

Putting Together the Puzzle of SCOTUS Ethics Reform: Leaks Must Be a Piece

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TABLE OF CONTENTS

INTRODUCTION	944
I. A HISTORY OF LEAKS: FROM <i>WHEELING AND BELMONT BRIDGE COMPANY TO MOYLE</i>	946
II. THE COST: THE SUPREME COURT’S LEGITIMACY	950
A. IS CONFIDENTIALITY VITAL FOR THE COURT TO HOLD ONTO ITS LEGITIMACY?	950
B. DO LEAKS RAISE POLITICAL INFLUENCE CONCERNS OVER THE COURT?	953
C. HOW DOES TECHNOLOGY CHANGE THE LEAK DISCUSSION?	955
1. INFORMATION SECURITY WITHIN THE COURT	955
2. POST-LEAK GUIDELINES AND INVESTIGATIONS	957
III. THE SOLUTION	958
A. AN ENFORCEMENT MECHANISM IN THE CODE	958
B. CONGRESSIONAL ACTION	960
CONCLUSION	961

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INTRODUCTION

The Supreme Court of the United States endures as an institution and exercises its critical power through its public legitimacy. That legitimacy is now in question. The American public's trust in the highest court is near a record low.¹ This reality coincides with the unprecedented leaks of entire draft Supreme Court opinions. To understand the current skepticism toward the judiciary, it is necessary to discuss the role that leaks have played—and continue to play—in legal history.

Against this background, the publication of the first Supreme Court Code of Conduct² (hereinafter the Code) in November of 2023 illustrates that the judicial landscape is changing. The Code was published after years of reports concerning the Justices' ethically questionable conduct. The Justices have been criticized for accepting gifts and free travel, along with refusing to recuse themselves. For example, Justice Thomas accepted a Frederick Douglass Bible valued at \$19,000 and a trip to the exclusive Bohemian Grove;³ Justice Breyer took approximately 225 subsidized trips over fourteen years, including a trip to Nantucket funded by David Rubenstein (a private equity mogul);⁴ Justice Scalia stayed at a lavish hunting lodge; and Justice Ginsburg toured Israel at the expense of a billionaire.⁵ Moreover, Justice Thomas failed to recuse himself in *Trump v. Thompson*,⁶ a case involving the subpoena of White House records regarding January 6, 2021. This was a “textbook case” for recusal because his wife's text messages regarding overturning the results of the 2020 presidential election were potentially at issue.⁷ The preceding occasions are

1. See Megan Brenan, *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sept. 29, 2023), <https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx?version=print> [<https://perma.cc/9QVU-UACW>] (finding that “less than half of Americans say they have ‘a great deal’ or ‘a fair amount’ of trust and confidence” in the Court, where prior to 2022 “trust in the judicial branch averaged 68%.”); Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Aug. 8, 2024), <https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low/> [<https://perma.cc/N3ZS-EJHM>] (reporting that the “court’s favorable rating is 23 percentage points lower than it was in August 2020,” based on a study conducted in July of 2024).

2. SUPREME COURT OF THE UNITED STATES, STATEMENT OF THE COURT REGARDING THE CODE OF CONDUCT (Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [<https://perma.cc/TSK4-TB57>] [hereinafter THE CODE].

3. Richard A. Serrano & David G. Savage, *Justice Thomas Reports Wealth of Gifts*, L.A. TIMES, (Dec. 31, 2004) <https://www.latimes.com/archives/la-xpm-2004-dec-31-na-gifts31-story.html> [<https://perma.cc/2WFW-Q5KL>].

4. Editorial Board, *The Ethics of Nine of the Most Powerful People in America*, N.Y. TIMES (Apr. 14, 2023), <https://www.nytimes.com/2023/04/14/opinion/editorials/clarence-thomas-trips-supreme-court.html> [<https://perma.cc/WK5B-M7FS>].

5. Jodi Kantor & Abbie VanSickle, *Inside the Supreme Court Ethics Debate: Who Judges the Justices?*, N.Y. TIMES (Dec. 5, 2024), <https://www.nytimes.com/2024/12/03/us/supreme-court-ethics-rules.html> [<https://perma.cc/4Y8P-WECL>].

6. *Trump v. Thompson*, 142 S. Ct. 680, 680 (2022).

7. Amy B. Wang & Brady Dennis, *Democrats Urge Clarence Thomas to Recuse Himself After Wife's Texts*, WASH. POST (Mar. 27, 2022), <https://www.washingtonpost.com/politics/2022/03/27/clarence-ginni-thomas-supreme-court-texts/> [<https://perma.cc/J3AK-VAPX>]; see Richard W. Painter, *SCOTUS House: Can a Supreme Court Ethics Lawyer and Inspector General Help Get This Fraternity Under*

just a few of the Justices' contested actions. Thereafter, the Court recognized that its status as the only unregulated body within the judiciary "ha[d] led . . . to the misunderstanding that the Justices . . . regard themselves as unrestricted by any ethics rules."⁸ They hoped that adopting the Code would "dispel this misunderstanding."⁹

The Code was an important first step in judicial reform, and the Court must be applauded for adopting a code of ethics. But there is much more to be done; the puzzle of a revised code of ethics for the Court will include many parts. The draft opinion leaks of *Dobbs v. Jackson Women's Health Organization*¹⁰ and *Moyle v. United States*¹¹ establish that one key piece to the puzzle must be ethical guidelines addressing Supreme Court leaks. The presence of draft opinion leaks poses ethical considerations and concerns for the Justices and their staff. Integrity, confidentiality, and democracy are central to the Court's legitimacy. Integrity is a bedrock that judges must champion to earn public respect and trust as interpreters of law. Confidentiality allows for open discussion and deliberations that enhance the quality of opinions handed down. And democracy ties the judiciary to the other branches, allowing for a system of checks and balances. Yet, the system is in a quagmire because those important principles are being questioned. Solid ethical frameworks are instrumental to gaining back the trust of the American people.

The basis of the legal profession is ethical rules and regulations. Every law student must take a course in professional responsibility and later is required to pass the Multistate Professional Responsibility Examination to be admitted to their state bar. Lower courts and SCOTUS are now guided by codes of conduct. Yet against this background, the presence of SCOTUS leaks shows faults in the system. Leakers, at a minimum, have failed to apply the "smell test,"¹² which outlines taking a pause and relying on common sense to contemplate whether the correct course of action is being taken. This is a critical oversight. Applying this test would reveal that leaks at the highest level of the judiciary are wrong.

This Note explores the implications of leaks, and why affirmative steps must be taken to prevent them. Part I summarizes the history and scope of SCOTUS leaks. Part II delves into the key questions surrounding the Court's legitimacy. And Part III discusses the implementation of an enforcement mechanism in the Code in the face of leaks. Overall, the Court must address how principles inherent

Control?, 37 GEO. J. LEGAL ETHICS 347, 367 (2024); see generally N.Y.C. BAR ASS'N, RULE OF LAW TASK FORCE, FED. CT. COMM., PRO. RESP. COMM., PRO. ETHICS COMM., THE SUPREME COURT NEEDS A MANDATORY AND ENFORCEABLE CODE OF ETHICS, 19–23 (Oct. 1, 2024) https://www.nycbar.org/wp-content/uploads/2024/09/20221365_ScotusEthics.pdf [<https://perma.cc/KD78-YBLQ>] [hereinafter NYC BAR REPORT] (discussing the general issue of recusal as support for the need for an enforceable SCOTUS code of ethics).

