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I. Introduction

Texas recently passed the most restrictive abortion law in the country known as the Texas Heartbeat Act. This law prohibits abortion the moment when a fetal heartbeat is detected, which means that it could prohibit abortions as early as six weeks into a pregnancy. This law additionally authorizes private citizens to enforce the law by way of bringing civil actions against a person who "performs or induces an abortion" to a person, instead of depending on the state government to enforce this ban.[2] The enactment of this Act resulted in a large proportion of legal scholars to agree that this act is unconstitutional under *Roe* and *Casey*.[3] In response to the passage of this Act and its strict restrictions, many abortion providers petitioned the U.S. Supreme Court for emergency injunctive relief rather than allow women to go without access to an abortion procedure.

Despite the unconstitutionality of this act as most legal scholars perceived it, and its substantial burdens that are now imposed on a

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2 Tex. Health & Safety. § 171.0031 (2021).

3 Ryan Lucas, *A U.S. judge blocks enforcement of Texas' controversial new abortion law*, NPR (October 6, 2021, 10:50 PM), https://www.npr.org/2021/10/06/1040221171/a-u-s-judge-blocks-enforcement-of-texas-controversial-new-abortion-law.

woman's right to an abortion in Texas, the Court denied the petition. The Court's rationale was that this was a novel issue surrounding the employment of the private populace in enforcement of this new statute with complex issues surrounding what the proper remedy to petitioners are. Due to the novelty and complexity of the case, the petitioners did not meet the burden of proof required for injunctive relief according to the Court.[4] Writing in dissent, Justice Kagan expressed that the Court "barely bothers to explain its conclusion—that a challenge to an unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail." Continuing, Justice Kagan goes to the root cause of the Court's haphazard decision, saying "the majority's decision is emblematic of too much of this Court's shadow-docket decision making—which every day becomes more unreasonable, inconsistent, and impossible to defend."[5] In Justice Kagan's opinion, the Court's emergency docket decision making, or shadow docket decision making, has set the Court down a slippery slope that makes its decisions more and more defenseless. The question remains, what is the impact of this shadow docket decision making and how can this situation for the Court be remedied?

This article argues that the increased use of the shadow docket damages the legitimacy of the Court and maims the American legal system. Due to these negative impacts, this article proposes a creation of a new specialized court system to mend the American legal system and restore the Court's legitimacy.

II. Background

The Founders knew that to protect the Constitution and Rights of the people, the power of judicial review should be delineated to an institution that would issue judgments in a deliberative manner, independent of outside influences. Alexander Hamilton argued that the judiciary would be the perfect institution because, unlike the

4 *Whole Woman's Health v. Austin Reeve Jackson*, J., No. 21-463, slip op. (U.S. Dec. 10, 2021).

5 *Jackson*, slip op at 1-2 (Kagan, J., dissenting).

executive that "holds the sword of the community" or the legislature that "commands the purse [and] prescribes the rules by which the duties and rights of every citizen are to be regulated," the judiciary has "neither Force nor Will, but merely [judgment]."[6] Consequently, the judiciary would be compelled to depend on other bodies to effectuate its judgments. Therefore, the judiciary was institutionally designed as a body to reach conclusions through rational deliberation to convince the other bodies and people. Being a deliberative body is not the only significant feature of the judiciary, however. An independent judiciary was similarly crucial in a properly functioning republic. Hamilton notes that the independence of the judiciary is "peculiarly essential" in this constitutional republic not only because it is essential to preserve enumerated rights and liberties, but independent from external influences reassures the populace that they are being treated freely and fairly before the law.

