal, rather than a stay highlights the concern with this shadow docket. An injunction is only supposed to be issued "sparingly, and only in the most critical and exigent circumstances," where "the legal rights at issue are indisputably clear."[19] Although this ruling did accompany a four-page per curiam opinion, this opinion was released without oral arguments or full briefings, which is shocking, considering the legal rights were not litigated fully before the court prior to finding that they are indisputably clear.

In addition to this case, the Court had previously enjoined New York COVID restrictions that were no longer in effect on the ground that they also violated the First Amendment Free Exercise of religion.[20] The Court justified this intervention in the unsigned 5-4 opinion by creating a hypothetical secondary attempt by New York to pass the COVID public

---

18) Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam)

19) Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n, 479 U.S. 1312, 1313 (Scalia, Circuit Justice 1986) (quoting Communist Party of Ind. v. Whitcomb, 409 U.S. 1235, 1235 (Rehnquist, Circuit Justice 1972).

20) Roman Catholic Diocese of Brooklyn at 64.

health restrictions. This pre-emptive ruling is clearly in opposition to the requirement that injunctions prior to the appellate procedure are to be granted only in the most "critical and exigent circumstances." In addition, it must be noted that this hypothetical concern of future State interference with rights is nowhere to be found in the other two cases briefed below.

B. Alabama Association of Realtors v. Dep't of Health & Human Services[21]

In another unsigned opinion, the Supreme Court granted an application lift a stay and enforce the District Court's judgment vacating the Centers for Disease Control and Prevention's imposition of a nationwide moratorium on evictions of any tenants who live in a county that is experiencing substantial or high levels of COVID-19 transmission and who make certain declarations of financial need. This 8 page, per-curiam opinion was released at 10 PM on Thursday, August 26, 2021, six days after the application was filed.

This case, though not tied to the First Amendment as the Tandon case was, is one where the Court changed public policy that affects millions of people. Justice Breyer, in the dissenting opinion, joined by Justices Sotomayor and Kagan, clearly stated his opposition to the use of the shadow docket to decide such a matter of great importance and reach. "Today, this Court, as an emergency matter, without full briefing or argument, blocks that order by vacating a lower court's stay." He then goes on to list the four factors which precedent has held must be present to vacate a stay entered by a lower court.[22]

Justice Breyer goes on to discuss the grave danger of the pandemic at

---

21) Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2320 (2021) (per curiam).

22) (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injury the other parties interested in the proceeding; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 426 (2009).

the time of the ruling, with the United States experiencing 150,000 new COVID cases per day and how those with no place to live are at higher risk of transmission of the Delta variant. He concludes "These questions call for considered decisionmaking, informed by full briefing and argument. Their answers impact the health of millions. We should not set aside the CDC's eviction moratorium in this summary proceeding. The criteria for granting the emergency application are not met."

The majority of the Supreme Court did not agree and lifted the stay of the moratorium, creating more of a hazard for those in low income areas.[23] The rationale for the emergency relief was explained by the authorless opinion stating that the applicants "not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing." The focus on the merits without fully hearing oral arguments regarding the merits, without any analysis of the substantial injury that the other parties will suffer is not a full analysis of the standard of review and is essentially the court saying "we have already made up our mind."

C. Whole Women's Health (SB 8)[24]

When the Supreme Court issued a one paragraph, unsigned 5-4 majority declining emergency relief sought by Whole Women's Health (a health care provider that performs abortions as part of their practice) at 11:58 PM on Wednesday, September 1, 2021, the shadow docket was finally recognized by the mainstream media and immediately decried by legal scholars who had seen this result coming.

The procedural intricacies of this case are unusual (by design) and based on those alone, it would be prudent for a Court (even one that sought to outlaw abortions after six weeks) to fully litigate and write a full opinion,

---

23) *See,* Peter Dizikes, Study: Ending an eviction moratorium increases Covid-19 hazard, MIT News, (August 30, 2021). https://news.mit.edu/2021/eviction-moratorium-ending-covid-19-0830

24) Whole Woman's Health v. Jackson, No. 21A24, 2021 WL 3910722 (U.S. Sept. 1, 2021) (mem.);

but that is not what happened in this case. I will provide some background to fully explain the Texas state law that is the subject of this case.