8. See THE CODE, *supra* note 2.

9. *Id.*

10. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

11. *Moyle v. United States*, 603 U.S. 324 (2024).

12. Jordan Rubin, *Federal Judge Calls Out Supreme Court Justices for Poor 'Sense of Smell' on Ethics*, MSNBC: DEADLINE: LEGAL BLOG (July 15, 2023), <https://www.msnbc.com/deadline-white-house/deadline-legal-blog/ponor-judge-supreme-court-opinion-piece-rcna94334> [<https://perma.cc/RV8F-Q6WM>].

to its operations—most importantly its legitimacy—interact with draft opinion leaks in the modern legal landscape.

I. A HISTORY OF LEAKS: FROM *WHEELING AND BELMONT BRIDGE COMPANY TO MOYLE*

The Court is no stranger to leaks surrounding its docket. In 1852, the Court was set to issue the decision of *Pennsylvania v. Wheeling and Belmont Bridge Company*.¹³ *Wheeling* addressed the issue of whether Congress possessed the authority to regulate commerce through navigation. Ten days before the decision was officially issued, the New York Tribune released the outcome of *Wheeling*, which found removing a bridge over the Ohio River permissible “because it interfered with interstate commerce.”¹⁴ However, that was not the end of the case nor the leaks accompanying it. Congress subsequently passed a law that permitted the bridge’s preservation, but the bridge was destroyed, and an injunction was issued against its reconstruction.¹⁵ Shortly after, the case was back in front of the Court, and the New York Tribune was once again the first to publicize its outcome.¹⁶

The culprit of the leaked information is believed to be Justice John McLean.¹⁷ The unconfirmed theory is that the Justices had an interest in the press’s coverage of both the Court and the Justices.¹⁸ Therefore, by leaking the information themselves, the Court maintained a level of control over public perception.

The prevalence of SCOTUS leaks continued into the twentieth century, this time revealing a new culprit and a new purpose. In 1919, the Court was set to issue the opinion of *United States v. Southern Pacific Company*,¹⁹ which addressed the controversy of whether the government could cancel a land patent due to the railroad’s application containing false representations.²⁰ The Court sided with the government, which in turn led Southern Pacific Company’s stock to fall.²¹ But hours before the opinion was officially issued, Wall Street speculators had already sold their stock and made a profit in doing so.²² This was no coincidence. As the Justice Department eventually determined, the speculators had their own magic eight ball providing them the outcome of the decision before it was issued.²³

13. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855).

14. Dareh Gregorian, *Abortion Opinion Leak Unprecedented but Not a Supreme Court First*, NBC NEWS (May 3, 2022), <https://www.nbcnews.com/politics/supreme-court/abortion-opinion-leak-unprecedented-not-supreme-court-first-rcna27130> [<https://perma.cc/P539-85PL>]; Mark Walsh, *Rare but Not Unprecedented Supreme Court Leak Considered ‘Staggering’*, ABA J. (May 5, 2022), <https://www.abajournal.com/web/article/rare-but-not-unprecedented-supreme-court-leak-considered-staggering> [<https://perma.cc/K625-6S2B>].

15. Walsh, *supra* note 14.

16. *Id.*

17. Gregorian, *supra* note 14.

18. *Id.*

19. *United States v. S. Pac. Co.*, 251 U.S. 1 (1919).

20. John B. Owens, *The Clerk, the Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919*, 95 NW. U. L. REV. 271, 275 (2000).

21. *Id.*

22. *Id.* at 275–76.

23. *Id.* at 289–90.

That insider was Ashton Fox Embry, a clerk to Justice McKenna.²⁴ Consequently, an investigation ensued.²⁵ In 1920, the grand jury began to hear testimony from witnesses, and Embry admitted to knowing what the Court would hold before it was released—“acknowledge[ing] ‘that the circumstances against him seemed to be very strong.’”²⁶ Despite these facts, the Justice Department struggled to bring charges against Embry, since this case predated the passage of the Securities and Exchange Commission Act of 1934 regulating insider trading.²⁷ Thus, it was unclear whether Embry’s actions were illegal, despite the consensus that they were ethically wrong.²⁸ In response, the defense argued that the disclosure was not a crime, and that Embry “may have violated the Court’s ‘custom and practice,’ but no more.”²⁹

Ultimately, the Justice Department submitted the charge of “impairing government functions by depriving the Court of its customary practice of announcing decisions.”³⁰ However, the trial never occurred.³¹ In 1929, ten years after the leak, the Justice Department dismissed the charges.³² Although information on why it dropped the charges was never released, one theory is that despite the Justice Department’s knowledge that Embry took part in leaking the decision, the Department did not have the evidence to meet its burden of proof.³³

The case of Ashton Embry is an example of the threat that clerks can pose to the Court’s operations. Furthermore, Embry was not an outlier. Clerks continued to be cited as culprits of leaking information regarding pending cases,³⁴ a phenomenon that helped instigate the adoption of the *Code of Conduct for Law Clerks of the Supreme Court of the United States*.³⁵ Central to the clerk’s code is

24. *Id.* at 272, 291, 304. December 16, 1919, was not only the day that newspapers reported that someone had leaked the decision to Wall Street speculators, but also the day that Embry resigned from his clerkship. After nearly nine years in service to Justice McKenna, he wrote that he needed to depart given his “bakery business having expanded to such an extent as to require practically all of [his] time.” *Id.* at 275–76.

25. *Id.* at 276, 290.

26. *Id.* at 290–91; see also James D. Robenalt, *The Supreme Court Clerk Who Leaked a Ruling to Wall Street Traders*, WASH. POST (May 11, 2022), <https://www.washingtonpost.com/history/2022/05/11/ashton-embry-supreme-court-leak/> [<https://perma.cc/A8CR-FSVK>].

27. See Owens, *supra* note 20, at 291–92.

28. See *id.* at 292; Lee VanHorn, *As American as Baseball, Hot Dogs, and . . . the Supreme Court: How Lessons Learned From Two American Staples Could Restore Public Confidence in the Supreme Court*, 46 AM. J. TRIAL ADVOC. 279, 296 (2023).

29. Owens, *supra* note 20, at 296.

30. VanHorn, *supra* note 28, at 296.

31. Owens, *supra* note 20, at 297.

32. *Id.*

33. *Id.* at 304, 308.

