

N. Rodgers: Hey Aughe.

J. Aughenbaugh: Good morning, Nia. How are you?

N. Rodgers: I am good. How are you?

J. Aughenbaugh: I'm good. The reason why I'm good is it's not very often I actually get to talk about institutions springing leaks.

N. Rodgers: Yes. Leak as it's being used in the news right now, I think it's a misnomer because leak implies drip and this is not drip.

J. Aughenbaugh: Yeah this is not a leak.

N. Rodgers: This is like drinking out of a fire hose, right?

J. Aughenbaugh: This is a dam breaking and we need to evacuate a city that is populated with a million folks.

N. Rodgers: Right. This is Hoover coming down. What we're talking about is the recent leak from the SCOTUS, from the Supreme Court on specifically Samuel Alito's opinion in the abortion case that has come before the court. We're not here to talk about the merits of the case. We are here briefly to talk about the history of leakage from the SCOTUS because in previous leakages, the way we really think of the word leak, which is like a couple of hours ahead or maybe a day ahead of something actually coming out.

J. Aughenbaugh: Or just bits and pieces of information that allow us to go behind the metaphorical curtain.

N. Rodgers: Like for the Wizard of Oz. Don't look behind the curtain.

J. Aughenbaugh: It's not very often listeners and me and I get to go ahead and use a Wizard of Oz reference. But nevertheless today we get to use one. But the previous leaks coming from the Supreme Court, it was like behind the curtain dishing, this justice was just a pain in the butt to deal with or a leak that comes out the same day, that gives us a hint of how the Supreme Court is going to roll. Now what we're talking about today is an article run by Political, the kind of online news magazine for all of the Washington DC junkies, right?

N. Rodgers: Right.

J. Aughenbaugh: They published a news story that contained a full draft of a majority opinion written by Samuel Alito, and he was joined by four other justices.

N. Rodgers: This is an adoptions case which is from Missouri.

J. Aughenbaugh: Mississippi,.

N. Rodgers: Mississippi. Okay. Sorry.

J. Aughenbaugh: But you got the pronunciation of Missouri correctly.

N. Rodgers: Thank you.

J. Aughenbaugh: Residents of that fine State would be like, Why do you guys keep on putting the E on the end of the word? It's Missouri, it's not Missoure. Okay, yes.

N. Rodgers: It has been verified that it was a legit thing. It's not false news in the sense that it's not a fake document.

J. Aughenbaugh: It is not affect document. Chief Justice John Roberts the following day, issued a press release from the White House Press Office, acknowledging that the draft opinion was authentic, his words.

N. Rodgers: But saying that they hadn't finished deliberating yet?

J. Aughenbaugh: No. They had.

N. Rodgers: Hence the word draft.

J. Aughenbaugh: It's that's a draft, yes.

N. Rodgers: As opposed to the final product. Because if it were the final product, they would just go ahead and release it. I'm assuming that what happens with drafts, can we briefly mention. I assumed that what happens is they write a draft, and then that drafts circulates through the court?

J. Aughenbaugh: Yes.

N. Rodgers: Then people get to react to the draft, and they get to write their descending or concurring opinions.

J. Aughenbaugh: That's right.

N. Rodgers: Based on that draft.

J. Aughenbaugh: The draft majority opinion starts the post-conference deliberation of the court.

N. Rodgers: Okay.

J. Aughenbaugh: The court heard oral arguments in the Dobbs case late in 2021. Then they had a conference that week and took the vote. That's the initial vote. Then the senior-most associate justice, if the Chief Justice is not in the majority, assigns the opinion. That's the other noteworthy thing about this. John Roberts was not part of the majority that signed onto Alito's opinion. The senior-most associate justice would have been Clarence Thomas. That meant that Justice Thomas assigned the majority opinion to Samuel Alito, okay?

N. Rodgers: Okay.

J. Aughenbaugh: But once Alito finishes the draft of the majority opinion, it gets circulated to the other justices, which then allow them, as you described, Nia, allows the other justices to say to Alito, if they're in the majority, Hey, I like all these parts, but I don't like Section 2 Part B. Could you rework that. But it also allows those who want to write separately, whether concurrences or if they disagree with the court's vote in dissent. The draft majority opinion basically becomes the target for the dissenters.

