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IDEAS

The Supreme Court Needs an Ethics Code

Without the formal adoption of ethical standards, the Court may begin to seem more like a political body than a guardian of the rule of law.

By Bob Bauer

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The extraordinary leak of a draft Supreme Court opinion overruling *Roe v. Wade* has reignited a discussion about ethical responsibility in public life. The core concern of

ethics is that, in deciding what to say and how to act, those with public roles must look to the public's interests, not their own or those of a narrow class of allies. In a period of acute concern about the erosion of institutional norms, the protection of those norms depends on individual ethical choices by those in positions of public responsibility.

The Supreme Court, however, has so far refused to adopt an ethics code. The justices may consult the code in effect for all other federal judges, but they need not do so, and the choices they make are their own. What requirements they do apparently impose on their workforce, such as a duty of confidentiality, they do not make public. President Joe Biden's Commission on the Supreme Court of the United States noted in its final report that "most public and private entities have adopted Codes of Conduct for their organizations and employees," and that "it is not obvious why the Court is best served by an exemption from what so many consider best practice." (I was a co-chair of that commission, but the views here are mine alone.)

The significance of the missing code is underscored by the curious, but also revealing, Court response to the leak. It issued a statement in two parts. One part represents the position of the Court as a whole, and another was a statement from Chief Justice John Roberts. The Court's statement spoke to the nature of the document: a confirmation of authenticity and a disclaimer that the draft's internal circulation was "routine" and "does not represent a decision by the court or the final position of any member on the issues of the case." Roberts addressed the question of the *harm* the leak had done, and added that he had instructed the Court's marshal to investigate the source of the leak. Only in one respect does the Roberts statement add a fact not covered in the Court's statement: He suggested that the leak came from the workforce, not the justices.

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In explaining the significance of the leak, the chief justice stated that it was a "betrayal of the confidence of the Court … intended to undermine the integrity of our operations." Whoever leaked the document had violated "an exemplary and important tradition of respecting the confidentiality of the judicial process and upholding the trust of the Court." That trust had been breached, and it was "an affront to the Court and the community of public servants who work here."

The omission of any reference to a rule or ethical standard that the leaker violated is immediately apparent. The problem as identified by the chief justice is the violation of a "tradition," one both "exemplary and important," of respecting confidentiality.

It seems odd to appeal to tradition in condemning what Roberts later described as "absolutely appalling" damage to an institution. Tradition is important, but its hold on us is more subject to exceptions, and those exceptions are more easily justified, than are our ethical obligations. Many dictionaries define a tradition in terms of a "custom." In the realm of public ethics, an ethical obligation has a greater call on compliance than a custom.

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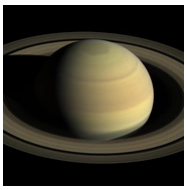

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This appeal to tradition seems connected to the nature of the harm done as the chief justice describes it: a "betrayal" and an "affront." An affront is an insult, a slap in the face. By contrast, a breach of an ethical command is a concrete wrong committed against the express terms of a binding code of conduct.

Moreover, the characterization of the offense as one committed against tradition, not ethical commitments, opens room for the argument that the content of the leak—the draft reversal of *Roe*—is relevant in determining the seriousness of the "breach of trust." Tradition is honored, custom followed, in normal circumstances. But if the circumstances are abnormal, and if a Court majority is taken (by critics of the Alito draft) to put politics or ideology above law, then tradition loses its customary force. We see this line of argument in much of the commentary about the leak, which argues that the Court is committing an egregious offense in preparing to overrule *Roe*, and that the leak should be assessed in light of the substance of what it revealed.

An ethical rule is more demanding, and it applies regardless of the direction that the Court jurisprudence might take at any time. For example, the Code of Conduct for Judicial Employees, which applies to all federal court employees except those working for the Supreme Court, sets out in clear terms a "duty" of confidentiality. It specifies that employees "should never disclose any confidential information received in the course of official duties except as required in the performance of such duties," and

"not use for personal gain any confidential information received in the course of official duties." An exception is made only for "reporting or disclosing misconduct, including sexual or other forms of harassment, by a judge, supervisor, or other person."

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The failure to treat the confidentiality of the Court's proceedings as an ethical imperative has had clear consequences. Some observers have applauded the leak. They suggest that the Court hides its politics behind black robes, too often legislating instead of judging, and the leak just puts this institution on the same footing with the other "political branches."

Other critics of the leak believe that its harm cannot be divorced from the draft's contents. The leak and the draft have been linked together in what has been described as a blow to the Court's legitimacy. How this combined effect precisely works is far from clear. Does it mean, for example, that the leak would have been less significant, less harmful to the institution's legitimacy, if it had suggested a pending 5–4 decision to uphold *Roe*?

