

Office of the Marshal
Supreme Court of the United States
Washington, D.C. 20543

Marshal's Report of Findings & Recommendations
January 19, 2023

On May 2, 2022, Politico published a copy of the draft majority opinion in *Dobbs v. Jackson Women's Health Org., No. 19-1392*. On May 3, 2022, the Chief Justice publicly announced that he had directed the Marshal to launch an investigation into the public disclosure of the draft majority opinion. On May 5, 2022, the Marshal initiated an investigation to determine who made the unauthorized disclosure of the draft majority opinion. The Marshal, in consultation with close advisors at the Court, developed an investigative plan of action. Investigators followed that plan, documented the course of their investigation, and reported the results. Section II of this report captures the material findings and recommendations. The investigative team consists of seasoned attorneys and trained federal investigators with substantial experience conducting criminal, administrative and cyber investigations.

The investigation has determined that it is unlikely that the Court's information technology (IT) systems were improperly accessed by a person outside the Court. After examining the Court's computer devices, networks, printers, and available call and text logs, investigators have found no forensic evidence indicating who disclosed the draft opinion. They have conducted 126

formal interviews of 97 employees, all of whom denied disclosing the opinion. Despite these efforts, investigators have been unable to determine at this time, using a preponderance of the evidence standard, the identity of the person(s) who disclosed the draft majority opinion in *Dobbs v. Jackson Women’s Health Org.* or how the draft opinion was provided to Politico. Investigators continue to review and process some electronic data that has been collected and a few other inquiries remain pending. To the extent that additional investigation yields new evidence or leads, the investigators will pursue them.

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I. Conduct of the Investigation

The draft majority opinion was circulated on February 10, 2022. Politico published the draft opinion on the evening of May 2. The investigation focused on Court personnel – temporary (law clerks) and permanent employees – who had or may have had access to the draft opinion during the period from the initial circulation until the publication by Politico. In the initial phase, investigators sought to gain an understanding of the details of the opinion circulation process; the Court’s policies and training addressing confidentiality; laws, if any, that were potentially violated by the unauthorized disclosure; and IT policies in place concerning the handling of sensitive information. The investigators preserved, collected, and reviewed any forensic information that could be found on the Court’s IT systems and conducted formal interviews with Court personnel. The investigative team also enlisted external technical assistance when necessary to examine specific items of evidence.

A. Rules and Court Policies Protecting Confidentiality.

By long-standing tradition, the Court’s deliberations are secret. As Justice Powell explained, “[t]he integrity of judicial decision making would be impaired seriously if we had to reach our judgments in the atmosphere of an

ongoing town meeting.”¹ Several Court rules and policies prohibit the disclosure of confidential, pre-decisional Court information. The Court presents onset and periodic training to employees on these policies.

(1) The Court’s Human Resources Manual.

The Court’s Human Resources Manual provides:

Employees must not disclose or use any confidential information except as required in the performance of official duties or except as expressly permitted by the Court or the employee’s supervising Court Officer.

“Confidential information” means any information relating to the Court or its employees that is not made public through means authorized by the Court. Confidential information includes without limitation:

- Non-public information relating to a case, such as the outcome of a case, the vote in a case, the identity of the author of any opinion in a case, and the date on which a decision in any case will be announced;
- The views of any Justice relating to cases or issues that have been before the Court, are currently pending before the Court, or are likely to come before the Court;
- Non-public information related to the Court’s policies, procedures, or practices; and
- Non-public personal information about individuals who work at the Court.

A former employee remains bound to the same restrictions on disclosure of confidential information that apply to a current employee, except as modified by the Court or the Court Officer supervising the employee’s former office.

¹ See Lewis F. Powell, Jr., What Really Goes on in the Supreme Court, in David M. O’Brien, ed., *Judges on Judging: Views from the Bench* 84 (1997).

Federal law prohibits the unauthorized disclosure or use of information by federal employees and provides for penalties of termination, fines, or imprisonment for unauthorized disclosure or use of information. *See, e.g.*, 18 U.S.C. §§ 641, 1905, 2071.

S.Ct. Human Resources Manual § 6.03 (Oct. 4, 2021). The Legal Office presents onset and periodic ethics training to all employees and the training addresses the Court’s confidentiality requirements and policy.²

(2) The Supreme Court Law Clerk Code of Conduct.

The Law Clerk Code of Conduct provides:

The law clerk owes the appointing Justice, all other Justices, and the Court as an institution, duties of complete confidentiality, accuracy, and loyalty. Justices rely upon law clerks’ assistance in exploring issues in pending cases. Justices rely on confidentiality in discussing the performance of their judicial duties and the work of the Court, and they expect and require complete loyalty from their own law clerks and the clerks of all other Justices.