N. Rodgers: Well, and all of that is bundled together in a case. When an opinion is released, it's released with all of the concurrences and the dissents and the majority, all of that is released together. That's why you don't get one thing being released and then people piling on later. That's not how they want us to work. They wanted to come out all at once.

J. Aughenbaugh: Yes. The court will not release a decision in a case until all the justices are finished writing.

N. Rodgers: We have no idea when this theoretically will be released?

J. Aughenbaugh: No. If I had to venture a guess, we're probably not going to go ahead and see it until late June or early July. Because that's when the Supreme Court heads down all of its controversial rulings.

N. Rodgers: Is this a crime?

J. Aughenbaugh: Well, yeah. I've been asked that question quite a bit Nia. On one hand, Supreme Court opinions are not classified documents. They are not classified documents, right?

N. Rodgers: Okay.

J. Aughenbaugh: Unless somebody hacked the Supreme Court intranet to release the document. Now if they did that, they could be charged with any number of computer crimes, right?

N. Rodgers: Right.

J. Aughenbaugh: Or they could be targeted for violating a number of federal laws about honest use, where government officials are only supposed to engage in behavior in furtherance of their public duties. But those are really difficult to prove, as we've seen of recent vintage when Virginia Governor

Bob McDonnell was targeted, and he won his case. New Jersey Senator, Robert Menendez was also targeted and his case was thrown out. I don't see it being a crime.

N. Rodgers: Although hat tip to Hillary Miller who's not here with us this morning. But theoretically, somebody steal someone else's intellectual property. You could go to copyright court.

J. Aughenbaugh: Adhere to for the Supreme Court and its justices have never claimed that their opinions are intellectual property.

N. Rodgers: Oh, okay. Because it's in the course of their work as a government official. Oh, we've done this, we've covered out that on another podcast, I guess.

J. Aughenbaugh: There you go. Yeah.

N. Rodgers: Will they investigate the leak

J. Aughenbaugh: Yes. In the press release coming from Chief Justice, John Roberts, not only did he verify that the draft opinion was authentic, he also announced that the Marshal of the court would be leading up in an investigation. Now, the Marshal of the Supreme Court basically runs the court's police department. The Supreme Court has a small police department to basically make sure that the court's operations run uninterruptedly.

N. Rodgers: If you go into the courtroom and you're sitting in the gallery and somebody says something and you've leaped to your feet and start yelling. The three guys who pounce on you to drag you out, work for the court-Marshal?

J. Aughenbaugh: Yes.

N. Rodgers: The court's Marshal.

J. Aughenbaugh: Yes. Okay?

N. Rodgers: Can we just put in here real quick the quote that you have in your notes that Roberts called this quote an egregious breach?

J. Aughenbaugh: Breach, yes.

N. Rodgers: That's one way to put it.

J. Aughenbaugh: Yes.

N. Rodgers: I reacted a little more strongly, which we're going to get to at the end with our opinions. But I think egregious breach is he's clearly offended and he clearly wants an answer about who did it.

J. Aughenbaugh: Yeah. Again for our listeners who are not Supreme Court aficionados like I&M for instance, you might be like, wow, egregious breach, Chief Justice John Roberts doesn't seem to be really all that worked up about this for John Roberts.

N. Rodgers: That's fighting words. That's practically cursing. He's practically cursing at this point. Considering that he is made of Wonder Bread and American cheese. Like he's made of the two most land things you can possibly have that for him. Let's just say for instance they investigate and they figure out it's an attorney.

J. Aughenbaugh: Wait, wait. Hold on just a second. Can I ask this question quite a bit here? Why use it that it's the Supreme Court Marshal's office that's doing the investigation? Well, technically, Chief Justice John Roberts could make a referral to the Justice Department, but who controls the Justice Department?

N. Rodgers: The President, the executive.

J. Aughenbaugh: The executive branch.

N. Rodgers: That's asking another branch to investigate your branch. I can see where he would not want that. He would want an internal juror. Just like you don't want the Marshal of the Court investigating what goes on in the White House.

