STATE OF MICHIGAN

IN THE COURT OF APPEALS

HASSAN M. AHMAD, ESQ,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF MICHIGAN,

Defendant-Appellee

Court of Appeals Case No.: 341299

Lower Court Case No. 17-000170-MZ
Hon. Stephen L. Borrello

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STATEMENT OF APPELLATE JURISDICTION

The jurisdictional summary in Plaintiff-Appellant's Brief on Appeal correctly states that this Court has jurisdiction.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Did the Trial Court correctly conclude that private records donated by Dr. John Tanton to the University of Michigan's Bentley Historical Library ("Bentley") pursuant to a charitable gift agreement that requires that certain papers be closed to access for a limited period of time (the "Closed Tanton Records") were not "public records" within the meaning of the Freedom of Information Act ("FOIA") and therefore need not be disclosed?

Defendant-Appellee asserts the answer is "yes."

Plaintiff-Appellant asserts the answer is "no."

II. Alternatively, did the Trial Court correctly conclude that requiring the disclosure of the Closed Tanton Records would not further the purposes of FOIA because "the library materials sought in this case plainly do not have the capacity to inform the citizenry of what [Bentley] 'is up to'"?

Defendant-Appellee asserts the answer is "yes."

Plaintiff-Appellant asserts the answer is "no."

III. Alternatively, did the Trial Court correctly conclude that requiring the disclosure of the Closed Tanton Records would interfere with Bentley's statutory authority to determine the use of its own materials under MCL 397.605?

Defendant-Appellee asserts the answer is "yes."

Plaintiff-Appellant asserts the answer is "no."

IV. Alternatively, and even though Court of Appeals need not decide this issue, should the Court affirm the dismissal of Plaintiff-Appellant's FOIA complaint because requiring the production of the Closed Tanton Records would contravene the University's constitutional autonomy under Article VIII, §5 of the Michigan Constitution?

Defendant-Appellee asserts the answer is "yes."

Plaintiff-Appellant asserts the answer is "no."

V. Alternatively, should the Court of Appeals affirm the dismissal of Plaintiff-Appellant's FOIA complaint because the Closed Tanton Records are exempt from disclosure?

Defendant-Appellee asserts the answer is "yes."

Plaintiff-Appellant asserts the answer is "no."

VI. Should the Court of Appeals reject Plaintiff-Appellant's arguments regarding the contents of Dr. Tanton's charitable gift agreement because (a) Plaintiff-Appellant waived this argument by not presenting it to the Court of Claims and (b) it was not necessary for the Court of Claims to ascertain the contents of the charitable gift agreement because Plaintiff-Appellant cannot establish that the Closed Tanton Records, which have been closed to research by anyone, were ever utilized "in the performance of an official function"?

Defendant-Appellee asserts the answer is "yes."

Plaintiff-Appellant asserts the answer is "no."

I. Introduction

The Freedom of Information Act ("FOIA") provides individuals with the ability to obtain information regarding the "affairs of government." The purpose of requiring disclosure is so that the public is aware of the government's "operations and activities." Conversely, documents that do not have the capacity to inform the citizenry about governmental activities (as opposed to private activities) fall outside the scope of FOIA. To this end, this Court's precedents establish that FOIA does not require the production of every document in the possession of a governmental entity. Instead, a document must only be produced if it meets the statute's definition of a "public record" and is not otherwise exempt from disclosure.

Plaintiff-Appellant Hassan M. Ahmad ("Ahmad") served a FOIA request seeking documents that are not "public records." Specifically, Ahmad sought private records that were donated by Dr. John Tanton to the University of Michigan's Bentley Historical Library ("Bentley") pursuant to a charitable gift agreement that requires that some, but not all, of the records be closed to access for a limited period of time (the "Closed Tanton Papers"). These documents do not relate to decisions, actions, or the functioning of Bentley or the University, and they have never been used in the "performance of an official function."

At set forth below, several alternative and independent reasons support affirming the Court of Claims' ruling dismissing Ahmad's claims. First, the Closed Tanton Records are not "public records" subject to disclosure because they have never been owned, used, possessed, or retained "in the performance of an official function." In this regard, the University's mere possession of a private record in a warehouse does not automatically convert the private record into a public record. Second, because the records were never used "in the performance of an official function," there was no need for the Court of Claims to review the charitable gift

agreement between Dr. Tanton and Bentley, an argument that Ahmad waived by not raising it in the Court of Claims. Third, ordering the production of the Closed Tanton Records would not further the purposes of FOIA because those records would not provide any information about the inner workings of Bentley. Additionally, ignoring the donor restrictions would hinder future donations of private papers to public institutions, thereby reducing their availability to the public. Fourth, the Library Privacy Act and Article VIII, §5 of the Michigan Constitution act as statutory and constitutional limitations precluding disclosure. Fifth, and finally, even if the Court were to determine the Closed Tanton Papers to be "public records," those records are exempt from disclosure. Accordingly, this Court should affirm.

II. Counter-Statement of Facts and Procedural Background

A. The Bentley Historical Library

Bentley, an academic unit at the University of Michigan, includes both the "University Archives and Records Program" and the "Michigan Historical Collections."[1] The Archives and Record program collects, preserves, and makes available records generated by the University in the conduct of its business. The Historical Collection collects, preserves, and makes available important historical materials: for the benefit of historians, researchers, and students:

> The Michigan Historical Collections will be maintained for the purpose of collecting, preserving, **and making available** to students manuscripts and other materials pertaining to the state, its institutions, and its social, economic, and intellectual development.[2] (emphasis added)

[1] *See* University Board of Regent's Bylaws, Sec. 12.04 (stating Bentley is "responsible to the provost and executive vice president for academic affairs") (http://regents.umich.edu/bylaws/bylaws12.html#7) and University Board of Regent's Bylaws, Sec. 2.04 (stating that "the provost and executive vice president for academic affairs will exercise executive responsibility for the Ann Arbor campus educational programs and supporting activities") (http://regents.umich.edu/bylaws/bylaws02.html#4)

[2] University Board of Regent's Bylaws, Sec. 12.04, (http://regents.umich.edu/bylaws/bylaws12.html#7).

As noted below, none of the documents at issue in this case have ever been made available to students, faculty, or the general public.

B. Dr. John Tanton Donates Documents to the University, with Specified Conditions

Dr. John Tanton, an ophthalmologist and conservationist, donated various papers to Bentley, which are described on the Bentley webpage. Under "Access Restrictions," the webpage states:

> The collection is only partially open to research. Boxes 1-14 are open without restriction; boxes 15-25 are closed for 25 years from the date of accession, or until April 6, 2035.[3]

The webpage further describes generically what is in the various boxes and notes where access is "Closed until April 6, 2035." Aside from the documents that are closed to research by anyone (whether it be a student, faculty member, or the general public), the remainder of the documents donated by Dr. Tanton are available for public inspection and research. It is undisputed that no one has accessed the records marked "Closed until April 6, 2035."

C. **Ahmad's FOIA Request and the University's Response**

On December 14, 2016, Ahmad filed a FOIA request seeking "all documents donated by Dr. John Tanton, Donor #7087, located in Boxes 15-25, and any others marked 'closed' at the Bentley Historical Archive (BHA) [sic] at the University of Michigan." (Compl, ¶8; Compl Ex 1 (FOIA Request)). Ahmad admits that he "was aware that his request sought records marked 'closed for 25 years from the date of accession, or until April 6, 2035.'" (Compl, ¶11).

On December 22, 2016, the University acknowledged receipt of the FOIA request. (Compl Ex 2). Given the volume of requests being processed by the University, the University informed Ahmad that it would respond to the request on or before January 13, 2017. (*Id.*)

[3] (http://quod.lib.umich.edu/b/bhlead/umich-bhl-861056?view=text)

On January 5, 2017, Ahmad narrowed his original request. (Compl Ex 5). The narrowed request still sought documents marked "closed" to access. (*Id.*)

On May 8, 2017, the University responded to Ahmad's request and confirmed that his request was denied. The University noted that Ahmad "requested voluminous records from the John Tanton papers archived at the University of Michigan Bentley Historical Library, which are currently restricted and closed to research." (Compl Ex 7). The denial letter explains that after Ahmad provided a deposit, the University determined that the documents were not "public records":

> Your request is denied. Subsequent to receiving your fee deposit, we have determined that the restricted records are not public records of the University of Michigan pursuant to Section 2(e) of the Michigan Freedom of Information Act, which defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function…" As indicated on the Bentley Historical Library website, the restricted records are closed to research until April 2035. Thus, they are not utilized, possessed or retained in the performance of any official University function.

(*Id.*) The University returned Ahmad's deposit and advised him of his appeal rights. (*Id.*)

On May 16, 2017, Ahmad appealed the denial of his FOIA request. (Compl Ex 8). In the appeal, Ahmad assumed the very thing he set out to prove before the Court of Claims and this Court: that the requested records are "public records" because (in his words) they "were acquired by the University for an official purpose." (*Id.* at 2).

On May 30, 2017, the University denied Ahmad's appeal. (Compl Ex 9). In addition to incorporating the reasons set forth in the May 8 denial (above), the University noted that the requested records "emanating from a private source are restricted and are not available to the university community or the public at this time by a valid charitable gift agreement with a donor. As such, they are not public records subject to disclosure under the FOIA and the University does not currently have the right to disseminate them." (*Id.*) The appeal denial further noted that

the disclosure of the records "would not only violate the terms by which a private citizen donated his property to the University, but would constitute an unwarranted invasion of the donor's privacy and, potentially, that of unrelated and unknowing third parties." (*Id.*) Finally, the University explained that production of the documents in violation of the gift agreement would prevent the University from fulfilling its educational mission:

> [V]iolating the terms of the gift agreement in this manner would undermine the University's ability to fully achieve its educational mission, insofar as preserving the history of the state of Michigan is one important aspect of its academic mission and is directly related to the willingness of other (e.g., legislators and judges) to donate their papers to the Bentley Library. Potential donors with key historical documents will be chilled by the University's failure to observe the limits expressly placed upon such gifts.

(*Id.*)

D. The Court of Claims' Ruling on the University's Motion for Summary Disposition

On August 16, 2017, the University filed a motion for summary disposition pursuant to MCR 2.116(C)(8). The University argued that FOIA did not require the production of the Closed Tanton Papers because they were not being utilized (either owned, possessed, used, or retained) "in the performance of an official function." It further argued that ordering the production of the Closed Tanton Records would frustrate FOIA's purpose and the Bentley Historical Library's mission. Alternatively, the University argued that the records were exempt from disclosure because public disclosure of the records would be an unwarranted invasion of Dr. Tanton's privacy.

On October 15, 2017, Ahmad filed a response. In his 19-page response brief, Ahmad never argued that it was necessary for the Court of Claims to review the charitable gift agreement (the contents of which he did not seek to learn about via discovery). And, Ahmad did not assert

that it was premature for the Court of Claims to rule on the University's motion. Instead, Ahmad focused his arguments on the purely legal issues in this case.

On November 3, 2017, the University filed its reply brief. The University explained why the production of the Closed Tanton Records would not fulfill FOIA's purpose and reiterated that the records do meet the statutory definition of a "public record." Replying to Ahmad's arguments, the University also explained that Ahmad was improperly inviting the Court to undermine the University's constitutional autonomy under Article VIII, §5 of the Michigan Constitution.[4] Finally, the University reiterated why the records were exempt from disclosure.

On November 20, 2017, the Honorable Stephen L. Borrello issued an Opinion and Order granting the University's summary disposition motion. (Ex 1, Opinion and Order). Judge Borrello observed that "[i]n order for a writing to become a public record, the public body must do more than merely possess the record." (*Id.* at 2-3 (citing *Hopkins v Duncan Twp*, 294 Mich App 401, 409-10; 812 NW2d 27 (2011)). He further explained that "the Court's inquiry focuses on how or if the writings 'are utilized by public bodies.'" (*Id.* at 3, (quoting *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 243; 789 NW2d 495 (2010)). Next, Judge Borrello emphasized that "[i]n this case, the issue is whether materials possessed by a library are utilized by the public body in the performance of an official function." (*Id.*) Reviewing this Court's precedents, Judge Borrello stated that "this state's appellate courts have, in answering the question of whether a writing is utilized in the performance of an official function, generally found such utilization in the context of a document that was *actively* used in a public body's decision-making process." (*Id.* (emphasis in original)).

[4] Ahmad argued that the Court of Claims should compel disclosure so that he could investigate Bentley's curatorial decisions. (Ahmad's Response at p. 5 (arguing that the documents would "allow[] the public to evaluate what documents Bentley finds historically significant, and whether Bentley is properly fulfilling its core purposes as a historical and research library").

Applying those precedents to the facts before him, Judge Borrello explained that the University's possession of the records was not enough to turn those records into public records which must be disclosed, particularly since they were not utilized "in the performance of an official function":

> The records are plainly possessed by the library, but this mere possession is not enough to render the records "public" under FOIA. The records must be utilized by the public body in the performance of an official function, and the Court finds that the records have not been so utilized in this case. Releasing the documents would not reveal any information regarding the affairs of the Library; rather, it would "only reveal information regarding the affairs" of Tanton, who is not a public body. *See Howell Ed Ass 'n*, 287 Mich App at 246.

(*Id.* at 4). Judge Borrello further noted that "Library staff members do not even have access to view the materials, thereby rendering dubious the assertion that the Library has done more than merely possess the records, and negating any assertion that the Library has applied the materials to an official function." (*Id.*) He also explained that requiring disclosure would violate the Library's statutory authority to determine the use of its own materials. (*Id.* (citing MCL 397.605(2)).

Reviewing federal case law that has addressed similar issues, Judge Borrello found that such cases were "particularly convincing" and clarified that "materials that are purely reference materials or research materials do not fall within the ambit of 'agency records' that are subject to disclosure under the federal FOIA." (*Id.* at 5). Ultimately, Judge Borrello held that "[t]he records sought in this case are held by the Library as reference material, and therefore are outside the scope of the records to which Michigan's FOIA was intended to apply." (*Id.*)

Addressing Ahmad's focus on the general purpose of FOIA, Judge Borrello concluded that the materials sought "plainly do not have the capacity to inform the citizenry of what the Library 'is up to.'" (*Id.* at 6-7).

III. Argument

A. Standard of Review

The University's motion was brought pursuant to MCR 2.116(C)(8). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are to be accepted as true and construed in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) should be granted where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id*. (quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992)). Additionally, dismissal pursuant to MCR 2.116(C)(8) is appropriate where claims are based on "mere conclusory allegations." *Porter v Fieger*, 2001 WL 738398, at *3 (Mich Ct App June 29, 2001); *ETT Ambulance Serv Corp v Rockford Ambulance*, 204 Mich App 392, 395; 516 NW2d 498 (1994) ("[M]ere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action.").[5] When deciding a motion brought under this section of the court rule, the court considers only the pleadings. *See* MCR 2.116(G)(5). However, the Court may consider documents referenced in a complaint in considering a summary disposition motion brought under MCR 2.116(C)(8). *See Dalley v Dykema Gossett*, 287 Mich App 296, 301 n1; 788 NW2d 679, 684 (2010).

In FOIA cases, "legal determinations are reviewed under a de novo standard." *Herald Co v E Michigan Univ Bd of Regents*, 475 Mich 463, 471-72; 719 NW2d 19, 24 (2006). However, "where a party challenges the underlying facts that support the trial court's decision," the "clear error standard of review" applies. *Id.* In such a case, "the appellate court must defer to the trial

[5] Unpublished cases are attached as Exhibit 2.

court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court." *Id.* at 471. "Finally, when an appellate court reviews a decision committed to the trial court's discretion . . . the appellate court must review the discretionary determination for an abuse of discretion and cannot disturb the trial court's decision unless it falls outside the principled range of outcomes." *Id.*

B. Governing Principles of Statutory Construction

The Michigan Supreme Court has summarized the ground rules that apply where, as here, the case involves a question of statutory interpretation:

> This case involves the interpretation and application of a statute, which is a question of law that this Court reviews *de novo*. When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent.

Whitman v City of Burton, 493 Mich 303, 311-12; 831 NW2d 223 (2013). To determine whether language is clear and unambiguous, "the contested provision must be read in relation to the statute as a whole and work in mutual agreement." *United States Fidelity Insurance & Guaranty Co v Mich Catastrophic Claims Association*, 484 Mich 1, 13; 795 NW2d 101 (2009) (citing *In re Certified Question (preferred Risk Mutual Insurance Co v Mich Catastrophic Claims Association*), 433 Mich 710, 722; 449 NW2d 660 (1989)). In other words, "each provision of the FOIA must be read ***so as to be consistent with the purpose announced in the preamble***." *Kestenbaum v Michigan State Univ*, 414 Mich 510, 522; 327 NW2d 783, 785 (1982) (emphasis added). "Effect should be given to every phrase, clause, and word in the statute. The

statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

As pertinent here, "Individual words and phrases . . . should be read in the context of the entire legislative scheme." *Michigan Properties, LLC v Meridian Township*, 491 Mich 518, 528; 817 NW2d 548 (2012); *see also* ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140 (Thomson/West 2012) (discussing the "Grammar Canon," which provides, "Words are to be given the meaning that proper grammar and usage would assign them").

C. The Freedom of Information Act

"The purpose of FOIA is to provide to the people of Michigan 'full and complete information ***regarding the affairs of government*** and the official acts of those who represent them as public officials and public employees,' thereby allowing them to 'fully participate in the democratic process.'" *Amberg v City of Dearborn*, 497 Mich 28, 30; 859 NW2d 674, 675 (2014) (quoting MCL 15.231(2))(emphasis added). *See also Detroit Free Press v Dep't of Consumer & Indus Servs*, 246 Mich App 311, 315; 631 NW2d 769, 772 (2001) ("By mandating the disclosure of information relating to the affairs of government and ***the official acts*** of public officials and employees, the FOIA facilitates the public's understanding of the ***operations and activities of government***.") (emphasis added); *Kocher v Dep't of Treasury*, 241 Mich App 378, 380–81; 615 NW2d 767 (2000) ("By requiring the public disclosure of information regarding the affairs of government and the ***official acts*** of public officials and employees, the act enhances the public's understanding of the ***operations or activities of the government***.") (emphasis added); *Manning v City of E Tawas*, 234 Mich App 244, 247; 593 NW2d 649, 652 (1999) ("The FOIA is a

manifestation of this state's public policy favoring public access ***to government information***, recognizing the need that citizens be informed ***as they participate in democratic governance***, and the need that public officials be held accountable for the manner ***in which they perform their duties***.") (emphasis added).

Additionally, although courts have described FOIA as broadly written and pro-disclosure, "the stated purpose of the act relates to government affairs and official acts, not the actions of private organizations." *Sclafani v Domestic Violence Escape*, 255 Mich App 260, 269; 660 NW2d 97 (2003). This is because "[o]ne of the reasons prompting the legislation was concern over abuses in the operation of government." *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 543; 475 NW2d 304 (1991). As discussed below, the Court of Claims correctly held that the documents at issue in this lawsuit do not relate to the "affairs of government" and are not "public records," and thus requiring their production would not fulfill the purposes of FOIA. Indeed, as the Court of Claims observed, the Closed Tanton Records "plainly do not have the capacity to inform the citizenry about what the Library 'is up to.'" (Ex 1, Opinion and Order at 7).

D. The Closed Tanton Papers Are Not Public Records Because They Are Not Being Owned, Used, Possessed, or Retained "in the Performance of an Official Function"

FOIA does not, as Ahmad asserts, start with a presumption that every document that comes into the hands of a public body must be disclosed.[6] Instead, a public body is not required to produce a document pursuant to FOIA unless it is a "public record." MCL 15.233(1). FOIA defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained

[6] Although a public body relying on a FOIA *exemption* bears the burden of providing that a public record is exempt, *Herald Co*, 475 Mich at 477, the University's legal arguments that the documents at issue are not "public records" do not rely on an exemption.

by a public body ***in the performance of an official function***, from the time it is created." MCL 15.232(e) (emphasis added).

Additionally, the Michigan Court of Appeals has held that to further the purpose of the statute, "we must construe the FOIA in such a manner as to require disclosure of records of public bodies used or possessed in ***their decisions to act***, as well as of similar records pertaining to ***decisions of the body not to act***." *Walloon Lake Water Sys v Melrose Twp*, 163 Mich App 726, 730–31; 415 NW2d 292, 294–95 (1987) (emphasis added). "Under this holding, not every communication received by a public body will be subject to disclosure." *Id.* When a document ***does not*** relate to a decision to act (or not act), it is not subject to disclosure.

As the Court of Claims recognized, cases finding that a record was utilized "in the performance of an official function" have focused on the record actively being used, or relied upon, by the public body. For example, in *Amberg* (relied upon by Plaintiff in his FOIA appeal), a surveillance video created by a third party was a public record because the city "received copies of the recordings as relevant evidence in a pending misdemeanor criminal matter." *Amberg*, 497 Mich at 32. The court explained that "even if the recordings did not factor into defendants' decision to issue a citation, they were nevertheless collected as evidence by defendants to support that decision." *Id.* at 33.

Similarly, in *Walloon Lake Water System*, the Court of Appeals held that "once the letter was read aloud and incorporated into the minutes of the meeting where the township conducted its business, it became a public record 'used … in the performance of an official function.'" 163 Mich App at 729. The court explained that "the content of the document *served as the basis for a decision* to refrain from taking official affirmative action," and therefore the document became a "public record." *Id.* at 731 (emphasis added). In other words, the letter was a public record

because (a) it was made a part of the public body's official minutes and (b) it served as the basis for official action. *Id.* at 731. *See also Rataj v City of Romulus*, 306 Mich App 735, 750-51; 858 NW2d 116 (2014) (video recording of police officer's alleged assault of an individual who had been arrested and handcuffed was a public record because it was used "in the performance of an official function" and "would shed light on the operations of the [police department]"); *MacKenzie v Wales Twp*, 247 Mich App 124, 131; 635 NW2d 335 (2001) (computer tax rolls were public records "because the tapes containing the tax information … existed and were used in performing defendants' official function of property tax billing … those tapes were subject to the FOIA"); *Ellison v Dep't of State*, 320 Mich App 169, 177; 906 NW2d 221 (2017) (insurance database maintained by Department of State was a public record "that defendant used to perform an official function"). In each of these cases, the documents were "public records" precisely because they related directly to the affairs of the government, were *utilized* by the government (or governmental actor) in performing its official functions and would shed light on the government's operations.

Contrastingly, the Closed Tanton Papers have never been utilized by the University (or any University employee or student) "in the performance of an official function." Bentley's official functions include "collecting, preserving, and making available" historical records. Unless all three acts are completed, the documents cannot be public records. *See OfficeMax, Inc v United States*, 428 F3d 583, 589 (6th Cir 2005) (use of "and" in phrase should be read in its ordinary conjunctive sense, requiring all elements to be satisfied). The Closed Tanton Papers were never made available.[7] Instead, they have been completely closed to access. Moreover,

[7] The University's mission statement refers to "creating, communicating, preserving *and* applying knowledge." (https://president.umich.edu/about/mission/) (emphasis added). Again, since the Closed Tanton Papers are not open to research, knowledge has not been "applied."

they do not reveal anything about the "affairs of government" because they do not relate to the functioning of Bentley or the University. The documents will not reveal anything about the official acts of University employees.

Ahmad takes the position, unsupported by case law that "mere possession" is sufficient to confer "public record" status on a document. (Ahmad's Appeal Br at 11, n4). But, the Court of Appeals has confirmed that physical possession of documents does not automatically lead to the conclusion that they are "public records." *Hopkins v Duncan Twp*, 294 Mich App 401, 409-10; 812 NW2d 27 (2011) ("Mere possession of a record by a public body does not, however, render it a public record; a record must be used in the performance of an official function to be a public record."). "Rather, it is ownership, use, possession, or retention ***in the performance of an official function*** that is determinative." *Detroit News* v *City of Detroit*, 204 Mich App 720, 724-25; 516 NW2d 151 (1994) (emphasis added). Ahmad never makes this "determinative" connection.

Addressing the possession of "purely personal documents," similar to the documents at issue here, the Court of Appeals has explained that such private "documents can become public documents based on how they are utilized by public bodies." *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 243; 789 NW2d 495 (2010). This is because "it is their subsequent use or retention 'in the performance of an official function' that rendered them so." *Id.* In *Howell*, personal emails between teachers were not pubic records, even though the board of education had complete control of the emails, because the board did nothing more than perform a blanket saving of information of the entire email system. *Id.* at 239-40. *Howell* explained that its "holding is consistent with the underlying policy of FOIA, which is to inform the public 'regarding the affairs of government and the official acts of ... public employees....'

Id. at 246 (quoting MCL 15.231(2)). Because the emails were never used "in the performance of an official function," they remained outside the scope of FOIA notwithstanding that the board of education possessed the documents. *See also Kestenbaum v Michigan State Univ*, 97 Mich App 5, 23-24; 294 NW2d 228 (1980), *aff'd*, 414 Mich 510 (1982) ("FOIA provides for freedom of information, not freedom to acquire valuable technological data which was developed at public expense, nor highly personal and sensitive information through records maintained by the University"); *Hopkins*, 294 Mich App at 417 ("individual notes taken by a decision-maker on a governmental issue are only a public record when the notes are taken in furtherance of an official function"); *US Dep't of Justice v Tax Analysts*, 492 US 136, 145-46 (1989) ("the term 'agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency"). The same result applies here.

Federal courts applying the federal FOIA have reached similar results.[8] The federal FOIA only reaches those documents the agency controls at the time of the request. The United States Supreme Court has held that control means "the materials have come into the agency's possession *in the legitimate conduct of its official duties.*" *Tax Analysts*, 492 US at 144-45 (emphasis added). Determining whether an agency has "control" involves the application of a four factor test:

> (1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) ***the extent to which agency personnel have read or relied upon the document***; and (4) the degree to which the document was integrated into the agency's record system or files.

[8] Michigan courts "look to federal courts for guidance in deciphering the various sections and attendant judicial interpretations, since the federal FOIA, 5 USC §552, is so similar to the Michigan FOIA." *Hoffman v Bay City Sch Dist*, 137 Mich App 333, 337; 357 NW2d 686 (1984). "Thus, a federal court decision on whether an item is an 'agency record' under the federal FOIA is persuasive in evaluating whether a record is a 'public record' under the Michigan FOIA." *Id.*

Judicial Watch v Federal Housing Finance Agency, 646 F3d 924, 926-27 (DC Cir 2011) (emphasis added). Oftentimes, courts conclude that "use is the decisive factor." *Consumer Fed'n of Am v Dep't of Agric*, 455 F3d 283, 288 (DC Cir 2006). That makes sense, as both the federal and Michigan's FOIAs are intended to shed light on government actions and decisions; and the manner of and extent to which documents are *utilized* is what provides such insights. Here, although the Closed Tanton Papers are described generically on Bentley's website, they cannot "used and disposed," and their contents have *never* been relied upon. Moreover, although Dr. Tanton might have relinquished physical control of the documents, he has not yet provided the University with the right to control those records as it sees fit. *Judicial Watch*, 646 F3d at 927 (rejecting argument that the federal entity controls a document merely because it holds title to it; "our cases have never suggested that ownership means control").

Other federal courts not applying the four-factor test described in *Judicial Watch* have rejected attempts to obtain records stored with the National Archives, an appropriate analogue to the Bentley Historical Library. In *Cause of Action v Nat'l Archives & Records Admin*, 753 F3d 210 (DC Cir 2014), the requestor sought copies of records that were prepared by the Financial Crisis Inquiry Commission, a legislative branch agency that was created to investigate the causes of the financial crisis. Although the Commission was not subject to FOIA, the requestor argued that the documents became "agency records" when they were transferred to, and thus possessed by, the National Archives. The D.C. Circuit noted that, as applied to the Archives, the four-factor test did not sufficiently recognize "FOIA's key objective—revealing to the public how federal agencies operate." *Id.* at 215. It explained that the Archives review and integration of records "do[es] not suddenly convert the records … into 'agency records' able to expose the operations of ***the Archives*** 'to the light of public scrutiny.'" *Id.* (citing *Dep't of Air Force v Rose*,

425 US 353, 372 (1976)) (emphasis added). Instead, the court noted that although the Archives controlled the records, its control consisted of "cataloguing, storing, and preserving, not unlike a 'warehouse.'" *Id.* at 216. Ultimately, as a matter of statutory interpretation and congressional intent, the court concluded that the documents were not "agency records" merely because they were deposited with the archives. *Id.* Put differently, the D.C. Circuit concluded that FOIA was designed to shed light on the workings of the final "holder" of the records, not the original creator.

Similarly here, although Bentley nominally possesses the documents, it is acting as a mere warehouse. As Ahmad admits, the documents are locked away and "are not available to the university community or the public at this time," (Compl Ex 9), somewhat akin to being stored in a time capsule, or even a locked backpack left in a reading room. Unlike other University library records, the Closed Tanton Records are not digitized or searchable. The University might physically possess the documents, but it does not have the *right* to access the documents. In other words, while it may be true that the documents are physically within the Bentley buildings, they are only maintained pursuant to the charitable gift agreement. Consequently, they are not "public records" subject to FOIA. *See Katz v National Archives*, 862 F Supp 476, 482-83 (DDC 1994) (photographs from President Kennedy's autopsy, which were donated to the National Archives pursuant to a deed of gift by the executors of the President's estate, were not "agency records" because the Archives "does not have the requisite control over them because of the Deed of Gift," which contained restrictions on access), *aff'd*, 68 F3d 1438 (DC Cir 1995). Thus, Ahmad's argument – that "possession" alone is sufficient to confer public record status – conflicts with a long line of uninterrupted precedent as well as persuasive federal

authority. And, accessing the closed portion of the Tanton papers would not shed light on the workings of the final "holder" of the records (Bentley).

Ahmad's attempt to shoehorn the Closed Tanton Records into the statutory definition of public records also fails for a related reason: they are reference or research materials. Surveying persuasive federal authority, Judge Borrello noted, "materials that are purely reference materials or research materials do not fall within the ambit of 'agency records' that are subject to disclosure under the federal FOIA." (Ex 1, Opinion and Order at 5 (citing cases)). For example in *SDC Dev Corp v Mathews*, 542 F2d 1116 (9th Cir 1976), Judge (now Justice) Anthony M. Kennedy considered whether a reference library of medical writings, stored in a computer bank by a federal agency, were "agency records" under the federal FOIA. In that case, the National Library of Medicine was created "to *acquire and preserve* medical publications, index and catalogue the materials, make the indexes and catalogues available to the public, and provide such other research assistance as furthers the purposes of the statute," *id.* at 1117 (emphasis added), a purpose analogous to the Bentley Library. Affirming the dismissal of the FOIA claim, Judge Kennedy explained that "the library material does not directly reflect the structure, operation, or decision-making functions of the *agency*," *i.e.*, the final holder, thereby falling outside the scope of an "agency record." *Id.* at 1120 (emphasis added). *See also Baizer v US Dept of Air Force*, 887 F Supp 225, 228 (ND Cal 1995) ("If an agency integrates material into its files and relies on it in decision making, then the agency controls the material. If, on the other hand, material is maintained solely for reference purposes or as a research tool, then the indicia of control are lacking."); *Katz*, 862 F Supp at 482-83; *Cause of Action*, 753 F3d at 215. Ahmad does not challenge this finding on appeal and has therefore waived his ability to challenge Judge Borrello's conclusion that reference material are outside FOIA's scope. *Denhof v Challa*, 311

Mich App 499, 521; 876 NW2d 266 (2015) ("When an appellant fails to dispute the basis of a lower court's ruling, we need not even consider granting the relief being sought by the appellant.")

Ahmad's "plain language" argument ignores a key statutory requirement. For a document to be a public record, it must relate to the "performance of an official function." MCL 15.232(e). While there are several preliminary words in the definition of a "public record" – "[1] prepared, [2] owned, [3] used, [4] in the possession of, or [5] retained" – simply satisfying one of those is not enough.[9] Consequently, because it is necessary to tie the document to the "performance of an official function," Judge Borrello correctly noted that this Court's rulings "have, in answering the question of whether a writing is utilized in the performance of an official function, generally found such utilization in the context of a document that was *actively* used in a public body's decision-making process." (Ex 1, Opinion and Order at 3 (emphasis in original)).

Judge Borrello was not, as Ahmad asserts, requiring that the document be "used" to the exclusion of the other preliminary words. Nor was Judge Borrello deviating from the statute by noting that Michigan case law has generally found that a public record is related to the "performance of an official function" "in the context of a document that was *actively* used in a public-body's decision-making process." (Ex 1, Opinion and Order at 3). Instead, applying the plain language of the statute, as interpreted by this Court's precedents, Judge Borrello correctly concluded that to tie the documents to the "performance of an official function," the documents must do more than just sit in a box. As noted above, that conclusion is consistent with *Amberg*, the only FOIA case Ahmad cites to support this argument. (*Id.* at 3 (citing *Amberg*)).

[9] Neither the University nor Judge Borrello required Ahmad to prove that the records fit all of the preliminary criteria in MCL 15.232(e), as Ahmad appear to assert on page 10-11 of his brief. Instead, as noted below, Ahmad's claim failed because he never tied the documents to the "performance of an official function."

The statute requires that the documents be tied to "the *performance* of an official function." MCL 15.232(e) (emphasis added). "Performance" is defined as "the execution of an action."[10] Thus, the statutory definition of "public record" necessarily imports an action. Consequently, the "mere possession of the records in [an] archival fashion does not establish the relationship between the records and the official function of the public body." (Ex 1, Opinion and Order at 6). Notably, Ahmad does not cite any FOIA case that did not have an active timing element, such that the records were being used or imminently would be used.[11]

Ahmad's assertion that an active timing element "makes little practical sense" is misplaced. According to Ahmad, "[i]f active status were the standard under the law, any public records kept in records retention, filing cabinets, or backup hard drives of government not recently touched by government workers would never be subject to FOIA's disclosure because a public body would simply claim document 'inactivity'…." (Ahmad's Br at 12). Initially, this argument is off-the-mark because it is based on a premise that does not apply here: the recent non-use of documents that were, at one time, indisputably "public records." The University is not asserting that once a document is a "public record," it can remove it from the scope of FOIA, and Judge Borrello did not make such a ruling. Instead, Judge Borrello was addressing whether the private Closed Tanton Records have, at least for now, ever reached the status of "public records" under FOIA.

