

SCOTUS FOCUS

How the leak might have happened



By **Tom Goldstein**

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Supporters of abortion rights rallied at the Supreme Court on Wednesday. (Ellena Erskine)

Among the debates generated by the **leak** of Justice Samuel Alito's opinion in **Dobbs** is whether the leaker was conservative or liberal. The leak will ultimately pale in importance to the court's decision once it is issued; the ruling will directly affect the lives and

rights of tens of millions of people. But in the meantime, the motives of the leaker are an important topic because they help explain why an institution that zealously guards its secrets suddenly seems porous.

Start from the premise that there were actually (at least) two leakers, and three leaks. The first leak was to **the Wall Street Journal editorial board** last week. In substance, it was that the court had voted to overrule **Roe v. Wade**, but that the precise outcome remains in doubt because Chief Justice John Roberts is trying to persuade either Justice Brett Kavanaugh or Justice Amy Coney Barrett to a more moderate position that would uphold the Mississippi abortion restriction without formally overturning Roe.

While not formally presented as relying on a leak, the editorial transparently does. The most obvious example is that it predicts that Alito is drafting a majority opinion to overrule Roe, but gives no explanation for that prediction and none is apparent. We now know that Alito did draft that opinion.

The second leak was to Politico. Likely within the past few days, a person familiar with the court's deliberations told them that five members of the court – Alito, Kavanaugh, and Barrett, along with Justices Clarence Thomas and Neil Gorsuch – originally voted to overturn Roe and that remains the current vote. In addition, the position of the chief justice is unclear. The remaining justices are dissenting.

The third leak was also to Politico. It was presumably – but not certainly – by the same person. Someone provided them with Alito's Feb. 10 **draft opinion**.

Note as well what was not leaked. Politico seemingly was not told which justices had joined the Alito opinion. (The fact that five justices voted in December to overturn Roe as a general matter does not mean that all five of them necessarily would have agreed to sign on to Alito's draft.) And Politico apparently was not provided with a subsequent draft, which ordinarily would have circulated to the court by now – in response to comments from some members of the would-be majority.

Here is what you would conclude is the state of play if you took all the leaks as both accurate and pretty complete (assumptions that, admittedly, are by no means certain). Alito's opinion probably has been joined by Thomas and Gorsuch. Kavanaugh and Barrett have yet to join – most likely because they are waiting to consider an alternative opinion from the chief justice.

In these circumstances, which ideological side would think it benefits from leaking the opinion? It seems to me, that is the left. I can see conservatives believing that they would gain from leaking the fact that Kavanaugh had originally voted to strike down Roe. They might believe it would tend to lock him into that position. But that was accomplished by leaking that fact to both The Wall Street Journal and Politico.

The question here is who believed they would benefit from leaking the opinion itself. That document was much more likely to rally liberals than conservatives. It brought home the fact that the court was poised to overrule *Roe* in much more concrete terms than merely leaking the vote. The opinion is also a full-throated attack on abortion rights and – with important caveats – substantive due process rights more broadly. And as a first draft – without the benefit of later refinement – it does not yet present the critique of *Roe* in its most persuasive form.

It is also important to look at the leak of the opinion through the lens of the fact that someone – almost certainly a conservative – had just before leaked the court's tentative decision and the state of the voting to *The Wall Street Journal*. That leak was itself an extraordinary and unethical breach of confidences and certainly caused very deep concern inside the court.

My guess is that someone on the left felt somewhat justified in releasing the opinion in response. Through the opinion, one would see what the *Journal* was saying Kavanaugh and Barrett were considering. That leak was a historically unprecedented violation of the deepest and most solemn trust among the justices and the court's staff. It wounded the institution.

One small note about the identity of the leaker. There has been some speculation that turns on a supposed relationship with Josh Gerstein, the *Politico* legal affairs reporter who is the

lead author on their story. It seems to me that the leak very likely runs instead through the other reporter with a byline on the story: Alexander Ward, who is a national security reporter. In response to questions from The Washington Post, Politico confirmed that the story **was very tightly held from even its own staff**. Almost surely, the leaker would have insisted on that confidentiality. I cannot think of a reason that Ward would have been on the story other than that the leaker communicated through him, not Gerstein. And Politico would have felt compelled to give Ward a byline on such a historic scoop.

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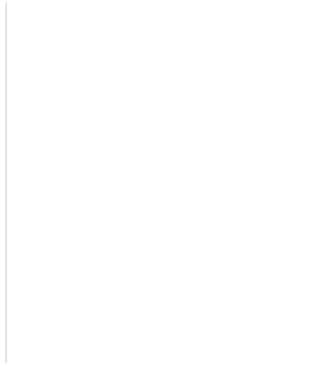


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