

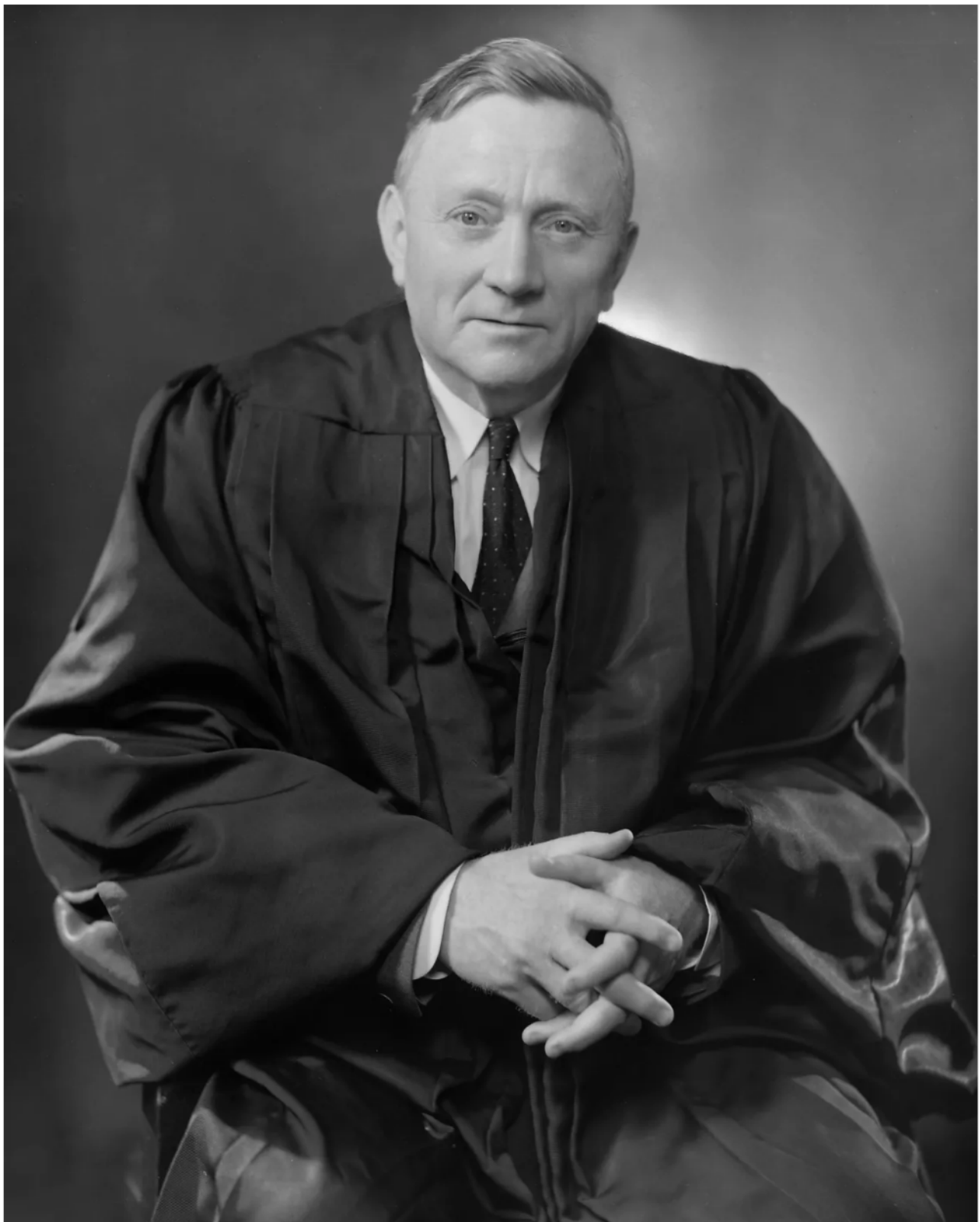
NEWS DESK MAY 16, 2022 ISSUE

SCOOPING THE SUPREME COURT

The first Roe v. Wade leaks happened fifty years ago.**By Jane Mayer**

May 6, 2022

Supreme Court watchers have been calling the leak of a draft opinion in advance of the Court's abortion decision "unthinkable" and "unprecedented." Chief Justice John Roberts has ordered an internal investigation by the marshal of the Court, and former Attorney General Bill Barr has suggested that a criminal probe may be warranted. Fifty years ago, however, the Court sprang another leak—two, in fact—in connection with the original Roe v. Wade decision. A rookie writer named David Beckwith published a story in *Time* magazine asserting that the Court was about to legalize abortion, a few hours ahead of the official decision. Speaking by phone the other day from his home in Austin, Texas, Beckwith said, "In my little incident, no one had any mal intent." He joked, "They just had the bad judgment to trust me."



