

**Society of American Archivists  
Council Conference Call  
January 13, 2021  
Virtual Meeting**

**Issue Brief: Judiciary Records  
(Prepared by the SAA Committee on Public Policy)**

**BACKGROUND / DISCUSSION**

**The purpose of SAA’s Committee on Public Policy (COPP) is:** “... to provide strategic information and advice to the SAA Council to enhance SAA’s capacity to address public policy issues and concerns affecting archivists, archives, the archival profession, and its stakeholders. The Committee recommends to the SAA Council the public policy priorities on which SAA should focus its attention and resources, within the context of the Society’s mission and strategic plan. Although the Committee’s purview is broad, its overarching priorities are issues related to the preservation of and access to records of enduring value that affect archivists, archival institutions, and users of the archival record.”

**Among the Committee’s assigned tasks and responsibilities is the following:** “Prepares drafts, for Executive Committee or Council approval, of position papers, statements, issue briefs, and other documents related to public policy issues, seeking input from members and experts (including component groups) as appropriate and feasible.”

**Issue briefs are developed in support of [SAA’s Public Policy Agenda](#).** They provide background and discussion of key public policy issues that have implications for archives and archivists. They serve both to educate members and other stakeholders about the issues and to provide a foundation for specific advocacy activities. (See a complete list of SAA issue briefs, position statements, and resolutions [here](#).)

The following brief, which has been on the Committee on Public Policy’s work plan for several years, complements other briefs on federal records (e.g., Executive Office and Congressional records) in calling for legislation to ensure transparency in and access to federal judges’ papers.

In preparing this issue brief, COPP consulted with the individuals listed at the end of the brief.

## Issue Brief: Judiciary Records

### SAA POSITION

The Supreme Court and federal judiciary has enormous influence over the American public. However, with no laws governing the disposition, preservation, and accessibility of the papers of Supreme Court justices and other federal judges, the public often cannot consult these archives for a fuller understanding of the federal courts. SAA supports the enactment of legislation to address these gaps in the management of federal judges' papers.

### BACKGROUND

The National Archives and Records Administration (NARA) is responsible for the [official institutional records](#) of the U.S. Courts. Despite the increasing attention to the federal judiciary in recent decades, there are no laws governing the disposition, preservation, and accessibility of the papers of Supreme Court justices and other federal judges. The lack of consistent transfer practices among judges and justices, and the absence of a law like the Presidential Records Act, has led to uneven public access to the archival records of some of our country's most powerful public servants.

This lack of consistent practice or uniform laws has led to varying terminology in describing the work-related documentation produced by individual judges: working papers, chambers papers, chamber files, and judicial records. For the purposes of this issue brief, the term "judges' papers" is used, but with the recognition that this simply describes the current legal reality and is not an endorsement of the current private ownership status of this material.

A "docket" is the summary of all activity in a court case. Dockets are arranged chronologically and list the pleadings, motions, orders, and other documents filed in a specific legal matter. Collectively, those filings are commonly referred to as "court documents." Court documents and dockets are maintained and preserved as official records by the judicial system. In addition to these records, judges create correspondence, notes and marginalia, draft opinions, internal memos between a judge and his or her clerks or colleagues, and other unofficial writings. These documents currently are not included as part of any official government record or proceeding, but they contain essential evidence and insight into the evolution of decisions that can't be seen through dockets alone.

The Federal Judicial Center (FJC) actively encourages federal judges to develop a plan for preserving their papers by communicating the value such documents have to researchers, historians, and the public. While acknowledging that judges' papers currently are considered private property and that there is no requirement that federal judges preserve their papers, FJC provides support and guidance for those who wish to do so. [A Guide to the Preservation of Federal Judges' Papers](#) (3<sup>rd</sup> edition) is meant to assist federal judges with making disposition decisions about their papers. The Guide identifies categories of judges' papers of greatest historical value and includes practical advice for organizing and preparing papers for donation, selecting a repository, and considerations when deciding on an access policy. The FJC refers to these materials as "chambers papers," the primary focus of the guide and this brief. (A judge's papers may also include non-court-related personal papers from other parts of their life and/or career).