34. Todd C. Peppers, *Of Leakers and Legal Briefers: The Modern Supreme Court Law Clerk*, 7 CHARLESTON L. REV. 95, 96–97 nn. 7, 8 (2012) (listing instances where law clerks were believed to have leaked information including: Blackmun’s clerk’s tell all book, and information regarding deliberations in *Bush v. Gore* and the Affordable Care Act). Peppers also acknowledges the fact that there could be the “unique circumstance in which a Justice might conceivably ‘instruct’ his or her law clerk to leak information about internal court deliberations.” *Id.* at 96–97. Although this will not be considered in depth here, it raises an interesting possibility that should be considered in discussing Supreme Court ethics reform.

35. *Id.* at 96.

the duty of confidentiality.³⁶ Specifically, Canon 3 emphasizes confidentiality and notes that a clerk “should take care not to . . . transmit any information not available to the public generally, particularly about the outcome of a case or the positions of particular Justices.”³⁷ This showcases the steps that have been taken when there was a breach in the Court’s confidences.

The history of information leaks expands beyond the cases outlined above. However, until recently, the Court had maintained the secrecy of a key component of their deliberative process—the draft opinions themselves.³⁸ On May 2, 2022, that changed when Politico published Justice Alito’s ninety-eight page draft opinion of *Dobbs v. Jackson Women’s Health Organization*, which examined whether the Constitution confers a fundamental right to abortion.³⁹ Politico stated that it acquired the draft from an individual “familiar with the court’s proceedings in the [] case.”⁴⁰ The Court characterized the leak as “one of the worst breaches of trust in its history” and “a grave assault on the judicial process.”⁴¹ A draft opinion leak is fundamentally distinct from prior Supreme Court leaks because it lacks finality. Previous leaks were disclosed “after a final draft of the opinion was complete and all the Justices had more or less established their position.”⁴² To the contrary, *Dobbs* was leaked almost two months before the final opinion was issued.

The aftermath of the monumental *Dobbs* leak took two forms: the public’s outcry and the Court’s investigation. First, the leaked draft elicited considerable alarm from outside commentators. For instance, Professor Phil Lord stated the concern of whether the opinion was now locked into its current state given that the leak made changes “less tenable.”⁴³ Moreover, lower courts considered the question of whether a draft opinion leak could occur in their jurisdictions as well.⁴⁴ Second, the Court conducted an investigation headed by the Marshall of the Supreme Court.⁴⁵ The Marshall’s investigation included interviewing around

36. *Id.* at 104–05.

37. *Id.*

38. Josh Gerstein, *How Rare is a Supreme Court Breach? Very Rare*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/supreme-court-draft-opinion-00029475> [<https://perma.cc/XQU8-3WUM>].

39. *Read Justice Alito’s Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> [<https://perma.cc/JT97-N92M>]; *see also* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231–32 (2022).

40. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/YT72-QQ2A>].

41. Press Release, Sup. Ct. of the U.S. (Jan. 19, 2023), https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf [<https://perma.cc/82UG-ZZE7>].

42. VanHorn, *supra* note 28, at 300.

43. Phil Lord, *Trumping Dobbs*, 2023 U. ILL. L. REV. ONLINE 12, 13 (2023).

44. *See generally* Amelia Buragas, *Drafts and Leaks: The Illinois Supreme Court’s Reporter of Decisions Weighs in on the U.S. Supreme Court’s Dobbs Draft Opinion Leak and the Chances of Such a Leak Occurring in Illinois*, 110 ILL. B.J. 12, 12–13 (2022).

45. Press Release, *supra* note 41.

one hundred employees, along with conducting additional forensic analysis.⁴⁶ However, the Marshall's team was unable to find the leaker.⁴⁷ At the time this Note is published, the leaker has not been found.

Although *Dobbs* was the first draft opinion leaked to the public, it was not the last. On June 26, 2024, the opinion of *Moyle v. United States*,⁴⁸ addressing the conflict between a federal law and an Idaho law prohibiting abortions except to prevent death, was released early.⁴⁹ Thus, for the second time in two years, an abortion opinion was leaked. The Court's response consisted of a statement from a court spokesperson, Patricia McCabe, that "[t]he court's publications unit inadvertently and briefly uploaded a document to the court's website. The court's opinion . . . will be issued in due course."⁵⁰ No further commentary has been issued.⁵¹ Therefore, if technological or personnel security precautions were put in place after the *Dobbs* leak, they proved deficient here.⁵²

Today the form and substance of Supreme Court leaks have reached new, more threatening heights. Information alone is no longer being leaked, but entire draft opinions themselves. Further, this leaked information spreads more rapidly and widely than ever before. These draft opinion leaks are deeply damaging to the Court. The Court leans on the confidentiality of the deliberative process; this environment is destroyed when draft opinions are leaked, whether through purposeful or inadvertent disclosure.⁵³ Furthermore, McCabe's note that *Moyle* was "briefly uploaded" holds little to no weight. All that was needed for the draft opinion to spread across the internet was the speed it took someone to press the download button.⁵⁴ Post the *Moyle* leak, any hope that the *Dobbs* draft opinion leak

46. *Id.*

47. *Id.*

48. *Moyle v. United States*, 603 U.S. 324, 326–27 (2024).

49. Ian Millhiser, *The Supreme Court's New Abortion Decision, Explained*, VOX (June 26, 2024), <https://www.vox.com/scotus/357302/supreme-court-leaked-abortion-moyle-united-states> [<https://perma.cc/N64C-K622>].

50. Carter Sherman & Jessica GlENZA, *US Supreme Court Draft Opinion Would Allow Emergency Abortions in Idaho*, GUARDIAN (June 26, 2024), <https://www.theguardian.com/us-news/article/2024/jun/26/supreme-court-emergency-abortion-idaho-decision> [<https://perma.cc/TYN2-WWRT>].

51. Although no further statements about the opinion leak were released, more information about the Court's deliberative process in *Moyle* was. CNN released a report detailing the negotiations amongst the Justices, and how the conservatives lost their "clear majority." CNN based its report off "sources inside and outside the court with knowledge of the deliberations." See Joan Biskupic, *Exclusive: Inside the Supreme Court's Negotiations and Compromise on Idaho's Abortion Ban*, CNN (July 29, 2024) <https://www.cnn.com/2024/07/29/politics/supreme-court-idaho-abortion-entala-biskupic/index.html> [<https://perma.cc/VK6D-B8BF>]. This raises the concern that the *Moyle* leak expanded beyond just the draft opinion pre-release.

52. Josh Blackman, *Tentative Thoughts on the Prematurely Posted Moyle Opinion*, VOLOKH CONSPIRACY (June 26, 2024), <https://reason.com/volokh/2024/06/26/tentative-thoughts-on-the-prematurely-posted-moyle-opinion/> [<https://perma.cc/N7Y6-ZSQQ>].

53. To be clear, the discussion of civil and criminal liability must be discussed in the face of leaks. However, that is beyond the scope of this Note.

54. See Blackman, *supra* note 52.

would remain an isolated incident vanished. Therefore, in the current state of affairs, leaks must be part of the discussion of judicial reform.