Overtime, this independent and deliberative Court has heard cases and made rulings by way of two dockets. The typical fashion in which the Court hears cases is through the merits docket. Under this well-known docket, the Court decides about seventy cases a year in a transparent, structured, and predictable manner. Under the standard procedure of the merits docket, the Court receives two rounds of briefings, followed by oral arguments, which are scheduled in advance, and concludes by providing a lengthy written opinion. Another process by which the Court hears cases is through what is known as the "shadow" docket. The shadow docket, a term originally coined by Professor William Baude in 2015, constitutes "a range of [Court] orders and summary decisions that defy its normal procedural regularity."[7] The Court uses this docket to manage thousands of other cases by way of orders that either handle litigation matters, such as extending case timelines, or manage requests for

6 Alexander Hamilton, *The Federalist Papers: No. 78*, The Avalon Project, https://avalon.law.yale.edu/18th_century/fed78.asp.

7 William Baude, *Foreword: The Supreme Court's Shadow Docket,* 19 N.Y.U. J.L. & Liberty 1, 1 (2015).

emergency relief.[8] Due to the nature of this docket, the Court oversees these cases with little briefings, no oral arguments, and provides brief, unsigned orders.

While the term shadow docket dates to 2015, this docket is not new. From 1802 to 1839, Congress had a single Justice come to Washington each August for a "rump" session to manage pending procedural issues.[9] Over time, Congress expanded the Court's authority under this docket to include granting emergency relief as well. The Court granted emergency relief in several instances over the 20th century like when the Court granted a stay on the Rosenburg executions in 1951 and issued an emergency order to stop the Nixon administration's bombing of Cambodia.[10]

Although the history of the shadow docket is well documented and has played a significant role in the U.S. Supreme Court's history, the controversy surrounding this docket is a recent development. There are several contributing factors for the sudden public criticism of the Court's use of the shadow docket. First, the Court is using this docket at a dramatically higher rate than in recent memory. During the Bush and Obama's administration, they rarely filed the applications for emergency relief, totalling at eight applications. However, during the Trump Administration, applications increased by 350 percent with the Court granting twenty-four applications.[11] Second,

8 *OAG's Testimony on the Supreme Court's "Shadow Docket": Hearing before the H.R. Subcomm. on Cts., Intell. Property, the Internet*, 117th Cong. (2021) (Testimony of Loren L. Alikhan, Solicitor General of the D.C.).

9 *Ibid.*

10 Steve Vladek, *Symposium: The Solicitor general, the shadow docket and the Kennedy effect*, SCOTUS Blog (Oct. 22, 2020, 2:00 pm), https://www.scotusblog.com/2020/10/symposium-the-solicitor-general-the-shadow-docket-and-the-kennedy-effect/; Burt Neuborne, *I Fought the Imperial Presidency, and the Imperial Presidency Won,* ACLU (Sep. 27, 2019), https://www.aclu.org/issues/national-security/i-fought-imperial-presidency-and-imperial-presidency-won.

11 *Texas's Unconstitutional Abortion Ban and The Role of the Shadow Docket: Hearing Before the S. Comm. on Judiciary*, 117th Cong. (2021) (Testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law).

the Court has suddenly been addressing high-profile issues such as immigration, state electoral processes, state COVID-19 response, and the death penalty. These issues are addressed in a manner that lacks the transparency of the merits docket, causing difficulty in understanding the rationale behind these decisions. This lack of transparency is also a source of concern for the lower courts when applying the shadow docket decisions related to their cases. Third, the granting of emergency relief is becoming increasingly divisive. Of the eight applications filed during the Obama and Bush administrations, only one provoked a public dissent from a Justice. During the Trump Presidency, however, twenty seven of thirty six applications filed provoked at least one dissent from a Justice.[12]

The U.S. Supreme Court scholars have debated the effects of this new phenomenon of the increased usage of the shadow docket. This paper's findings show that the dramatically increased use of the shadow docket delegitimizes the U.S. Supreme Court and damages the American judicial system. In order to restore legitimacy and heal the American judicial system, Congress should make a specialized court to oversee applications for emergency relief.

