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## **That's It? Scrutinizing the Marshal of the Supreme Court's Role in an Investigation within the Context of 28 U.S.C. § 672**

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The top of the article's webpage read, "Exclusive."<sup>1</sup> The first paragraph cut to the point: "[t]he Supreme Court has voted to strike down the landmark *Roe v. Wade* decision, according to an initial draft majority opinion . . . obtained by POLITICO."<sup>2</sup> Very soon thereafter, Chief Justice Roberts issued a statement directing the Marshal of the Supreme Court ("Marshal") to "launch an investigation into the source of the leak."<sup>3</sup> Thus began a months-long investigation into who was responsible for the leak.<sup>4</sup> The investigation recently culminated in a final report that detailed the process the investigation took, the general findings, and some recommendations for future changes – all to potentially prevent similar leaks from occurring in the future.<sup>5</sup> One major question commentators posed after the report's release was whether the Marshal did everything in her power to elicit answers, such as interviewing the justices, during the course of the investigation.<sup>6</sup> Exactly one day after the report's release, and seemingly responding to such scrutiny, the Marshal released her own statement.<sup>7</sup> In deciding whether or not the Marshal failed in her duties to conduct a proper internal investigation of the Court, the statutory constraints the Marshal is under must be examined.

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<sup>1</sup> Josh Gerstein & Alexander Ward, *Supreme Court has voted to overturn abortion rights, draft opinion shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

<sup>2</sup> *Id.*

<sup>3</sup> Press Release, Supreme Court of the United States (May 3, 2022), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_05-03-22](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22).

<sup>4</sup> See Hyemin Han, *Supreme Court Releases Marshal's Report of Dobbs Leak*, The Lawfare Institute (Jan. 19, 2023, 3:59 PM), <https://www.lawfareblog.com/supreme-court-releases-marshals-report-dobbs-leak#:~:text=The%20Supreme%20Court%20on%20Thursday,and%20interviewed%20almost%20100%20employees>.

<sup>5</sup> Marshal's Report of Findings & Recommendations 1, 17 (Jan. 19, 2023), available at [https://www.supremecourt.gov/publicinfo/press/Dobbs\\_Public\\_Report\\_January\\_19\\_2023.pdf](https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf).

<sup>6</sup> See Zoe Tillman & Sabrina Willmer, *Supreme Court Dobbs Leak Report Never Says If Justices Were Interviewed*, BLOOMBERG LAW (Jan. 20, 2023), <https://www.bloomberglaw.com/product/mopc/document/ROR8JOT0AFB5> (posing the question of whether the Justices were questioned and how the report in its final form produces a "fresh round of doubt about the institution's chances of rebuilding record low public trust").

<sup>7</sup> See Press Release, Marshal Gail A. Curley, Statement from Marshal Curley (Jan. 20, 2023), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_01-20-23](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_01-20-23) (stating that the Marshal spoke with each of the Justices).

The Marshal is responsible for the Court's security detail, its financial matters, its ceremonies (including the space management thereof), renovations, contracting, and events that transpire at the Court (and that is a non-exhaustive list).<sup>8</sup> The Marshal oversees the management of "approximately 260 employees."<sup>9</sup> Safe to say, the Marshal is essentially the Court's jack of all trades. The current Marshal is Gail Curley, who came into the position after previously working in the Office of the Judge Advocate General of the U.S. Army.<sup>10</sup> The degrees she holds are a Bachelor's in political science, a J.D., a Master of Laws, and a Master of Science.<sup>11</sup> Clearly, the current Marshal exhibits an upstanding resume.<sup>12</sup>

The Marshal position is a product of the U.S. Code.<sup>13</sup> The Supreme Court appoints its own Marshal according to the guiding statute of 28 U.S.C. § 672 ("§ 672").<sup>14</sup> Once appointed, the Marshal shall "[s]erve and execute all process and orders issued by the Court" and is subject to removal only by the Court itself.<sup>15</sup> § 672 does not mention the word 'investigation,' nor does it bind the Marshal to follow ordinary processes adhered to by practicing attorneys in civil and criminal matters when conducting an investigation.<sup>16</sup> Additionally, § 672 does not clarify which standard of proof the Marshal must strive towards when conducting any investigation.<sup>17</sup>

So how may § 672 influence the discussion around the Marshal's investigation of the *Dobbs* draft opinion leak? Due to § 672's broad language and lack of clarity on the Marshal's investigatory powers, the Marshal was likely free to use broad discretion to conduct the kind of investigation that she believed was the most proper, or that may elicit

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<sup>8</sup> See Supreme Court Historical Society, *How the Court Works – Clerk of the Court and the Marshal*, SUPREME COURT HISTORICAL SOCIETY (last visited Jan. 23, 2023), <https://supremecourthistory.org/how-the-court-works/clerk-of-the-court-and-the-marshal/#:~:text=The%20Marshal%20directs%20the%20Supreme,as%20a%20Treasury%20Disbursing%20Officer.>

<sup>9</sup> Press Release, Supreme Court of the United States, Gail A. Curley named Marshal of the Supreme Court of the U.S. (May 3, 2021), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_05-03-21](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-21).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See *id.* Ms. Curley also reached the level of Colonel in the U.S. Army.

<sup>13</sup> 28 U.S.C. § 672.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Based on a strict reading of the statute's language, the Marshal does not answer to any other authority besides the Court.

<sup>16</sup> See generally *id.* The statute is also silent on whether the Marshal shall be the position that the Court shall entrust to conduct internal investigations of the Court's personnel in a similar fashion to what Chief Justice Roberts asked Marshal Curley to do in May 2022.

<sup>17</sup> See *id.*

some conclusive finding.<sup>18</sup> The report stated that the Marshal made each Court employee who was interviewed as part of the investigation sign an affidavit affirming that the employee did not knowingly disclose the draft opinion to anyone outside the employment of the Court, and that the employee disclosed all “pertinent information” known at the time of the interview.<sup>19</sup> The Marshal also requested assistance on the technical intricacies of the matter from outside sources.<sup>20</sup> Discretion was certainly exercised by the Marshal here.

Yet, it still appears the Marshal chose to approach the investigation in a conservative manner when it came to the interviews. Unencumbered by any language in § 672 that would prevent her from subjecting the Justices themselves to sworn affidavits when investigating matters within the Court, particularly one with the seismic importance as this one, the Marshal ultimately chose to treat the justice’s answers as credible and not worthy of subjection to the penalty of perjury.<sup>21</sup>

Continued scrutiny for the Marshal’s choices to not hold the justices to the same legal standard (when it comes to affidavits, at least) as other Court employees will not be justified by falling back on § 672, since that statute did not bind the Marshal to be overly accommodating to the justices in investigatory interviews.<sup>22</sup>

Edited by Allison Frisella

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<sup>18</sup> See Statement from Michael Chertoff, former Secretary of Homeland of Security, to the Supreme Court of the United States (2023), available at [https://www.supremecourt.gov/publicinfo/press/Dobbs\\_Public\\_Report\\_January\\_19\\_2023.pdf](https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf) (finding that the Marsal “undertook a thorough investigation within her legal authorities”).

<sup>19</sup> See Marshal’s Report of Findings & Recommendations, *supra* note 4, at 14. These affidavits were apparently sworn before a Notary Public, which is a measure used by the Marshal that appeared to totally come from her discretionary powers in conducting the interviews. *Id.* at 15.

<sup>20</sup> *Id.* at 16-17.

<sup>21</sup> See Press Release, *supra* note 6.

<sup>22</sup> See 28 U.S.C. § 672, *supra* note 12.