II. THE COST: THE SUPREME COURT'S LEGITIMACY

The United States Judiciary has lost the public's trust. At forty-two percent, United States Courts fall behind Russia, Iraq, Iran, Libya, and Hungary in public confidence,⁵⁵ a number that is likely to be lower when 2024 data is published.⁵⁶ To reverse this trend, the Court and the legal system must examine how it has seen two draft opinion leaks regarding a critical and controversial topic in the United States—abortion. Draft opinion leaks are detrimental because they limit the Court's capacity to function. As discussed in detail in Sections IIA–C below, draft opinion leaks raise multiple concerns regarding confidentiality, politicization, and technology safeguards within the Court. Consequently, if the Court no longer has the confidence of the American people, the judicial branch is at risk of losing its power to issue binding decisions.⁵⁷ Today, that power is further threatened by the possibility of the executive ignoring federal judges' orders.⁵⁸ As such, the Court must address factors that threaten its legitimacy, including leaks.

A. IS CONFIDENTIALITY VITAL FOR THE COURT TO HOLD ONTO ITS LEGITIMACY?

The Court's "culture of confidentiality" is a unique factor that sets it apart from other organizations.⁵⁹ This dynamic allowed some to hold the belief that "there is one organization that has never had any trouble keeping its secrets secret: the Supreme Court."⁶⁰ This perception is now threatened, given the *Dobbs* and *Moyle* leaks. These leaks gave the public an insight into SCOTUS draft opinions and left open the question of whether the Court's secrecy in its deliberative process is necessary. If confidentiality is crucial, draft opinion leaks are an attack on the Court's ability to function. On the other hand, the high level of secrecy may render the Court at odds with the democratic principle of an informed public.⁶¹

55. Adam Liptak, *Confidence in U.S. Courts Plummets to Rate Far Below Peer Nations*, N.Y. TIMES (Dec. 17, 2024), <https://www.nytimes.com/2024/12/17/us/gallup-poll-judiciary-courts.html> [<https://perma.cc/XQ8U-U2H9>].

56. *Id.*

57. VanHorn, *supra* note 28, at 313.

58. See Lindsay Whitehurst & Regina Garcia Cano, *Judge Questions Trump Administration on Whether it Ignored Order to Turn Around Deportation Flights*, ASSOCIATED PRESS (Mar. 17, 2025), <https://apnews.com/article/aclu-trump-deportations-el-salvador-boasberg-e447c61de031150669d01687edc4b11b> [<https://perma.cc/AD4A-J9TX>].

59. Tierney Sneed, *Yet Again, the Supreme Court's Controlled Release of Rulings is Upended in a Major Abortion Case*, CNN (June 27, 2024), <https://www.cnn.com/2024/06/26/politics/media-release-supreme-court-abortion/index.html> [<https://perma.cc/D26G-ESPC>].

60. Walter R. Gordon, *Supreme Court Secrets, Several Kinds*, BALTIMORE SUN (Dec. 20, 1971), <https://www.cia.gov/readingroom/docs/CIA-RDP80-01601R000300360044-5.pdf> [<https://perma.cc/JG8K-CBHM>].

61. *What's at Stake*, ACLU, <https://www.aclu.org/issues/national-security/secrecy> (last visited Feb. 14, 2025) [<https://perma.cc/2K87-C2LK>] (citing the Court's recognition that "an informed public is the most potent of all restraints upon misgovernment").

There is a strong argument that without confidentiality, there would be detrimental implications for the operations of the Court. This sentiment is supported by Chief Justice Roberts, who in the wake of the *Dobbs* leak noted the “exemplary and important tradition of respecting the confidentiality of the judicial process.”⁶² Key to this argument is the idea that, in the case of deliberations and circulation of drafts, secrecy and confidentiality are indispensable to the operations of the Court.⁶³ The decisions “of the Court are explained in majority, concurring and dissenting opinions. The decision must stand or fall on the quality of those opinions, not on any ancillary comments justices might make to reporters or lawyers or in any other public way.”⁶⁴

The seminal case of *Brown v. Board of Education*⁶⁵ represents why confidentiality is necessary to the deliberative process. In 1952, when the case was first argued, the Court was split.⁶⁶ But when it came time for the second argument on the matter, the makeup of the Court had changed after the death of Chief Justice Vinson.⁶⁷ This new Court issued the ultimate 9-0 ruling that separate education facilities are inherently unequal.⁶⁸ The responsibility of keeping deliberations secret eliminated the risk of “segregationists . . . us[ing] knowledge of a divided court to foment even more resistance to the court’s authority.”⁶⁹ A consequence that would have been fatal to the Court’s legitimacy, judicial independence, and its core purpose to create compliance with its rulings.

Moreover, concern about the exposure of the deliberative process has led some to believe that another draft opinion leak could lead the Justices to bar clerks from the process.⁷⁰ This action would diminish the already limited diversity of perspectives brought to deliberations.⁷¹ Ultimately, *Brown*’s deliberative process demonstrates the current necessity of confidentiality within the deliberation and drafting process. Otherwise, the Court faces the real risk of producing bad law.⁷²

Strict confidentiality within the Court is not without its critiques. Professor Arthur Miller argues that if the American public is in part governed by the Court, democracy would appear to require that the public know how those who govern

62. Press Release, Sup. Ct. of the U.S. (May 3, 2022), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22 [<https://perma.cc/A4HW-8DDL>].

63. See *id.*; see also Richard W. Painter, *SCOTUS Draft Opinion Leak is a Breach of Legal Ethics*, BLOOMBERG LAW (May 6, 2022), <https://news.bloomberglaw.com/us-law-week/scotus-draft-opinion-leak-is-a-breach-of-legal-ethics> [<https://perma.cc/98R4-4XTV>] (discussing how “[p]rivacy is an essential feature of adjudicative deliberation, and it is virtually unheard of for courts to deliberate except with strict confidence”).

64. Gordon, *supra* note 60.

65. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

66. Painter, *supra* note 63.

67. *Id.*

68. *Brown*, 347 U.S. at 495.

69. Painter, *supra* note 63.

70. VanHorn, *supra* note 28, at 315.

71. See *id.*

72. Walsh, *supra* note 14; see also Richard W. Painter, *Open Chambers*, 97 MICH. L. REV. 1430, 1470 (1999) (“[C]andid communication among the Justices is critical to sound judicial making.”).

us govern.⁷³ More specifically, the challenges lie in determining when confidentiality is used as a defense of the “authority and independence” of the Court, versus when it is used for “personal convenience” or deprivation of information the public is entitled to.⁷⁴ Respectively, Professor Amar noted that the Court’s current communication practices are contrary to the democratic principle of public discourse and “governmental openness that should generally apply to American officialdom.”⁷⁵

In considering the concepts of an open government and judicial independence in the wake of unprecedented leaks, the Court should look to the Supreme Court of Canada, which has never experienced such a leak.⁷⁶ In contrast to the United States, the Canadian Court releases its opinions to journalists early through a “lock-up” system.⁷⁷ Justice Frank Iacobucci of the Canadian Supreme Court supports the system because an open court supports judicial legitimacy.⁷⁸ How? Through the recognition that the Court’s legitimacy depends in part on its capacity to communicate its decisions—which is in danger if the media conveys inaccurate information.⁷⁹ Accordingly, the journalists are placed in secure conditions and asked to sign a commitment not to report on the matter until the decision is released,⁸⁰ conditions that bear similarities to the conduct requirements of clerks. Yet, Canada does not have the same leak issues as the United States. Thus, adopting a more transparent system may have benefits.