Justice William O. Douglas. Photography from Bachrach / Getty

Beckwith, a law-school graduate, joined *Time's* Washington bureau in 1971, just as the Supreme Court was about to hear arguments in *Roe v. Wade*. On July 4, 1972, he noticed what he called “one of the strangest stories I’d ever seen” on the front page of the *Washington Post*. It had no byline and quoted no sources by name. But it contained an

extraordinary number of confidential details about a struggle inside the Supreme Court chambers over the right to abortion. The story revealed that, while a majority of the Justices clearly supported a constitutional right to abortion, Chief Justice Warren Burger, who opposed abortion rights, wanted to hold off announcing a decision until President Richard Nixon could fill two vacancies on the Court—which Burger hoped would change the outcome.

Although no one seemed to pick up on the *Post*'s account, published on a national holiday, Beckwith took notice. He decided to dive in and report out the story, interviewing more than a dozen Court insiders, including Justices and clerks.

A close reading of [the *Post* story](#) shows that it was leaked by someone with inside knowledge of the Court's private deliberations. It revealed the date on which the Justices had met to discuss the case, and also disclosed that the Court's reigning liberal, Justice William O. Douglas, was enraged by what he viewed as Burger's delay tactics, which he saw as an attempt to subvert the outcome. Douglas circulated a memo describing the Chief Justice's improper power plays to his fellow Justices and their clerks. Within days, its contents were on the front page of the *Post*.

Douglas Brinkley, a historian who is writing a book in which Douglas is a central figure, thinks it plausible that Douglas himself gave the memo to the *Post*. "Douglas leaked constantly to the press," he said. "That was his modus operandi." He was a passionate defender of individual liberty and the right to a zone of privacy. He'd written the 1965 decision supporting the right to contraception, on which Roe was modelled. "He was very worked up about it," Brinkley said. "There would be no Roe without Douglas." The Justice also moved in the same social circles as the *Post*'s editor, Ben Bradlee, and its owner, Katharine Graham, although Bradlee's widow, Sally Quinn, is dubious that Douglas was close enough to Bradlee to leak the memo to him. The journalist Bob Woodward said that the recent leak was a "big, big deal," but that a leak from the Supreme Court, generally, "is not that unusual." His book "[The Brethren](#)," co-authored with Scott Armstrong, used as sources five Justices and approximately a hundred and forty Court clerks.

The Court heard *Roe v. Wade* a second time, in October of 1972. Beckwith continued digging, and on January 22, 1973, *Time* published his article, predicting that the Court was about to legalize abortion.

In scheduling his story, Beckwith had been guided by an anonymous source, who asked him to hold off until after January 17th, when the decision was slated to be announced. But then Burger unexpectedly delayed again: he was about to preside over Nixon's second Inauguration, and, Beckwith surmised, he was so afraid to stand face to face with Nixon, who opposed abortion rights, that he postponed the Roe announcement until the week after. *Time*, though, printed Beckwith's article as planned, scooping the Court on its own decision.

Today, such news would have broken the Internet, as the Alito leak did. But Beckwith said that not even the New York *Times* picked up his story. One *Time* subscriber who did notice the piece was Justice Harry Blackmun. He was the author of the Roe decision, and he was furious that he had been preempted before he could announce the decision that he had anticipated would be the apex of his legal career. (He was further upstaged by Lyndon Johnson, who died the same day that the Roe decision was announced.)

"Blackmun lit a fire under Burger," Beckwith said. The Chief Justice summoned the top editors of *Time* to Washington to discuss the leak, and Burger, out for blood, presented them with a three-inch-thick binder detailing all of Beckwith's contacts with Supreme Court personnel.

Although Beckwith said that his investigation had taken "a lot of shoe leather," one Court clerk, Larry Hammond, a law-school classmate of Beckwith's, confessed to the Justices, thinking that he had been the only source. "He took the hit, poor guy," Beckwith said. Hammond was forgiven by the Justices, including Burger, and went on to a distinguished legal career.

Burger, in his meeting with *Time's* editors, had demanded that Beckwith be fired for "espionage." Instead, the editors realized just how industrious a journalist they had. Beckwith stayed at *Time* until 1989.

After decades of reporting, Beckwith became an aide to conservative politicians, including former Vice-President Dan Quayle. He is not a fan of the Roe decision, and he worries that the recent leak of Alito's draft opinion was aimed at influencing the outcome of the case in a way that his own story was not. "But I'm still enough of a reporter to say, the more information out there, the better," he said. "Good for the guys who got the story."

Published in the print edition of the May 16, 2022, issue.

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