III. Proof of Claim

A. Poses Risk to the Legitimacy of the Court

The legitimacy of the judiciary was not self-evident at the beginning of the republic; rather, the Court had to earn its legitimacy through independent and impartial actions while maintaining the deliberative nature of the Court. This slow climb to legitimacy is evident in the number of cases that the Supreme Court decided in its beginnings. During the first eighty years of the Court's existence, it only held that four federal statutes were unconstitutional—and of those, only two had any significance. Occasionally during this period of the Court's history, there was an open defiance from the executive branch

12 *Texas's Unconstitutional Abortion Ban and The Role of the Shadow Docket: Hearing Before the S. Comm. on Judiciary*, 117th Cong. (2021) (Testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law).

to accept judicial action as legitimate. For example, in *Worcester v. Georgia*, the Marshall Court settled a controversy between Georgia and the Cherokee tribes. The Court ruled to void Georgia state law in the Cherokee Nation because the intercourse between the Cherokee Nation and the United States belonged "exclusively to the Congress of the United States."[13] Rather than apply this ruling, President Andrew Jackson famously said, "Well John Marshall has made his decision: now let him enforce it!"[14]

In addition to the early challenges the Court experienced to legitimize itself against the other federal institutions, it also struggled to gain legitimacy from the populace who were affected by its decisions. No case exemplifies this struggle to gain public legitimacy better than *Brown v. Board of Education*. From this landmark decision, the Warren Court held that the racial segregation in public schools was unconstitutional, which in response, the Southern States publicly refused to adhere to the Court's holding. In 1956, a large majority of Southern representatives issued what later became known as the Southern Manifesto. These representatives urged all southerners to lawfully resist the Court's ruling, citing that this was an "abuse of judicial power" and that it was an example of the "Federal judiciary undertaking to legislate…."[15] Fortunately for the Court, by this time, it had established itself as a legitimate institution to the other federal institutions and to the rest of the nation at large. Thus, despite the public criticism of the Court's decision in *Brown*, the Supreme Court was held as an independent judiciary that had issued this judgment through a deliberative process. Furthermore, the Supreme Court's legitimacy is evident because despite the Southern states objections, the judgment from *Brown* was enforced.

Following *Brown*, the Court maintained itself as a deliberative institution, independent of external influences, not swayed neither from the public nor other branches of government. With this legitimacy in

13 *Worcester v. Georgia*, 31 U.S. 515, 540 (1832).

14 Edwin A. Miles, *After John Marshall's Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. S. Hist. 519, 519 (1973).

15 Brent J. Aucoin, *The Southern Manifesto and Southern Opposition to Desegregation*, 55 Ark. Hist. Q. 173 ,190 (1996).

place, the Court was able to make widespread decisions protecting civil rights and liberties for the rest of the 20th century. Entering the 21st century, the Court retained its legitimacy despite deciding highly polarized issues. The high regard for the Court is evident from the public's response to *Bush v. Gore*. Even though the case was of national importance, which was hotly debated on the merits, and received substantial criticism for the Court's intervention, the public followed the decision. Associate Justice Stephen Breyer remarked that "They did so peacefully, with no need for troops as in Little Rock, without rocks hurled in the street, without violent massive protest."[16]

Since the Court relies heavily on the aura of independence from political influences and the demonstration of deliberation in judgment making, the increased use of the shadow docket poses a unique threat to the legitimacy of the Court. The maintenance of normal judicial procedure is critical for the Court's perception to the public. According to Professor William Baude, "procedural regularity begets substantive legitimacy… A sense that its processes are consistent and transparent makes it easier to accept the results of those processes, win or lose."[17] The "procedural regularity" of the merits docket provides the public with a sense that even if the Court issues a majority opinion that is contrary to their beliefs, the public respects the Court's decision because it was made in a deliberative manner. Unfortunately, the shadow docket does away with this procedural regularity. In an emergency stay granted by the Court in favor of the Trump administration, Justice Sonia Sotomayor dissented saying this continued use of the shadow docket "erodes the fair and balanced decision-making process that this Court must strive to protect."[18]

