

JUDGES AND THEIR PAPERS

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Who should own a federal judge's papers? This question has rarely been asked. Instead, it has generally been accepted that the Justices of the U.S. Supreme Court and other federal judges own their working papers, which include papers created by judges relating to their official duties, such as internal draft opinions, confidential vote sheets, and case-related correspondence. This longstanding tradition of private ownership has led to tremendous inconsistency. For example, Justice Thurgood Marshall's papers were released just two years after he left the bench, revealing behind-the-scenes details about major cases involving issues such as abortion and flag burning. In contrast, Justice David Souter's papers will remain closed until the fiftieth anniversary of his retirement, and substantial portions of Justice Byron White's papers, including files relating to the landmark case of Miranda v. Arizona, were shredded. In addition, many collections of lower federal court judges' papers have been scattered in the hands of judges' families. Notably, this private ownership model has persisted despite the fact that our country's treatment of presidential records shifted from private to public ownership through the Presidential Records Act of 1978. Furthermore, private ownership of judicial papers has endured even though it has proven ill-equipped to balance the many competing interests at stake, ranging from calls for governmental accountability and transparency on the one hand, to the judiciary's independence, collegiality, confidentiality, and integrity on the other.

This Article is the first to give significant attention to the question of who should own federal judges' working papers and what should happen to the papers once a judge leaves the bench. Upon the thirty-fifth anniversary of the enactment of the Presidential Records Act, this Article argues that judges' working papers should be treated as governmental property—just as presidential papers are. Although there are important differences between the roles of president and judge, none of the differences suggest that judicial papers should be treated as a species of private property. Rather than counseling in favor of private ownership, the unique position of federal judges, including the judiciary's independence in our constitutional design, suggests the advisability of crafting rules that speak to reasonable access to and disposition of judicial papers. Ultimately, this Article—giving renewed attention to a long-forgotten 1977 governmental study commissioned by Congress—argues that Congress should declare judicial papers public property and should empower the judiciary to promulgate rules implementing the shift to public ownership. These would include, for example, rules governing the timing of public release of judicial papers. By involving the judiciary in implementing the shift to public ownership, Congress would enhance the likelihood of judicial cooperation, mitigate separation of powers concerns, and enable the judiciary to safeguard judicial independence, collegiality, confidentiality, and integrity.

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INTRODUCTION

In the immediate aftermath of the Supreme Court's blockbuster June 2012 ruling on the constitutionality of the Affordable Care Act,¹ something fairly remarkable occurred: Sources within the Court leaked behind-the-scenes details.² Just days after the Court's ruling came down, a CBS News report—relying upon “two sources with specific knowledge” of the deliberations that took place among the Justices—confirmed widespread speculation among Court watchers that “Chief Justice John Roberts initially sided with the Supreme Court's four conservative justices to strike down the heart of President Obama's health care reform law . . . but later changed his position and formed an alliance with liberals to uphold the bulk of the law.”³ According to CBS's inside sources, Chief Justice Roberts's change in position provoked the ire of the four conservatives and pushed them to independently craft a highly unusual unsigned joint dissent.⁴ A different media outlet—quoting a “source within the court with direct knowledge of the drafting process”—also reported that Chief Justice Roberts had changed his vote in the case but countered the CBS account by reporting that “most of the material in the first three quarters of the joint dissent” was actually drafted in Chief Justice Roberts's chambers before Roberts changed his vote, *not* in the chambers of the four conservative dissenting Justices.⁵

Although not wholly unprecedented,⁶ such high-profile leaks are quite unusual. This is because—in contrast to the White House or Congress—the Supreme Court is shrouded in intense secrecy.⁷ A

¹ Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

² See, e.g., Sam Baker, *Supreme Court Healthcare Ruling Leaks Have DC Buzzing: Who Is the Culprit?*, THE HILL (July 4, 2012, 6:00 AM), <http://thehill.com/blogs/healthwatch/legal-challenges/236197-supreme-court-talk-has-dc-buzzing-who-is-the-leaker> (“Supreme Court observers are shocked at the leaks that are flowing from the high court's chambers in the wake of its landmark healthcare decision. In contrast to Congress . . . and the White House . . . the court has a reputation as leak-proof, which is a key part of its above-the-fray image.”).

³ Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law.

⁴ *Id.*

⁵ Paul Campos, *Roberts Wrote Both Obamacare Opinions*, SALON (July 3, 2012, 6:13 PM), http://www.salon.com/2012/07/03/roberts_wrote_both_obamacare_opinions.

⁶ See Jonathan Peters, *The Supreme Court Has Always Leaked*, SLATE (July 6, 2012, 2:25 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/the_supreme_court_leaking_john_robert_s_decision_to_change_his_mind_on_health_care_should_not_come_as_such_a_surprise_.html (describing the history of leaks at the Court).

⁷ See, e.g., BOB WOODWARD & SCOTT ARMSTRONG, THE BROTHERS 1 (1979) (“No American institution has so completely controlled the way it is viewed by the public. The Court's deliberative process—its internal debates, the tentative positions taken by the

variety of factors contribute to this secrecy. The Court, for example, has been steadfast in its refusal to televise its oral arguments or to allow cameras into the courtroom.⁸ Although the Court's oral arguments are technically open to the public, only a small number of public seats are actually available, which means that often members of the public must go to great lengths, even including camping overnight outside the Court, in order to secure a spot.⁹ After oral arguments, the nine Justices disappear behind a curtain and then conference and vote on argued cases in private without even allowing aides or law clerks into the conference room.¹⁰ Confidentiality rules forbid law clerks from disclosing to the public internal information they learn as a result of their employment with the Court,¹¹ and the judiciary is exempt from the public disclosure requirements of the Freedom of Information Act and other sunshine laws.¹² Indeed, given the tight-lipped nature of the Court, the only way the public will likely ever learn what actually happened behind the scenes in the Court's blockbuster health care ruling—and which media outlet, if any, got the story correct—will be via the release of the working papers of a retired or deceased Justice who sat on the case.¹³

Justices, the preliminary votes, the various drafts of written opinions, the negotiations, confrontations, and compromises—is hidden from public view.”); Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 4 (2011) (“[T]he Court operates outside of the public eye and under a cloak of secrecy.”).

⁸ See Bruce D. Collins, *C-SPAN's Long and Winding Road to a Still Un-Televised Supreme Court*, 106 MICH. L. REV. FIRST IMPRESSIONS 12, 12 (2007), available at <http://www.michiganlawreview.org/assets/fi/106/collins.pdf>; *On Cameras in Supreme Court, Souter Says, "Over My Dead Body,"* N.Y. TIMES, Mar. 30, 1996, at 24.

⁹ See, e.g., Adam Liptak, *Tailgating Outside the Supreme Court, Without Cars*, N.Y. TIMES, Mar. 3, 2010, at A14 (discussing the various members of the public who had gathered to hear oral arguments).

¹⁰ See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 259–61 (9th ed. 2011) (“Conference discussions are secret, except for revelations in justices’ opinions, off-the-bench communications, or, when available, private papers.”).

¹¹ See *id.* at 127 (discussing the Supreme Court’s Code of Conduct for Supreme Court Law Clerks, which instructs the clerks not to discuss the work of the Court, except with the Justices or other clerks, even after their clerkship has ended).

¹² Brief of Respondent-Petitioner at 38, *Mistretta v. United States*, 488 U.S. 361 (1989) (No. 87-7028) (“[T]he Freedom of Information Act, the Privacy Act, and the Government-in-the-Sunshine Act apply only to executive, and not to judicial, bodies” (citations omitted)); see also 5 U.S.C. § 552(f) (2012) (defining “agency” as an “executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch . . . or any independent regulatory agency” for the purposes of the Freedom of Information Act); *id.* § 552a(a)(1) (applying the definition in § 552(f) to the Privacy Act); *id.* § 552b(a)(1) (applying the same definition to the Government in the Sunshine Act).

¹³ Cf. Linda Greenhouse, *The Story So Far*, N.Y. TIMES (July 25, 2012, 7:30 PM), <http://opinionator.blogs.nytimes.com/2012/07/25/the-story-so-far/> (“History may someday settle on one of the competing and contradictory narratives now running rampant within the

A judge or Justice's working papers include those papers generated in the course of deciding cases and other judicial matters.¹⁴ In contrast to the official record in a case, which might include official hearing transcripts, briefs, motions, and final opinions that are publicly accessible, judicial working papers often include a treasure trove of behind-the-scenes details about the judiciary's confidential decisional process, such as internal draft opinions, case-related correspondence, law clerks' work product, conference notes, and vote sheets.

Unlike presidential papers—now treated as governmental rather than private property as a result of the Presidential Records Act of 1978 (PRA), passed in the wake of the Watergate scandal¹⁵—judges' papers have never been affirmatively regulated by Congress or the judiciary. This means that no uniform rule governs judges' working papers—other than a longstanding historical default, which embraces private ownership of judicial papers and gives individual judges and their heirs complete control over the fate of their papers.¹⁶ And unlike rules governing presidential papers, which have received at least some scholarly attention over time,¹⁷ scholars generally have failed to

virtual Beltway to explain the decision by Chief Justice John G. Roberts Jr. to save the Affordable Care Act.”).

¹⁴ See Alexandra K. Wigdor, *A Survey of the Collections of Personal Papers of Supreme Court Justices*, in *THE RECORDS OF FEDERAL OFFICIALS: A SELECTION OF MATERIALS FROM THE NATIONAL STUDY COMMISSION ON RECORDS AND DOCUMENTS OF FEDERAL OFFICIALS* 199, 199 (Anna Kasten Nelson ed., 1978) [hereinafter *RECORDS OF FEDERAL OFFICIALS*] (noting the distinction between “working papers” created in the course of rendering decisions and “private papers,” which might include private correspondence with family and friends or personal diaries); see also Del Dickson, *Introduction to THE SUPREME COURT IN CONFERENCE 1940–1985: PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS*, at xxiii, xxv (Del Dickson ed., 2001) (noting that the Justices' private papers, including their conference notes, “are compiled during the daily course of business and are not intended for public consumption”).

¹⁵ Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at 44 U.S.C. §§ 2201–2207 (2006)).

¹⁶ See *FED. JUDICIAL CTR., A GUIDE TO THE PRESERVATION OF FEDERAL JUDGES' PAPERS* 1 (2d ed. 2009) [hereinafter *FJC GUIDE*], available at [http://www.fjc.gov/public/pdf.nsf/lookup/judgpa2d.pdf/\\$file/judgpa2d.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judgpa2d.pdf/$file/judgpa2d.pdf) (“The chambers papers of a federal judge remain the private property of that judge or the judge's heirs, and it is the prerogative of the judge or the judge's heirs to determine the disposition of those papers.”).

¹⁷ See, e.g., Philip G. Schrag, *Working Papers as Federal Records: The Need for New Legislation to Preserve the History of National Policy*, 46 *ADMIN. L. REV.* 95 (1994) (focusing on the need for preservation of the records of the executive branch relating to significant national policies); Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 *CORNELL L. REV.* 651, 651 (2003) (addressing “the long-standing dispute over the disclosure of presidential papers from historical, constitutional, and philosophical perspectives”). For further discussion of the debate surrounding disclosure of presidential papers, see generally Carl Bretscher, *Presidential Records Act: The President and Judicial Review Under the Records Acts*, 60 *GEO. WASH. L. REV.* 1477 (1992); Carl McGowan, *Presidents and Their Papers*, 68 *MINN.*

address the question of whether to or how best to regulate judicial working papers.¹⁸

Congress has given serious national attention to the proper handling of judicial working papers at only two points in our country's history. The first was in the 1970s when the Nixon Watergate scandal pushed the issue of access to the records of public officials to the forefront of the nation's consciousness,¹⁹ prompting Congress to create a governmental commission to study the issue of access to public records created by all three branches.²⁰ The second was in 1993 when Justice Thurgood Marshall's papers—containing more than 3000 case files spanning his twenty-four-year career on the U.S. Supreme Court—were opened to researchers upon his death just two years after he retired from the bench, revealing a wealth of inside information about the Court's handling of hot-button issues such as flag

L. REV. 409 (1983); Sandra E. Richetti, Comment, *Congressional Power Vis-à-vis the President and Presidential Papers*, 32 DUQ. L. REV. 773 (1994); Stephen H. Yuhan, Note, *The Imperial Presidency Strikes Back: Executive Order 13,233, the National Archives, and the Capture of Presidential History*, 79 N.Y.U. L. REV. 1570 (2004).

¹⁸ No law review articles or books address in any significant detail the normative question of how best to handle ownership of judicial papers or what kinds of rules should govern judges' papers once a judge leaves the bench. Two very useful scholarly works, however, do give significant descriptive treatment to how our nation has handled judicial papers as a historical matter. The first is a book on cultural treasures by Joseph Sax, which includes a chapter specifically addressing the papers of Supreme Court Justices. JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 93–116 (1999). The second is a book by Alexandra Wigdor that serves primarily as a descriptive guide to the collections of Supreme Court Justices. ALEXANDRA K. WIGDOR, *THE PERSONAL PAPERS OF SUPREME COURT JUSTICES* (1986). It also includes general discussion of past practices regarding preservation of and access to judicial collections. *See id.* at xi. Other than these two largely descriptive discussions about the handling of Justices' papers, scholars have engaged with the issue of ownership and access to judicial papers only in passing or at a fairly high level of generality. *See, e.g.*, J. Woodford Howard, Jr., *Comment on Secrecy and the Supreme Court*, 22 BUFF. L. REV. 837, 842 (1973) (briefly noting that the subject of access to judicial papers "is in serious need of standards to prevent some lamentable practices such as destruction of records that belong to the public, scrambling for monopolistic control of papers on the part of archivists and scholars, and leaks via judicial papers that intrude on the Court's current operations"); Adrian Vermeule, Essay, *Judicial History*, 108 YALE L.J. 1311, 1347 (1999) (noting in passing that judicial papers are the property of the judge and that "there is no guarantee that an official system for gathering and publishing judicial history, akin to the Congressional Record, could lawfully be created").

¹⁹ The Nixon scandal stemmed from a burglary in 1972 of the Democratic National Committee headquarters at the Watergate Hotel a few months before Nixon's reelection. Various high-level White House officials were implicated in the burglary. *See generally* CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974). This led to a fight over access to White House tapes of conversations between Nixon and others, which the Supreme Court ultimately resolved. *United States v. Nixon*, 418 U.S. 683 (1974).

²⁰ *See infra* notes 141–57 and accompanying text.

burning, civil rights, and abortion.²¹ Concerns that the early release of the Marshall papers had invaded the Court's sanctity, independence, and deliberative process led to a congressional hearing in 1993.²² Ultimately, however, neither Congress nor the judiciary ever took any action to regulate judicial papers in the wake of the hearing, leaving in place the historical default, which treats judges' working papers as private property.

Not surprisingly, the longstanding proprietary theory of ownership governing judicial papers has led to tremendous inconsistency—ranging from the shredding, destruction, or burning of some papers to the preservation and public release of others. With respect to the papers of lower federal court judges, relatively few collections of judicial papers have been preserved—in large part because the cost and burden of preserving the papers fall on judges and their heirs.²³ The record of preservation with respect to the papers of Supreme Court Justices is better but it too has varied over time and from Justice to Justice.²⁴ For example, prior to the beginning of the 1986 Term, Justice Byron White—after twenty-five years on the Court—decided to “clean up the place,” and he and his law clerks ran file after file, including a file on *Miranda v. Arizona*,²⁵ through a shredder.²⁶ In contrast, some Justices have chosen to make their papers available only after long periods of access restrictions, as Justice David Souter did when he announced that his papers would not be open for a full fifty years after his retirement.²⁷ There is, in other words, “by no means a uniform practice” when it comes to the papers of Supreme Court

²¹ See Neil A. Lewis, *Rare Glimpses of Judicial Chess and Poker*, N.Y. TIMES, May 25, 1993, at A1; see also Joan Biskupic, *How an Era Ended in Civil Rights Law*, WASH. POST, May 24, 1993, at A1; Tony Mauro, *Marshall's Papers Cause Supreme Stir: Justice Tilted at Court's Windmills*, USA TODAY, May 27, 1993, at 1A; David G. Savage, *Marshall Papers Show O'Connor Delaying Court Work Law*, L.A. TIMES, May 27, 1993, at A6; Benjamin Weiser & Joan Biskupic, *Secrets of the High Court: Papers Afford a Rare Glimpse of Justices' Deliberations*, WASH. POST, May 23, 1993, at A1.

²² *Public Papers of Supreme Court Justices: Assuring Preservation and Access: Hearing Before the Subcomm. on Regulation and Gov't Info. of the S. Comm. on Governmental Affairs*, 103d Cong. 1 (1993) [hereinafter *Judicial Papers Hearing*] (statement of Sen. Joseph I. Lieberman, Member, Subcomm. on Regulation and Gov't Info. of the S. Comm. on Governmental Affairs).

²³ See *infra* Part I.B.1.

²⁴ See *infra* Part I.B.2.

²⁵ 384 U.S. 436 (1966).

²⁶ See DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 3 (1998).

²⁷ See Linda Greenhouse, *Down the Memory Hole*, N.Y. TIMES, Oct. 2, 2009, at A31 (lamenting the loss to history from Justice Souter's fifty-year hold on his papers); cf. SAX, *supra* note 18, at 96 (“Justice Jackson's papers were functionally unavailable to researchers for thirty years after he dropped dead of a heart attack in 1954 while still serving at the Court.”).

Justices or lower federal court judges, and there is nothing that restrains any Justice or judge from making his own plans for his working papers, even if those plans include a “bonfire.”²⁸

This ad hoc system, which allows the preferences of individual judges rather than any uniform rules to determine the fate of judicial papers, has not proven capable of balancing the many competing interests that surround judicial papers in a concerted or collaborative manner. On the one hand, researchers’ interest in gaining access to materials of significant historical value and the public’s interest in governmental transparency, accountability, and disclosure have been thwarted when individual judges have destroyed their papers, allowed them to be scattered in the hands of heirs, or kept them from the public eye for long waiting periods. On the other hand, the judiciary’s independence, collegiality, confidentiality, and integrity have been called into question by the release of other judges’ papers.

In light of the significant stakes that surround judicial papers, this Article addresses the important but rarely asked question of who should own judicial working papers—including papers created both by Supreme Court Justices and by lower federal court judges—and how best to dispose of such papers. Ultimately, this Article argues as a normative matter that judicial papers should be treated as governmental rather than private property, just as presidential papers are. Although there are significant differences between the roles of president and judge, none of these differences suggest that judicial papers should be treated as a species of private property. The unique position of judges in our country, including the independence of our judiciary, should be taken into account when crafting rules to govern access to and disposition of judicial papers, not when answering the threshold question of ownership. Hence, this Article argues in favor of congressional legislation declaring judicial papers to be public property that shall be made reasonably accessible to the public and empowering the Judicial Conference of the United States to promulgate its own rules governing the specifics of reasonable access and disposition. These would include, for example, rules speaking to the precise timing of release of judicial papers, the selection of suitable depositories, and the respective treatment of papers produced by different types of federal courts so as to account for varying levels of historical and curatorial interest.

In proposing a shift from a private to a public ownership model for judicial papers, this Article gives renewed attention to a long-forgotten report published in 1977 by the National Study Commission

²⁸ SAX, *supra* note 18, at 94.

on Records and Documents of Federal Officials, a commission established by Congress to study problems with respect to control of federal records in the wake of the Nixon Watergate scandal.²⁹ The Commission's report set forth various recommendations governing access to the papers of all three branches, ultimately recommending that the papers of all branches be treated as public property.³⁰ With respect to the judiciary, it not only made this general recommendation, but also proposed that public access to judicial papers be allowed no more than fifteen years after a judge or Justice left the federal bench.³¹ Although Congress responded to those portions of the Commission's report that dealt with presidential records by enacting the PRA,³² Congress ultimately punted on the issue of judicial records, possibly so as to give the judiciary a chance to address the issue on its own.³³ Yet some thirty-five years later, neither the judiciary nor Congress has addressed the subject, leaving the ultimate disposition of judicial papers—including papers relating to major cases like the recent Affordable Care Act case—up to the whims of individual Justices and judges. On the thirty-fifth anniversary of the passage of the PRA, this Article asserts that the time for waiting has long passed and that Congress should adopt a more uniform approach for handling judicial papers based on a public ownership model.³⁴

This Article proceeds in four parts. Part I traces the longstanding historical roots of the proprietary theory of ownership and its consequences, illustrating the wide array of ways with which federal judges and Supreme Court Justices have dealt with their papers over time. Part II argues that continued adherence to the proprietary theory of ownership is problematic for two main reasons: (1) The private ownership model is at odds with our shift from private to public ownership of presidential papers and cannot be explained by modern property

²⁹ See NAT'L STUDY COMM'N ON RECORDS AND DOCUMENTS OF FED. OFFICIALS, FINAL REPORT 1 (1977) [hereinafter COMMISSION REPORT] (stating the purpose for which the commission was created).

³⁰ *Id.*

³¹ *Id.* at 39, 41.

³² Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended at 44 U.S.C. §§ 2201–2207 (2006)).

³³ See *infra* at notes 163–66 and accompanying text. Congress also punted on the issue of congressional papers, declining to follow the Commission's recommendation proposing a statute that would treat papers created by individual congressmen as public property. See *infra* note 164 and accompanying text.

