Personal Papers of Justices of the Supreme Court:
A Brief Look at Access Issues

The ideal tableau of the Court – and certainly the image it has
sought to perpetuate over the years – is one of nine wise, just, and
serene jurists sitting to render, with irreproachable integrity,
decisions crucial to the conduct of national life. (Witt 733)

Earlier this year, Associate Justice Sandra Day O’Connor announced her
retirement from the United States Supreme Court. The current practice of retiring
Supreme Court Justices is to donate their papers to an archival repository, and Justice
O’Connor is apparently no exception. In fact, according to the web site of the Library of
Congress, she and fellow current sitting Justice Ruth Bader Ginsburg have already begun
to gift their papers (albeit with restrictions on processing and access) to the Library.

In recent years, directly due to the Justices’ current practice, researchers have
been able to study the Court in ways that were not possible a short time ago. An example
of such research is Lee Epstein and Jack Knight’s The Choices Justices Make, a data-
driven study of the decision-making processes of the Burger Court (1969-86). In the 
preface, the authors state that in order to conduct the research they envisioned, they 
needed to collect most of the data from the justices’ papers rather than 
from published sources. …[They] could access (1) the case files of 
Marshall and Brennan … (2) Justice Powell’s records, including case 
files, docket books, and conference notes … and (3) Brennan’s 
conference notes and docket books – records that scholars have 
deemed highly reliable and comprehensive. (Epstein and Knight xv) 
In other words, their detailed analysis of the strategies and methods employed by the 
members of the Court was dependent on access to a wide range of these Justices’ 
personal working papers. Working papers are the papers created in the course of 
decision-making, including bench notes, conference notes, notes exchanged between 
Justices, research notes, law clerks’ memoranda, draft opinions, docket books, notes of 
conversations, and certiorari memoranda (Wigdor 3). 

The work of the Supreme Court is a complex mix of highly structured activities, 
long-standing tradition, and leading edge legal thinking. “The modern Court functions 
through a dynamic between politics and law, human interest and institutional practice” 
(Brigham 5). The personal papers of the Justices, and in particular those relating to their 
service on the Court, are invaluable in understanding that dynamic. They are windows 
into the functioning of the Court, the development of the Justices’ thoughts on particular 
issues and cases, and the collaborative processes that go into the issuance of an opinion. 
Because of the prominence and authority of the Court in the American legal system, the
papers stand as evidence of the evolution of legal principles and philosophies in the United States. Given the nature of the cases argued before the court, the papers also represent serious reflection on major social policies, issues, and trends.

This paper is a brief exploration of some of the historical background of the practice of archiving Justices’ papers. Instances of several Justices’ papers will be used to illustrate various aspects of general availability, scope, and access.

Certainly, a key factor in availability is the continued existence of the Justices’ personal and professional papers. Alexandra Wigdor compiled research indicating that, as of 1986:

- 23 of 101 Justices had left no surviving collection of papers
- 22 had left small collections (ranging from a maximum of under three linear feet to just a few items) consisting mostly of correspondence and not containing any court papers; in some cases it is known that a Justice’s papers were deliberately destroyed
- Most of the twentieth century Justices had left large collections (more than 5,000 items) in one or more repositories; however, two Justices, Owen Josephus Roberts (Associate Justice, 1930-45) and Edward Douglas White (Associate Justice, 1894-1910; Chief Justice, 1910-21) purposely left no papers, preferring to destroy them (31-34).
The absence of papers is of note for two reasons. The first, of course, is that potentially rich resources for the study of the history of the United States are not available. Of the forty-five no- or small-collection Justices in noted above in Wigdor’s study, thirty-seven served prior to 1915. One can imagine that our understanding of nineteenth century landmark court decisions would be enhanced if scholars could have opportunities to study the draft versions of opinions or the notes taken by the Justices for those cases.

Secondly, the deliberate destruction of some or all papers by Justices (or their representatives) is interesting because it inevitably leads to speculation as to a Justice’s motivation to do so. At least in the past, such destruction was likely to have been influenced by traditions established early in the Court’s history:

[A] factor affecting the content of judicial collections is the tradition of judicial secrecy, which was firmly established by the Marshall Court [1801-35]. The felt necessity to protect the confidentiality of the Court has been so pervasive, that, until recently, judges have tended to destroy their working papers. (Wigdor 4)

Elder Witt, in a book published in 1990, commented that this “unwritten code of secrecy” functions to shield from public view not only the processes and procedures of deliberation, but also any personal disagreements or ill will between Justices. In Witt’s analysis, the members of the Court have been “loath to reveal instances of infighting and conflict … lest they demean the dignity of the Court and encourage further quarreling among the justices” (748).
Justice Hugo Black’s son recalled that his father felt that “reports by one Justice of another’s conduct in the heat of difference might unfairly and inaccurately reflect history” (qtd. in Wigdor 48). Justice Black (Associate Justice, 1937-71) frowned on the idea of making public the personal observations contained in the diaries or other contemporary notes of public figures according to John P. Frank, a former law clerk and long-term close friend of the judge:

Some of the Justices were obviously keeping notes of conferences or other discussions for historical purposes. This practice the Justice thought extremely unwise. Indeed, while his official papers went to the Manuscript Division of the Library of Congress, most of his informal communications were, upon his instruction, burned on his death. (61-62)

Justice Black not only doubted the value of personal impressions (Frank 62), but thought that the note-preservation would have a detrimental effect on the Court’s deliberative process. Justice Black reportedly instructed his son to burn his conference notes out of concern that publishing them would inhibit the Justices from freely exchanging ideas (Wigdor 48). The conferences (held shortly after the completion of oral arguments in each case the Court hears) are attended strictly by the Justices and are conducted in total secrecy (Witt 742) - perhaps that element of complete confidentiality is why the conference notes were of more concern to Justice Black than his other papers.

Justice Black’s actions and beliefs are representative of the transition in the Justices’ approach to archiving their papers. There is clear movement from near (or in so
many cases, utter) secrecy to an openness that reflects modern beliefs about transparency in government. Justices leaving the Court since Justice Black have leaned toward a more liberal view of access to their papers, both in what they choose to donate and the restrictions they place on access to them.

Some of the archived papers have drawn public and scholarly interest because they are evidence of how certain contentious cases, such as prayer in public schools and abortion rights, have narrowly missed being decided in the opposite way. In addition, they reveal information about the reasoning of Justices who remain on the Court.

Associate Justice Lewis Powell (1971-87), bequeathed his papers to his undergraduate and law school alma mater, Washington and Lee University. Washington and Lee University School of Law has established an entire facility: the Lewis F. Powell, Jr. Archives. According to the web site for the archive, Justice Powell’s “donor deposit agreement” states:

Material from the Depositor’s Supreme Court and Court of Appeals files not already public information (is restricted), for so long as any member of the Supreme Court or Court of Appeals with whom the Depositor served remains a member of the Supreme Court or the Court of Appeals, except with the written consent of Justice Powell. ... After Justice Powell’s death ..., the Archivist will make this determination with the approval of the Dean of the School of Law. Clearly these restrictions are designed to strike a balance between secrecy and access.
In 2004, five years after his death (per his bequest), the Library of Congress opened to the general the papers of Associate Justice Harry Blackmun (1970-94). In addition the Library has a major online exhibit, complete with finding aids, of this substantial collection of materials. Justice Blackmun wrote the majority opinion in *Roe v. Wade*, the landmark case establishing the legality of abortion nationwide. The papers contain a great deal of correspondence (both in support and against the opinion) on this issue alone.

Recent donations of papers, or more accurately their release from access restrictions, have not been without controversy. In 1993, current Chief Justice William Rehnquist admonished the Library of Congress for immediately releasing the restrictions on Associate Justice Thurgood Marshall’s (1967-91) papers upon his death without consulting with the Court first. Chief Justice Rehnquist wrote a letter to the Librarian of Congress, James Billington, stressing the significance of the tradition of confidential deliberations, stating:

Most members of the Court recognize that after the passage of a certain amount of time, our papers should be available for historical research. But to release Justice Marshall’s papers dealing with deliberations which occurred as recently as two terms ago is something quite different. (qtd. in Reske 26)

Retired Chief Justice Warren Burger characterized the Library’s actions as an “irresponsible and flagrant abuse” of its discretion (qtd. in Reske 26). Friends and associates of Justice Marshall chimed in: Some were firmly of the opinion that the full release of the Justice’s papers so soon after his death was not at all what the Justice
would have wanted; others believed that the Library’s actions were consistent with the Justice’s wishes (Reske 26, 28). Billington defended the release, stating that “Justice Marshall was aware that journalists used library manuscript collections” (qtd. 26) and that the Justice’s “instrument of gift” limiting access to “researchers or scholars engaged in serious research” did not exclude journalists or lawyers (26).

It appears that we will never know Justice Marshall’s true intent. Historians and legal scholars quoted in Henry Reske’s article pointed out that what’s information contained in the papers cannot really be successfully used by litigators seeking to manipulate their arguments before the Court (28). We can assume, however, that the papers reveal previously unknown insights into Justice Marshall’s long and varied legal career, as well as his influence on civil rights issues. One can imagine that one lasting effect of the fracas over the Marshall papers is that it cautioned Justices into insisting that their deeds of gift reflect their intentions in unambiguous language.
Works Referenced