In light of Canada’s successful transparent system, how far should SCOTUS’s strict confidentiality and secrecy extend? The Court itself noted that “[t]o meet [their] obligations as judges, [they] accept submissions from parties and *amici*, [they] engage advocates at oral argument, and [they] publish explanations of [their] final decisions. All of this [they] do in the open.”⁸¹ Even so, the Court should expand this openness. One reason, as recognized by Professor Barry

73. Gordon, *supra* note 60.

74. *Id.*

75. AKHIL REED AMAR, THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA, 113–14 (2016); see also Barry Sullivan & Ramon Feldbrin, *The Supreme Court and the People: Communicating Decisions to the Public*, 24 U. PA. J. CONST. L. 1, 80–81 (2022) (discussing Amar’s perspective).

76. Tony Mauro, *The Marble Palace Blog: At Canada’s Supreme Court, There Are No Leaks*, NAT’L L.J. (May 12, 2022), <https://www.law.com/nationallawjournal/2022/05/12/the-marble-palace-blog-at-canadas-supreme-court-there-are-no-leaks/>[<https://perma.cc/985Z-DPDY>].

77. Sullivan & Feldbrin, *supra* note 75 at 55–56. The lock-up system comprises of accredited journalists who gain early access to the Court’s decisions. Prior to entering the lock-up the journalist must turn over their communication devices and sign a document which consist of, in part, a duty not to disclose the information learned prior to decision being issued. Moreover, the Executive Legal Officer—an individual who is a senior lawyer or academic—is in the room as a resource for journalists to obtain clarification on the decision. *Id.* at 53, 55 n.217. Moreover, this phenomenon is not limited to Canada, as the German Court also allows some members of the press access to advanced information of its decisions. *Id.* at 62.

78. *Id.* at 52–53.

79. *Id.*

80. *Id.* at 55, n.217.

81. Press Release, *supra* note 41.

Sullivan, is the “vital importance of correct, complete, and timely accounts” of the Court’s work in a media and technology-driven world.⁸² For it is those characteristics that support the Court’s legitimacy.

A second reason is that disclosure of ethical shortcomings is essential to public confidence.⁸³ The critical abortion cases of *Dobbs* and *Moyle* shed light as to why this transparency is key. After the *Dobbs* leak, the Court issued a detailed report noting that there were improvements to be made in both training and IT capabilities to restrict access to sensitive materials.⁸⁴ However, after *Moyle*, the public was provided only a short statement about the inadvertent disclosure, and is now left to wonder, were improvements made? If so, how did they fail (at least in some capacity) when *Moyle* was prematurely disclosed to the public? Thus, at a minimum, the public is entitled to increased transparency about whether the Court is continuing to take action to revise its IT procedures to diminish the risk of another leak. Otherwise, the public is left to question why the highest court in America cannot prevent the leaks of entire draft opinions. In the wake of two key abortion decisions being leaked, the Court must address the flaws in its system and reconsider the level of transparency it owes to the American public.

B. DO LEAKS RAISE POLITICAL INFLUENCE CONCERNS OVER THE COURT?

An opinion is not final until it is officially issued by the Court. But the presence of draft opinion leaks raises the concern that the Justices could be subject to political pressures—particularly given the contested topic of abortion at issue. Against this backdrop, the *Dobbs* leak reveals benefits for either side of the political line. For liberals within the Court, the leak could be used as a tool to expose the significant shift in abortion rights.⁸⁵ Professor Daniel Urman furthers this idea by noting the possibility of a coordinated effort between President Biden and the Court, when President Biden released a statement to pass legislation to protect abortion rights.⁸⁶ Under the conservative theory, the Justices on the fence would be locked into their opinion to change the constitutional doctrine on abortion rights,⁸⁷ and the early publication would diminish the backlash from the public when the final opinion would be released.⁸⁸

Additionally, *Moyle*’s impact on abortion protections subjects it to many of the same political concerns. In fact, individuals took to X to comment on

82. Sullivan & Feldbrin, *supra* note 75, at 50–51.

83. See Painter, *supra* note 7, at 406.

84. Press Release, *supra* note 41, at 18.

85. Walsh, *supra* note 14.

86. Molly Callahan, *Who Leaked the Supreme Court Draft Opinion Overturning Roe v. Wade? Four Theories*, NORTHEASTERN GLOB. NEWS (May 3, 2022) <https://news.northeastern.edu/2022/05/03/supreme-court-draft-opinion-overturing-roe/> [<https://perma.cc/78Y6-MU3H>].

87. Walsh, *supra* note 14.

88. Callahan, *supra* note 86 (discussing the sentiment that by the time the decision was published everyone would “be thinking ‘[d]idn’t we know this already?’”).

the similarities: “[c]urious that the only 2 #SCOTUS leaks both had to do with abortion rights,”⁸⁹ “[w]hat is it about abortion decisions and Supreme Court internal controls? . . . Two years ago, the *Dobbs* decision was leaked,”⁹⁰ “[t]his time, is there any chance we Americans will be granted the extreme honor of being told how exactly this latest Supreme Court leaked occurred?”⁹¹ Although, some concerns were minimized when the final *Moyle* opinion was released the next day, a much quicker turnaround than the time between draft opinion leak and final opinion issuance in *Dobbs*. Nevertheless, the possibility of a politically motivated leak on a highly contested topic in America risks furthering the decline of the Court’s legitimacy.

On the other hand, the leakers may have believed they were doing the right thing. The nature of abortion cases may have led the leaker(s) to feel an obligation to release the documents before they were officially published or that an unofficial release could serve as a check on the power of the Court.⁹² Daniel Ellsberg, the leaker of the Pentagon Papers in 1971, supports this view, believing that “[i]t’s a very good thing that [*Dobbs*] got out.”⁹³ The political details of the arguments made, he argues, should be available to the public.⁹⁴

Although both the duty-based argument and Ellsberg’s points hold weight, entire draft opinion leaks are still harmful for our current judicial system. At risk lies the “independence” of the Court, “collegiality” between its members, and “consensus-building” of the Justices.⁹⁵ With this risk, what is left of the judicial deliberative process if every contested case is released before its official publication? As expressed by Professor Daniel Epps, the *Dobbs* leak opens the possibility of others like it because once a norm is broken, it may be more susceptible to being broken again.⁹⁶ However, the Court cannot afford the repetition of this norm.

89. Michael Smerconish (@smerconish), X (June 26, 2024, 2:30 PM), <https://x.com/smerconish/status/1806032319569858770?lang=en&mx=2> [<https://perma.cc/443H-WFR5>].