³⁴ One could make similar arguments with respect to the ownership of congressional papers. After all, both congressional papers created by individual congressmen and judicial papers created by judges are made by public officials in connection with the discharge of their public duties. However, because significant differences do exist between Congress and the judiciary, this Article focuses on judicial papers and does not directly address the question of how congressional papers should be regulated.

theories; and (2) as a policy matter, the private ownership model has proven ill equipped to balance the many competing interests surrounding judicial papers. Part III addresses the question of how best to achieve a shift to public ownership for judicial papers. Finally, Part IV considers potential objections to the proposal set forth here, including the possibility of chilling judicial deliberations, the financial costs that would flow from preserving the papers of both lower federal court judges and Supreme Court Justices, concerns about judicial independence and separation of powers, and congressional inertia relating to both congressional and judicial papers.

I

THE LONGSTANDING TRADITION OF TREATING JUDICIAL PAPERS AS A SPECIES OF PRIVATE PROPERTY

Papers created by federal judges consist primarily of two kinds of materials: official papers and personal papers. Official papers include those materials that relate to the official record in a judicial matter or a case, such as briefs, transcripts, motions, judgments, and orders.³⁵ Official judicial records are maintained and disposed of by the government according to various statutory and regulatory provisions.³⁶ Although the Supreme Court is exempt from some provisions relating to the maintenance of judicial records, the Supreme Court authorized the Clerk of the Court to deposit its official records with the National Archives beginning in 1956.³⁷ Thus, the official judicial records of both the Supreme Court and the lower federal courts are viewed as governmental records and are held either in the National Archives or by the court which created them.³⁸

In contrast to official papers, a judge's personal papers include both *working* papers and *private* papers. Working papers are created by a judge relating to official duties, such as conference notes,

³⁵ See COMMISSION REPORT, *supra* note 29, at 22 (making the distinction between official and personal papers); see also FJC GUIDE, *supra* note 16, at 10–11 (listing official papers to be preserved).

³⁶ See COMMISSION REPORT, *supra* note 29, at 22–23 (describing various statutory and regulatory provisions governing the official records of the lower federal courts); see also 44 U.S.C. § 3101 (2006) (obligating heads of federal agencies to “preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions”).

³⁷ See COMMISSION REPORT, *supra* note 29, at 25.

³⁸ See Ferris E. Stovel, *Judicial Records in the National Archives*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 189, 194–95 (describing the retention of the official records of courts); see also 28 U.S.C. § 457 (2006) (“The records of district courts and of courts of appeals shall be kept at one or more of the places where court is held. Such places shall be designated by the respective courts except when otherwise directed by the judicial council of the circuit.”).

correspondence between judges about cases, law clerks' work product in specific cases, internal draft opinions, memoranda, vote sheets, and papers relating to a judge's official administrative duties, such as the Chief Justice's papers relating to his administrative oversight over the federal courts. In contrast, a judge's private papers consist of nonofficial papers, such as private correspondence with friends and family, personal diaries, and financial records.³⁹ It is judges' *working* papers—not their *private* papers relating to nonofficial matters—that are the focus of this Article.⁴⁰

Whereas official judicial records are treated as governmental records and subject to various records management rules, judges' personal papers found in chamber files—including their working papers—have historically been viewed as judges' private property.⁴¹ Indeed, a 2009 guide to the preservation of federal judges' papers prepared by the Federal Judicial Center states:

The chambers papers of a federal judge *remain the private property of that judge or the judge's heirs*, and it is the prerogative of the judge or the judge's heirs to determine the disposition of those papers. Neither federal statute nor the policies of the Judicial Conference of the United States make any provision for the preservation of federal judges' papers. Judges' staffs or the clerks of court cannot determine where the papers go, and the National Archives cannot accept the collections as part of the records of the courts. Nor are court funds available for the preservation of judges' papers, and the federal records centers do not provide temporary storage of judges' chambers papers.⁴²

This Part traces the origins of this proprietary theory surrounding judges' papers, explaining that it has deep historical roots and describing how private ownership has led to very inconsistent approaches with respect to the preservation and disposition of judges' papers.

A. *The Roots of Private Ownership*

From the time of our nation's founding, the Justices of the Supreme Court and judges of the lower federal courts have treated

³⁹ See COMMISSION REPORT, *supra* note 29, at 23; see also WIGDOR, *supra* note 18, at 3.

⁴⁰ This Article does not challenge the longstanding view that a judge's private papers should be treated as the judge's private property and disposed of according to the judge's own wishes.

⁴¹ See COMMISSION REPORT, *supra* note 29, at 23 (noting that the contents of a judge's chamber files "traditionally have been considered the private property of the Judge").

⁴² FJC GUIDE, *supra* note 16, at 1 (emphasis added). Because judicial papers are viewed as private property, the FJC GUIDE acknowledges that a judge's decision to donate his papers may raise tax issues. See *id.* at 31 (noting the complicated law governing tax deductions for donations of papers).

their papers as “private property, protected by and alienable according to the laws of private property.”⁴³ Although it is difficult to pinpoint exactly where this private ownership model came from or why it emerged, there are a variety of possible explanations. Many of these explanations are not specific to the judiciary but rather speak to the records of the other branches as well.

The dominant view of property rights that existed in the eighteenth century may well be one explanation. As Jonathan Turley has explained, during that time period, John Locke’s view of property, which “heavily influenced the leaders in the early Republic,” provided that an “individual acquired a near absolute claim to ownership when he ‘mixed’ his labor with property in its first possession or creation.”⁴⁴ Thus, according to Turley, the Lockean view of property that held sway early in our country’s formation might help to explain why former presidents were viewed as having private ownership over the records they created—works they often created in their own handwriting.⁴⁵

In particular, Turley finds evidence of this Lockean influence in an opinion written in 1841 by Justice Story sitting as a circuit justice in *Folsom v. Marsh*.⁴⁶ Justice Story confronted a dispute between Justice Bushrod Washington, who had inherited President George Washington’s papers, and a publisher, who had used some materials from the papers.⁴⁷ Justice Story ultimately ruled in favor of Justice Washington and his claims of private ownership, stating: “Unless, indeed, there be a most unequivocal dedication of private letters and papers by the author, either to the public, or to some private person, I hold, that *the author has a property therein*.”⁴⁸ According to Turley, what is striking about this ruling is that “[i]t was not the status of the author as president, but rather the president as an author that determined the outcome,” suggesting a “more normative interpretation of Locke’s labor theory—a creator should be rewarded for his labor.”⁴⁹

⁴³ WIGDOR, *supra* note 18, at 3.

⁴⁴ Turley, *supra* note 17, at 679.

⁴⁵ *Id.* at 680. Turley argues that although Lockean theory seems to have shaped the view that presidential papers are private property, Lockean theory—when correctly understood—actually should not lead to the conclusion that presidential papers are private property. This is because presidents create the papers in their governmental capacity, not their private capacity. See *infra* notes 179–81 and accompanying text.

⁴⁶ See Turley, *supra* note 17, at 681–82; see also *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

⁴⁷ See *id.*

⁴⁸ *Folsom*, 9 F. Cas. at 345 (emphasis added).

⁴⁹ Turley, *supra* note 17, at 682.

To the extent that Turley is correct about the application of Lockean theory to presidential papers, Locke's theory may well explain not only why presidential papers were originally viewed as private property but also why judicial papers have traditionally been viewed as privately owned. Under this theory, the status of federal judges as authors—rather than their status as judges—may have determined that they should be rewarded for their work and should be viewed as the proper owners of their work.

Another more practical, less theoretical explanation for why governmental records were viewed as private at the beginning of our country's founding is the fact that governmental manuscript repositories did not emerge until the turn of the twentieth century.⁵⁰ Tellingly, President Benjamin Harrison, who served as president from 1889 to 1893, asserted in his will that he had wanted to leave his papers to a historical society where the papers might be kept safely together instead of dividing them between his wife and children but that there was no suitable organization at that time.⁵¹ The Manuscript Division of the Library of Congress was not established until 1897,⁵² the National Archives not until 1934.⁵³ The records profession too is a relatively recent phenomenon in this country.⁵⁴ Indeed, an invention as simple as the "wooden file box" did not emerge in records offices throughout the country until after the Civil War, and when it did emerge, it was viewed as a "revolution."⁵⁵ Given that there truly was no infrastructure in place to deal with the preservation of governmental papers in the early years of our country, the principal custodians of such papers were "families and private collectors."⁵⁶ Hence, the private ownership model may well have emerged due to the lack of any "practical alternative."⁵⁷

⁵⁰ WIGDOR, *supra* note 18, at 3.

⁵¹ See COMMISSION REPORT, *supra* note 29, at 13.

⁵² *Id.*

⁵³ RICHARD J. COX, CLOSING AN ERA: HISTORICAL PERSPECTIVES ON MODERN ARCHIVES AND RECORDS MANAGEMENT 2 (2000); see also H.G. JONES, THE RECORDS OF A NATION 5 (1969) ("[T]he voices for archival preservation on the national scene were singularly ineffective and it was not until the 1870s that considerable interest was exhibited in the halls of Congress.").

⁵⁴ See JONES, *supra* note 53, at 6–7 (describing the development of public records around the turn of the twentieth century).

⁵⁵ H.G. JONES, LOCAL GOVERNMENT RECORDS 8 (1980) ("The revolution was . . . a simple wooden 'file box' . . . about four inches wide, ten inches high, and a foot deep—just about the size of a standard sheet of paper folded twice or thrice, wrapped with a ribbon or placed in a paper jacket, and placed upright in the box.").

⁵⁶ See WIGDOR, *supra* note 18, at 3.

⁵⁷ See *id.*

There are also some court-specific explanations that may shed light on why judicial records traditionally have been treated as private property. First, the federal courts historically have been surrounded by a tradition of judicial secrecy, which may well have prompted early federal judges to think of their working papers as their own private property rather than governmental property, or perhaps as property that should not be disclosed due to concerns that it would threaten the confidentiality of judicial deliberations and judicial independence. According to Alexandra Wigdor, who has published a guide to the locations of the personal papers of Supreme Court Justices, this tradition of judicial secrecy has roots in many of the procedures and conventions established by Chief Justice John Marshall after he became chief in 1801.⁵⁸ For example, Chief Justice Marshall's desire to have the Supreme Court speak through one single, official opinion rather than through seriatim opinions could potentially have led the Justices to view any papers extraneous to the Court's official opinion as non-official documents.⁵⁹

Second, the federal courts are courts of record.⁶⁰ The Judiciary Act of 1789, for example, called for the appointment of clerks for the Supreme Court and lower federal courts, and it obligated the clerks to "record all the orders, decrees, judgments and proceedings of the said court."⁶¹ In light of this, it may well be that judges and Justices determined early on that anything outside of the official record simply was not worth keeping in any official capacity.

B. *The Consequences of Private Ownership*

Regardless of the precise reason for why judges' papers historically have been viewed as private property, the consequences of the longstanding private ownership model are clear: Judicial papers are governed by individual judges and Justices in an ad hoc manner, rather than by any uniform rules set by either Congress or the judiciary as a whole.⁶² This means that judges have followed a dizzying array of approaches in disposing of their papers—ranging from loss and destruction of some papers to the preservation and public release of others.

⁵⁸ See *id.* at 5.

⁵⁹ See SAX, *supra* note 18, at 94.

⁶⁰ WIGDOR, *supra* note 18, at 3.

⁶¹ Judiciary Act of 1789, ch. 20, § 7, 1 Stat. 73, 76 (1789).

⁶² Cf. Editorial, *Safeguarding History: Why the Records of Supreme Court Justices Should Be Governed by Rules—Not Individuals*, WASH. POST, Sept. 6, 2009, at A18 (arguing that uniform rules or guidelines would ensure a more inclusive preservation of important judicial records).

1. *The Papers of Lower Federal Court Judges*

With respect to the working papers of lower federal court judges, relatively few sets of papers have been preserved and made available to the public.⁶³ Some notable exceptions do exist. For example, Judge J. Skelly Wright, a prominent federal judge who served on the U.S. Court of Appeals for the D.C. Circuit and the U.S. District Court for the Eastern District of Louisiana, made his papers open to research upon his retirement.⁶⁴ In addition, Judge Clement Haynsworth, a Fourth Circuit judge who was nominated to the U.S. Supreme Court in 1969 by President Nixon but whose nomination ultimately was rejected by the Senate,⁶⁵ left his papers to the Library of Congress when he died.⁶⁶ Similarly, Judge Gerhard A. Gesell of the U.S. District Court for the District of Columbia, who kept a handwritten diary containing his thoughts and impressions from his time presiding over the Oliver North trial, donated his papers to the Library of Congress.⁶⁷ These lower federal court judges' decisions to preserve and donate their papers, however, represent the exception, not the norm.

The small number of collections of lower federal court judges' papers is likely attributable to the fact that judges and their heirs face the burden of finding suitable archival repositories for their papers.⁶⁸ A document prepared by the library for the U.S. Court of Appeals for the Eighth Circuit relating to the preservation of judges' papers highlights this fact, noting: "While the Eighth Circuit Library manages the Court Archives documenting the history of the federal courts in the Eighth Circuit, it unfortunately does not have the space or resources required for judges' papers collections, which can be quite

⁶³ See COMMISSION REPORT, *supra* note 29, at 39.

⁶⁴ See, e.g., SAX, *supra* note 18, at 96; see also Library of Congress Catalog Record for J. Skelly Wright Papers, LIBR. CONG., <http://lccn.loc.gov/mm81058982> (last visited Sept. 6, 2013) (noting that the files include "[p]ersonal and professional correspondence, case files, opinions, memoranda, reports, speeches and writings, financial papers, teaching material, clippings, printed matter, and photographs documenting Wright's legal and judicial career").

⁶⁵ Stephen L. Wasby & Joel B. Grossman, *Judge Clement F. Haynsworth, Jr.: New Perspective on His Nomination to the Supreme Court*, 1990 DUKE L.J. 74, 74 (1990).

⁶⁶ Editorial, *Powell's Bequest*, RICHMOND-TIMES DISPATCH, Dec. 20, 1989, at 14 ("When federal Appeals Court Judge Clement Haynsworth died last month, he performed a final favor for history: He left his papers to the Library of Congress.").

⁶⁷ *Preserving the Papers of Federal Judges: A Presentation of the Historical Society of the D.C. Circuit*, HISTORICAL SOCIETY OF THE D.C. CIRCUIT, 7, 10 (June 5, 2009), <http://dcchs.org/Biographies/judgespapers.pdf> [hereinafter *Presentation of the Historical Society of the D.C. Circuit*].

⁶⁸ See *Testimony Received in Public Hearings*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 265, 274 (statement of Rayman L. Solomon, Director, History Project, U.S. Court of Appeals, Seventh Circuit).

voluminous.”⁶⁹ Similarly, the Federal Judicial Center’s *Guide to the Preservation of Federal Judges’ Papers* notes: “[T]he National Archives cannot accept the collections as part of the records of the courts. Nor are court funds available for the preservation of judges’ papers, and the federal records centers do not provide temporary storage of judges’ chambers papers.”⁷⁰

According to the director of a history project at the U.S. Court of Appeals for the Seventh Circuit, what this often means is that if a judge dies while in office, the “papers are boxed immediately, taken to the family, and quite often, the widow is moving from a large house to a small apartment, and the papers are destroyed.”⁷¹ Once the papers land in the hands of family members, many lower federal court judges’ papers are “gradually scattered and lost, or are destroyed.”⁷² Alternatively, some judges’ families choose not to open the judge’s papers to the public or to scholars. For example, Maeva Marcus, who wrote a book titled *Truman and the Steel Seizure Case*,⁷³ wanted to access the papers of the district court judge who decided the famous “steel seizure” case that ultimately reached the Supreme Court in *Youngstown Sheet and Tube Co. v. Sawyer*.⁷⁴ Marcus, however, was disappointed to learn that the district court judge’s family had “boxes of stuff,” which “they would not release.”⁷⁵

2. *The Papers of Supreme Court Justices*

When compared to the relative dearth of papers of lower federal court judges, the existence of working papers from Supreme Court Justices is much more common. The more robust record of preservation with respect to Supreme Court Justices’ papers is likely due to the perception that the papers of Supreme Court Justices are more important than the papers of lower federal court judges⁷⁶ and perhaps due to the comparatively small number of Supreme Court Justices—just

⁶⁹ U.S. Courts Library, Eighth Circuit, *Preservation of Judges’ Papers*, U.S. COURTS LIBRARY EIGHTH CIRCUIT, www.lb8.uscourts.gov/pubsandservices/histsociety/tipsheet_judgespapers.pdf [hereinafter *Eighth Circuit Preservation Guide*] (last visited Sept. 6, 2013).

⁷⁰ FJC GUIDE, *supra* note 16, at 1.

⁷¹ *Testimony Received in Public Hearings*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 265, 274 (statement of Rayman L. Solomon, Director, History Project, U.S. Court of Appeals, Seventh Circuit); *see also* COMMISSION REPORT, *supra* note 29, at 23, 40.

⁷² COMMISSION REPORT, *supra* note 29, at 24.

⁷³ MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE* (1994).

⁷⁴ 343 U.S. 579 (1952).

⁷⁵ *See Presentation of the Historical Society of the D.C. Circuit*, *supra* note 67, at 21.

⁷⁶ *See infra* note 211 and accompanying text.

112 Justices in all—who have served over time.⁷⁷ However, even with respect to the papers of the Justices of the U.S. Supreme Court, the record of preservation is still quite spotty, varying over time and from Justice to Justice.⁷⁸

Up until the twentieth century, relatively few Justices' working papers were preserved.⁷⁹ For example, unlike early presidents like George Washington and James Madison, Chief Justice Marshall “left no legacy of personal papers and correspondence when he died.”⁸⁰ Instead, “[h]e and his family routinely destroyed or discarded many documents during his lifetime.”⁸¹ Perhaps this was because neither he nor his family saw the papers as important.⁸² Or perhaps it was attributable to his “desire to destroy such material . . . in keeping with Marshall’s strong efforts to have the Court reveal itself only through a single, official voice.”⁸³ In the early years, even the collections of those Justices who did not take affirmative steps to destroy their papers were not likely to survive. Due to the lack of any national document depositories, “the principal custodians of such papers were families and private collectors.”⁸⁴ This in turn “created a high probability of irretrievable dispersal and chance destruction.”⁸⁵

With the emergence of manuscript repositories in the United States and a greater sense of the historical importance of the Justices' papers,⁸⁶ an increasing number of significant collections of Justices'

⁷⁷ The most recent Justice to join the Court, Justice Elena Kagan, serves as the 112th Justice. See Peter Baker, *Kagan Is Sworn In as Fourth Female, and 112th Justice, on the Supreme Court*, N.Y. TIMES, Aug. 8, 2010, at A13. In contrast, there are currently 677 federal district court judgeships and 179 court of appeals judgeships in the country. *Federal Judgeships*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Sept. 6, 2013) [hereinafter *Federal Judgeships*].

⁷⁸ According to a survey published by Alexandra K. Wigdor in 1986, out of ninety-two Justices studied, twenty-three Justices left no surviving collection, twenty-eight Justices left small collections with fewer than 1000 items, twelve Justices left medium-sized collections with up to 5000 items in each collection, and twenty-nine Justices left large collections. See WIGDOR, *supra* note 18, at 31–34.

⁷⁹ See SAX, *supra* note 18, at 94 (noting that few working papers from the nineteenth century still exist).

⁸⁰ See Mark St. John Erickson, *W&M's Look at John Marshall's Life: Doing Judge Justice*, DAILY PRESS (Newport News, Va.), Apr. 18, 2006, at A1 (noting that it took scholars at William & Mary nearly half a century to scour various corners of the world for papers from Chief Justice John Marshall and to cobble together a set of his papers).

⁸¹ *Id.*

⁸² See *id.* (relating an interview with an experienced Marshall papers researcher).

⁸³ SAX, *supra* note 18, at 94.

⁸⁴ COMMISSION REPORT, *supra* note 29, at 25.

⁸⁵ *Id.*

⁸⁶ See SAX, *supra* note 18, at 94 (noting that during the second half of the twentieth century, “the historical value of the justices' working papers ha[d] been widely recognized”).

papers have been preserved in the twentieth and twenty-first centuries. For example, Justices Harold Burton, Tom Clark, William O. Douglas, Felix Frankfurter, Robert Jackson, Stanley Reed, Wiley Rutledge, Potter Stewart, Harlan Fiske Stone, Earl Warren, Louis Brandeis, Thurgood Marshall, and William Brennan preserved large collections of their papers.⁸⁷ So did Justices Lewis Powell,⁸⁸ Harry Blackmun,⁸⁹ William Rehnquist,⁹⁰ David Souter,⁹¹ and Sandra Day O'Connor.⁹² In addition, some Justices, like Justice Hugo Black, preserved portions of their collections but ordered the destruction of the rest.⁹³

Even those Justices who have opted for preservation have set wildly different terms concerning access to and disposition of their papers. One area where the Justices have diverged involves *who* is allowed to review their papers. Some Justices have opened their papers only to certain privileged scholars for research,⁹⁴ whereas others have granted access to all researchers or to the public at large.⁹⁵ For example, two months before the public opening of Justice Harry

⁸⁷ See *id.* at 95. Notably, some of Frankfurter's papers were stolen from the Library of Congress in 1972. See Adam Liptak, *Memo Adds to Doubt on Rehnquist Denials*, N.Y. TIMES, Mar. 20, 2012, at A18 ("In 1972, somebody—probably a scholar—stole hundreds of pages from Justice Frankfurter's papers at the Library of Congress . . .").