...

The law clerk, like the Justices, holds a position of public trust and must comply with the demanding standards of that position.

...

Separate and apart from the duty owed by each law clerk to the appointing Justice is the duty owed by each law clerk to the Court as a body. Each law clerk is in a position to receive highly confidential circulations from the Chambers of the other Justices and other Court offices. All information from all Chambers and Court offices pertaining to the work of the Court is confidential

² The HR Manual also states that employees must take guidance from the Code of Conduct for Judicial Employees. *See id.* § 6.01. That code provides that “[a] judicial employee should avoid making public comment on the merits of a pending or impending action and should require similar restraint by personnel subject to the judicial employee’s direction and control.” Code of Conduct for Judicial Employees, Canon 3D(1). “A judicial employee should not use for personal gain any confidential information received in the course of official duties.” *Id.*, Canon 3D(2). “A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties. A former judicial employee should observe the same restriction on disclosure of confidential information that applies to a current judicial employee, except as modified by the appointing authority.” *Id.*, Canon 3D(3).

information. “Confidential information” means any information relating to the Court or its employees that is not made public through means authorized by the Court or by the law clerk’s appointing Justice, including without limitation:

- the outcome of a case; the vote in a case; the identity of the author of a majority, concurring, or dissenting opinion; the date on which an opinion is to be announced;
- the positions or preliminary ideas or views of any Justice with respect to cases that have been before the Court, are pending before it, or are likely to come before it;
- information relating to the Court’s policies, procedures, and practices; and
- personal information about individuals who work at the Court.

Nothing in this Code precludes the reporting of potential misconduct to the law clerk’s appointing Justice, the Chief Justice, the Counselor to the Chief Justice, the Legal Counsel, or the Human Resources Director

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C. Forensic IT information.

It is unlikely that the public disclosure was caused by a hack of the Court's IT systems. The Court's IT department did not find any indications of a hack but continues to monitor and audit the system for any indicators of compromise or intrusion into the Court's IT infrastructure. The investigators have likewise not uncovered any evidence that an employee with elevated IT access privileges accessed or moved the draft opinion.

The investigative team obtained forensic information from the Court's IT systems in order to identify individuals of interest to the investigation, and to furnish the basis for questioning of employees. In several cases, such forensic information caused investigators to hold multiple interviews with certain employees. The investigative team reviewed the operating system event logs and other logging for artifacts relevant to the draft majority opinion. One initial focus of that review was to determine whether the draft opinion had been moved electronically from the Court's IT system prior to the Politico publication. They found that certain employees emailed the draft document to other employees, with approval. There was no evidence discovered that anyone emailed the draft opinion to anyone else, although technical limitations in the Court's computer recordkeeping at the time made it impossible to rule out this possibility entirely.

The investigators were not able to readily search and analyze all event logs because at the time the system lacked substantial logging and search functions.

The investigators determined that in addition to the Justices, 82 employees had access to electronic or hard copies of the draft opinion.

On February 10, the draft opinion was sent via email to a distribution list consisting of law clerks and permanent personnel who work on opinions. The vote memos were also subsequently sent to this list. There were 70 unique, active users on the distribution list. On March 22, eight more permanent personnel received the draft opinion via email. The investigators also found that two additional permanent personnel accessed the draft opinion electronically by separate means. In sum, the investigators determined that 80 personnel received or had access to electronic copies of the draft opinion.

The draft majority opinion was also distributed in hard copy to some Chambers. The two Chambers personnel who were not on the email distribution list would have had access to the circulated hard copies and to any other copies that were printed in Chambers. Thirty-four personnel confirmed they printed out copies of the draft opinion and four were unsure; many printed out more than one copy. And, as noted in Section D below, in the course of their interviews, several personnel acknowledged that they did not

treat information relating to the draft opinion consistent with the Court's confidentiality policies.

The investigators searched all available logs for evidence of who handled the draft majority opinion after circulation. A few circumstances justified closer inspection, which was conducted but did not result in any solid leads as to the identity of who may have disclosed the document. Consistent with standard policy for most law enforcement agencies, this report does not identify any individuals who received additional scrutiny because (a) certain aspects of the investigation may yield additional pertinent information and (b) in any event, there is not adequate evidence, even applying a preponderance of the evidence standard, to conclude that any particular individual was responsible for the disclosure.

The investigators did not find any logs or IT artifacts indicating that the draft opinion was downloaded to removable media, but it is impossible to rule out.