In 1974, President Gerald Ford signed the [Presidential Recordings Preservation Act](#), which required the preservation of [President Nixon's presidential records](#) and established the National Study Commission on Records and Documents of Federal Officials, a national committee to "study problems and questions with respect to the control, disposition, and preservation of records and documents produced by or on behalf of

Federal officials.” In 1977 the Committee issued its [final report](#), which was [considered](#) in the passage of the [Presidential Records Act in 1978](#). The 1977 Committee Report addressed the “public papers” of the President, Vice President, members of Congress, and members of the federal judiciary. The report recommended that the President and Vice President transfer their papers to the National Archives immediately at the end of service, but that elected representatives and judges should be able to choose their own depository. Although the Presidential Records Act institutionalized many of the Commission’s recommendations regarding the records of the President and Vice President and created the paradigm shift that legally transformed the President’s private papers into public records, the United States lacks similar legislation concerning the status of records of members of Congress and federal judges.

Controversy about the opening of Associate Justice Thurgood Marshall’s papers within months of his death led to the 1993 Senate hearing on “[Public papers of Supreme Court justices: assuring preservation and access](#)” before the Subcommittee on Regulation and Government Information of the Committee on Governmental Affairs. Beyond what had already been addressed in the 1977 Public Documents Commission report, one new point raised was the emergence of electronic records and the need to address them. No actions resulted from the hearing.

The status of judges’ papers has received limited attention from academic researchers. In recent years, most of this scholarship has taken place within law reviews (i.e., legal journals). In [2013, Kathryn Watts](#), a law professor and former clerk for Justice John Paul Stevens, wrote a comprehensive legal article reviewing the private property status of judges’ papers and issues associated with the current “ad hoc approach,” and calling for legislation to create public ownership of judges’ papers. Criticizing Watts’s argument, Justin Walker, law professor and former clerk for Justice Anthony Kennedy, [and Caroline Phelps \(2017\)](#) questioned whether Congress has standing to legislate the work of the judiciary and argued for the role of continued judicial secrecy. [Wayne Kalkwarf \(2018\)](#) questioned the feasibility of Watts’s argument by reviewing his own experience in disposing of the papers of judges at lower levels of the federal judiciary, and considered several hypothetical challenges to a uniform approach to judges’ papers. Finally, law librarian [Susan David deMaine \(2018\)](#) reviewed the current restrictions on existing judicial collections, findings that reinforce Watts’s argument that a lack of applicable legislation results in significant *ad hoc* approaches. deMaine recommended an intriguing and novel solution: Congressional appropriation of money (for processing purposes) to a repository receiving a donation of judges’ papers. Under deMaine’s proposal, more money would be available if judges agreed to shorter periods of access restrictions on their papers.

## THE ISSUES

### *The law lags behind archival ethics*

When it comes to documenting the Supreme Court, the lack of recordkeeping laws applicable to federal judges hinders archivists charged with preserving judge’s papers according to our [professional values and ethics](#) related to transparency and access. The most prominent federal recordkeeping laws are the [Federal Records Act](#) (which excludes Congress and the Supreme Court) and the [Presidential Records Act](#) (which covers only the Executive Office). The level of public availability of information pertaining to the operation of any one branch of government should not be privileged over another; this is counter to the idea of co-equal branches of government. Just as the Executive branch is regulated by the Presidential Records Act, the Judiciary should be regulated by a similar law that specifies and standardizes the preservation and accessibility expectations for judicial records.

In addition, archival practice and law employ differing definitions of “record.” In archival practice, we generally define correspondence, notes and marginalia, draft opinions, internal memos between a judge and the judge’s clerks or colleagues, and other unofficial writings as records. In this context, such materials would be considered by most archivists to be the records of the judicial branch. But as Watts notes (p. 1669), legal status and precedent has treated them as if they were what archivists would define as “papers”: personal property that may be disposed of or transferred at the discretion of the individual. It is important to reconcile this gap in understanding between professions. One ideal step would be to see the law’s definition of “record” more closely match that of the archives profession’s to enable and clarify archivists’ legal rights and the rights of our users.