⁸⁸ See *Powell's Bequest*, *supra* note 66 (noting that Powell left his papers to Washington and Lee University); see also Rob Walker, *Powell's School, W&L, to Get Papers*, RICHMOND TIMES-DISPATCH, Dec. 14, 1989, at C9 (noting that Powell's papers fill twenty-seven file cabinets and include files on each of the 2300 cases that came before the court between 1972 and 1987).

⁸⁹ See *The Harry A. Blackmun Papers*, LIBR. CONG., <http://www.loc.gov/rr/mss/blackmun/> (last visited May 25, 2013); see also Tony Mauro, *Blackmun Papers Highlight Importance of a Single Justice*, USA TODAY, Mar. 16, 2004, at 13A.

⁹⁰ See HOOVER INSTITUTION ARCHIVES, STANFORD UNIV., REGISTER OF THE WILLIAM H. REHNQUIST PAPERS 2 (2008), available at <http://cdn.calisphere.org/data/13030/tn/kt4z09r7tn/files/kt4z09r7tn.pdf>.

⁹¹ See *infra* note 105 and accompanying text.

⁹² See FJC GUIDE, *supra* note 16, at 40 (noting that access to case files in Justice O'Connor's papers, which were deposited with the Library of Congress, are to open upon her death but that individual case files are to remain closed "during the service of any justice who participated in the case").

⁹³ See SAX, *supra* note 18, at 99–101 (describing how notes from conferences and some other internal Court documents are missing from Justice Black's large collection of 56,530 items, which was left to the Library of Congress, because Justice Black instructed his son to burn his papers involving notes of conversations between the Justices).

⁹⁴ See *id.* at 103 (noting that two law professors, Alexander Bickel of Yale and Paul Freund of Harvard, were appointed as custodians of Justice Brandeis's papers, and that they "planned to restrict access completely until a biographer they authorized had used the papers").

⁹⁵ See SAX, *supra* note 18 at 109 (noting that a microfilm edition of Justice Holmes's papers was created and sold to libraries, giving both scholars and interested persons ready access to the papers); Don Williamson, Editorial, *Thanks Thurgood: We Needed That*, SEATTLE TIMES, May 28, 1993, at A12 (noting that Marshall's agreement with the Library

Blackmun's papers, the Blackmun family gave journalist Linda Greenhouse special access to the papers so that she could review the papers before the broader public did.⁹⁶ Similarly, Justice William Brennan arranged for his biographer, Stephen Wermiel, to have exclusive access to his collection.⁹⁷ This caused grumbling among other scholars—especially because seventeen years after Brennan granted Wermiel special access, Wermiel had yet to finish a biography on Brennan.⁹⁸

Justices who opt for preservation of their records also often diverge in terms of *when* and *where* their papers shall be made available. For example, after initially considering burning all of his papers,⁹⁹ Justice Thurgood Marshall ultimately chose to donate his papers to the Library of Congress, which opened his papers to researchers upon his death in 1993, just two years after he retired from the bench.¹⁰⁰ His papers revealed a wealth of information about cases only very recently decided by the Court and also about the other Justices who were still sitting on the Court.¹⁰¹ Given the short two-year time span between when Justice Marshall left the bench and when his papers were released, it is not surprising that Chief Justice Rehnquist and others on the Court balked at the quick release of the Marshall papers. In a letter that Rehnquist wrote to James Billington, the Librarian of Congress, Rehnquist stated:

I speak for a majority of the active Justices of the Court when I say that we are both surprised and disappointed by the library's decision to give unrestricted public access to Justice Thurgood Marshall's papers. . . . Unless there is some presently unknown basis for the library's actions, we think it is such that future donors of judicial papers will be inclined to look elsewhere for a repository.¹⁰²

Billington responded by stressing that the Library of Congress was simply adhering to the instructions of the donor, noting: "Restricting or suspending access to the Marshall papers now would

of Congress provided that use of his papers would be limited to "private study on the premises of the Library by researchers or scholars engaged in serious research").

⁹⁶ LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY*, at xii (2005).

⁹⁷ See Jeffrey Toobin, *A Not So Brief Recess*, *NEW YORKER*, Jan. 5, 2004, at 28.

⁹⁸ See *id.*

⁹⁹ See SAX, *supra* note 18, at 114.

¹⁰⁰ See Weiser & Biskupic, *supra* note 21; see also Williamson, *supra* note 95.

¹⁰¹ See Lewis, *supra* note 21 (discussing how the Marshall papers were made available only two years after he left the Court).

¹⁰² Williamson, *supra* note 95 (alteration in original); see also Linda P. Campbell, *Marshall's Papers Causing Stir: Rehnquist Reports Justices' Surprise, Disappointment at Timing of Release*, S.F. EXAMINER, May 26, 1993, at A16.

cast doubt on the Library's ability to carry out the instructions of a deceased donor."¹⁰³

In contrast to the near-immediate release of Justice Marshall's papers, numerous Justices have chosen to make their papers available only after long periods of access restrictions. For example, Justice Warren Burger's son donated his father's papers to the College of William & Mary in 1996, but the papers remain closed to researchers until 2026.¹⁰⁴ Justice David Souter decided upon his retirement in 2009 that he would give his papers to the New Hampshire Historical Society in Concord, New Hampshire, but that they could not be opened until 2059—a full fifty years after his retirement.¹⁰⁵

Other recent Justices have imposed more moderate timing restrictions. For example, when Justice Harry Blackmun gave his papers, which included more than 530,000 documents,¹⁰⁶ to the Library of Congress in May 1997,¹⁰⁷ he provided that they were not to be opened until five years after his death.¹⁰⁸

Similarly, upon his death, Chief Justice William H. Rehnquist provided for delayed access to his case files when he donated his judicial papers to the Hoover Institution Archives at his alma mater, Stanford University. Specifically, he provided that all case files and related materials from 1975 to 2005 were to remain closed “during the lifetime of any member of the Supreme Court who served with [him].”¹⁰⁹ Some of his early case files have already been opened.¹¹⁰ However, given that Chief Justice Rehnquist served with Justice Clarence Thomas, who was still in his fifties when Rehnquist died, the access restriction could mean that some of Rehnquist's case files will remain closed for two or three more decades.

The preservation of Justices' papers is increasingly prevalent,¹¹¹ but not all twentieth-century Justices have chosen to preserve the bulk

¹⁰³ *The Marshall Files: The Complaints and the Library's Response*, WASH. POST, May 27, 1993, at A20.

¹⁰⁴ Coll. of William & Mary, Warren Burger Collection, SWEM LIBRARY, <https://swem.wm.edu/research/special-collections/warren-burger-collection> (last visited Sept. 6, 2013).

¹⁰⁵ See Greenhouse, *supra* note 27.

¹⁰⁶ Mauro, *supra* note 89.

¹⁰⁷ *About the Harry A. Blackmun Papers*, LIBR. CONG., <http://www.loc.gov/rr/mss/blackmun/blackmun-ex-about.html> (last updated Oct. 14, 2010).

¹⁰⁸ See Mauro, *supra* note 89 (reporting that “Blackmun, who served on the court from 1970 to 1994, was a pack rat” and that his collection “sheds light on the agony and turmoil over Blackmun's most famous opinion, *Roe vs. Wade*, which declared a woman's right to an abortion in 1973” (italization added)).

¹⁰⁹ HOOVER INSTITUTION ARCHIVES, *supra* note 90, at 2.

¹¹⁰ See Adam Liptak & Jonathan D. Glater, *Papers Offer a Close-Up of Rehnquist and the Court*, N.Y. TIMES, Nov. 18, 2008, at A12.

¹¹¹ See SAX, *supra* note 18, at 94–95.

of their papers.¹¹² Take Justice Byron White, for instance. Prior to the beginning of the 1986 Term, Justice White—having accumulated 25 years of case files—determined it was “time to clean up the place.”¹¹³ He and his law clerks then spent successive weekends running files, including a file on the landmark case of *Miranda v. Arizona*,¹¹⁴ through a paper shredder obtained just for the occasion.¹¹⁵ According to Dennis Hutchinson’s biography of Justice White, “[o]ne of the clerks, who had academic ambitions, recalls vividly putting one file after another marked *Miranda v. Arizona* through the shredder” and thinking, “Well, here’s an article; here’s an entire book. I couldn’t believe how much history was going down the chute.”¹¹⁶ Ultimately, the papers in Justice White’s collection that did survive ended up at the Library of Congress, where they were opened to research in 2012, on the tenth anniversary of his death.¹¹⁷

Similarly, many other members of the twentieth-century Court, including Owen Roberts, Edward Douglas White, Joseph McKenna, Rufus Peckham, Sherman Minton, Benjamin Cardozo, Charles Whitaker, Charles Evan Hughes, Horace Lurton, James McReynolds and George Sutherland, destroyed all or nearly all of their papers.¹¹⁸ Sherman Minton reportedly ordered his papers burned after reading a biography of Chief Justice Harlan Fiske Stone, written by Alpheus T. Mason.¹¹⁹ The book, published in 1956,¹²⁰ was the first judicial biography to “rely on informal, individual papers,”¹²¹ and it created quite a stir due to concerns that it would harm the Court’s integrity and cause “unnecessary embarrassment.”¹²²

¹¹² See *id.* at 95 (“Of the 101 justices who had served up to the mid-1980s, 23 left no collections of papers at all, and another 28 left very little.”).

¹¹³ HUTCHINSON, *supra* note 26.

¹¹⁴ 384 U.S. 436 (1966).

¹¹⁵ See HUTCHINSON, *supra* note 26.

¹¹⁶ *Id.* (internal quotation marks omitted).

¹¹⁷ News Release, Library of Cong., Papers of Supreme Court Justice Byron R. White Opened for Research (Apr. 26, 2012), available at <http://www.loc.gov/today/pr/2012/12-089.html>.

¹¹⁸ See SAX, *supra* note 18, at 94–95.

¹¹⁹ See *id.* at 94.

¹²⁰ ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956).

¹²¹ SAX, *supra* note 18, at 94; see also *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 211, 214 (statement of Sidney Fine, Professor of History, University of Michigan) (noting that the Stone biography was the “first judicial biography to penetrate the velour curtain”).

¹²² See Edmond Cahn, *Eavesdropping on Justice*, THE NATION, Jan. 5, 1957, at 14, 15; see also Alan F. Westin, Book Review, 66 YALE L.J. 462, 468–69 (1957) (reviewing MASON, *supra* note 120) (questioning the propriety of the author’s use of Justice Stone’s personal papers to write an extended biography).

In short, as Joseph Sax aptly noted in his book on national cultural treasures titled *Playing Darts with a Rembrandt*, there is “by no means a uniform practice” when it comes to the treatment of a Justice’s papers.¹²³ Although the modern trend certainly seems to be in favor of preservation, the Justices’ working papers—like those of lower federal court judges—are viewed as a species of private property, which the Justices may dispose of as they please.

II

QUESTIONING PRIVATE OWNERSHIP

The private ownership model certainly has longstanding historical roots, but continued adherence to the proprietary theory of ownership is ill-advised for two main reasons. First, the private ownership model is at odds with our nation’s shift from a private to public ownership model for presidential papers through the passage of the PRA, and the differential treatment of judicial and presidential papers cannot be explained by any leading property theories.¹²⁴ Second, the private ownership model—which leaves the fate of judges’ papers in the hands of individual judges rather than subject to uniform rules set by Congress or the judiciary—has proven ill-equipped to balance the many competing interests surrounding judicial papers in a collaborative or concerted manner.¹²⁵

A. *Inconsistent Treatment of Presidential and Judicial Papers*

One reason that continued adherence to private ownership is troubling is that it puts our treatment of judicial papers at odds with how we currently treat presidential papers. Even though many differences exist between presidents and judges, this Subpart argues that the differences should be taken into account when crafting rules concerning access to and disposition of judges’ papers, not ownership thereof.

1. *The Historical Treatment of Presidential Papers*

The early history of presidential papers is very similar to that of judicial papers in that presidential papers also were viewed originally as a species of private property.¹²⁶ This original understanding of

¹²³ See SAX, *supra* note 18, at 94–95.

¹²⁴ See *infra* Part II.A.

¹²⁵ See *infra* Part II.B.

¹²⁶ See Bretscher, *supra* note 17, at 1481 (“Throughout most of the history of the presidency, presidents regarded their White House records as their personal property, to be preserved, published, or discarded as they and their heirs saw fit.”); see also McGowan, *supra* note 17, at 409 (“Presidents have uniformly viewed any papers accumulated during

presidential papers as private property was shared by all three branches of government.¹²⁷ Indeed, Congress even seemed to condone the notion of private ownership by appropriating funds specifically for the purchase of presidential papers from time to time, including papers of Presidents George Washington, Thomas Jefferson, James Madison, and James Monroe.¹²⁸

Under the private ownership system for presidential papers, many presidential collections did not fare very well. Presidential collections often ended up in the hands of former presidents' families and heirs where the papers were lost, scattered, or destroyed over time.¹²⁹

Things, however, slowly began to change in the twentieth century. One very important development was the establishment of presidential libraries.¹³⁰ President Franklin D. Roosevelt established the first such library in 1939 when he obtained congressional support for a resolution that authorized the Archivist of the United States to receive President Roosevelt's papers.¹³¹ Roosevelt, a "serious student of history" who was "self-conscious of the public significance of his papers,"¹³² firmly believed "that Presidential papers are an important part of the national heritage and should be accessible to the public,"¹³³ even though he "considered the papers to be his property."¹³⁴ Subsequently, in 1950, President Harry S. Truman decided that he too would build a library to house his papers, and he pushed Congress to take congressional action on the subject,¹³⁵ which culminated in Congress's passage of the Presidential Libraries Act in 1955.¹³⁶ Although the Act did not establish governmental ownership over

their terms in office as personal property . . ."). For a discussion about the early view of judicial papers, see *supra* Part I.A.

¹²⁷ See Title to Presidential Papers—Subpoenas, 43 Op. Att'y Gen. 11, 11 (1974) (noting the "almost unvaried understanding of all three branches of the Government since the beginning of the Republic" that presidential papers should be privately owned).

¹²⁸ John McDonough, Manuscript Historian in the Manuscript Division of the Library of Congress, Remarks During Panel Discussion: Who Owns Presidential Papers? (Sept. 6, 1974), in *MANUSCRIPTS*, Winter 1975 at 2, 4.

¹²⁹ See McGowan, *supra* note 17, at 409 ("This concept of private ownership has made collection and maintenance of presidential papers difficult and has resulted in the loss of many historical documents.").

¹³⁰ See *id.* at 413–14 (stating that this development indicates a recognition of presidential papers' importance and increasing magnitude).

¹³¹ See *id.* at 413–15.

¹³² *SAX*, *supra* note 18, at 84.

¹³³ *A Brief History, Presidential Libraries*, NATIONAL ARCHIVES, <http://www.archives.gov/presidential-libraries/about/history.html> (last visited Sept. 6, 2013).

¹³⁴ *SAX*, *supra* note 18, at 84.

¹³⁵ See NATIONAL ARCHIVES, *supra* note 133.

¹³⁶ Presidential Libraries Act, ch. 859, 69 Stat. 695 (1955), *repealed by* Act of Oct. 22, 1968, Pub. L. 90-620, § 3, 82 Stat. 1309.

presidential materials, it authorized the Archivist of the United States to accept any papers that a president should voluntarily choose to leave.¹³⁷

The next major development came in the wake of President Richard Nixon's resignation in 1974 in the midst of the Watergate scandal.¹³⁸ Questions arose over whether Nixon could take with him over forty million pages of documents and 880 tape recordings that he had accumulated while in office despite the Watergate Special Prosecutor's need for access to the materials.¹³⁹ Ultimately, Congress—attempting to “assume control of the Nixon tapes and papers and safeguard them from destruction”—weighed in on the controversy by passing the Presidential Recordings and Materials Preservation Act of 1974 (PRMPA).¹⁴⁰

The PRMPA did two things of note. First, Title I specifically targeted the Nixon records, providing that the Administrator of the General Services was to seize and retain possession of tape recordings and other papers accumulated during the Nixon administration.¹⁴¹ Second, Title II of the Act created a temporary National Study Commission on Records and Documents of Federal Officials (the Commission), charged with studying and recommending appropriate legislation to govern disposition of government records.¹⁴² The thinking was that “the nation had long suffered from the absence of a clear and definite policy with respect to treatment of the papers of federal officials” and that a national commission was needed to help recommend a better path forward.¹⁴³

The PRMPA specified that the Commission was to consist of seventeen members who would represent different viewpoints.¹⁴⁴ Among the members of the Commission were senators, members of the House of Representatives, a federal judge, two history professors,

¹³⁷ See McGowan, *supra* note 17, at 415.

¹³⁸ See *id.* at 415–16.

¹³⁹ See *id.* at 416.

¹⁴⁰ See RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at xvi; see also Presidential Recordings and Materials Preservation Act (PRMPA), Pub. L. No. 93-526, 88 Stat. 1695 (1974) (stating, in the preamble, that the Act was meant “[t]o protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President”).

¹⁴¹ See PRMPA, Pub. L. No. 93-526, § 101, 88 Stat. 1695, 1695 (1974). Not surprisingly, Nixon challenged the constitutionality of the Act, but the Supreme Court rejected his claims. See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 439 (1977) (upholding the Act against Nixon’s claims that the Act, *inter alia*, violated separation of powers and represented a breach of constitutional privilege).

¹⁴² 44 U.S.C. §§ 3315–3324 (2006); see also McGowan, *supra* note 17, at 431.

¹⁴³ McGowan, *supra* note 17, at 431.

¹⁴⁴ See RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at xvi.

various representatives from the Society of American Archivists, the Department of Defense, and the Library of Congress, and members of the public.¹⁴⁵ The Commission was chaired by Herbert Brownell, a former U.S. Attorney General.¹⁴⁶

The Commission first gathered factual information relating to record-keeping in the White House, the judiciary, Congress, and federal agencies; the Commission's legal staff researched and gathered information on legal questions.¹⁴⁷ The Commission then held public hearings around the country in 1976 and 1977.¹⁴⁸ These hearings were augmented by three "panels of experts who were called upon to air their views for the further edification of the Commissioners and the staff"; one panel addressed the papers of Congress, another the papers of the judiciary, and the third panel addressed the papers of the White House.¹⁴⁹

After completing its thorough investigative process, the Commission issued a lengthy final report in 1977.¹⁵⁰ Although the Commission ultimately could not agree on all the details, the one fundamental issue that the Commission's seventeen members did agree upon was that federal records, including the records of the President, members of Congress, and the judiciary, should be treated as public property.¹⁵¹ Specifically, the final majority report, which was signed by fifteen members of the Commission, declared: "All documentary materials made or received by Federal officials in connection with their constitutional and statutory duties should be the property of the United States."¹⁵² Similarly, the alternate minority report, which was signed by the Chairman and another member, noted: "[I]t is time to end the fiction that the public's records belong to presidents or other federal officials and therefore recognize and declare the fact that governmental records and documents belong to the people of the United States."¹⁵³ The alternate report reasoned that governmental records "are produced by and for the President and other federal officials,

¹⁴⁵ See McGowan, *supra* note 17, at 431; see also COMMISSION REPORT, *supra* note 29, at iii.

¹⁴⁶ McGowan, *supra* note 17, at 431.

¹⁴⁷ See RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at xvii.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at xvii–xviii.

¹⁵⁰ COMMISSION REPORT, *supra* note 29.

¹⁵¹ See RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at xviii ("In spite of diverse backgrounds and constituencies, the seventeen members of the Commission found themselves in agreement on one fundamental issue: ownership.")

¹⁵² COMMISSION REPORT, *supra* note 29, at 1.

¹⁵³ *Id.* at 65.

working on government time and utilizing government facilities, in the course of discharging their official governmental duties.”¹⁵⁴

It is quite notable that all seventeen members of the Commission expressly agreed that Congress should pass legislation declaring the records of all three branches to be public property, not private property.¹⁵⁵ Where the majority and alternate reports parted ways was with respect to the specific details of how best to implement such a move from private to public ownership. The alternate report, for instance, proposed extending the Freedom of Information Act to all three branches,¹⁵⁶ whereas the majority report proposed a new statutory mechanism that would provide public access to the papers of public officials within fifteen years of their exit from office.¹⁵⁷

After the majority and alternate reports were released, Congress took action: It enacted the PRA.¹⁵⁸ The PRA terminated the long-standing tradition of private ownership for presidential papers,¹⁵⁹ and—beginning with President Ronald Reagan’s papers—provided for public access to certain restricted documents, such as confidential communications between the President and advisors,¹⁶⁰ after a twelve-year time restriction had elapsed.¹⁶¹ It also permitted access to non-restricted documents under the Freedom of Information Act immediately upon the completion of archival processing.¹⁶²

Notably, however, the PRA did nothing with respect to congressional or judicial papers.¹⁶³ Its sole focus was presidential papers. The reason for this is somewhat uncertain. With respect to congressional

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 3, 97.

¹⁵⁶ *Id.* at 65.

¹⁵⁷ *Id.* at 7.

¹⁵⁸ Pub. L. No. 95-591, 92 Stat. 2523 (1978) (codified as amended at 44 U.S.C. §§ 2201–2207 (2006)).

¹⁵⁹ Bretscher, *supra* note 17, at 1484 (noting that Congress “terminated the tradition of private ownership of presidential records in favor of public ownership and control to ensure their preservation and availability”).

¹⁶⁰ 44 U.S.C. § 2204(a)(5) (2006). The other categories of restricted documents are: classified materials relating to national defense or foreign policy; materials relating to the “appointments to Federal office”; information “specifically exempted from disclosure by statute”; privileged or confidential trade secrets and commercial or financial information; and information “the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” (for example, medical files). 44 U.S.C. § 2204(a)(1)–(4), (6) (2006).