J. Aughenbaugh: That's right. Okay.

N. Rodgers: You want those separation of powers, you also want to keep your own, as my mother would say, keep your own dirty laundry in your own house.

J. Aughenbaugh: That's right. Yes, okay. Because once he makes that referral, the investigation is out of the control of the Supreme Court.

N. Rodgers: Right. In the current political climate, it could turn into some really dramatic, I mean, as, Wonder Bread.

J. Aughenbaugh: As Trump Robert says.

N. Rodgers: As J. Rob is, he would not want the possibility of this being splashed across headlines and going bananas. Let's just pretend that there are two possibilities here. One, is that it is a janitor, it finds it in the garbage.

J. Aughenbaugh: You're taking a plot-line from an old John Grissom book.

N. Rodgers: Boy, this looks interesting. I think I'll turn it over to the news. I think I'll turn it over. That's different than if this is one of the clerks, one of the lawyers involved, because that person will be prosecuted, they will probably lose their job because they should not have done that. They should have

turned it into somebody and said, you-all probably don't want to put this in the garbage can because just anybody can find it. But if it's a law clerk.

J. Aughenbaugh: Now you're talking about the violation of the oath. Each of the clerks have to take because each of the clerks taken oath to work at the Supreme Court. Part of that oath is the maintenance of confidentiality. Is it a legal breach? Probably not. Would it be an ethical breach? Well, according to the standards of the Supreme Court? Oh heck yes. Nia, just to give you an example wait, hold on just a second. Just to give you an example. When clerks have talked to journalists after their service to the court, and dish dirt on the court when they work there. The clerk, if you will, alarms are very critical. The classic example is a former law clerk by the name of Ed Lazarus, who worked for Justice Blackmun in the late 1980s Supreme Court. He wrote a book called Closed Chambers, where he disclosed the political infighting among the various justice's opposites. Particularly among the clerks and the clerk network, were very critical of him.

J. Aughenbaugh: Now as a scholar, I loved his book because I've occasionally used it in my courts and politics class. But that was viewed after the fact, Nia, as a breach of the ethical code of working at the Supreme Court. If there was a law clerk and they released Alito's draft opinion.

N. Rodgers: Will they be disbarred? Could they be disbarred? I guess could be, depending on.

J. Aughenbaugh: It would really depend on the bar association. If they're not yet a member of the bar, one of the factors that bar associations take into account is the ethics and character of the person applying for membership to the bar. If you've been outed as the clerk who released a confidential draft. Here's the other thing, Nia. This was a draft working document. Client-attorney relationship is predicated on clients and attorneys being able to speak freely. Yet the clerks are going to go ahead and release this kind of information to the press. Then their bosses, the justices are going to be less likely to do what in front of them.

N. Rodgers: Right. Talk about it, have any sort of discussions.

J. Aughenbaugh: Don't we want the court to be a deliberative body that considers in some cases, some of the craziest, strangest legal ideas to settle really difficult, complex cases. This is where for all of us who are like, wow, this is incredible. Well, part of me is just like, it's not incredible because the institution can't work if the justices are unwilling to be open and free with their discussions before they issue a final decision.

N. Rodgers: Which is, I think, probably in some quarters, a belief of motivation.

J. Aughenbaugh: Yes.

N. Rodgers: Is that it's that somebody doesn't like the way the court is going and wants to, either stifled discussion, or stifle how people are doing their opinion. On either side, they might've been a liberal clerk who's like, I don't like the way we're going conservative with [inaudible] and so I'm going to try to bring public pressure, or I'm going to try to bring notoriety to this, or from the conservative side, we're not

going far enough. We need to blow this thing up and get rid of those three pesky liberal judges, activists, liberal commies.

J. Aughenbaugh: There's been plenty of discussion about what would be the potential motivation of the leaker. There are some who posited, as you pointed out, it could be a clerk from one of the three justices on the liberal side of the ideological spectrum wanting to expose to the public before the court officially decides, hey, this is what's going to happen. It could be a clerk from one of the conservative justices wanting to lock in the five justices, who, if the draft ends up being the final decision, the Mississippi law will be upheld as constitutional, and a couple of very important Supreme Court precedence would be overturned.

