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Legal Sidebar

Is Unauthorized Dissemination of a Draft Supreme Court Opinion a Federal Crime?

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On May 2, 2022, it was first reported that a news organization had obtained a draft Supreme Court majority opinion in *Dobbs v. Jackson Women's Health Organization* and received confirmation from "a person familiar with the court's proceedings" in the case. The Court subsequently authenticated the draft opinion, and Chief Justice Roberts ordered an internal investigation. Beyond discussion of the substance of the draft opinion and its implications for the constitutional right recognized in *Roe v. Wade*—and setting aside potential employment or professional consequences for the person or persons who shared the draft—a number of commentators have questioned whether the act of providing the draft opinion to a media organization was a federal crime. Several Members of the House Oversight Committee wrote a letter to the Attorney General on May 3, 2022, calling for, among other things, a Department of Justice investigation and a briefing on "whether criminal charges are being considered against the individual or individuals responsible for this breach."

Although federal law does prohibit the dissemination of certain kinds of government information—such as "classified" information related to national security—there does not appear to be a federal criminal statute expressly prohibiting unauthorized sharing of Supreme Court documents like draft opinions. Several laws that have been publicly referenced in connection with disclosure of non-public Supreme Court information could apply to particular disclosures depending on the underlying facts, which remain unclear in this instance, but there would be legal hurdles associated with seeking to use any of the referenced laws to prosecute the person or persons who shared the draft opinion in *Dobbs*. The provenance of the disclosure is unknown, so the laws addressed in this Legal Sidebar may or may not apply depending on the facts. Further developments in the Supreme Court marshal's investigation could also make additional laws relevant (for instance, 18 U.S.C. § 1001, which prohibits knowingly and willfully making a materially false statement "in any matter within the jurisdiction of the . . . judicial branch of the Government of the United States," among other things). As relevant to the disclosure itself, this Legal Sidebar will briefly describe three federal criminal provisions that have been cited by commentators in the context of apparently unauthorized Supreme Court information dissemination and identify some of the potential issues that application of each of those laws could raise.

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Computer Fraud and Abuse Act: 18 U.S.C. § 1030

Among other things, the Computer Fraud and Abuse Act (CFAA) makes it a crime to intentionally access a computer *without authorization* or to *exceed authorized access* and obtain information from a financial institution, the federal government, or "any protected computer" (any computer connected to the internet). The term *without authorization* is not further defined in statute, while the term *exceeds authorized access* is defined as "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter[.]" Prior to a recent Supreme Court decision, some courts had read the statute broadly to include accessing a computer or information on a computer to which the person already had authorized access but doing so for a *purpose* that was *not* permitted. An example would be an employee accessing a database containing "sensitive personal information" for his personal use despite an employer policy prohibiting use of the database for nonbusiness purposes.

In *Van Buren v. United States*, however, the Supreme Court held that the relevant CFAA provision "covers those who obtain information from particular areas in a computer—such as files, folders, or databases—to which their computer access does not extend," but it does *not* "cover those who . . . have improper motives for obtaining information that is otherwise available to them." As such, as it relates to the disclosure of the draft opinion in *Dobbs*, if the person or persons who shared the opinion obtained it by accessing a computer or area of a computer that was completely "off limits," such conduct might constitute a violation of the CFAA. While the circumstances of the disclosure remain unknown, if a person or persons who shared the draft were given access to it for work-related purposes, it does not appear that a CFAA charge would be available.

Concealment, Removal, or Mutilation of Certain Documents: 18 U.S.C. § 2071

18 U.S.C. § 2071 prohibits, in part, "willfully and unlawfully . . . remov[ing]" a "record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States" or "with any judicial or public officer of the United States." Potential application of this provision to the person or persons who shared the Supreme Court draft opinion in *Dobbs* would need to clear several legal hurdles. First, the *mens rea* requirement, that a person acted "willfully and unlawfully," appears stringent. According to the Ninth Circuit, the standard requires one to act "intentionally, with knowledge that he was breaching the statute." Second, there is little caselaw on what it means for a record or document to be "filed or deposited" with a relevant officer, though a 1923 Third Circuit opinion interpreting a predecessor statute suggested that a document "deposited" may include one "intrusted to [the] care" of another.

In any event, there is conflicting judicial opinion as to whether the statute applies to the removal of a mere *copy* of a record or document. In a 2014 decision, the federal district court for the District of Columbia ruled that the statute as a whole extends only to circumstances where a person's actions with respect to a covered record or document "obliterated information from the public record," disagreeing with an earlier divided Tenth Circuit opinion. The trial court further wrote that it was "difficult to see how the government could prove that [the defendant] obliterated information from the public record in violation of [the statute] by printing electronically stored documents and then taking the print-outs." If followed, this decision would seem to exclude application of the statute to the *Dobbs* disclosure, which appears to have involved a photocopy.

Theft or Conversion of Public Property: 18 U.S.C. § 641

Several commentators have asserted that disclosure of the draft opinion in *Dobbs* could violate 18 U.S.C. § 641, which prohibits, in relevant part, embezzling, stealing, purloining, knowingly converting to one's own use or the use of another, or without authority conveying or disposing of a record or "thing of value

of the United States or of any department or agency thereof." Application of the statute in this context could raise several legal questions. At the threshold, for instance, the extent to which the statute applies to the judicial branch appears unclear. Although Section 641 has been used to charge conversion of judicial branch property in the past, the Supreme Court has held that the terms *department* and *agency*, as used in Title 18, do not extend to the judiciary.

Additionally, courts are divided on whether and to what extent *information* may be considered a "thing of value" under the statute, a prospect that some have suggested may raise First Amendment concerns. The D.C. Circuit, possibly the federal appellate court of jurisdiction given the Supreme Court's location, has held that the statute can apply broadly to intangible property "generally protected as personal property," such as "computer time and storage," but it does not appear to have addressed whether it would consider information a form of protected intangible property. It also appears that the Department of Justice has maintained a written policy that it is "inappropriate to bring a prosecution" under the statute "when: (1) the subject of the theft is intangible property, i.e., government information owned by, or under the care, custody, or control of the United States; (2) the defendant obtained or used the property primarily for the purpose of disseminating it to the public; *and* (3) the property was not obtained" by wiretapping, illegally intercepting correspondence, or illegal entry or trespass. One reason given for the policy is to "protect[] 'whistle-blowers.' Thus, under this policy, a government employee who, for the primary purpose of public exposure of the material, reveals a government document to which he or she gained access lawfully or by non-trespassory means would not be subject to criminal prosecution for the theft." It appears that the policy was last updated during a prior Administration. The extent to which the policy is still in force is unclear.

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