¹⁶¹ *See* 44 U.S.C. § 2204 (2006) (permitting the President to specify access restrictions of up to twelve years).

¹⁶² *Id.* § 2204(b)(2) (2006) (providing for access to unrestricted documents once the Archivist of the United States has finished processing but no later than five years after the date on which the Archivist receives custody of the records).

¹⁶³ *See* McGowan, *supra* note 17, at 434 (“Congress has done nothing to implement the Commission’s recommendations with respect to Congress itself, the federal judiciary, or the regulatory agencies.”).

papers, it appears that Congress believed the problem would best be addressed via separate rules of each House rather than by statute.¹⁶⁴ However, legislative history does not shed light on why Congress did not follow through on the Commission's recommendation regarding the judiciary.¹⁶⁵ Perhaps Congress wanted to give the judiciary a chance to address the issue first in order to show respect to its coordinate branch and avoid potential separation-of-powers questions.¹⁶⁶ Or perhaps Congress—in the immediate aftermath of the Nixon scandal—was so fixated on solving the issue of presidential papers that it failed to give serious attention to congressional or judicial papers. Regardless, the end result is that Congress has never taken any action to regulate judicial papers, leaving in place the long-standing historical tradition of private ownership.

2. *The Lack of Justifications for Divergent Treatment of the Ownership of Judicial and Presidential Papers*

Certainly, there are important differences between the role and constitutional design of President and judge. Whereas the President is elected by the people and is subject to political accountability and oversight, members of the federal judiciary are insulated from political and popular control due to lifetime tenure and salary protections set forth in the Constitution.¹⁶⁷ Further, although the President addresses the country in many different ways, such as through executive orders, memoranda, press conferences, television interviews, and public speeches, the judiciary generally limits its official

¹⁶⁴ See *Presidential Records Act of 1978: Hearings Before a Subcomm. of the H. Comm. on Gov't Operations on H.R. 10998 and Related Bills*, 95th Cong. 75–77 (1978) [hereinafter *PRA Hearing*] (statement of Rep. Allen E. Ertel) (“The reason we did not include [the Commission’s proposal to provide access to congressional and judicial papers] in our proposal was the fact that we are advised it would be better done as a resolution of the House and thereby change the rules, rather than by statutory enactment.”).

¹⁶⁵ See *id.*

¹⁶⁶ See *Judicial Papers Hearing*, *supra* note 22, at 2–3 (statement of Sen. Joseph I. Lieberman, Member, Subcomm. on Regulation and Gov’t Info. of the S. Comm. on Governmental Affairs) (noting that Congress took no action in response to the Commission’s 1977 report and suggesting that deference to the Supreme Court and concerns about separation-of-powers issues might counsel in favor of giving the Court more time to act, even though Congress could not “wait for the Court to act forever”). For a discussion of the separation-of-powers questions that might arise if Congress tried to govern judicial papers, see *infra* notes 316–23 and accompanying text.

¹⁶⁷ See U.S. CONST. art. III, § 1 (establishing that judges are to “hold their Offices during good Behaviour” and that their compensation cannot be reduced during their service); see also Watts, *supra* note 7, at 35–36 (noting that Supreme Court Justices are fairly insulated from political control).

communication to its final judgments and written opinions.¹⁶⁸ Finally, the executive branch's interpretations of the law are related to and flow from its enforcement powers,¹⁶⁹ while judicial interpretations of the law are issued in the interest of resolving cases or controversies between litigants.¹⁷⁰ Since the judiciary lacks the power of the sword that the President possesses, the judiciary relies heavily on its legitimacy to ensure that its judgments are enforced.¹⁷¹

However, despite these differences, nothing about the special position of judges or their constitutionally guaranteed independence counsels in favor of private ownership of their papers. Judges' papers—like presidential papers—are created by governmental officials in furtherance of official duties and often while using governmental resources and facilities. The National Study Commission recognized as much in 1977, stating:

As is the case with the Public Papers of Presidents and Members of Congress, the Public Papers of Federal Judges are created in the course of doing the public's business, using Government facilities, and at public expense. The Commission can find no distinctions that would modify its conclusion that all such materials should be the property of the United States.¹⁷²

Judge Carl McGowan, who sat on the U.S. Court of Appeals for the D.C. Circuit, acknowledged as much during one of the Commission hearings:

I can't see any reason why the memoranda that [are] in those files . . . relating to the case itself, law clerks' memoranda to me, my memoranda to them, my memoranda to the other judges on the case, draft opinions, and notes of the conference, all that kind of thing, they seem to me to be papers generated because I am being paid by the United States to decide that case. As far as I am concerned, . . . what's in that file in the sense of papers that are

¹⁶⁸ See Tony Mauro, *The Supreme Court and the Cult of Secrecy*, in *A YEAR IN THE LIFE OF THE SUPREME COURT* 263, 263 (Rodney A. Smolla, ed., 1995) ("Supreme Court Justices are fond of saying that the Court speaks only through its opinions."). Some exceptions, such as the Chief Justice's year-end reports on the federal judiciary, do exist. See *Chief Justice's Year-End Reports on the Federal Judiciary*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> (last visited Sept. 6, 2013) (making the Chief Justice's reports available to the public).

¹⁶⁹ See U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . .").

¹⁷⁰ U.S. CONST. art. III, § 2.

¹⁷¹ Cf. Watts, *supra* note 7, at 36 ("[B]ecause the Court enjoys neither the power of the purse nor the sword, the Court depends on the coordinate branches and the American public to enforce and follow its judgments.").

¹⁷² COMMISSION REPORT, *supra* note 29, at 39.

necessarily generated in the decision of the case, is the property of the United States Government¹⁷³

Put simply, as Judge McGowan recognized, the creation of judicial papers in the course of public employment seems to provide a clear case for viewing judicial papers as public in character.¹⁷⁴

This is not to say that differences between the President and the judge, including the judiciary's constitutionally guaranteed independence and its need to protect its sense of institutional legitimacy and collegiality, are irrelevant when assessing how best to handle judicial papers. To the contrary, as discussed in Part III below, the unique position of judges in our country should be taken into account when crafting rules relating to *access* to and *disposition* of judicial papers—just not when answering the threshold question of public ownership.¹⁷⁵ For example, the tradition of independence, secrecy, and confidentiality that surrounds the judiciary is relevant to the question of which judicial papers should be disclosed and when, but not to

¹⁷³ *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 211, 247 (statement of Carl McGowan, J., U.S. Court of Appeals for the District of Columbia).

¹⁷⁴ Copyright law might provide some support for this notion that the government should be viewed as the creator of judicial papers. Under what is known as the “work made for hire” rule in copyright law, employers hold the copyright in materials created by their employees in the course of their employment. See Sean M. O’Connor, *Hired to Invent vs. Work Made for Hire: Resolving the Inconsistency Among Rights of Corporate Personhood, Authorship, and Inventorship*, 35 SEATTLE U. L. REV. 1227, 1233–34 (2012). In addition, federal law provides that copyright protection is “not available for any work of the United States Government,” 17 U.S.C. § 105 (2012), and the law defines such works as “work prepared by an officer or employee of the United States Government as part of that person’s official duties.” *Id.* § 101. The revision notes accompanying this statutory provision expressly state that it is not meant to speak to the question of ownership of the governmental works themselves. H.R. REP. NO. 94-1476, at 59 (1976) (“The use of the term ‘work of the United States Government’ does not mean that a work falling within the definition of that term is the property of the U.S. Government.” (quoting 17 U.S.C. § 105 (2012))). Hence, although not speaking directly to the question of ownership of the governmental works themselves (as opposed to ownership of the intellectual property rights), these copyright rules do seem to bolster the notion that materials created by employees in the course of their employment should be viewed as the creations of the employer, not the employee. They also raise the question of whether ownership in the underlying works and ownership in the intellectual property rights attached to the works should move together or separately. With respect to judicial papers, it would seem most logical to have ownership in the underlying papers and ownership in the intellectual property rights attached to the papers move together in the same direction such that the government was viewed as the owner of both.

¹⁷⁵ See *infra* Part III.B.1 (noting that Congress is in the best position to decide questions of ownership, but that the judiciary should be empowered to decide questions of access and disposition).

whether, the papers are public or private in nature.¹⁷⁶ Similarly, the fact that public access to judicial papers might raise issues of judicial privilege is highly relevant to whether and when the public should be allowed to access certain judges' working papers, but not to the question of who owns the papers in the first place.¹⁷⁷

The bottom line is that because judges' papers are created by federal officials on government time relating to official governmental duties, there is no principled reason—other than historical happenstance—to continue treating judicial working papers as a species of private property. Not even the leading property theories, such as the Lockean, Hegelian, or utilitarian theories, can be said to support the continued treatment of judicial papers as private property.¹⁷⁸

Locke's labor theory of property is based around the idea of "moral desert" and affirms the notion that "a maker is entitled to ownership of the things she intentionally brings into being" through her own labor.¹⁷⁹ As applied to the question of whether judicial papers should be viewed as judges' private property, that notion does not support an affirmative answer. For one thing, judges do not personally create many of the papers in their files. Some of their papers, such as letters, internal memoranda, and internal draft opinions, are written and created by other judges or by their law clerks. Hence, conferring ownership rights to judges over all papers in their files would seem to exceed Locke's theory that one should own what one makes with one's own labor.¹⁸⁰ Moreover, even those working papers that judges do personally create using their own labor are created in the course of official employment for which the judges are compensated by the government. It could be said that judicial papers are created using "public labor," not individual labor, as Jonathan Turley has

¹⁷⁶ See *id.* (describing these traits of the judiciary as relevant to rulemaking regarding the specifics of disclosure).

¹⁷⁷ See *infra* Part III.B.2.b (addressing the effect of privilege on access questions).

¹⁷⁸ In the context of an article on presidential papers, Jonathan Turley reached a similar conclusion, finding that that the longstanding private ownership model, which treated presidential papers as private property until the passage of the PRA, persisted simply as a matter of historical tradition and expectation. See Turley, *supra* note 17, at 721. Turley concluded that the private ownership model today "lack[s] . . . a conceptual basis," *id.*, and asserted that "[t]he creation of presidential papers in the course of public employment offers a clear and compelling basis for public ownership." *Id.* at 719.

¹⁷⁹ GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 37, 46 (2012). Alexander and Peñalver also note that "[t]he usual reading of Locke's labor theory understands him as saying that, by mixing something she owns (her labor) with something she does not own (the raw material on which she labors), a person comes to acquire a private property right to the object of labor." *Id.* at 46.

¹⁸⁰ *Cf.* Turley, *supra* note 17, at 710 (noting that Locke's labor theory does not support private ownership of presidential papers because "presidential papers always involve the mixing of a variety of individuals' labor, not just a president's efforts").

argued with respect to presidential papers.¹⁸¹ Re-conceiving the papers' creation in this way undermines the entire premise of private ownership under Locke's labor theory.

The Hegelian "personality theory" of property also fails to support private ownership of judges' papers.¹⁸² According to the personality theory, property serves to promote individual freedom by allowing individuals to extend their free will beyond their inner lives to the external world through the simple process of "possessing, controlling, and owning material goods."¹⁸³ Possession is critical because it is the "means by which one embodies one's will in an object."¹⁸⁴ Hegel's personality theory, however, fails to support private ownership of judicial papers. For one thing, in contrast to judges' *private* papers, such as private letters or personal diaries, judges possess judicial *working* papers in their chambers files in their *governmental* capacity. In other words, judicial papers end up in judges' official hands as a result of their governmental employment. This seems to undercut the notion that judges have placed their own *individual*, personal free will in the papers through possession of the papers. In addition, according to Hegelian theory, gaining ownership over a thing via mere possession is possible only if the object is "not already owned by another."¹⁸⁵ With respect to judicial papers, it could be argued that the papers are already owned by others, such as the government.

Third, the social obligation theory of property, which was recently embraced by Gregory Alexander,¹⁸⁶ might be used to justify restrictions on judges' use and disposition of their papers while nonetheless treating them as privately owned.¹⁸⁷ This is because the social obligation theory of property holds that all individuals have an obligation to others in their respective communities to promote the capabilities that are essential to human flourishing.¹⁸⁸ The problem here, however, is that the social obligation theory focuses on justifying the

¹⁸¹ Cf. *id.* ("In the case of presidential papers, both the labor and the object of the labor are arguably owned by the public and not the possessor.")

¹⁸² See ALEXANDER & PEÑALVER, *supra* note 179, at 57 (noting that Hegelian property theory focuses "on the ways in which property contributes to development of the self, or personality").

¹⁸³ *Id.* at 61.

¹⁸⁴ *Id.* at 63.

¹⁸⁵ *Id.*

¹⁸⁶ See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009) (discussing the social obligation norm).

¹⁸⁷ Cf. *id.* at 794–95 (noting that the social obligation theory might be used to justify imposing restrictions on a private property owner; for example, requiring a property owner to maintain the aesthetic and historical integrity of historical landmark buildings, such as Penn Central).

¹⁸⁸ *Id.* at 768 (affirming this obligation).

imposition of social obligations on privately owned property—not on the threshold question of whether property should be private to begin with. For the reasons already described, private ownership simply does not make sense in the context of judicial papers given that the papers are created by government officials in the course of performing their official government duties.

Finally, today's leading property theory—utilitarianism—also fails to support a private ownership model for judicial papers. Utilitarianism seeks a socially efficient use of property by assessing the “goodness or badness of consequences in terms of their tendency to maximize utility or welfare.”¹⁸⁹ Utilitarianism “do[es] not automatically favor public ownership claims because private ownership may be the most socially efficient approach in a given area.”¹⁹⁰ However, in the context of judicial papers, the utilitarian theory would seem to favor public, not private, ownership. This is because the private ownership model has led to the destruction and loss of many historically valuable judicial papers, particularly the papers of lower federal court judges.¹⁹¹ In addition, although private ownership could be said to protect judicial independence and candor, the private ownership model also arguably has harmed the judiciary's confidentiality, legitimacy, and collegiality when papers have been released shortly after a judge or Justice's retirement. Hence, the private ownership model—which privileges the interests of individual judges—could be said to have produced an inefficient result for society when viewed through a utilitarian lens.¹⁹²

In short, modern property theories do not support treating judicial papers as private property. Nor does the unique position of the judiciary counsel in favor of treating judicial papers as privately owned while presidential papers are treated as government property. Indeed, nothing other than historical happenstance counsels in favor of continuing to treat judicial working papers as a species of private property but presidential papers as government property.¹⁹³

¹⁸⁹ ALEXANDER & PEÑALVER, *supra* note 179, at 11.

¹⁹⁰ Turley, *supra* note 17, at 715.

¹⁹¹ See *supra* Part I.B (discussing the spotty record of preservation with respect to judicial papers).

¹⁹² Cf. Turley, *supra* note 17, at 719 (arguing that the private model of ownership governing presidential papers “created a highly inefficient result for society throughout U.S. history”).

¹⁹³ It is interesting to note that records created by federal executive agencies, like presidential papers, are viewed as public property that must be retained. See, e.g., 36 C.F.R. § 1222.12(c) (2012) (describing working files, “such as preliminary drafts and rough notes, and other similar materials,” that must be maintained); *id.* § 1222.20 (excluding personal files, such as private, non-agency correspondence, from official agency records); see also *id.* § 1220.18 (“Personal files . . . are documentary materials belonging to an individual that are

B. The Private Ownership Model's Ineffectual Balancing of Competing Interests

The proprietary theory of ownership governing judicial papers also is problematic because it is not well equipped to balance the many competing interests surrounding judicial papers in a collaborative or concerted manner. Cutting in favor of preservation and disclosure are historical interests as well as concerns about promoting governmental accountability, oversight, transparency, and public knowledge. Counseling against disclosure (or at least against premature disclosure) are serious concerns about protecting litigants as well as the judiciary's independence, integrity, confidentiality, and collegiality. The current private ownership model leaves judges free to balance these and other competing interests on their own, regardless of whether a judge's own individual balancing will threaten broader institutional, historical, or societal interests.

1. Interests Favoring Access

A variety of interests weigh in favor of preserving federal judges' papers. Chief among these is the public's interest in preserving history—the history of the judiciary's decisionmaking process, the history of individuals who have served in the judiciary, the history behind cases and social movements, the administrative history of the judiciary, and the history of the judiciary's relationship to society as a whole.¹⁹⁴ Judges' papers help to preserve history because they contain a veritable treasure trove of information about the judicial decision-making process, about particular cases, and about particular judges.

For example, when Justice Harry Blackmun's papers were opened, the papers "releas[ed] a trove of material from 24 years of internal deliberations at the U.S. Supreme Court on issues such as capital punishment, school prayer and especially abortion."¹⁹⁵ His papers also included memoranda written by former law clerks, including now-Justice Elena Kagan—in fact, some of those memos

not used to conduct agency business. Personal files are excluded from the definition of Federal records and *are not owned by the Government.*" (emphasis added)).

¹⁹⁴ See COMMISSION REPORT, *supra* note 29, at 40 (noting that destruction of judicial papers "inevitably makes more difficult our understanding of the Court and impoverishes the record of the nation's past"); see also *Presentation of the Historical Society of the D.C. Circuit*, *supra* note 67, at 29 (statement of George W. Jones, Jr., Chair, Archival Preservation Historical Society Committee) ("[W]hat the historians are looking for is anything that sheds light on the way judges do their work . . . as district court, court of appeals, or Supreme Court, and the functioning of institutions in America at various points in time . . .").

¹⁹⁵ Fred Barbash, *Blackmun's Papers Shed Light into Court; Justice's Trove Opened by Library of Congress*, WASH. POST, Mar. 5, 2004, at A1.

subsequently came to be at issue during Justice Kagan's confirmation process.¹⁹⁶ In addition, Justice Blackmun's papers revealed that "Blackmun was convinced that *Roe* was doomed when a court majority led by Chief Justice William H. Rehnquist appeared ready to effectively overrule *Roe* and had a draft opinion already in hand."¹⁹⁷ According to the papers, "[t]he day was saved, from Blackmun's point of view, by Justices Sandra Day O'Connor and David H. Souter, who worked successfully behind the scenes to help persuade an anguished Justice Anthony M. Kennedy to abandon the Rehnquist majority in *Planned Parenthood [v.] Casey*."¹⁹⁸ Blackmun's papers even contained the note Justice Kennedy sent him to tell him he was switching sides.¹⁹⁹

Similarly, when Justice Thurgood Marshall's papers were opened to the public, they revealed a wealth of information about cases only recently decided by the Court and also about the other Justices who were still sitting on the Court.²⁰⁰ Journalists and researchers sifted through the papers, which consisted of more than 173,000 items spanning Marshall's twenty-four-year career on the Court,²⁰¹ and the news media ran article after article parsing the papers and providing an extraordinary glimpse of the behind-the-scenes evolution of cases involving issues ranging from abortion to civil rights.²⁰² Among other things, Justice Marshall's papers revealed that the Court had come so close to overruling its seminal abortion precedent, *Roe v. Wade*,²⁰³ in 1989 "that three Justices already had prepared an angry dissent."²⁰⁴ In addition, his papers showed that the Court's 1989 decision striking down laws prohibiting flag burning came "right down to the wire" and ultimately rested in the hands of Justice Harry Blackmun, who cast the determinative fifth vote just two days before the opinion was

¹⁹⁶ See *Presentation of the Historical Society of the D.C. Circuit*, *supra* note 67, at 15–16 (statement of George W. Jones, Jr., Chair, Archival Preservation Historical Society Committee); see also Mark Sherman & Jessica Gresko, *Kagan Clerking Notes May Draw GOP Fire*, BOSTON GLOBE (May 26, 2010), http://www.boston.com/news/nation/articles/2010/05/26/kagan_memos_as_justice_marshall_s_clerk_may_draw_gop_fire.

¹⁹⁷ Barbash, *supra* note 195.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See Lewis, *supra* note 21 (noting that the release of Justice Marshall's papers soon after his retirement was a rare event because it revealed near-current information).

²⁰¹ See *id.* (noting the breadth of the materials released); see also Weiser & Biskupic, *supra* note 21 (asserting that the papers released were "extensive").

²⁰² See *id.* (noting that the papers included notes on internal debates and preliminary votes in a variety of cases).

²⁰³ 410 U.S. 113 (1973).

²⁰⁴ See *Supreme Court Nearly Overturned Roe*, *Newspaper Reports*, ASSOCIATED PRESS, May 24, 1993, available at <http://www.apnewsarchive.com/1993/Supreme-Court-Nearly-Overturned-Roe-Newspaper-Reports/id-6452a17b969d5each3bdd68fe24aaeb3>.

issued.²⁰⁵ On the more lighthearted side, his papers also showed that memoranda were flying between the Justices at one point about the correct spelling of the word “marijuana.”²⁰⁶

Numerous books and articles ranging from biographies to institutional histories have benefited from these kinds of historical insights and details that have been discovered in judicial papers.²⁰⁷ These scholarly works have shaped, among other things, what the public knows about specific judges and Justices, what we understand about the judiciary’s relationship to societal movements and societal change, what we understand about the fragility of some judicial decisions, and how Americans perceive the judicial decisionmaking process and the judiciary’s legitimacy. Although many different examples could be discussed, four illustrative examples suffice to demonstrate the rich historical value that scholars and journalists have found in judicial papers.