Texas Governor, Greg Abbott, signed SB8 into law May 2021. The law bans "all abortions performed on any pregnant person where cardiac activity has been detected in the embryo, with no exceptions for pregnancies that result from rape, sexual abuse, incest, or a fetal defect incompatible with life after birth. S.B. 8 is enforced through a dual private and public enforcement scheme, whereby private citizens are empowered to bring civil lawsuits in state courts against anyone who performs, aids and abets, or intends to participate in a prohibited abortion, and the State may take punitive action against [providers[through existing laws and regulations triggered by a violation of S.B. 8—such as professionally disciplining a physician who performs an abortion banned under S.B. 8." [25]

Previously, thirteen states have enacted so-called fetal heartbeat laws, which use the same cardiac activity within the embryo test.[26] Courts have previously enjoined their enforcement as unconstitutional. These laws prohibit abortions after 6 weeks of gestational age of the embryo (which is before most women know they are pregnant). Due to the unique feature of civil enforcement, which has been referred to as a "bounty" by opponents of this law, is, as Professor Vladeck testified a plan to "frustrate and incentivize."[27] Pre-enforcement review is frustrated because even if one potential defendant is identified correctly, there is no way to bar all potential enforcement actions (because literally anyone could start a lawsuit). The law also prohibits providers from recovering costs or fees, even with frivolous suits, and allows a basis for liability if abortions are performed while SB8 is subject to a judicial temporary restraining order. This incentivizes defendants to participate in endless lawsuits with no potential risk, the providers having to pay for defense and a potential to

---

25) TX SB8 (2021).

26) Julie Carr Smyth and Kimberlee Kruesi, 'Fetal heartbeat' in abortion laws taps emotion, not science, AP News, (May 15, 2021) https://apnews.com/article/abortion-laws-government-and-politics-health-77c9ba98c4f4ab46fdbd5bcc47b5b938

27) Vladeck Testimony p 23.

collect the $10,000 "bounty." [28]

This law went into effect on September 1, 2021, after the Fifth Circuit blocked all proceedings in District Court by granting an administrative stay (without any written reasoning) and despite the providers seeking emergency relief in the Supreme Court on Monday, August 30, 2021. The court did not even issue a temporary administrative stay, despite having previously done so in an unrelated case regarding immigration. Rather, through inaction, it allowed the Texas law to go into effect on September 1, 2021. The next night, the Court issued a ruling denying a stay or injunction with a one paragraph, unsigned opinion.

The Court's order was confusing and relied on the purposeful procedural issue of enforcement against (potentially unlimited) civil defendants. The Court did NOT hold that this was a procedural obstacle, but rather that it was a question. Typically, when the Court is provided a procedural question, a case on the merits is warranted and full hearings, amicus briefs and oral arguments are the way to resolve these questions. In this case, the court simply stated that it was unclear and declined to grant relief. Once again, not following procedural precedent which would analyze the case in terms of potential harm to parties and public interest.

It is estimated that SB 8 would prevent more than 8 in 10 people from obtaining abortion care.[29] The procedural analysis did not even consider the substantial injury that pregnant people in Texas would suffer or where the public interest lies. Justice Sotomayor, in her dissent, stated "Last night, the Court silently acquiesced in a State's enactment of a law that flouts nearly 50 years of federal precedents. Today, the Court belatedly explains that it declined to grant relief because of procedural complexities of the

---

28) This procedural maneuvering does not just make it "impossible for anyone to challenge one of the most restrictive abortion laws in the country. It would also set an ominous precedent for turning citizens against one another on whatever contentious issue their state legislature chose to insulate from ordinary constitutional review." Laurence H. Tribe & Stephen I. Vladeck, The Texas Abortion Law Threatens Our Legal System, N.Y. TIMES, (July 22, 2021), at A20 *See also,* TX SB8, 2021.