N. Rodgers: There are trigger laws in many states that would then automatically take into effect. The potential effects, which we will talk about when we do this [inaudible] wrap-up of the summer because I'm sure this case will be prominent in that discussion, but they could be trying to affect not just this particular case, but states that already have built-in laws that if this case goes the way the current draft is written.

J. Aughenbaugh: Or other political purposes, right?

N. Rodgers: Right. That's true. Getting people out to vote in the mid-terms.

J. Aughenbaugh: Yeah.

N. Rodgers: It's true.

J. Aughenbaugh: This is one of those issues.

N. Rodgers: It's going to be passionate. Isn't it?

J. Aughenbaugh: That has galvanized the American public, so there are any number of motivations here, but then the other is, this is where I think we can conclude this short podcast episode, is what is the view of the leak? Many commentators have condemned the leak for the reasons I mentioned just a few moments ago. It would really hurt the trust that is required in a small group organization to do its work. Because if you know that how you got to a decision is going to be exposed, you might be less likely to go ahead and entertain. I tell my students this all the time. Nia, you and I've talked about this. One of the values of this podcast episode is usually, one or both of us have crazy ideas, and then we talk them out, right?

N. Rodgers: Right. I want to take over the world. Here's why that's a bad idea.

J. Aughenbaugh: Bad idea.

N. Rodgers: But that's a thing that happens with, as we've titled it, civil discourse. It's what happens when people say, that's an extreme view. Maybe I could get on board if you could come back two feet

from where you are. Instead of being all the way out at the edge, maybe come back a little bit. We also don't know. Well, anyway, I'm with those people. I think that it changes the way people work. I think it has a chilling effect on the way small groups work. My department is a relatively small group. There are nine of us. Sometimes when we make the sausage, when we talk about what we want to do programming-wise for our graduate students, our first ideas are bonkers, and we would be embarrassed if those got out. That's not saying my colleagues are crazy. They're not. What they're trying to do is think at the edge and then come back to a place that's more widely palatable.

J. Aughenbaugh: I tried to remind my students of this, Nia. If you think about the rational comprehensive decision-making model, which is taught in graduate schools and public administration, business administration, they actually say that the second step after you've figured out what the problem is or what your goal is, the second step is consider all possible alternatives.

N. Rodgers: Exactly. We force every graduate student to take a library course. Let's take a step back from that because there's no way we're going to be able to do that. Then we figure out how to work ourselves in.

J. Aughenbaugh: How to incorporate it into existing curriculum.

N. Rodgers: Exactly. It's that kind of thing. Sorry, not implying that we would make all graduate students do, but it is and regularly comes up that we then say, no, we can't do that and we move on. I personally think that that's the danger of these leaks. Just institutionally, I don't know that it is wise for people to understand the deep ins and outs of how things are decided for any group, for any corporation, for any organization, for any government because you're not in the room, you can't read people's faces, you can't read their body language. You don't know what's being said. You're only getting this document. It's not a full representation of what happened.

J. Aughenbaugh: That's usually my push-back when I hear people say, well, what's the problem? It's a government institution. All government institution supposed to be transparent. I'm like, so how far do we go with this transparency and what are the costs? I said, what are the trade-offs? If we assume that transparency is a good thing, what are the trade-offs? What are the costs? You just mentioned one of them, but there are other costs related to too much transparency. One of them, particularly, with an institution like the Supreme Court is, there are less likely to go ahead and engage in the deliberation that many of us want the highest court in the land to engage in. We don't want less deliberation.

N. Rodgers: We want more.

J. Aughenbaugh: We want more. I want everybody, no matter where they fall on the ideological spectrum on the court, to have full body conversations. One of the purposes of the clerks is to go ahead and give feedback, challenge the justice that they worked for. But if the justice can't trust them, then where's that conversation go to occur? I got to be honest. If you gave an example from the organization you work in at VCU. Some of the things that I've actually considered doing in my classes that then I've discussed with my colleagues and they've gone ahead and said Aughe, you can't do that. If I had some of those ideas like disclose to my students, I would lose my job.