A formal ethics code would help sort out these questions. Such a code would set standards for the justices and their workforce in clear, publicly available terms, and on the basis of fully considered rationales. If its code differs from the one in effect for all other judges, because the Court must adopt one that is tailored to its unique institutional requirements, then the variations will be clear, and the justices can explain them.

This clarity of ethical vision enables the public to better understand these kinds of issues. A "private" set of standards does not serve a key function of ethics codes: to compel the institution to openly articulate ethical standards and establish a basis for public assessment of their sufficiency and of the seriousness with which they are observed or enforced. If anything seems inadequate in the rules, or inadequately enforced, a public code of ethics can prompt informed public discussion and change. The formal adoption of ethical standards strengthens an institution's accountability.

As matters stand, the justices can communicate different expectations to their clerks and staff. Consider the story told by one of Antonin Scalia's former clerks, that he warned them that if they failed to observe strict confidentiality in their work for him, "I will do everything in my power to ruin your career." The late justice sought to make his point in unmistakable terms, but this is not a constructive approach to building an ethical culture. In fact, this kind of threat—do as I say, or I will destroy you—does not serve to foster respect for the rule and for the reasons behind it.

Much of the commentary about the leak suggests that the problem resides, as the chief justice suggested, in the violation of trust. Justices will deliberate with less candor if they imagine that they risk a leak. Distrust can spread beyond the feared leak of conversations and documents to a more pervasive collapse of collegiality. As stories about "disarray" on the Court since the leak suggest, this distrust may break out of the institution into the more general, public perception of the Court. The Court may begin to seem more like a political body than a guardian of the rule of law.

These are all sound grounds for a tightly formulated and clearly explained ethics rule on confidentiality. An additional reason for such a rule is its importance in protecting against further politicization, or the perception of politicization, of the Court. Leaks are meant to expose the Court's deliberations to public pressure (in the case of the recent leak, perhaps to protect *Roe* or perhaps to ensure its demise). If the leaker's intent was to warn about a politically or ideologically motivated Court, then the means chosen were no less political; the response to the disease was more its symptom than a treatment or cure.

In a period of sharp political polarization, there is cause for concern that, at the Court as elsewhere, politics will begin to win out over ethics. Or, worse, that what is ethically required or permissible will be redefined in terms of its service to politics or ideology.

The ethical issue in the matter of the *Roe* leak is the leak itself. To argue, as one commentator did, that "the fact of the leak cannot be separated from its substance" is not correct. I strongly object to both any decision to overturn *Roe* and the approach to reversal on display in the Alito draft. However, at a time when public ethics is in disarray, evidence that the Supreme Court may also be on the brink of—or now launched on—a downward ethical slide should occasion deep concern, regardless of whether the observer supports or opposes *Roe*. Critics of Alito's draft who see in it evidence of bad faith or ideologically tainted judging, or who believe that he and his colleagues Neil Gorsuch and Brett Kavanaugh misled Congress on their view of stare decisis, do not make their case stronger by linking these concerns to the damage done by the leak. Instead, they confuse the ethical issue.

These questionable responses to the leak include yet another, by Justice Clarence Thomas, which further underscored the need for clarity about the justices' ethical obligations. Thomas denounced the leak as a betrayal of trust, which he deemed exceptionally damaging to the institution, but his remarks then took a different and troubling direction. Rather than reassuring the public that the justices would take the necessary action to address the problem and prevent its recurrence, he suggested that trust on the Court was "gone forever" and reportedly implied that the problem lay with those (unnamed) justices who joined the Court after 2005. He further assigned to progressives the exclusive blame for inappropriate public attacks on the Court, such as the "trashing" of nominees. He weighed in on the contentious issue of whether the Senate had acted within norms in denying an election-year hearing to Merrick Garland and then holding, indeed expediting, one four years later for Amy Coney Barrett.

Are these remarks an issue of ethics, or just imprudent? The code of conduct for federal judges (other than justices) requires them to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." It is hard to reconcile this requirement with Thomas's comments, but, of course, he is not bound by this code—or any—in making them.

The *Roe* leak is not the only problem arising from the absence of a Court code of ethics. The presidential commission cited other issues, such as the Court's lack of transparency about recusal standards, including any requirement or practice of explanations of recusals in particular cases, and it also referred to a "building

consensus among [Court] observers" that justices, and their spouses and dependent children, should not hold individual, publicly traded securities. Members of Congress have introduced legislation to establish a code for the Court.

Margaret Atwood: I invented Gilead. The Supreme Court is making it real.

What the leak episode showed, however, is that, without formal, published ethical rules and standards, the very nature of a problem such as the *Roe* leak will elude clear public explanation. The chief justice faltered in explaining the seriousness of this incident; so did a number of commentators. Justice Thomas's public comments merely served to further muddy the picture of the state of ethics at the Court.

This has all served to illustrate the importance of an ethics code for the Court—and to underscore the urgent need for the justices to adopt one.