Polly Price’s biography of Judge Richard S. Arnold, who sat on the U.S. Court of Appeals for the Eighth Circuit, made a crucial contribution to the public’s understanding of the lower courts. Price relied in part upon Judge Arnold’s papers, which included case files pertaining to school desegregation in Little Rock—cases that never made it to the U.S. Supreme Court but are nonetheless historically significant.²⁰⁸ Price also discovered that Judge Arnold’s files included correspondence between members of the U.S. Court of Appeals for the Eighth Circuit who decided *Carhart v. Stenberg*,²⁰⁹ an important case involving partial-birth abortion that was later appealed to the

²⁰⁵ Weiser & Biskupic, *supra* note 21.

²⁰⁶ Mauro, *supra* note 21.

²⁰⁷ See, e.g., Richard A. Posner, *Foreword to DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA*, at x–xi (2012) (noting that Dorsen made use of Judge Friendly’s case files and correspondence in researching his book); MIMI CLARK GRONLUND, *SUPREME COURT JUSTICE TOM C. CLARK: A LIFE OF SERVICE*, at xviii (2010) (noting that Gronlund relied upon papers of Justice Clark found at the University of Texas); KENNETH N. KLEE, *BANKRUPTCY AND THE SUPREME COURT* 44–48 (2009) (noting that the Justices’ internal papers shed light on the “politics of coalition building and vote trading” that occur in bankruptcy cases); POLLY J. PRICE, *JUDGE RICHARD S. ARNOLD: A LEGACY OF JUSTICE ON THE FEDERAL BENCH* 16 (2009) (noting the importance of Judge Arnold’s papers to the writing of Price’s book); TINSLEY E. YARBROUGH, *HARRY A. BLACKMUN: THE OUTSIDER JUSTICE*, at xiii (2008) (noting that the author relied in part on the papers of Justices Blackmun, Black, Douglas, Brennan, Marshall, and Powell); Dickson, *supra* note 14, at xxvi (noting that the book incorporates the edited notes and papers of multiple Justices); Lee Levine & Stephen Wermiel, *The Landmark That Wasn’t: A First Amendment Play in Five Acts*, 88 WASH. L. REV. 1, 1 (2013) (noting that the authors drew “heavily on . . . unpublished internal papers from the chambers of Justice William Brennan and other Justices”).

²⁰⁸ See PRICE, *supra* note 207, at 13, 16 (noting the range of cases presided over by Arnold and described in the book on the basis of his papers and other research).

²⁰⁹ 192 F.3d 1142 (8th Cir. 1999).

Supreme Court.²¹⁰ Using insights gleaned from Judge Arnold's chambers papers as well as interviews and other sources, Price helped demonstrate that while many scholars focus their attention on the Supreme Court, it is actually lower federal courts that are far more important to regular Americans—if only because the percentage of cases that make it all the way to the Supreme Court is miniscule.²¹¹ Price noted, for example, that Judge Arnold “decided more abortion cases than any single Supreme Court justice,” and he “considered hundreds of appeals from men facing the death penalty, ninety of whom were executed during his tenure.”²¹² Yet despite the importance of judges like Judge Arnold—and the role they play in protecting rights guaranteed by the Constitution—“most Americans are unaware of the day-to-day work of judges in the traditional forum for recognition of civil rights in the United States.”²¹³ By drawing attention to Judge Arnold's role in deciding issues of national importance ranging from abortion to desegregation to the death penalty, Price illuminated the work of one judge in our legal system in a way that was accessible to the American people and, in the end, likely enhanced the legitimacy of the judiciary.

Linda Greenhouse's recent biography of Justice Harry Blackmun provides a second illustrative example of a scholarly work that benefitted from details revealed in judicial papers.²¹⁴ The biography—which relies almost exclusively upon the private and official papers of Justice Harry Blackmun—sheds light on the Court's handling of abortion, the death penalty, and sex discrimination cases during Blackmun's tenure.²¹⁵ In reviewing Blackmun's papers, Greenhouse found that Blackmun had left the country a “great gift” when he donated his papers—a treasure trove of historical sources that “[a]nyone interested in the Supreme Court during the last quarter of the twentieth century will turn to [for] many generations to come.”²¹⁶ For example, Justice Blackmun's papers shed light on how the Justice struggled to deal with the divisive discourse and criticism that resulted from the Court's abortion decision in *Roe v. Wade*, which he authored.²¹⁷ His papers also shed light on how the Court adapted to

²¹⁰ *Stenberg v. Carhart*, 530 U.S. 914 (2000).

²¹¹ PRICE, *supra* note 207, at 11–12.

²¹² *Id.* at 13.

²¹³ *Id.* at 14.

²¹⁴ GREENHOUSE, *supra* note 96, at xi (2005) (noting that Greenhouse relied on Blackmun's papers in authoring this book).

²¹⁵ *Id.* at xiii.

²¹⁶ *Id.* at xi, xiii.

²¹⁷ *Id.* at 136–38 (discussing the public response to the decision and the continuing discussion of it within the Court).

the confirmation of the Court's first female member, Justice Sandra Day O'Connor, who joined the Court in 1981.²¹⁸ Specifically, Blackmun's files showed that prior to O'Connor joining the Court, Blackmun objected to dropping the Court's traditional reference to "Mr. Justice" and replacing it with the gender-neutral term "Justice,"²¹⁹ thereby shedding light on how the Court reacted to changes in gender roles in society.

A book published in 2001 by Del Dickson provides a third example of scholars' reliance on the historical materials found in judges' and Justices' working papers. Dickson's book presents edited and annotated versions of conference notes relating to approximately 300 major cases preserved among the papers of eight Justices who served on the U.S. Supreme Court between 1940 and 1985,²²⁰ including papers relating to historically significant cases such as *Korematsu v. United States*,²²¹ *Loving v. Virginia*,²²² and *Brown v. Board of Education*.²²³ The papers that Dickson compiled help to shed light on the Court's decisionmaking process, demonstrating that the Court's decisions are not all about law and precedent but rather "are an intricate and shifting composite of law, politics, policy, principle, efficiency, expedience, pragmatism, dogmatism, reason, passion, detachment, individual personality, group psychology, institutional forces, and external pressures."²²⁴ Thus, the papers help to give scholars and the American public a better understanding of what drives judicial decisions and what process is used to reach judicial decisions.

Finally, yet another excellent example of the value of judicial papers can be found in an article titled *The Landmark that Wasn't: A First Amendment Play in Five Acts*, which was recently published in the *Washington Law Review* and written by Lee Levine and Stephen Wermiel.²²⁵ The article relies on internal, previously unpublished Court memos from the Brennan papers to reveal how the 1964 landmark decision in *New York Times Co. v. Sullivan*²²⁶ was once in serious jeopardy of being overruled.²²⁷ Specifically, the article demonstrates that the *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*

²¹⁸ *Id.* at 141.

²¹⁹ *Id.*

²²⁰ Dickson, *supra* note 14.

²²¹ 323 U.S. 214 (1944).

²²² 388 U.S. 1 (1967).

²²³ 347 U.S. 483 (1954).

²²⁴ Dickson, *supra* note 14, at xxvii.

²²⁵ See Levine & Wermiel, *supra* note 207, at 11.

²²⁶ 376 U.S. 254 (1964).

²²⁷ See Levine & Wermiel, *supra* note 207, at 11.

case from 1985,²²⁸ which is often viewed as containing only minor First Amendment refinements, actually “is more significant than most think, not for its formal holding but rather for the internal doubts some of the Justices harbored between 1983 and 1985 concerning the soundness of the rule announced in *New York Times v. Sullivan*.”²²⁹ In relying on previously unpublished, internal court documents (which are now posted and linked on the *Washington Law Review*’s website),²³⁰ Levine and Wermiel “evaluate the import of the strikingly candid and sometimes surprising private thoughts” of several Justices, and show readers the Justices’ “analytical volleying back and forth, their strategic wrangling for votes, and even the input of the law clerks as the reason and result of the case hang in the balance.”²³¹ Not only does the article thus provide an informative glimpse into the decisional process at the Court, but it also illuminates the meaning of the *Greenmoss* case and demonstrates the fragility of the Court’s seminal ruling in *New York Times v. Sullivan*. Accordingly, the article advances our understanding of both the Court’s decisionmaking process as well as the Court’s approach to First Amendment issues.

As these illustrative examples of scholarly works demonstrate, although the historical value of judicial papers may not have been obvious at the beginning of our country’s history, awareness of the historical value of judicial papers has mounted over time.²³² Evidence of this awareness can also be found in various statements made by the judiciary. For example, a document prepared by the library of the U.S. Court of Appeals for the Eighth Circuit notes that “[j]udges’ papers are an invaluable primary source of information on judicial biography and court history, providing insight not otherwise available. They constitute a veritable gold mine for legal scholars, biographers, and the general public.”²³³ Specifically, the document from the Eighth Circuit points out that the papers of federal judges can be helpful in three contexts: biographical studies, institutional histories, and general studies of legal history.²³⁴ Similarly, a guide to the preservation of

²²⁸ 472 U.S. 749 (1985).

²²⁹ Ronald Collins, *Academic Highlight: Internal Memos of Greenmoss Case Reveal Doubts About Sullivan Ruling*, SCOTUSBLOG (Apr. 4, 2013, 10:04 AM), <http://www.scotusblog.com/2013/04/academic-highlight-internal-memos-of-greenmoss-case-reveal-doubts-about-sullivan-ruling/>.

²³⁰ *Interactive Article Links to Original Supreme Court Documents*, WASH. L. REV., <http://www.law.washington.edu/WLR/Issues/FeaturedArticles/mar13.aspx> (last visited Sept. 6, 2013).

²³¹ Collins, *supra* note 229.

²³² See SAX, *supra* note 18, at 94 (“[D]uring the last half-century at least, the historical value of the justices’ working papers has been widely recognized.”).

²³³ See *Eighth Circuit Preservation Guide*, *supra* note 69.

²³⁴ *Id.*

federal judges' papers prepared by the Federal Judicial Center notes that scholars of the courts see the significant historical value in the materials and "recognize the unique perspective offered" in a judge's papers.²³⁵ Accordingly, historical interests clearly are one of the identifiable factors leaning in favor of preservation of federal judges' working papers.

In addition to historical interests, the public's interest in governmental transparency, accountability, and disclosure also supports public access to federal judges' papers.²³⁶ Certainly, the judiciary "isn't subject to popular control in the same way that the legislature and executive branch are,"²³⁷ given that federal judges enjoy lifetime tenure and salary protections and do not run for elected office.²³⁸ However, the judiciary has taken steps recently to make its actions more accessible to and transparent to the American public. For example, the U.S. Supreme Court recently began releasing audio files of all oral arguments at the end of each argument week,²³⁹ and the lower federal courts have recently piloted cameras in some courtrooms.²⁴⁰ These small steps toward opening up the judicial process seem to be reflective of the general notion that there is nothing sacred about the judiciary that should prevent the public from receiving an "accounting of how the Court functions and how it reaches its decisions."²⁴¹ Indeed, the fact that judges are relatively unaccountable

²³⁵ FJC GUIDE, *supra* note 16, at 3. The guide stresses the historical value of judges' papers, provides a "how to" on preserving judges' papers, and highlights issues that judges should think about if they choose to donate their papers to a repository. *Id.* at 1–2.

²³⁶ See COMMISSION REPORT, *supra* note 29, at 6 (noting that information "is a necessary basis of responsible government, without which the claims of popular sovereignty cannot be realized"); RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at ix (noting James Madison's views that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both").

²³⁷ *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 211, 213 (statement of Sidney Fine, Professor of History, University of Michigan).

²³⁸ U.S. CONST. art. III, § 1.

²³⁹ See *Argument Audio*, THE SUPREME COURT OF THE UNITED STATES (July 7, 2013), http://www.supremecourt.gov/oral_arguments/argument_audio.aspx ("Prior to the 2010 Term, the recordings from one Term of Court were not available until the beginning of the next Term.").

²⁴⁰ See *Courts Selected for Federal Cameras in Court Pilot Study*, UNITED STATES COURTS (June 8, 2011), http://www.uscourts.gov/News/NewsView/11-06-08/Courts_Selected_for_Federal_Cameras_in_Court_Pilot_Study.aspx (describing the camera pilot program).

²⁴¹ *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 211, 213 (statement of Sidney Fine, Professor of History, University of Michigan).

while in office might suggest that it is even more imperative that judges be made accountable to history, at least eventually.²⁴² Without an opportunity for public scrutiny, the fear is that “anonymous hands may become irresponsible hands.”²⁴³

Judge Richard S. Arnold seems to have subscribed to this view. According to Judge Arnold’s biographer, Polly J. Price, Judge Arnold “knew that continued public acceptance of the federal courts was a fragile thing, easily jeopardized by individual behavior.”²⁴⁴ He was aware that the future of the judiciary “depended upon continued public acceptance of the judiciary,” and he provided Price with access to his papers before his death to further the public’s access to the actions he took as a judge.²⁴⁵

Sidney Fine, a professor of history, took a similar position in favor of greater judicial disclosure and accountability during a panel discussion held in 1976 at Yale University as part of the National Study Commission’s hearings on judicial records when he stated:

I can’t see why, assuming some protection for people on the Court, there is something sacred about a judicial decision, more sacred than a presidential decision. After all, presidential decisions may lead to an act of war in which millions of people are killed, and yet we say we have a right to rake that over. Why in a democracy should the public be denied knowledge of the judicial process, the way in which opinions are created? An opinion like *Brown v. Board of Education* had enormous impact on every living American. Why should it be a secret to us how that decision was reached?²⁴⁶

By this account, disclosure of judicial papers could help to discipline and improve the work of judges and Justices who—although they enjoy lifetime tenure and are not subject to popular control via elections—care about their reputations and about the judiciary’s

²⁴² See Walter F. Murphy, *The Judicial Process and Judicial Papers: Of Privacy, Prospects, Accountability and Understanding*, in RECORDS ON MICROFICHE OF THE NATIONAL STUDY COMMISSION ON RECORDS AND DOCUMENTS OF FEDERAL OFFICIALS, No. 38, at 2–4 (“[I]f it is improper to judge judges immediately, it is all the more necessary to judge them thoroughly when the proper time eventually arrives.”); *id.* at 3 (noting that holding judges accountable requires an examination of not merely “the final products of their work—their decisions and opinions—but also the processes by which they arrived at those results”).

²⁴³ Cahn, *supra* note 122, at 15.

²⁴⁴ PRICE, *supra* note 207, at 16.

²⁴⁵ *Id.* (“Prior to his death Arnold granted me access [to his papers], along with several hours of interviews.”).

²⁴⁶ *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 211, 219 (statement of Sidney Fine, Professor of History, University of Michigan).

image and legitimacy in the public's eyes.²⁴⁷ For example, if judges know that their records will be subject to eventual public scrutiny, they might well be even more careful to avoid making improper comments, such as discriminatory statements like the one Justice Jackson made when he noted that Justice Frankfurter's Jewish faith might "grate on Southern sensibilities."²⁴⁸ They also would likely be even more mindful to adhere carefully to the rule of law when deciding cases since their actions would ultimately be judged by history, and they might take greater care to communicate with their colleagues with civility if they knew that others outside the Court ultimately would be able to read the communications.

Disclosure of judicial papers also could help to discipline the work of judicial law clerks who, unlike their bosses, do not enjoy lifetime tenure. If law clerks know that what they write may well be revealed to the public down the road, then they too may take greater care in ensuring that their recommendations adhere to the law rather than to their own personal preferences and that anything they write is carefully considered and well-reasoned. A memo written by a law clerk in 1952 about *Plessy v. Ferguson* provides perhaps the best example of how the release of judicial papers can render former law clerks accountable long after they clerk.²⁴⁹ In the 1952 memo, the law clerk, William H. Rehnquist, wrote: "I realize it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be reaffirmed."²⁵⁰ The memo later came back to haunt Rehnquist in 1971 on the eve of his Senate floor debate on his nomination to the Supreme Court.²⁵¹

2. *Interests Weighing Against Access*

Despite the various interests that counsel in favor of access to judicial papers, many other countervailing interests pull in the other direction—or at least counsel against immediate or premature disclosure of working papers. Among these interests is the judiciary's interest in protecting its independence, which has its roots in the U.S. Constitution's grant of lifetime tenure and salary protections to

²⁴⁷ Cf. WIGDOR, *supra* note 18, at 8 ("Since Justices are appointed for life and not subject to popular control through the ballot, . . . their sole constraints are the threat of impeachment and concern for their reputation.").

²⁴⁸ See Cahn, *supra* note 122, at 15.

²⁴⁹ Liptak, *supra* note 87.

²⁵⁰ *Id.*

²⁵¹ *Id.*

Article III judges.²⁵² Some have asserted that public access to judicial working papers would “weaken judicial independence by subjecting the judge to demagogical pressure”²⁵³ and “tend to politicize the judicial function, cheapen the process, and subject the independence of the judiciary to a very real threat.”²⁵⁴

Related to concerns about judicial independence are concerns about preserving the judiciary’s collegiality, confidentiality, and integrity. For example, Justice Lewis F. Powell, Jr., who ultimately donated his papers to Washington and Lee University,²⁵⁵ once wrote about the need for confidentiality and candor in the Court’s decisionmaking process, noting:

The integrity of judicial decision making would be impaired seriously if we had to reach our judgments in the atmosphere of an ongoing town meeting. There must be candid discussion, a willingness to consider arguments advanced by other Justices, and a continuing examination and re-examination of one’s own views. The confidentiality of this process assures that we will review carefully the soundness of our judgments. It also improves the quality of our written opinions.²⁵⁶

Similarly, during hearings held in the 1970s by the National Study Commission on Records and Documents of Federal Officials, Judge James Oakes of the Second Circuit argued that “[p]ublic access to judicial materials would serve, on an appellate level, to inhibit free discussion among the participating judges, chill exploration of unconventional or uncharted areas of law, and generally delay the operations of a system already strained by a number of extraneous factors.”²⁵⁷

In addition to the potential chilling effect that release of judicial papers could have, there is also reason to worry that the public airing of a judge’s “dirty laundry”—while promoting transparency and enabling greater oversight and accountability—could unnecessarily tarnish or embarrass the judiciary’s reputation.²⁵⁸ This concern, for

²⁵² See U.S. CONST. art. III, § 1.

²⁵³ *Testimony Received in Public Hearings*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 265, 266 (statement of James L. Oakes, J., U.S. Court of Appeals for the Second Circuit).

²⁵⁴ *Id.*

²⁵⁵ See *supra* note 88.

²⁵⁶ Lewis F. Powell, Jr., *What Really Goes On at the Supreme Court*, in JUDGES ON JUDGING: VIEWS FROM THE BENCH 84 (David M. O’Brien ed., 1997).

²⁵⁷ *Testimony Received in Public Hearings*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 265, 266 (statement of James L. Oakes, J., U.S. Court of Appeals for the Second Circuit).

²⁵⁸ *But see* Dickson, *supra* note 14, at xxvii (noting that the Justices “rarely allude to personal antagonisms or conference infighting in their notes” and suggesting that those

example, was raised in the wake of Alpheus Mason's publication of a biography of Chief Justice Stone.²⁵⁹ Specifically, in an article called *Eavesdropping on Justice*, Edmond Cahn asserted in 1957 that some of the revelations in the Stone biography, which were based on internal working papers from the Court, "will surely cause unnecessary embarrassment."²⁶⁰ To support this claim, Cahn pointed out that the biography revealed that Justice Jackson had argued in an internal Court memorandum that a case involving racial discrimination in Texas should not be written by Justice Felix Frankfurter "because, among other objections, he is a Jew, a circumstance which 'may grate on Southern sensibilities.'"²⁶¹ Some might argue that these sorts of details should be publicly revealed so as to enable greater oversight of the judiciary; Cahn seemed more concerned about the harm and embarrassment that such revelations could cause to the judiciary as an institution.

Furthermore, there are concerns that judges' working papers may not actually "provide a full or objective account" and may be unreliable.²⁶² For example, some working papers may provide only partial, half-complete information that presents a skewed view of what actually happened during the judicial decisionmaking process, or the papers might include details that were designed to make the judge or Justice look good in the light of history. These worries about the accuracy and reliability of papers might be seen as undercutting the historical value of the papers. However, one study, which examined papers from Justices Earl Warren, William Douglas, William Brennan, and Thurgood Marshall for the 1967 and 1968 Terms, found that the Justices' records are indeed substantially accurate and reliable.²⁶³ Accordingly, concerns about the accuracy and reliability of judicial papers may well be overblown.²⁶⁴

Finally, yet another interest counseling against disclosure of judicial papers—or at least against immediate disclosure—is the

"who enjoy salacious gossip about the Court may be somewhat disappointed by what they read").

²⁵⁹ See Cahn, *supra* note 122, at 15 (discussing Mason's biography of Stone).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Dickson, *supra* note 14, at xxv ("Conference notes . . . do not provide a full or objective account of how or why the Justices decided cases as they did. . . . They are neither complete nor objective transcripts but are a partial record of what interested the note-taker at the time.").

²⁶³ See Forrest Maltzman and Paul J. Wahlbeck, *Inside the U.S. Supreme Court: The Reliability of the Justices' Conference Records*, 58 J. POL. 528 (1996).

