

Commentary: Consequences of SCOTUS Leak Could Be Significant

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By Robert W. Stanko

Late Monday night, news outlet Politico published what it reported to be a draft of an opinion from the U.S. Supreme Court overturning *Roe v. Wade*. News of the draft opinion authored by Justice Samuel Alito quickly made its way across social media platforms, and before long the Capitol Police were erecting barricades in front of the Supreme Court as protesters of the court's presumed decision began to gather late into the night.

When I first heard the news, I was appalled. My reaction had nothing to do with the case or the content of the opinion. I hadn't even read it. I couldn't get past the idea that such a brazen breach of process could occur within the close confines of our country's highest court. I hoped against hope that the document was fraudulent, that there was no leak, that the integrity of the court's process was intact.

I served as a law clerk for former Chief Justice Thomas Saylor of the Pennsylvania Supreme Court following my graduation from law school in 2008. At the time, the court was led by Chief Justice Ronald Castille, with associate justices Michael Eakin, Seamus McCaffery, Max Baer, Debra Todd and Jane Cutler Greenspan. The court's internal operating procedures were not unlike those in place at the U.S. Supreme Court. Oral argument would be held in Philadelphia,

Harrisburg or Pittsburgh, after which a preliminary vote was taken and a justice in the majority of the vote was assigned the task of authoring the initial opinion. A draft of the opinion was thereafter circulated among all of the justices for comment.

While the goal was always unanimity, that was never easily achieved and most often abandoned in favor of reaching a majority. Of course, the precedential effect of the court's rulings weighed heavily on the minds of the justices. Fundamental differences of opinion were common and the process of trying to find middle ground was at times a lengthy and frustrating one. Debates were had. Some prompted changes in the opinion, others sometimes changed votes.

As a young law clerk, I found this deliberative process tremendously enlightening. I saw how important the behind-the-scenes collaboration between the justices and their respective clerks was to the development of the issues and overall function of the court. I saw the rapport they maintained and the respect they had for one another even at the peak of disagreement. They challenged each other. The process was authentic, built on trust and the freedom of honest debate.

I want to believe that the same is true on our country's highest court. The late Justice Ruth Bader Ginsburg reflected on the benefits of this collaborative process in the midst of her eulogy of fellow justice, Antonin Scalia. The two were famously good friends despite their diametrically opposed ideologies. Ginsburg recalled that she was in the midst of finalizing a draft majority opinion striking down the Virginia Military Institute's ban on admitting women, when Scalia walked into her office with papers in hand, saying "Ruth, this is the penultimate draft of my dissent in the VMI [Virginia Military Institute] case. It's not yet in shape to circulate to the court, but I want to give you as much time as I can to answer it." Ginsburg described the opinion "as a zinger, of the 'this wolf comes as a wolf' variety," and went on to say that the final opinion of the court was much improved thanks to Scalia's "searing criticism."

Indeed, draft opinions are circulated routinely among the justices and the back and forth that results improves the overall product. The collaboration among the justices requires trust in one another and the process generally. A lack of trust is sure to stifle honest debate, which jeopardizes the court's function as a whole and the quality of the overall product.

But sure enough, the following day the Supreme Court issued a release verifying the authenticity of the draft. The release also included a blistering statement from Chief Justice John Roberts, who cited the "exemplary and important tradition of respecting the confidentiality of the judicial process and

upholding the trust of the court," and called the leak an "egregious breach of that trust."

I couldn't agree more.

We have no knowledge of where the court was in its process with the draft that was leaked. In its statement verifying the authenticity of the document, the court clarified that it was not a final decision nor was it representative of the final position of any member of the court. Whether that holds true remains to be seen but we must separate the content of the leaked opinion from the manner through which we learned of it in order to tend responsibly to the implications of both.

Confidentiality is a pillar of our profession. It promotes honest discussion and builds trust, both necessary components of the court's deliberative work. This unprecedented leak represents a grave violation of the court's internal operating procedures and the cloak of confidentiality that surrounds them. The effect it will have on the operation of our nation's highest court over time is perhaps far more significant than the intended consequences contemplated by the individual or individuals responsible.



Robert W. Stanko is a shareholder at Marshall Dennehey Coleman & Goggin. He focuses his practice on commercial litigation. He has handled matters in every stage of litigation—from emergency response to trial and all the way through appeal. He served as the chairman for The Legal Intelligencer's Young Lawyer Editorial Board for seven years.