This perception that "fair and balanced" decision making is not taking place has already begun to threaten the Court's legitimacy as an independent judiciary. The Supreme Court currently has its highest disapproval rating for at least the past twenty years, with 53% of

16 Stephen Breyer, Making Our Democracy Work (2010). 86

17 William Baude, *Foreword: The Supreme Court's Shadow Docket,* 9 N.Y.U. J.L. & Liberty 1, 10 (2015).

18 *Wolf v. Cook County, Illinois*, 140 S. Ct. 681, 684 (2020).

the public disapproving of the Court.[19] The justices of the Court have attempted to salvage the image of the Court as an impartial body as expressed by Justice Amy Barrett, who said, "My goal today is to convince you that this court is not composed of a bunch of partisan hacks" or Justice Clarence Thomas, who shared that justices don't rule based on "personal preferences."[20] Despite these attempts, the public, and even Congressional leaders are not convinced. Following his public relations mission, Senator Richard Blumenthal, a former Supreme Court clerk, stated, "I think these last few years have really been very dangerous and potentially devastating to the Supreme Court's credibility because the public is seeing the court as increasingly political, and the public is right…. The statements by Thomas, Barrett, Breyer, you know, give me a break… they are just inherently non credible." The degradation of the Court's legitimacy has not merely resulted in public disapproval but also brought a suggestion to restructure the Court. The Biden Administration has formed a commission to examine the current Court's structure to find potential changes which range from term limits to an expansion of the Court.[21] If the current path which the Court is trending is not dramatically readjusted, the erosion of its legitimacy could result in highly contentious issues being received like *Worcester* or *Brown* rather than *Bush*.

19 *Supreme Court*, Gallup, https://news.gallup.com/poll/4732/supreme-court.aspx.

20 Robert Barnes and Seung Min Kim, *Supreme Court observers see trouble ahead as public approval of justices erodes*, WASH. POST, Sep. 26, 2021, https://www.washingtonpost.com/politics/courts_law/supreme-court-public-opinion/2021/09/25/379b51ec-1c6c-11ec-bcb8-0cb135811007_story.html.

21 Bo Erickson, Melissa Quinn, Ed O'Keefe, *Biden's Supreme Court commission nears end with reviews of court packing, term limits, shadow docket. Progressive may be disappointed*, CBS News, Oct. 14, 2021, https://www.cbsnews.com/news/supreme-court-commission-report-court-packing-term-limits/.

B. Damages the American Judicial System

The Supreme Court's relationship with the lower courts is critical to the function of the American judicial system. The Supreme Court interprets the law and utilizes judicial review to ensure that state and federal statutes are constitutional. Additionally, under the doctrine of stare decisis, the issued judgments are precedential, binding all lower courts which includes the federal circuit court of appeals, district courts, and future Supreme Courts. On the other hand, the institutional design of the lower courts was to bring "rapid, localized justice" to the rest of the country.[22] The lower courts do the bulk of the judicial work with 100 million cases being filed every year in state courts and roughly 400,000 cases being filed in federal trial courts compared to the mere estimated 80 cases that the Supreme Courts hear each term.[23] In order for the Supreme Court to ensure that their agents, the lower courts, are applying the law according to their constraints, the Court formulates written opinions with the lower courts in mind. This trend is evident in a study conducted by Pamela Corley among others. They found through utilizing plagiarism technology that the Supreme Court "systematically incorporates language from the lower federal courts into its majority opinions."[24]

Understanding the interdependency between the higher and lower courts shows that when the Supreme Court issues an important constitutional decision by way of the shadow docket, it fundamentally damages the American Judicial system. The lower courts are dependent on Supreme Court rationale to properly apply precedent to localized cases. Under shadow docket decisions unfortunately, Supreme Court rationale is often not publicly explicit. As the Court has issued increasingly important decisions by way of the

22 S. S. Silbey, *What the Lower Courts Do – The Work and Role of Courts of Limited Jurisdiction*, NCJRS (Sep. 1979), https://www.ojp.gov/pdffiles1/Digitization/77523NCJRS.pdf.

