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Leak Likely To Spur Paranoia At High Court, Legal Pros Say

By **Dorothy Atkins**

Law360 (May 3, 2022, 10:11 PM EDT) -- The bombshell draft opinion overturning *Roe v. Wade* that was leaked from an unknown source Monday is an unprecedented occurrence that will likely increase paranoia among justices, degrade the reputation of the U.S. Supreme Court for being nonpartisan and hamstringing judicial deliberations going forward, according to legal experts.

The early look at the court's thinking was published by Politico on Monday evening, and it suggests that a majority of justices will completely nix both *Roe* and the high court's subsequent ruling in *Planned Parenthood v. Casey*, which largely affirmed the right to terminate a pregnancy.

Chief Justice John Roberts **released a statement early Tuesday** confirming that the draft opinion — which was written by Justice Samuel Alito, and joined by Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett — is authentic, but he emphasized it is not the court's final decision.

Justice Roberts also asked the marshal of the Supreme Court to launch an investigation into who leaked the document, calling the leak a "singular egregious" breach of trust that is an affront to the court and its staff.

Distrust and Suspicion Within an Ivory Tower

Legal experts agreed there's no specific statute that criminalizes the act of leaking a justice's draft opinion, but they said the leak will likely force the high court to implement stricter rules on documents prepared during judicial deliberations.

"I would expect more leaks and more draconian rules, like drafts only being located on one computer or penalties for unauthorized circulation," said Ford O'Brien LLP partner Kevin O'Brien, a former federal prosecutor who is now a white collar defense attorney.

O'Brien added that Justice Roberts has raised the stakes by announcing an investigation, instead of "tempering temperatures down a little bit."

Paranoia has been growing in all branches of the government with ever-increasing partisan divides, and that paranoia can be counterproductive to the workings of government, but it will likely now spread at the nation's top court, O'Brien said.

"I think paranoia is the word that will reign to some extent inside the court and it's too bad," he said. "You don't have a relaxed collegiate atmosphere."

Tom Lee, a constitutional law professor at Fordham University School of Law and a former Supreme Court clerk, agreed the leak could deter justices from engaging in judicial deliberations and lively debates during conferences, which are typically held behind closed doors, and that's a bad thing for consensus building, judicial decision-making and democracy.

"[The leak] is going to push the justices to become more private and to be more suspicious of each other, and that's very unfortunate," Lee said.

The Supreme Court's History of Leaks

After news of the leak broke on Monday, media law professor Jonathan Peters, who has faculty appointments at the University of Georgia School of Law and UGA's journalism school, took to Twitter to recount a handful of leaks that have occurred during the Supreme Court's 233-year history.

In 1852, the New York Tribune reported the outcome of [Pennsylvania v. Wheeling and Belmont Bridge Co.](#) 10 days before the justices handed down an opinion. And when the case returned to the court two years later, the Tribune again publicized the court's opinion before the justices revealed it, according to Peters. Later that year, the Tribune also published a running account of the deliberations in [Dred Scott](#), Peters said.

There have been more recent leaks, including the 1968 leak published in The New York Times, which sourced its intel from a law clerk who shared details regarding Justice Abraham Fortas' extrajudicial activities to support the Vietnam War, according to Peters.

Peters also noted there was a "wave of leaks" in the 1970s, which began in June 1972 when the Washington Post published Justice William O. Douglas' memo to his colleagues regarding the impending Roe v. Wade decision.

Still, in past cases, the leaks consisted of excerpts or they merely indicated which way a panel was leaning. Legal experts agree it is unprecedented for a full draft opinion to be leaked to the media.

"Leaking in general is not unprecedented (but still very rare), and leaking a full draft majority opinion does seem to be unprecedented," Peters wrote on Twitter.

A Clerk's Code of Conduct

Carolyn Shapiro, professor of law and co-director of Chicago-Kent College of Law's Institute on the U.S. Supreme Court, told Law360 on Tuesday that when she clerked for Supreme Court Justice Stephen G. Breyer from 1996 to 1997, there was a code of conduct that law clerks were required to follow, which emphasized confidentiality.

"It was really just drilled into us," she said. "And draft documents were put into burn bags so they could be destroyed. It was a pretty significant part of the clerkship."