The critical inquiry is whether the documents were used "in the performance of an official function." "Public records," such as official meeting minutes and information distributed to public officials prior to a hearing are used in the performance of an official function and

[10] (https://www.merriam-webster.com/dictionary/performance).

[11] Many cases assume that the documents met the statutory definition of "public record," without any analysis of whether they were owned or possessed "in the performance of an official function."

remain subject to FOIA. Placing those documents in an archive does not remove them from FOIA. On the other hand, taking private documents – which are never tied to "the performance of an official function" – and merely storing them in an archival fashion does not transform those documents into "public records."

Although Ahmad contends that the documents should be produced because they relate to the ongoing debate regarding this county's immigration policy, that documents relate to a current event is insufficient to transform a private document in a public record. FOIA does not provide *carte blanche* access to records simply because those records relate to a trending topic.

Similarly, Ahmad's belief that the records might shed light on the influence that certain private organizations might play in shaping the country's immigration policy, (Compl, ¶13; Ahmad Br at 2), does not justify disclosure. *Judicial Watch v Federal Housing Finance Agency*, 646 F3d 924 (DC Cir 2011). In *Judicial Watch*, the court rejected the requestor's attempt under the federal FOIA to obtain information about how much money Fannie Mae and Freddie Mac gave to politicians leading up to the recent financial crisis. Affirming the denial of the request, the court explained that "satisfying curiosity about the internal decisions of private companies is not the aim of FOIA, and there is no question that disclosure of the requested records would reveal nothing about decisionmaking at the [Federal Housing Finance Authority]," the federal agency which possessed the private records. *Id.* at 928. Because the agency did not create or reference the documents while performing "official duties," they were outside the scope of FOIA. *Id.*

Analogously, although Ahmad is curious as to how the Federation for American Immigration Reform ("FAIR") has shaped and affected US immigration policy, his curiosity does not turn private documents into public records. The documents will not reveal anything

about Bentley's functions, or even the functions of the University. (Ex 1, Opinion and Order at 7). "The public cannot learn anything about [Bentley's] decisionmaking from a document the agency neither created nor consulted, and requiring disclosure under these circumstances would do nothing to further FOIA's purpose of 'open[ing] agency action to the light of public scrutiny.'" *Judicial Watch*, 646 F3d at 927 (quoting *Rose*, 425 US at 372). In other words, as the Michigan Supreme Court has explained, FOIA's "purpose … is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Mager v Dep't of State Police*, 460 Mich 134, 148; 595 NW2d 142 (1999) (quotations omitted). *See also Kocher*, 241 Mich App at 382-83 ("Plaintiff's request for information concerning private citizens is unrelated to how well defendant is complying with its statutory functions"). Simply put, the Closed Tanton records "plainly do not have the capacity to inform the citizenry of what the Library 'is up to.'" (Ex 1, Opinion and Order at 6-7). *See also SDC Dev Corp v Mathews*, 542 F2d 1116, 1120 (9th Cir 1976) ("library material does not directly reflect the structure, operation, or decision-making functions of the agency").

Finally, Ahmad's assertion that the University is advocating for a "new" exemption for charitable gift agreements is off-the-mark. In the Court of Claims, the University did not argue for, and Judge Borrello did not create, any "new" exemptions.[12] Instead, Judge Borrello faithfully applied the language of the statute, concluding that the records fell outside the statutory definition of "public records." Here, Ahmad cannot tie the records to the "performance of an official function" because Bentley does not exist merely to acquire documents. Instead, unless a

[12] Judge Borrello rejected the University's argument that any exemption applied.

document is "collect[ed], preserv[ed], **and** ma[de] available,"[13] the documents are not possessed in the performance of an "official function."

If Ahmad's interpretation of FOIA were correct, which it is not, any public entity would be required to dig up a time capsule if it received a FOIA request for records placed in the capsule. Such an interpretation would produce an absurd result, in violation of a well-recognized canon of statutory interpretation. *Luttrell v Dep't of Corr*, 421 Mich 93, 106; 365 NW2d 74 (1984) ("It is a recognized rule of statutory interpretation that the courts will not construe a statute so as to achieve an absurd or unreasonable result."). Overall, while Ahmad focuses on physical possession, he ignores case law establishing that mere possession is not enough and that "it is ownership, use, possession, or retention ***in the performance of an official function that is determinative."*** *Detroit News*, 204 Mich App at 724-25 (emphasis added).

E. It Was Not Necessary for the Court of Claims to Review the Actual Gift Agreement

The existence (or non-existence) of a gift agreement does not alter the conclusion that private records which are not tied to the "performance of an official function" are not "public records." Ahmad waived his principal argument on appeal—that the Court of Claims' ruling was premature—and it lacks merit in any event.

First, Ahmad never argued that the Court of Claims could not rule unless it reviewed the charitable gift agreement. Thus, Ahmad waived this argument. (*See, e.g.*, Ahmad's Br at 13, n6 ("For an issue to be preserved *for appellate review*, it must be raised, addressed, *and decided* by the lower court.") (citing *Hines v Volkswagen of America*, 265 Mich App 432, 443; 695 NW2d 84) (emphasis in Ahmad's Brief). *See also Bennett v Russell*, No. 334859, _ Mich App_; _ NW2d _; 2018 WL 442374, at *2 (Mich Ct App Jan 16, 2018) ("when a party presses a claim of

[13] (http://regents.umich.edu/bylaws/bylaws12.html#7) (emphasis added).

error that was not raised in, and addressed and decided by, the trial court, it is not properly preserved for appellate review"); *Maxson v Bay Co*, 290 Mich 86, 89, 287 NW 389 (1939) ("the question, not having been presented to or passed upon by the trial court, cannot be raised for the first time on appeal").

Second, the issue in this case is whether private records became public records subject to FOIA, not whether a valid and enforceable gift agreement exists; and thus there is no need to review any gift agreement. *See Katz v Natl Archives & Records Admin*, 68 F3d 1438, 1441 (DC Cir 1995) (rejecting argument that the court needed to consider the validity of a deed restriction on a gift of President Kennedy autopsy photos because the photographs were personal presidential materials when created and had not become agency records). As set forth above, mere possession of private records by a public entity is not enough. Unless the records are utilized in the performance of an official function, they remain outside of FOIA's scope. Here, there is no dispute that the records are closed to research and that they have not been used by anyone. (*See e.g.*, Compl, ¶¶8, 11)**.** Consequently, the purely legal issue before the Court of Claims and the Court of Appeals is whether private documents warehoused by a public library become "public records." As set forth elsewhere in this brief, the records never became public records subject to disclosure.

F. Ordering the Production of the Closed Tanton Papers Would Frustrate the Purposes of FOIA and the University's Mission

FOIA's purpose is to provide individuals with "full and complete information regarding the affairs of government and the official acts of those who represent them." Even if Ahmad were correct (which he is not) that the Closed Tanton Papers somehow relate to the "affairs of government," ordering their production in this case would frustrate the pro-disclosure purpose of FOIA by inhibiting the donation of private papers to public institutions.

Ordering disclosure would not be in keeping with the purpose of Michigan's FOIA, which is to provide this state's residents with information about the affairs of their state government, allowing them to "participate in the democratic purpose." MCL 15.231(2); *Amberg*, 497 Mich at 30. To fulfill that purpose, FOIA "requires public disclosure of information regarding the formal acts of public officials and employees" in Michigan. *Booth Newspapers v Univ of Mich Bd of Regents*, 444 Mich 211, 231; 507 NW2d 422 (1993). Ahmad's request has nothing to do with that purpose. Here, Ahmad is seeking restricted papers housed by a ***state*** institution (the Bentley Historical Library) because he believes they may be relevant to the ***national*** immigration debate, including the formulation of the current presidential administration's ***national*** immigration policy. But, Bentley plays no role in federal immigration policy. Unsealing a donor's private papers (in contravention of the gift agreement) to satisfy Ahmad's interest in ***national*** policy issues would shed no light on the actions of ***state*** government and thus do nothing to further the letter or spirit of Michigan's FOIA. Indeed, for the reasons noted below, it would undermine FOIA's purposes.

Dr. Tanton donated his papers pursuant to a charitable gift agreement, with the understanding that certain papers would remain sealed for 25 years. He was not obligated to donate the documents to Bentley or any *public* institution. He could have easily donated them to a private institution, which would not be subject to FOIA and thus could deny access to the public. In the end, Dr. Tanton donated the records to Bentley precisely because the University agreed that certain documents would remain sealed for the specified period, preventing access by anyone—University student, researcher or public citizen. Absent Bentley's agreement that the documents would remain sealed, Dr. Tanton likely would not have donated the documents to the University where, after an agreed upon period of time, they would be open to the public.

Ahmad's assertion that the gift agreement somehow violates public policy lacks merit. The University is not attempting to "contract around" its FOIA obligations. In *MacKenzie*, a case on which Ahmad relies, the documents were used by the defendant and remained public records notwithstanding the defendant's decision to contract with an outside entity "to more efficiently perform an official function." 247 Mich App at 129.[14] Here, the documents never became public records. Instead, Dr. Tanton determined that he did not want a portion of his donated private records to become public records for 25 years.[15]

Far from violating public policy, adhering to a donor's instructions on access restrictions for personal records of historical interest is critical to ensuring that future donations continue, as indicated by testimony before a United States Senate Subcommittee following the release of Justice Thurgood Marshall's papers immediately upon his death.[16] Justice Marshall had donated his papers to the Library of Congress, with access restrictions during his lifetime. After his

[14] In *Kestenbaum*, the other case Ahmad quotes, the Michigan Supreme Court stated that: "A public body may not thwart disclosure under the FOIA by the simple expedient of sending sensitive documents home with its employees." 414 Mich at 539. In the next sentence (omitted by Ahmad in his brief), the Supreme Court explained that "unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee." *Id.* In other words, the Supreme Court recognized the dichotomy of public writings and private writings, the latter of which are not automatically subject to disclosure.

[15] Although not necessary for the Court to address, other reasons support rejecting Ahmad's public policy argument. For example, charitable gifts or donations are deeply rooted in Michigan jurisprudence. *In re Rood's Estate*, 41 Mich App 405, 422; 200 NW2d 728 (1972) ("Charitable gifts and trusts are favorites of the law and of the courts, and the courts will declare valid, and give effect to, such gifts and trusts where it is possible to do so consistently with established principles or rules of law.") (internal quotation omitted). Additionally, FOIA does not contain any provisions mandating that private property and information coming into the hands of a public body automatically becomes a "public record." Finally, there is no legal support for Ahmad's false premise that the principles underlying FOIA supersede all other legal principles, including principles requiring compliance with donor intent. *See Babcock v Fisk*, 327 Mich 72, 83; 41 NW2d 479 (1950) (solicitors of funds responsible for carrying out donor intent).

[16] *Public Papers of Supreme Court Justices: Assuring Preservation and Access: Hearing Before the Subcomm on Regulation and Gov't Info of the U.S. Senate Comm on Governmental Affairs*, 103rd Cong. (1993) (hereinafter "Public Papers") (Ex 3).

death, the collection was to "be made available to the public at the discretion of the Library."[17] After newspaper articles were published discussing the contents of those papers, the Senate convened a subcommittee hearing to discuss the issue. Defending the release of the records, the Librarian of Congress testified that "it is for the donor to decide when the collection is to be made available, and for us to carry out that determination. We have consistently, rigorously, scrupulously adhered to that principle."[18] The Librarian explained further that "[w]e rely upon the judgment of each donor as to the most appropriate restrictions on access to his or her papers."[19] The President of the Society of American Archivists, Anne R. Kenney, provided testimony echoing the importance of following donor intent in handling donated documents. She stated:

> ***Donors have an absolute right to dictate the conditions under which their papers are to be used***. And while archivists can and should advise on the ramifications of such restrictions or of unrestricted access, it ultimately does rest with the donor to make the final decision, providing it is consonant with the law and the capabilities of the repository.[20]

Ms. Kenney further explained that by "holding fast" on donor instructions, other donors can be assured that the archivist would "honor their conditions if they chose to dictate limited access."[21]

Ordering Bentley to produce the sealed records in this case would likely dissuade other similarly situated individuals from donating private papers of historical significance to public

[17] *Id*. at 69 (Thurgood Marshall instrument of gift).

[18] *Id.* at 7.

[19] *Id.*

[20] *Id.* at 23 (Testimony of Anne R. Kenney, President, Society of American Archivists) (emphasis added).

[21] *Id.* at 24.

institutions.[22] Such documents would instead either be donated to private institutions completely outside the reach of FOIA or destroyed. This would frustrate the purpose of FOIA and the public policy of the state (which encourages donations) by making less information potentially subject to FOIA at some future date.[23] The University would be hindered from fulfilling its mission to "serve the people of Michigan and the world through preeminence in creating, communicating, *preserving* and applying knowledge, art and academic values…."[24] At the same time, Bentley's efforts to "collect[], preserv[e], and mak[e] available" historical records would be undermined.

The Closed Tanton Papers are not closed in perpetuity. Instead, this portion of his donated papers is restricted from public access for 25 years, a practice that is common when others (*e.g.*, legislators or judges) donate private papers. For example, Justice William Brennan's papers maintained by the Library of Congress contain access restrictions.[25] And Justice Scalia's family recently donated his private papers to the (private) Harvard Law School, which "will be made available for research on a schedule agreed upon by the Scalia family and

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[22] Donors make contributions "if the donor is reasonably assured that that the charity [here, a public body] will carry out its side of the 'contract' implicit in a donation." Susan N. Gary, *The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing*, 85 Chi-Kent L Rev 977, 1002 (2010). It logically follows that "failure to respect donor intent will result in fewer donations." *Id.* at 1003.

[23] It is also increasingly likely that failure to follow a donor's intent will result in the donee institution being subjected to litigation. This is not a speculative risk, as recent years have seen a spike in lawsuits by donors and their families to enforce gift intent. Kathryn Miree and Winton Smith, *The Unraveling of Donor Intent: Lawsuits and Lessons* (Nov 12, 2009), *available at* http://www.pgdc.com/pgdc/unraveling-donor-intent-lawsuits-and-lessons. Among the more recent lawsuits, the University of Chicago is currently being sued by a donor for failing to follow the terms of the gift agreement. Dawn Rhodes, *Pearson Family Members Foundation sues University of Chicago, aiming to revoke $100M gift*, Chicago Tribune (Mar 6, 2018), *available at* http://www.chicagotribune.com/news/local/breaking/ct-met-university-of-chicago-donation-lawsuit-20180305-story.html.

[24] (https://president.umich.edu/about/mission/) (emphasis added).

[25](http://findingaids.loc.gov/db/search/xq/searchMfer02.xq?_id=loc.mss.eadmss.ms002010&_faSection=overview&_faSubsection=did&_dmdid=)

the Harvard Law School Library."[26] Justice David Souter's papers will remain closed until the fiftieth anniversary of his retirement. Kathryn A. Watts, *Judges and Their Papers*, 88 NYUL Rev 1665, 1671, 1684 (2013). Justice Robert H. Jackson's papers were unavailable for thirty years after his 1954 death. *Id.* at 1671 n27. *See also id.* at 1684 (describing access restrictions placed on papers by Justice Warren Burger, Justice Harry Blackmum and Chief Justice William H. Rehnquist).

A "delayed" record that is preserved and later becomes available to the public is better than a destroyed or secret private record of historical significance. Accordingly, requiring access to the Closed Tanton Papers would frustrate the purposes of FOIA and the University's mission.

G. Statutory and Constitutional Limitations Preclude Ordering Access to the Closed Tanton Records

1. The Library Privacy Act Provides Bentley with Exclusive Authority to Control Access to Library Materials

Upholding the denial of Ahmad's FOIA request, Judge Borrello noted that not only would releasing the Closed Tanton Papers "violate the terms pursuant to which they were given to the library, *but it would also permit the use of FOIA to interfere with the Library's statutory authority to determine the use of its own materials*," citing MCL 397.605(2), a provision of the Library Privacy Act. (Ex 1, Opinion and Order at 4) (emphasis added). In other words, the

[26] *Scalia Family Donates Late Justice's Papers to Harvard Law School Library* (Mar 6, 2017), *available at* https://today.law.harvard.edu/scalia-family-donates-late-justices-papers-harvard-law-library/.

Library Privacy Act provides an alternative and independent basis for affirming, regardless of the existence or content of the charitable gift agreement between the University and Dr. Tanton.[27]

The Library Privacy Act sets forth rules governing both the selection and use of library records. MCL 397.605(1) addresses the acquisition of potential library materials. It states that "Except as otherwise provided by statute or by a regulation adopted by the governing body of the library, ***the selection of*** library materials for inclusion in a library's collection ***shall be determined only by an employee of the library***." MCL 397.605(1)(emphasis added). MCL 397.605(2) addresses the use of collected materials. It states that "Except as otherwise provided by law or by a regulation adopted by the governing body of the library, ***the use of library materials shall be determined only by an employee of the library.*** MCL 397.605(2)(emphasis added). The phrase "shall be determined only by" vests exclusive authority in library employees to determine whether to acquire materials and whether there should be any restrictions on the use of those materials. In other words, library employees (and not private parties or the courts) determine when library materials can be used. A contrary rule would mean that an individual could obtain rare, fragile, irreplaceable materials in a public library collection through FOIA.

There is no conflict between FOIA, originally enacted in 1976, and the Library Privacy Act, MCL 397.601, *et seq.*, enacted in 1982. "It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when

[27] On appeal, Ahmad does not address Judge Borrello's holding regarding the applicability of the Library Privacy Act, thereby waiving any challenge on appeal to this ruling. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523 (2004) ("issue not contained in the statement of questions presented is waived on appeal"). And, he cannot address this issue for the first time in a reply brief. *Wade v McCadie*, No. 335418, 2017 WL 5473215, at *7 (Mich Ct App Nov 14, 2017) ("Moreover, even if the arguments had been raised in Wade's brief on appeal as opposed to his reply brief, it would still be improper to consider them. 'Michigan generally follows the 'raise or waive' rule of appellate review.') (quoting *Walters v Nadell*, 481 Mich 377, 587; 751 NW2d 431 (2008)).

enacting new laws." *Walen v Dep't of Corr*, 443 Mich 240, 248; 505 NW2d 519 (1993). "Moreover, as a general rule, a more recently enacted statute takes precedence over an earlier one, especially if the more recent one is also more specific." *City of Kalamazoo v KTS Indus*, 263 Mich App 23, 34; 687 NW2d 319 (2004). FOIA is a general statute regarding the disclosure of public records. The Library Privacy Act is a more recent, specific statute which (among other things) governs the selection and use of library materials. MCL 397.605. Because requiring disclosure would undermine Bentley's statutory authority to control access to library materials, the documents are not "public records" under FOIA. *See also SDC Dev Corp*, 542 F2d at 1118 (affirming dismissal of federal FOIA claim and noting that requiring production of reference materials "would result in the obliteration of that portion of the National Library of Medicine Act, 42 U.S.C. s 276(c)(2), which gives the Secretary and the Board of Regents wide discretion in setting charges for use of library material").

2. Ordering Disclosure Would Contravene the University's Constitutional Autonomy Under Article VIII, §5 of the Michigan Constitution

Although, for the reasons above, the Court need not consider the issue,[28] Article VIII, §5 of the Michigan Constitution grants the University full autonomy to exercise jurisdiction over its educational mission. *Federated Publications v Mich State Univ Bd of Trustees*, 460 Mich 75, 87; 594 NW2d 491 (1999). Indeed, a "long series of Supreme Court decisions and Attorney General opinions … established the independent authority of the universities to be free from legislative interference in the operation of their respective institutions." *Regents of Univ of Mich v State*, 47 Mich App 23, 52; 208 NW2d 871 (1973).

[28] Courts avoid addressing constitutional questions where statutory or general law concepts are dispositive. *Dep't of Health and Human Services v Genesee Circuit Judge*, 318 Mich App 395, 407; 899 NW2d 57 (2016) ("The 'widely accepted and venerable rule of constitutional avoidance' counsels that we first consider whether statutory or general law concepts are instead dispositive." (quoting *People v McKinley*, 496 Mich 410, 415–416, 852 NW2d 770 (2014)).

Article VIII, §5 precludes Ahmad from using the courts to second-guess Bentley's academic, curatorial decisions to accept donations with conditions. Indeed, such an intrusion on the University's autonomy was foreclosed almost 150 years ago when the Supreme Court rejected legislative efforts requiring the University to appoint a professor of homeopathic medicine. *People v Regents of the Univ of Mich*, 18 Mich 469, 482 (1869).

The same constitutional provision grants the University autonomy in how it acquires and uses property. *See, e.g., Regents of Univ of Mich v State*, 166 Mich App 314, 329; 419 NW2d 773 (1988) (striking down state law precluding investment of University funds in certain countries on constitutional autonomy grounds). That authority includes the right of the University to enter into charitable gift agreements with restrictions. Here, Bentley – an academic unit of the University – has determined that allowing donors to put modest restrictions on their private papers – a common practice[29] – would most effectively further its mission of obtaining documents that would at some point be available to students, scholars, and the residents of Michigan. This is a decision for Bentley to make in its considered judgment, not Ahmad. His arguments fail to recognize that, if Bentley cannot exercise its discretion to accept gifts in such a manner, records will almost certainly go to private institutions which, unlike the University, have no obligation to share them with the public at some point. In short, casting aside the terms of a charitable gift agreement and ordering disclosure of what are still private papers would foil FOIA's purpose and run counter to Article VIII, §5 because it would ultimately lead to fewer publically available historical records.

[29] (*See* pages 28-29).

H. Alternatively, The Closed Tanton Papers are Exempt from Disclosure

The University's denial of Plaintiff's administrative appeal, in addition to stating that the Closed Tanton Papers fell outside the definition of "public records," concluded that disclosure would constitute an unwarranted invasion of the donor's privacy. (Compl Ex 9). Accordingly, if the papers were "public records" (which they are not), then the Court should dismiss Plaintiff's Complaint because the University appropriately determined that Plaintiff's request for the Closed Tanton Papers were exempt under FOIA's privacy exemption.[30]

MCL 15.243(1)(a) exempts from FOIA disclosure "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." This exemption "has two prongs that the information sought to be withheld from disclosure must satisfy. First, the information must be 'of a personal nature.' Second, it must be the case that the public disclosure of that information 'would constitute a clearly unwarranted invasion of an individual's privacy ....'" *Mich Fed of Teachers v Univ of Michigan*, 481 Mich 657, 675; 753 NW2d 28 (2008). "Information of a personal nature" includes "private or confidential information relating to a person" as well as "embarrassing or intimate details." *Id.* at 676. To determine whether disclosure would be "a clearly unwarranted invasion of an individual's privacy," the court "must balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect." *Mager*, 460 Mich at 145 (quotation marks and citation omitted). During this balancing analysis, "the only relevant public interest in disclosure ... is the extent to which disclosure would serve the core purpose of the FOIA, which

[30] Even if the appeal denial had not raised the privacy argument, the University is permitted to raise additional arguments not previously presented at the administrative level. *Bitterman v Vill of Oakley*, 309 Mich App 53, 61; 868 NW2d 642 (2015) ("a public body may assert for the first time in the circuit court defenses not originally raised at the administrative level") (citations omitted).

is contributing significantly to public understanding of the operations or activities of the government." *Id.* (quotation marks, citations, and emphasis omitted).

Here, Ahmad cannot demonstrate that the public interest in disclosure of the Closed Tanton Papers outweighs Dr. Tanton's privacy rights and the right to control when and under what circumstances his private communications may be subject to public scrutiny. Ahmad seeks access to the Closed Tanton Records precisely because it contains private information. Dr. Tanton has taken proper legal steps to protect against disclosure by (a) not previously publishing the content of his private papers; and (b) entering into a contract with the University under which the University agreed not to disclose a portion of his papers for a certain period of time. Disclosure is unwarranted because it would breach the donor's gift agreement and understanding that certain papers would remain private.

What is more, Dr. Tanton is a private citizen and has never been employed by the University. Likewise, as noted above, the University has not used the Closed Tanton Records in the performance of any governmental function. As such, Plaintiff cannot credibly argue that the disclosure of the Closed Tanton Papers will contribute "significantly to public understanding of the operations or activities of the government." *Mager*, 460 Mich at 145. "As the U.S. Supreme Court explained in [*Dep't of Justice v Reporters Committee for Freedom of the of the Press*, 489 US 749 (1989)], fulfilling a request for information on private citizens—a request entirely unrelated to any inquiry regarding the inner working of government, or how well the [the government] is fulfilling its statutory functions—would be an unwarranted invasion of the privacy of those citizens." *Mager*, 460 Mich at 146.

IV. Conclusion

For the foregoing reasons, the University of Michigan requests that the Court affirm the dismissal of Ahmad's Complaint, in its entirety.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/Brian M. Schwartz

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Dated: March 28, 2018

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2018, I caused to be electronically filed the foregoing paper with the Clerk of the Court using the electronic file and serve system which will send notification of such filing to:

Philip Ellison at pellison@olcplc.com .

Respectfully submitted,

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Exhibit 1

STATE OF MICHIGAN

COURT OF CLAIMS

HASSAN A. AHMAD,

Plaintiff,

v

THE UNIVERSITY OF MICHIGAN,

Defendant.

OPINION AND ORDER

Case No. 17-000170-MZ

Hon. Stephen L. Borrello

Pending before the Court is defendant's motion for summary disposition under MCR 2.116(C)(8). For the reasons stated more fully in this Opinion and Order, defendant's motion for summary judgment is GRANTED. This matter is being decided without oral argument pursuant to LCR 2.119(A)(5).

I. BACKGROUND

In this FOIA action, plaintiff seeks records created and donated by a private individual, Dr. John Tanton, to the University of Michigan's Bentley Historical Library ("the Library"). Tanton's donation to the Library consisted of 25 boxes of papers. Boxes 1-14 were donated with no restrictions on their use. Boxes 15-25, however, are to be closed—meaning inaccessible to the public, students, or faculty—until approximately April 6, 2035.

In December 2016, plaintiff filed a FOIA request seeking the documents in Boxes 15-25, as well as any other "closed" materials. Plaintiff subsequently narrowed this request in January 2017, but still sought "closed" materials. Defendant denied the request on or about May 8, 2017,

contending that the materials sought were not "public records" as defined by FOIA. As an alternative, defendant argued that, even assuming the materials were "public records," they were exempt from disclosure under MCL 15.243(1)(a), which exempts from disclosure materials of a personal nature.

II. ANALYSIS

MCL 15.233(1) permits the inspection, upon written request, of "public records" of a public body. The purpose of FOIA is to provide persons with access to "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." MCL 15.233(2). In light of the statute's stated purpose, FOIA has often been described as a pro-disclosure statute, and any interpretation of its provisions must be made with that purpose in mind. *Hopkins v Duncan Twp*, 294 Mich App 401, 410; 812 NW2d 27 (2011).

FOIA defines "public record" to mean "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." There is no dispute that defendant is a public body or that the materials sought qualify as "writings" under FOIA. Although the records in this case were prepared by a private individual and thus were not public records at the time of their creation, the fact that a writing is not a public record at the time it is created does not control the outcome with regard to whether it is a "public record" under FOIA. In fact, "[a] writing can become a public record after its creation." *Detroit News, Inc v Detroit*, 204 Mich App 720, 725; 516 NW2d 151 (1994).

A writing can become a public record subject to FOIA depending on its use by the public body. *Hopkins*, 294 Mich App at 409-410. In order for a writing to become a public record, the

public body must do more than merely possess the record. *Id.* "[W]hat ultimately determines whether records in the possession of the public body are public records within the meaning of FOIA is whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function." *Amberg v Dearborn*, 497 Mich 28, 32; 859 NW2d 674 (2014). Thus, the Court's inquiry focuses on how or if the writings "are utilized by public bodies." *Howell Ed Ass'n*, 287 Mich App at 243.

In this case, the issue is whether materials possessed by a library are utilized by the public body in the performance of an official function. The parties have not identified any Michigan caselaw directly on point. Nonetheless, this state's appellate courts have, in answering the question of whether a writing is utilized in the performance of an official function, generally found such utilization in the context of a document that was *actively* used in a public body's decision-making process. For instance, in *Amberg*, 497 Mich at 32, a surveillance video that was found to have been used to help support the decision to issue a misdemeanor citation was used in the performance of an official function. In addition, in *Walloon Lake Water Sys, Inc v Melrose Twp*, 163 Mich App 726, 729-730; 415 NW2d 292 (1987), a letter became a public record when it was read aloud into the record at a public meeting and its contents were subsequently used by the township board in its decision-making process. The Court in *Walloon Lake* explained that its holding intended to capture within the definition of "public records" records or writings "used or possessed [by public bodies] in their decisions to act." *Id.* at 730.

Contrastingly, in *Hopkins*, 294 Mich App at 411-412, a public official's personal notes taken during a township board meeting—notes that were neither shared with anyone else nor utilized by the Board—the Court of Appeals held that the notes were not taken in the performance of an official function. In addition, in *Howell Ed Ass'n*, the Court of Appeals was

tasked with deciding whether private e-mails that were "captured in a public body's e-mail system's digital memory" became public records. Although it was apparent that the e-mails were used or retained, the Court of Appeals held that the e-mails were not so used or retained in the performance of an official function. *Id.* at 436. Merely saving and retaining the e-mail messages was not enough. *Id.* at 243.

Turning to the instant case, the Court concludes that the records sought by plaintiff are more akin to those sought in *Howell Ed Ass'n* and *Hopkins* and that the records are not used or maintained in the performance of an official function. The records are plainly possessed by the library, but this mere possession is not enough to render the records "public" under FOIA. The records must be utilized by the public body in the performance of an official function, and the Court finds that the records have not been so utilized in this case. Releasing the documents would not reveal any information regarding the affairs of the Library; rather, it would "only reveal information regarding the affairs" of Tanton, who is not a public body. See *Howell Ed Ass'n*, 287 Mich App at 246. Indeed, as the parameters of the donation agreement attest, Library staff members do not even have access to view the materials, thereby rendering dubious the assertion that the Library has done more than merely possess the records, and negating any assertion that the Library has applied the materials to an official function. Moreover, releasing the papers would not only violate the terms pursuant to which they were given to the library, but it would also permit the use of FOIA to interfere with the Library's statutory authority to determine the use of its own materials. See MCL 397.605(2) ("Except as otherwise provide by law or a regulation adopted by the governing body of the library, the *use of library materials* shall be determined only by an employee of the library.") (Emphasis added).

The Court agrees with defendant that this conclusion is in accord with federal authorities that have decided similar issues.[1] In general, materials that are purely reference materials or research materials do not fall within the ambit of "agency records" that are subject to disclosure under the federal FOIA. See, e.g., *Tax Analysts v United States Dep't of Justice*, 845 F2d 1060, 1069 (DC Cir, 1998). For instance, in *SDC Dev Corp v Matthews*, 542 F2d 1116, 117 (1976), then-Judge (now Justice) Anthony M. Kennedy wrote for the Ninth Circuit, which concluded that a reference library of medical writings and publications was not an "agency record" as contemplated by FOIA. The Ninth Circuit explained that "[t]he library reference material does not directly reflect the structure, operation, or decision-making functions of the agency . . . ." *Id.* at 1120. In *Baizer v United States Dep't of Air Force*, 887 F Supp 225, 228-229 (ND Cal, 1995), a case that relied heavily on *SDC Dev Corp*, the Northern District of California held that material maintained "solely for reference purposes or as a research tool" was not an "agency record" subject to FOIA. Such materials, like museum materials, are only used for reference and exhibition purposes, and do not serve the same purpose as the types of records to which Congress intended the federal FOIA to apply. *Id.* at 229. In so concluding, the *Baizer* Court noted that the information requested in that case was not withheld in order for the agency to protect its own information. *Id.*

The United States Court of Appeals for the D.C. Circuit has reached similar conclusions in cases involving materials held at the National Archives. For instance, in *Katz v Nat'l Archives & Records Admin*, 68 F3d 1438, 1441 (DC Cir, 1995), autopsy photographs of President John F.

[1] "Federal court decisions regarding whether an item is an 'agency record' under the federal freedom of information act, 5 USC 552, are persuasive in determining whether a record is a 'public record' under the Michigan FOIA." *Hopkins*, 294 Mich App at 414.

Kennedy were not transformed into "agency records" by merely depositing the photographs with the Archives. See also *Cause of Action f Nat'l Archives & Records Admin*, 753 F3d 210, 215 (DC Cir, 2014), quoting *Dep't of Air Force v Rose*, 425 US 352, 361; 96 S Ct 1592; 48 L Ed 2d 11 (1976) ("[T]ypical archival functions—common to every record in the Archives—do not suddenly convert the records . . . into 'agency records' able to expose the operations of the Archives "to the light of public scrutiny.' ").

In light of the absence of Michigan caselaw directly on point, the Court finds these federal authorities particularly convincing. The records sought in this case are held by the Library as reference material, and therefore outside the scope of the records to which Michigan's FOIA was intended to apply. See MCL 15.232(e) (defining "public records.").[2] The Library's mere possession of the records in this archival fashion does not establish the requisite relationship between the records and the official function of the public body.

Plaintiff would have this Court find that defendant's mere possession is enough to satisfy the definition of "public records," because the Library's official function is to possess records. The Court declines to adopt such a view, and instead finds persuasive the views espoused in the federal authorities documented above. Additionally, the Court finds that plaintiff's argument contradicts the stated general purpose of FOIA statutes to inform citizens "about what their government is up to." *U.S. Dep't of Justice v Reporters Comm for Freedom of the Press*, 489 US 749, 773; 109 S Ct 1468; 103 L Ed 2d 774 (1989) (internal quotation marks and citation

[2] For the avoidance of doubt, this Court's opinion should not be construed as applying to material beyond reference material, nor should it be construed as giving public bodies license to withhold materials that would otherwise be within the scope of FOIA simply by referring to them as being "closed" from access for any period of time.

omitted). See also *Rataj v City of Romulus*, 306 Mich App 735, 748; 858 NW2d 116 (2014) (describing the purpose, in a similar fashion, of the Michigan FOIA statute). Simply paraphrasing, the library materials sought in this case plainly do not have the capacity to inform the citizenry about what the Library "is up to."