90. Jonathan Turley (@JonathanTurley), X (June 26, 2024, 2:10 PM), <https://x.com/JonathanTurley/status/1806027317845586074?lang=en> [<https://perma.cc/TS9R-MNRF>].

91. Michael Beschloss (@BeschlossDC), X (June 26, 2024, 1:48 PM), <https://x.com/BeschlossDC/status/1806021781989576921> [<https://perma.cc/H7B9-8LPE>]; see also Aila Slisco, *Supreme Court Blunder Raises Questions*, NEWSWEEK (June 27, 2024) <https://www.newsweek.com/supreme-court-blunder-raises-questions-1917955> [<https://perma.cc/UT63-CLR9>] (referencing further social media posts and the notion that the Court had been “compromised”).

92. Callahan, *supra* note 86; see also Vanessa Romo, *The Pentagon Papers Leaker Explains Why the Supreme Court Draft Leak is a Good Thing*, NPR (May 11, 2022), <https://www.npr.org/2022/05/11/1098146060/daniel-ellsberg-on-why-the-supreme-courts-leaked-draft-opinion-is-a-good-thing> [<https://perma.cc/P6BJ-N5PZ>].

93. Romo, *supra* note 92.

94. *Id.*

95. *Id.*; Callahan, *supra* note 86.

96. Walsh, *supra* note 14.

C. HOW DOES TECHNOLOGY CHANGE THE LEAK DISCUSSION?

The Court and its members not only have a duty to keep individual knowledge of draft opinions confidential, but also to prevent leaks.⁹⁷ Therefore, it is necessary to consider the role that modern technology plays in upholding the duty against disclosure. More narrowly, in the realm of the recent draft opinion leaks, there are two main concerns to be raised. *First*, does the Court have proper systems in place to minimize disclosures? *Second*, should there be explicit guidelines for investigating leaked decisions?

1. INFORMATION SECURITY WITHIN THE COURT

Present in both the *Dobbs* and *Moyle* leaks is the notion of accidental disclosure. After *Dobbs*, one theory emerged that the cause was either an information technology specialist or an accidental leak.⁹⁸ *Moyle*, on the other hand, was cited as a premature disclosure by the Court's publication unit. Moreover, the reality of a technology-based reporting world increased the likelihood of a full draft opinion leak.⁹⁹ This turns the discussion of draft opinion leaks into "an electronic-age story"¹⁰⁰ where the highest court may not have the proper mechanisms in place to combat developing technologies—subjecting the Court to attacks even when opinions are leaked inadvertently. This concept is bolstered by the Justices recognition of the dangers of technology in the changing media landscape.¹⁰¹ Chief Justice Roberts cautioned against misinformation from social media on the internet, and Justice Gorsuch noted that the new media sectors run contrary to traditional journalistic standards based on the truth.¹⁰² Yet, they have failed to recognize that the Court must be cautioned against the new form of media and technology as well.

After *Dobbs*, the public investigative report revealed that the Supreme Court's "information security policies are outdated and need to be clarified and updated. The existing platform for case-related documents appears to be out of date and in need of an overhaul."¹⁰³ The recommendations also included introducing new technology (e.g., tracking for both the copying and printing of sensitive materials).¹⁰⁴ The new technology would help combat the "inadequate safeguards" currently in place.¹⁰⁵ And a clarification of the security protocols would diminish the risk of human error. But with new technology comes the need to understand how

97. Lynne Marie Kohm, *Why the Dobbs Draft Release Makes it Tougher to Teach Legal Ethics*, 13 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 319, 326 (2023).

98. Walsh, *supra* note 14.

99. Callahan, *supra* note 86.

100. *Id.*

101. Sullivan & Feldbrin, *supra* note 75, at 82–83.

102. *Id.*

103. Press Release, *supra* note 41, at 19.

104. *Id.*

105. *Id.*

technology can change the nature of security—for better and for worse. Thus, recognition of an overhaul of the publication platform and information security procedures is just one step to responding to draft opinion leaks.

Another step is the continued revision of the Code. The legal profession, albeit slowly at times, has adapted to the changes in technology—including in amending the commentary to its code of conduct for lawyers in accordance with these evolutions.¹⁰⁶ And the increasing presence of AI will soon require further revisions of the code of conduct.¹⁰⁷ Additionally, now if an attorney makes inadvertent disclosures during their case, they would be held to ethical standards and procedures—seen through the adoption of clawback measures.¹⁰⁸ Generally, clawback procedures create a safety valve for inadvertently disclosed documents by permitting the request that the document(s) be returned.¹⁰⁹ The Court’s status would keep it from adopting the same clawback measures afforded to lawyers, but it is not similarly limited in imposing ethical standards. This suggests that if the Court revises the Code, rules governing the inadvertent disclosure of opinion leaks should not be forgotten. Against this background, and at the heart of all legal operations, lies the notion of confidentiality. Chief Justice Roberts cited the “important tradition” of confidentiality after the *Dobbs* leak, and the *ABA Model Rules of Professional Conduct* and *ABA Model Code of Judicial Conduct* impose regulations on the topic.¹¹⁰ Thus, in revising the Code, the Court should look to the regulations guiding the other members of the profession.

First, a lawyer’s duty of maintaining and protecting confidentiality entails that “lawyers must be informed about changes in technology *and* changing client security needs.”¹¹¹ If lawyers fail to understand technology, technology could destroy confidentiality.¹¹² At the most basic level, all lawyers understand that they should not talk about confidential information when there is clearly someone listening who should not be privy to the matter.¹¹³ Yet that instinct becomes less apparent when applied to the world of technology, and it often becomes increasingly difficult to know if and when confidentiality is at risk of being destroyed.¹¹⁴

106. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.1, cmt. 8 (2018) [hereinafter MODEL RULES] (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”); *August 2012 Amendments to ABA Model Rules of Professional Conduct*, LEGAL ETHICS F., <https://www.legalethicsforum.com/files/20120808-clean-version-of-all-august-amendments-1.pdf> [<https://perma.cc/7HUK-BESA>].

107. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 512 (2024).

108. See Ashish S. Joshi, *Clawback Agreements in Commercial Litigation: Can You Unring a Bell?*, MICH. BAR J. 34, 35 (2008).

109. See *id.*

110. Press Release, *supra* note 62; see MODEL RULES R. 1.6; MODEL CODE OF JUDICIAL CONDUCT R. 3.5 (2020) [hereinafter MODEL CODE].

111. Lynda C. Shely, *Confidentiality in the IT Age*, 37 FAM. ADVOC. 38, 39 (2015).

112. Kevin Crews, *E-Filing From the Local Coffee Shop: A Practical Look Into Confidentiality, Technology, and the Practice of Law*, 87 FLA. B.J. 82, 85 (2013).

113. *Id.* at 82.

114. *Id.*

Although the Court does not have the same explicit conduct regulations as that governing lawyers, it is not something to be ignored in light of the *Dobbs* and *Moyle* leaks.