23 *FAQS: Judges in the United States*, Quality Judges Initiative (2014), https://iaals.du.edu/publications/faqs-judges-united-states.

24 Pamela C. Corley, Paul M. Collins Jr., and Bryan Calvin, *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. Pol., 31, 31 (2011).

shadow docket, it sent waves of confusion throughout the judicial system. A portion of this confusion is caused by statements made by the Court in relation to the precedential value of these decisions. In *Lunding v. New York Tax Appeals Tribunal*, the Court stated that the shadow docket rulings "do not have the same precedential value ... as does an opinion of this Court after briefing and oral argument on the merits."[25] The above statement illustrates that the Court preferred to limit the role of the shadow docket on precedence. The Court issued a much different statement, however, in *Tandon v. Newsom*. In this case, coming after a series of emergency rulings striking down COVID-19 restrictions on religious worship in California, Justice Kavanaugh noted that "[t]his is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise… The Ninth Circuit's failure to grant an injunction pending appeal was erroneous. This Court's decisions have made [this] clear."[26] In *Tandon*, the Court issued five emergency rules to strike down pandemic restriction statutes without a single majority opinion. Despite this fact and the statement issued in *Lunding*, the Court expected the Ninth Circuit to apply their rulings as precedent.

This new importance on shadow docket rulings has placed a stress on judges inside the judiciary and actors outside the judicial system. Inside the judiciary, you can see evidence of scrambling among judges. A notable example is that of D.C. district judge Trevor McFadden, who published a paper attempting to categorize the different shadow docket rulings according to what their precedential value should and should not be. William Baude of the University of Chicago has concluded that these shadow docket rulings are not good for lower court judges ``[b]ecause the lower-court judges don't know why the Supreme Court does what it does, they sometimes divide sharply when forced to interpret the court's non-pronouncements."[27]

25 *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 307 (1998).

26 *Tandon v. Newsom*, 141 S. Ct. 1294, 1296-7 (2021).

27 William Baude, Opinion, *The Supreme Court's Secret Decisions*, N.Y. Times, Feb. 3, 2015, https://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html.

These decisions not only affect judges but similarly affect other actors who interact with the judicial system. For litigants, majority court opinions function as guides when shaping what they propose in written argument and oral argument. For other states and federal branches of government, and federal bureaucracies, the Supreme Court's decisions powerfully influence the way legislation is written and mold the way bureaucracies act.[28] As the Court continues to pursue this policy of shadow docket decisions making, it can be expected to see further damage done to the American Judicial system.

C. Specialized Borrowed-Judge Court

The continued use of the shadow docket to respond to these increasingly important legal questions has both damaged the American legal system and put significant stress on the legitimacy of the Court. The root cause of these issues is that the Court lacks transparency in these controversial decisions, leading to the weakening of its image as an independent judiciary. Solving this issue does not require that the shadow docket must be done away with all together, however. Testifying before the Senate Committee on the judiciary, Professor Stephen Vladeck stated, "the problem is not the shadow docket itself; for as long as we have a Court the jurisdiction of which extends to emergency applications, some action on the shadow docket is inevitable." [29]Ultimately the issue with the shadow docket is the way the Court has used it over the past decade. In order to remedy this issue, the Supreme Court needs a way to handle complex emergency issues in an efficient, transparent way. Providing the Court a route to handle these issues transparently while saving the shadow docket for procedural minutia could be done effectively through the creation of a specialized court.