Because the Court concludes that the records are not public records within the meaning of FOIA, the Court need not decide defendant's conclusory assertion that the records meet the privacy exemption in MCL 15.243(1)(a).

IT IS HEREBY ORDERED that defendant's motion for summary disposition is GRANTED.

This order resolves the last pending claim and closes the case.

Dated: November 20, 2017,

Stephen L. Borrello, Judge
Court of Claims

Exhibit 2

2001 WL 738398
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Mark PORTER, Plaintiff-Appellant,
v.
Geoffrey FIEGER and Fieger, Fieger & Schwartz, P.C., Defendants-Appellees.

No. 221349.
|
June 29, 2001.

Before: SAWYER, P.J., and GRIFFIN and O'CONNELL, JJ.

Opinion

PER CURIAM.

***1** Plaintiff appeals as of right from the trial court's opinion and order granting defendants' motion for summary disposition in this action for defamation and intentional infliction of emotional distress. We affirm.

Plaintiff, a police officer who shot and killed an unarmed person while on duty, alleged that defendant Geoffrey Fieger publicly, falsely, and maliciously referred to plaintiff as a "murderer" and an "executioner." Plaintiff brought this action against Fieger, as well as his law firm, defendant Fieger, Fieger & Schwartz, P.C. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(8), holding that plaintiff was a public official and that plaintiff was unable to prove that the statements were made with actual malice. The trial court also dismissed plaintiff's claim of intentional infliction of emotional distress because plaintiff failed to offer evidence that he had experienced emotional suffering.

We review de novo the trial court's decision whether to grant a motion for summary disposition under MCR 2.116(C)(8). *Beaty v. Hertzberg & Golden, PC,* 456 Mich. 247, 253; 571 NW2d 716 (1997). Summary disposition is proper where, taking all factual allegations in the complaint as true, the claim "is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Simko v. Blake,* 448 Mich. 648, 654; 532 NW2d 842 (1995). We also bear in mind that, because defamation actions necessarily implicate First Amendment freedoms of speech and expression, summary disposition is an essential tool in protecting against forbidden intrusions into those fields. *Ireland v. Edwards,* 230 Mich.App 607, 613; 584 NW2d 632 (1998). We hold that the trial court did not err by granting defendants' motion for summary disposition.

Not all defamatory statements are actionable. *Id.* at 614. Where a statement, although factual and provably false, "could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff [,]" the statement is protected by the First Amendment. *Id.* at 617. Thus, a statement that is simply "rhetorical hyperbole" is not actionable. *Id.* at 618-619; *Kevorkian v. American Medical Ass'n,* 237 Mich.App 1, 7; 602 NW2d 233 (1999). For example, in *Ireland, supra* at 610-611, the defendant, an attorney, made several statements to the media during a child-custody battle between her client and the plaintiff. Some of the defendant's statements essentially claimed that the plaintiff never spent any time with the child, and this Court held that these statements were not actionable, but amounted to "rhetorical hyperbole." *Id.* at 618-619. The statements "were obviously expressions of disapproval regarding the amount of time plaintiff spent with her child, and, taken literally, they are patently false. However, any reasonable person hearing these remarks in context would have clearly understood what was intended." *Id.* at 619.

***2** Similarly, in *Kevorkian, supra* at 4-6, the defendants made statements to the effect that the plaintiff, a well-known proponent of assisted suicide, was a killer and a murderer. This Court, noting that its decision was strictly limited to the facts of the case, held that the trial court should have granted the defendants' motion for summary disposition. *Id.* at 10, 14. The panel set forth many reasons for its decision, one of them being that the statements amounted to "nonactionable rhetorical hyperbole" because they could not be understood as stating actual facts about the plaintiff. *Id.* at 13. The panel noted that the plaintiff's actions in assisting persons with suicide "can be described as murder or mercy, and any reasonable person could understand that both *or neither* could be taken as stating actual facts about [the] plaintiff."

Id. at 7. See also *Greenbelt Cooperative Publishing Ass'n, Inc v Bresler,* 398 U.S. 6, 14; 90 S Ct 1537; 26 L.Ed.2d 6 (1970) (holding that a reference to the plaintiff's negotiating position as "blackmail" was not actionable, in that it "was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable"); *Hodgins v. The Times Herald Co,* 169 Mich.App 245, 253-254; 425 NW2d 522 (1988) (holding that, although direct accusations of criminal conduct are not protected as opinion, "[e]xaggerated language used to express opinion, such as 'blackmailer,' 'traitor' or 'crook,' does not become actionable merely because it could be taken out of context as accusing someone of a crime").

In this case, plaintiff was a police officer who shot and killed an unarmed citizen. Defendant Fieger's references to plaintiff as a "murderer" and an "executioner" would be understood by any reasonable listener as rhetorical hyperbole, designed to express the opinion that the shooing was unjustified. Thus, Fieger's statements could not be understood as stating actual facts about plaintiff. Just as assisting someone to commit suicide may be viewed as mercy or murder, a police shooting of an unarmed person may be viewed as protecting society or murdering a citizen. Fieger's statements, although certainly containing vigorous epithets, simply conveyed disapproval of the shooting; therefore, they do not subject him to liability for defamation. The freedom of expression guaranteed by the First Amendment protects a statement that cannot be reasonably interpreted as stating actual facts about the plaintiff. *Ireland, supra* at 614.

The question whether a statement is an actionable defamatory statement may be decided by a court as a matter of law. *Id.* at 619. Therefore, the trial court appropriately granted defendants' motion for summary disposition. Although the trial court did not rely on this reasoning, this Court will nonetheless affirm the correct result. *Messenger v. Ingham Co Prosecutor,* 232 Mich.App 633, 643; 591 NW2d 393 (1998). Plaintiff's allegations did not show that defendants made an actionably false and defamatory statement concerning plaintiff. Thus, plaintiff failed to satisfy the elements of a defamation claim, and summary disposition was appropriate under MCR 2.116(C)(8).

***3** We also note an alternative ground for granting summary disposition. Plaintiff, a police officer, was a public official for purposes of defamatory statements relating to the performance of his official duties. Thus, plaintiff was required to prove that the statements were made with actual malice. *Garvelink v. The Detroit News,* 206 Mich.App 604, 608; 522 NW2d 883 (1994). "Actual malice" means that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co v. Sullivan,* 376 U.S. 254, 279-280; 84 S Ct 710; 11 L.Ed.2d 686 (1964). In this case, the circumstances surrounding the shooting were reasonably in dispute. Also, beyond mere conclusory allegations, plaintiff fails to plead actual malice. Mere statements of the pleader's conclusions will not survive a motion for summary disposition. *ETT Ambulance Service Corp v. Rockford Ambulance,* 204 Mich.App 392, 395; 516 NW2d 498 (1994). Plaintiff fails to specifically plead factual allegations that defendant Fieger knew that his statements were false or entertained serious doubts concerning the truth of his statements. *Ireland, supra* at 622. Plaintiff claims that summary disposition was premature because no discovery had taken place. However, because the motion was brought under MCR 2.116(C)(8), the court only looked to the pleadings. No factual development would justify recovery. Plaintiff simply failed to state a claim on which relief could be granted.

Plaintiff argues that he was not a public official, because he was merely a street-level policeman without control over the affairs of government. However, we need not decide this issue because, in any event, summary disposition of plaintiff's defamation claim was appropriate because defendant Fieger's statements were nonactionable rhetorical hyperbole. Because plaintiff's claim of intentional infliction of emotional distress is based on the same statements, summary disposition of that claim was also appropriate. *Ireland, supra* at 624-625. First Amendment protections are not exclusive to defamation claims. *Collins v. Detroit Free Press, Inc,* 244 Mich.App 27, 36; 624 NW2d 761 (2001).

Affirmed.

All Citations

Not Reported in N.W.2d, 2001 WL 738398

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End of Document

2017 WL 5473215
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

James WADE, Plaintiff–Appellant,
v.
William MCCADIE, D.O. and St. Joseph Health System, Inc. doing business as Hale St. Joseph Medical Clinic, Defendant–Appellees.

No. 335418
|
November 14, 2017

Iosco Circuit Court, LC No. 13–007515–NH

Before: M.J. Kelly, P.J., and Ronayne Krause and Boonstra, JJ.

Opinion

Per Curiam.

***1** In this medical malpractice case, plaintiff, James Wade, appeals by right the trial court's order granting summary disposition in favor of defendants, William McCadie, D.O. and St. Joseph Health System, Inc., under MCR 2.116(C)(7) (statute of limitations). Because the trial court did not err by granting summary disposition, we affirm.

I. BASIC FACTS

The relevant facts were set forth in this Court's prior opinion in this matter.

> Plaintiff alleged that following medical examinations in February 2012, he was advised by his treating doctors that he was suffering from renal and kidney failure as a result of poorly controlled hypertension. According to plaintiff, defendant William McCadie, D.O., his regular doctor, breached his duty of care over a prolonged period by failing to properly manage and treat plaintiff's condition, leading to plaintiff's renal and kidney failure. Plaintiff alleged a series of errors on McCadie's part beginning in 2008. Plaintiff admits that his claim accrued on April 21 or 25, 2011, the date when McCadie should have first been aware of plaintiff's renal dysfunction, and that he had until April 21 or 25, 2013 to file his claim under the two-year statute of limitations for malpractice actions.
>
> According to plaintiff, he first requested medical records from defendant Hale St. Joseph's Medical Clinic on April 2, 2012. The clinic allegedly prepared a bill for copying plaintiff records on April 23, 2012, which stated, "Records are complete and ready to be mailed." Plaintiff asserts that he paid the requested copying fee on April 26, 2012.
>
> On August 21, 2012, plaintiff's counsel mailed a notice of intent to file suit to defendants St. Joseph Health System and Hale St. Joseph's Medical Clinic and requested access to all of plaintiff's medical records within their control, including billing and payment records, within 56 days under MCL 600.2912b(5)....
>
> Plaintiff filed his complaint on February 22, 2013, and on February 28, 2013, submitted a request for production of documents, including all medical and billing records in defendants' control. On May 15, 2013, defendants' counsel sent a letter to plaintiff's counsel, stating the following:
>
> > At our meeting to exchange medical records for the above referenced case on April 24, 2013, you had requested that we look into whether your client's laboratory records for the time period prior to 1992 were available.
> >
> > Michigan Public Health Code section 333.16213(1) only requires that medical records be retained for a minimum of (7) years, however, we also asked our client to examine their records again to see if the laboratory results were still in existence. Upon information and belief, laboratory results pertaining to [plaintiff] for the time period prior to 1992 no longer exist. Those records were destroyed in a manner consistent with the requirements of Michigan Public Health Code section 333.16213(4).
>
> On May 7, 2013, defendants filed a motion for summary disposition under MCR 2.116(C)(7), arguing that plaintiff failed to provide an affidavit of merit with his complaint as required by MCL 600.2912d.

Plaintiff filed a response to defendants' motion for summary disposition on May 28, 2013, along with an affidavit of merit signed by Richard Stern, M.D., who opined, based on a review of plaintiff's medical records, that McCadie's negligent acts and omissions were the direct and proximate cause of plaintiff's acute renal failure in February 2012. Plaintiff argued that he was permitted to file the affidavit of merit within 91 days of the complaint under MCL 600.2912d(3) because defendants failed to provide him with his complete medical records as they were required to do under MCL 600.2912b(5).

***2** Defendants replied that they mailed plaintiff's counsel all of plaintiff's medical records within their control in April 2011, which is all that is required of them under MCL 600.2912b(5). Defendants also argued that medical records between 1979 and 1992 were not related to plaintiff's malpractice claim, as required under MCL 600.2912b(5), and that plaintiff received enough records to file an affidavit of merit.

At the hearing on defendants' motion, defendants' counsel said she had no knowledge of any records in defendants' possession that were not provided to plaintiff, but that some of his records had been destroyed. The trial court granted defendants' motion on the basis that plaintiff had failed to show that defendant did not comply with MCL 600.2912b(5), explaining as follows:

> All right. Well, I'm granting defendant's motion for summary disposition in this case. I ... think defendant has complied with the statute, especially considering basically the defendant being able to destroy records that are more than seven years old. Did I say that right? I mean, we have ... a situation here where plaintiff is, I guess, asking me to find that plaintiff was excused from filing this Affidavit of Merit with the Complaint by that exception, and I just think that plaintiff has failed to show that the exception applies so, therefore, I am granting defendant's motion.

The trial court entered its order granting defendants' motion on June 20, 2013 and entered a final order dismissing the case on August 2, 2013. [*Wade v. McCadie*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2015 (Docket No. 317531), pp. 1–3.]

This Court concluded that although Wade had not filed an affidavit of merit with his complaint, as required by MCL 600.2912d(1), there were two exceptions to that requirement. *Id.*, unpub. op. at 4. Relevant to the earlier appeal, this Court determined that the exception in MCL 600.2912d(3) applied because defendants had failed to allow access to Wade's medical records within 56 days of receiving his notice of intent to sue under MCL 600.2912b(5). *Id.* Accordingly, this Court held that, under MCL 600.2912d(3), Wade's affidavit of merit could be filed within 91 days of his February 22, 2013 complaint. *Id.*

Defendants appealed this Court's decision to our Supreme Court, which vacated a portion of the prior opinion because the panel erroneously applied an inapplicable statutory definition of the phrase "medical record. *Wade v. McCadie*, 499 Mich. 895 (2016). However, the Supreme Court did not reverse the result reached in this Court's prior opinion because the same result would have been reached by applying the plain meaning of the phrase "medical record." *Id.*

Upon return to the trial court, defendants again moved for summary disposition under MCR 2.116(C)(7). Defendants argued that in order to be timely filed under the 91–day extension permitted by MCL 600.2912d(3), Wade had until May 24, 2013 to filed his affidavit of merit, but the affidavit of merit was not actually filed until May 28, 2013. Because the affidavit of merit was untimely under MCL 600.2912d(3) and because the two-year statute of limitations for medical malpractice claims had expired, defendants argued that the claim had to be dismissed with prejudice. In support, defendants attached a copy of the affidavit of merit which had a date and time stamp on the first page stating "FILED 2013 May 28 A 10:25."

***3** In response, Wade asserted that the affidavit of merit was delivered to the Iosco Circuit Court on May 24, 2013 and a copy of it was electronically transmitted to defendants' lawyer on May 23, 2013. In support, he submitted a copy of a United States Postal Services receipt, which stated that Wade's lawyer sent a package via overnight mail to the "Iosco County Circuit Ct" on May 23, 2013 and that the "scheduled" time of delivery was at 3:00 p.m. on May 24, 2013. He also submitted a May 23, 2013 e-mail from his lawyer to defendants' lawyer that indicated the affidavit of merit was attached. Finally, Wade submitted an undated proof of service indicating

that a copy of his affidavit of merit "was served upon counsel for Defendant by placing same in an envelope and mailing it though the U.S. Postal Service ... and by sending a copy of the same by e-mail on May 24, 2013." [1] Wade argued that his documentary evidence demonstrated that the affidavit of merit had been timely filed "even though it may not have been formally stamped by the clerk." He also argued that further proof that the affidavit of merit was not timely stamped by the clerk was evident by reference to a calendar. Specifically, he asserted that May 28, 2013 was the Tuesday following the Memorial Day holiday, and he speculated that on May 24, 2013 when the affidavit of merit was delivered to the court, "the approaching weekend holiday may well explain why it was not formally stamped by the clerk." Wade also argued that because defendants had a copy of the affidavit of merit within 91 days of the complaint being filed, there was no prejudice to defendants, so dismissal was not proper. Wade briefly suggested that the trial court should use its power under MCL 600.2301 to amend the affidavit of merit in order to further the interests of justice. Finally, at oral argument, Wade raised the issue of equitable estoppel, and he asserted that defendants' lawyer had admitted that the affidavit of merit was filed on May 24, 2013. Wade's lawyer also represented to the court that he could not get a confirmation of delivery from the postal service because it only kept records for six months following a delivery, but the issue had not been raised until three years after delivery.

1 A time-stamped copy of the proof of service is part of the lower court record. That document indicates that the proof of service was filed on May 28, 2013, and it includes a signature page, which was signed by Wade's lawyer and is dated May 24, 2013. Additionally, although the proof of service states that a copy of the affidavit of merit was e-mailed to defendants' lawyer on May 24, 2013, the e-mail attached in support of Wade's response to summary disposition is dated May 23, 2013.

Following oral argument, the trial court granted defendants' motion for summary disposition, reasoning that the affidavit of merit was time stamped as filed on May 28, 2013 and that there was no proof that it was delivered on May 24, 2013 and inadvertently was not stamped until May 28, 2013. The trial court also denied Wade's request for an evidentiary hearing to determine whether the clerk failed to timely stamp the affidavit of merit (or would sometimes fail to stamp documents the same day that they were received).

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Wade argues that the trial court erred by granting summary disposition in defendants' favor. He argues that the trial court erred by determining that the date stamp on the affidavit of merit conclusively determined what date it was filed despite the fact that he produced significant circumstantial evidence suggesting that it was received by the Iosco Clerk's Office on May 24, 2013 and was simply not stamped until May 28, 2013. We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg. Co., Inc. v. Gates Performance Engineering, Inc.*, 285 Mich. App. 362, 369; 775 N.W.2d 618 (2009).

B. ANALYSIS

A plaintiff bringing a medical malpractice claim must generally file with his or her complaint an affidavit of merit that meets the requirements of MCL 600.2912d(1). "[F]or statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Scarsella v. Pollak*, 461 Mich. 547, 549; 607 N.W.2d 711 (2000) (citation and quotation marks omitted). Therefore, "when a plaintiff wholly omits to file the affidavit required by MCL 600.2912d(1), the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitations." *Ligons v. Crittenton Hosp.*, 490 Mich. 61, 73; 803 N.W.2d 271 (2011) (citation and quotation marks omitted). Furthermore, "[w]hen the untolled period of limitations expires before the plaintiff files a complaint accompanied by an [affidavit of merit], the case must be dismissed with prejudice on statute-of-limitations grounds." *Id.*

There are two exceptions to the general requirement in MCL 600.2912d(1). First, under MCL 600.2912d(2), "for good cause shown," a party may file a motion in the trial court for a 28–day extension in which to file the affidavit of merit required under MCL 600.2912d(1). See *Solowy v. Oakwood Hosp. Corp.*, 454 Mich. 214, 228–229; 561

N.W.2d 843 (1997) (recognizing that a plaintiff may be unable to obtain an affidavit of merit within the requisite time period, in which case "the plaintiff's attorney should seek the relief available in MCL 600.2912d(2)"); see also *Castro v. Goulet*, 312 Mich. App. 1, 4–5; 877 N.W.2d 161 (2015) (stating that the statute of limitations is tolled if a plaintiff is granted a 28–day extension to file his or her affidavit of merit under MCL 600.2912d(2)).

***4** The second exception—and the one at issue in this case—provides:

> (3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in [MCL 600.2912b(6)], the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint. [MCL 600.2912d(3).]

Although it does not appear that any court has held that an affidavit of merit filed within the 91–day extension allowed under MCL 600.2912d(3) serves to toll the statute of limitations, our Supreme Court stated in *Solowy* that during the 28–day extension permitted under MCL 600.2912d(2), the statute of limitations is tolled. *Solowy*, 454 Mich. at 229. Similarly, because there is no practical difference between the extension permitted under MCL 600.2912d(2) and the extension permitted under MCL 600.2912d(3), we conclude that the statute of limitations is tolled for the 91–day extension permitted under MCL 600.2912d(3).

In the prior appeal, this Court held that Wade was entitled to the 91–day extension in MCL 600.2912d(3). Therefore, the question we must now determine is whether he successfully filed his affidavit of merit within that time period.

Wade contends that the affidavit of merit was filed on May 24, 2013. In support, he directs this Court to a number of facts. First, he mailed a copy of the affidavit of merit to the Iosco Circuit Court on May 23, 2013, and his receipt from the United States Postal Services indicates a scheduled arrival before 3:00 p.m. on May 24, 2013. However, mailing a document does not constitute "filing" a document. *Hollis v. Zabowski*, 101 Mich. App. 456, 458; 300 N.W.2d 597 (1980). Moreover, it has long been established that "a paper or document *is filed*, so far as the rights of the parties are concerned, *when it is delivered to and received by the proper office to be kept on file* ...." *People v. Madigan*, 223 Mich. 86, 89; 193 N.W.2d 806 (1923). Here, although Wade mailed the affidavit of merit to the trial court on May 23, 2013, he provided no proof that it was delivered to and received by the clerk of the Iosco Circuit Court on May 24, 2013. Based on our review of the lower court record, the only proof of when the affidavit of merit was received by the lower court is (1) the lower court register of actions for this case and (2) the date-stamp on the first page of the affidavit of merit. See MCR 8.119(C) (requiring the clerk of the court to "endorse on the first page of every document the date on which it is filed") and MCR 2.107(G) (stating that in the event that the clerk "records the receipt of materials on a date other than the filing date, the clerk shall record the filing date on the register of actions"). In this case, the first page of the affidavit of merit is date-stamped May 28, 2013, and the register of actions does not indicate that the affidavit of merit was received earlier and merely not stamped until May 28, 2013. Accordingly, the trial court did not err by concluding that the affidavit of merit was filed on May 28, 2013.

On appeal, Wade suggests that the outcome of this case is controlled by *VandenBerg v. VandenBerg*, 231 Mich. App. 497; 586 N.W.2d 570 (1998) (*VandenBerg I*). We disagree. In that case, the trial court dismissed the plaintiff's complaint because she failed to file an affidavit of merit with her complaint as required by MCL 600.2912d(1). *Id.* at 498–499. This Court reversed and remanded to the trial court, reasoning that a less severe sanction was appropriate because the defendants did not suffer any prejudice as they had been served with the affidavit of merit along with the complaint. *Id.* at 502–503. On remand, however, the trial court granted summary disposition in favor of defendants because the claim was barred by the statute of limitations, and the plaintiff again appealed to this Court. *VandenBerg v. VandenBerg*, 253 Mich. App. 658; 660 N.W.2d 341 (2002) (*VandenBerg II*). In *VandenBerg II*, this Court explained that although the complaint was filed within the limitations period, the affidavit of merit was filed outside the limitations period. *Id.* at 661. Relying on this Court's decision in *Scarsella v. Pollak*, 232 Mich. App. 61; 591 N.W.2d 257 (1998), aff'd 461 Mich. 547; 607 N.W.2d 711 (2000), the *VandenBerg II* Court explained:

> ***5** In *Scarsella*, this Court recognized that, "[g]enerally, a civil action is commenced and the period of limitation is tolled when a complaint is filed," but that "medical malpractice plaintiffs must file more than a complaint; 'they shall file with the complaint an affidavit of merit. ...' " [*Scarsella*, 232 Mich. App] at 63–64, quoting MCL 600.2912d(1). The *Scarsella* panel reasoned that the Legislature's use of the word "shall" indicates that the accompaniment of an affidavit is mandatory, and that, therefore, "the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit." *Id.* at 64. Noting that, by providing for a twenty-eight day extension for the filing of an affidavit, the Legislature provided a remedy for "those instances where an affidavit cannot accompany the complaint," see MCL 600.2912d(2), the panel determined that unless a plaintiff has moved for the statutorily provided extension, a plaintiff was not permitted to file a complaint without the affidavit, then attempt to "amend" the complaint by later supplementing the filing with an affidavit of merit. [*Id.*] at 65. *Here, plaintiff filed the affidavit of merit beyond the period set by the applicable statute of limitations, but failed to move for an extension. Accordingly, plaintiff's suit was not timely commenced and the trial court properly granted summary disposition in favor of defendants.* [*VandenBerg II*, 253 Mich. App. at 661–662 (emphasis added).]

In sum, the *VandenBerg I* Court held that a dismissal was not required as a sanction when the defendant suffered no prejudice from the failure to file an affidavit of merit with the complaint, and the *VandenBerg II* Court held that because the affidavit of merit was not filed within the statute of limitations period, the case was time-barred. Here, because the affidavit of merit was filed outside the limitations period—and outside the 91–day extension required under MCL 600.2912d(3)—the outcome of this case is controlled by *VandenBerg II*. The trial court did not, therefore, err in dismissing the complaint on statute of limitations grounds.

Wade next asserts that defendants' lawyer stated on the record that the affidavit of merit was filed on May 24, 2013. Wade argues that the on-the-record statement constitutes a binding admission. "[A] statement made by a party or his counsel, in the course of trial, is considered a binding judicial admission if it is a distinct, formal, solemn admission made for the express purpose of, *inter alia*, dispensing with the formal proof of some fact at trial." *Ortega v. Lenderink*, 382 Mich. 218, 222–223; 169 N.W.2d 470 (1969). See also *Zantop Int'l Airlines, Inc. v. Eastern Airlines*, 200 Mich. App. 344, 364; 503 N.W.2d 915 (1993) (noting that arguments of counsel are neither evidence nor stipulations of fact). Based on our review, the statements by defendants' lawyer—in the lower court, in this Court, and before our Supreme Court—were not distinct, formal, and solemn admissions made for the express purpose of dispensing with formal proof at trial. Rather, the statements were made informally in connection with a wholly distinct argument. In particular, when making the earlier statements, it was not the timely filing of the affidavit of merit that was important, rather the pertinent fact that the lawyer was attempting to convey was that the affidavit of merit had been filed before Wade received all the medical records, so there was no prejudice from defendants' failure to provide the requested medical records. Accordingly, we conclude the statements by defendants' lawyer during the earlier proceedings do not constitute a binding judicial admission.

Wade next contends that equitable tolling should apply under the circumstances of this case. In support, he directs us to *Ward v. Rooney–Gandy*, 265 Mich. App. 515; 696 N.W.2d 64, rev'd 474 Mich. 917 (2005). In that case, this Court held:

> "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff." 51 Am Jur 2d, Limitation of Actions, § 174, p. 563. "In order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations, provided it is in conjunction with the legislative scheme." 54 CJS, Limitations of Actions, § 86, p. 122. [*Ward*, 265 Mich. App. at 517.]

***6** As explained in *Ward*:

> Equitable tolling has been applied where "the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass." Am Jur 2d, supra at 563. While equitable tolling applies principally to situations in which a defendant actively misleads a plaintiff about the cause of action or in which

> the plaintiff is prevented in some extraordinary way from asserting his rights, the doctrine does not require wrongful conduct by a defendant. *Id.* at 564. An element of equitable tolling is that a plaintiff must exercise reasonable diligence in investigating and bringing his claim. *Id.* at § 175, p. 564. In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96; 111 S. Ct. 453; 112 L.Ed. 2d 435 (1990), the United States Supreme Court noted that it had "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period [.]" In support, the Supreme Court cited, in part, *Burnett v. New York Central R. Co.*, 380 U.S. 424; 85 S. Ct. 1050; 13 L.Ed. 2d 941 (1965), in which the plaintiff filed a timely complaint, but in the wrong court. *Irwin*, supra at 96 n. 3. [*Ward*, 265 Mich. App. at 519–250.]

The *Ward* Court applied equitable tolling to save a plaintiff's medical malpractice case after the plaintiff inadvertently filed the wrong affidavit of merit with the complaint and subsequently failed to file the proper affidavit of merit until after the limitations period expired. *Id.* at 516–517, 525. However, this Court's decision in *Ward* was reversed by our Supreme Court for the reasons stated in Judge O'CONNELL'S dissenting opinion in *Ward.* 474 Mich. at 917. As such, it is not binding. Moreover, in Judge O'CONNELL'S dissent in *Ward*—which was the basis for the Supreme Court's order reversing the majority opinion in *Ward*—he explained that under present caselaw, a "grossly nonconforming" affidavit of merit filed under MCL 600.2912d(1) was insufficient to toll the statute of limitations "any more than a complaint that is unaccompanied by any affidavit" could toll the statute of limitations. *Ward*, 265 Mich. App. at 527 (O'CONNELL, J., dissenting). He further concluded that equitable tolling could not save a claim where the failure to file a conforming affidavit of merit was a mere negligent failure rather than the product of understandable confusion about what was required under the statute. *Id.* at 528–529. Similarly, in this case, equitable tolling is not applicable because the failure to file the affidavit of merit in a timely fashion is the product of negligent failure—i.e., Wade's lawyer's failure to ensure that the affidavit of merit was actually filed with the trial court within the applicable time frame—rather than any understandable confusion about the law.

Wades also suggests that this Court should revisit *Young v. Sellers*, 254 Mich. App. 447; 657 N.W.2d 555 (2002). The *Young* Court urged our Supreme Court to revisit or distinguish *Scarsella* "so that clearly inadvertent errors no longer have such a harsh result," but the Court recognized that it was nevertheless constrained to follow *Scarsella*. *Id.* at 454–453. Therefore, *Young* stands for the proposition that if a plaintiff fails to file his or her affidavit of merit with the limitations period, the statute of limitations will bar his or her claim even if the complaint was filed within the limitations period. Given that, like the *Young* panel, this Court is bound by *Scarsella*, we cannot grant relief on the basis of *Young*.

***7** Finally, Wade argues that MCL 600.2301 permits the trial court to "ignore reality at times." The statute provides that a trial court may "amend any process, pleading or proceeding ... in form or substance, for the furtherance of justice ...." MCL 600.2301. He contends that the trial court ought to have used that power to amend the filing date stamped on the front page of the affidavit of merit. Amending the date of the affidavit of merit is only necessary in order to prevent Wade's claim from being dismissed as time-barred by the statute of limitations. MCL 600.2301, however, may not be used to save a case from dismissal when the statute of limitations bars it. See generally *Tyra v. Organ Procurement Agency of Mich.*, 498 Mich. 68, 91–92; 869 N.W.2d 213 (2015).

III. ISSUES RAISE IN REPLY BRIEF

In his reply brief, Wade raises two additional arguments for why we should reverse the trial court's decision. First, he argues that because this Court's earlier opinion states that his affidavit of merit was timely filed, the law-of-the-case doctrine applies and the trial court is bound by this Court's conclusion that it was timely filed. Second, he also asserts that under MCR 2.112(L)(2), defendants' challenge to the timeliness of the affidavit of merit is untimely. However, reply briefs may contain only rebuttal argument, and raising an issue for the first time in a reply brief is not sufficient to present the issue for appeal. MCR 7.212(G). See also *Check Reporting Srv., Inc. v. Mich. Nat'l Bank–Lansing*, 191 Mich. App. 614, 628; 478 N.W.2d 893 (1991). Accordingly, the arguments about the law of the case and MCR 2.112(L)(2) are not properly presented for appeal, and we decline Wade's invitation to address them further. [2]

[2] Moreover, even if the arguments had been raised in Wade's brief on appeal as opposed to his reply brief, it

would still be improper to consider them. "Michigan generally follows the 'raise or waive' rule of appellate review." *Walters v. Nadell*, 481 Mich. 377, 587; 751 N.W.2d 431 (2008).

> Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a failure to timely raise an issue waives review of that issue on appeal.
>
> The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful. Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. [*Id.* at 387–388 (citations and quotation marks omitted).]

Accordingly, as neither issue was raised before the trial court, the issues were waived and should not now be addressed on appeal.

Affirmed. Defendants, as the prevailing party, may tax costs. MCR 7.219(A).

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PUBLIC PAPERS OF SUPREME COURT JUSTICES: ASSURING PRESERVATION AND ACCESS

HEARING

BEFORE THE

SUBCOMMITTEE ON REGULATION AND GOVERNMENT INFORMATION

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

JUNE 11, 1993

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PUBLIC PAPERS OF SUPREME COURT JUSTICES: ASSURING PRESERVATION AND ACCESS

FRIDAY, JUNE 11, 1993

U.S. SENATE,
SUBCOMMITTEE ON REGULATION AND
GOVERNMENT INFORMATION,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:35 a.m., in room SD–342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Subcommittee, presiding.

Present: Senators Lieberman and Cochran.

OPENING STATEMENT OF SENATOR LIEBERMAN

Senator LIEBERMAN. Good morning. The hearing will come to order. I want to thank all of you for joining us this morning as this Subcommittee focuses its attention on the difficult question about how best to preserve and grant access to the working papers of retired or deceased Supreme Court Justices.

The recent release of the papers of Justice Thurgood Marshall has brought into full public view a host of questions that has been left unattended for a number of years. I must say that I read with great fascination the series of articles in The Washington Post based on Justice Marshall's papers that examined the Supreme Court's decision-making process in some very controversial areas such as abortion rights and civil rights.

As fascinating as it was to read about the discussions and negotiations in chambers that preceded cases like *Webster* and *Wards Cove* and *Patterson,* I must say that I read with a certain discomfort, two kinds of discomfort. The first was that as fascinated as I was and as much as I learned, I felt, in some senses, as if I had been—as if the curtain separating me and the public from the inner world of the Supreme Court had been pulled back and I had been let in, much to my surprise, to the inner workings of the Court. In some senses, I will own up to having felt, if I may use this term, something like a judicial peeping tom.

Perhaps that is because I approach these papers as a lawyer, as an occasional litigator, as an admirer—one might almost say a devoted fan—of the Supreme Court. On the other hand, I felt a very different kind of discomfort as I thought about the dispute that followed the release of Justice Marshall's papers, and that was that they may not have ever been released at all. Indeed, they may not

have ever been preserved to be published and available for scholars, researchers and journalists.

In fact, as is well known, it is reported that at one point, Justice Marshall himself threatened to burn his papers. While, of course, that may have been hyperbole by Justice Marshall, nonetheless it was his right to destroy his papers and, in fact, several Justices of the Supreme Court have done just that at a considerable loss to history and, in that sense, to our country.

From the outset of our Government, the papers of public officials have traditionally been treated as the private property of those officials. They would decide where the papers should be deposited, if at all, and what kind of access should be granted to the papers.

During this century, however, we have been moving away from that policy toward the principle that documents created by public officials while employed by the public on public time belong to the public. In 1934, Congress created the National Archives to preserve Government documents. In 1950, the Federal Records Act was passed to ensure preservation of the records of Governmental agencies. And, in 1978, Congress passed the Presidential Records Act to ensure the preservation of, and access to, the records of Presidents of the United States.