29) Kari White, Gracia Sierra, Laura Dixon, Elizabeth Sepper, Ghazaleh Moayedi, "Texas Senate Bill 8: Medical and Legal Implications" Texas Policy Evaluation Project, July 2021. http://sites.utexas.edu/txpep/files/2021/07/TxPEP-research-brief-SB8.pdf

State's own invention."[30]

Roe v. Wade is unquestionably constitutional precedent, it provides for a constitutional right to a pre-viability abortion, it does not allow states to ban all abortion after cardiac activity is found in an embryo. The Supreme Court, by not issuing a temporary stay or injunction, has allowed a state law which is unconstitutional to stand. As many have pointed out, this is terrible precedent for the ability of this Supreme Court to protect any and all constitutional rights.

Ⅴ. Shadow Docket Problems

The previous cases show that the current Supreme Court is making substantive changes to precedent and law that affects millions of people by using a method that avoids transparency, accountability and has been recently applied without engaging in clear procedural precedent. The Court has seemingly decided that some cases (involving religious liberty in particular) are exigent and are in need of this "fast track" in order to protect constitutional rights and that others (involving low income people or women's reproductive rights) are not an emergency or even worth the procedural analysis to deny review.

If it were purely an ideological concern, critics would not be asking for more clarification (more explanation or complete rationales spelled out in precedent). If the Court is looking to end eviction moratoriums, COVID-19 restrictions on gatherings, or ban abortions, they should give full reasoning and guidance to courts below.

In addition to the lack of reasoning explained, the legal community and the legitimacy of the Court is diminished when amicus briefs are not accepted, the parties (both aggrieved and defending) are able to fully brief their legal arguments and the parties have a full oral argument. It leaves the impression that the Justices have already made up their minds and that

30) Women's at ___.

the appellate process will provide no new or novel solutions to these procedural or substantive quandaries.

This procedure greatly undermines the Court's legitimacy, which has been pointed out by academics, the media, and the dissenting Justices during this last year. While writing this article, it appears that the conservative justices have been paying attention to the critiques of the shadow docket and the inconsistent, unexplained and seemingly all Republican policy affirming cases that have recently been decided. In response, Justice Samuel Alito gave a speech regarding the shadow docket at The University of Notre Dame Law School.[31] He stated that "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…" In addition, Justice Amy Coney Barrett recently spoke out at a celebration of the Mitch McConnell University of Louisville facility, stating the Supreme Court is "not comprised of a bunch of partisan hacks."[32]

Progressives or liberals are not the only ones with concerns regarding this procedural trend. The coining of the "shadow docket" was actually not by a progressive that was concerned with the right leaning nature of the results, but rather, a former clerk of Chief Justice Roberts and the author of the 2020 commentary "Conservatives, Don't Give Up Your Principles or the Supreme Court" in the New York Times.[33] In his 2015 paper he expresses concern with fairness and the lack of transparency leading to a depersonalization of the Court.

The concerns of the shadow docket, in particular the lack of clear

---

31) Katie Barlow, Alito blasts media for portraying shadow docket in "sinister terms," SCOTUSblog (Sep. 30, 2021, 6:59PM), https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/

32) Mary Ramsey, Justice Amy Coney Barrett argues US Supreme Court isn't 'a bunch of partisan hacks,' Louisville Courier Journal, (Sept 12, 2021, 7:24PM), https://www.courier-journal.com/story/news/politics/mitch-mcconnell/2021/09/12/justice-amy-coney-barrett-supreme-court-decisions-arent-political/8310849002/

33) William Baude, "Foreword: The Supreme Court's Shadow Docket" (University of Chicago Public Law & Legal Theory Working Paper No. 508, 2015), *see also* CV William Baude, https://www.law.uchicago.edu/faculty/baude.

rationale and the confusion over whether the court is creating precedent or not, should be one that scholars on all sides of the political spectrum share. It does not foster confidence nor does it create a legal environment where arguments are heard and legitimately reviewed. Rather it appears that the Justices have decided prior to hearing any of the arguments or lower court review what they believe the law should be. That is not a system of appellate review, that is a lifetime appointment for 9 people to give their opinions based on their opinions alone.

Ⅵ. How to Remedy the Trend

There are some who believe that the Court has already lost it's legitimacy, that it has been lost to partisan politics since 2016 when Justice Scalia died and the Republican Senator Mitch McConnell refused to hold hearings on the nomination of Merrick Garland. He withheld the nomination process for nine months after the death of Justice Antonin Scalia. It was then a strategy that he reveled in when he pushed Justice Amy Coney Barrett through the nomination process in just over a month, to avoid a nomination by President-elect Joe Biden. For those that believe this partisan game of nominees has already tainted the court beyond repair, the way to remedy this situation is to dilute the power of the nine justices by increasing the number of Supreme Court justices.