### ***Inconsistency of donation and processing practices***

Donation practices for judges’ papers, especially Supreme Court justices, are not well-documented or understood. Because donor agreements are developed on an *ad hoc* basis, types and lengths of restrictions on access to the public vary significantly despite the material having similar content and purpose. In addition, although some justices have created and kept electronic records in the form of email, word processing documents, and other common business tools, there is no confirmation that any justice to date has authorized the transfer of electronic records to a repository.

Processing practices for these materials, which have unique considerations regarding restrictions and access, also are not well-documented or understood. Thus the archival handling of these papers for preservation is inconsistent. In the current environment, the burden to collect and provide access to these papers is too great for one non-governmental institution to address. The burden should not be on singular institutions to build and rebuild these workflows in silos. Backed up by legal requirements, the establishment of consistent collecting, processing, and access practices would make future U.S. Supreme Court collections more accessible to the public.

### ***Inconsistency of access***

Because of the absence of mandates regarding judges’ papers, access to these papers—even when they are transferred to a repository—is inconsistent and often exclusionary. Through the 1930s, papers were donated (usually without restrictions) long after a justice’s death, and large portions of collections often were lost or destroyed prior to transfer to a repository. In the latter half of the 20th century, it was common practice to restrict access to “legitimate scholars,” with material subject to review by an agent dedicated to protecting the reputation of the justice—often the justice’s family or a special board. In the early 1990s, donors of justices’ papers began to add complex and specific access provisions. deMaine’s research found that access restrictions lengthened following the opening of Justice Thurgood Marshall’s papers (p. 191). The donors of these collections often negotiate a variety of approaches to access restrictions, such as opening material on a rolling basis or by permission, or applying blanket time restrictions. These different types of restrictions may even overlap depending on the nature of the material, causing a host of complications for archivists and researchers.

### ***Lack of transparency***

The issue of privacy is often raised as a defense for the current practice of treating judges’ papers as private property. However, there is [little substantive evidence](#) that continuing to treat judges’ papers in this manner contributes to the larger public interest.

All people in the United States, as they are subjected to the laws and decisions of the federal government, should have access to records created by all three branches. Given the rising political polarization around the makeup of the federal courts, this transparency is more essential than ever. The United States Supreme Court is the country's highest judicial power, yet it enjoys a disproportionate lack of transparency into how its decisions are made.

Nominees to the Supreme Court often come up through the federal judiciary system, in which they have served as lower-court judges and clerks. The absence of mandates regarding federal judges' papers means that, during the confirmation process, the Senate and interested members of the public do not have access to information about the inner workings of the nominee's approach to judicial interpretation—unless the nominee served in a capacity with mandated preservation of records or had records donated as part of another person's collection.

A rare example of the first case was the 2018 confirmation of Justice Brett Kavanaugh. Kavanaugh's previous role within the White House Counsel's office in the Bush administration subjected his records to scrutiny through NARA-mediated [FOIA requests](#). Had he not served in the Executive branch and been covered by the Presidential Records Act, his recent record would not have been known. Nominees who come up solely through the federal judiciary may have their previous legal work come to light only if their work is part of a donated collection from another justice who imposed few access restrictions. This was the case with Justice Elena Kagan's [legal memorandums](#) produced when she clerked for Justice Thurgood Marshall, whose papers were opened by the Library of Congress in 1993.