Congress has also enacted statutes and rules to ensure that its own committee records are public property, not the property of the member of Congress who happens to be the chair of the Committee. Now, the Marshall papers episode, in addition to rasing questions such as those that I myself felt as I watched it unfold, I think shows the need for some set of ground rules to govern preservation of, and access to, a Supreme Court Justice's working papers.

We invited each of the members of the Supreme Court to be with us this morning. They regretted and said they could not come, based on the fact that they are in the midst of their Friday conferences and June is a busy time. However, I want to read from, and I will put in the record, the letter that Justice Rehnquist did send to me.

And at one point, he does say, "Even with the limited time available to us, we have no"—that is, between the time of the Marshall episode and my letter inviting them, and this letter. "Even with the limited time available to us, however, we have no hesitancy in expressing the opinion that legislation addressed to the issues discussed in your letter is not necessary and that it could raise difficult concerns respecting the appropriate separation that must be maintained between the legislative branch and this Court." [1]

Senator LIEBERMAN. I want to make clear that I, for one, am not, at this time, proposing that we adopt something that might be called a Judicial Records Act that would parallel the Presidential Records Act. But I do think that the process of developing a set of guidelines for the preservation of, and access to, these judicial documents needs to begin.

In deference to the Supreme Court's position in our constitutional scheme and because of concerns for the separation of powers, I, for one, am certainly prepared to wait to see how the Court will address these issues. But I do not think that Congress can wait for

[1] See page 71.

the Court to act forever. There is just too much public interest involved in this matter. In this regard, I would say that it is significant that Chief Justice Burger actually attempted to address some of these issues on a Court-wide basis 20 years ago, but obviously without success.

Now, the hearing this morning is designed to consider a number of questions that are related to the preservation and publication of judicial records. First, how, through rules of the Court or otherwise, perhaps through legislation, can we be assured that the drafts and work products related to the business of the Court are preserved for posterity? Second, is it prudent to continue to rely on individual Justices, their estates and institutions to which Justices may have donated papers to weigh adequately the competing interests surrounding record preservation and disclosure and to set the terms and conditions of such preservation and disclosure?

At present, for instance, the archivist receiving the donation is bound by the wishes of the donor. There are no fixed rules. Who, then, should write the rules if there should be rules? If Congress does, is this too invasive an act, given separation of powers considerations? If the Court sets the rules, will they be adequately enforceable against third parties or against successors?

And third, if ground rules are needed, what is the right balance between the interest of the public in access and the interest of sitting Justices and the Court as an institution in safeguarding the deliberative process? In fact, if I may just explain a little bit for a moment the unease I felt about the Marshall papers. It was that not only was Justice Marshall, in his papers, revealing to us the thought process that he was going through. But he was also revealing his own interpretation or recording of the thought processes of some of his colleagues, some of whom are still sitting on the bench, and considering areas of case law that he comments on and that are still developing.

What other interests, such as the interest of parties to litigation, are implicated by disclosure of predecisional work of sitting Justices and how should these interests be accommodated? If restrictions on access are set, how long should they run, given the long lifespan of issues before the Supreme Court?

Now, this is not the first time these issues have been considered, though I doubt that they have received as much public attention as they have in the aftermath of the release of Justice Marshall's papers. As I have mentioned, Chief Justice Burger did appoint a committee 20 years ago to review these same issues. They were explored again in 1977 by the Public Records Commission, chaired by former Attorney General Herbert Brownell.

The Brownell Commission, whose recommendations, incidentally, formed the basis for the Presidential Records Act that we now have, recommended that a Justice's working papers be made public property, and that public access be allowed, but not until 15 years had passed from the time the Justice left the Court. Of course, no formal Court-wide or legislative action was taken in response to that recommendation.

There is another more contemporary question that should be asked, which was not an issue at the time the Brownell Commission studied these questions, and that is, as the Supreme Court

and all of us move into the age of electronic communications, how should electronic records be addressed?

In many ways, Justice Marshall's papers, actually, may become unique as the pen and paper age draws to an end and we go more deeply into the electronic age. How will we preserve draft Supreme Court opinions and comments from one Justice to another about pending cases when these are all circulated by E-mail, by electronic mail? In fact, it might be said that the dawn of the electronic age actually gives a greater urgency to the need to examine and to deal in a more formal way with the whole questions of records preservation.

I look forward to a thoughtful discussion of these questions today with the extraordinary and very able group of witnesses that I am pleased have made themselves available to the Committee this morning. I would now yield to my friend and colleague, and the ranking Republican member of the Committee, Senator Thad Cochran from Mississippi.

OPENING STATEMENT OF SENATOR COCHRAN

Thank you very much, Mr. Chairman.

I join you in welcoming our witnesses to this hearing today. I think it is an important inquiry that we make today, but I also think we need to recognize as we begin it that we are dealing here with a question of some sensitivity and that we, as the Library of Congress was directed to do in the agreement with Justice Marshall, should exercise some discretion. That is, we should be careful and we should be discrete, and we should exercise good judgment as we go about trying to inquire and then maybe to define what the respective rights and obligations and duties are in protecting, preserving and making available to the public papers of Supreme Court Justices and others who may be officials of the U.S. courts.

I think one of the most compelling reasons for this discretion that this Committee should exercise is the traditional separation of powers, first of all, and the fact that we are coequal branches of government. The judiciary is independent and should be. The Congress and the executive, of course, have meddled in each other's business for quite awhile, and that has become the norm rather than the exception. And the passage of the Presidential Papers Act, or the legislation that makes public the official property of U.S. Presidents, is an indication of how Congress can exercise power when it considers it to be in the public interest and that that overrides a consideration of the notion of being coequal and independent.

But it should also be noted that while there have been legislative acts in the past that have attempted to rule or legislate that Government records were public and not private, there still remains in the law the concept of private property by members of Congress over their papers and their offices, cabinet members and others. The Congressional committees are the only entities within the Congress that have been decided through legislation to be custodians for the public of the records of those committees.

But on the other hand, members of Congress, for example, are considered to be the custodians of their records, and they are considered to be private property. And so it does not necessarily follow

that the Congress has the power to legislate an answer in this case for the U.S. courts or for the Supreme Court. I would prefer, for example, the Court to undertake a definition of rights and responsibilities and definitions of access for Supreme Court Justice's papers rather than Congress legislating in that area.

I understand, for example, that the historian of the Administrative Office of the U.S. Courts is currently undertaking the development of guidelines for dealing with the records and papers of all U.S. judges, including Supreme Court Justices. It would be interesting to hear, during this hearing or maybe at a later date, what the intentions are of the Administrative Office of the U.S. Courts or, for that matter, of the Supreme Court.

We have invited, as the Chairman may have indicated, the Chief Justice of the United States to make available someone to testify at this hearing. And we received a response, a polite letter, but no indication that we will have a witness at the hearing, pointing out the traditional separation of the judiciary and the independence of the judiciary from the Congress. But it would seem to me that that would be the more appropriate way to go about dealing with this problem.

Additionally, it would be nice to hear from the Library as to how it views its obligations to use discretion. It seems that the discretion that it considered to be bound by had to do only with access of individuals, to be discrete in who you allow to have access and to not permit access until the papers have been organized and are in some kind of order that would permit appropriate review of those papers.

I was wondering, too, whether private study of the papers, as described in the agreement, would limit that to just what it says, private study, rather than dissemination of. Is that included in private study? Those are questions that seem to me ought to be appropriate for us to look into if we are trying to determine, as we are today, whether the Library of Congress conducted itself in an appropriate way. It is, after all, a creature of the Congress, and so we do have a legitimate right to inquire of the Library.

Rather than to take up any more time of the witnesses, I again want to thank the Chairman for convening the hearing because I think it is an important inquiry, and we ought to make this inquiry, and I look forward to hearing the testimony of our witnesses.

Senator LIEBERMAN. Thank you very much, Senator Cochran.

We will call our first witness, the Honorable James H. Billington, Librarian of Congress. Good morning, Mr. Billington. May I say, for the record, that we normally meet at baseball games. So I do not know whether it is a pleasure to see you here as opposed to there, but in any case, it is a pleasure to see you once again.

TESTIMONY OF HON. JAMES H. BILLINGTON, LIBRARIAN OF CONGRESS

Mr. BILLINGTON. Thank you, Mr. Chairman. Well, the team is not doing quite as well this year.

Senator LIEBERMAN. Well, but they are on a streak.

Mr. BILLINGTON. Baseball team, that is.

Senator LIEBERMAN. Right.

Mr. BILLINGTON. I thank you, Mr. Chairman and Senator Cochran, members of the Subcommittee. I am pleased to be here today for this hearing concerning the preservation of an access to the public papers of Supreme Court Justices.

Since the early years of this century, the Library of Congress has been a repository for the papers of both sitting and former members of the Supreme Court. Our manuscript division presently counts such collections for 37 former High Court Justices, which were mostly donated by the Justices or their heirs.

Chief Justice Earl Warren and nine of the Justices who served with him have placed their papers here, which has reenforced the Library's role as the principal research center for the study of the Court. Our collections of judicial papers, supplemented by other related manuscript collections, as well as the world's largest law library, permits students of American legal history to explore research problems within the broadest possible context.

We have taken pride in our role as a neutral scholarly institution devoted to the effective preservation of judicial papers and providing sophisticated reference assistance to a broad range of scholars and researchers of widely different viewpoints and backgrounds who use the collections.

Until recently, no controversy has arisen over our management of these materials. A few weeks ago, we were surprised and distressed by the number of concerns expressed about our administration of judicial papers following the publication of several newspaper articles on the Court. All this happened some months after the opening of Justice Thurgood Marshall's papers.

Let me take this opportunity, Mr. Chairman, to put our action in the case of the Marshall collection in the larger context of the Library's policies governing the accession and management of such papers. Traditionally, the papers produced by and on behalf of members of the Supreme Court have been regarded as their personal property, as you indicated earlier, to be taken away by them upon their resignation or retirement from the bench and disposed of as they or their heirs may decide.

In fulfilling our mission to preserve such historically valuable material and provide a facility in which it becomes publicly accessible, the Library and the donor enter into a contract or instrument of gift detailing the terms of access and other administrative arrangements. It is the donor who decides when the collection is to be made accessible and on what conditions. The Library abides faithfully by that determination, insisting only upon the discretion to determine when the papers are properly catalogued and physically ready for use, in answer to the question Mr. Cochran posed.

The Supreme Court Justices have chosen a variety of procedures to govern access to their personal papers. Justices Harold Burton and Thurgood Marshall controlled access to their papers during their lifetimes, but made the collections available without restrictions after their deaths. Others have set limited special conditions upon access to their collections at the Library.

Justice Felix Frankfurter, at the other end of the spectrum, for example, closed access for 16 years from the date of each paper's original creation. Chief Justice Earl Warren personally controlled access during his lifetime, but indicated in his will that after 10

years had elapsed from the time of his death, access was to be unrestricted.

Two sitting members of the Court have donated their papers to the Library. Justice Byron R. White has indicated that access to his materials shall be granted only with his permission during his lifetime. The collection will be open to the public 10 years after his death. Justice Sandra Day O'Connor has allowed access to her papers at the Library with her permission during her lifetime. Thereafter, access is to be unrestricted except for case files which are closed as long as any participating Justice continues to serve on the Court.

As I said earlier, it is for the donor to decide when the collection is to be made available, and for us to carry out that determination. We have consistently, rigorously, scrupulously adhered to that principle. For us, each donation is a distinct, self-contained transaction. We work on a case-by-case basis. The Library of Congress does not set broad policy or general standards concerning the accessibility of the papers of former Supreme Court Justices as a group.

Unlike Supreme Court Justices, Federal judges of the lower courts have also made varying assessments of what constitutes appropriate access to their papers. Judge Abner Mikva and the late Judge J. Skelly Wright, who have both served as Chief Judge of the U.S. Court of Appeals for the District of Columbia, for instance, have expressed dramatically different points of view about this matter.

Judge Wright made his papers available without restriction upon his retirement in 1987, whereas Judge Mikva has argued recently that judicial deliberations cannot be protected unless a judge's personal papers are closed for a significant period of time. This debate illustrates the range of opinions that exists on this issue. We do not and cannot make independent assessments of how access to the papers of individual Supreme Court Justices affect the entire judicial process.

We rely upon the judgement of each donor as to the most appropriate restrictions on access to his or her papers in light of the possible impact of such access on the work of colleagues and the Court. My own view as a historian is that judicial papers should be preserved in as complete a fashion as possible. These collections help us understand the critical role that the Court has played in our national life, but they also underscore the characteristically American openness that members of the Court have permitted in the examination of the judicial process.

Use of judicial papers by researchers and scholars at the Library generally produces a patient, gradual, historical reconstruction and continuing reexamination of our judicial past. This past must be explored with as few restrictions as possible to enhance public understanding of the judicial process.

Now, the experience of the Public Documents Commission, which concluded its deliberations in 1977, may also be useful to this Subcommittee in its deliberations over improving arrangements for the preservation and accessibility of the papers of the Justices. For example, it might be worthwhile to consider some categorical distinctions suggested by the Public Documents Commission to describe

the documentary materials accumulated in the administrative offices of the Court and the chambers of the individual Justices.

The commission identified as Federal records, the first category, those materials that are forwarded by the Court's administrative offices to the National Archives. Public papers and personal papers, two other terms used by the commission, were used to describe materials in the individual chambers of the Justices:

First, Federal records; materials, that is, filed by the parties, dockets, transcripts, administrative and similar documents which are official Government records to be retired to the National Archives.

The second category was public papers; that is, 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.

And third, personal papers; that is, materials of a purely private or non-official character that pertain to a judge's personal affairs.

Disposition standards for public papers might, most appropriately, be developed by the Supreme Court itself or perhaps by the Judicial Conference of the United States. The Archivist of the United States and other appropriate parties, particularly from the scholarly and archival communities, could also offer useful suggestions in framing access standards for particular types of sensitive public papers.

I, and my colleagues at the Library, stand ready to participate in such a reexamination of current practices and I have already written current Justices of the Court to offer any help they might wish from us in such a process.

Let me conclude, Mr. Chairman, by drawing your attention to a rather recent development that, in the context of this hearing, certainly merits discussion and which you also touched on. In its deliberations on improving arrangements for the preservation and accessibility of the papers of Supreme Court Justices, I urge the Subcommittee to consider information in electronic forms and formats.

Court opinions are now being electronically disseminated across the Nation. The hard memory disks in the personal computers of Supreme Court Justices and their staffs contain information of historical value equal to that of the much publicized electronic documentation being created by White House staff.

We believe our posture in all deliberations should be studiously neutral since we are the principal, and we believe we have been the efficient and the faithful, repository of most of the Supreme Court's history. As a historian, of course, and as the Librarian of Congress, I think it important to continue to have Supreme Court Justices under changed policy concerning their papers free to choose at all times the depository for these materials.

And let me just add in conclusion, Mr. Chairman, in addition to the prepared testimony, because it was raised by Mr. Cochran, the question of private use. We have strictly adhered to that. Private use on the premises means exactly that. These papers do not leave. They are used there. But, of course, that does not necessarily cover the question. They are used by researchers who are going to, obviously, make some use of them in their own writing and further work. But private use on the premises is something we have strict-

ly adhered to and defined. They have not been taken off or used in any other way than privately there.

I would be happy to answer any questions, Mr. Chairman and Mr. Cochran.

Senator LIEBERMAN. Thank you very much for that very helpful testimony.

There are some questions that I want to ask you in your capacity as a historian. And I suppose some have to do with Library procedures. But I take it from your statement that really in both capacities, you think that we would be helped if there were some ground rules here, leaving aside whether it was the Court or the Judicial Conference or, indeed, ultimately Congress that created some ground rules.

Mr. BILLINGTON. Well, I think it is for the Court to carefully determine what, indeed, the problems may be with an individual Justice making things available on the relatively soon rather than the relatively later scale.

Senator LIEBERMAN. Right. Right.

Mr. BILLINGTON. How does that affect—what are those conditions? That is something that really only the Court can determine. If, after that determination and serious consideration of it, this really is seen to seriously affect, in some way, then an appropriate ground rule, it seems to me, established by themselves, it would have to, I think, be voluntarily accepted by the Justices. But if it were developed within the Court, I assume that could be a shared perception. And then it could be something which they would have agreed on and therefore insist on in their individual bequests on this matter. That would be, it seems to me, the ideal situation.

But it is for them to make the determination how much, how important, what is—these would be very difficult determinations, it seems to me, for anybody outside of the Court itself to make. And I think because it is a delicate problem which seems hard to phrase precisely, we have seen words like mystique used a great deal.

Senator LIEBERMAN. Right.

Mr. BILLINGTON. These are words that are not particularly congenial to those of us who feel it is our responsibility to preserve the Nation's heritage and make it part of an ongoing public dialogue of self-government constantly examining and improving itself.

But if there are, behinds those kinds of phrases, genuine concerns about the function of the judicial process, it seems to me it is up to the organs of the judiciary to define what they are and to work out ground rules among the Justices themselves.

Senator LIEBERMAN. Well, there is no question, I agree with you and I may have said this before Senator Cochran came in, that I certainly agree that it is the Court that is the preferable source of ground rules here for all sorts of reasons. But there is a public interest here and I hope that something will happen.

Let me go back and ask what may be the baseline question here, which is whether we ought to have either—just to go back to my own reaction, my initial discomfort, about the disclosure, not so much with regard to Justice Marshall's own papers, but with regard to draft opinions and his comments on the opinions of the other Justices, that was really ultimately much overridden in my own reaction to this episode by the clear public interest in disclo-

sure. And then, for me, the question becomes under what terms and what length of time should the papers be held private.

But having reached that conclusion and having come to understand, as I did not really before, that a Justice could destroy his papers or her papers if they wanted, should we have a baseline provision that that is illegal, that ultimately, again, assuming this would come from the Court and not from Congress, that the public has enough of an interest here that a Justice has an obligation to preserve his papers or her papers?

Mr. BILLINGTON. Well, I think it is obviously very strongly desirable that these papers be preserved. Indeed, it was our—when we went to see Justice Marshall, we did it with some urgency. He basically prescribed the terms. He set the agenda and prescribed—he clearly thought about it and told us what he wanted done.

But our initial concern in going there in the first place was that we had heard these things that this mighty record might, indeed, be destroyed. And I think only in the case of Justice Whitaker has that, in fact, happened. So it has not been a very common occurrence. But it is a source of deep, deep concern. I do not know what sort of legal steps or legal actions one should take on this, but obviously the method in the early commission that led to the Presidential Records Act does make this definition of these as public property, which should not be destroyed. So that would be, I suppose, an option in terms of whether one wants to formalize that in some way.

Senator LIEBERMAN. Yes. My memory may be failing me, but I believe that Mr. Prettyman indicates in his testimony that several Justices have, in fact, destroyed their papers. Am I remembering correctly? I am.

Mr. BILLINGTON. Parts.

Senator LIEBERMAN. Parts of their papers.

Mr. BILLINGTON. Parts, but I think Whitaker is the only—am I incorrect?

Mr. HUTCHINSON. Since World War II.

Mr. BILLINGTON. Yes.

Senator LIEBERMAN. Yes.

Mr. BILLINGTON. That is what I was referring to.

Senator LIEBERMAN. Let me then ask you the next question. Again, as a historian, having been through these negotiations and through the papers to some extent, if you would venture an opinion on whether there ought to be a time limit here; that is, a time after retirement or death when the papers ought not to be open to the public and what an appropriate time might be, or whether that should really be up to the individual Justices?

Mr. BILLINGTON. I think it should be basically up to the individual Justices. They themselves have had a wide difference of opinion on this. I think, you know, as a historian—not speaking as the Librarian of Congress but just as an individual historian—I think one favors, as did not influence our exercise of any individual Justice's wish, we obey their wishes scrupulously (sic). But as a historian, I think there is a strong argument in favor of "the sooner, the better," consistent with if it really does harm the Court. That is a judgment that only the Courts can make, although I think it would be helpful if they could help explain to us exactly why it does it

in which way, and then define some ground rules to deal with the problem.

I can express an opinion, I think, on one issue, even though I am not a lawyer and I am not a historian of the Court, particularly, and that is does the effect of opening these up lower people's opinion of the Court or destroy respect? I think it seems to have had, from what we can tell, talking to a great many people, almost the opposite effect.

I mean, there is a great respect for the seriousness of the debate. People say, "Is it bad to see people changing their minds?" I think, on the contrary, people respect decisions more when it is revealed to have been the process of a real, genuine deliberative process in which people exchange ideas and are seriously thinking. And there was an incident like this in the past, to some extent, that we were trying to think of past analogies.

The biography of Justice Stone came out, by Alpheus Thomas Mason, in 1956, that had used a lot of material on Justices who were still sitting in the Court. And I think that biography, like all serious discussion, if it is sometimes frivolous or slipshod in the first instance, it is best rectified by the next person coming along and correcting it.

But the general process of public dialogue about these things, as well as the revelation that this is an extraordinarily serious and intellectually demanding and committed process of deliberation, I think the—again, I do not want to judge, and I think it is for the Court to tell us what specific areas may need specific restriction. But in terms of generalized restrictions, I would be disinclined, not only from the point of view of the historian but from the point of view of the respect, the general growth of public respect and understanding for the judicial process, the development of a mature respect and a mature democracy, to be in favor of relatively early access wherever possible.

Senator LIEBERMAN. I have another question related to that, but my time is up on this round, and I am going to yield to Senator Cochran.

Senator COCHRAN. Well, thank you, Mr. Chairman. In thinking about what were appropriate questions to raise this morning, I thought back on the reading of the articles that were published in the Washington Post by the reporters who came to the Library and gained access under this agreement, read parts of the records there and then reported on intra-Court communications that, in many instances, were at the heart and soul of some of the decisions that had just recently been made by the Supreme Court and dealing with issues that are not yet laid to rest.

And it struck me that this was an inappropriate disclosure of confidential communications within the Court. And were I a member of the Supreme Court, and had comments that I had made to other Justices during the deliberative process published, I would have been upset. I would have felt that my privacy had been invaded inappropriately. And I think, too, that future communications within the Court will be affected by the fact that those statements and writings were made public, to the extent that the quality and, at least, the traditional independence of the Court and its processes may be adversely affected.

And so, what do we do about it? It is not the fault of the Library of Congress that that occurred, in my view. I would have hoped, however, that the access that would be granted would be such that would be limited to those parts of the records, the collection of papers, that would not inappropriately jeopardize the independence and the confidentiality of intra-Court communications, and the procedure the Court has to use if it is to carry out its duties and functions as the Supreme Court of the United States.

I was looking through the instrument of gift for some better definition of the responsibility of the Library of Congress to set aside, maybe, those parts of the papers that would not be, in your discretion, appropriate to make available to the public. But there is no such distinction within the instrument of gift. So you did not have much choice.

I think, as you say, your discretion goes to when the papers should be available and to whom they should be available, not what parts of the papers may be available. But when I first came across this issue and knew that we were going to have the hearing, I tried to put myself in the same position you and your staff were in. And I would prefer, as the Librarian, if I were in your place, to withhold access to certain parts of those documents until some period of time has elapsed, 10 years, 15 years, as Judge Mikva says he thinks is appropriate. I agree with him.

There has to be—there should be—some period of time there to protect the confidentiality of the Justices who are now serving. And we are not talking about Justice Marshall only. We are talking about the entire membership of the Court, and its process and its obligation to deal with issues that are continuing to be issues. They have not all been decided and disposed of, and that is history. That is not history. That is now. And many of these issues will be current and continue to occupy the attention of the Court for some years.

So I guess, rather than asking a question, I can just say that having heard your testimony now and read your statement of May 26th in connection with this matter, I agree with you that you did not have much choice about what parts of the papers to permit researchers to have access to.

The only other question I guess I have is the use of the words, or the interpretation of the words in paragraph two of the instrument, that relates to the use. It says, "Use of the materials constituting this gift shall be limited to private study on the premises of the Library by researchers or scholars engaged in serious research."

Private study, we have talked about a little bit. And I have wondered whether or not private study meant just what it said, or whether it means to publish, to disseminate immediately. And the instrument really does not say. But then, who are researchers or scholars engaged in serious research. I suppose your discretion extends to determining who those folks are. And I presume you have determined that a newspaper reporter is a researcher or scholar engaged in serious research?

Mr. BILLINGTON. Yes, Sen. Cochran, there is very well-established usage on that. I mean, you say "researcher or scholar," recognizing that there are other kinds of researchers besides academic

scholars who have some kind of Ph.D. or some sort of form of certification, and that includes lawyers, journalists, a wide variety of people.

What it has always included at the Library, and I think in general archival usage, is somebody distinct from high school students, who may have a legitimate interest but do not have the maturity. I mean, the Archives talks about just anybody over a certain age. We define it as basically high school students.

We also exclude people who are just sort of interested in seeing the papers, I mean, tourists. There are a large number of people who would like to see letters of Lincoln or the papers of Justice Warren, or something of that kind. And so it is a very inclusive term, and it has always been interpreted that way.

Senator COCHRAN. It is my understanding that this instrument of gift was drafted by the staff of the Library; is that correct?

Mr. BILLINGTON. Yes, sir. But it was sent to him with a cover letter inviting any changes, alterations or willingness to discuss the matter with him.

Senator COCHRAN. Well, I do not know whether questions will arise later about the use of the terms and the phrases that are in this instrument of gift. But it may be the Library should consider defining or setting out more inclusively by the use of words such as "including newspaper reporters and others" who some might not consider to be researchers or scholars engaged in serious research.

That sounds like it is limited to academicians, to people who are writing a book. I do not know. I just raised the question. I do not have an opinion.

Mr. BILLINGTON. No, I think maybe we should sort of examine the standard language so that it is more explicit for laymen. I do not think anyone was in any way misled by this. I mean, in fact, in our conversation with Justice Marshall, he mentioned a particular book that he liked, written about another Supreme Court Justice, not about himself, but which was, in fact, written by a journalist. So he clearly had in mind, in his own thinking, that.

But in any event, I do not believe we ever got any indication anyone has been misled by these terms. These are terms of standard usage. I think it is probably useful to—I do not know—rephrase them if there has been this retrospective understanding.

Senator COCHRAN. I think if other terms had been used, we may have seen a period of time provided in the document whereby the papers would not be accessible, 10 years, 15 years, after the date of death of Justice Marshall, not to protect or to hide anything, not to protect Justice Marshall's privacy or to hide anything, but to protect the integrity of the Court and its processes. That is my point.

Mr. BILLINGTON. Well, I think, you know, that is up to the Court.

Senator COCHRAN. Well, now that the Library knows what can happen, you might consider writing something like that the next time you draft a document to submit to a Supreme Court Justice, at least, keeping that in mind, what could happen and the use of discretion. Care, being discrete, using good judgment, is all included in the definition of the word "discretion," in my view.

Mr. BILLINGTON. I really think that there is no doubt that Justice Marshall would have introduce and specified any limitations

that he wanted. He was very explicit to us that he did not want any limitations. And we asked for exactly the authorization which he gave us in order to execute his expressed wishes.

Now, there may be that there is a better way of writing these instrument of gifts. But I do not think there was any doubt in his mind. We had been in discussion with him since 1965 about this. It is a question he obviously knew about, the practice of other Justices. We did not suggest the terms to him. He specified them to me and two of my colleagues.

And it is clear that he specified, in fact, one limitations and we suggested one to him in the dialogue. He specified that he did not want classified materials from his time as Solicitor General being—he wanted to make sure that they were specially cared for. And then we suggested to him that he might want to add the thing about during his lifetime, it could be used with his permission. And he accepted that.

So, I mean, he had clearly thought about it. I think he knew what the alternative was. I do not think he, in any way, could have had the kinds of doubts, nor were any of them expressed until after the newspaper articles when all of this concern has come out. But I think we can probably improve the phraseology. But I do not think there was any doubt that he understood and would have specified if he wanted any limitations. And I think that it would be a very slippery slope if we start using discretions to apply limitations on the basis of subsequent concerns or other thoughts.

I am very sympathetic with the concerns of the Court. We really are. I have written the Justices individually. I am going to be talking to them individually, I hope, in the weeks ahead. And we want to be helpful in any way to devise these ground rules. But I do not think we can be fairly asked to exercise a kind of discretion that amounts to choosing who gets to use these things and who does not. It is a very dangerous slippery slope for Government officials to be making those decisions.

I have had a lot of contact with a system that ran their libraries and their archives that way. And that system, fortunately, the Soviet Union, is no longer with us. The only limitations, I think, that we can respect as archival custodians are the expressed wishes of the donor and formal Government classification.

Now, there may be some kind of ground rules that the Court can establish and develop among its own people. But I think to have open-ended discretion in terms of these kinds of access—the terms of access are always fixed by the donor. And I think these were very clearly fixed.

I think it is true that we perhaps should have language that is more clearly understandable to the layman. But I do not think it confused anybody or altered anything essential about this particular agreement or any of our past agreements.

Senator LIEBERMAN. Thank you, Senator Cochran.

I want to pursue, just for a moment, some of the same line of questioning Senator Cochran has been involved in, to this extent: I am curious, and may I say personally that I feel that your administration, your handling of these papers of Justice Marshall, when one considers the wording of this instrument of gift, was quite right. I want to come back, though, and perhaps the difficulty of

it all is another argument for some common set of ground rules, preferably originating from the Court.

I want to ask you: When a Justice begins a relationship at the Library of Congress and agrees that his or her papers are going to be deposited there, does the Library suggest document retention policies? In other words, was this instrument of gift in the nature of the standard form from which some have varied, or have you generally left it up to the particular Justice?

Mr. BILLINGTON. We draw up the instrument of gift after talking with the individual Justice. Often, there is a dialogue that goes on for some time, and gets interrupted and resumed again, which gives us the authority that we need to execute his expressed wishes. And usually, they will say, "We want a 10-year limit," or some other kinds of limitations on the length of time for the types of things, as I have indicated, by this brief history of the kind of variety of prescriptions.

They usually make those either in the course of the face-to-face discussion and dialogue or in the case of adding them to the instrument of gift, at either time.

Senator LIEBERMAN. The basic instrument?

Mr. BILLINGTON. Through the basic instrument. And in this case, Justice Marshall returned it, signed, with no change, giving us the authorization that we had asked for. So it can occur at either of those times. But usually, this is a subject so much, I believe, discussed among the Justices themselves, and usually we have a fairly lengthy dialogue over the years with people. It gets interrupted and picked up again. And other repositories do, as well.

Certainly I have said, I think other people should consider other repositories. But I think it is, frankly, faintly demeaning to the other repositories to suggest that they would exercise some kind of gratuitous discretion other than that strictly prescribed by the donor. That is a fairly uniform code of archival and librarianship ethics and legal obligation, for that matter.

So, yes, those things are either in the original verbal determination or in the instrument of gift that is sought to follow up. They have, in effect, two opportunities to establish any kind of limitations that they wish.

Senator LIEBERMAN. Right. And I gather from your answer to the earlier questions that in light of some of the questions about the wording in the Marshall instrument of gift, that the Library is reviewing the document now to see if it might make changes.

Mr. BILLINGTON. I think we will somewhat revise the language, but not the basic intent.

Senator LIEBERMAN. Right.

Mr. BILLINGTON. But I think there is no indication that anyone had any concern with us, either the Justice or anyone on his behalf, until after the articles began appearing in the newspaper.

Senator LIEBERMAN. Let me just finally pursue one more line of questioning, and this goes to the interest of third parties in the papers that are released. And as we indicated, there are variations in the terms when some of the Justices deposit their papers. I gather that Justice O'Connor, in fact, has closed access to case files, even after her departure from the Court and her death, so long as a participating Justice is still sitting on the Court.

And my question is whether the Library feels a responsibility with regard to the interest of third parties and papers. This obviously is a broader question for historians. But is there a duty to counsel a Justice as to the third party interest that may be implicated by early disclosure or publication?

Mr. BILLINGTON. Well, I think that is a very real concern and one we share, but I think it would be almost presumptuous of us to try to counsel Justices about the papers, the very life blood of the Court, which involves the interaction of other Justices about where you draw the line, where it is affecting another Justice. Certainly, that is an element of very grave concern.

But I think the courts have to give, it seems to me, or some body of the judiciary, has to define any such thing. I mean, is there a category of documents? I say the best thing we have is those three categories of documents that have been described in the Presidential Records Act, the part that was not adopted, pertaining to the judiciary.

I do not know how you draw the line. And again, for a neutral executor of a repository to be making those distinctions gets you again into the slippery slope of deciding who shall see and who will not, who shall see which type of thing and will not. We have to have either Government classification or the individual donor. In this case, I think the group deciding and individual donors executing would be the best way to go. But this is certainly one of the more real problems, I recognize.

Senator LIEBERMAN. It is a real problem. It just strikes me that the third parties are obviously not represented in the negotiations between, not only the Library, but any archive and a depositor of papers. And I will be interested in asking this to the next panel.

So who, then, if anybody, has an obligation to speak for the interest of third parties; in this case, for instance, a sitting Justice who may have a draft opinion or a private communication revealed in those papers?

Let me ask just one more question, somewhat related, and this is a knotty one that, as a lawyer, I cannot resist asking. If the Court were to promulgate rules governing access to a retired Justice's papers, would you feel bound to follow such rules if they were not explicitly incorporated in the deed of gift from a particular Justice? In other words, which would prevail, the rules or the particular instrument of gift by a departing Justice?

Mr. BILLINGTON. I think if the Court were to promulgate such rules, we would feel obligated to discuss them very seriously with any donor before accepting the gift.

Senator LIEBERMAN. Right.

Mr. BILLINGTON. But once we have decided to accept the gift, unless there is some legal force behind it, we would have to abide by the donor. But we would have to take that into consideration. We do not necessarily accept every gift. These gifts bring with them great expense. I mean, I am sorry that nowhere in all of this has been mentioned the extraordinary rapidity with which 173,000 documents were processed and made available.

Senator LIEBERMAN. That is true.

Mr. BILLINGTON. The staff, the hard-working staff at the Library, I think we felt pleased that we had maybe played a small hand in

keeping this record from possibly being lost and that we had exercised unusual measures to make it usable. So there are many complex questions.

There are also questions of preservation. Much of the record is on perishable paper, and the Library is a pioneer in working on these matters. So there is a great deal of expense and burden. It is something we have been happy to shoulder and, I think, have done well.