Second, the Court should seek guidance from the *ABA Model Code of Judicial Conduct* by adopting principles in its preamble. More specifically, the Court should consider the requirement that judges “must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.”¹¹⁵ Under the theory that leaks showcase an information security issue within the Court, the Court would not meet its duty of public trust and confidence. Rather, as discussed above, the public and lower courts’ confidence can falter when the highest court is unable to prevent leaks, inadvertent or purposeful.

Third, the *Supreme Court Code of Conduct* should revise its commentary on Canon 1, “a justice should uphold the integrity and independence of the judiciary,”¹¹⁶ to include a discussion on the role that draft opinion leaks play in undermining the Court’s integrity. Implementing these principles into the Code will help guide a Court whose legitimacy is at stake.

It is worth noting that both the *ABA Model Code of Judicial Conduct* and *Supreme Court Code of Conduct* reference the disclosure of “nonpublic information.”¹¹⁷ However, both codes place the reference within the overarching categories of “extrajudicial activities.” This fails to explicitly account for the disclosure of confidential information within a justice or judge’s judicial activities. Thus, prohibiting disclosure of nonpublic information within a judicial officer’s judicial activities is worth exploring in revised codes of conduct given the presence of opinion leaks and the nature of a technology driven world.

2. POST-LEAK GUIDELINES AND INVESTIGATIONS

Related to information security is how the Court investigates leaked opinions. The information provided to the public after the *Dobbs* and *Moyle* leaks calls into question the transparency of the investigative process. Although the *Dobbs* report provided an account of the steps that the Marshall took, some questioned whether the Court’s staff was capable of conducting the investigation without assistance from the FBI—or another executive branch agency.¹¹⁸ This concern is arguably furthered by the fact that, if the Court adopted precautionary systems after the *Dobbs* investigation, those measures failed in the wake of *Moyle*’s release. Moreover, as discussed above, the explanation for *Moyle*’s early release was minimal.¹¹⁹ No information was provided on

115. MODEL CODE pmbl. ¶ 1.

116. THE CODE, *supra* note 2, Canon 1.

117. MODEL CODE R. 3.5 (“A judge shall not intentionally disclose or use nonpublic information[] acquired in a judicial capacity for any purpose unrelated to the judge’s judicial duties.”); THE CODE, *supra* note 2, Canon 4(D)(4) (“A Justice should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the Justice’s official duties.”).

118. Walsh, *supra* note 14.

119. See Millhisser, *supra* note 49.

whether the Court investigated how the inadvertent posting occurred, if the publications unit needed additional security measures, or if the Court had investigated the motivation behind the posting. The lack of information is concerning because the pre-released document had both a version number and a date of nearly a month earlier.¹²⁰ This required more than an incorrect single action, but rather the bypassing of numerous steps in the publication process.¹²¹

Consequently, the Court should consider seeking assistance to help investigate leaks in tandem with providing more detailed reports to the public even when a leak is inadvertent. If the system fails to adopt changing procedures as technology advances, the risk of leaks happening again emerges—and with it, the loss of the ability to protect confidential opinions until their proper release date.

III. THE SOLUTION

A. AN ENFORCEMENT MECHANISM IN THE CODE

While many of the Court's operations remain at a heightened level of secrecy, it is no secret the path to reforming the Code will not be easy. Any reform must address the presence of unprecedented leaks. As demonstrated by the case of Ashton Embry, there is strong agreement that the leaking of a draft opinion is ethically wrong.¹²² Yet if the Code has no accountability provision or enforcement mechanism in place, leaks could be met with no significant repercussions. Relatedly, the focus on the Code does not mean that there is no space for civil and criminal liability in the face of leaks. However, that discussion would turn on whether the leak came from a Justice, a clerk, outside individuals, or if it was an inadvertent disclosure,¹²³ a scope that extends beyond this Note.

The Code has a fatal flaw—it lacks an enforcement mechanism and thus “lets individual justices decide ethics questions for themselves,”¹²⁴ which can be deeply problematic in the event of a draft opinion leak. Supreme Court Justices and legal scholars are divided over whether this is a flaw in the new Code. Justice Gorsuch holds the view that the Court (and the Justices) must have independence to operate.¹²⁵ This notion is fueled by the concern that regulation would become a tool to be used along political lines.¹²⁶ Given the increasing belief in the politicization of the Court, the Code should not become another partisan debate.

120. Blackman, *supra* note 52.

121. *Id.*

122. See Owens, *supra* note 20, at 292.

123. See generally Chad Marzen & Michael Conklin, *Information Leaking and the United States Supreme Court*, 37 BYU J. PUB. L. 101, 114 (2023) (discussing the criminal and civil sanctions possible if the leak came from a Supreme Court Justice or a law clerk).

124. Adam Liptak, *Supreme Court's New Ethics Code is Toothless, Experts Say*, N.Y. TIMES (Nov. 14, 2023), [https://www.nytimes.com/2023/11/14/us/politics/supreme-court-ethics-code-clarence-thomas-sotomayor.html?unlocked_article_code=1.OU4.w9S7.V7y2IcXIIW5S&\[https://perma.cc/8VKF-UK5M\]](https://www.nytimes.com/2023/11/14/us/politics/supreme-court-ethics-code-clarence-thomas-sotomayor.html?unlocked_article_code=1.OU4.w9S7.V7y2IcXIIW5S&[https://perma.cc/8VKF-UK5M]).

125. Kantor & VanSickle, *supra* note 5.

126. *Id.*

Commentators agree that ethical standards for the Court must be beyond the political realm but rather rooted in the integrity of the Court and the rule of law.¹²⁷

Nevertheless, the arguments for an enforcement mechanism hold significant weight. As Professor Stephen Vladeck recognizes, “[e]ven the most stringent and aggressive ethics rules don’t mean all that much if there’s no mechanism for enforcing them.”¹²⁸ Contrary to the Code, every state has tools set in place for complaints against the state’s highest courts.¹²⁹ The Code’s departure from lower courts on this avenue was not in line with Justices Kagan, Jackson, and Sotomayor’s belief that there should be an enforcement mechanism in place.¹³⁰ Justice Kagan offered the solution of an outside panel of judges to review allegations,¹³¹ a recommendation some members of the legal community support.¹³²

Looking at both sides of the debate, leaks provide a reason for including enforcement mechanisms in a revised code of conduct. Although Justice Gorsuch’s concern for judicial independence is important, this Note shows that independence is undermined when the Court no longer holds onto its custom of releasing decisions and the vital confidentiality of the deliberative process. Moreover, the fact that *Moyle* was released after *Dobbs* precautions had been put in place shows that the Court may not be fully equipped to handle this matter on its own. Therefore, there is great value in adopting the view that an impartial and equipped panel should be created to provide advice to the Justices and their operations teams on procedures that can be taken in the wake of leaks.¹³³ This allows separate resources to be utilized to undertake what can often be a long investigation to determine how a leak occurred.