²⁶⁴ Cf. Dickson, *supra* note 14, at xxv–xxvi (discussing the limitations of the Justices' papers).

judiciary's and litigants' interest in the finality of judgments.²⁶⁵ If judicial papers involving specific cases were opened up soon after a case was decided, then the finality of the decision might well be called into question by unhappy litigants,²⁶⁶ who could comb the papers in an attempt to find a basis for seeking to have the judgment set aside.²⁶⁷ As one judge noted during the National Study Commission's hearings on public records in the 1970s, "it would be awful if a big case were decided and the conference notes were made available a year later, and the losing party wants to come in and reopen because Judge X was under a misapprehension on a fact, and so forth."²⁶⁸

Alternatively, litigants might well seek to use evidence gleaned from judicial papers as evidence of the authoritative meaning of judicial precedents—akin to how legislative history is often used to show the meaning of statutes passed by Congress.²⁶⁹ This would open up a variety of thorny questions regarding whether or not judicial papers and judicial history should be legally admissible to prove the meaning of judicial texts.²⁷⁰ Although arguments could be made that it would

²⁶⁵ *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University, in RECORDS OF FEDERAL OFFICIALS*, *supra* note 14, at 211, 218 (statement of J. Edward Lumbard, Jr., J., U.S. Court of Appeals for the Second Circuit) (noting that "we have very firmly rooted in the Anglo-American tradition, that there has to be a finality to judicial decisions," and that courts should not "attempt to set aside what has been done after the full and due process of law, unless, of course, there be discovery of some criminal act or fraud or something of that sort").

²⁶⁶ *Cf. State ex rel. Steffen v. Kraft*, 619 N.E.2d 688 (Ohio 1993) (rejecting defendant's attempt on a writ of mandamus to seek the notes that the judge made during the defendant's murder trial); *Beuhler v. Small*, 64 P.3d 78 (Wash. 2003) (holding that an attorney had no right to seek access to a judge's computer files under state public records law); *State v. Pankin*, 579 N.W.2d 52 (Wis. 1998) (holding that defendant in Wisconsin seeking postconviction relief had no right under state law to access the sentencing court judge's personal notes).

²⁶⁷ A litigant might, for example, try to bring a direct attack against the judgment using Federal Rule of Civil Procedure 60(b). *See* FED. R. CIV. P. 60(b) (providing that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for" a variety of reasons, including mistake or "any other reason justifying relief").

²⁶⁸ *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University, in RECORDS OF FEDERAL OFFICIALS*, *supra* note 14, at 211, 236 (statement of Carl McGowan, J., U.S. Court of Appeals for the D.C. Circuit).

²⁶⁹ *See Vermeule*, *supra* note 18, at 1311–12 (considering whether judicial history, such as internal drafts of Supreme Court opinions, should be legally admissible when interpreting the meaning of a judicial precedent).

²⁷⁰ If courts were of the view that judicial papers should not be allowed to be introduced to prove the meaning of a judicial precedent, then the courts could fairly easily solve the problem by developing a formal evidentiary rule that prevents the admissibility of judicial history—akin to how Rule 606 of the Federal Rules of Evidence prevents evidence relating to jurors' thought processes from being used to impeach a jury verdict. *See* FED. R. EVID.

be helpful to have this kind of judicial history available for use in deciphering the meaning of judicial precedents (just as legislative history is used in interpreting the meaning of statutes), the arguments are complex,²⁷¹ and under current practices, judicial history is not admissible to prove the legal meaning of a judicial opinion.²⁷²

In short, there are many different competing interests at play when it comes to judicial papers: On the one hand, tipping in favor of preservation, there are historical interests and the public's interest in accountability, transparency, disclosure, and oversight. On the other hand, tipping against disclosure (or at least premature disclosure), there are serious concerns about protecting the judiciary's independence, collegiality, confidentiality, and integrity as well as protecting litigants and the finality of judicial decisions.

3. *The Desirability of Collective Rather than Individualized Calculations*

Rather than calling for collaborative or collective thinking about how best to balance the many competing interests surrounding judicial papers, the current ad hoc approach used to deal with judicial papers leaves each judge free to come up with his or her own answer. Put more simply, the private ownership model allows individual interests to trump broader institutional or societal interests. This seems quite problematic when one considers that many of the competing interests at stake involve interests that are much broader than any one judge or any one Justice. Indeed, many of the interests go to the very heart of the judiciary's institutional integrity and independence as well as to the public's broad interests in preserving history and holding our government accountable.²⁷³

Take, for example, Justice David Souter or Justice Warren Burger's decisions to delay the release of their papers for decades.²⁷⁴ Their decisions do not necessarily represent what is in the best interests of the public at large or historians, but rather represent their own

606(b)(1) (“[A] juror may not testify about any statement made or incident that occurred during the jury’s deliberations; the effect of anything on that juror’s or another juror’s vote; or any juror’s mental processes concerning the verdict or indictment.”).

²⁷¹ See Vermeule, *supra* note 18, at 1313–16 (exploring the complex arguments surrounding whether or not judicial history should be used as an interpretive source).

²⁷² See *id.* at 1313.

²⁷³ Cf. E. Barrett Prettyman, Jr. & Allen R. Snyder, *Breaching Secrecy at the Supreme Court—An Institutional or Individual Decision?*, LEGAL TIMES OF WASH., June 12, 1978, at 6–7 (suggesting that the most appropriate answer to the question of how to handle judicial papers “is not necessarily one for individual decision but rather may be an institutional one” because such a decision “affects all members of the Court and the integrity of their views in regard to each case”).

²⁷⁴ See *supra* notes 104–05 and accompanying text.

individualized decision.²⁷⁵ Similarly, Justice Thurgood Marshall's decision to allow his papers to be released immediately upon his death merely represented his own calculation about how best to mediate the competing interests at play.²⁷⁶ Indeed, a majority of Justices then on the Court affirmatively opposed the Library of Congress's decision to provide researchers with access to Justice Marshall's papers so soon after he left the bench.²⁷⁷ As these examples illustrate, the current private ownership model creates the possibility that individual, private interests will prevail over broader institutional or societal interests as well as the interests of individual litigants and other judges.

Hence, our continued adherence to the private ownership model governing judicial papers seems problematic, both under leading property theories and as a matter of policy, since it has proven ill-equipped to balance the interests of individual judges against the interests of society as a whole.²⁷⁸ We need a more uniform approach for handling judicial papers—one that moves toward a public ownership model. It is to the question of precisely how to achieve such a shift that this Article now turns.

III

MOVING FORWARD: HOW TO ACHIEVE A SHIFT FROM A PRIVATE TO A PUBLIC OWNERSHIP MODEL FOR JUDICIAL PAPERS

In considering how a shift from private to public ownership might most appropriately be achieved, there are several questions to consider. For example, should the legislature or the courts set the rules for judicial papers? What sorts of matters would the rules need to address? What factors would need to be taken into account in order to advance society's broad interests in preserving papers of historical value and gaining access to information while at the same time

²⁷⁵ An editorial published in the *Washington Post* noted this tremendous power that our current system places in the hands of individual Justices, arguing the following in the wake of Justice Souter's decision to close his papers for fifty years: "[T]he absence of guidelines leaves individual justices with far too much power to determine the fate of records that the public rightly has a claim to. After all, justices are public servants and are paid with public dollars." *Safeguarding History*, *supra* note 62.

²⁷⁶ See *supra* notes 101–03 and accompanying text (discussing the release of Marshall's papers).

²⁷⁷ See *supra* note 102 and accompanying text.

²⁷⁸ This argument in favor of a collective rather than individual balancing does not necessarily answer the question of *who* should set uniform rules for judges' papers—that is, Congress or the judiciary as a whole. That question is addressed *infra* Part III.B.1, which argues in favor of delegating authority to the judiciary to set uniform rules concerning access to and disposition of judges' papers.

protecting litigants and the judiciary? This Part addresses these and other questions in an attempt to map a possible path forward.

A. Learning from the Past: The National Study Commission's 1977 Report

In thinking about the most promising approach, it makes sense to start by learning from the past. Specifically, it is valuable to take a careful look at the conclusions and recommendations set forth in the 1977 report compiled by the National Study Commission—a report that has long been overlooked.²⁷⁹

In particular, the National Study Commission's conclusions are worth careful reconsideration because they were made after studying and taking into account the views of various experts, including federal judges and academics.²⁸⁰ The Commission itself, for instance, included one representative from the judiciary—Judge J. Edward Lumbard, Jr., of the U.S. Court of Appeals for the Second Circuit.²⁸¹ In addition, the Commission received testimony or written statements from a variety of federal judges, including Judge Gerhard A. Gesell of the U.S. District Court for the District of Columbia, Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia,

²⁷⁹ In addition to looking to the National Study Commission's report, it also makes sense to look to the states to see if any of their practices shed light on how best to regulate judicial papers. Unfortunately, however, the states—like the federal government—generally have failed to give serious attention to the issue of who should own judges' papers. What little attention states have given to judicial papers generally has focused on whether internal court records should be open to public access. *See, e.g.*, MO. CT. OP. R. 8.02(N) (excluding internal court records from public access provisions); NEV. SUP. CT. R. 2 (same); N.J. R. Cr. 1:38-3(b) (same); *Copley Press, Inc. v. Superior Court*, 7 Cal. Rptr. 2d 841 (Cal. Ct. App. 1992) (concluding that preliminary drafts, personal notes and rough records created by judges are not subject to public inspection because “[m]uch more harm would be done to the judicial process by requiring this . . . material to be available to the public, than would ever be overborne by any benefit the public might derive thereby”); *State ex rel. Steffen v. Kraft*, 619 N.E.2d 688, 689 (Ohio 1993) (“A trial judge’s personal handwritten notes made during the course of a trial are not public records.”). However, at least two states have expressly called for the retention of judicial working papers. First, in Maine, a judicial order provides that the information contained in judges’ and law clerks’ notes, including draft documents and communications between judges and clerks, is to be retained in court files but marked as “confidential.” ME. ADMIN. ORDER JB-05-20 (2009). Requests for access to the confidential materials must be made by “motion with notice to all parties of record” as provided by various state rules. *Id.* Second, in Florida, rules governing the judicial branch’s records provide that “memoranda, drafts or other documents involved in a court’s judicial decision-making process” should be retained “until obsolete, superseded or administrative value is lost.” FLA. R. JUD. ADMIN., RETENTION SCHEDULE (June 14, 2013), available at [https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F854D695BA7136B085257316005E7DE7/\\$FILE/Judicial.pdf](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F854D695BA7136B085257316005E7DE7/$FILE/Judicial.pdf).

²⁸⁰ *See* RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at xvi–xviii (describing the careful study that the Commission undertook).

²⁸¹ *See* COMMISSION REPORT, *supra* note 29, at iv.

Judge Herbert P. Sorg of the U.S. District Court for the Western District of Pennsylvania, Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia, and Judge James L. Oakes of the U.S. Court of Appeals for the Second Circuit.²⁸² The Commission also sent a questionnaire to federal judges and polled chief judges concerning current procedures for handling judicial papers.²⁸³ Notably, of the 371 judges who responded to the Commission's questionnaire, 222 indicated that they would be "well disposed toward guidelines to aid them in the organization, control, and disposition of their papers."²⁸⁴

Records and transcripts from the Commission's proceedings indicate that of the issues voiced during the proceedings, many reflected a concern with protecting the judiciary's constitutional role and independence as well as the finality of judicial judgments.²⁸⁵ One commentator considered whether it would be problematic to have Congress pass legislation governing the judiciary's papers, since Congress and the judiciary are "separated institutions."²⁸⁶ Some judges and scholars have expressed concerns that the disclosure of judicial papers would lead to a "chilling effect" and would hamper candid judicial deliberations.²⁸⁷ Other qualms raised during the proceedings touched on the significant costs of preserving judicial records²⁸⁸ and lingering doubts

²⁸² See RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at xxiii (noting Commission members); see also COMMISSION REPORT, *supra* note 29, at 55–56 (same).

²⁸³ See COMMISSION REPORT, *supra* note 29, at 25 (noting a "judicial questionnaire sent by the Commission to the Judges of the district courts and the courts of appeals"); see also *id.* at 24 (noting that Judge Lumbard polled the chief judges of the courts of appeals for the Commission).

²⁸⁴ *Id.* at 40.

²⁸⁵ See, e.g., COMMISSION REPORT, *supra* note 29, at 41 (noting a "need to protect the constitutional role of the courts as imposers of final judgment"); *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 211, 218 (statement of J. Edward Lumbard, Jr., J., U.S. Court of Appeals for the Second Circuit) (discussing judicial independence and finality of judgments).

²⁸⁶ Murphy, *supra* note 242, at 18.

²⁸⁷ See, e.g., COMMISSION REPORT, *supra* note 29, at 41 (referencing a "chilling effect"); Murphy, *supra* note 242, at 7–8 ("[T]here is room for legitimate concern that the problem of revelation, even at some future date, of his tentative thoughts would inhibit a Justice from candid expression of his views either at conference, by memoranda to the Court, or by notations on slip opinions.").

²⁸⁸ See *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 211, 221 (statement of Gerhard A. Gesell, J., U.S. District Court for the District of Columbia) (noting that the Government Accountability Office "has estimated there is \$15 billion a year spent by the Federal Government in the management of records").

as to whether judicial files would contain anything “of permanent value.”²⁸⁹

After considering all of the testimony and comments that it received, the Commission concluded that “[t]he existing system of private custodianship of Judges’ office files has not functioned well in terms of preserving an adequate historical record of the judicial decision-making process, of the individuals who have served on the courts, or of the relationship of the courthouse to the larger society.”²⁹⁰ The Commission’s majority report ultimately took the position that Congress should declare judicial papers to be public property, notwithstanding the need to protect the judiciary’s independence and its ability to engage in full and candid deliberations.²⁹¹ The Commission suggested that Congress should do this by relying both upon its powers enumerated in Article I of the Constitution and on Article IV, which provides that Congress shall have the power to make rules respecting the property of the United States.²⁹² According to the Commission’s recommendation, covered judicial papers should include “documentary materials, exclusive of court records, generated or received by Federal Judges in connection with their official duties and retained in their files after final judgment has been entered in a case.”²⁹³ The Commission recommended that Congress declare that these papers be made available to citizens no more than fifteen years after the Justice or judge leaves office; the Commission felt that this fifteen-year period of access control would alleviate concerns about “chilling effects” and about unduly trouncing on judicial independence because judges themselves would have control over access to their papers for a fifteen-year period.²⁹⁴ In addition, the Commission recommended that Congress enable federal judges to choose their

²⁸⁹ *Id.* at 232 (statement of Carl McGowan, J., U.S. Court of Appeals for the District of Columbia). *But see* Murphy, *supra* note 242, at 4 (noting that if “the information and the understanding” gleaned from “judicial papers were to be excised from the public record and private memories, knowledge of the Supreme Court in particular and the judicial process in general would regress to an extent measurable only in a scale that had calibrations of the magnitude of light years”).

²⁹⁰ COMMISSION REPORT, *supra* note 29, at 39.

²⁹¹ *Id.* at 39–41. The alternate report agreed that judicial papers should be treated as public property and subject to disclosure; however, instead of proposing a new statute, it proposed extending the Freedom of Information Act to the judiciary. *See id.* at 65, 69.

²⁹² *See* U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States . . .”).

²⁹³ COMMISSION REPORT, *supra* note 29, at 39.

²⁹⁴ *See id.* at 7 (“[T]he Commission recommends that Congress establish a mechanism similar to that contained in the Freedom of Information Act to provide the citizen with the legal right to access to all Public Papers at the end of the fifteen-year closure . . .”); *see also id.* at 41 (“If Judges can feel confident that materials they consider sensitive will be

own preferred depository (whether public or private),²⁹⁵ and that Congress consider a one-time federal grant to non-federal depositories to encourage adequate treatment of judicial materials.²⁹⁶

Finally, as to the specifics for how to implement a public ownership model for judicial papers, the Commission recommended that the Judicial Conference of the United States be empowered to promulgate guidelines to determine which court-related papers should be retained. Recognizing that “there will be neither sufficient resources nor interest in preserving all of the court-related papers of all Federal judges,” the Commission suggested that the Judicial Conference of the United States work in consultation with the Archivist of the United States to develop disposition standards governing what documents should be retained and what documents lack “important elements” and can be culled from the collections.²⁹⁷

B. Toward the Future: Designing a Set of Governing Rules

Certainly the Commission’s final report provides a very useful roadmap for how a shift to a public ownership model for judicial papers might occur—a roadmap that should be carefully studied and consulted in thinking about how to move toward public ownership. However, given that it was published more than thirty-five years ago, it is appropriate to think anew about the best way to move toward a public ownership model in light of today’s political climate and in light of developments that occurred after the report issued, including the passage of the PRA, controversies that have surrounded implementation of the PRA, and recent Justices’ dispositions of their papers. This Subpart aims to do that.

1. Who Should Make the Rules: Congress or the Courts?

The first question that arises when thinking about how to move to a public ownership model is this: Who should be the one to regulate? Congress? Or the courts?

On the threshold issue of declaring public ownership, it seems that Congress would be best equipped to act. This is because overriding the longstanding tradition of private ownership that surrounds judicial papers would constitute a legislative act. Indeed, it might well

protected from premature disclosure, they are far more likely to produce a full and candid record of their judicial activities.”).

²⁹⁵ See *id.* at 40 (reporting recommendation).

²⁹⁶ *Id.* at 41.

²⁹⁷ See *id.* at 40 (reporting recommendation).

raise Takings Clause concerns if applied retroactively.²⁹⁸ For example, the D.C. Circuit held that the Presidential Recordings and Materials Preservation Act, which deemed President Nixon's papers to be public property, constituted a *per se* taking.²⁹⁹

It is possible that one could argue that Congress—by previously delegating to the federal courts the power to “prescribe rules for the conduct of their business”³⁰⁰—has empowered the judiciary to make this kind of legislative call. However, it is difficult to see how this statutory provision, which was intended simply to enable courts to promulgate local rules of practice and procedure,³⁰¹ could be read to enable the judiciary to effect a taking of what has historically been judges' private property.

Similarly, Congress's decision in the Rules Enabling Act to grant to the Supreme Court the power “to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals” applies by its own terms only to rules of *practice*, *procedure*, and *evidence*.³⁰² Indeed, the Rules Enabling Act states that “[s]uch rules shall not abridge, enlarge or modify any substantive right.”³⁰³ Hence, it seems that there has been no congressional delegation to the judiciary that would empower the judiciary to take what would be a legislative act—namely, declaring judicial papers to be public rather than private property.³⁰⁴ This leaves

²⁹⁸ U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”). It might be possible to overcome takings concerns by arguing that judicial papers have *always* been public property since they were prepared on public time using public property and with the aide of governmental employees. However, in light of judges' reliance on the longstanding private ownership model, it would seem wise as a prudential matter to avoid applying any new ownership rules retroactively—even *if* the Constitution itself does not mandate the avoidance of retroactivity.

²⁹⁹ See *Nixon v. United States*, 978 F.2d 1269, 1284 (D.C. Cir. 1992) (concluding that the Presidential Recordings and Materials Preservation Act constituted a *per se* taking of former President Nixon's property).

³⁰⁰ 28 U.S.C. § 2071(a) (2006).

³⁰¹ See *United States v. Hvass*, 147 F. Supp. 594, 596 (N.D. Iowa 1956) (noting that rulemaking grants to the federal courts “were intended only to cover matters of practice and procedure”), *rev'd on other grounds*, 355 U.S. 570 (1958). See generally 35A C.J.S. FEDERAL CIVIL PROCEDURE § 23 (2008) (“The authorization to make and amend rules governing the practice in the district court is intended only to cover matters of practice and procedure.”).

³⁰² 28 U.S.C. § 2072(a) (2006).

³⁰³ *Id.* § 2072(b).

³⁰⁴ See *Judicial Papers Hearing*, *supra* note 22, at 34–35 (pointing out that if Congress did not act and instead the Supreme Court sought to regulate judicial papers, then the Court's own regulations might lack the force and effect of law and hence would not necessarily bind depositories receiving judicial papers under contrary instructions from a Justice).

Congress as the most appropriate actor to answer the question of ownership.³⁰⁵

Ownership, however, is just the tip of the iceberg. Many other questions, including the scope of coverage, the timing of release, and ultimate disposition, would also need judicial input. With respect to these details, Congress should make clear that judicial papers must be made “reasonably” accessible to the public,³⁰⁶ but it should otherwise empower the Judicial Conference of the United States to fill in the details of the regulatory scheme with uniform regulations.³⁰⁷ This would leave the judiciary free to set uniform rules governing the specifics, such as rules governing what papers should be kept, where they should be deposited, and when they should be released.

There are a variety of reasons why giving the judiciary a significant role in implementation of the move to a public ownership model—rather than having Congress legislate with great precision—makes sense. First, if Congress tried to legislate with great specificity, there would likely be serious problems with achieving judicial compliance, as well as serious questions about enforceability. If judges were unhappy with the terms set by Congress, then—as one commentator pointed out to the Commission in the 1970s—there would “be no hope of requiring a stubborn Justice to comply” without an “FBI agent or U.S. commissioner sitting in each Justice’s office (and perhaps others in the offices of his secretary and clerks).”³⁰⁸

Our country’s experience with implementation of the PRA, which has been a bit rocky, corroborates the significance of this concern. When President Reagan’s papers—the first presidential papers

³⁰⁵ In deciding the question of ownership, Congress would likely want to take care to apply the rule of public ownership only to future judicial papers. This would help to avoid any Takings Clause claims that might apply if Congress tried to take previously created judges’ papers and turn them into public property. *Supra* notes 298–99 and accompanying text; *infra* note 309 and accompanying text. In addition, there are other reasons why it might make sense for Congress to apply the move toward public ownership of judicial papers only in a prospective manner—either only to newly appointed judges or only to papers produced after the effective date of the statute. These additional reasons might include, for example, the notion that judges may have relied on the old private ownership model and that retroactive application of public ownership would upset these reliance interests.