But certainly, if those kinds of rules were promulgated, we would feel clearly obliged to take them up in all seriousness and then we would have to make a judgment of whether we would accept papers if there was some sharp conflict between an expressed wish of the Court and so forth. I cannot predict, because it would depend on each one, with us, having to be an individual transaction.

It would also depend on the question of whether involved in this redefinition is the modification of the present legal status which is, as I understand it, that they are still defined as private property.

Senator LIEBERMAN. Correct.

Mr. BILLINGTON. As long as it is defined in that way, we would have to honor the wishes of the donor in anything we accepted. But we would certainly make that a part of the dialogue, as we will, I think, feel strongly obliged to do that.

Senator LIEBERMAN. Thank you.

Senator Cochran?

Senator COCHRAN. I have nothing further, Mr. Chairman.

Senator LIEBERMAN. Mr. Billington, thanks very much for your thoughtful testimony. Whenever I see you, even outside of a ball park, I always feel grateful that you are where you are and that it is much to the benefit of the people of this country. So thank you very much.

Mr. BILLINGTON. Thank you, Mr. Chairman. Thank you, Mr. Cochran.

Senator LIEBERMAN. I would call on the second panel now and welcome them to the table: E. Barrett Prettyman, Jr., an attorney here in Washington; Dennis Hutchinson, who is the Editor of The Supreme Court Review; Anne Kenney, President of the Society of American Archivists; and Jane Kirtley, Executive Director of the Reporters Committee for Freedom of the Press.

We welcome the four of you here. We thank you very much for being with us. We have gotten testimony from each of you that we will include in full in the record. We are going to run the lights on a six-minute cycle. If, when the red light goes on, you feel that you have some additional thoughts that are important to share with the Committee, do not feel that your First Amendment rights are being severely constrained, but do not go on too long either.

Let us now proceed. I think that the opening statement by Mr. Billington and the conversation that ensued raises some of the questions, and we now look forward to having you help us answer them and perhaps raise some more questions.

Mr. Prettyman, thanks for being here, and we would like to begin with your testimony.

TESTIMONY OF MR. E. BARRETT PRETTYMAN, JR., ATTORNEY, WASHINGTON, DC.

Mr. PRETTYMAN. I will capsulize it, Mr. Chairman, in light of the fact that I understand it will be placed in. Although I am a member of a number of organizations, I am speaking here personally here today and on the invitation of the Committee.

Some 15 years ago, my partner, Allen Snyder, and I wrote an article that dealt with this precise problem in the legal——

Senator LIEBERMAN. Mr. Prettyman, can you move the mike a little closer? Actually I would say this to everybody. These are very directional, so the closer you are, the better it will sound. Thank you.

Mr. PRETTYMAN. And in this article, we pointed out that it was Chief Justice Burger's view—then Chief Justice Burger's view—that all conference notes and other personal court papers ought to be destroyed. It was his experience, both on the Circuit Court and as Chief Justice, that these notes were very misleading in the sense that these notes often were in conflict with each other and did not often accurately reflect what had actually gone on at conference.

And it was our point that if one Justice's papers were to be preserved, all of them should receive the same treatment. An example we gave then, and I think it is equally applicable today, is by way of Justice Black, who had his conference notes destroyed, whereas Justice Burton kept very extensive notes, and his were made immediately open to the public upon his death, so that in researching a book like "Simple Justice" on the case of Brown v. Board of Education, the researcher would go when he or she wanted to find out what Justice Black thought not to Justice Black's notes, which were then non-existent, but rather to Justice Burton's notes to find out what Justice Black thought.

And it has since been revealed in a book that, in fact, Justice Black thought that Justice Burton's notes were not wholly reliable.

So what we suggested in the article was that preferably the Court, but if not that, then Congress should perhaps address this problem and try to get some system that was applicable to all. Unfortunately, that has not happened. The Court has, as I understand it, tried to address this problem, has not gotten agreement among the Justices, and consequently, as I point out in my testimony, while I have absolutely no inside information of any kind, it is my hunch that perhaps the Court would welcome a Congressional statute dealing with this problem, so long as—and this is extremely important—that the statute did not trench upon the inner workings of the Court, and by that I mean making papers available so early, either upon the death of the Justice or too soon thereafter, so that, in fact, you learn what is going on right now in regard to cases that may have begun, had their progeny back some years before.

I use an example in my testimony of a note which has been found in the Marshall papers, a memo by Justice Souter, in which he writes his views about the retroactivity of rulings on the constitutionality of State taxes.

My own view is that this revelation is unfair to Justice Souter whose views may be developing, and could be misleading to the liti-

gants who rely upon it, and that in any event, even if it accurately reflects the Justice's views, it provides an unfair advantage to those of us who live and work in Washington and have easy access to these papers, as opposed to someone in Montana or California who does not.

Consequently, I think that making papers immediately available works much mischief. I would suggest that if any attempt by Congress is made to deal with the problem, that it first of all deal with all papers in the same way, and secondly that if it Federalizes, if you will, the papers, that it makes them available to the public only after they have indeed become history.

And while I recognize that even historians would not agree perhaps as to when a piece of paper has become history, I think something on the order of 25 years. That may be a little long. But in my testimony, I give examples of papers which, if they had been made available at the time that the Presidential Act applied some 12 years ago, would reveal papers that very much affected ongoing cases before the Court today.

So I would hope that the Court itself would act in the light of this most recent incident with Justice Marshall's papers. But if after a period goes by and the Court has once again failed to act, that the Congress at least look seriously toward a statute which would not intrude upon the ongoing deliberations of the Court, which would respect the fact that these papers do deal not only with the personal views of the Justices, but views that are extraordinarily important, the ongoing evolution of cases before the Court, and that, as I say, it then treat all of the papers in the same manner.

I have obviously given a lot more detail in my statement, but that is a very brief summary.

Senator LIEBERMAN. Thank you, Mr. Prettyman. Your statement is an excellent one.

I will say also that the fact that you summarized meant that you did not have the opportunity to indicate not only your name, but who you are, and I would say for the record and for those who are in the room and may be watching across the country on television that you have an extraordinary record, having clerked for three Supreme Court Justices, written a book on the Court, argues, I believe, brought almost 20 cases before the Court. And I was in practice here in Washington under another President of the American Academy of Appellate Lawyers. So you come to these questions with some experience, and we thank you for that.

Mr. Hutchinson, we look forward to hearing you now.

TESTIMONY OF DENNIS J. HUTCHINSON, EDITOR, THE SUPREME COURT REVIEW

Mr. HUTCHINSON. Thank you very much, Mr. Chairman.

Following the pattern that Mr. Prettyman has set, I would refer to the full statement that I supplied your staff and try to respond to the issues that have developed this morning in your questioning of the Librarian and of Mr. Prettyman.

Senator LIEBERMAN. Good.

Mr. HUTCHINSON. I would like to address four points very quickly.

One has to do with the duration of time, which is becoming part of the focus of this hearing, that should elapse between the time that a Justice retires and his working papers become open for research. 25 years is one rule. 30 years is a rule, of course, that was used in Britain for some time with respect to official State papers. Felix Frankfurter suggested and used 16. A more common practice now since World War II has been either at the death of the donor or after the retirement of the last Justice with whom the donor served.

As you may know, it is not only Justice O'Connor who has put that restriction in the deed of gift of her papers to the Library of Congress, but Justice Potter Stewart did the same thing with respect to the gift of his papers to the Yale Library. Justice Stewart, as you know, retired in 1981; his papers are still closed and will be until the retirement of Chief Justice Rehnquist, Justice Blackmun, and Justice Stevens.

So you have a fairly flexible set of models to follow. I think it is regrettable that the Stewart papers are not open at this point. So I think we could spend some time trying to debate whether you go to 5, 15, 20, or the like, but certainly I think you might get a consensus that 2 years is way too short; 15 to 25 may be unduly scrupulous.

So that is the first point I would make, is that there are a lot of models out there.

Senator LIEBERMAN. Do you have any idea what the basis of Justice Frankfurter's choice of 16 years was?

Mr. HUTCHINSON. I do not know for sure. At one point, he was attracted to the idea of 30, since it was the British model, and he was an unquenchable Anglophile. How he came up with 16, though, I have no idea, and I have looked through the Frankfurter papers fairly extensively.

The second point I would like to address is the question of public property: Could we treat judicial working papers as we do Presidential papers, as the late Skelly Wright argued that we should do?

I think that would be a mistake, because I think that begins to get very close to what Senator Cochran properly said at the outset of his remarks of entrenching on separation of powers and the question of the sanctity of the judicial process while it is ongoing. The idea of the rule being enforced presents for me a nightmare of questions of separation-of-powers issues, and I think it is too much of a cure for whatever the disease is that we have. So with all respect to the late Skelly Wright, I would not urge a public property approach to this problem.

The third point that I think it is important to address is the one that you have emphasized, Mr. Chairman, and that is: Can the Court not solve this problem for us?

If we are concerned about questions of separation of powers, then should we not defer to that branch for whom the greatest concern lies?

As both of you have said this morning, our real anxiety here is—and as Mr. Prettyman has emphasized—what happens to Justices still sitting? Is David Souter embarrassed? Are there others who will feel that their thoughts in *medias res* have been portrayed?

Let me say this. I think there are two responses to that. One, I think, as the Chief Justice's letter to the Librarian of Congress indicates, getting the Supreme Court of the United States to reach consensus on anything outside of its own jurisdiction is extremely difficult. And I must say that I was slightly embarrassed for the Court. The Chief Justice was forced to say in his letter that he was speaking for a majority of the sitting Justices, and I am afraid that may suggest to all of us how difficult it would be for the Court to reach a consensus on what period of time or what papers should be the subject of any sort of Court rules. I just do not see it happening.

Some Justices would, I assume, go for the outer limit; some Justices, following the pattern not only, if I may say, of Justice Burton and Justice Marshall, but also of Justice Tom Clark, who made his papers available at his death. His papers are at the University of Texas at Austin and not in the Library of Congress. But there are Justices who believe that they have nothing to hide and that there is no risk to the work of the ongoing institution of immediate release.

That takes me, I think, to the final point that I would like to highlight this morning, and that is: What exactly is the damage to the institution of the release of working papers at this time?

And it seems to me that there are two points that are being raised, and I think Barrett Prettyman has highlighted them both in his remarks this morning: one, an embarrassment to sitting Justices; two, an unfair advantage to the Washington sector of the Supreme Court Bar. Let me address both very briefly.

One, while it may be embarrassing for a sitting Justice to see his views on a developing issue published so soon after the private rendition of those views, to say that the Justice is disadvantaged in ongoing private deliberations, I think, is to underestimate the Justice in question.

We heard—and I am not speaking of Justice Souter here, but I am speaking of the same argument that was made after the publication of Alpheus T. Mason's biography of Stone—Justice Frankfurter, who was still sitting on the Court, Justice Black, Justice Douglas all were quoted extensively in Mason's work on issues that were still live before the Court. The argument was made that from thereon there could never be the sort of deliberation that was necessary to the wise administration of justice and so on.

That simply did not happen, insofar as I can tell from the working papers post-1956. The Justices are bigger men and women than that.

Secondly, the advantage to the D.C. Bar, I think, may be overstated. On the one hand, any lawyer who does not consult the papers with respect to some live issues may be fairly charged with not exercising due diligence for his client; on the other hand, if he does rely on that in crafting an argument to make before the Court, almost exclusively he may be making a terrible mistake, because this is a dynamic institution. As I say in my formal statement, it is like Heraclitus' river; you cannot step in it in the same place twice.

The Court will have changed two knights, if I may say so, within the next several weeks, since the period in which the Marshall pa-

pers were created. That changes the entire decision-making dynamic of a nine-person institution where four votes begin the process of judgment, and five votes can finish it.

So I think the advantage is more apparent than real, and in any event, it may be evanescent.

Thank you.

Senator LIEBERMAN. Thank you very much for that very helpful testimony.

You know, it struck me when the controversy was going on about the Marshall paper and Mr. Billington's interpretation of the word "researcher", that one of the reasons he made the right decision was somewhat related to this last point of yours—perhaps it is a small point—but that if he had really tried to limit the access to researchers, there would be the possibility that a law professor who was a researcher, but also with some regularity an advocate before the Court, might have an access that regular members of the D.C. Bar or other Supreme Court litigants might not have, so that his broader interpretation of that word on all counts was the right one.

Ms. Kenney, thanks for being here as President of the Society of American Archivists. We look forward to your testimony now.

TESTIMONY OF ANNE R. KENNEY, PRESIDENT, SOCIETY OF AMERICAN ARCHIVISTS

Ms. KENNEY. Thank you very much.

The current impasse that the Library of Congress faces vis-a-vis a number of Supreme Court Justices represents an archivist's nightmare, and we recognize the validity of concerns expressed on both sides of this controversy.

A primary goal of an archivist is to provide fair, equitable, and timely access to materials for researchers as they struggle to understand the past so as to inform the future.

This desire, however, is balanced by an archivist's need to protect the interests of donors as well as those of their families and third parties. Archivists are sensitive to the need for restricting access under a number of circumstances and their responsibility to honor the wishes of a donor.

Less well-defined but also an important responsibility is the archivist's role in assessing the impact of either restricting or not restricting access to materials and of conveying such information to the donor. As an archivist and historian, I feel for the staff of the Library of Congress. By defending their contractual obligations to Thurgood Marshall, they may ultimately be defeating the goal of preserving and making available over the long term records vital to the history of our Judiciary.

The disposition of the papers of current and future Justices hangs in the balance.

Last fall, the Society of American Archivists adopted a revised Code of Ethics, which I would like to append to my testimony today. It addresses the issue of third-party protection. The Code reads:

"Archivists discourage unreasonable restrictions on access or use, but may accept as a condition of acquisition clearly stated restrictions of limited duration and may occasionally suggest such restrictions to protect privacy. Archivists observe faithfully all agree-

ments made at the time of transfer or acquisition and can recommend to donors that they make provision for protecting the privacy and other rights of individuals who created or are the subjects of records and papers, especially those who had no voice in the disposition of the materials."

Under what conditions should material be restricted? Under what conditions should archivists temper their natural desire to make historical material available? Four such circumstances are relevant to this situation.

The first is embedded in the legal rights of the donor and others who are the subjects of information contained in the collection. These include the protection of privacy and confidentiality. The concept of privacy defines the rights of living individuals to be left alone, to keep information about themselves to themselves, and to specify what information they wish to have known. Invasion of privacy can take a number of forms, but it usually refers to divulging information of a personal or private nature, rather than a professional or public nature. The rights of privacy of Government officials are severely limited.

Confidentiality refers to private communications between individuals which are restricted to them alone. Confidentiality is an essential element of privileged relationships: doctor/patient, lawyer/client, priest/confessor, and some would argue journalist and source. It is imperative that the archivist inform potential donors about such issues and the implications of restricting or not restricting material, based on the archivist's knowledge of the contents or potential contents of a collection.

In this case, it is unclear whether those at the Library of Congress did conduct such discussions. But given the background of the donor, it is reasonable to assume he was fully conversant with the law.

It is also unclear, to me at least, if the privacy rights or confidences of others, especially the other Justices on the Supreme Court, have been breached. But I suspect they have not. Certainly I am unaware of any call for restricting access based on these grounds.

The second circumstance for restricting access involves the interests of national security, and the Library of Congress recognized such concerns in dealing with Marshall's papers and in restricting certain sections.

The third circumstance for restricting access involves the wishes of the donor as expressed in the deed of gift. Donors have an absolute right to dictate the conditions under which their papers are to be used. And while archivists can and should advise on the ramifications of such restrictions or of unrestricted access, it ultimately does rest with the donor to make the final decision, providing it is consonant with the law and the capabilities of the repository.

Once such an agreement has been reached, the archivist's most pressing responsibility will be to execute that agreement. If an archivist fails to do so, then that whole delicate continuum from donor to the ultimate user is threatened.

In this case, I would argue that it would be a grave disservice to Justice Marshall, the Library of Congress, and the entire archival profession for the Librarian to ignore the will of the donor and

reclose the papers. Such a move would cast doubt on all present and future donor/repository relations. Perhaps ironically, it is only by holding fast on honoring the conditions laid down by Justice Marshall that Justice Rehnquist and others can be assured of the Librarian's ability to honor their conditions if they chose to dictate limited access.

If Justice Rehnquist were to donate his papers to the Library under the provision that they be closed for 40 years, he can be assured of the Library's commitment to abide by this criterion only if it stands fast in its commitment to Marshall to open them.

If the Supreme Court Justices and others want to argue that these papers should be closed based on national security or clear breaches of confidence or invasions of privacy, that is fine. But the Librarian of Congress should not retreat from his obligation to a donor under an implied threat about future acquisitions.

The problem with the Marshall agreement, as other have pointed out, is not so much one of language or intent, but of timing. Had Justice Marshall died 20 years from now, these issues would probably be moot.

This leads me to the fourth area in which archivists may go against their natural desire to make material available, and it is a gray one: professional discretion.

There are valid reasons why archivists would restrict access to material. If a collection has not been catalogued or it is in poor physical condition, it may be imperiled by use. An archivist can restrict researchers to the use of surrogate copies such as microfilm. There are legitimate conditions under which an archivist should exercise discretion regarding access.

What is less legitimate, however, is for an archivist to determine who can access the collection and for what purposes. In the past, it has been argued that access to manuscript collections should be granted only to serious researchers and scholars. In this context, archivists controlled access by determining who could be allowed to use the records.

The Society of American Archivists has moved away from such restrictions on users and embraces the concept of equality of access. In a joint statement with the American Library Association, it identifies an archivist's responsibility to make available research materials on equal terms. By providing access only to scholars and to other qualified researchers, a repository gets into the business of controlling use. And as the Marshall case illustrates, this can be problematic.

I would urge the Library of Congress to begin to wean donors from placing restrictions on their papers that define an exclusive body of users and to embrace a policy of equal access.

In sum, I believe I speak for most of my professional colleagues in supporting the Library of Congress' decision to keep Justice Marshall's papers open, in calling for a policy of equitable access and in limiting archival discretion to concerns surrounding the physical protection and the security of the records themselves.

Senator LIEBERMAN. Thank you, Ms. Kenney.

And now finally to Ms. Jane Kirtley. Thank you.

TESTIMONY OF JANE E. KIRTLEY, EXECUTIVE DIRECTOR, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Ms. KIRTLEY. Thank you, Mr. Chairman.

I am a lawyer and a member of the Bar of the Supreme Court, but I am here today in my capacity as Executive Director of the Reporters Committee for Freedom of the Press. We are a not-for-profit association, and we work to promote the First Amendment and Freedom of Information interests of the press and the public.

I would like to just summarize my testimony, if I could, by saying that I have really been somewhat chagrined that these hearings needed to be held and that there was a public outcry surrounding the revelations of what was in Justice Marshall's papers.

I think that the press stories that we have seen and copies of which have been appended to my testimony give us some awfully good information. They show us that the Nation's highest court is in order, that it works hard, and that it works conscientiously. So it is a little surprising to think that when we print something that positive, the reaction is to try to pass a law against doing it in the future.

I think that if Justice Marshall's papers had indicated something else—that is, for example, if the Justices were shown to be lazy or corrupt—that would also be news and legitimate news that could provoke the citizenry and Congress to seek change, as it did when it amended the Freedom of Information Act, when it enacted the Presidential Recordings and Materials Act, and in all of the other Acts that have guaranteed the preservation and openness of Government documents of various kinds.

I think, though, that in this case, when it is not clear to me that there is an identifiable harm that has been caused by disclosure, that Congress should act very cautiously in considering any kind of legislative initiative to deal with this issue.

The main issues that have been raised, I think, some of which have been touched on here having to do with the release of the papers, are first that it detracts from the dignity of the Court. I think that has been already adequately addressed here by the other speakers. But I would just point out that mystique and the notion of mystique is something that I think the Founding Fathers rejected over 200 years ago and that they would expect us to look at the Court in perhaps a more pragmatic light than some people would suggest is necessary.

A second point has been the suggestion that Justice Marshall, because he repudiated the opportunity to profit from the use of the papers in his memoirs, therefore could not have meant for them to be made publicly available.

My own view is a different theory. I think that he chose to leave his legacy of information to the public and deliberately shunned the chance to benefit from it financially. I mean, none of us can know, of course, but I think that choosing to give away the information that he could have sold was an ethical choice and one that is consistent with his strong sense of propriety and public service.

There have certainly been instances of public officials in other branches who have chosen to do otherwise. The General Accounting Office has lots of investigations of people who have taken away boxloads of papers when they left office. And I bring to your atten-

tion a list called "For Their Eyes Only", which lists some of the ex-Government officials who have treated public records as personal property, deposited them with the Library of Congress, but seriously restricted public access and profited from that by writing their own memoirs. I think it is something that should be repudiated, frankly, by public officials, and I think it was characteristic of Justice Marshall to have done so.

Finally, I guess the point that I am probably really here to address is the issue of journalism as serious research. I think it is a very odd designation, and I do not think it is one that would have occurred to Justice Marshall, to suggest that journalists are not serious researchers.

As we know from press reports, the Justice himself spoke to at least two reports, Juan Williams and Carl Rowan, about the possibility of them writing the story of his life. Justice William Brennan chose a former Wall Street Journal reporter named Steve Wermiel to write his authorized biography. And, of course, Anthony Lewis, who wrote "Gideon's Trumpet" and "Make No Law", has brought a great deal of public understanding about the operations of the Court to the public, I would suggest more so than any other researcher.

Now this is not the first time that this issue has come up. There was a case in Washington State back in 1983 where some records custodians there denied a Seattle Times reporter access to Government documents because there was a statute that restricted their use to individuals engaged in legitimate research. And the State Supreme Court there ruled that the reporter could view the records available for legitimate research. It simply looked at the dictionary definition of "research" as "a studious inquiry or examination" and said that reporters' articles could serve to inform the public and that that was an appropriate criterion by which to grant access.

Now the Court recognized that it was certainly possible for records to be exploited by journalists, that sensational reporting might occur, but that that should not rob other journalists of their opportunity to engage in research. And I must add that with all due respects to the Justices of the Supreme Court, I do not think it is likely that Justice Marshall's papers or probably any of the Justices' papers will lend themselves to sensational treatment. If reporters are looking for a frivolous topic, they are going to have to look someplace else than in the voluminous Marshall papers, I think.

As I said, we have appended copies of a number of stories, not only The Washington Post, Wall Street Journal, New York Times stores, but also those from regional papers such as the Dallas Morning News and the Kansas City Star, which I think reflect the care that the journalists have taken in putting these stories together and also, perhaps more to the point, reflecting the careful considerations made by the Justices in a wide variety of decisions that have come down in the last few years.

I would like to address quickly two other points that have come up in the course of the discussion. One is the derivative use question that was raised by Senator Cochran.

This is something that we have been fighting against in a Freedom of Information context for a long time, and I would have to

urge that any consideration that is being given to the purpose of research is really not an appropriate one. It is sometimes hard to predict what use will be made, but I think any journalist that is engaging in news-gathering for the purpose of news dissemination should certainly be given access, as should any other legitimate researcher.

On the time period and the common set of groundrules questions, obviously speaking as a journalist, I would like things to be made available when they are news, and, in fact, many times I suspect the day they become available, they will be news. And I would be very concerned about trying to set any kind of fixed period during which we decide that the line is crossed between what is just news and what is history.

As far as a common set of groundrules is concerned, I would like to quickly make reference to a similar issue that came up a few months ago in the D.C. Circuit, the U.S. Court of Appeals here in the D.C. Circuit.

You may recall that during the confirmations of Justice Clarence Thomas, an opinion that he had written that had not yet been released was leaked to the press. And after that, Judge Silberman suggested that there be a new court rule that would limit the dissemination of information about cases that had been argued by anyone who was employed by the Court for a period of 10 years after the case was decided.

We were chagrined by this at the Reporters Committee, and so we filed comments with the Judicial Conference, suggesting that that kind of a fixed rule would not really serve the public interest very well.

I can report that the Court gave due consideration to the point that we made and responded by changing it from a 10-year limit to a limit in perpetuity. That kind of Phyrric victory, I am afraid, is the sort of thing that we face a lot when we are looking at these kinds of questions. I really am reluctant to enter into a discussion about what the appropriate time period would be and would suggest that it should be left in the discretion of the Justice most nearly concerned, the Justice whose records are at stake.

Senator LIEBERMAN. Thanks, Ms. Kirtley.

I do want to say in response to your opening comments that it is, well, first the intention of the Committee, or my intention, is not to respond defensively and to clamp a lid on Supreme Court documents and papers as a result of the interest in Justice Marshall's papers. Quite the contrary.

My ultimate response is that this episode has shown me how much we have to preserve and benefit from these papers, and that is why we ought to establish a common set of groundrules, although in the discussion, it is then implicated at least questions that we have to ask about such as what the results of third parties—in this case, namely other sitting Justices—are, or any other questions about the way in which disclosure may affect the fairness before the Court, although I think those are harder to deal with.

But it is interesting that at least today I have not heard anybody say—and I do not think it is near a majority opinion, to use the terminology of the Court—that disclosure has in any sense demeaned the Court. I know some reacted that way at the outset, but

I do not think anybody—I do not think that is a position that can be sustainable for very long.

Mr. PRETTYMAN. Mr. Chairman?

Senator LIEBERMAN. Mr. Prettyman.

Mr. PRETTYMAN. I wonder if you would mind if I commented on that?

Senator LIEBERMAN. I would welcome it.

Mr. PRETTYMAN. With all candor, I do not think that is the issue. I think, yes, that the Court in no way has been demeaned, and, in fact, it is wonderful that the Court has been shown to be doing its duty and very concerned.

Senator LIEBERMAN. Right.

Mr. PRETTYMAN. I think the real issue is whether the Court can properly be doing its business when a Justice knows that another Justice is taking notes at the end of the table during the conference, which notes may be available in a matter of months, if that Justice were to suddenly die of a heart attack, as one of the Justices for whom I worked, Justice Jackson, did while working.

I do not agree that the publication of the Stone biography had no impact upon the Court. We do not know what effect it had. If you talk to the Justices right now, they say that one thing that they are disappointed about in coming to the Court is that there is not more collegiality, more discussion, more openness, more give-and-take, back-and-forth about these cases. It may be that they are somewhat reluctant to do more and to commit more to paper because of precisely what we are talking about here.

Senator LIEBERMAN. Well, I welcome your comment, and incidentally I invite each of you to respond to one another as this goes on.

Mr. HUTCHINSON. I wonder if I could comment on that, Mr. Chairman?

Senator LIEBERMAN. Yes, please.

I think you have stated the relevant concern here pretty well, Mr. Prettyman.

Mr. HUTCHINSON. It is ironic that Justice Jackson, for whom Mr. Prettyman clerked and so ably clerked, is used as a model in talking about access to working papers, because functionally his papers were unavailable to the Library of Congress and to general researchers for 30 years after he dropped dead of a heart attack. And that was because the model of access of Justice Jackson's papers was the old one of 50 years ago in the custody of a senior scholar who had absolute control over granting and denying access to papers, and the Library of Congress did not get them until the family decided that they should go to the Library in 1985.

I am afraid, with all respect, that I have to disagree with Mr. Prettyman. I just do not see the evidence that the Court has been substantially inhibited by the publication of either the Stone biography or of "The Brethren", and we will just have to see about the Marshall papers.

The question of collegiality is one, I think, that has much less to do with whether or not a Justice's notes are going to hit the newspapers in 6 months than the way the Court organizes itself to make decisions.

It is Justice Powell who said they organize themselves like nine little law firms and work with larger and larger staffs, thanks to

Congressional appropriation, such that they talk less and less to each other.

I think the Court has never been as collegial as we have hoped it would be, but I do not think that is because of Alpheus T. Mason's biography or of two journalists' book, "The Brethren".

Senator LIEBERMAN. Ms. Kirtley, do you want to respond?

Ms. KIRTLEY. Well, again, I guess harkening back to the D.C. Circuit's response to what they felt was an improper leak of the unpublished opinion written by Judge Thomas, I guess my feeling is that the Court has shown itself to be well capable of taking care of its concerns about secrecy. I mean, the secrecy surrounding the Court is legendary, the fact that clerks are admonished to keep their own counsel and that Justices very seldom grant interviews to the press and so forth.

And it would seem to me that if the Court is genuinely disturbed by what has happened here today, it is very easy for Chief Justice Rehnquist and the others to discuss what would be appropriate terms of bequest in the future. I do not really think that we have to concern ourselves overly with that.

Senator LIEBERMAN. Let me ask you this question, based on your concern about what groundrules might do here to inhibit access.

What about the other side of it? I presume you are concerned about the liberty that a Justice has now to destroy his or her papers?

Ms. KIRTLEY. Yes.

Senator LIEBERMAN. Should we have a rule or a law that says that they cannot do that, or what about a Justice who might say, under the current circumstance: I do not want my papers opened for 100 years?

Ms. KIRTLEY. Well, I am always on the side of the proposition that those who are working at the expense of the taxpayer doing Government business should not have a proprietary right in the papers that are prepared in the course of their work. That is the view I have always taken.

I have to reluctantly recognize that in the case of these papers, that is not the view that is held currently in the State of the law, and I am sure that there are serious separation-of-powers questions if Congress were to attempt to insert itself in here and dictate to the Court what the terms would be.

But again, I think that fortunately the track record has been that the majority of the Justices, the vast majority of them, have recognized the important archival natures of the papers and at the very least are putting most of them into repositories where eventually they become publicly available.

But if you are asking me my preference, it would be for something, yes, similar to the various preservation laws that are already on the books that would dictate the retention and storage and access to those documents, just like any other Government documents.

Senator LIEBERMAN. And although I know you have said in your prepared statement that you would be hesitant to try to state a time limit here, that you would be concerned if we left it totally to the discretion of the Justices, that the time limit might be too long.

Ms. KIRTLEY. Well, yes. I mean, again we thought we had argued very eloquently to the D.C. Judicial Counsel that a 10-year time period was unworkable in certain circumstances where there was really no logical need for it. And as I said, their reaction to that was to clamp down and say: Well, we will make it a permanent rule.

So I am not sure that the Justices or anybody in the Judiciary perhaps looks at the issue the same way journalists do, and I am afraid there is that tendency to fear that the rule would become quite lengthy indeed.

So, you know, again I think there is some merit in the flexibility that exists now, and I would be concerned about fixing a time limit, because I am afraid it would become much longer.

Senator LIEBERMAN. Yes. Mr. Hutchinson, I gather from your testimony that because of your concerns about separation-of-powers issues that you think it would be inappropriate for Congress, at the extreme here, to say that a Justice could not destroy his papers.

Mr. HUTCHINSON. Well, I worry about it. I think it poses substantial separation-of-powers issues. At this point, part of the Court's normal operating procedure is to collect burn-bags on a daily and weekly basis that include draft opinions, memoranda, and the like. Some Justices use them aggressively, I am told; others ignore them.

I do not think that you want to set up a mechanism that superintends what has been a practice, at least to my knowledge, since the days of Chief Justice Warren.

So it is that sort of an issue that I would worry about. Some Justices want to have a very minimal collections of papers for their own personal papers while they are serving and may donate even less of them after they retire or leave the Court.

Senator LIEBERMAN. Well, that is an important anecdote you have just given, which is—just so I understand it—on a weekly basis, there is a circulation within the Court of what you have described as burn-bags, so that draft opinions and the like can be disposed of?

Mr. HUTCHINSON. Exactly.

Senator LIEBERMAN. So in that sense, there is an inducement to do that at this time.

Mr. HUTCHINSON. Already. And that has been an established practice, I think, under the last three Chief Justices.

Senator LIEBERMAN. But notwithstanding this concern about whether we have any right to compel the Justice to keep the papers, your conclusion is that if they do, there ought to be a statute to govern the terms on which they are preserved and published, because of your skepticism that the Court will ever adopt a rule itself?

Mr. HUTCHINSON. Well, I think you are pushing me into that position. I think that——

Senator LIEBERMAN. I do not mean to do that.

Mr. HUTCHINSON. No, no, no. I certainly did not mean it as an accusation.

It is not clear to me that things are sufficiently broke that they need to be fixed with respect to preservation and dissemination of working papers.

I think that this entire incident in the last 6 months is going to say a great deal to the Justices themselves, who are the ones, of course, who initially must confront this question of whether to donate collections of papers at all.

And so it is not clear to me that anything beyond what the Librarian testified this morning in both his formal statement and what he said is necessary.

Certainly there can be protocols with respect to official Court documents. When one moves to kind of internal in-chambers working papers, I am not sure that it is as necessary as some others think at this point.

Senator LIEBERMAN. Mr. Prettyman, you have recommended that—you have agreed that it would be better if the Court initiates this rule promulgating the process itself, but that if not, we might consider acting.

Could you talk for a minute about your own evaluation of the separation-of-powers issue, if we do act to try to create some groundrules here with regard to Justices' papers?

Mr. PRETTYMAN. First of all, I do not think that a statute attempting to deal with the situation would per se be unconstitutional, and I rely upon the statute dealing with the Presidential papers for that. That is, it is hard for me to understand why that statute would be constitutional and one attempting to deal with the papers of Justices would not.

However, I can easily see how a separation-of-powers question could be raised, if, as I indicated before, the statute were to order the immediate dissemination or even the dissemination to the public in the short term of papers of Justices.

And I think the reason for that is that to the extent that Congress is forcing a separate branch to reveal what is essentially its current thinking, its current deliberations, its current policies—and by "current", I mean not just today and this month, but in the last so many years—it could well be intruding upon the ability of that other branch to function. And that is why, while I am always reluctant to suggest long periods of time, I thought that to avoid that question, something on the order of 25 years, perhaps a little shorter, but something on that order would avoid the separation-of-powers problem.

Senator LIEBERMAN. Thank you. Senator Cochran?

Senator COCHRAN. Mr. Chairman, I am curious to note whether any witness in the panel thinks that the Library of Congress abused its discretion in any respect in this case.

Mr. Hutchinson?

Mr. HUTCHINSON. I do not think it did, Senator Cochran. As I say in my prepared testimony—and I think that both of you brought it out well this morning—the Library needs to change the language that it uses in both its deed of gifts and in other publications announcing access to its collection in the Manuscript Division.