N. Rodgers: Right. Or people would choose not to take your classmates, your craze balls?

J. Aughenbaugh: Yeah which means I wouldn't have my job.

N. Rodgers: The other thing that makes me twitchy about this leak is you signed a contract that you wouldn't do this?

J. Aughenbaugh: Yes.

N. Rodgers: Everybody who goes to work there signs a contract that says they will not impede something of justice. I can't remember what the exact wording is, but it's basically you won't mess around with the workings of the court.

J. Aughenbaugh: Yes.

N. Rodgers: When I came to VCU, they made me sign about 4,000 pieces of paper that said, I would never release student information. I will never release faculty increment. I don't get to say, John Aughenbaugh worked on these days with his research to other people. But I don't get to do that because there's a privacy expectation. The janitor sign that up to the law clerks, up to the justices, but justices assigned it. If you're thinking that a Justice released this, well, first of all, if they ever figured that out, that would be like a bomb going off in the building.

J. Aughenbaugh: Yes.

N. Rodgers: That will harm all of the relations of everyone there. I fervently hope that it is not one of the justices. That's worst-case scenario possible. But that's my other part of this. Just a simple from a simple contract point of view. You violated the contract you sign.

J. Aughenbaugh: Yes nobody put a gun to your head saying he had to go to work for the Supreme Court.

N. Rodgers: Exactly.

J. Aughenbaugh: That's okay. Here's the other reality. Let's say it was a clerk. You get to be a clerk to a Supreme Court justice. You basically get to write your ticket for your career because you worked at the court, right?

N. Rodgers: Right.

J. Aughenbaugh: You want to work at a big law firm you get to do that. You want to go ahead and be a tenured professor at some really good law school. You get to do that. You want to go work in Justice Department for a president, you gets to do that, why? Because you were clerk, you get opportunities that nobody else who went to law school get. To trade on that, wow, that's [inaudible] .

N. Rodgers: Throw that away. It's ridiculous.

J. Aughenbaugh: That's a big wow.

N. Rodgers: That's very short-term thinking.

J. Aughenbaugh: On the other hand, there are some people who have gone ahead and said, the leak is a good thing because they believe that it reflects all the bad stuff going on at the Supreme Court. I believe that the Supreme Court should be reformed. Others have pointed out that the leak really does demonstrate that John Roberts no longer has functional control over the Supreme Court. Of course when I read that criticism, I'm like chief justices usually don't have control over the Supreme Court.

N. Rodgers: Well, he's not omniscient. He can't know what everyone's doing it every month. If J. Rob is god, he wouldn't fall down on golf courses. He's not omniscient. I think that's not a fair criticism. I agree that reform and the drive to reform might be a reasonable criticism. I don't think this is the way to do it, but I can see somebody's saying to themselves, maybe I can get reformed by blowing this thing up a little bit.

J. Aughenbaugh: Blown this up a little bit. Anytime I read this stuff, like Supreme Court justices are supposed to have control over the institution. I'm like.

N. Rodgers: Have they ever.

J. Aughenbaugh: Their colleagues are basically people who have been told their entire lives, you are the smartest person in the room. Good luck controlling one those justices and moreover, the young people, the clerks who worked for them. Who were once again, the best of the best.

N. Rodgers: Can we undermine one other criticism because I have heard this is like the Pentagon papers. I've heard this likened to the Pentagon papers as and that was a good thing. I agree that was a good thing because the US government was lying to people about how many people were dying in Vietnam. They were lying about the state.

J. Aughenbaugh: In the US government had lied for decades about our involvement in Vietnam.

N. Rodgers: This is not the same.

J. Aughenbaugh: Thing because the Supreme Court.

N. Rodgers: They're not laughing about this. There's no lie here. There's no attempt at deception. This it has been suggested to me that Alito might have released it in order to break the thunder early. I'm like Alito doesn't care about the thunder of you met Alina. He will just walk up and slap you if he thinks it's a good idea.