During the search of logs for networked printers, the investigators discovered very few confirmed print jobs of the draft majority opinion. This is the case for two reasons. First, for some networked printers there was very little logging capability at the time, so it is likely that many print jobs were simply not captured. Second, the investigators learned that many printers in

the building, including some assigned to Chambers, were locally connected printers and not resident and tracked on the Court's networks. This means that the print logs for these printers were stored only locally in the printers' internal memory. These local, desk-side printers typically keep a log of the last 60 documents printed on the printer. The investigators obtained the hard copy print outs of the logs from 46 local printers but found nothing relevant in the limited logs.

The investigators collected Court-issued laptops and mobile devices from all personnel who had access to the draft opinion. To date, the investigators have found no relevant information from these devices.

The Court historically has not issued mobile phones to all employees. However, all employees who were requested to do so voluntarily provided call and text detail records and billing statements for their personal devices for a defined period to the best of their abilities. The investigators reviewed the call and text logs retrieved but found nothing relevant in the limited logs.

D. Interviews.

The investigators to date have conducted 126 formal interviews of 97 personnel. At the initial interviews, the investigators informed all witnesses that they had a duty to answer questions about their conduct as employees; that disciplinary action including dismissal could be undertaken if they refused

to answer or failed to answer fully and truthfully; that the answers provided and any resulting information or evidence could be used in the course of civil or administrative proceedings; and that such information or evidence could not be used against them in any criminal proceedings unless they knowingly and willfully provided false statements. All personnel agreed to be interviewed and many were interviewed more than once.

For the initial interviews with employees, investigators reviewed any available legal research history while bulk requests were pending with the service providers. The purpose was to determine whether an employee might have researched the legality of disclosing confidential case-related information – possibly indicating the person’s intention to do so or concern about having done so after the fact. Investigators later obtained, analyzed and confirmed legal research history for all employees directly from the service providers. The investigators did not find anything suspicious or relevant in these records.

At the conclusion of the initial interviews, each employee was asked to sign an affidavit, under penalty of perjury, affirming that he or she did not disclose the *Dobbs* draft opinion to any person not employed by the Supreme Court, did not disclose to any person not employed by the Supreme Court any information relating to the *Dobbs* draft opinion not made public through means authorized by the Court, and had provided all of the pertinent information known to him or her relating to the disclosure or publication of the *Dobbs* draft

opinion. Each employee was then asked to swear to the truth of the statements in the affidavit before a Notary Public. Each of these employees signed a sworn affidavit. A few of those interviewed admitted to telling their spouses about the draft opinion or vote count, so they annotated their affidavits to that effect. [REDACTED]

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Some individuals admitted to investigators that they told their spouse or partner about the draft *Dobbs* opinion and the vote count, in violation of the Court's confidentiality rules. Several personnel told investigators they had shared confidential details about their work more generally with their spouses and some indicated they thought it permissible to provide such information to their spouses. Some personnel handled the *Dobbs* draft in ways that deviated from their standard process for handling draft opinions.

Investigators carefully evaluated the statements and conduct of personnel who displayed attributes associated with insider-threat behavior – violation of confidentiality rules, disgruntled attitude, claimed stressed, anger at the Court’s decision, etc. – and also weighed behavior and evidence that would tend to mitigate any adverse inferences. Investigators also carefully evaluated whether personnel may have had reason to disclose the Court’s draft decision for strategic reasons.

Investigators looked closely into any connections between employees and reporters. They especially scrutinized any contacts with anyone associated with Politico. Investigators also assessed the wide array of public speculation, mostly on social media, about any individual who may have disclosed the document. Several law clerks were named in various posts. In their inquiries, the investigators found nothing to substantiate any of the social media allegations regarding the disclosure.

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II. General Findings and Recommendations.

At this time, based on a preponderance of the evidence standard, it is not possible to determine the identity of any individual who may have disclosed the document or how the draft opinion ended up with Politico. No one confessed to publicly disclosing the document and none of the available forensic and other evidence provided a basis for identifying any individual as the source of the document. While investigators and the Court's IT experts cannot absolutely rule out a hack, the evidence to date reveals no suggestion of improper outside access. Investigators also cannot eliminate the possibility that the draft

opinion was inadvertently or negligently disclosed – for example, by being left in a public space either inside or outside the building.

Assuming, however, that the opinion was intentionally provided to Politico by a Court employee, that individual was evidently able to act without being detected by any of the Court’s IT systems. If it was a Court employee, or someone who had access to an employee’s home, that person was able to act with impunity because of inadequate security with respect to the movement of hard copy documents from the Court to home, the absence of mechanisms to track print jobs on Court printers and copiers, and other gaps in security or policies.

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