There is a common law that has grown up about what discretion is, what serious researchers are, and the like. And this is where there is a Washington advantage, where those who do routine research in the Manuscript Division know, but any intelligent lawyer reading the deed of gift might have expected Dr. Billington to be personally vetting each researcher who appeared to look at the

Marshall papers, and the Library could do itself a favor, as I say in my testimony, by clarifying precisely what it does.

I think it does the right thing. You cannot draw lines between this researcher and that researcher, or as Ms. Kirtley used the example of Steve Wermiel of the Wall Street Journal writing a biography of Justice Brennan. Steve Wermiel has now taken on the cloth and is a law professor. You know, people have different roles at different times.

But on the basis of what I know today, I think the Library acted consistently with its prior practices and with what my understanding of the terms of the deed of gift are.

Senator COCHRAN. Mr. Prettyman?

Mr. PRETTYMAN. Yes. Based on what I know, I would agree with that. I do think that the Library, in its discussions with potential donors and particularly with elderly ones, have a duty to make very clear the ramifications of what is happening. And since I am not privy to the discussions that took place with Justice Marshall, we do know that early on apparently, according to an article by Juan Williams, he was disposed or at least indicated that he might even want to destroy his papers. He obviously changed his mind and decided not only to release them, but to do so immediately.

I would have to know more about what took place and why he changed his mind. But that is all speculation.

Based upon the public record, I think the Library apparently acted properly.

Senator COCHRAN. Ms. Kenney?

Ms. KENNEY. I agree that I believe the Library of Congress acted properly in this case. I think there is a real problem in monitoring who uses what papers, and a serious researcher can look through the papers and produce a sensational article, just as well as a journalist could.

I would urge them to embrace the policy of equality of access, so they can avoid these issues and to make clear to donors in the future exactly what that entails.

Senator COCHRAN. Ms. Kirtley?

Ms. KIRTLEY. Obviously I agree with the Librarian of Congress' determination that journalists are researchers, too.

Senator COCHRAN. Yes. Well, in that case, do you think different language should be used to describe the persons who do have access under an arrangement of this kind?

I mean, why use the words "researchers or scholars engaged in serious research" and use no other words to describe who has access?

Ms. KIRTLEY. Well, I suppose Ms. Kenney can probably address that better than I can. I mean, I think this is fairly common language that I have encountered in many kinds of archival agreements. I mean, I think there is always a tendency to want to parse out every conceivable meaning.

On the other hand, using generic terms, I think, give custodians, and for that matter donors, a good deal of flexibility. I mean, you know, I would not object to a definition that was spelling out specifically including journalists, of course, but as in lots of legislation, when you try to make an exhaustive list, you do not always anticipate every conceivable person that you might want to cover.

Senator COCHRAN. Well, if it is unlimited, why try to limit it? That is my point. Why not just strike those words? If we are not limiting, in fact, access to some specific class, why try to limit it?

Ms. KIRTLEY. Well, I sort of would defer again to Ms. Kenney on this, because I think what the Librarian of Congress was saying, was trying to draw a distinction between, I suppose, what I might call the casual tourist coming through, perhaps, that just wants to take a glance at something that has Justice Marshall's handwriting on it, as opposed to someone who is engaged in research.

But that is almost more of a traffic control issue, I think, than a content one.

Ms. KENNEY. I think that the Librarian of Congress should promote equality of access and limit access only on the basis of the physical protection and security of the papers themselves. And you could argue that a casual reader may represent a threat to the collection itself.

But I would say that archivists are moving away from terminology indicating serious researcher or scholar.

Senator COCHRAN. Mr. Prettyman?

Mr. PRETTYMAN. Senator, once the sufficient period, whatever that is, has passed, I get very nervous about restricting access to certain people. If it is a family member who has the key to access, he or she is liable to restrict it to people who he or she knows is sympathetic to the particular Justice, for example, in writing about that Justice.

It just seems to me that you get into a dangerous area if you begin saying: Well, certain people or certain types of people can look at these documents, but others cannot. I would prefer to see it open to the public for anyone to come in, so long as they are not trying to take the documents out and so forth or writing on them.

But that presupposes again that a period has gone by, so that they are now history, and they are now open to the public.

Senator COCHRAN. Mr. Hutchinson, any reaction to that?

Mr. HUTCHINSON. As I have said before, I think you are dead right; the language needs to be changed. And I think that discussions such as this and hearings such as this probably have a greater educative effect for all those involved, starting with the Court and the present members of the Court, than anything else that could be done at this time.

As Mr. Prettyman says, if the Library is negotiating donations from elderly members of this or other courts, this sort of discussion, I think, will better inform their own judgment about third-party sensitivities and risks than almost any legislative instrument that can be drafted at this point.

Senator COCHRAN. I think that is a very salient observation. And, Mr. Chairman, I think it serves as an excuse for me to thank you again and congratulate you for scheduling this hearing. I think it really is a positive influence, a constructive thing to do, but I do not think we ought to get carried away and come out with a sweeping legislative solution to the problem right now.

Senator LIEBERMAN. Thank you, Senator Cochran. Thank you for your thoughtful participation today. And I share your feelings here, and I hope that there is some indication that the Court, I suppose in response to the Marshall papers being disclosed, has begun to

come back and consider this again. Somebody involved said to me that they thought they were going to work it out.

But it has not happened before, so we are going to watch it closely and hope that it happens this time.

I am intrigued by this question of the interests of third parties, which Mr. Prettyman has stated, in this case sitting Justices, most forcefully here today.

And I wanted to ask, Ms. Kenney, from the point of view of an archivist, this question which is: Since third parties are not normally represented in negotiations between someone—in this case, a Justice donating papers to an archive, to a library—in the profession of archivists, is there any thought about who has the responsibility to represent the third party or whether there is any—whether an archivist has an obligation to suggest to the donor of the papers, that he or she consider the privacy or interests of a third party?

Ms. KENNEY. As I indicated in my testimony, I think that the rights of third parties should be protected in the cases of privacy and confidentiality, and I do believe that it is the archivist's responsibility to discuss those protections with the donor. The donor may be fully conversant with the law, but he or she may not be conversant with the contents of the collection itself.

Senator LIEBERMAN. Let me end with the question that I asked Mr. Billington, which is prospective but of interest, and I guess it goes to some of the questions we have raised here about competing interests and rights, and since we have a range of professions and disciplines represented, I would be interested in the response of each of you, if you want to answer, which is: If the Court did promulgate rules governing access to retired Justices papers, do you believe that an archivist would be bound to follow such rules, even if they were not explicitly incorporated into the particular deed or instrument of gift executed by the donating Justice?

Why do we not just start with Mr. Hutchinson and go across?

Mr. HUTCHINSON. I guess my anxiety, Mr. Chairman, is that I take kind of an old-fashioned view of the powers of the Supreme Court and of the Federal Courts, and that is that their power extends to cases and controversies within the jurisdiction that the Congress sets for them, and when they start making rules that go out decision-making, I get very nervous about scope of authority and legal foundation for doing so.

And so I am not sure I would want to encourage the Court to take on that task and expand its rulemaking capacity at all. I think that this is something that Justices themselves must work out and they must work out on an individual basis, taking account of concerns for the future operations of the institutions and respect for their fellow colleagues.

Senator LIEBERMAN. I guess perhaps it is obvious, but just to say it, that if for some reason the Court did not act and Congress felt obliged to set some minimal groundrules, then clearly those, as a matter of law, would prevail over the particular deed of gift.

Mr. HUTCHINSON. Oh, absolutely. And I have never doubted—I simply did not State my separation-of-powers concerns very clearly a few minutes ago—I have no doubt that Congress has the power

to say that, for example, no working papers may be released or published for a period of X years after their generation.

Senator LIEBERMAN. Right.

Mr. HUTCHINSON. If worse comes to worse, in my view, Congress clearly, in my view, has the constitutional authority to do that. It may be sensible to discuss those sorts of limitations.

Senator LIEBERMAN. Thank you. Mr. Prettyman?

Mr. PRETTYMAN. Yes. I think that is right. Absent a statute, I do not think that the Justices would necessarily follow rules, although they might feel morally bound to do so.But, of course, a new Justice coming on the Court might feel differently.

If I may just add one last point to the discussion we were having a moment ago——

Senator LIEBERMAN. Please.

Mr. PRETTYMAN. —this discussion with someone who is going to give papers has been cast in terms of warning the donor about the possible effect upon third parties, and we have been talking as if, for example, the Library of Congress would be talking to the Justice or the Judge.

But what will often happen is that a Judge or Justice will die, and his or her papers will then go to a widow, who really has very little appreciation of the possible impact upon other members of the Court. And it is particularly important in that situation—and I happen to be personally familiar with one where I acted on behalf of the widow of a Judge—it is extremely important that she know the implications of the release of these papers, perhaps prematurely, and what impact that could have ongoing on the deliberations of the Court.

Senator LIEBERMAN. Thank you. Ms. Kenney?

Ms. KENNEY. I would agree with Dr. Billington that an archival repository ought to take into consideration any regulations the Judiciary may want to express, but that they would not be bound by it.

I would also point out that even given the Federal Records Law and the Presidential Records Act, it would be commingling of private and public papers. We have considerable problems in guaranteeing access to those collections anyway, as we've seen with the Nixon tape controversy and with the White House electronic mail files.

Senator LIEBERMAN. Ms. Kirtley?

Ms. KIRTLEY. Well, I think I would agree that the rule would be binding on the Justice, to the extent it was recognized by him or her and would be something that the archivist could consider, but would not necessarily be bound by.

I think this has brought us full circle about what we were talking about at the outset, which was this issue of who really owns these papers, and that perhaps is the crux of the question, because the reality is, of course, that the bequest or whatever would really become irrelevant if these were held to be genuinely public documents, which would be disposed of as any other public document would be. It is this curious hybrid situation that we have where they belong to the Justice and are passed on to his estate, and then they decide what will happen to them that I think has put us in

this position as it is, and perhaps that is the issue that needs to be clarified.

Senator LIEBERMAN. And on that one, you would say these are public documents?

Ms. KIRTLEY. I would, yes.

Senator LIEBERMAN. Well, I thank you all for your substantial contributions to this discussion. It did seem to us that the release of the Marshall papers raised questions of real public importance that ought to be considered in a thoughtful, not sensational, way, without any sort of eagerness to rush to legislate, and that has been very much the tone of the hearings this morning, and I appreciate the contributions that each of you and Dr. Billington made to the discussion.

We are going to consider the record, and we hope that the Justices of the Supreme Court may have been listening, and I intend to send the record of the hearing this morning for their review and consideration as they do what I believe they are doing, which is to take up this issue among themselves.

In the meantime, we will keep the record of this hearing open for 2 weeks, if any of you have any additional statements or anyone else has any statement that they want to add to the record.

With that, I thank you again. I thank my colleague, Senator Cochran, and adjourn the hearing.

[Whereupon, at 11:38 a.m., the Subcommittee was adjourned.]

APPENDIX

AMERICAN LIBRARY ASSOCIATION

50 EAST HURON STREET CHICAGO, ILLINOIS 60611-2795 U.S.A
312-944-6780 800-545-2433
TELEX 4909992000 ALA UI FAX 312-440-9374 TDD 312-944-7298

STATEMENT OF SUPPORT FOR THE LIBRARY OF CONGRESS' DECISION TO OPEN ACCESS TO THE PAPERS OF JUSTICE THURGOOD MARSHALL

Intellectual freedom and open access to library materials are the most fundamental principles of the library profession and are among the highest priorities of the American Library Association. The Library of Congress' decision to open access to the papers of Justice Thurgood Marshall, pursuant to his plain instructions, is consistent with the highest professional standards of librarianship, and representative of the finest spirit of our constitutional republic: government of the people, by the people and for the people.

The current move to close or restrict access to Justice Marshall's papers, if successful, would force the Library of Congress, an institution looked upon by the library profession as an example for all libraries, to violate these most fundamental tenets of librarianship.

Justice Marshall made his intentions clear in the Instrument of Gift he signed. He entrusted his papers to the Library of Congress for the benefit of the public. According to *The Washington Post* and *The New York Times*, that Instrument made an unrestricted gift of Justice Marshall's papers to the Library, directing the Library to release the documents, at its discretion, to the public, following Justice Marshall's death, and releasing all claims of copyright. There is no reason to second guess the plain intent of the document, nor to doubt that Justice Marshall was thoroughly aware of the meaning of the terms used at the time he signed the document. The suggestion that the Library has abused the discretion granted it by Justice Marshall by opening access to the papers impugns the professionalism of the Library specialists who worked directly with Justice Marshall in making the arrangement for the donation of his papers, in the process described by Librarian of Congress James Billington in his statement of May 26.

It is reasonable to conclude that Justice Marshall, one of our most revered jurists, by reason of his experience as a practicing attorney and as a United States Supreme Court Justice, knew perfectly well the meaning and scope of the "discretion" he granted.

Justice Marshall dedicated his life to the preservation and the fair and equal application of the liberties guaranteed by the Constitution, the Bill of Rights and the laws of the United States. To close access to his papers when his intent that access should be open was so plain, would violate the very principles Justice Marshall himself embodied in his life's work. The American Library Association wholeheartedly supports the decision of the Library of Congress to open access to Justice Marshall's papers, pursuant to Justice Marshall's plain instructions, and urges that access to these highly significant documents remain open for the benefit of the public.

The American Library Association is a nonprofit educational organization of more than 56,000 librarians from school, public, academic, research, state, and specialized libraries, as well as library trustees, library and information science educators, and friends of libraries.

STATEMENT
SUBMITTED TO
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON REGULATION AND GOVERNMENT INFORMATION

Cynthia Harrison, Ph.D.
Chief, Federal Judicial History Office
Federal Judicial Center
June 16, 1993

My name is Cynthia Harrison; I am the chief of the Federal Judicial History Office at the Federal Judicial Center. I hold a Ph.D. in American history and a master's degree in library service, both from Columbia University. The Board of the Federal Judicial Center has not reviewed or approved this submission. The statements, conclusions, and points of view expressed here are mine.

The Federal Judicial History Office was established by the Federal Judicial Center in response to the action of the Hundredth Congress, which amended the Federal Judicial Center's statute to authorize it to "conduct, coordinate, and encourage programs relating to the history of the judicial branch of the United States government" (28 U.S.C. § 623 (a)(7)). Preserving the documentary record of the work of the judicial branch is among the most important History Office concerns. [A brief description of the activities of the Federal Judicial History Office is attached.] Through the Joint Committee on Court Records, established in 1991, the History Office works closely with the staff of the National Archives and Records Administration and the Administrative Office of the United States Courts to improve records preservation and access. This committee includes staff of the Administrative Office, the Federal Judicial Center, the federal courts, and the National Archives, in addition to historians and archivists with academic or other government affiliations

I appreciate the opportunity provided by these hearings to comment on some issues raised by publication in the press of memoranda from the private papers of Supreme Court Justice Thurgood

Marshall, donated by him to the Library of Congress, and to place in the record information about the Center's effort to promote the preservation of the papers of federal judges.

As part of its work, the Federal Judicial History Office routinely responds to inquiries from federal judges about the preservation of their chambers papers.[1] These papers have historically been considered the personal papers of the judge, in the same way that office files of members of Congress belong to the member. In order to help judges to preserve their papers for eventual research use, the Federal Judicial History Office is now drafting a handbook,[2] which will be adopted after consultation with the Joint Committee on Court Records, as well as other judicial branch officers. To guide the judges and the repositories that collect these papers, the Center handbook will include information about the methods judges have employed for preservation that respect both the need for confidentiality and the right of eventual public access.

Confidentiality is an important matter for federal judges because their papers routinely contain material reflecting in-camera judicial deliberations, understood at the time to be protected from contemporaneous disclosure. This understanding of confidentiality is designed to foster robust and unrestrained discussion; fear of untimely publication could hamper such exchange. Further, it is a premise of the American legal system that judicial decisions are communicated by public statements on the record. Untimely access to judicial papers intentionally excluded from the public record by the judge-creator could improperly influence new proceedings.

The confidentiality of communication between judges and law clerks, and among appellate judges (on the U.S. courts of appeals as well as the Supreme Court) is a settled question. To ensure their protection, the records of those exchanges are kept not in the official case files, which are public

[1] A memorandum, which answers the questions most frequently asked, is appended.

[2] A model of such a tool is Karen Dawley Paul, *Records Management Handbook for United States Senators and their Archival Repositories* (S. Pub. 102-17, 1992), the handbook for the U.S. Senate. Paul is the archivist of the Senate Historical Office.

documents, but in the private papers of the judge in chambers, which include as well external correspondence and other material of historical value.

If these valuable historical records are to be preserved, judges must be assured that their legitimate concerns for confidentiality will be respected. These concerns affect not only the judge donating the papers, but the other judges whose candid and presumptively confidential comments are perforce included in the papers donated without their assent. Additional third party interests may also be involved because chambers' papers may contain or explicitly reference confidential material associated with cases, such as trade secrets or personal medical or psychological information pertaining to litigants.

Thus, one may well fear that the publicity over the release of material in the Marshall papers disclosing confidential deliberations will result in the destruction of papers by some judges already uneasy about opening confidential papers to public view. Others are likely to be more cautious in drawing up deeds of gift, insisting on more stringent restrictions than they would otherwise have stipulated. Such outcomes are inevitable if potential donors — rightly or wrongly — take away from the Marshall papers experience the belief that repositories will invariably interpret ambiguities in favor of disclosure.

The Library of Congress is, of course, the premier national repository for the papers of distinguished public figures. Other repositories look to the Library for guidance on handling these collections and donors consider the Library's curators, with whom they discuss gifts of deed, as advisors in this pursuit, a role endorsed by the Society of American Archivists. The Library therefore has a singular responsibility to have in place policies that will encourage donors to permit access to researchers at the same time that due regard is demonstrated toward sensitive materials and the third parties who may be affected by disclosure of confidential material. Because Library

instruments are likely to serve as models for other institutions, they should be drafted with exceptional care, employing language that admits of no doubt concerning the intentions of the donor or the practices of the Library.

Dr. Billington has already directed the Library staff to review existing documents and policies. In undertaking such a review, the Library should consult those affected by these policies. This community would include historians and other likely researchers, archivists in other repositories whose experience could prove useful to the Library and whose institutions may be influenced by the Library of Congress policies, and potential donors from the judicial branch and members of Congress. The review should include policies respecting the donation of collections containing particular categories of sensitive materials and the advisory role of the archivist. Once the review is completed, policies should be clearly articulated for the guidance of donors, users, and other repositories.

The recognized threats to public inquiry are the excessive restriction that in some cases hinders access to government documents decades old and elaborate screening procedures that require page-by-page examination before clearance. But untimely release of judicial papers also threatens the documentary legacy. The Library of Congress, scholars, archivists, judges and judicial branch staff should collaborate to create procedures that offer appropriate safeguards to sensitive judicial records while fostering preservation of and access to these crucial historical documents.

THE FEDERAL JUDICIAL CENTER
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June 1993

In 1988, the Hundredth Congress amended the Federal Judicial Center's statute to authorize it to "conduct, coordinate, and encourage programs relating to the history of the judicial branch of the United States government" (28 U.S.C. § 623 (a)(7)).The Federal Judicial Center established the Federal Judicial History Office to implement that provision.

The Federal Judicial History Office has the following projects underway:

Oral History

- An oral history program, undertaken jointly with the Supreme Court Historical Society, to conduct interviews with the retired Justices;
- Revision of an oral history procedures manual for judicial branch oral history programs; and
- A limited oral history program related to Center history and judicial administration.

Judicial Branch Records

- A joint effort with the AO to work with the National Archives on preserving the records of the courts, including electronic and audio/visual records; and
- An initiative to encourage the preservation by private repositories of the chambers papers of federal judges.

Reference Tools

- Creation of a directory to judges' papers already in manuscript repositories; and
- Creation and maintenance of a database of biographical information about federal judges from 1789 to the present.

Publications

- *A Directory of Oral History Interviews Related to the Federal Courts*, June 1992;
- An occasional newsletter, *The Court Historian;*
- Volume on the twenty-fifth anniversary of the Center's establishment (forthcoming); and
- Handbook for Judges' Chambers Papers.

Research and Reference Services

- The History Office works with allied organizations, such as the American Society for Legal History, in support of judicial history and provides reference service on judicial history to members of the courts staff, scholars, and the public.
- The History Office has provided staff assistance for projects of the Committee on the Bicentennial of the Judicial Conference and is now engaged in historical research for the National Commission on Judicial Discipline and Removal.

Federal Judicial Center
Federal Judicial History Office

Tel: 202-273-4181
FAX: 202-273-4027

memorandum

DATE: March 5, 1993 [Revision of memorandum distributed in November 1991]
FROM: Cynthia Harrison, Chief, Federal Judicial History Office
SUBJECT: Papers of federal judges

The Federal Judicial History Office has received many requests for advice about the preservation of the chambers papers of federal judges—those administrative papers, correspondence, and case-related papers kept by judges in chambers, separate from the official record of the court. This memorandum will provide some preliminary answers to these questions, with the hope of assisting both the judges and their secretaries in maintaining these papers and, if the judge wishes, preserving them for *eventual* research use. The History Office is planning to publish a handbook on the disposition of judges' papers that will address these questions in more detail.

1. Do the papers of a district or circuit court judge have historical significance?

Yes. Chambers files are an essential supplement to the official court record, which focuses on formal procedures. Investigators—i.e., legal scholars, historians, and political scientists as well as biographers of individual judges—who seek to understand the work of the federal court need to explore internal decision-making practices and the informal culture of the court as well as material in published opinions. Chambers papers illuminate the interaction between the bench and the bar, the complexities of judicial administration, the impact of innovation, and the relationship of the court to the community. Moreover, because the record needs to reflect the experience of judges of diverse backgrounds, working in diverse locales and with different colleagues, the papers of virtually every federal judge will contain material of value. The fuller the record available, the better the scholarship and the more comprehensive our understanding of an institution of central importance in American governance.

2. Who decides on the disposition and research use of the chambers papers of federal judges?

By longstanding custom, the chambers papers of federal judges are considered to be the personal property of the judge, to be preserved or disposed of according to the discretion of the judge. Therefore, judges who wish to have their papers preserved and made available as a historical resource after their tenure must make plans to deposit their papers with a repository. Papers can often be transferred on an on-going basis in order to clear files in the judge's chambers without being made available for research until the judge decides research use is appropriate. Agreements with repositories can, if the judge wishes, include provisions to ensure that confidential material is secure until it would be appropriate to release it. With the agreement of a repository, a judge may also make provision in a will for papers to be donated to the repository after the judge's death.

It is advisable for all judges to express a preference on the disposition of chambers files.

5. What kind of agreement should be drawn between the repository and the donor?

Each agreement is drawn up individually between the repository and the donor. Most judges have privacy concerns that most repositories are willing to accommodate.

Three sample agreements are attached. Two are agreements between judges and the Library of Congress; one is an agreement between the Second Circuit Court of Appeals and Harvard University Law Library. Donors are free, however, to craft a wide range of stipulations in conjunction with a repository. (See Attachment C.)

6. Will chambers papers be transferred as soon as a deposit agreement is drawn up?

Repositories will differ in procedures. Some will send archivists to chambers to assist in shipping files; some will ask that all papers be sent; some will request that only certain categories of papers be sent.

7. May a judge's papers be donated to the National Archives?

Not under normal circumstances. The National Archives holds the official record of the federal court and will not usually accept personal papers. However, some presidential libraries may be interested in the papers of a judge who had a close tie to a particular president.

8. May a judge's papers be stored temporarily at the Federal Records Center?

No. The Federal Records Centers do not have the authority to accept judges' papers, even temporarily. Some collections have been sent there inadvertently; if you are aware of any such donations, they should be recalled and relocated.

9. Will the Library of Congress usually accept the papers of a federal judge?

No. The Library of Congress accepts the papers of federal judges who, in judicial service or in non-judicial careers, have made unusual contributions in an area where the Library's collections are particularly strong. Most of the Library's recent collections of judicial papers are from circuit judges whose work had particular significance for civil rights and federal legislation.

10. If a judge wishes to donate papers to a repository, where can the papers be stored before shipment?

Many repositories will accept papers on an on-going basis as a judge determines that they are no longer needed in chambers. For example, an individual judge may decide to keep chambers files relating to cases for three years and then transfer them. Thus, donation of papers may free chambers space that can then be used for new files. A judge may wish to establish a regular procedure for the end of each year, asking staff to weed and arrange files from the previous year. At that time, files of a designated age can be transferred to the repository.

Attachment A

LIBRARY OF CONGRESS
MANUSCRIPT DIVISION

The Papers of

FRANK M. JOHNSON, JR.

The papers of Frank Minnis Johnson, Jr. (1918-), lawyer and judge, were given to the Library of Congress by Johnson in 1990.

Linear feet of shelf space occupied : 63
Approximate number of items: 55,000

Attachment A

Scope and Content Note

The papers of Frank Johnson, Jr., span the years 1955 through 1982 with the bulk of the papers ranging from 1962 to 1979. The majority of the papers documents Johnson's career as a judge on the United States District Court for the Middle District of Alabama, 1955-79, and the Temporary Emergency Court of Appeals of the United States, 1972-82. The papers consist of two series: the United States District Court File and the Temporary Emergency Court of Appeals File.

The United States District Court File series (1955-80) documents Johnson's twenty-four years of service as a district court judge. Papers in this series are divided into four subseries: General Correspondence, Case File, Orders and Opinions, and Office File. The General Correspondence subseries (1956-80) includes incoming and outgoing letters between Johnson and judges, lawyers, court staff, federal and state officials, and the general public. The letters pertain primarily to district court matters.

The Case File subseries (1955-79) includes correspondence, memoranda, opinions, orders, briefs, writs, motions, petitions, depositions, transcripts, notes, background information, clippings, and printed matter. Cases are arranged chronologically by date of first court action. The majority of the case files pertain to Johnson's precedent shattering decisions in the areas of civil rights for blacks, prison inmates, and mental patients. During the late 1950s and mid-1960s, many of the significant racial conflicts in the South, including the Montgomery bus boycott (Browder v. Gayle) and the Selma-Montgomery march (Williams v. Wallace), were settled in his court. Although known primarily for his decisions on civil rights, Johnson's decisions to improve the living conditions in Alabama's prisons (Pugh v. Locke and James v. Wallace) and mental hospitals (Wyatt v. Stickney) were some of his most controversial. Johnson maintained that federal courts had to act to provide relief when constitutional rights were violated because state institutions were not providing proper living conditions and proper medical care for those confined in prisons and mental hospitals. Also included in this series are cases documenting Johnson's occasional sittings for other courts. These cases are filed at the end of the Case File subseries. Notes on cases also appear in the Office File.

Papers in the Orders and Opinions subseries (1955-79) consist of principal orders and opinions issued by Johnson during his tenure as a district judge. This series includes orders and opinions of several cases that do not appear in the Case File subseries.

The Office File subseries (1955-79) relates to Johnson's administrative duties, his work as a member of the Advisory Committee on Criminal Rules for the Judicial Conference of the United States, and his involvement in other professional activities. The majority of the series, however, consists of brief files and notes on cases. The brief files contain memoranda and briefs (usually from Johnson's law clerks), opinions, articles, and printed matter that Johnson maintained as a reference about various subjects such as bankruptcy, civil rights, and social security. An index to

Attachment A

LIBRARY OF CONGRESS
MANUSCRIPT DIVISION

The Papers of

J. SKELLY WRIGHT

The papers of James Skelly Wright (1911-1988), attorney, judge, and educator, were given to the Library of Congress by Wright in 1987. An addition was received in 1988.

Copyright in the unpublished writings of J. Skelly Wright in these papers and in other collections of papers in the custody of the Library of Congress have been dedicated to the public.

Linear feet of shelf space occupied: 116
Approximate number of items: 81,200

Attachment A

Scope and Content Note

The papers of James Skelly Wright span the years 1933 through 1987, with the majority of the papers concentrated from 1948 through 1986. The bulk of the papers documents Wright's career as a judge on the United States District Court for the Eastern District of Louisiana, 1949-62, and the United States Court of Appeals for the District of Columbia, 1962-87. The papers consist of five series: General Correspondence, United States District Court File, United States Court of Appeals File, Speeches and Writings File, and Miscellany.

The General Correspondence series (1947-87) includes incoming and outgoing correspondence relating to Wright's professional and personal interests. Much of the correspondence from 1962 through 1987 is from members of the legal profession and relates to professional matters.

The United States District Court File series (1933-63) is divided into four subseries: General Correspondence, Case File, Opinions, and Office File. The chronological files in the General Correspondence subseries contain incoming and outgoing correspondence pertaining mainly to district court matters. The latter part of this subseries, segregation correspondence, consists of pro and con letters to Wright about his civil rights decisions from 1956 through 1962. These letters reflect the deep emotional anguish felt by, not only the people of Louisiana, but individuals throughout the United States.

The Case File subseries (1948-62), arranged chronologically by date of last court action, constitutes the bulk of the district court series and consists primarily of cases that came before Wright as a judge in the Eastern District of Louisiana. Also included, however, are case files documenting Wright's service as a visiting judge for other circuits, mainly the Southern District Court of New York, and a few cases that Wright made no decisions about but were of interest to him. The Case File and the Opinions series (1949-63) reflect the wide range of cases that came before the Eastern District Court during Wright's thirteen year tenure. Two areas in which Wright was considered particularly adept were maritime law and civil rights. The latter brought him into national prominence with his decision on Bush v. Orleans Parish School Board. His enforcement of the law mandated by Brown v. Board of Education led to the desegregation of the public schools in New Orleans, an arduous process, that earned him the wrath and hatred of the local community. The case sheets preceding the case files provide a summary of many of Wright's cases from 1949 through 1954. Papers in the Opinion series are opinions written by Wright except for a few of the segregation opinions. Most of Wright's opinions are typescripts, although later years also include final printed versions. The opinions, arranged chonologically by year, are preceded by an alphabetical index which identifies the year most of the cases were decided. Opinions also appear in the Case File and Office File subseries.

Papers in the Office File subseries (1933-62) include correspondence, memoranda, opinions, notes, charges to juries, and reports documenting Wright's administrative activities and his involvement in judicial conferences and local law institutes.

Attachment A

The final series in the papers, Miscellany (1935-81), includes correspondence, memoranda, financial papers, teaching materials, photographs, clippings, and printed matter. The majority of the series focuses on Wright's law classes as a professor at Loyola University, 1951-1961, and his early career as a notary public, 1936-42.

Among the most significant and frequent of Wright's correspondents are Robert A. Ainsworth, Jr., Jack Bass, Hugo Black, Wayne G. Borah, H. Payne Breazeale, John R. Brown, Ben F. Cameron, Robert Coles, Herbert Christenberry, Kenneth Culp Davis, Eperhard P. Deutsch, Susan Estrich, Abe Fortas, G. W. Foster, Jr., John P. Frank, Fred W. Friendly, Joseph C. Hutchinson, Jr., J. Edward Lumbard, Sidney C. Mize, Lee Mortimer, Thomas F. Murphy, Frank T. Read, Eugene V. Rostow, Ralph Slovenko, and Simon E. Sobeloff.

ATTACHMENT B

Sample of Repositories Now Holding Personal Papers of Federal Judges
(Partial listing, for illustration only)

Alabama Department of Archives and History (Montgomery, AL)

University of Alaska Library (Fairbanks, AK)

Albany Institute of History and Art (Albany, NY)

American Jewish Archives (Cincinnati, OH)

American Philosophical Society Library (Philadelphia, PA)

Brown University Library (Providence, RI)

Calais Free Public Library (Calais, ME)

University of California, Bancroft Library (Berkeley, CA)

Case Western Reserve University Library (Cleveland, OH)

Chicago Historical Society Library (Chicago, IL)

University of Chicago Library (Chicago, IL)

Cincinnati Historical Society (Cincinnati, OH)

Clemson College Library (Clemson, SC)

Columbia University Libraries (New York , NY)

Connecticut Historical Society (Hartford, CT)

DeGolyer Foundation Library (Dallas, TX)

Delaware Public Archives Commission (Dover, DE)

Detroit Public Library, Burton Historical Collection (Detriot, MI)

Dickinson College Library (Carlisle, PA)

Duke University Library (Durham, NC)

Fisk University Library (Nashville, TN)

Free Library of Philadelphia (Philadelphia, PA)

Harvard Business School, Baker Library (Cambridge, MA)

Harvard Law School Library (Cambridge, MA)

Hawaii Public Archives (Honolulu, HI)

Tacoma Public Library (Tacoma, WA)

Tennessee State Library and Archives (Nashville, TN)

Texas State Library, Archives Division (Austin, TX)

Texas Tech University, SouthWest Collection (Lubbock, TX)

University of Texas (Austin, TX)

Virginia Historical Society (Richmond, VA)

Virginia State Library, Archives Division (Richmond, VA)

Washington & Lee Law School Library (Lexington, VA)

Washington State Historical Society Library (Tacoma, WA)

West Virginia University Library (Morgantown, WV)

Western Virginia Dept. of Archives and History (Charleston, WV)

Yale University Library (New Haven, CT)

ATTACHMENT C-1

INSTRUMENT OF GIFT

I, (hereinafter: Donor), hereby give, grant, convey title in and set over to the UNITED STATES OF AMERICA for inclusion in the collections of the Library of Congress (hereinafter: Library) and for administration therein by the authorities thereof a collection of the personal and professional papers of my late husband, .

I hereby dedicate to the public all rights, including copyrights throughout the world, that I possess in these papers.

The papers constituting this gift shall be subject to the conditions hereinafter enumerated:

1. Access. The entire collection shall be made immediately available to researchers and scholars at the discretion of the Library.

2. Reproduction. Persons granted access to the collection may procure single-copy reproductions of the unpublished writings contained in the collection. For reasons of security, preservation, or service, the Library, when consistent with its policies and in consideration of the national interest, may reproduce, transcribe, transmit, copy and/or publicly display or exhibit all or parts of the collection.

3. Additions. Such other and related materials as the Donor may from time to time donate to the UNITED STATES OF AMERICA for inclusion in the collections of the Library shall be governed by the terms of this Instrument of Gift or such written amendments as may hereafter be agreed upon between the Donor and said Library.