To do so, the Senate Democrats would need to eliminate the filibuster and pass the current legislative bill sponsored by Senator Edward Markey and Senator Tina Smith to increase the number of Justices to 13.[34)]

Some less aggressive and more deferential approaches have been proposed by Professor Vladeck, who outlined reforms both within the Court and also with Congress in his testimony before congress on September 29, 2021. The Court based reforms include: Circuit Justices resolving

34) S. 1141- Judiciary Act of 2021 https://www.congress.gov/bill/117th-congress/senate-bill/1141?q= %7B%22search%22%3A%5B%22Judiciary+Act+of+ 2021%22%5D%7D&r=1&s=1

emergency applications individual and formally publishing those decisions (with or without an opinion), formalizing rules and norms to provide guidelines for emergency applications, which allow for oral argument and amicus participation, requiring statutory authority for denial or granting of emergency relief, treating applications for emergency relief as petitions for certiorari, and making a schedule of releases with public notice.[35)]

The Congressional reforms suggested are as follows: Allowing the federal government to transfer nationwide injunctive relief to the DC District Court, speeding up appellate timelines in cases with any governmental action is enjoined by a federal court to allow priority, codifying the traditional four-factor test that the Court applies in considering applications for emergency relief, and encouraging Justices to hold hearings when there is a chance relief will be granted.[36)]

Out of these proposals by Professor Vladeck, the codification of the four-factor test that the Court applies is the most imperative. It is clear that the current Supreme Court has not applied these factors in their recent rulings and the failure to do so has left millions without a full review by the Court of last resort. In addition, the Court, if they wish to be respected as non-partisan legal minds, they must apply a standard of review for emergency injunctions and stays that provides robust analysis of irreparable harm and honors the public interest. Without full, transparent analysis, they will continue to give the impression that they are hard at work for the constituents and Senators that placed them on the Court rather than impartial jurists seeking for a more perfect union.

35) Testimony at 31-33
36) Id.

[참고문헌]

1. United States Federal and State Law
28 USC § 1651
28 USC § 2101(f)
S. 1141- Judiciary Act of 2021
TX SB8 (2021)
SUP. CT. R. 11
SUP. CT. R. 20

2. Cases
Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S. Ct. 2320 (2021)

Bartlett v. Stephenson, 535 U.S. 1301 (2002)

Cheney v. U.S. Dist. Court, 542 U.S. 367 (2004)
Conkright v. Frommert, 556 U.S. 1401 (2009)
Communist Party of Ind. v. Whitcomb, 409 U.S. 1235 (1972)
Ex parte Fahey, 332 U.S. 258 (1947)
Ex Parte United States, 242 U.S. 27 (1916)
Nken v. Holder, 556 U.S. 418 (2009).
Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020)

Rostker v. Goldberg, 448 U.S. 1306 (1980)
Tandon v. Newsom, 141 S. Ct. 1294 (2021)
Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n, 479 U.S. 1312 (1986)
Ortiz v. United States, 585 US ___ (2018).

3. Articles and Other Sources
Katie Barlow, Alito blasts media for portraying shadow docket in "sinister terms," SCOTUSblog (Sep. 30, 2021, 6:59PM), https://www.scotusblog.com

/2021/09/ alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/

William Baude, "Foreword: The Supreme Court's Shadow Docket" (University of Chicago Public Law & Legal Theory Working Paper No. 508, 2015)

Peter Dizikes, Study: Ending an eviction moratorium increases Covid-19 hazard, MIT News, (August 30, 2021). https://news.mit.edu/2021/eviction-moratorium-ending-covid-19-0830

Michael B. Gerrard, 'Presidential Progress on Climate Change: Will the Courts Interfere With What Needs to Be Done to Save Our Planet?' American Constitution Society Issue Brief (2021) https://scholarship.law.columbia.edu/faculty_scholarship/2740?utm_source=scholarship.law.columbia.edu%2Ffaculty_scholarship%2F2740&utm_medium=PDF&utm_campaign=PDFCoverPages

Wendy K. Mariner, 'Shifting Standards of Judicial Review During the Coronavirus Pandemic in the United States,' German Law Journal (2021), 22, pp. 1039-1059.

