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SUPREME COURT

How rare is a Supreme Court breach? Very rare

Court watchers can’t recall a previous time when a draft opinion was publicly disclosed before a decision.

The Supreme Court is pictured. | Eric Baradat/AFP/Getty Images

By **JOSH GERSTEIN**
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The disclosure of a draft opinion in a Supreme Court case is a highly unusual occurrence.

Supreme Court historians, former law clerks and other court watchers say they cannot recall a previous instance before Monday's publication of a draft opinion in the Mississippi abortion rights case.

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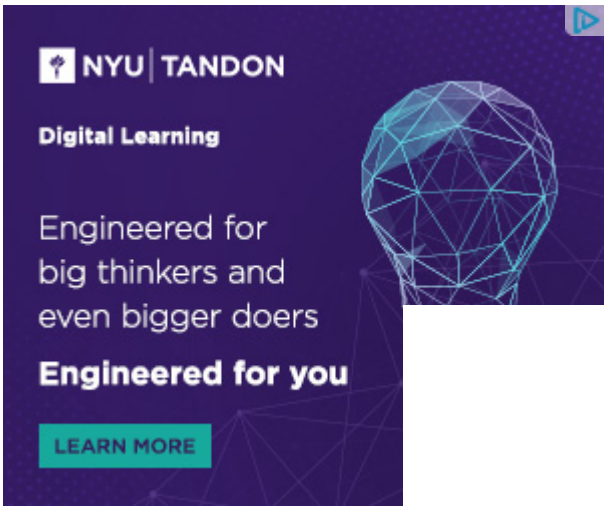

However, in a handful of cases, hints about deliberations have slipped out publicly, including in *Roe v. Wade,* the landmark abortion-rights precedent that the justices now appear to be on the verge of abandoning.

In 1972, while *Roe* was under deliberation, an unbylined Washington Post story detailed the justices' internal wrangling on that subject. The Post story — which appeared days after the justices ordered a second round of arguments in the case — was attributed to anonymous informed sources and did not quote any draft opinions or internal memoranda, but described them in significant detail.

In 1979, ABC News Supreme Court correspondent Tim O'Brien went on air with reports predicting the outcome of two decisions that were days away from release. Chief Justice Warren Burger launched an inquiry into whether anyone at the court had breached protocol, and a Government Printing Office employee involved in setting type for the court's rulings was transferred to a different division. The staffer denied leaking any information.

SUPREME COURT

Read Justice Alito's initial draft abortion opinion which would overturn Roe v. Wade

BY POLITICO STAFF

Prior to the Supreme Court's high-profile 2012 decision upholding Obamacare's individual mandate, some legal analysts believed they saw indications that the justices' internal deliberations had leaked.

Eleven days before that ruling, conservative columnist Avik Roy, writing in Forbes, cited "third-hand" sources predicting that Justice Anthony Kennedy would vote to strike down the mandate.

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A floor speech by Sen. Patrick Leahy (D-Vt.) in May of that year urging Chief Justice John Roberts to rule the mandate constitutional also led to speculation that Leahy had inside word that the court's chief was on the fence.

Days later, National Review and conservative syndicated columnist George Will both published calls for Roberts not to side with liberal justices expected to

back Obamacare's mandate.

Most of the commentary gave no direct indication of insider information, but the timing and the ultimately prescient focus on Roberts led some observers to believe the reports were inspired by a whisper campaign based on indications from people inside the court.

Roberts sided with the liberals in a 5-4 vote that upheld the mandate, although he did so by construing it as a tax.

Some saw a similar pattern in public commentary in 2019 when the court was considering whether a longstanding federal law against sex discrimination in employment also prohibits discrimination based on sexual orientation or gender identity.

About six weeks after the case was argued, the Wall Street Journal published an editorial warning that Roberts and conservative Justice Neil Gorsuch might side with liberals like Justice Elena Kagan in favor of the broad interpretation protecting LGBT rights.

"Kagan tries to lure Gorsuch and Roberts off the Scalia method," a headline on the editorial read. "If Justice Gorsuch or the Chief Justice follow Justice Kagan in defining textualism down, we hope Justice Kavanaugh and the others will explain their errors," the editorial board wrote.

SUPREME COURT

10 key passages from Alito's draft opinion, which would overturn Roe v. Wade

BY JOSH GERSTEIN

Northwestern University law professor Andrew Koppelman said the fact that the Journal editorial and a similar National Review article were published in "quick succession" was a "remarkable" coincidence.

"Perhaps some conservative justice indiscreetly complained to a friend that Kagan is winning. Let us hope," Koppelman wrote on the website of the

American Prospect.

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The unusual final line-up in the case tracked with what those commentators predicted, as Roberts and Gorsuch both sided with the court's liberal justices in a 6-3 decision. In a surprise, Gorsuch — an appointee of President Donald Trump — wrote the court's majority opinion.

Another prominent court watcher, South Texas College of Law Professor Josh Blackman, said the reports surrounding the LGBT-rights and Obamacare cases appeared to reflect leaks from the court and seemed intended to trigger not-so-subtle pressure campaigns and counter-campaigns targeting justices perceived to be wayward.

"These sorts of leaks, however titillating, are extremely harmful to the Court. They need to stop," Blackman wrote on the Volokh Conspiracy blog.

Some tea-leaf reading about pending Supreme Court cases is based on the court's public orders and acts. Just last week, some commentators picked up a

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"That SEEMS TO IMPLY that the Chief Justice was NOT assigned the opinion in Dobbs," University of Michigan Law Professor Leah Litman wrote on Twitter Thursday.