Attachment C-2

INSTRUMENT OF GIFT

I, (hereinafter: Donor), hereby give, grant, convey title in and set over to the UNITED STATES OF AMERICA for inclusion in the collections of the Library of Congress (hereinafter: Library) and for administration therein by the authorities thereof a collection of my papers, more particularly described in the attached schedule.

I hereby dedicate to the public all rights, including copyrights throughout the world.

The papers constituting this gift shall be subject to the conditions hereinafter enumerated:

1. Access. With the exception that the entire collection shall at all times be available to the staff of the Library for administrative purposes, access to the collection is restricted to me and to others only with my written permission, or, in the event of my death, that of one or more of my Literary Executors; , Esq., , Esq., , Esq., , Esq., , Esq., and , Esq. for a period of 25 years from the date hereof. Thereafter, the collection shall be made available to the public at the discretion of the Library.

ATTACHMENT C-3 (Friendly papers)

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

OFFICE OF THE DEAN

May 5, 1986

Honorable Wilfred Feinberg
Chief Justice
United States Court of Appeals
Second Circuit
United States Courthouse
New York, NY 10007

Dear Judge Feinberg:

This confirms our understanding regarding the procedures that will govern access to and use of the papers bequeathed to the Harvard Law School Library by Judge Henry J. Friendly.

Judge Friendly's papers include many confidential communications, including communications with other members of the Second Circuit Court of Appeals with respect to pending decisions and administrative policies, which were intended solely for internal court use. Public disclosure of these documents, until some time has passed, may not be in the public interest.

Out of respect of the need for judicial confidentiality and out of a concern for other privacy interests that may arise upon examination of the papers, the Law School will establish a committee with the authority to approve or reject requests for examination of the papers.

This committee will consist of three individuals appointed by the Dean of the Law School, including one member of the Second Circuit.

For the next twenty years, permission to examine, reproduce or quote from the Friendly Papers will only be granted by the committee for serious, scholarly purposes which can be

(COPY)

RICE UNIVERSITY
P. O. BOX 1892
HOUSTON, TEXAS
77251

June 8, 1993

DEPARTMENT OF HISTORY
713/527-~~8101, ext. 4144~~ - 6086

Harold M. Hyman
William P. Hobby Professor of History
And
Director, Center for the History of Learning Institutions (CHILI)

Mr. John T. Nakahata
Staff Director
Sub-Committee on Regulation and Government Information
Senate Hart Office Building
Room 605
Washington, D. C. 20510-6254

Dear Mr. Nakahata:

Please accept the enclosed statement for inclusion in the record of the Hearing on Access to Judicial Records, scheduled for June 11, 1993.

May thanks for this service.

Sincerely,
Harold M. Hyman
Harold M. Hyman

HMH: 6/93

COMMUNITY OF INTEREST OR CONFLICT ON CAPITOL HILL?

-by Harold M. Hyman, *William P. Hobby Professor of American Legal and Constitutional History*, Rice University; author, among other books, of *Equal Justice Under Law: Constitutional Developments, 1835-1875* (Harper & Row, 1982 [with W. M. Wiecek]); and vice president, American Society for Legal History.

-- 1 --

What is the public's interest in the May 1993 dispute between the Library of Congress and several Justices of the United States Supreme Court, over the Library's swift opening of the late Justice Thurgood Marshall's personal papers, even to journalist-researchers? That interest is very large.

These two great institutions are physical neighbors. They face each other only across a narrow street on Capitol Hill. Both the Court and the Library are fundamentally important, precious national resources. Ultimately both serve the same constituency -- all the American people -- but in differing ways.

As it has for two centuries, the Court often tries

acceptably to resolve abrasive public issues that Presidents, Congressmen, and/or state authorities allegedly mishandled or ignored. And, one of the world's greatest knowledge depositories, the Library, as it has for almost all of America's national existence, provides Senators, Representatives, Justices, and all researchers, with opportunities to reevaluate public issues on the basis of ascertainable facts.

Why, then, the dispute? Its origins are in the written wish of recently-deceased Justice Thurgood Marshall to donate his personal papers to the Library. Doing so, he honored a tradition hallowed and followed by major figures in our history, of donating their personal papers -- their private property -- to the Library or to other archives.

Historians bless this tradition. Among the Library's major magnets for them are its unequalled manuscripts collections. They consist of donors' unpublished letters, diaries, scrapbooks, and other written items, plus, more recently, transcripts of oral history interviews. Scholars treasure these unedited, often revealing, contemporary documents. After carefully studying their contents against other relevant sources, researchers, for example, can perhaps correct public officials' sometimes self-serving versions of events. From 1789 to the present, such versions have existed in printed Senate and House proceedings, Presidential messages, and, to return to the matter at hand,

Supreme Court decisions. The historian's function, in short, is to be a nagging critic even of incumbent public officials, if ascertainable facts justify criticism.

From the careful, laborious study of donated personal papers have come some of our most instructive and enduring insights into how the Court's -- that is, the nation's -- decisions in what lawyers call "leading cases" took their shape. Without such documents both history and justice are, at best, cripplingly blind. Public policies that exclude researchers from access to accumulated contemporary research sources like Justice Marshall's papers, commonly characterize non-democratic societies.

-- 2 --

Justice Marshall followed a well-hewn trail in donating his papers to the Library, but, ever a kicker-over-of-traces, he did so in an unusual manner. No party to the present dispute over his papers suggests, however, that when signing his "Instrument of Gift" to the Library, Marshall was mentally or otherwise incapable of making binding decisions about how he wanted his personal property dealt with. Such a suggestion would be contrary to fact and a gross insult to the memory of this acute lifetime lawyer.

The facts are that Marshall's written "Instrument of Gift" (a copy, attached, appeared in the *Washington Post*, May 29, 1993), in brief form and untechnical language, specified the terms of his donation, terms understood by both parties to the transaction. Marshall did not, as many other donors including Justices had done, stipulate that a certain number of years had to pass or that the demises of all then-sitting high jurists had to occur, before researchers should enjoy access. He was untroubled by the fact that the Library did not define "researcher" to mean only PhD historians, JD attorneys, Congressmens' aides, NAACP activists, or any other credentialed calling or purposeful public position or private association.

And so Marshall's papers went to the Library. Its staff arranged them for use according to the archival profession's best standards. And researchers, including journalists, began quickly to use Marshall's materials, a consequence the late Justice, a man wise to the ways of the Washington world, surely anticipated.

They included notes he had kept of the Justices' tightly closeted conference committee deliberations, notes that journalist-researchers have excerpted and placed before readers. These notes are pithy, frequently illuminating, and occasionally amusing. In their extracted form at least, they upset no prevailing understandings of Justices' stands on major publi

issues. In sum, unless partisanly politicized, Marshall's papers seem very unlikely to erode scholarly or popular respect for the Court.

It has been a long time since scholarly Court-watchers believed, or Justices asserted, that the Court's decisions resulted only from dispassionate philosophical consistencies or clashing convictions about the intentions of the Constitution's Framers. By detailing the fact that Justices shifted voting intentions in pending litigations, Marshall's notes reaffirm that our robed nobility is, after all, human and that some Justices' strong interests and personalities influence others.

And, to the Court's credit, the published Marshall excerpts redocument the toughness of the Court's unending task as a vital third of our check-and-balance national government. That task is to ease the nation's transit through life's numerous hazardous twilight zones. In them, as in abortion, religion, or gun control, for examples, public laws and private moralities contend, but the Constitution, laws, and precedents provide uncertain guides.

-- 3 --

When published in newspapers, excerpts from Marshall's notes

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made during the Court's conference committees, outraged Chief Justice of the United States William Rehnquist and an impressive number of Associate Justices. In strong terms, Rehnquist criticized in the press the Library's swift opening of the Marshall papers to researchers and its broad definition of researcher that included journalists.

An important journalist, Carl Rowan, who, like Marshall, is one of America's preeminent blacks and who is writing Marshall's biography, and Marshall's lawyer, William T. Coleman, Jr., also denounced the Library. One effect of their criticisms has been the rekindling of racial undertones heard recently in controversies about Dr. Martin Luther King's donation of h papers to Boston University.

Across broad lawns yet intimately close to both Library a Court, some members of Congress are attending, quite properly (is, after all, the Library of Congress) to the Chief Justice' Rowan's, and Coleman's criticisms. Efforts may emerge fro Congress to require the Library to stipulate to donors li Justice Marshall, whatever their wishes, that extended periods o years must pass before researchers can examine donat manuscripts, and to exclude journalists from the category of researchers. The first possible policy would violate elementa and properly treasured legal principles about the rights o owners of private property. And the second possible policy wou

have excluded among other journalist-researchers, Georges Clemenceau, Walter Lippman, Bob Woodward, Carl Bernstein, William Safire, and Anthony Lewis. Bad ideas, both.

-- 3 --

Reasons both obvious and obscure seem to have inspired the Justices' sharp displeasure at the Library's quick opening of the Marshall papers to journalist-researchers. An obvious reason suffuses Chief Justice Rehnquist's pungent public statement on the Library. It is that the Court needs to keep absolutely intact its traditional cloak of secrecy over conference committee proceedings.

Yet in the past, including the recent past, some Justices themselves have violated this tradition. But, paradoxically, the tradition endures even in our time of statutory dedication to freedom of information about the formulation and implementation of public policies, a dedication resisted or evaded, however, by other agencies of government in addition to the Court.

The Court's secrecy tradition endures in part perhaps because, historically, many Justices dislike revelations that what they do is part of governing. Marshall's notes suggest that the Court's conference committee sessions reflect many of the

tensions exhibited also in the White House and Congress. Notwithstanding, defenders of the Court's absolute secrecy tradition assert that the Justices can proceed toward supportable decisions only if their deliberations are wholly confidential. Recent Presidents who made analogous claims immersed themselves in very hot water.

-- 4 --

Which leads to an admittedly obscure reason that perhaps inspired Chief Justice Rehnquist's and his colleagues' criticisms of the Library. In light of Justice Marshall's clear positions in his Instrument of Gift, guesswork about this obscure reason is appropriate.

It is that the Justices' criticisms of the Library were rooted in intellectual carryovers from their pre-judicial law careers.

As law students and practitioners the present Justices, like their predecessors, learned repetitively that they bore heavy professional responsibilities to protect clients' confidentiality against intrusive third parties. Attorneys who fail to meet this obligation face awful publicity, damage claims from erstwhile clients, and heavy civil penalties imposed by their colleagues in

states' bar associations and legislatures. These penalties include suspensions of licenses to practice or even permanent disbarments.

Are the Court's present critics of the Library applying to their cherished institution's conference committees, professional habits of mind about confidentiality cemented earlier in their careers? If so, perhaps the angry Justices should consider some results of their profession's intellectual baggage, results that a decade ago caused Harvard's then-law school dean, Derek Bok, to worry publicly that legal education and practice had become seriously flawed.

These flaws have complex causes that go back a long way. Their visible manifestation remains the physical separation of the intellectual world of law from the rest of knowledge. On university campuses, for example, law schools and law libraries are commonly physically separated from everything else, and arrange law curricula, books, periodicals, and other legal resources differently from all others. Distressingly few law libraries want to collect manuscripts even of distinguished lawyers and jurists, or to maintain non-case publications.

Which for a long time forced historians and other scholars to build their studies of the Court largely on published high-court case reports that explicitly ignored and implicitly

denied that Justices' human attitudes affected decisions. Resulting books and courses almost killed undergraduates' interests in constitutional history -- the kids are smart -- and severely limited our understanding of the mysterious science of the law. We know a lot about the formal constitutional side from what high jurists wrote in printed decisions. But we know far less about the law sides, including the often adverse discretionary positions that Justices asserted in their closed conference committees. Personal records like those Justice Marshall donated help to enlarge the knowledge.

Legal historians yearn to write no-holds-barred histories of federal and state courts of both lower and higher ranks. But, like practicing attorneys, with exceptions like Marshall, perhaps Chief Justice Rehnquist and his like-thinking colleagues are extending their profession's requirement to protect client confidentiality to exclude outsiders from access to the Court's inner life.

-- 5 --

In sum, the basic fact in the Court-Library controversy is that Justice Marshall knew what he was doing. In clear written terms easily comprehensible by laymen and law men and women, the late Justice Marshall chose to give his papers to the Library of

Congress. He chose also not to delay access to his papers by any stipulated delay, or to restrict access to journalists or any other specified class of persons. In short, Marshall understood his own permissive intentions and Library access policies.

It is appropriate also to note that important law firms, hospitals and corporations, whose spokesmen long asserted the existence of strict confidentiality limitations on third-party access, have recently afforded historians access to their archives, and that no known injuries have resulted to their institutions, clients or customers. Is the United States Supreme Court so fragile or vulnerable that researchers' access to Justices' notes of conference committee proceedings will damage this vital institution?

The Supreme Court is a marble palace. But it is not should not be, and has no means to be a self-quarantined intellectual fortress. Nothing yet visible in the printed excerpts from the Marshall papers are shockingly novel or potentially corrosive to the Court's dignity or authority. But, once politicized, the attack on the Library by the Chief Justice may destabilize his cherished institution far more than the publication he deplores. It insults the memory of this fine lawyer to suggest that he needed a lawyer in order clearly to state his intentions and understandings?

HMH: 6/93

-- 6 --

A personal closing note. I am a historian who has studied, thought about, written on, and taught legal history for almost a half-century, in universities and in law schools here and abroad. I accepted recently a presidential appointment to a permanent committee created by Congress decades ago to honor Associate Justice Oliver Wendell Holmes, primarily by encouraging historical scholarship on the Court. The committee is chaired by Dr. Billington. My concern is that the present dispute triggered by the Court may raise higher already too-high barriers between legal historians and lawyers (and jurists), barriers that had seemed to be relaxing.

A decade ago, shortly before his death, the young, gifted legal historian Stephen Botein, deeply discouraged at the barriers' seeming intractability, wrote (in *Reviews in American History* (1985), 313): "Let lawyers be their own legal historians...and let historians be the same. Once in a while they may have something to say to one another."

"Once in a while" is now.

INSTRUMENT OF GIFT

I, Thurgood Marshall (hereinafter: Donor), hereby give, grant, convey title in and set over to the United States of America for inclusion in the collections of the Library of Congress (hereinafter: Library), and for administration therein by the authorities thereof, a collection of my personal and professional papers, more particularly described on the attached schedule.

I hereby dedicate to the public all rights, including copyrights throughout the world, that I may possess in the Collection.

The papers constituting this gift shall be subject to the conditions hereinafter enumerated:

1. Access. With the exception that the entire Collection shall be at all times be available to the staff of the Library for administrative purposes, access to the Collection during my lifetime is restricted to me and to others only with my written permission. Thereafter, the Collection shall be made available to the public at the discretion of the Library.

In witness whereof, I have hereunto set my hand and seal this 24th day of October, 19 91, in the city of Washington, D.C.

Thurgood Marshall (seal)

Accepted for the United States of America

The Librarian of Congress (seal)

November 8, 1991
Date

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1993

The Honorable Joseph I. Lieberman
Chairman
Subcommittee on Regulation and Government Information
United States Senate
Washington, D.C. 20510-0703

Dear Mr. Chairman,

My colleagues and I have discussed at Conference your letter of June 1st which was sent to each of us. They have each requested that I respond on their behalf as well as my own. We recognize the importance of the issues into which your Subcommittee will be inquiring, and regret that we are unable to either appear personally on Friday, June 11th, or furnish any detailed response to your questions. We have our usual Friday Conference scheduled for June 11th, and the month of June is traditionally one of our busiest because it is then that we try to wind up the Court's business for the current term.

Even with the limited time available to us, however, we have no hesitancy in expressing the opinion that legislation addressed to the issues discussed in your letter is not necessary and that it could raise difficult concerns respecting the appropriate separation that must be maintained between the legislative branch and this Court.

We appreciate your having advised us of the hearings and of the questions that your Subcommittee wishes to explore.

Sincerely,

William H. Rehnquist

The Society of
American Archivists

1993 JUN 17 PM 2:33

June 15, 1993

The Honorable Joseph I. Lieberman
Chairman
Subcommittee on Regulation and Government Information
United States Senate
Washington, DC 20510

Dear Senator Lieberman:

On behalf of our members, I would like to thank you for providing the opportunity for SAA President Anne Kenney to testify on the matter of access to the Thurgood Marshall Papers at the Library of Congress from an archival perspective.

Following her appearance before your subcommittee last Friday, she flew to Chicago to chair a meeting of the governing Council of the Society. Enclosed is a copy of a resolution regarding the Marshall Papers that was adopted by this body.

For your information, also enclosed is a resolution regarding timely and equitable access to government records around the world that was also adopted.

Please feel free to call upon SAA for information and archival thinking in the future if it can be of help in the important work of your subcommittee.

Cordially,

Anne P. Diffendal

Anne P. Diffendal
Executive Director

Telephone
(312) 922-0140

Fax
(312) 347-1452

cc: David B. McMillen

The Society of
American Archivists

RESOLUTION

SAA Resolution on Access to the Thurgood Marshall Papers at the Library of Congress

WHEREAS the Library of Congress' actions in fulfilling the terms of the Instrument of Gift for the Thurgood Marshall Papers have been called into question; and

Whereas a primary goal of archivists is to provide fair, equitable, and timely access to materials for researchers; and

Whereas the *Joint Statement on Access to Original Research Materials* issued by the Society of American Archivists (SAA) and the American Library Association states: "It is the responsibility of a library, archives, or manuscript repository to make available original research materials in its possession on equal terms of access.... A repository should not deny access to materials to any person or persons, nor grant privileged or exclusive use of materials to any person or persons, nor conceal the existence of any body of material from any researcher, unless required to do so by law, donor, or purchase stipulations."; and

Whereas the SAA *Code of Ethics* states: "Archivists discourage unreasonable restrictions on access or use, but may accept as a condition of acquisition clearly stated restrictions of limited duration and may occasionally suggest such restrictions to protect privacy. Archivists observe faithfully all agreements made at the time of transfer or acquisition."

Therefore, be it resolved that the Council of the Society of American Archivists considers that it would be a grave disservice to Justice Marshall, to scholars and other researchers, to the American people, and to the entire archival profession to ignore the will of the donor and to close or restrict access to the Thurgood Marshall Papers.

Be it further resolved that the Librarian of Congress should continue to honor the terms of the agreement with Justice Marshall, administer the Library's collections of original research materials on the basis of equal access, ensure that the language in the Library's future agreements with donors is clear and unambiguous, and limit the repository's discretion to restrict access and use only to insuring the physical protection and security of the materials.

Adopted by the Council of the Society of American Archivists, June 13, 1993.

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312 / 922-0140

600 S. Federal
Suite 504
Chicago, Illinois
60605

The Society of
American Archivists

RESOLUTION

SAA Resolution on Post-Cold War Access to Archives

In light of changes in the post-Cold War era, the Society of American Archivists encourages governments around the world to review their declassification policies with the purpose of pursuing policies of open access to archives.

We support our professional colleagues in efforts to preserve historically valuable archives, to protect the integrity of these records, and to make these resources open for research in a timely and equitable manner.

We particularly encourage efforts of archivists in the Confederation of Independent States and in Eastern European nations where archives were formerly closed to foreign researchers for their efforts to open the archives and to share widely information about our world history.

Adopted by the Council of the Society of American Archivists, June 13, 1993.

The Society of American Archivists, North America's oldest and largest professional archival association, includes a membership of more than 3,500 individuals and institutions concerned with the identification, preservation, and use of records of historical value. Members are drawn from government agencies, colleges and universities, historical societies, museums, libraries, businesses, and religious institutions. For more information, contact the Society of American Archivists, 600 S. Federal, Suite 504, Chicago, IL 60605, (312)922-0140.

Telephone
312 / 922-0140

600 S. Federal
Suite 504
Chicago, Illinois
60605

Code of Ethics for Archivists

THE SOCIETY OF
AMERICAN ARCHIVISTS

600 South Federal, Suite 504
Chicago, Illinois 60605
(312) 922-0140

Adopted by the Council of the Society of American Archivists,

Archivists select, preserve, and make available documentary materials of long-term value that have lasting value to the organization or public that the archivist serves. Archivists perform their responsibilities in accordance with statutory authorization or institutional policy. They subscribe to a code of ethics based on sound archival principles and promote institutional and professional observance of these ethical and archival standards.

Archivists arrange transfers of records and acquire documentary materials of long-term value in accordance with their institutions' purposes, stated policies, and resources. They do not compete for acquisitions when competition would endanger the integrity or safety of documentary materials of long-term value, or solicit the records of an institution that has an established archives. They cooperate to ensure the preservation of materials in repositories where they will be adequately processed and effectively utilized.

Archivists negotiating with transferring officials or owners of documentary materials of long-term value seek fair decisions based on full consideration of authority to transfer, donate, or sell; financial arrangements and benefits; copyright; plans for processing; and conditions of access. Archivists discourage unreasonable restrictions on access or use, but may accept as a condition of acquisition clearly stated restrictions of limited duration and may occasionally suggest such restrictions to protect privacy. Archivists observe faithfully all agreements made at the time of transfer or acquisition.

Archivists establish intellectual control over their holdings by [illegible] finding aids and guides to facilitate internal controls and access by users of the archives.

Archivists appraise documentary materials of long-term value with impartial judgment based on thorough knowledge of their institutions' administrative requirements or acquisitions policies. They maintain and protect the arrangement of documents and information transferred to their custody to protect its authenticity. Archivists protect the integrity of documentary materials of long-term value in their custody, guarding them against defacement, alteration, theft, and physical damage, and ensure that their evidentiary value is not impaired in the archival work of arrangement, description, preservation, and use. They cooperate with other archivists and law enforcement agencies in the apprehension and prosecution of thieves.

Archivists respect the privacy of individuals who created, or are the subjects of, documentary materials of long-term value, especially those who had no voice in the disposition of the materials. They neither reveal nor profit from information gained through work with restricted holdings.

Archivists answer courteously and with a spirit of helpfulness all reasonable inquiries about their holdings, and encourage use of them to the greatest extent compatible with institutional policies preservation of holdings, legal considerations, individual rights, donor agreements, and judicious use of archival resources. They explain pertinent restrictions to potential users, and apply them equitably.

Archivists endeavor to inform users of parallel research by others using the same [illegible] viduals concerned agree, supply each name to the other party.

As members of a community of scholars, archivists may engage in research, publication, and review of the writings of other scholars. If archivists use their institutions' holdings for personal research and publication, such practices should be approved by their employers and made known to others using the same holdings. Archivists who buy and sell manuscripts personally should not compete for acquisitions with their own repositories, should inform their employers of their collecting activities, and should preserve complete records of personal acquisitions and sales.

Archivists avoid irresponsible criticism of other archivists or institutions and address complaints about professional or ethical conduct to the individual or institution concerned, or to a professional archival organization.

Archivists share knowledge and experience with other archivists through professional associations and cooperative activities and assist the professional growth of others with less training or experience. They are obligated by professional ethics to keep informed about standards of good practice and to follow the highest level possible in the administration of their institutions and collections. They have a professional responsibility to recognize the need for cooperative efforts and support the development and dissemination of professional standards and practices.

Archivists work for the best interests of their institutions and their profession and endeavor to reconcile any conflicts by encouraging an [illegible] to avoid all [illegible]

Code of Ethics for Archivists and Commentary

The code is a summary of guidelines in the principal areas of professional conduct. A longer Commentary explains the reasons for some of the statements and provides a basis for discussion of the points raised. The Code of Ethics is in italic bold face; the Commentary is in modern type.

I. The Purpose of a Code of Ethics

The Society of American Archivists recognizes that ethical decisions are made by individuals, professionals, institutions, and societies. Some of the greatest ethical problems in modern life arise from conflicts between personal codes based on moral teachings, professional practices, regulations based on employment status, institutional policies and state and federal laws. In adopting a formal code of professional ethics for the Society, we are dealing with only one aspect of the archivist's ethical involvement.

Codes of ethics in all professions have several purposes in common, including a statement of concern with the most serious problems of professional conduct, the resolution of problems arising from conflicts of interest, and the guarantee that adoption of [illegible]

The archival profession needs a code of ethics for several reasons: (1) to inform new members of the profession of the high standards of conduct in the most sensitive areas of archival work; (2) to remind experienced archivists of their responsibilities, challenging them to maintain high standards of conduct in their own work and to promulgate those standards to others; and (3) to educate people who have some contact with archives, such as donors of material, dealers, researchers, and administrators, about the work of archivists and to encourage them to expect high standards.

A code of ethics implies moral and legal responsibilities. It presumes that archivists obey the laws and are especially familiar with the laws that affect their special areas of knowledge; it also presumes that they act in accord with sound moral principles. In addition to the moral and legal responsibilities of archivists, there are special professional concerns, and it is the purpose of a code of ethics to state those concerns and give some guidelines for archivists. The code identifies areas where there are or may be conflicts of interest, and indicates ways in which these conflicting interests may be balanced; the code urges the highest standards of professional conduct and excellence of work in every area of archives administration.

This code is compiled for archivists, individually and collectively. Institutional policies should assist archivists in their efforts to conduct themselves according to this code; indeed, institutions, with the assistance of their archivists, should be [illegible] adoption of [illegible] policy [illegible]

II. Introduction to the Code

Archivists select, preserve, and make available documentary materials of long-term value that have lasting value to the organization or public that the archivist serves. Archivists perform their responsibilities in accordance with statutory authorization or institutional policy. They subscribe to a code of ethics based on sound archival principles and promote institutional and professional observance of these ethical and archival standards.

Commentary: The introduction states the principal functions of archivists. Because the code speaks to people in a variety of fields - archivists, curators of manuscripts, records managers - the reader should be aware that not every statement in the code will be pertinent to every worker. Because the code intends to inform and protect non-archivists, an explanation of the basic role of archivists is necessary. The term 'documentary materials of long-term value' is intended to cover archival records and papers without regard to the physical format in which they are recorded.

III. Collecting Policies

Archivists arrange transfers of records and acquire documentary materials of long-term value in accordance with their institutions' purposes, stated policies, and resources. They do not compete for acquisitions when competition would endanger the integrity or safety of documentary materials of long-term value, or solicit the records of an institution that has an established archives. They cooperate to ensure the preservation of materials in repositories [illegible] unwarranted.

Commentary: Among archivists generally there seems to be agreement that one of the most difficult areas is that of policies of collection and the resultant practices. Transfers and acquisitions should be made in accordance with a written policy statement, supported by adequate resources and consistent with the mission of the archives. Because personal papers document the whole career of a person, archivists encourage donors to deposit the entire body of materials in a single archival institution. This section of the code calls for cooperation rather than wasteful competition, as an important element in the solution of this kind of problem.

Institutions are independent and there will always be room for legitimate competition. However, if a donor offers materials that are not within the scope of the collecting policies of an institution, the archivist should tell the donor of a more appropriate institution. When two or more institutions are competing for materials that are appropriate for any one of their collections, the archivists must not unjustly disparage the facilities or intentions of others. As stated later, legitimate complaints about an institution or an archivist may be made through proper channels, but giving false information to potential donors or in any way casting aspersions on other institutions or other archivists is unprofessional conduct.

It is sometimes hard to determine whether competition is wasteful. Because owners are free to offer collections to several institutions, there will be duplication of effort. This kind of competition is unavoidable. Archivists cannot always avoid the increased labor and expense of such transactions.

IV. Relations with Donors, and Restrictions

Archivists negotiating with transferring officials or owners of documentary materials of long-term value seek fair decisions based on full consideration of authority to transfer, donate, or sell; financial arrangements and benefits; copyright; plans for processing; and conditions of access. Archivists discourage unreasonable restrictions on access or use, but may accept as a condition of acquisition clearly stated restrictions of limited duration and may occasionally suggest such restrictions to protect privacy. Archivists observe faithfully all agreements made at the time of transfer or acquisition.

Commentary: Many potential donors are not familiar with archival practices and do not have even a general knowledge of copyright, provision of access, tax laws, and other factors that affect the donation and use of archival materials. Archivists have the responsibility for being informed on these matters and passing all pertinent and helpful information to potential donors. Archivists usually discourage donors from imposing conditions on gifts or restricting access to collections, but they are aware of sensitive material and do, when necessary, recommend that donors make provision for protecting the privacy and other rights of the donors themselves, their families, their correspondents, and associates.

In accordance with regulations of the Internal Revenue Service and the guidelines accepted by the Association of College and Research Libraries, archivists should not appraise for tax purposes [illegible]

Some archivists are qualified appraisers and may appraise records given to other institutions.

It is especially important that archivists be aware of the provisions of the copyright act and that they inform potential donors of any provision pertinent to the anticipated gift.

Archivists should be aware of problems of ownership and should not accept gifts without being certain that the donors have the right to make the transfer of ownership.

Archivists realize that there are many projects, especially for editing and publication, that seem to require reservation for exclusive use. Archivists should discourage this practice. When it is not possible to avoid it entirely, archivists should try to limit such restrictions; there should be a definite expiration date, and other users should be given access to the materials as they are prepared for publication. This can be done without encouraging other publication projects that might not conform to the standards for historical editing.

V. Description

Archivists establish intellectual control over their holdings by describing them in finding aids and guides to facilitate internal controls and access by users of the archives.

Commentary: Description is a primary responsibility and the appropriate level of intellectual control should be established over all archival holdings. A general descriptive inventory should be prepared when the records are accessioned. Detailed processing can be time-consuming and should be completed according to a priority based on the significance of the [illegible]

for archivists to hold and preserve materials: they also facilitate the use of their collections and make them known. Finding aids, repository guides, and reports in the appropriate publications permit and encourage users in the institution and outside researchers.

VI. Appraisal, Protection and Arrangement

Archivists appraise documentary materials of long-term value with impartial judgment based on thorough knowledge of their institutions' administrative requirements or acquisitions policies. They maintain and protect the arrangement of documents and information transferred to their custody to protect its authenticity. Archivists protect the integrity of documentary materials of long-term value in their custody, guarding them against defacement, alteration, theft, and physical damage, and ensure that their evidentiary value is not impaired in the archival work of arrangement, description, preservation, and use. They cooperate with other archivists and law enforcement agencies in the apprehension and prosecution of thieves.

Commentary: Archivists obtain material for use and must insure that their collections are carefully preserved and therefore available. They are concerned not only with the physical preservation of materials but even more with the retention of the information in the collections. Excessive delay in processing materials and making them available for use would cast doubt on the wisdom of the decision of a certain institution to acquire materials. [illegible]

Some archival institutions are required by law to accept materials even when they do not have the resources to process those materials or store them properly. In such cases archivists must exercise their judgment as to the best use of scarce resources, while seeking changes in acquisitions policies or increases in support that will enable them to perform their professional duties according to accepted standards.

VII. Privacy and Restricted Information

Archivists respect the privacy of individuals who created, or are the subjects of, documentary materials of long-term value, especially those who had no voice in the disposition of the materials. They neither reveal nor profit from information gained through work with restricted holdings.

Commentary: In the ordinary course of work, archivists encounter sensitive materials and have access to restricted information. In accordance with their institutions' policies, they should not reveal this restricted information, they should not give any researchers special access to it, and they should not use specifically restricted information in their own research. Subject to applicable laws and regulations, they weigh the need for openness and the need to respect privacy rights to determine whether the release of records or information from records would constitute an invasion of privacy.

VIII. Use and Restrictions

Archivists answer courteously and with a spirit of helpfulness all reasonable inquiries about their holdings, and encourage use of them to the greatest extent com- [illegible] ***institutional policies,*** [illegible] ***holdings, [and legal***

donor agreements, and judicious use of archival resources. They explain pertinent restrictions to potential users, and apply them equitably.

Commentary: Archival materials should be made available for use (whether administrative or research) as soon as possible. To facilitate such use, archivists should discourage the imposition of restrictions by donors.

Once conditions of use have been established, archivists should see that all researchers are informed of the materials that are available, and are treated fairly. If some materials are reserved temporarily for use in a special project, other researchers should be informed of these special conditions.

IX. Information about Researchers

Archivists endeavor to inform users of parallel research by others using the same materials, and, if the individuals concerned agree, supply each name to the other party.

Commentary: Archivists make materials available for research because they want the information on their holdings to be known as much as possible. Information about parallel research interests may enable researchers to conduct their investigations more effectively. Such information should consist of the previous researcher's name and address and general research topic and be provided in accordance with institutional policy and applicable laws. Where there is any question, the consent of the previous researcher should be obtained. Archivists do not reveal the details of one researcher's work to others or prevent a researcher from using [illegible] used. Archivists are also sensitive to the needs of confidential research, such as research in support of litigation, and in such cases do not approach the user regarding parallel research.

X. Research by Archivists

As members of a community of scholars, archivists may engage in research, publication, and review of the writings of other scholars. If archivists use their institutions' holdings for personal research and publication, such practices should be approved by their employers and made known to others using the same holdings. Archivists who buy and sell manuscripts personally should not compete for acquisitions with their own repositories, should inform their employers of their collecting activities, and should preserve complete records of personal acquisitions and sales.

Commentary: If archivists do research in their own institutions, there are possibilities of serious conflicts of interest — an archivist might be reluctant to show to other researchers material from which he or she hopes to write something for publication. On the other hand, the archivist might be the person best qualified to research in area represented in institutional holdings. The best way to resolve these conflicts is to clarify and publicize the role of the archivist as researcher.

At the time of their employment, or before undertaking research, archivists should have a clear understanding with their supervisors about the right to research and to publish. The fact that archivists are doing research in their institutional archives should be made known to patrons, and archivists should not reserve materials for their own use. Because it increases their familiarity with their own collections, this kind of research should make it possible for archivists to be more helpful to other researchers. Archivists are not obliged, any more than other researchers are, to reveal the details of their work or the fruits of their research. The agreement reached with the employers should include in each instance a statement as to whether the archivists may or may not receive payment for research done as part of the duties of their positions.

XI. Complaints About Other Institutions

Archivists avoid irresponsible criticism of other archivists or institutions and address complaints about professional or ethical conduct to the individual or institution concerned, or to a professional archival organization.

Commentary: Disparagement of other institutions or of other archivists seems to be a problem particularly when two or more institutions are seeking the same materials, but it can also occur in other areas of archival work. Distinctions must be made between defects due to lack of funds, and improper handling of materials resulting from unprofessional conduct.

