

Congress of the United States

Washington, DC 20515

April 11, 2023

Michael Chertoff
Executive Chairman
The Chertoff Group
1399 New York Avenue NW, Ste. 1100
Washington, D.C. 20005

Dear Mr. Chertoff:

Thank you for your prompt response to our February 23, 2023, letter regarding your review of the Marshal of the Supreme Court's investigation into the leak of the draft opinion in *Dobbs v. Jackson Women's Health Organization*. We have been involved with a number of investigations over the years, and several aspects of the Court's investigation seem anomalous to us. We request your comment on your firm's role in reviewing and approving certain aspects of the investigation, with specific reference to whether your firm reviewed them (and if not, why not), and if your firm did review them, why they met with your approval and how they correspond with standard investigative technique.

As you know, on January 19, 2023, the Supreme Court published three items related to the leak investigation: a "Statement of the Court Concerning the Leak Investigation," a statement from you summarizing your review of the investigation, and the Marshal's report on her investigation. The Marshal's report stated that she and her team "conducted 126 formal interviews of 97 personnel," during which "investigators informed all witnesses that they had a duty to answer questions about their conduct as employees."¹ Investigators then asked each employee "to sign an affidavit, under penalty of perjury, affirming" that they were not responsible for the leak and had provided all "pertinent information."² No reference was made to any investigative effort regarding the justices, so the Marshal clarified in a subsequent statement that:

"During the course of the investigation, I spoke with each of the Justices, several on multiple occasions. The Justices actively cooperated in this iterative process, asking questions and answering mine. I followed up on all credible leads, none of which implicated the Justices or their spouses. On this basis, I did not believe that it was necessary to ask the Justices to sign sworn affidavits."³

¹ Office of the Marshal, Supreme Court of the United States, *Marshal's Report of Findings & Recommendations*, 13-14, Jan. 19, 2023.

² *Id.*

³ Supreme Court of the United States, Press Release, *Statement from Marshal Gail A. Curley*, (Jan. 20, 2023), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_01-20-23.

The Marshal concluded that her team was not able to determine who leaked the draft opinion, using a preponderance of the evidence standard.⁴ Notwithstanding the Marshal's inability to identify a culprit, the Supreme Court issued a statement implying that the leak was a "misguided attempt at protest."⁵

The report also noted that the leak of the draft opinion may have violated federal law prohibiting "the unauthorized disclosure or use of information by federal employees," and listed seven federal statutes "potentially relevant to the investigation."⁶ The report also stated that "[a]nother statute, 18 U.S.C. § 1001 [False Official Statements]" became "important to the investigation" because the Marshal required Court personnel, but not the justices, to sign sworn affidavits.⁷ The Marshal's report noted that she and her team "requested outside technical assistance on a number of matters," but it did not specifically state that the Marshal requested assistance from federal law enforcement.⁸

Based on your review of the Marshal's investigation and your own investigative experience, we would appreciate your assistance in clarifying the additional matters listed below.

1. Please describe the investigation of the justices compared to the investigation of other Supreme Court personnel, in time sequence and manner, and what investigative basis there was for treating them differently. If you found that to be good investigative methodology, please explain. Specifically, what was the evidentiary basis for the discrepancy in investigative method?
2. Do you agree that it is a basic investigative protocol to take witness statements, either recorded, or in writing and signed by the witness, or memorialized in a professional statement of the interview like an FBI 302? To our understanding, the benefit of this protocol is to preserve a record to refer to and compare with other evidence in the investigation, to minimize misunderstandings and mix-ups between interviewer and interviewee, and to discourage lying and prevarication by having a document that provides solid evidence should any accountability be pursued for any lying or prevarication.
 - a. Were any statements taken of the justices, and was any record kept of the statements; if not, why not; and did your firm approve this gap in investigative method?
 - b. Were any other witnesses interviewed with no statement taken and preserved?
 - c. Is it proper investigative practice to engage in a separate "iterative process" with a small group of individuals who are potential witnesses or suspects?

⁴ Office of the Marshal, *supra* note 1, at 17.

⁵ Supreme Court of the United States, *Statement of the Court Concerning the Leak Investigation* 1, Jan. 19, 2023.

⁶ *Id.* at 5, 8-9.

⁷ *Id.* at 9.

⁸ *Id.* at 16-17.

- d. Why would any further “credible leads” be necessary before taking a statement when it was known that justices had access to the leaked draft?
3. Although the investigation failed to identify any culprit, the Statement of the Court that prefaced the Marshal’s report implied that the leak was a “misguided attempt at protest.” (Emphasizing the wrong felt by the Court, the statement said that the leak was “no mere misguided attempt at protest”—the imputation of motive was collateral but clear.) It seems anomalous to fail to identify any culprit, but nevertheless manage to speculate about his or her motive. The report failed to identify any evidence supporting the suggested motive. Moreover, speculating that protest was the motive cast suspicion on chambers and personnel likely to protest the decision. Other motives were possible, and indeed were the subject of public discussion in the press, but only that motive was mentioned by the Court.
 - a. Did your firm review and approve the statement suggesting that the motive was a “misguided attempt at protest”?
 - b. What evidence did you review or can you point us to that would support that assertion?
 - c. How was it that the Court could determine the motive without identifying the culprit?
 - d. Did you find it justified, and proper investigative practice, for the Court to suggest without evidence a motive that casts particular suspicion on certain chambers and personnel?
 4. The Marshal’s report references possible violations of federal law. When an internal investigation into misconduct implicates possible violations of federal law, is it ordinary and proper investigative practice to notify or request assistance from professional federal law enforcement officials? Was that done here?

Thank you again for your cooperation, and we look forward to your timely responses to these additional questions.

Sincerely,



SHELDON WHITEHOUSE
Chairman, Senate Judiciary Subcommittee on
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and Federal Rights



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