J. Aughenbaugh: I knew almost immediately that the draft was authentic even before Chief Justice Roberts.

N. Rodgers: Because of a language.

J. Aughenbaugh: No because I read it and I was just like Alito want this.

N. Rodgers: Alito is the one who pulls the paint out of a grenade and hold for a few seconds and then tosses it into the group. Like you got no chance of escape with him. He's a Scalia style writer of.

J. Aughenbaugh: Well, he is a Scalia style writer but without the catchy phrases.

N. Rodgers: Right. Well, but he puts his opinion straight up forward. I don't think he's afraid of anybody hearing anything he has to say. I'm not buying back conspiracy.

J. Aughenbaugh: Moreover, to your point that this isn't the Pentagon papers. If you read the transcript of the oral arguments in this case from late last year, the draft opinion should not have shocked you. Moreover, as I told my students, this is a decision potentially that's about 45 years in the making.

N. Rodgers: Because people disagreed with rho almost immediately.

J. Aughenbaugh: Immediately.

N. Rodgers: Every discussion that's come up since then, it's not shocking that there is content in there that is upsetting too. [inaudible] a variety of people

J. Aughenbaugh: The Supreme Court that have been aligned the debate, the Supreme Court about abortion has been public every time they've taken an abortion case issue, the ruling, and if you read the opinions, you're just like, they're really divided. Yes, they're really divided. Guess who else is really divided? The American public, there's no line here, there's no subterfuge.

N. Rodgers: This is not the same thing as these papers or the big release in Britain right of all the wealth and where all the wealth is hidden and other big shock, wealthy people hiding their money.

J. Aughenbaugh: When I read those news reports, all I kept on thinking was, I thought wealthy people were better at hiding their money.

N. Rodgers: Exactly. How did they let reporters find this out? I will be interested to see. I assumed that we will know something before the end of this term. Do you think we will know something before the end of this term that will wrap up the investigation or do you think they did?

J. Aughenbaugh: Even if the Marshal finds out who it is before the end of the term. Knowing John Roberts the way I think I do because I study the court it wouldn't bother him in the least. If the Supreme

Court announces, like late July, when all the justices in a big chunk of the American public is at the beach or on vacation., it gets released or announced on a Friday afternoon.

N. Rodgers: Late Friday afternoon. The case has been wrapped up and the person has been terminated.

J. Aughenbaugh: Yes. It has been identified in disciplinary measures have been taken.

N. Rodgers: Exactly. They may not even say terminated. They'll just say disciplinary measures have been taken.

J. Aughenbaugh: That's it.

N. Rodgers: That's it. Then everybody will go home for the weekend and Monday morning people will say did something happen at the Supreme Court? No. That'll be the end of that. Because that the Friday evening dump is traditionally what you do when you want to release and you wanted to go wildly unnoticed, is that you do it? You do it either on Friday afternoon or Saturday morning when nobody cares.

J. Aughenbaugh: At the White House, it's referred to as take out the trash day.

N. Rodgers: Take out the trash on Friday afternoons.

J. Aughenbaugh: Because most people they don't want to be seen taking out the trash. In most of us really don't like looking in the trash. That's the day you take it out and nobody notices, nobody cares. If they're remotely curious, as you pointed out Nia, by the time Monday rolls around and you've re-engaged your brain, you're like, it's all may happen. Well, it's the Supreme Court.

N. Rodgers: That's three days old that might as well have happened 10 years ago.

J. Aughenbaugh: It was a go.

N. Rodgers: In the current scheme of news, three days is an eternity.

J. Aughenbaugh: Political news cycle. Oh my goodness, yes.

N. Rodgers: But we will bring to you what we find out when we find out.

J. Aughenbaugh: Yes.

N. Rodgers: As part of our wrap-up. Thanks Aughe for helping me unravel this.

J. Aughenbaugh: Again, this is unusual. But nevertheless, some things to consider as your listeners is you're trying to make sense of what actually happened. I enjoyed the conversation. Thanks, Nia.

N. Rodgers: Thank you.