³⁰⁶ Mandating only “reasonable” access would enable the judiciary to determine the specifics of access, such as the precise timing of access and the location of access, and thus would help to address concerns about protecting the judiciary’s independence and separation-of-powers issues.

³⁰⁷ Uniformity does not necessarily imply or call for uniformity across different levels and types of courts. *See infra* notes 333–36 and accompanying text. Rather, it calls for uniform rules within each level and type of court.

³⁰⁸ Murphy, *supra* note 242, at 20.

covered under the Act³⁰⁹—were set to be released, President George W. Bush delayed the release and issued Executive Order 13,233,³¹⁰ which limited “the ability of the public to access presidential documents by giving the sitting president and former presidents an effective veto over the release of their records.”³¹¹ This led to debate and controversy³¹² and eventually to President Barack Obama’s revocation of Bush’s order on January 21, 2009.³¹³ In place of the Bush order, President Obama “substituted a less protective protocol modeled on one established by President Reagan in 1989.”³¹⁴ Under the Obama order, “records cannot be protected by former presidents in their sole discretion; . . . claims of executive privilege asserted by former presidents must be submitted to the archivist for a determination, made in consultation with the attorney general, the White House counsel, and ‘such other executive agencies as the Archivist deems appropriate.’”³¹⁵

As Bush’s attempts to cut back on and weaken the PRA indicate, a willingness to cooperate from those being regulated would be crucial to the success of any law seeking to regulate judicial papers. Hence, rather than having Congress legislate with precision—like it did in the PRA in setting a twelve-year access restriction for certain restricted presidential documents—the safest route would be for Congress to involve the judiciary in crafting and filling in the details of the regulatory scheme.

Second, unilateral Congressional action to regulate disposition of judicial records might raise separation-of-powers issues.³¹⁶ For

³⁰⁹ Aware of potential Takings Clause concerns, Congress took care to apply the Presidential Records Act only to future presidents, beginning with Ronald Reagan. See *Nixon v. United States*, 978 F.2d 1269, 1277 n.19 (D.C. Cir. 1992) (“In 1978, Congress prospectively abolished presidential ownership of White House materials with the Presidential Records Act” (emphasis added)).

³¹⁰ Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2001).

³¹¹ Yuhan, *supra* note 17, at 1570; see also Turley, *supra* note 17, at 653.

³¹² See *Am. Historical Ass’n v. Nat’l Archives & Records Admin.*, 402 F. Supp. 2d 171 (D.D.C. 2005) (“Plaintiffs have asked the Court to find that the president has overstepped the limitations on his power by issuing an executive order that alters the terms of [the Presidential Records Act].”). See generally Yuhan, *supra* note 17 (noting the conflict that Bush’s order caused).

³¹³ Exec. Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 21, 2009).

³¹⁴ Eric Lane, Frederick A.O. Schwarz, Jr. & Emily Berman, *Too Big a Canon in the President’s Arsenal: Another Look at United States v. Nixon*, 17 GEO. MASON L. REV. 737, 783 (2010).

³¹⁵ *Id.* (quoting Exec. Order No. 13,489, 74 Fed. Reg. 4669 § 4 (Jan. 21, 2009)).

³¹⁶ See *Judicial Papers Hearing*, *supra* note 22, at 2 (statement of Sen. Joseph I. Lieberman, Member, Subcomm. on Regulation and Gov’t Info. of the S. Comm. on Governmental Affairs) (noting Chief Justice Rehnquist’s concerns about separation-of-powers problems that might arise if Congress tried to regulate judicial papers); *id.* at 4 (statement of Sen. Thad Cochran, Member, Subcomm. on Regulation and Gov’t Info. of

example, were Congress to dictate to federal judges that they must create and keep certain records, it might appear as if Congress were intruding on the judiciary's independence by telling the courts how to do their jobs.³¹⁷ Any express mandate for release of judicial papers after a term of years would likely prompt similar objections.³¹⁸ Chief Justice Rehnquist noted as much when he wrote to Senator Joseph Lieberman in 1993 in the wake of the release of Justice Thurgood Marshall's papers. Specifically, Chief Justice Rehnquist stated: "[W]e have no hesitancy in expressing the opinion that legislation [respecting the Justices' papers] . . . could raise difficult concerns respecting the appropriate separation that must be maintained between the legislative branch and this Court."³¹⁹

Notably, in the context of presidential papers, these sorts of separation-of-powers concerns have not made much headway. For example, when former President Richard Nixon challenged the Presidential Recordings and Materials Preservation Act,³²⁰ which applied only to President Nixon's papers, the Supreme Court rejected his separation-of-powers challenge.³²¹ In addition, in a 1996 case involving the PRA, Judge Tatel of the D.C. Circuit noted in a dissenting opinion that the government had not asserted that "the Presidential Records Act represents an unconstitutional intrusion upon the President's exercise of his constitutional duties"—presumably "in recognition of Congress's authority to preserve documents of the United States Government."³²²

the S. Comm. on Governmental Affairs) (stressing the need for caution given the delicate separation-of-powers issues that regulation of judicial papers would implicate).

³¹⁷ See *id.* at 30 (statement of Dennis Hutchinson, Editor, Supreme Court Review) (indicating concern that constitutional separation-of-powers issues would arise if Congress told the Court that it must keep certain papers); *cf.* *United States v. Lopez*, 514 U.S. 549, 614 (1995) (Souter, J., dissenting) (suggesting that "an Act of Congress mandating long opinions from this Court" would be "patently unconstitutional"); *Houston v. Williams*, 13 Cal. 24 (1859) (rejecting power of California legislature to require state appellate courts to give reasons for their decisions in writing).

³¹⁸ *But see Judicial Papers Hearing*, *supra* note 22, at 31 (statement of E. Barrett Prettyman, Jr., Attorney, Hogan & Hartson) (suggesting that it would be constitutional for Congress to regulate access to judicial papers so long as a sufficient time lag is allowed to account for the judiciary's need for confidentiality).

³¹⁹ Letter from Chief Justice William Rehnquist to Sen. Joseph I. Lieberman (June 7, 1993), *reprinted in Judicial Papers Hearing*, *supra* note 22, at 71.

³²⁰ Pub. L. No. 93-526, 88 Stat. 1695 (1974).

³²¹ See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 441 (1977) (upholding the Presidential Recordings and Materials Preservation Act against a separation-of-powers challenge).

³²² *Armstrong v. Exec. Office of the President*, 90 F.3d 553, 579 (D.C. Cir. 1996) (Tatel, J., dissenting).

Although the Commission's 1977 report, which predates these various cases involving presidential records, did not give much attention to separation-of-powers questions, such concerns should not be dismissed too readily today—especially in light of recent precedents indicating that the Court takes threats to the judiciary's independence seriously.³²³ Even assuming *arguendo* that Congress has the power to regulate the specific details of judicial papers as a constitutional matter, *the judiciary* ultimately would have the final say on the constitutional questions. Thus, in light of very real separation-of-powers concerns, it would be wise for Congress to legislate in the least intrusive way possible.

Congress, for example, could declare something along these lines:

The United States shall reserve and retain complete ownership, possession, and control of judicial records, including internal draft opinions, internal correspondence, vote sheets and administrative records and memoranda, created and retained in chambers files by federal judges and Supreme Court justices in the course of conducting official judicial business and deciding judicial matters and cases. Such judicial records shall be administered and made reasonably accessible to the public in accordance with regulations promulgated by the Judicial Conference of the United States. Such regulations shall seek to serve the public interest and to provide uniform regulations to govern judicial records.

Legislation along these lines would not force judges to create any particular records. Nor would it necessarily force judges to retain any papers; a judge could conceivably choose to discard certain records in his or her chambers files so long as that practice was consistent with the regulations promulgated by the Judicial Conference. Rather, the main contribution of legislation along these lines would be to declare public ownership of judicial papers and to prompt the judiciary to make uniform rules deciding what papers should be retained, when such papers should be made accessible to the public, and what terms of access and disposition are “reasonable.”

³²³ See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011) (holding that bankruptcy court lacked constitutional authority to enter judgment on counterclaim); Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 693 (2006) (arguing that the Rehnquist Court's separation-of-powers jurisprudence increased the judiciary's power by allowing a drift of power from Congress to agencies and then to courts “whose authority has increased because of the ways it can review the actions of administrative agencies”). *But see* *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (taking a very flexible approach to determining the “extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch”).

At first blush, it might not seem like a very big step forward to merely have Congress answer the ownership question and then direct the rest of the issues to the judiciary. However, some thirty-five years have passed since the Commission's 1977 report recommended that judges' papers be regulated,³²⁴ and some twenty years have passed since Congress held a hearing about the issue in the wake of the release of Justice Marshall's papers.³²⁵ During all these years, the judiciary has done nothing to establish a set of rules to govern judicial papers—allowing judicial papers to be handled in an ad hoc manner as a species of private property. Thus, the main benefit of legislation along the lines proposed here is that it would force the judiciary's hand, prompting the judiciary to bring some much-needed uniformity to the treatment of judicial papers.

2. *What Should the Rules Provide?*

Assuming that Congress delegates to the judiciary the power to fill in the details of a public ownership model for judicial papers, the judiciary would have many issues to work through. These issues would fall roughly into three main categories: (1) definitional terms, such as what papers should be retained; (2) access terms, such as rules governing the timing of the release of papers; and (3) terms speaking to the disposition of papers, such as where papers must be deposited.

a. *Definitional Terms*

As a threshold matter, the judiciary would need to determine precisely how to define which judicial working papers should be retained and opened to the public and which should not. In making this determination, the judiciary would need to take into account any privacy laws that might apply to personal information about third parties contained in the papers.³²⁶ The judiciary would also need to consider the sheer volume of records produced by the courts,³²⁷ particularly in

³²⁴ See *supra* note 29 and accompanying text (discussing the 1977 Commission Report).

³²⁵ See *supra* note 22 and accompanying text (discussing congressional hearings).

³²⁶ See FJC GUIDE, *supra* note 16, at 28 ("Federal or state privacy laws may apply to some personal information about third parties."). But see *supra* note 12 (noting that the Privacy Act does not apply to the judiciary).

³²⁷ In the context of the PRA, the sheer volume of presidential papers has proved challenging for the National Archives, leading to a processing backlog in libraries governed by the PRA. Congress responded to this issue in 2009 by appropriating funds for twenty-five new archival positions for the four presidential libraries with records controlled by the Presidential Records Act. See *Joint Hearing Before the Comm. on Transp. & Infrastructure & the Comm. on Oversight & Gov't Reform*, 112th Cong. 28, 29 (2011) (statement of Hon. David S. Ferriero, Archivist of the U.S., National Archives & Records Administration) (discussing funding).

today's electronic age.³²⁸ Furthermore, the impracticality—both in terms of resources and interest—of preserving every scrap of paper or every electronic record that emanates from a judge's chambers also would need to be kept in mind when crafting rules defining covered papers.³²⁹ After all, there are more than 800 Article III federal judgeships in the country.³³⁰ If every paper or electronic file created by federal judges were preserved and disclosed,³³¹ not only would significant financial resources need to be expended to archive the materials, but the sheer volume of the papers also would likely obscure the information,³³² thereby undercutting transparency and accountability objectives.

In thinking about how best to approach the volume of the papers created by hundreds of federal judges, the judiciary should consider setting different definitional terms for different types of federal courts, including one uniform set for the federal district courts, one for the courts of appeals, and one for the U.S. Supreme Court. Papers created by specialized federal courts, such as bankruptcy courts and

³²⁸ See, e.g., *Presentation of the Historical Society of the D.C. Circuit*, *supra* note 67, at 29–31 (noting that Judge Richard Arnold's secretary had a practice of printing out e-mails between judges and retaining them); *id.* at 37–38 (“If somebody says something to you in an e-mail is it appropriate to save it? . . . [I]f you say something to someone in an e-mail casually is it appropriate for, or do you want the other person to save it . . . [and] do they have some obligation to tell the other person . . . ?”); see also FJC GUIDE, *supra* note 16, at 21 (“The chambers ‘papers’ of federal judges are becoming increasingly full of ‘documents’ that are ‘born digital’”); *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 211, 221 (statement of Gerhard A. Gesell, J., U.S. District Court for the District of Columbia) (“We are in, as you all know, a Xerox Age. It is physically impossible for me in my chambers to keep all the papers that come in. I am throwing papers out all the time.”); *id.* at 222 (“I think we have to put the brakes upon preservation of all of this material just because of the sheer enormity of it.”).

³²⁹ See COMMISSION REPORT, *supra* note 29, at 40 (“The Commission recognizes that there will be neither sufficient resources nor interest in preserving all of the court-related papers of all Federal Judges.”).

³³⁰ See *Federal Judgeships*, *supra* note 77.

³³¹ In the context of presidential papers, many questions have arisen about how best to deal with and capture electronic records. According to a Congressional Research Service report, “[t]he PRA appears to require collection and maintenance of—and accessibility to—the records of former Presidents, including those created electronically.” WENDY GINSBERG, CONG. RESEARCH SERV., THE PRESIDENTIAL RECORDS ACT: BACKGROUND AND RECENT ISSUES FOR CONGRESS 5 (2012); see also *id.* at 9 (summing up challenges for collection and retention of electronic presidential records). However, the National Archives and Records Administration has struggled to ensure that “ubiquitous and perhaps ephemeral electronic records,” such as presidential use of social networking sites like Twitter or Facebook, “can be collected, maintained, and accessed, regardless of format.” *Id.* at 5.

³³² See Woodrow Hartzog & Frederic D. Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1, 40 (2013) (noting that obscure information has a minimal risk of being discovered or understood by unintended recipients).

tax courts, would also likely require a distinct approach.³³³ The type and volume of papers created at these different courts—and their historical and curatorial values—varies sufficiently that guidelines differentiating between federal courts would make sense,³³⁴ especially from a fiscal perspective.³³⁵ However, in differentiating between different federal courts, the judiciary would need to take care not to be overly dismissive of the historical value of lower federal courts' papers. Given the high visibility of the U.S. Supreme Court, most people easily recognize the historical value of the Supreme Court Justices' papers. There, however, seems to be a general misperception that lower federal court judges' papers are of little historical value.³³⁶

b. Access

The judiciary would also need to carefully consider the question of when and how judicial papers should be made accessible to the public. Here the key would be to appropriately balance society's interest in prompt disclosure against potential harm to litigants and to the judiciary that could occur if judicial papers were released too quickly.³³⁷

In its 1977 report, the Commission suggested releasing judges' papers no more than fifteen years after the federal judge left office. According to the Commission, this approach would be advantageous because it would allow flexibility: “[T]he Judge is the person most likely to be able to make informed decisions as to which portions of the collection might be opened earlier and which are sensitive enough to require closure for the entire fifteen years.”³³⁸

³³³ With respect to bankruptcy courts, some bankruptcy judges' papers have been deposited at the Biddle Law Library at the University of Pennsylvania Law School. It is home to the National Bankruptcy Archives. See *Biddle Law Library: The National Bankruptcy Archives*, U. PA. L. SCH., <https://www.law.upenn.edu/library/archives/bankruptcy/index.php> (last visited Sept. 6, 2013).

³³⁴ See generally FJC GUIDE, *supra* note 16, at 12–14 (noting different types of papers created by different kinds of federal courts).

³³⁵ See *infra* Part IV.D (discussing the cost of preserving judges' papers).

³³⁶ See, e.g., *Presentation of the Historical Society of the D.C. Circuit*, *supra* note 67, at 22–23 (questioning whether many lower court judges' papers are worth keeping). But see *supra* notes 208–13 and accompanying text (discussing how even the papers of lower federal court judges have proven to be immensely helpful to scholars and researchers).

³³⁷ See *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 211, 219 (statement of Walter F. Murphy, Professor of Political Science, Princeton University) (noting the need for a reasonable “time lag to protect litigants before the court, or who are about to come before the court, or who have time to petition for a rehearing, or who might be involved in several pieces of litigation at any one time”).

³³⁸ COMMISSION REPORT, *supra* note 29, at 41.

This kind of flexible approach, however, seems ill advised. If only an outer point of disclosure were set (for example, “judges must disclose their papers within fifteen years of leaving the bench but may release their papers sooner in their discretion”), then nothing would prevent a judge from disclosing his or her papers as soon as the judge left office. This might harm litigants’ interests, call into question the finality of judgments, and damage the judiciary’s collegiality, integrity, and confidentiality. Consider, for example, the controversy that erupted after the prompt release of Justice Marshall’s papers. The controversy highlighted how the appropriate timing of the release of his papers implicated interests that went far beyond Justice Marshall, extending to the sitting members of the Supreme Court and to the judiciary as an institution.

Thus, in considering what kind of timing rule would be most advisable, the judiciary should keep in mind that releasing judicial papers too early can be just as problematic as releasing them too late: Early releases run the risk of threatening litigants’ and the judiciary’s interests, whereas late releases threaten society’s interest in disclosure and governmental accountability as well as historians’ access to valuable information. To balance these concerns, the most sensible approach would be for the judiciary to settle on a specific number of years and to specify that judges’ papers shall be open to the public on that date—no sooner and no later.

Courts would also need to resolve whether a specified time lag would be sufficient to alleviate concerns about judicial privilege, particularly with respect to the disclosure of confidential communications between judges and their law clerks. In *United States v. Nixon*, the Supreme Court hinted in dicta that judicial deliberations might well be protected by some kind of judicial privilege akin to executive privilege by stating: “The expectation of a President to the confidentiality of his conversations and correspondence, *like the claim of confidentiality of judicial deliberations*, . . . has all the values to which we accord deference for the privacy of all citizens.”³³⁹

In the case of the PRA, Congress—presumably trying to avoid trampling on executive privilege—expressly enabled the President to restrict access to “confidential communications requesting or submitting advice, between the President and his advisers, or between such advisers” for a period of twelve years.³⁴⁰ In light of this language, an argument could be made that the PRA balanced the various competing interests at play and decided that the presumption in favor of

³³⁹ 418 U.S. 683, 708 (1974) (emphasis added).

³⁴⁰ 44 U.S.C. § 2204(a)(5) (2006).

executive privilege should last for twelve years but no more.³⁴¹ However, at least one federal district court has refused to read the statute as abrogating the president's constitutionally-based privilege after the twelve-year clock has run.³⁴² Instead, pointing to language in the PRA, which states that “[n]othing in this Act shall be construed to *confirm, limit, or expand* any constitutionally-based privilege,”³⁴³ the district court held that executive privilege survives beyond the twelve-year period specified in the statute.³⁴⁴

Hence, in crafting regulations to implement the move to public ownership for judicial papers, the judiciary would need to carefully consider whether any assertions of judicial privilege should be allowed to persist beyond a specified window of time. For example, if the Judicial Conference settles on fifteen years as the appropriate point at which judicial records shall be opened, would judges nonetheless retain the ability to withhold certain records even beyond that fifteen-year window by relying upon notions of a constitutionally-based judicial privilege? One concern with allowing this is that the exception might well swallow the rule; judges might simply assert judicial privilege across the board and thereby indefinitely close their records off from public scrutiny and historical research.

More importantly, it seems unnecessary to allow claims of judicial privilege to persist beyond a specified period of time.³⁴⁵ Restricting access to judicial papers for a determined period of time should be sufficient to protect judges' interests in the confidentiality of their communications and correspondence with law clerks and other judges. The Supreme Court itself suggested as much in the presidential records context when it stated in *Nixon v. Administrator of General Services* that “[t]he expectation of the confidentiality of executive communications . . . has always been limited and *subject to erosion*

³⁴¹ See *Am. Historical Ass'n v. Nat'l Archives & Records Admin.*, 402 F. Supp. 2d 171, 183–84 (D.D.C. 2005) (considering the claim that executive privilege did not extend beyond the twelve-year period); see also *H.R. 1255, the Presidential Records Act of 1978: A Review of Executive Branch Implementation & Compliance, Hearing Before the Subcomm. on Info. Pol'y, Census & Nat'l Archives of the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 16 (2007) (statement of Allen Weinstein, Archivist of the U.S.) (“[A]fter twelve years, there is no *statutory* basis to withhold records that might be subject to a constitutionally based privilege.”).

³⁴² *Am. Historical Ass'n*, 402 F. Supp. 2d at 183–84.

³⁴³ 44 U.S.C. § 2204(c)(2) (2006) (emphasis added).

³⁴⁴ See *Am. Historical Ass'n*, 402 F. Supp. 2d at 183–84 (“The Court will not read a twelve year restriction on the president's constitutionally-based privilege where Congress has expressly refused to do so.”).

³⁴⁵ *But see Swidler & Berlin v. United States*, 524 U.S. 399, 401, 410–11 (1998) (holding that the attorney-client privilege extends even beyond the death of the client).

over time after an administration leaves office.”³⁴⁶ Similarly, in setting rules to govern access to judicial papers, it would make sense for the judiciary to determine that claims of judicial privilege erode over time and that judicial privilege only operates to protect confidential judicial communications for a specified period of time. Figuring out exactly what that specified period of time should be is the million-dollar question—and one that can only be properly answered after surveying federal judges and taking their views into account.

One promising approach that the judiciary should consider—and solicit judges’ reactions to—would be for judges’ files to be made available ten years after a judge leaves office but no sooner than fifteen years after any given case was decided.³⁴⁷ Such an approach would balance the public’s interest in prompt disclosure against litigants’ and the judiciary’s interest in protecting the finality of judgments by enabling older case files to become public within ten years of a judge leaving the bench. At the same time, this would also ensure that new case files would not become public until at least fifteen years after the case was decided.

c. Disposition

Finally, the Judiciary would also need to establish guidelines to govern disposition. Specifically, the judiciary would need to decide whether to give Justices and judges discretion in choosing an appropriate depository.

