

ACCESS TO JUSTICE?

A STUDY OF ACCESS RESTRICTIONS ON THE PAPERS OF U.S. SUPREME COURT JUSTICES

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ISSUE

For scholars of law, history, and government—and the American public—the papers of all Supreme Court Justices are of vital importance. They contribute to biographies, histories, and legal critiques. Our understanding of the Court and its decisions is enriched by access to the thinking of the justices. In turn, this knowledge informs our views on our laws and social order and helps shape the future of our legal, political, and even moral culture.

Despite the importance of these papers, many justices who have donated their papers in the past 75 years or so have placed restrictions on access to the collection. These restrictions generally keep the papers closed until a certain amount of time has passed. This time period may be a few years or decades, but the trend is toward restriction for longer periods of time.

CURRENT STATUS

- ♦ Papers of all federal judges are considered personal property.
- ♦ Neither any federal statute nor policy of the Judicial Conference of the United States provides for the disposition of the papers of federal judges, including Supreme Court justices.
- ♦ The National Archives cannot accept the justices' papers as part of the court records, and no court funds are available for preservation and disposition.

CONGRESSIONAL ACTIONS

- ♦ 1978—passed Presidential Records Act.
- ♦ 1984—explicitly excepted Supreme Court from definition of “Federal agency.”
- ♦ 1993—held hearings following the opening of Thurgood Marshall’s papers only months after his death.

CONCERNS

- ♦ Appropriate balance between privacy and public interest.
- ♦ Separation of powers.

IMPACT OF ACCESS

Access to a justice’s papers enriches scholarly research and is critical for significant biographical work.

- ♦ Since 1993, 280 law review articles and 651 news stories refer to Thurgood Marshall’s papers.
- ♦ Since 2004, 311 law review articles and 50 news stories mention Justice Blackmun’s papers.
- ♦ Biographer Howard Ball cited 10 different collections of Justices’ papers in his biography of Hugo Black.

PROPOSALS FOR IMPROVEMENT

Best option: “Public papers” are public property as proposed by the 1977 National Study Commission with 15-year-post-retirement embargo to protect privacy and administration of justice.

- ♦ “Public papers” would fall between official papers and private papers—essentially work product created in the course of federal government business.

Alternative: Legislate incentives for complete collections and short embargos.

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LESS RESTRICTIVE

MORE RESTRICTIVE