### ***Lack of power to adhere to values and ethics***

Archives and special collections preserve historic material from people and groups in vastly varying levels of institutional and community power, from high school students to Supreme Court justices. Although it is part of the archivist's job to learn to navigate one's own positionality while developing and moving through these relationships, the archivist or curator is in an inherently compromised position when negotiating with interests as powerful as the Supreme Court. Donations of these materials often involve more layers of institutional administration than is typical for archival collection donations, adding many complicated conflicts of interest and power that far outweigh the interests and power of the archivist who will be affected by the donation and responsible for carrying out the donor's wishes. Archivists need a stronger federal law to regulate federal judiciary materials so that they are not subjected to power differentials that leave them with choices that may violate our profession's values and ethics.

## **RECOMMENDATIONS**

The most effective way to create a desirable consistency regarding the disposition, preservation, and accessibility of the entire archival record of the judiciary would be to enact legislation to address gaps in the management of federal judges' papers. Many of the recommendations of the 1977 report are still worth considering. Effectively, a judicial version of the Presidential Records Act should be passed.

To ensure the greatest public access, consideration should be given to centralizing responsibility for these records under NARA, the Library of Congress, or a government-funded consortium of authorized repositories to preserve judges' papers.

If such a consortium of authorized repositories is funded, inclusion of academic and public libraries with archives, historical societies, or museums with a history of transparency and effectiveness in serving records to the public would allow judges some of the current discretion in choosing an appropriate destination for

their materials while also ensuring that the repository is held to the same standards as others caring for such records. Trust in consortium membership could be bolstered by creation of an oversight board—comprising archivists and members of the public—to approve institutional membership.

In the absence of federal legislation to resolve this issue, [A Guide to the Preservation of Federal Judges' Papers](#) should be considered the standard best practices document and should be updated periodically by a joint group comprising archivists and members of the public.

## ADDITIONAL RESOURCES

United States Courts records disposition schedules for the United States [courts of appeals](#) and [district courts](#).

NARA [record groups](#) for judicial records.

A [list of repositories](#) that currently hold judges' papers.

Federal Judicial Center: [A Guide to the Preservation of Federal Judges' Papers](#) (3rd edition).

[Article \(open access link\)](#): deMaine, S.D. (2018). Access to the Justices' Papers: A Better Balance. *Law Library Journal*, 110, 185.

[Article](#): Kalkwarf, W.A. (2017). What Shall We Do with Federal Judges' Papers after They Retire? *University of Toledo Law Review*, 49, 265.

[Article \(open access link\)](#): Walker, J., and Phelps, C. (2016). Chilled Chambers: Constitutional Implications of Requiring Federal Judges to Disclose Their Papers Upon Retirement. *University of Memphis Law Review*, 47, 1169.

[Article \(open access link\)](#): Watts, K.A. (2013). Judges and Their Papers. *New York University Law Review*, 88, 1665.

### Contributors to this issue brief:

- Krista Ferrante, MITRE Corporation (Committee on Public Policy member)
- Irene Gates, Project Archivist, Justice Antonin Scalia Judicial Papers, Harvard Law School Library (2018-2020), Massachusetts Historical Records Advisory Board (August 2020 – present)
- Ed Moloy, Curator of Modern Manuscripts, Harvard Law School Library
- Jessica Farrell, Educopia Institute (Committee on Public Policy member)
- Eira Tansey, University of Cincinnati (Committee on Public Policy member)
- Michelle Trumbo, Executive Director, Legal Information Preservation Alliance, George Mason University

## **RECOMMENDATION**

**THAT the issue brief on Judiciary Records prepared by the Committee on Public Policy be approved.**

**Support Statement:** This issue brief supports SAA's Public Policy Agenda by providing members and other prospective audiences with SAA's considered opinion on the topic of the appropriate management of federal judiciary records.

**Impact on Strategic Priorities:** Addresses Goal 1: Advocating for Archives and Archivists, Strategy 1.1. Provide leadership in promoting the value of archives and archivists to institutions, communities, and society, 1.2. Educate and influence decision makers about the importance of archives and archivists, and 1.3. Provide leadership in ensuring the completeness, diversity, and accessibility of the historical record.

**Fiscal Impact:** Approval of the issue brief does not commit SAA to expend funds on any particular advocacy effort at this time.