A Wall Street Journal editorial Wednesday noted alarm about the potential ruling on the left and expressed concern that Roberts might be "trying to turn" one or both of the court's newest justices—Barrett and Kavanaugh—to join an opinion that would uphold the Mississippi law without completely abandoning

Roe. The Journal editorial led at least one prolific conservative courtwatcher to suspect some sort of leak from the court.

Still, much of what's known about the inner workings of the court has been driven by leaks or perceived leaks from Supreme Court law clerks — the roughly three dozen attorneys who typically do one-year stints reading briefs and helping draft opinions.

EXCLUSIVE

Supreme Court has voted to overturn abortion rights, draft opinion shows

BY JOSH GERSTEIN AND ALEXANDER WARD

Over the past five decades, various accounts by journalists, authors and the clerks themselves have triggered passionate debate about the scope of clerks' confidentiality duties.

The first book giving the public an in-depth, behind-the-scenes look at the court was "The Brethren," published in 1979 and authored by Bob Woodward and Scott Armstrong, which detailed the inner workings of the Burger court. They appeared to have done extensive background interviews with clerks and to have gained access to some of the justices' working papers.

A former law clerk to Justice Harry Blackmun, Edward Lazarus, touched off another round of controversy in 1998 when he published "Closed Chambers," which he touted as "the first eyewitness account of the epic struggles inside the Supreme Court."

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The book set off a heated debate in legal circles, with then-9th Circuit Judge Alex Kozinski declaring that he had "nothing but contempt" for Lazarus and a legal ethics expert, Richard Painter, suggesting that Lazarus should be prosecuted.

Lazarus emphatically rejected those arguments.

"The portion of my book that Mr. Painter identifies as suspect is based entirely on the public record or on material I knew nothing about while clerking," the former Blackmun clerk wrote in a letter to the Journal. "Mr. Painter goes on to imply that I may have violated federal criminal laws regarding the theft or misuse of government documents. He offers neither legal nor factual support for this outrageous and false charge."

A prominent Supreme Court litigator — Professor Erwin Chemerinsky — rallied to Lazarus' side and insisted that any breaches of confidence in the book were minimal.

"Lazarus did nothing wrong," wrote Chemerinsky, then at the University of Southern California and now the dean of the law school at the University of California at Berkeley. He also disputed that clerks were sworn to a lifetime of silence about their work at the high court.

"The Lazarus book provides an excellent vehicle for reconsidering the secrecy that surrounds the Supreme Court," Chemerinsky wrote in the Yale Law Journal. "The debate generated by Lazarus's book, even more than the book itself, should encourage careful thought about whether the intense secrecy surrounding every aspect of the Court's work is a good thing."

Despite the furor, no action was ever taken against Lazarus.

The gravest violations of Supreme Court confidentiality came just over a century ago and led to a law clerk being accused of leaking the outcome of cases to Wall Street traders so he and they could turn a quick profit.

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The Justice Department fingered Ashton Embry, a longtime clerk to Justice Joseph McKenna, with being the source of leaks in business-related cases handed down in 1919 related to a wartime ban on liquor distilling and so-called patents allowing railroads to use particular lands.

“The Ashton Embry case is the only matter I know of where someone financially benefitted from disclosing inside information at the Supreme Court,” current 9th Circuit Judge John Owens said in an interview with POLITICO last week. “If that’s your metric, that was the worst.”

The investigation and prosecution of Embry dragged on for a decade, complicated in part by the lack of insider trading laws at the time. Prosecutors charged him instead with defrauding the United States, but in the end, Embry was never brought to trial.

The criminal case ultimately fell apart due to problems with an informant who became erratic and later disappeared, according to Owens, who chronicled the leaks and the ensuing investigation in a pair of academic articles.

While sitting justices' files are not available to the general public, some members of the court have given favored academics the chance to review them.

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Wermiel said the justices typically argue that confidentiality is critical to the high court's operation and collegiality.

"They think it will chill their deliberation with one another and their candor and willingness to be open in exchange of views," Wermiel said. Some also contend that such reports distract from the court's most enduring work: its opinions.

"Some say that there's only one thing that matters [and] that's the final opinion, which is the law, which kind of negates the historical value. That's their view," the professor added.

Despite the general tendency towards secrecy, on rare occasions a justice publicly drops a hint at or offers an unexpected preview of the outcome of a case.

During oral arguments on a Trump-era immigration policy this February, Justice Stephen Breyer mentioned that red states' claim of standing to defend the policy was "pretty similar to what we had just allowed" in a case involving who could defend a Kentucky abortion statute. But the high court had not yet ruled in the Kentucky case. It did so eight days later, ruling 8-1, as Breyer and many less informed others had predicted.

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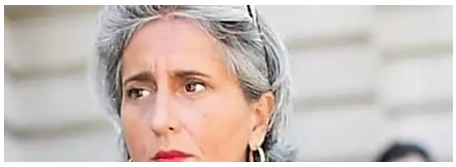

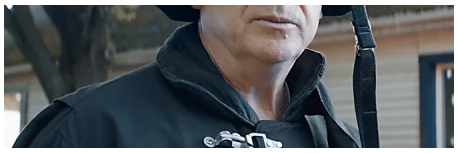

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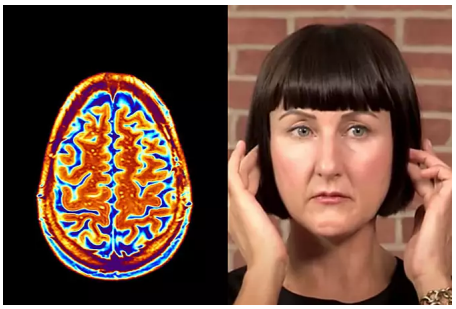

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