Congress has frequently taken this route when having a court of judges focused on handling a particular niche of legal problems

28 Corley, *supra.* at 42.

29 *Texas's Unconstitutional Abortion Ban and The Role of the Shadow Docket: Hearing Before the S. Comm. on Judiciary*, 117th Cong. (2021) (Testimony of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law) 32.

seemed like a beneficial/appropriate solution. For example, following *Katz v. United States* and *United States v. United States District Court*, the Court ruled that in order for the United States government to be able to conduct electronic domestic surveillance in congruence with the fourth amendment, warrants needed to be issued. Justice Powell suggested to Congress that for "sensitive cases" a warrant could be procured by going to a "specialized designated court".[30] Following this suggestion, Congress established the Foreign Intelligence Surveillance Court (FISC) to conduct such specialized tasks. The FISC has since provided the government both oversight and efficiency when it comes to conducting domestic surveillance on those deemed to be foreign spies, a complicated task if left to the generalized courts. Similarly, following issues removing noncitizens for terrorist activities due to immigration law barring the use of classified information in a case, the Reagan Administration pushed for the creation of a court that had the power to order removal based on classified information. This eventually led to the creation of the Removal Court. Outside of these two particular examples, there are several other specialized courts that Congress has created to handle particular areas of law, from bankruptcy to international trade. Professor Lawrence Baum, an expert in the field of specialized courts, has stated, "specialization sometimes has powerful effects on the work of the courts. Those realities merit greater attention from students of the courts and from policy makers who shape the structure of the judiciary".[31]

A specialized appellate court should be established to handle petitions for emergency relief that would normally be addressed to the Supreme Court for relief. Like the FISC's responsibility to handle specialized cases surrounding the granting of warrants to conduct surveillance on foreign spies within the United States, the Emergency Relief Court would be required to handle petitions of emergency relief resulting from congressional, executive, and state action. Granting emergency relief is a unique burden that is placed on judges. Federal and State judges often have the luxury of time

30 Lawrence Baum, Specializing the Courts 82 (2010).

31 Baum, Specializing, 230 (2010).

when issuing a judgment. Time gives the judges the chance to be well briefed on the case before them, go through arguments, and then write a thorough opinion. Emergency petitions give no such luxuries. The judges granting relief need to be briefed and decide whether or not to grant the petition while avoiding the appearance of partisanship, an issue that has been plaguing the Supreme Court. These unique problems warrant the creation of the Emergency Relief court to handle these novel issues.

How will this new court be structured? While the specific structure of this court would ultimately be determined through congressional statute, the structure of the FISC provides a blueprint that could be mirrored in the creation of the Emergency Relief Court. The FISC sits in Washington DC and is composed of eleven federal district court judges who are designated by the Chief Justice of the Supreme Court. Each judge serves a maximum of seven years with term expiration dates staggered in order to provide continuity to the court. The judges must be drawn from at least seven of the United States judicial circuits and three must reside within twenty miles of the District of Columbia. Judges then typically sit for one week at a time on a rotating basis. There are at least three reasons as to why this structure is beneficial in the operation of the Emergency Relief court. First, it attempts to be a reflection of judges all across the union. This is important because emergency petitions come from all over the United States concerning issues that are equally as diverse. Having district judges sit on this court who originate from these different places provides the experience required to handle the diverse petitions that will come before the court. Second, it gives the Supreme Court oversight. The ability of the Chief Justice to select the judges sitting on this court gives the Supreme Court the chance to place trusted judges in these important positions and thus give more legitimacy to this court in the eyes of the high court's sitting justices. Third, this structure would be the most efficient manner to respond to emergency petitions. Similar to the current process established to respond to emergency relief petitions, this court would have one justice decide whether or not to bring the emergency petition before the eyes of the rest of the members of the court. Due to the

limited number of emergency petitions filed and granted each year, this would be the most efficient way to respond to those petitions. [32]