At the time, there were roughly three dozen clerks who could access draft opinions, which are distributed among justices in multiple rounds so they can respond to arguments. But Shapiro noted there were also other support staff in the courthouse who could view those documents.

Shapiro said if it turns out that a law clerk leaked Justice Alito's draft opinion, the conduct could have serious consequences for their career and that alone would likely deter most clerks, since clerkships are highly prestigious and fiercely competitive among early-career lawyers.

Lee recalled that when he clerked for Justice David Souter in 2001 and 2002, the high court would destroy draft opinions and not merely place them in the garbage. But he noted justices would circulate digital copies of the opinions via an email Listserv in addition to hard copies.

Lee, who also worked as an intelligence officer and served as special counsel in the U.S. Department of Defense, observed the Pentagon has various requirements for different classified documents because at the DOD, "leaks were facts of life." However, the DOD's classification standards don't apply to any opinions at the high court, he said.

"There's nothing like that at the Supreme Court," he said.

Lee said that during his clerkship, it was also not unusual for justices to write dozens of draft opinions and in at least one instance, it took 55 drafts before the justice landed on a final version.

Justice Alito's leaked draft opinion has a February date and therefore it's likely the draft has gone through multiple revisions since then, Lee said. He also observed there may be significance to the fact the leaked document is aged and not more current.

"It is an interesting puzzle," he said. "Why are we seeing a draft that's almost three months old when there are most certainly more recent drafts?"

A Question of Motive

Legal experts offered a wide range of potential motives for leaking the draft opinion, a document that Shapiro said is "very extreme, and opens the door to some really drastic changes in law not only limited to abortion."

Shapiro said it's plausible the leak could be a strategic effort to sway the opinions of the other justices who may be resistant to the majority's draft opinion, and Lee and O'Brien suggested it may be a last-ditch effort by a progressive clerk to publicize the draft opinion in the hope it could sway lawmakers to codify Roe v. Wade into law. But each expert acknowledged their guesses are merely speculation.

Still, O'Brien said the U.S. Marshal's probe will likely be able to discover who leaked the document.

"They will find out," he said. "It's a small universe of people [who have access to the draft opinions], it's not like finding a needle in a haystack exactly."

O'Brien added that regardless of who leaked the document, the consequences for that individual are unknown.

"Let's say they determine it is 'X clerk' in [Justice] Breyer's chambers? What do you do then? Do you hang them out to dry? There are no formal rules governing this stuff," O'Brien said. "The Supreme Court has always prided itself on not being subject to those rules. That's why ethics rules don't apply. They apply to [lower] courts ... There is no applicable statute that would apply to this situation."

Justices as 'Politicians in Robes'

Regardless of the source of the leak, Lee and other experts agreed the leak is bad for the high court's reputation, its goal of rising above partisanship and its effort to combat the public perception that justices are just "politicians in robes."

In the day following the leak, there were already protests, demonstrations and demands by Democratic lawmakers to codify Roe v. Wade into law — and even a self-proclaimed "pro-life Spider-Man" climber who scaled the 1,070-foot Salesforce Tower in downtown San Francisco.

There have also been plenty of jokes, some made at the expense of the Supreme Court justices.

"Sooo ... it appears the Supreme Court believes their opinions have a fundamental right to privacy ...," quipped comedian Jon Stewart on Twitter.

O'Brien said the leak has already degraded the reputation of the court because it reveals partisan opinions of justices who had pitched themselves during confirmation proceedings as respecting the importance of precedent.

"Now you realize what their true beliefs were," he said. "It was all a sham. It's like that scene in 'The Wizard of Oz,' when the great and powerful wizard pulls back the curtain and it's just a little man. That's what it all was. All pretext. There was no great, powerful wizard. They're all little men, running around trying to advance their agenda."

For her part, Shapiro thinks it is premature to say there will be more leaks in the future, but she agreed some reputational damage has been done.

"[More leaks] would surprise me," she said. "But it does contribute to the perception that the Supreme Court is a political institution, which it is. But I don't think it wants to be seen as political in this particular instance."

--Additional reporting by Chris Villani. Editing by Kelly Duncan and Lakshna Mehta.

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