If there are no implications for entire draft opinions being leaked before their publication dates, especially in the case of the divided topic of abortion that was addressed in both *Dobbs* and *Moyle*, reoccurring opinion leaks risk becoming the

127. NYC BAR REPORT, *supra* note 7, at 3.

128. Joshua Kaplan et al., *The Supreme Court Has Adopted a Conduct Code, but Who Will Enforce It?*, PROPUBLICA (Nov. 13, 2023), <https://www.propublica.org/article/supreme-court-adopts-ethics-code-sctus-thomas-alito-crow> [<https://perma.cc/78VB-HB2F>].

129. Kantor & VanSickle, *supra* note 5.

130. *Id.*

131. Ann E. Marimow, *Justice Kagan Calls for a Way to Enforce Supreme Court Ethics Code*, WASH. POST (July 25, 2024), <https://www.washingtonpost.com/politics/2024/07/25/supreme-court-kagan-ethics-code-reform/> [<https://perma.cc/SBP3-8CBF>].

132. Letter from Jeremy Fogel & Noah Bookbinder, Citizens for Responsibility and Ethics in Washington, to Chief Justice Roberts (Oct. 7, 2024), <https://www.citizensforethics.org/wp-content/uploads/2024/10/SCOTUS-Code-of-Conduct-Letter.pdf> [<https://perma.cc/4XJL-RCG3>] (recommending “a panel [appointed by Chief Justice Roberts] of retired federal judges qualified by their extensive experience and unquestioned integrity to provide the justices with confidential advice as to recusals and other significant ethical questions”).

133. Richard Painter notes that despite the Justices’ ideological differences, they are unified behind issues of the Court as an institution—especially when the Court’s independence is threatened. Painter suggests that although maintaining confidentiality surrounding the Court’s deliberative process is important, there are reasonable oversight measures that can be taken. Painter proposes that ethical issues at the Court could be addressed through the creation of an ethics office and an inspector general for the Court, noting that the inspector general would be barred from disclosing information about the Courts deliberations and the draft opinions. See Painter, *supra* note 7, at 381, 385–86, 390, 401.

norm. The legal community should not overlook the implications of this new reality.

B. CONGRESSIONAL ACTION

The split between the Justices' beliefs on whether there should be an enforcement mechanism, and Justice Gorsuch's statement that it was "remarkable" that the Justices "were able to agree unanimously" on the Code, suggest that the Court itself is unlikely to adopt a revised Code anytime soon.¹³⁴ But Congress can intervene. Under the assumption that Congress possesses the ability to legislate in this space,¹³⁵ the question becomes what considerations should be at the forefront of Congress's goals. After the adoption of the Code, bills have been introduced to tackle the enforcement issue.

On April 19, 2024, Congresswoman Melanie Ann Stanbury introduced H.R. 8098 ("Judicial Ethics Enforcement Act of 2024") which would establish an inspector general for the judicial branch.¹³⁶ The inspector general would have the power to investigate lower courts, "alleged violations of the Code of Conduct for Justices of the Supreme Court," and "other alleged misconduct" within the Supreme Court as well.¹³⁷ This expansion of investigative authority to other misconduct within the Court must include the issue of leaks, and at the very least, entire draft opinion leaks. Congressional concern for leaks is more explicitly present in the Bill introduced on June 4, 2024, by Congressman Daniel Goldman, H.R. 8609 ("Supreme Court Ethics and Investigations Act"), that would create an Office of Ethics Counsel within SCOTUS.¹³⁸ This Bill recognizes the importance of "advis[ing] and provid[ing] guidance" on matters that deal with the "unauthorized disclosure of official Court documents,"¹³⁹ while also proposing the establishment of an Office of Investigative Counsel with a subpoena power and a method for filing ethics complaints against the Justices.¹⁴⁰ The Bill's recognition of dealing with unauthorized disclosures is essential to the Court's operations, especially in the modern world of technology.

These bills are not novel; the 118th Congress alone has seen a range of other bills addressing a code of conduct for the Justices. H.R. 927 ("Supreme Court Ethics Act") discusses an "Ethics Investigations Counsel" that would adopt rules for the enforcement, S. 359 ("Supreme Court Ethics, Recusal, and Transparency Act of 2023") and S. 1290 ("Supreme Court Code of Conduct Act") discuss establishing a complaint process for alleged violations against the Justices, and H.R. 3973 ("Judicial Ethics and Anti-Corruption Act of 2023") discusses the

134. Kantor & VanSickle, *supra* note 5.

135. See generally NYC BAR REPORT, *supra* note 7, at 37–65.

136. Judicial Ethics Enforcement Act of 2024, H.R. 8098, 118th Cong. § 1021 (2024).

137. *Id.* § 1023(2).

138. Supreme Court Ethics and Investigations Act, H.R. 8609, 118th Cong. § 678 (2024).

139. *Id.* § 678(a)(2)(E).

140. *Id.* § 679.

establishment of a code of conduct for the Justices with the inclusion of an enforcement section.¹⁴¹ This showcases that the need for an enforcement mechanism within the Code has been at the forefront of the mind of the legislature, even before an official code was adopted.

In the context of Supreme Court ethics, our current reality is twofold. First, the Court took an important step in adopting a code of conduct. Second, technology has changed the way our legal system operates and plays a key role in the legitimacy of the Court, whether as a means through which information about the Court's operations is leaked, as a catalyst for the speed at which information spreads, or as an influence on the Justices themselves. Taking those together, the ethical considerations and concerns come to light. *Dobbs*, a seminal decision in modern constitutional law, was leaked and yet the public is still left with countless questions surrounding what occurred. With *Moyle*, even less information was released, and nothing was implemented to suggest that it will not happen again. Therefore, if the Court fails to act in revising the Code, Congress must be primed to do so.

CONCLUSION

On May 2, 2022, the Court “suffered one of the worst breaches of trust in its history: the leak of a draft opinion.”¹⁴² Unanimously, the Justices agreed “that the extraordinary betrayal of trust . . . warranted a thorough investigation.”¹⁴³ But despite that characterization, the public was left without an answer about who leaked *Dobbs*, and another leak followed. The Court has now seen two abortion decision drafts leaked to the public before their final issuance.

Against this reality of unprecedented leaks, the changing judicial landscape must recognize their danger. The judicial system cannot allow draft opinion leaks for highly contested issues to become the norm. *Dobbs*, although importantly recognized for its major doctrinal shift, is also an important marker for ethical concerns of legitimacy in a technological world, an issue that was only heightened in the pre-release of *Moyle*. This Note offers accounts of the key issues the Court faces in upholding its legitimacy—its confidentiality, its politicization, and its security in a technology-based system, with the hope that the Court itself, or in the alternative Congress, will install the regulations necessary to combat this issue.

141. Supreme Court Ethics Act, H.R. 927, 118th Cong. § 3 (2023); Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. § 367 (2023); Supreme Court Code of Conduct Act, S. 1290, 118th Cong. § 2(c)(1) (2023); Judicial Ethics and Anti-Corruption Act of 2023, H.R. 3973, 118th Cong. § 5(c) (2023).

142. Press Release, *supra* note 41.

143. *Id.*