

Chair Dick Durbin
Senate Committee on the Judiciary
Washington, DC 20510

Chair Jim Jordan
House Committee on the Judiciary
Washington, DC 20510

Questions RE: SCOTUS Leak Investigation

Chairs Durbin and Jordan,

As you know, last week the Supreme Court finally released the long-awaited report from its internal investigation into last May's leak of Justice Samuel Alito's draft *Dobbs v. Jackson Women's Health Organization* opinion. Unfortunately, the final report raised more questions than it answered — perhaps most importantly about the degree to which the justices themselves were investigated.

Since the release of the report, the Marshal of the U.S. Supreme Court has confirmed that she spoke with the justices during the course of the investigation. But she also admitted that the justices were not obligated to sign affidavits. Given the history of certain justices' disregard for basic ethical standards — including but not limited to Justice Alito maintaining close communication with outside right-wing advocacy groups and Justice Thomas' wife Ginni Thomas' role in organizing right-wing attempts to overturn the 2020 election — the justices should not have received special treatment during the course of this investigation, and it is imperative that we know whether they were examined with the same rigor as each of the other employees of the Court.

The Court is already facing a crisis of legitimacy as the American people's trust in the institution reaches historic lows. It is essential to the Court's integrity that it is transparent and clear with the public that no one, the justices included, was held to higher standards in this investigation than anyone else. Unfortunately, the Court has proven time and again that it is incapable of policing itself. As such, it falls to Congress to step up to its role as a coequal branch and provide the oversight that is so sorely lacking.

With that in mind, we urge your committees to immediately launch an investigation and hold hearings on whether the justices received special treatment during the investigation into the *Dobbs* leak. Open questions include, but are undoubtedly not limited to, the following:

1. In her January 20, 2023 statement, the Marshal indicated that she did not ask Justices to sign affidavits because no “credible leads” “implicated the Justices or their spouses.” Yet the report issued on January 19, 2023 stated that “all personnel who had access to the draft opinion signed sworn affidavits affirming they did not disclose the draft opinion nor know anything about who did.” Why did the Marshal apply different standards to the justices and their staff?

- a. Why did the Marshal's report omit the fact that the justices were excluded from the affidavit request, and indeed imply – by stating that “all personnel who had access to the draft opinion” signed affidavits – that the justices were included?
 - b. Did the Marshal receive any instruction or request to omit mention of the justices themselves from the report?
2. Was the decision not to require justices to sign affidavits made solely by the Marshal or did Justice Roberts or other justices have input?
3. What guidance or restrictions did the Chief Justice put on the investigation with regard to the justices?
4. What instructions, guidance, or restrictions were placed on the overall investigation?
5. The Marshal's report indicates that “the investigative plan” was developed in “consultation with close advisors at the Court.” Who were these advisors? Did they include the justices? If so, who?
6. Did the justices know other employees were required to sign affidavits?
7. Did the justices know they were excluded from investigative methods to which their staff were subjected?
8. Did the Marshal review justices' calendars?
9. Did the Marshal request access to the justices' computers, phones, other electronic devices, and phone logs?
10. The report indicates there is a non-public version of the leak investigation report. What types of material were excluded from the public version?
11. Who chose Michael Chertoff to conduct the review of the investigation? Was Chertoff told the justices were excluded from affidavits?
12. Public reporting indicates the Marshal is inexperienced/ill-equipped to conduct this investigation.
 - a. Did the Marshal consider seeking help – or even just advice – from investigative agencies outside the Court?
 - b. Did the Marshal raise this possibility with Roberts?
 - c. Did Roberts or the Court place any constraints on the Marshal's ability to seek counsel and assistance outside the Court?
13. In July 2022, an anti-abortion activist wrote a [letter](#) to Chief Justice Roberts claiming that in 2014 a donor to his organization learned of the *Burwell v. Hobby Lobby* decision from Justice Samuel Alito before it was public. The activist explicitly placed this information in the context of the investigation into the *Dobbs* leak, writing, “Considering there may be a severe penalty to be paid by whoever is responsible for the initial leak of the recent draft opinion, [I] thought this previous incident might bear some consideration by you and others involved in the process. Of course, I would be happy to fully cooperate should you find any value in other details surrounding what I have transmitted here.”
 - a. Did the Marshal question Justice Alito about this letter?
 - b. Did the Marshal review Justice Alito's calendar, notes, and other records for contacts between the Justice and these or other anti-abortion activists in 2014, and in 2022?
 - c. Did the Marshal question the other justices about their own contact with these activists, or about their knowledge of Justice Alito's relationship with them?
 - d. Did the Marshal review the other justices' calendars and records for relevant information about contact with these or other anti-abortion activists?

14. Public reporting has indicated that Justice Thomas' clerks participate in a private email listserv with former Thomas clerks and Justice Thomas's wife Ginni Thomas, a prominent conservative activist whose work related to matters before the Court has been a topic of considerable public concern. Did the Marshal request access to the archives of this listserv? Did she receive it?
15. The Marshal's report cites the Code of Conduct for U.S. Judges' restrictions on public comments by judges about pending matters. But Supreme Court justices are not subject to this code of conduct, and the justices have previously engaged in activities that would violate the code were they bound by it. [For example](#), in 2019 Justices Alito and Kavanaugh held a private meeting with a conservative activist whose organization had filed briefs in cases then-pending before the Court. In the absence of an official ethics code for the justices, what, if any, code of conduct was used to guide the investigation and assess the justices' behavior?
16. Supreme Court employees would be vulnerable to a wide range of sanctions, including termination of employment and damage to future career prospects, if they are found to have misled the Marshal's investigation. By contrast, the justices enjoy lifetime appointments and are virtually impossible to remove from office. Why, then, did the Marshal think the additional threat of legal jeopardy was necessary to ensure honest cooperation by Court staff, while declining to subject the justices to the same legal vulnerability?
17. The report states "The investigators collected Court-issued laptops and mobile devices from all personnel who had access to the draft opinion." The justices had access to the draft opinion, so this would seem to suggest investigators collected laptops and mobile devices from the justices. Did they?
18. The report states "Investigators carefully evaluated the statements and conduct of personnel who displayed attributes associated with insider-threat behavior – violation of confidentiality rules, disgruntled attitude, claimed stressed, anger at the Court's decision, etc. – and also weighed behavior and evidence that would tend to mitigate any adverse inferences." The report does not indicate that investigators applied similar scrutiny to personnel who might have indicated *satisfaction or excitement* at the Court's decision. What steps, if any, did the investigators take to ensure their investigation was not artificially constrained or biased by the investigator's assumptions about possible motives for the leak?

We appreciate your commitment to upholding the checks and balances that underpin our democratic system, and ask that you conduct the oversight necessary to bring much-needed transparency and accountability to the judicial branch.

Thank you for your consideration,

Sarah Lipton-Lubet
President, Take Back the Court Action Fund