

Op-ed | **The Unthinkable Has Happened**

by *Peter G. Verniero*

The once unthinkable has now happened. A draft opinion of the United States Supreme Court has leaked to the press, apparently for the first time in history. The leak itself reflects another sad step toward casting the court as a political body. Whatever your preferred jurisprudence, a leak of this kind is a most unfortunate development for the rule of law.

The leak involved the case of *Dobbs v. Jackson Women's Health Organization*, which implicates abortion rights found under *Roe v. Wade*. That the leak related to an abortion decision only exacerbates the harm that it has inflicted on the judiciary as an institution. Few issues other than abortion have caused more national divisiveness. There are deeply held views on both sides. It is a critically important subject deserving of an orderly judicial deliberation.

That orderly deliberation has now been interrupted. A wave of public praise or criticism for the draft opinion is being registered by advocates, depending on their perspective. Such commentary after an opinion's official release is a healthy hallmark of democracy. But a high volume of commentary on a draft opinion runs the risk of something else entirely.

A judicial opinion goes through many iterations before it is officially released. Sometimes the final product closely resembles the first draft, sometimes not. Indeed, sometimes a first draft of a majority opinion turns into a concurring or dissenting opinion by the time the court is finished with it. Unless the final version of *Dobbs* ends up, word for word, being the same as the leaked version, we always will wonder whether the final version was unduly influenced by public commentary.

This is not what the founders had intended. Alexander Hamilton could not have been clearer in *Federalist Paper No. 78* that to do their jobs properly, judges had to be independent of the elected branches. That independence is accomplished by lifetime tenure and the freedom to act without regard to popular opinion or political influences. A leaked judicial opinion trespasses on the court's work by distorting the entire dynamic in which judicial decisions are reached and finalized.

And then there is the related problem of broken trust. Trust among the justices. Trust among the justices and their law clerks and staffs. The trust that, until now, has been the bedrock of judicial deliberations. Namely, that justices should be free to have candid discussions in the form of draft opinions without the worry of an opinion's premature release. Will the justices in *Dobbs* now feel "locked in" to the leaked draft? Or, to the contrary, will they feel pushed into changing their vote due to the tumult caused by the leaked opinion?

Perhaps those and similar questions are what prompted Chief Justice John Roberts to issue a forceful public statement the day after the leak. "To the extent this betrayal of the confidences of the Court was intended to undermine the integrity of our operations, it will not succeed," he said. "The work of the Court will not be affected in any way." Time will tell whether those reassuring words will hold true (to the extent we can ever know for sure).

Yes, there are regular leaks of information from Congress and the White House. At times, fragments of judicial deliberations have been revealed.

And, yes, some might say that in the age of social media, a leak of a draft Supreme Court opinion was inevitable. Those things may be so, but a leak of an entire draft opinion nonetheless strikes at the core of the judicial function in ways not visited on the rest of government.

The protocol of our nation's highest court has been seriously ruptured. Whether and how that rupture is repaired remains to be seen. We all should hope that this unprecedented breach will not happen again. For if it regularly occurs, our judiciary will be transformed into something it was never intended to be.

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