In 1977, the Commission recommended that “Justices and Judges should be allowed to choose the depository for their Public Papers.”³⁴⁸ Recent donations of Supreme Court Justices’ papers suggest that this recommendation continues to deserve serious consideration today. Specifically, during the past two decades, Justices have selected a variety of different repositories for their papers. For example, Chief Justice Rehnquist donated his papers to the Hoover Institution Archives at his alma mater, Stanford University,³⁴⁹ and Justice David Souter donated his papers to a historical society in his home state of New Hampshire.³⁵⁰ In contrast, Justice Thurgood Marshall and Justice Harry Blackmun donated their papers to the

³⁴⁶ 433 U.S. 425, 451 (1977) (emphasis added).

³⁴⁷ See *Judicial Panel Discussion*, in 35 NAT’L STUDY COMM’N ON RECORDS & DOCUMENTS OF FED. OFFICIALS 119 (1977) (suggesting that files be staggered so that a judge’s old case files are opened earlier than newer case files).

³⁴⁸ COMMISSION REPORT, *supra* note 29, at 40.

³⁴⁹ See *supra* note 109 and accompanying text.

³⁵⁰ See *supra* note 105 and accompanying text.

Library of Congress.³⁵¹ These recent examples provide continued support for the Commission's conclusion in 1977 that "judges will respond more favorably to the exercise of public ownership in judicial working papers if they may choose a depository which reflects their regional identification, university affiliation, or other interest."³⁵²

However, there is reason to be cautious about giving judges complete control over where their papers will reside. For one thing, some repositories, such as the Library of Congress in Washington, D.C., are more easily accessed than others, such as the New Hampshire Historical Society located in Concord, New Hampshire. In addition, some public repositories such as the Library of Congress may have greater resources and technological capabilities to enable widespread access to judicial papers in the future via online platforms. Furthermore, some private depositories might take steps, such as imposing significant access fees, that would impose a barrier to reasonable public access. Hence, giving judges complete discretion to determine where to donate their papers does not seem ideal. A better solution might be to dictate that judges must give their papers to a robust public institution such as the Library of Congress.

IV

POTENTIAL OBJECTIONS

This Article's central argument—that Congress should pass legislation embracing a public ownership model for judicial papers while empowering the judiciary to fill in the details of the regulatory scheme—is likely to meet some resistance. In particular, there are at least four primary objections to the proposal: (1) the risk of creating perverse "chilling" effects; (2) financial costs; (3) judicial independence and separation of powers; and (4) congressional inertia relating to both congressional and judicial papers.

A. Perverse Chilling Effects

Perhaps the most significant objection that could be made against a move toward public ownership is that doing so might have the perverse effect of causing judges to commit less to writing in their attempt to evade public disclosure. This concern about "chilling effects" was raised during hearings held by the Commission in the 1970s. For example, Judge Lumbard, one of the members of the Commission, noted: "Any feeling that [a judge] has to preserve anything that may be committed to paper is simply going to drive the

³⁵¹ See *supra* notes 89, 100 and accompanying text.

³⁵² COMMISSION REPORT, *supra* note 29, at 40.

judges not to commit things to paper, but simply to handle matters by word of mouth or telephone.”³⁵³ Similarly, during one of the Commission’s hearings, Judge McGowan noted: “Some judges are going to respond to it by not writing as many memoranda as they might, not putting down as much on paper, and perhaps walking down the hall to talk to another judge rather than writing a memorandum.”³⁵⁴

While these sorts of concerns are legitimate, they do not seem insurmountable. For one thing, time restrictions, which assure judges that judicial records will not be released for a specified period of time, should help to minimize judges’ concerns about committing matters to writing or communicating their views to other judges, who may then commit the oral conversations to writing.³⁵⁵ If judges know with certainty that judicial papers will not be disclosed for some specified term of years, then they should not be overly concerned about committing matters to writing. In fact, such a regime—whereby judges know that interjudge communications will remain closed for a specified period of time before being disclosed—may actually raise less of a chilling effect than the current system of private ownership, which allows individual judges to release such records immediately upon retirement if they wish.

Furthermore, in thinking about whether mandating the eventual disclosure of judicial papers would unduly chill judicial deliberations, it is reassuring to note that the current system of private ownership, which allows one judge to decide whether to release interchambers and interjudge communications, has not stopped judges from communicating with each other in a frank and candid manner. Since the 1956 publication of the first judicial biography that “rel[ie]d on informal, individual [Justices’] papers,”³⁵⁶ the Justices of the U.S. Supreme Court, for example, continue to deliberate in conference and to share their views on cases with each other, and they continue to circulate and share interchambers memoranda and draft opinions. So too do lower federal court judges, despite prominent publications relying

³⁵³ *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University*, in RECORDS OF FEDERAL OFFICIALS, *supra* note 14, at 211, 218 (statement of J. Edward Lumbard, Jr., J., U.S. Court of Appeals for the Second Circuit).

³⁵⁴ *Id.* at 240 (statement of Carl McGowan, J., U.S. Court of Appeals for the District of Columbia Circuit).

³⁵⁵ *See id.* at 241 (“[A]ny legislation along this line . . . has to have[] some wisely conceived time limitations and things like that in order to minimize the amount of simply refraining from writing that would come about on the part of more cautious and timid judges than on the part of others.”).

³⁵⁶ SAX, *supra* note 18, at 94.

upon the papers of lower federal court judges.³⁵⁷ If our current system, which allows the almost immediate release of interjudge communications, has not unduly chilled judicial deliberations or threatened candid interjudge communications, then it seems unlikely that a public ownership model calling for disclosure of papers only after a specified waiting period would do so.

Even with respect to a judge's completely internal chamber discussions that the judge never shares with other judges (and hence that the judge can currently choose never to disclose), it seems unlikely that judges will be unduly chilled if eventual disclosure is mandated moving forward. Indeed, a variety of factors are likely to push judges to continue to commit matters to writing in their own chambers even if they know that such intrachambers records will eventually be disclosed.³⁵⁸ For example, due to the nature of the drafting process and the necessity of passing drafts back and forth between the judge and his law clerks, judges are likely to continue to write various iterations of draft opinions in their chambers even if they know that those draft opinions will be made public. In addition, some judges may well choose to create their own chambers records precisely because they will become public someday and hence might enable historians to look through that judge's eyes rather than through the eyes of one of his colleagues. One historian, for example, noted during a presentation on judicial records at the Historical Society of the D.C. Circuit that when Chief Justice Warren Burger would tell her that he was going to burn his papers, she would say to the Chief Justice: "[O]h, no, that's really a bad idea because if you burn your papers the history of the Supreme Court will be told from the point of view of William Brennan."³⁵⁹

Finally, our country's experience with the PRA lends further support to the notion that concerns about "chilling effects" stemming from disclosure laws may be overblown. In the wake of the passage of the PRA, concerns have arisen from time to time over whether the PRA has prompted presidents to refrain from creating certain kinds of written or electronic records.³⁶⁰ However, these concerns seem to

³⁵⁷ See, e.g., PRICE, *supra* note 207.

³⁵⁸ See SAX, *supra* note 18, at 97.

³⁵⁹ *Presentation of the Historical Society of the D.C. Circuit, supra* note 67, at 39–40.

³⁶⁰ See, e.g., PETER SEZZI, PERSONAL VERSUS PRIVATE: PRESIDENTIAL RECORDS IN A LEGISLATIVE CONTEXT: A BIBLIOGRAPHIC EXPLORATION 5 (2005) (noting PRA critics' concern that legislated access would lead to a "'Chilling Effect'—fearful of reappraisals by opposing parties or a public unaware of the situation/context in which a document or record was created who would use the information . . . to intimidate, expose or shame the records' creator, i.e., that fewer and fewer records will be created"); Ben Smith, *Obama Staff Will Say Cu L&r 2 IM*, POLITICO (Jan. 17, 2009, 8:09 PM), <http://www.politico.com/>

be contradicted by evidence showing that “since the enactment of the PRA, [the] growth of federal records has not abated.”³⁶¹ Indeed, “[d]espite the cry of critics of the PRA that the law would ensure only that high-ranking executive branch officials would not keep records, memoirs and recollections of presidential associates have grown in number over time”—so much so that a Library of Congress heading now specifically covers memoirs by former high-ranking executive branch officials.³⁶² These memoirs—although potentially one-sided accounts—illustrate that the PRA has not prevented high-level executive officials from preserving and sharing their recollections.

Rather than creating serious “chilling effects,” the PRA instead has been plagued mainly by concerns about presidential compliance with the PRA’s disclosure requirements.³⁶³ Specifically, when it came time for 68,000 pages of records from the Reagan administration containing confidential advice and discussions to be released to the public in 2001 at the end of the PRA’s twelve-year waiting period governing confidential communications, President George W. Bush balked at releasing the Reagan papers.³⁶⁴ Indeed, President Bush went so far as to issue an Executive Order that, among other things, effectively extended the PRA’s twelve-year delay for confidential communications indefinitely.³⁶⁵ This all goes to show that after the implementation of the PRA, presidents have continued to create tens of thousands of pages of written and electronic records capturing confidential communications, advice, and deliberations.³⁶⁶ But presidential compliance and buy-in have proven shaky, highlighting the need to focus on ways of maximizing the likelihood of judicial compliance with any new disclosure requirement.³⁶⁷

news/stories/0109/17567.html (reporting that Obama Administration members were instructed by lawyers that instant messaging programs would not be allowed in the White House because of “fear of embarrassment if IMs were to be disclosed” after the president leaves office).

³⁶¹ SEZZI, *supra* note 360, at 5–6.

³⁶² *Id.*

³⁶³ See *supra* notes 310–15 and accompanying text.

³⁶⁴ See Deb Riechmann, *Reagan’s Presidential Papers Finally Released*, BOWLING GREEN DAILY NEWS, Jan. 4, 2002, at 3-B.

³⁶⁵ See Exec. Order No. 13,233, 3 C.F.R. 815 (2002); see also Turley, *supra* note 17, at 671–72 (“Congress expressly stated that the twelve-year delay was a ‘buffer period’ for confidential communications, balancing the legitimate concerns of the executive branch with the public’s need to receive this information. The executive order would extend this period indefinitely and . . . [thus] violates the very foundation of the PRA.”) (internal citations omitted); *supra* notes 310–15 and accompanying text.

³⁶⁶ See Riechmann, *supra* note 364, at 3-B (referring to the 68,000 pages of confidential records contained in Reagan’s files).

³⁶⁷ It is precisely because of the risk of noncompliance and the need to maximize judicial buy-in that this Article proposes that the judiciary be given a significant role in filling in the

In short, concerns about chilling judicial deliberations are real and must be taken seriously when considering how to craft a rule mandating disclosure of judicial papers. However, judges are likely to continue to create both inter- and intrachambers judicial records even if they know that such records will eventually see the public light—just as presidents have continued to create records of confidential deliberations and discussions in the wake of the PRA. This is especially likely to be true if judges are assured that their records will be protected from premature disclosure by a sufficiently lengthy waiting period.³⁶⁸

B. *Financial Costs*

Yet another major objection that could get in the way of a move to a public ownership model is cost. Preserving, processing, and retaining records in a publicly accessible facility can be a terribly costly endeavor. For example, the cost of operating the Presidential library system in fiscal year 2008 was more than \$63 million, which included funding for operating expenses, salaries and benefits, security, operations and maintenance, and repairs or other infrastructure needs at the Presidential libraries.³⁶⁹

Exactly how much federal investment would be required would likely depend on the specifics of the regulations developed by the Judicial Conference of the United States, such as whether private depositories would be involved in the receipt, cataloging, and processing of judicial collections. One reason to allow the involvement of private depositories is that some private depositories might well be willing to bear all or much of the cost of managing high-profile or noteworthy judges' papers, such as Supreme Court Justices' papers.

Regardless, it is clear that a shift to a public ownership model would require the investment of significant federal resources. Thus, the real question is not whether a public ownership model would require financial investments but rather whether that investment is warranted. In other words, should our federal government invest in the preservation of federal judges' papers? The answer to that

details of any scheme regulating judicial papers. *See supra* notes 315–16 and accompanying text. By allowing the judiciary to decide the details of a new public ownership model (rather than having Congress legislate with great specificity as it did in the PRA), Congress should increase the likelihood of judicial compliance and buy-in.

³⁶⁸ *See* COMMISSION REPORT, *supra* note 29, at 41 (“If Judges can feel confident that materials they consider sensitive will be protected from premature disclosure, they are far more likely to produce a full and candid record of their judicial activities.”).

³⁶⁹ *See* NAT'L ARCHIVES & RECORDS ADMIN., REPORT ON ALTERNATIVE MODELS FOR PRESIDENTIAL LIBRARIES ISSUED IN RESPONSE TO THE REQUIREMENTS OF PL 110-404, at 14 (2009).

question seems to be quite clearly “yes” when historical and cultural interests are taken into account. As previously discussed, judicial papers—both the papers of Supreme Court Justices and lower federal court judges—have significant historical and cultural value. Under our current model of private ownership, the cost of preservation has been put in the hands of judges’ families and heirs, and as a result, judicial papers have often been lost, scattered, or destroyed.³⁷⁰ If we are to protect “an adequate historical record of the judicial decisionmaking process, of the individuals who have served on the courts, or of the relationship of the courthouse to the larger society,”³⁷¹ then investing in the preservation of judges’ papers is an endeavor that we as a nation must be willing to make. It is also one that many judges should embrace given that it will shift the financial burden of preserving our nation’s history—particularly the financial burden of preserving lower federal court judges’ papers—from judges and their families to the government.³⁷²

C. *Judicial Independence and Separation of Powers*

A third possible objection is that Congress—in light of the separation-of-powers concerns already discussed³⁷³—should respect the judiciary’s independence and wait for the judiciary to address judges’ papers on its own initiative. On its face, this argument seems appealing: The judiciary is the branch that would be most directly impacted by any regulation of judges’ papers, so why not let it decide by its own lights how best to deal with preservation and access to judges’ papers? In addition, why risk a potential confrontation between Congress and the judiciary if any confrontation could be avoided by letting the judiciary rather than Congress regulate in the area?

The main problem with this argument is that the judiciary has had plenty of opportunities to take action but has shown no willingness or inclination to do so. Indeed, in the wake of the release of Justice Marshall’s papers, Congress quite clearly invited the judiciary to step

³⁷⁰ See *supra* Part I.B.

³⁷¹ COMMISSION REPORT, *supra* note 29, at 39.

³⁷² Cf. *Transcript: Documents and Records of the Judiciary, a Panel Discussion Moderated by Geoffrey Hazard, Professor of Law, Yale University, in RECORDS OF FEDERAL OFFICIALS*, *supra* note 14, at 211, 232 (statement of Carl McGowan, J., U.S. Court of Appeals for the District of Columbia Circuit) (“I wouldn’t certainly object . . . to legislation which required me to turn [my papers] over to some agency for whatever they want to do with them. . . . [I]t might be a great convenience, rather than to put them under my arm and go home with them, to have somebody come and take them away.”).

³⁷³ See *supra* notes 316–23 and accompanying text.

in and address the issue of judicial papers,³⁷⁴ but the judiciary did not respond.³⁷⁵ If the judiciary is left to address the problem on its own without any prompting from Congress, it seems likely that no uniform rules will develop—leaving the fate of judicial papers in the hands of individual judges.

Moreover, even if the judiciary did try to set uniform rules governing judicial papers without any prodding from Congress, the rules would lack the force and effect of law given that the judiciary lacks the legislative power to turn judges' papers from public into private property. At most, the judiciary could set some nonbinding guidelines or norms for judges to look to regarding their papers. In addition, without congressional funding to support the preservation of judges' papers and without any basis for giving the guidelines legal effect, there is no guarantee that the guidelines would be widely followed or that they would have much success. If, for example, the guidelines provided that no judge shall release his papers until fifteen years after the judge retires from the bench, there would be nothing as a matter of law that would prevent the judge from choosing to release his papers earlier than fifteen years (potentially threatening the judiciary's confidentiality, collegiality, and integrity), or later than fifteen years (potentially threatening society's interest in disclosure and accountability and historians' interest in timely access to historically valuable information).

D. *Congressional Inertia Relating to Congressional as well as Judicial Papers*

Finally, another major objection that could be made against a move toward a public ownership model relates to congressional inertia—namely, that Congress is not likely to take action to overturn the longstanding tradition favoring private ownership because doing so might force Congress to address the fate of the papers of its own congressional members.

This objection certainly has some force. The National Study Commission recommended in 1977 that the papers of members of Congress—consisting of “documentary materials in a Member’s office files made or received by the Member and his staff in connection with

³⁷⁴ See, e.g., *Judicial Papers Hearing*, *supra* note 22, at 2–3 (statement of Sen. Joseph I. Lieberman, Member, Subcomm. on Regulation and Gov’t Info. of the S. Comm. on Governmental Affairs) (indicating that judicial attention to the issue would be welcome).

³⁷⁵ The only real movement that the judiciary has made toward dealing with the issue of judicial papers is the Federal Judicial Center’s creation in 1996 and then revision in 2009 of a guide, which merely provides curatorial suggestions to federal judges about how to preserve their papers should they be inclined to do so. See FJC GUIDE, *supra* note 16, at v.

official duties”—be treated as “the property of the United States.”³⁷⁶ Congress, however, has not taken steps to regulate the papers of its own individual members³⁷⁷—just as it has failed to regulate judicial papers. If Congress tried to regulate judges’ papers without regulating its own members’ papers, Congress might look self-serving.³⁷⁸ This concern, however, does not seem terribly strong when one considers that Congress does much of its work in the public eye. Congress has required that a great deal of its papers and deliberative processes be preserved and publicly disclosed—leading to long trails of legislative history. At the close of each Congress, pursuant to statutory command, “all the noncurrent records of the Congress *and of each congressional committee*” must be transferred to the National Archives and Records Administration for preservation.³⁷⁹ Daily proceedings and floor debates are also preserved in the Congressional Record.³⁸⁰

Furthermore, even if it would not be palatable for Congress to tackle judicial papers without also addressing the fate of papers of individual members of Congress, that would not be such a bad thing. Indeed, it would be a positive development since the question of who should own congressional papers—like the question of who should own judicial papers—has rarely been asked in our nation’s history and deserves attention and scrutiny.

CONCLUSION

Some thirty-five years after the National Study Commission recommended that judicial papers be treated as governmental rather than private property, neither the judiciary nor Congress has chosen to regulate judicial papers, leaving the ultimate disposition of judicial papers—including Supreme Court papers relating to cases of significant national concern like the Affordable Care Act case—up to the

³⁷⁶ COMMISSION REPORT, *supra* note 29, at 35.

³⁷⁷ See *Judicial Papers Hearing*, *supra* note 22, at 4 (statement of Sen. Thad Cochran, Member, Subcomm. on Regulation and Gov’t Info. of the S. Comm. on Governmental Affairs) (noting that Congress has not chosen to regulate the papers of its own members but that it has regulated the papers of congressional committees).

³⁷⁸ Cf. *PRA Hearing*, *supra* note 164, at 75–76 (statement of Rep. Allen E. Ertel) (responding to the concern “that it would be unfair to put restrictions on accessibility to the Presidential papers and not to congressional and judicial papers” by expressing intent to “take the Commission report and try to redraft it into legislative form so we can . . . have access to congressional and judicial papers,” and explaining that “[t]he reason we did not include it in our proposal was the fact that we are advised it would be better done as a resolution of the House and thereby change the rules, rather than by statutory enactment”).

³⁷⁹ 44 U.S.C. § 2118 (2006) (emphasis added).

³⁸⁰ *About the Congressional Record*, LIBR. CONG., <http://thomas.loc.gov/home/abt.cong.rec.html> (last visited Sept. 6, 2013).

whims of individual Justices and judges. The consequence has been tremendous inconsistency surrounding access to and disposition of judges' working papers: Some papers have been destroyed, shredded, burned, or lost; others have been closed to the public for long periods of time; and others yet have been publicly released almost immediately after the judge who created them left the bench. This ad hoc, laissez-faire system has not effectively served the many competing interests that surround judicial papers.

The PRA, which shifted presidential records from a private to a public model of ownership, suggests a possible path forward for judicial papers—namely, that Congress could enact legislation declaring judicial working papers, like presidential papers, to be governmental property. Given significant differences between the roles and constitutional design of the President and judges, including the independence of our judiciary, it would not be wise to import the PRA wholesale into the judicial context. Nonetheless, a promising approach would be for Congress to pass legislation declaring that judicial papers moving forward will be viewed as governmental property and to empower the judiciary to promulgate rules governing the specifics of access to and disposition of the papers. By involving the judiciary in the implementation process rather than trying to dictate the terms itself, Congress would likely enhance the likelihood of judicial compliance and buy-in; enable the judiciary to craft rules aimed at safeguarding litigants' rights as well as judicial independence, legitimacy, candor, collegiality, and confidentiality; and help to mitigate separation-of-powers concerns.

In the end, if Congress does not take action to force the judiciary's hand, then it seems unlikely that the judiciary will formulate any uniform guidelines of its own. The judiciary, after all, has had plenty of opportunities to do so in the past but simply has not shown any inclination to regulate in this area. Without congressional action, the fate of judicial papers—and the many broad historical, institutional, societal, and individual interests that judicial papers implicate—will likely continue to be governed by individual Justices and judges rather than by rules. That would be an unfortunate outcome for history, society at large, and the judiciary as an institution.