This court would follow the same established pattern for granting emergency relief as published by the Supreme Court. Where this court would differentiate from the Supreme Court's use of the shadow docket is in its transparent procedure. While the Supreme Court will only provide a vaguely, if at all, written opinion when issuing emergency relief, this Emergency Relief Court will be required to provide opinions that are customary of a normal court when issuing judgements. This rule would be instituted in order to avoid brief opinions being drafted by this new court as well. This gives two primary benefits. First, it provides clear direction to the involved parties as to why the court ruled in the manner in the way that it did. Not only does this work to better inform the direct parties involved but it gives guidance to future parties engaged in a similar dispute to understand how the court will rule in a controversy similar to their own. Second, it instills legitimacy to both the court and the decision. As this paper has discussed, courts are meant to be independent bodies that rely on their rationale to have their decisions enforced. This court providing opinions customary of regular case opinions will ensure that this court does not have a legitimacy crisis and that their decisions will faithfully be enforced.

While there are many benefits to the introduction of a new specialized court, there are also critiques. One critique is that the creation of a new court will further drain already strained resources, limiting resources to the other courts.[33] While this is a legitimate concern in a deficit concerned society, the ability of the court to respond to emergency petitions in an efficient manner will address some of that concern by providing financial saving benefits through this specialized court's efficacy in handling cases. While the court's efficacy will not completely make up for the financial expenditures, it is important to remember that it is difficult to put a price

32 Baum, Specializing, 15 (2010).

33 Chris Burke, *Advantages and Disadvantages of Specialized Courts*, Legal Beagle (June 20, 2017), https://legalbeagle.com/8398649-advantages-disadvantages-specialized-courts.html

on justice and the legitimacy of one of the United States' three major branches. While budget concerns are valid, they should not hamper justice being delivered to the proper parties. Another critique is that specialization tends to cause courts to develop policy-oriented missions which subsequently would mean this body is acting more like an administrative agency rather than an independent court.[34] While this concern is characteristic of specialized courts like a tax court or bankruptcy court, this Emergency Relief court has the benefit of being specialized in emergency petitions while also being a generalized court in the policy questions it addresses. This prevents the court from developing into a policy-orientated body as there is not a single policy this court will solely handle.

The benefits of establishing a specialized court system to handle emergency applications are numerous. Rather than leave the Court this shadow docket to respond to emergency petitions, this will provide the Supreme Court an opportunity to return the shadow docket to its original purpose, that being mostly procedural minutia. This also ensures that legal questions that require emergency relief get the transparency that the public is asking for. This similarly will solve problems that the increased use of the shadow docket has caused towards the legal system. Rather than confuse lower courts and others involved with the Court, these different units in the legal system will no longer be bound by precedent of the specialized court system. In sum, the creation of a specialized court system will bring normalcy back to the American legal system and restore legitimacy to the Supreme Court.

IV. Conclusion

In conclusion, this controversy surrounding the shadow docket is complex. There are opponents and proponents on every side of the Court's ruling regardless of the docket from which the case was decided. The dilemma with the shadow docket is that it is not providing evidence of deliberation or impartiality for its decisions regardless of what party benefits from its decision. Failing to stay in line

34 Baum, Specializing the Courts 227 (2010).

with a consistent pattern of decision making through the shadow docket as well as providing little to no rationale behind its decisions is making it increasingly difficult to defend important decisions coming out of this docket. Not only does this system of shadow docket decision making impair the ability of the American legal system to operate efficiently, but it is mangling the legitimacy of the Supreme Court as an institution.

What this paper offers is a way to rehabilitate the legitimacy of the Court and its functionality to the American legal system through the establishment of a specialized court system designed to handle emergency petitions. This new court system will be able to restore the legitimacy of the Court by taking these controversial shadow docket decisions away from the Court and reemphasizing the decisions made through the normal merits docket. This new court system will similarly restore the functionality of the American legal system by isolating emergency petition actions to this new court system and removing any confusion caused by the vague emergency orders issued by the Supreme Court.