Erin E. Murphy, "The Dangers of Decentralization by Neglect and Destruction", The Journal of Law & Politics Research, Vol. XVIII No. 4, December 2018, pp. 229-255.

Richard J. Pierce, Jr., 'The Supreme Court Should Eliminate Its Lawless Shadow Docket,' GW Law Faculty Publications & Other Works, 2021, pp. 1549. https://scholarship.law.gwu.edu/faculty_publications/1549

Mary Ramsey, 'Justice Amy Coney Barrett argues US Supreme Court isn't 'a bunch of partisan hacks,' Louisville Courier Journal, (Sept 12, 2021, 7:24PM), https://www.courier-journal.com/story/news/politics/mitch-mcconnell/2021/09/12/justice-amy-coney-barrett-supreme-court-decisions-arent-political/8310849002/

Julie Carr Smyth and Kimberlee Kruesi, 'Fetal heartbeat' in abortion laws taps emotion, not science, AP News, (May 15, 2021) https://apnews.com/article/abortion-laws-government-and-politics-health-77c9ba98c4f4ab46fdbd5bcc47b5b938

Laurence H. Tribe & Stephen I. Vladeck, The Texas Abortion Law Threatens Our Legal System, N.Y. TIMES, (July 22, 2021)

U.S. Courts of Appeals－Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit. https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2017.pdf

Professor Stephen I. Vladeck, Testimony before the Senate Committee on the Judiciary, September 29, 2021

Steve Vladeck (@steve_vladeck), TWITTER

Stephen I. Vladeck, The Solicitor General and the Shadow Docket, 133 HARV. L. REV. 123 (2019)

Kari White, Gracia Sierra, Laura Dixon, Elizabeth Sepper, Ghazaleh Moayedi, "Texas Senate Bill 8: Medical and Legal Implications" Texas Policy Evaluation Project, July 2021. http://sites.utexas.edu/txpep/files/2021/07/TxPEP-research-brief-SB8.pdf

[Abstract]

Substantive Changes in the Shadow Dockets of the U.S. Supreme Court

Erin E. Murphy*

In the past decade, the United States Supreme Court has increased the quantity of cases decided on the Court's shadow docket. The Shadow Docket is comprised of orders and summary judgment that do not follow the normal procedural process. Most opinions from the shadow document are unsigned, decided without full briefing, amicus participation, oral arguments and do not contain a full analysis of the rationale behind the decision.

This article gives an overview of the legislative permission and jurisdiction of the Court to decide cases this way, the court rules and precedent that have previously limited the instances of emergency or extraordinary decisions made this way and details the recent shift in the types of cases decided.

In 2021 alone, the Court has issued numerous shadow docket cases that have produced either new precedent, reversed public health protocols, or overturned decades of constitutional protection. All without the normal procedural process.

Until recently, the shadow docket has not been studied in detail due to the relatively few controversial cases resulting from the practice. But, as the Court hands down more cases that restrict the rights of immigrants, the indigent and women, the docket has garnered much attention. The conservative members of the Court have recently spoken out in favor of these types of decisions, responding that they are not partisan, but an analysis of the cases shows a clear preference for emergency relief when it benefits conservative ideologies.

The shadow docket does not allow for those aggrieved or affected by the

* Professor of Law, Yeungnam University Law School, Gyeongsan, South Korea; B.S SUNY Brockport, JD Georgetown University Law Center.

law to have redress at highest court. It also has been sporadically applied without adherence to procedural safeguards that have been laid out to reserve emergency judgments for cases in which they are truly needed. The Court has used the shadow docket as a way to quickly and quietly make major substantive changes to the law and it must be remedied.

There are a few options to remedy, including increasing the number of justices, codifying the procedural safeguards that require exigent circumstances and an analysis of public interest, and also creating a more transparent system of reviewing emergency petitions.

Keywords : SCOTUS, Shadow Docket, Transparency, Judicial Review, Emergency Relief, Precedent