XII. Professional Activities

Archivists share knowledge and experience with other archivists through professional associations and cooperative activities and assist the professional growth of others with less training or experience. They are obligated by professional ethics to keep informed about standards of good practice and to follow the highest level possible in the administration of [illegible] They have a professional responsibility to recognize the need for cooperative efforts and support the development and dissemination of professional standards and practices.

Commentary: Archivists may choose to join or not to join local, state, regional, and national professional organizations, but they must be well-informed about changes in archival functions and they must have some contact with their colleagues. They should share their expertise by participation in professional meetings and by publishing. By such activities, in the field of archives, in related fields, and in their own special interests, they continue to grow professionally.

XIII. Conclusion

Archivists work for the best interests of their institutions and their profession and endeavor to reconcile any conflicts by encouraging adherence to archival standards and ethics.

Commentary: The code has stated the "best interest" of the archival profession—such as proper use of archives, exchange of information, and careful use of scare resources. The final statement urges archivists to pursue these goals. When there are apparent conflicts between such goals and either the policies of some institutions or the practices of some archivists, all interested parties should refer to this code of ethics and the judgment of experienced archivists.

THE SOCIETY OF AMERICAN ARCHIVISTS
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CHICAGO, ILLINOIS 60605

APPENDIX D: AMERICAN LIBRARY ASSOCIATION–SOCIETY OF AMERICAN ARCHIVISTS JOINT STATEMENT ON ACCESS TO ORIGINAL RESEARCH MATERIALS IN LIBRARIES, ARCHIVES, AND MANUSCRIPT REPOSITORIES

1. It is the responsibility of a library, archives, or manuscript repository to make available original research materials in its possession on equal terms of access. Since the accessibility of material depends on knowing of its existence, it is the responsibility of a repository to inform researchers of the collections and archival groups in its custody. This may be accomplished through a card catalog, inventories and other internal finding aids, published guides or reports to the *National Union Catalog of Manuscript Collections* where appropriate, and the freely offered assistance of staff members, who, however, should not be expected to engage in extended research.

2. To protect and insure the continued accessibility of the material in its custody, the repository may impose several conditions which it should publish or otherwise make known to users.

a. The repository may limit the use of fragile or unusually valuable materials, so long as suitable reproductions are made available for the use of all researchers.

b. All materials must be used in accordance with the rules of and under the supervision of the repository. Each repository should publish and furnish to potential researchers its rules governing access and use. Such rules must be equally applied and enforced.

c. The repository may refuse access to unprocessed materials, so long as such refusal is applied to all researchers.

d. Normally, a repository will not send research materials for use outside its building or jurisdiction. Under special circumstances a collection or a portion of it may be loaned or placed on deposit with another institution.

e. The repository may refuse access to an individual researcher who has demonstrated such carelessness or deliberate destructiveness as to endanger the safety of the material.

f. As a protection to its holdings, a repository may reasonably require acceptable identification of persons wishing to use its materials, as well as a signature indicating they have read a statement defining the policies and regulations of the repository.

3. Each repository should publish or otherwise make available to researchers a suggested form of citation crediting the repository and identifying items within its holdings for later reference. Citations to copies of materials in other repositories should include the location of the originals, if known.

4. Whenever possible a repository should inform a researcher about known copyrighted material, the owner or owners of the copyrights, and the researcher's obligations with regard to such material.

5. A repository should not deny access to materials to any person or persons, nor grant privileged or exclusive use of materials to any person or persons, nor conceal the existence of any body of material from any researcher, unless required to do so by law, donor, or purchase stipulations.

6. A repository should, whenever possible, inform a researcher of parallel research by other individuals using the same materials. With the written acquiescence of those other individuals, a repository may supply their names upon request.

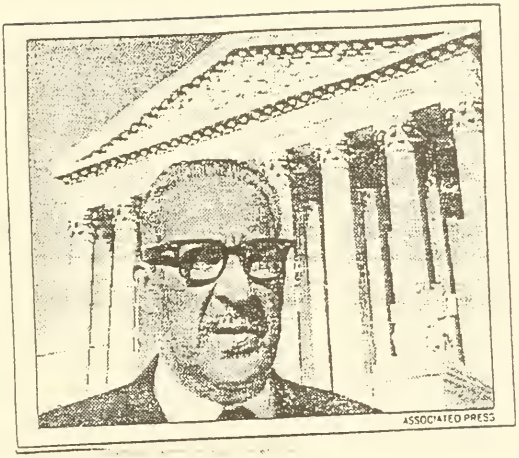
7. Repositories are committed to preserving manuscript and archival materials and to making them available for research as soon as possible. At the same time, it is recognized that every repository has certain obligations to guard against unwarranted invasion of personal privacy and to protect confidentiality in its holdings in accordance with law and that every private donor has the right to impose reasonable restrictions upon his papers to protect privacy or confidentiality for a reasonable period of time.

a. It is the responsibility of the repository to inform researchers of the restrictions which apply to individual collections or archival groups.

b. The repository should discourage donors from imposing unreasonable restrictions and should encourage a specific time limitation on such restrictions as are imposed.

c. The repository should periodically reevaluate restricted material and work toward the removal of restrictions when they are no longer required.

8. A repository should not charge fees for making available the materials in its holdings. However, reasonable fees may be charged for the copying of material or for the provision of special services or facilities not provided to all researchers.



Thurgood Marshall after having been sworn in as a Supreme Court justice in September 1967. He often signed court correspondence with his initials.

T.M.

Roe's Eleventh-Hour Reprieve

'89 Drafts Show Court Poised to Strike Abortion Ruling

By Benjamin Weiser and Bob Woodward
Washington Post Staff Writers

Four years ago, a draft of a Supreme Court majority opinion came so close to overturning the landmark abortion rights decision *Roe v. Wade* that three justices declared in a proposed dissent that "Roe no longer survives," according to court documents among the papers of the late Justice Thurgood Marshall.

Over a one-month period, Chief Justice William H. Rehnquist circulated four drafts of his proposed majority opinion in the 1989 case *Webster v. Reproductive Health Services.* Each draft upheld a Missouri law imposing new restrictions on women seeking abortions and sharply attacked the 1973 *Roe* decision, which established a woman's constitutional right to an abortion.

The fourth draft was dated for release on the last scheduled day of the court's term, showing that Rehnquist was proceeding at that late stage as if he still held a majority. His opinion would have made it much easier to pass laws retricting access to abortions.

But in the last 10 days of the term, Justice Sandra Day O'Connor—the critical fifth vote—declined to agree with Rehnquist's language attacking *Roe*, forcing him to back off in his fifth and final draft.

Rehnquist's failure to hold a majority for his overall opinion limited the scope and impact of the *Webster* decision. The court in the end upheld the Missouri restrictions, but without any sweeping new constitutional ruling.

Once it became clear that O'Connor had deprived Rehnquist of a majority, Justice Harry A. Blackmun, who had written the *Roe* decision, removed his "*Roe* no longer survives" language from his proposed dissent and rewrote it to say: "For today, at least, the law of abortion stands undisturbed."

While the *Webster* case was being decided, there had been hints of an internal struggle at the court—a four-day delay in the release of the ruling and rumors that the *Roe* decision would be overturned—but Marshall's extensive files provide the first publicly available record of the court's confidential deliberations in the case.

The Marshall files on the *Webster* case in-

See ABORTION, A21, Col. 1

The Washington Post 5/23/93

In '89 Case, Roe's Days Seemed Numbered

ABORTION, From A1

clude 25 internal court memos, 19 drafts of majority opinions, concurrences and dissents, and Marshall's handwritten vote tally sheet and brief notes from the justices' conference.

In one memo, Justice John Paul Stevens objected to Rehnquist's first draft and declared that *Roe* deserved "a decent burial instead of tossing it out the window of a fast-moving caboose."

The *Webster* case file—one of 3,000 Supreme Court case files that Marshall gave to the Library of Congress from his 24 years at the court—shows how the deeply divided justices wrestled with the abortion question. Because each justice generally circulates copies of memos and drafts of opinions to every other justice, Marshall's files contain not only his own drafts and memos in the *Webster* case, but those of the other justices as well.

But like any paper trail, the documents show only what was written down and can only go so far in illuminating the court's work. The files appear to contain no notes or information about the conversations among the justices in chambers or on the telephone—often an important part of the court's decision-making process.

Nonetheless, the internal files from the *Webster* case show the evolution of the justices' thinking in one of the most hotly contested Supreme Court decisions in recent years.

Webster Caused Immediate Stir

The *Webster* case caused an immediate stir when it arrived at the Supreme Court in the fall of 1988.

Both supporters and opponents of abortion rights thought the conservatives on the court might finally have the votes to overturn *Roe*. In the 1980s, the high court had allowed some state laws regulating and restricting abortions. Then in early 1988, Anthony M. Kennedy replaced Justice Lewis F. Powell Jr., a consistent fifth vote to uphold the right to abortion. Kennedy, a conservative Reagan appointee, was thought to tip the balance against *Roe*.

In 1986, the Missouri Legislature passed one of the most restrictive abortion laws. A key provision required doctors performing abortions to conduct various tests on wo-

In the draft, Rehnquist upheld the M souri law's restrictions, including the quirement to test the fetus's viability in second trimester. Then, in three pages the end of the draft, he took direct aim the underpinnings of *Roe*.

Rehnquist strongly criticized *Roe*'s mester framework, which Blackmun had veloped in writing the court's majority o ion in the 1973 case. Blackmun's opinio Roe had divided pregnancy into three mesters of about 12 weeks each, and discussed the competing rights of the st the woman and the fetus in each stage.

Under Blackmun's formulation, states could not pass laws seeking to tect the fetus until the third trimes when the fetus is considered able to outside the mother's body.

Rehnquist said in his draft that "the elements of the *Roe* framework" appear where in the Constitution and were too id. He called *Roe* "unsound in principle unworkable in practice," wording appare ly designed to appeal to O'Connor, who used virtually the same language to criti the trimester formulation in earlier cases

In a 1983 Ohio abortion decision, O'C nor wrote, in a dissent joined by Rehnqu that medical advances had pushed feta ability back to a much earlier point in pr nancy. At the same time, she wrote, te nology allowed women to have safe ab tions later and later. "The *Roe* framewo then, is clearly on a collision course with self," she said.

In his *Webster* draft, Rehnquist offere new constitutional test for a state abort law—whether it "reasonably furthers state's interest in protecting potential man life," before or after viability.

Then, echoing his statements at the c ference that he was not overruling *Roe* such," Rehnquist said the case "affords us occasion to revisit the holding of *Roe* . . . we leave it undisturbed." Without explanat and perhaps in contradiction, he conclud "To the extent indicated in our opinion, modify and narrow *Roe* and succeed cases."

A Polite Form of Fury

On May 25, Rehnquist circulated draft to the eight other justices. Immedia ly, his language drew fire.

men believed to be at least 20 weeks pregnant. The tests were supposed to determine whether the fetus was "viable," or able to survive outside the womb.

This formulation struck at the heart of the *Roe* decision, which said that states could regulate abortions during this period—the second trimester of pregnancy, defined as 13 to 24 weeks—only to protect the mother's health.

A federal appeals court, citing *Roe*, struck down the Missouri law; the Missouri attorney general, William L. Webster, appealed that decision to the Supreme Court. The Bush administration's Justice Department, in a friend-of-the-court brief, formally asked the court to accept the case and overturn *Roe*.

A Marshall law clerk feared the outcome if the court decided to hear Missouri's appeal, the files show. For "defensive reasons," the clerk wrote in a Dec. 29, 1988 memo, Marshall and the other justices who support *Roe* should vote to keep the case away from the conservatives.

"Taking this case would pose a great threat that the majority on this Court would overrule, or dramatically limit, *Roe*," the clerk stated.

But on Jan. 9, 1989, over the objections of Marshall, Blackmun and Justice William J. Brennan Jr., the justices decided to take the case, according to Marshall's handwritten tally of the votes.

The tally sheets are used to track cases from the day they come to the court through final disposition. The single-page sheets list the justices in order of seniority, beginning with the chief justice, and have separate columns for votes in all stages of the case.

On April 28, two days after listening to the formal oral arguments from both sides in the case, the justices met in private for their weekly, justices-only conference. These discussions are the court's most tightly held secret; the court releases no public record of them or of any preliminary votes.

The next day, Blackmun informed every justice by memo, "I shall be writing something in this case"—clearly meaning a dissent. On May 30, Brennan and Marshall wrote Rehnquist that they would wait to see Blackmun's opinion.

That same day, Stevens sent Rehnquist a detailed two-page memo, challenging the chief justice. Stevens mocked Rehnquist's reasoning, saying that Rehnquist's "newly minted standard" allowing the states to determine their interest in "protecting potential human life" was far too open-ended.

"A tax on abortions, a requirement that the pregnant woman must be able to stand on her head for fifteen minutes before she can have an abortion, or a criminal prohibition would each satisfy your test . . . ," Stevens said. "The same result could be accomplished by requiring tests of the woman's knowledge of Shakespeare or American history."

Stevens also criticized Rehnquist for waiting until the end of the opinion to introduce his new test. "Because the test really rejects *Roe v. Wade* in its entirety, I would think that it would be much better for the Court, as an institution, to do so forthrightly rather than indirectly with a bombshell first introduced at the end of its opinion. . . .

"As you know, I am not in favor of overruling *Roe v. Wade*," Stevens concluded, "but if the deed is to be done, I would rather see the Court give the case a decent burial instead of tossing it out the window of a fast-moving caboose."

On the same day that Rehnquist received Stevens's broadside, his draft won the support of Kennedy and White, who sent memos joining the Rehnquist opinion in full. A week later, on June 6, Rehnquist sent around a second draft with only stylistic changes.

Then on June 21, Blackmun circulated the first draft of his dissent. A 26-page typed version and a printed copy went to each chamber.

Marshall's tally sheet shows five votes to uphold the Missouri law—Rehnquist, Byron R. White, O'Connor and the two new justices who had not yet written on the abortion issue, Antonin Scalia and Kennedy.

Marshall listed himself, Blackmun, and Brennan as voting to strike down the Missouri law. The position of the ninth justice, Stevens, is not clear from Marshall's notes of the discussion. "On and off," Marshall scrawled next to Stevens's initials on a page of blue-lined notebook paper attached to the tally sheet.

The only indication that the justices explicitly discussed *Roe* comes from Marshall's notes. Referring to the chief justice as "CJ," Marshall wrote that Rehnquist "disagrees with *Roe v. Wade*" but would "not overrule as such." The phrase "as such" foreshadowed the coming internal debate, as Rehnquist would maintain in his drafts that his opinion would not harm *Roe*, while the dissenters said it would dismantle the ruling.

Marshall's notes show clearly that O'Connor voted with the majority to uphold the specific restrictions in the Missouri law. But there is no indication that she said anything about whether this case should be used to overturn *Roe*. By the initials "SDO" in his notes on the discussion, Marshall left a blank.

As the senior justice in the majority, Rehnquist got to choose which justice would write the majority opinion. On May 1, he assigned the opinion to himself, as the chief justice traditionally does in important cases.

His first draft ran 23 pages. It began, "Chief Justice Rehnquist delivered the opinion of the Court," indicating that he was writing for a majority that he expected either to retain or to garner with his draft.

Today, Blackmun declared angrily, a bare majority of this Court disserves the people of this Nation, and especially the millions of women who have lived and come of age in the 16 years since the decision in *Roe v. Wade*. . . . To those women, and to all others, this Court owes an essential duty of explanation—a duty of candor and forthrightness, a duty to interpret the Constitution and our past decisions in a reasoned and honest fashion. The majority mocks this duty."

His draft went on: "Let there be no misunderstanding: the two isolated dissenters in *Roe* [Rehnquist and White], after all these years, now have prevailed, with the assent of the Court's newest Members, in rolling back that case and in returning the law of procreative freedom to the severe limitations that generally prevailed before January 22, 1973. . . .

"I rue this day. I rue the violence that has been done to the liberty and equality of women. I rue the violence that has been done to our legal fabric and to the integrity of this Court. I rue the inevitable loss of public esteem for this Court that is so essential. I dissent."

As soon as Marshall and Brennan saw Blackmun's draft, they sent memos formally signing on. Brennan called it "magnificent."

The following day, June 22, Rehnquist sent around a two-page scheduling memorandum that said he would announce the *Webster* decision on June 29, which was then supposed to be the final day of the term.

That same day, O'Connor circulated her first draft opinion, a typed version that ran 16 pages. It is the first document in Marshall's files that suggests Rehnquist might not have a majority.

O'Connor said she, like Rehnquist, would uphold the Missouri testing provision. But, she wrote, she did not see any conflict with the court's past rulings, including *Roe*. She said she continued to believe that *Roe*'s trimester framework was "outmoded," but that question could be addressed in a future case. The *Webster* case posed no necessity "to reexamine the constitutional validity of *Roe*," she concluded.

When O'Connor circulated a printed version of her draft the following day, there was a significant change: Instead of calling *Roe*'s framework "outmoded," she used the more neutral word "problematic."

That same day, Rehnquist distributed a third draft of his majority opinion, adding new material to respond to Blackmun's dissent. "Our holding today will allow some governmental regulation of abortion that would have been prohibited," Rehnquist said. But, he wrote, Blackmun's suggestion that legislatures "will treat our holding today as an invitation to enact abortion regulation reminiscent of the dark ages not only misreads our holding but does scant justice to those who serve in such bodies and the people who elect them."

On Monday, June 26, Scalia, a member of the initial majority, weighed in with his first writing. He said he saw one issue as Blackmun did—that Rehnquist's opinion effectively would overrule *Roe*. "I agree that should be done," he said, "but would do it more explicitly."

The next day, Rehnquist circulated his fourth draft. The document still said, "Chief Justice Rehnquist delivered the opinion of the Court," traditional wording indicating he had not given up his hopes of getting O'Connor's support.

The Justice Thurgood Marshall papers are available at the Library of Congress manuscript reading room, on the first floor of the Madison Building, 101 Independence Ave. SE, with access by the public subject to the discretion of the library. Researchers are asked to obtain a library user's card, which requires them to show a photo identification card, and to describe the general purpose of their work.

He seems to have been eager to accommodate O'Connor's draft, incorporating some of her points from a section unrelated to the *Roe* issue. "Sandra has indicated that she had no objection to such modest plagiarism," Rehnquist said in a short memo. He made no reference to the portion of her draft opinion disagreeing with his reasoning on *Roe*.

For the first time, Rehnquist's draft contained the scheduled announcement date, June 29, an addition that usually appears only when the case is near its end.

But right around this time, something definitive happened to the Rehnquist majority. Rehnquist pushed back the announcement four days, he told the other justices in a memo. O'Connor, in a new draft of her opinion dated June 28, began referring to the Rehnquist opinion as a "plurality," rather than a majority.

Also on June 28, Blackmun circulated a new draft that became his final dissent, changing the word "majority" to "plurality" in 45 places.

Because the absence of a majority undermined whatever Rehnquist said about *Roe*, Blackmun now dismissed Rehnquist's plurality opinion, saying that it did not make "a single, even incremental, change in the law of abortion."

He retained much of his sharp language, but deleted the phrase "Roe no longer survives." Instead of saying "I rue this day," he now said, "I fear for the future."

On June 29, Rehnquist circulated his fifth and final draft.

For the first time, he called his opinion the "judgment" of the court—meaning the Missouri law would be upheld but there would be no majority opinion addressing *Roe*. Rehnquist's final language was agreed to by a plurality of three—himself, White, and Kennedy—though Scalia and O'Connor joined in the narrow judgment.

As for *Roe*, Rehnquist expressed his thoughts in terms of what the plurality desired. "We would modify and narrow *Roe* and succeeding cases," inserting the word "would" for the first time.

Scalia also held to his view and stated in his concurring opinion that Roe should be overruled directly.

On July 3, the Webster case was announced publicly by the Court with no reference to the internal turmoil. Blackmun read in open court from his dissent, with a final section that he added after Rehnquist failed to muster a majority.

"For today, the women of this Nation still retain the liberty to control their destinies," he concluded. "But the signs are evident and very ominous, and a chill wind blows."

The Marshall files also show how, after the *Webster* case, the justices who supported *Roe* undertook a campaign to win over O'Connor.

In the *Hodgson v. Minnesota* abortion case the following term, the court examined one provision of a Minnesota law that required women under the age of 18 to notify both parents before having abortions.

In the Dec. 1, 1989, conference vote, O'Connor was listed as voting to uphold that part of the law, according to Marshall's tally sheet. But in a Dec. 8 memo to the chief justice, she explained that she had listened to some of Stevens's arguments and "this leads me to change my vote."

Because she was the critical fifth vote on this point, the majority swung to the side that wanted to uphold *Roe*.

Eager to make sure they didn't alienate O'Connor, Brennan, Marshall, and Blackmun agreed among themselves to put aside their minor differences with Stevens, who was writing the majority opinion, according to several memos in the files.

"I think it is important for John [Stevens] to get as much support as possible, now that Sandra has for the first time joined us in holding invalid a law regulating abortion," Brennan wrote Marshall on June 13, 1990.

By a 5-4 vote, the court held the two-parent notification unconstitutional.

Last summer, the court decided the Pennsylvania case *Planned Parenthood v. Casey*. Since Marshall retired from the court, his papers do not include it. But the public record shows O'Connor's shift.

Though the court upheld some new restrictions, O'Connor was finally ready to live with *Roe*. In a 5-4 decision that she helped to write, the court declared that "the woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce."

Researcher David Greenberg contributed to this report.

NEXT: Civil rights cases

The Washington Post 5/23/93

116TH YEAR ··· No. 169 ···

THE MARSHALL FILES

First of Three Articles

Secrets of the High Court

Papers Afford a Rare Glimpse of Justices' Deliberations

By Benjamin Weiser and Joan Biskupic
Washington Post Staff Writers

Newly available papers of the late Justice Thurgood Marshall, including extensive internal files on cases decided as recently as 1991, provide a rare look at the confidential deliberations of the contemporary Supreme Court.

The Marshall files, which were made public by the Library of Congress after his death in January at age 84, contain private memos and drafts of decisions that circulated among all the justices and reveal new details on how the court—one of the government's most secretive institutions—handled such issues as abortion, civil rights, free speech, crime and government power.

Collectively, the papers show the court's decision-making process as a continuing conversation among nine distinct individuals on dozens of issues simultaneously. The exchanges are serious, sometimes scholarly, occasionally brash and personalized, but generally well-reasoned and most often cast in understated, genteel language.

The papers, which Marshall gave to the Library of Congress after his 1991 retirement, consist of about 173,700 items from his career, mostly from his years at the court. The collection would fill a wall of bookshelves 8 feet high and nearly 30 feet long; the Supreme Court files cover more than 3,000 cases.

Normally, the public sees only portions of the court's process: a brief announcement that a case has been accepted for a decision, written and oral arguments; and, months later, the final ruling and written opinions.

The Marshall papers provide a wealth of material on the steps that are rarely seen: the private debate, votes and jockeying among the justices over which cases to take and reject; the preliminary votes at the weekly justices-only conferences and the crucial assignments of authors for the majority and dissenting opinions.

Included are the handwritten tallies that Marshall made of the justices' votes and whatever brief notes he took on their discussion of which issues to address or avoid.

The papers also show the draft-by-draft evolution of the written opinions, as well as glimpses of the critical negotiations as one of the justices maneuvers to hold or forge a majority. "I shall do my best to accommodate the criticism which seems to be emanating

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A Rare Glimpse Over Sitting Court's Shoulder

PAPERS, From A1

from all directions," Justice John Paul Stevens wrote to his colleagues as his majority slipped away in a 1989 case.

The months-long internal debate on a case often focuses on how much law to change or make. Sometimes, cases come right down to the wire. In a 1989 decision that struck down laws prohibiting flag-burning, Justice Harry A. Blackmun cast his decisive fifth vote two days before the opinion was issued. "I struggled with this difficult and distasteful little (big?) case, but I join your opinion," Blackmun wrote in a one-sentence memo to Justice William J. Brennan Jr., the author of the majority opinion in the 5-4 decision.

In other cases, a majority of justices start down one path, only to reverse direction. This happened in a 1989 case that was a matter of life and death. Initially, a majority of justices voted in conference to overturn the murder conviction of Phillip D. Tompkins, who was on death row in Texas. Justice Stevens circulated a 28-page draft majority opinion, saying that the systematic exclusion of blacks from the jury may have denied Tompkins a fair trial.

Then, votes began to shift and Stevens himself expressed uncertainty about some parts of his draft. Three months and 31 memos and draft opinions later, the justices discarded this work and upheld Tompkins's conviction in a 10-word unsigned ruling. Tompkins was spared execution when the governor of Texas, citing reasons different from Stevens's draft opinion, commuted his sentence to life in prison.

This is the kind of internal debate that the justices have argued should remain confidential, taking the position that only their final opinions have legal authority. They have expressed concern that premature disclosure of their private debates and doubts may undermine the court's credibility and inhibit their exchange of ideas according to a Dec. 19, 1990, memo that Brennan wrote to the justices, which is contained in the Marshall papers.

Marshall's files almost did not make it to the library at all. At one time, he apparently considered destroying them. "Because we heard that you intended to burn your valuable collection, we are especially grateful that it will soon become [part] of the holdings of the nation's library," Billington wrote to Marshall on Oct. 21, 1991.

Washington Post reporters have examined several dozen case files from the Marshall archive, paying particular attention to recent controversial cases involving abortion, civil rights and other constitutional issues. The papers also contain hundreds of memos on court administration and protocol, including a glimpse of the justices' efforts to keep the court untainted by politics.

For example, some justices expressed reservations about swearing-in ceremonies for new colleagues held at the White House, rather than at the court. In October 1990, when the Bush administration arranged a White House swearing-in for David H. Souter, Stevens recalled his uneasiness about attending a similar function for Reagan appointee Anthony M. Kennedy in 1988. "I know that on that occasion I had serious misgivings about the possible separation of powers implications of the President's use of the occasion in a somewhat political way," Stevens wrote to his colleagues.

The issue arose again after Bush named Clarence Thomas to the court in 1991. Blackmun wrote in a Sept. 19, 1991, memo to his colleagues, "The practice of having an oath administered in the White House lends further weight to the politicization of the appointment process. It appears to have begun in the years of the Reagan administration. . . . I refused to attend the White House ceremony the last time, and I shall not attend this time, if there is one."

The same day, Chief Justice William H. Rehnquist offered his views in a memo: "I am

late justice, issued a statement Friday through her attorney: "My husband had great respect for the court and its tradition of confidentiality. I am certain he never intended his papers to be released during the lifetime of the justices with whom he sat and I am surprised that the Library of Congress has chosen to release them at this time."

Other former Marshall associates said last week that Marshall must have assumed that the library would follow the practice of delaying public access until Marshall's fellow justices were no longer serving on the court. Jill Brett, a spokesman for Librarian of Congress James H. Billington, said yesterday that Billington and two library staff members met at the Supreme Court Oct. 7, 1991, with Marshall, who agreed to "access without restriction upon his death."

In 1988, Marshall agreed to write an autobiography with the assistance of journalist Carl T. Rowan. But when Rowan wanted to focus on Marshall's years on the court and its secrets, Marshall dropped out of the project and returned the $100,000 advance that he had received, one Marshall associate said. Rowan went on alone to write a book about Marshall.

"It was very difficult for him because he did not have much money," the associate said of Marshall's decision to give back the advance, "but he was scared to death about anyone tracing or attributing leaks or [court] stories to him."

In recent times, no other justice's papers have become available so soon after his departure from the court. The papers of the late Justice William O. Douglas, who retired in 1975, did not become available until 10 years later. Byron R. White, who has announced his retirement, has specified that his papers will not become freely available until 10 years after his death.

Brennan, who retired in 1990, strictly limited access to his papers when he gave them to the Library of Congress. He tightened the restrictions even further after several of his former colleagues said they were worried about possible "embarrassment,"

to a swearing-in at the court and perhaps allow cameras for the first time so the president could have a "photo-op."

But Scalia said this proposal carried risk. "I believe in the camel's nose," Scalia quipped in his memo, referring to the difficulty of keeping the camel out of the tent once it pokes its nose inside.

Scalia said he was willing to break precedent and allow cameras inside the court for the occasion only if "there is some offsetting benefit. I would consider the elimination the White House ceremony to be such a benefit. . . . In order to make the arrangement attractive to President Bush (and later Presidents) I think we should allow minimally intrusive on-floor cameras and even lights. The President's men are going to want good theatre and attractive close-ups."

Rehnquist noted in response to Scalia: is somewhat awkward to invite someone your house on the condition that he not vite you to his house."

In the end, the court decided against televising Thomas's swearing-in after all justices weighed in with separate memos the chief justice. Most offered a bit of explanation for opposition, but Marshall was characteristically terse. "I vote to deny the quest to televise the investiture," his me said.

An Obsession With Detail

This kind of one-person, one-vote democracy prevails in just about everything the tices do, at least during the period when Marshall was on the court. They take few actions without consulting each other, soliciting written responses on everything from increased security at the court during the Persian Gulf War to planning a traditional wine toast commemorate a justice's birthday.

This obsession with detail surfaces often in the files. An April 1, 1991, memo from Rehnquist, for example, proposed that "assistant clerk for records management be given a new title of "deputy clerk" to recognize the clerk's years of service. One by one, each justice sent Rehnquist a separate memo endorsing the change.

Dear Sandra . . .

The documents show the justices to be meticulous in their drafting of opinions. Sometimes they will change a single word in a lengthy draft of an opinion and send it to be completely reprinted and redistributed to each justice. The new draft will carefully list on the front of every page where the slightest changes have been made, so no one will miss them.

A ritual courtesy pervades their private communications. The strong language that sometimes appears in published opinions rarely shows up in the memos they write to each other. "Dear Thurgood, I think I will wait 'til the dust settles before voting on this," Justice Sandra Day O'Connor wrote to Marshall as he sought her support for an opinion in a 1985 case.

They refer to each other by first names (Harry and Sandra) or nicknames (Nino for Scalia, Tony for Kennedy). The chief justice merits his own special appellation: "Chief," or CJ."

When responding to a draft they do not like, the justices almost never say "no" outright. Instead, they have developed their own distinct vocabulary. "I await other writing in this case," means "I don't like your opinion and I want to see what someone else has to say." When they say "in due course," they mean, "when I get around to it."

In their private writing, most of the justices come across much as they do in public. Scalia is blunt, witty and sometimes caustic. Brennan is strong-willed but conciliatory, looking to build a consensus. Stevens likes to weigh carefully all sides of an issue, sometimes seeming indecisive, which Marshall case—they reveal only what is written down—but they offer a rare opportunity to learn more about how a justice arrived at a controversial decision.

For example, the papers shed light on a longstanding mystery: why Justice Lewis F. Powell Jr. switched sides and voted to uphold a Georgia law banning sodomy, changing the outcome of a 1986 case, *Bowers v. Hardwick*.

Powell explained his reasons in an April 8 internal memo that he circulated to the other justices. Originally, he wrote, he voted to strike down the sodomy law because punishing someone for "a private act of homosexual sodomy" might violate the Constitution's Eighth Amendment ban on cruel and unusual punishment.

But no one had made the Eighth Amendment argument to the court, he wrote, so it would be inappropriate for him to address it.

Moreover, he said, he could not go along with the argument—that a "fundamental substantive constitutional right" existed "to engage in conduct that for centuries has been recognized as deviant, and not in the best interest of preserving humanity."

So, Powell said, "upon further study as to exactly what is before us, I conclude that my 'bottom line' should be to [uphold the law.]"

Exploring Issues in Print

At times, the justices explore subjects in their memos that never make their way into published opinion. In the landmark 1978 *Regents of the University of California v. Bakke* case, where a splintered 5-4 court decided that colleges could consider an applicant's [illegible] in admissions, Blackmun scholar Alexander M. Bickel had offered in an earlier case.

"And, of course, his position is—and I hope I offend no one, for I do not mean to do so—the 'accepted' Jewish approach," Blackmun wrote in a May 1, 1978, memo.

"It is to be noted that nearly all the responsible Jewish organizations who have filed amicus briefs here are [on] one side of the case," he wrote. "They understandably want 'pure' equality and are willing to take their chances with it, knowing that they have the inherent ability to excel and to live with it successfully. Centuries of persecution and adversity and discrimination have given the Jewish people this great attribute to compete successfully and this remarkable fortitude."

The papers show how seriously the justices take their responsibilities, as illustrated by Blackmun's lengthy memo to his colleagues as they considered the Bakke case.

"The Chief [Warren E. Burger], not inappropriately, has been pressing me for a vote in this case," Blackmun wrote as he began a 13-page exposition on his tentative views.

He concluded, "I appreciate the patience of each and all of you. For me, this case is of such importance that I refused to be drawn to a precipitate conclusion. I wanted the time to think about it and to study the pertinent material. Because weeks are still available before the end of the term, I do not apologize; I merely explain."

This story was reported and written by staff writers Weiser, Biskupic, Bob Woodward and Fred Barbash. Researcher David

THE MARSHALL FILES

Second of Three Articles

How an Era Ended In Civil Rights Law

By Joan Biskupic
Washington Post Staff Writer

In its 1988-89 term, the Supreme Court made a decisive break with a string of liberal civil rights decisions dating back decades. The newly available papers of the late Justice Thurgood Marshall show how the conservatives, strengthened by recent appointments of Ronald Reagan, seized a majority to narrow the scope of job discrimination law.

Memos exchanged among justices, draft opinions and vote tallies now on file in the Library of Congress illuminate key roles played by Justices Antonin Scalia and Anthony M. Kennedy as the court confronted conflicting visions of how America's civil rights laws should be interpreted.

The changes that the conservatives wrought led to a prolonged political struggle and were eventually reversed by Congress in the Civil Rights Act of 1991.

For three decades, since the liberal activism of the Warren era took root, the court had broadly interpreted the Constitution and federal law to protect minorities and the disadvantaged. The 1988-89 term marked the end of that era, as the justices limited affirmative action, made it harder for workers to prove discrimination and cut back the money remedies for those who could prove discrimination.

The once-private papers of Marshall, who died in January, show that Justice William J. Brennan Jr., the tactical powerhouse of the liberal wing for a generation, was desperately trying to stall the conservatives. Writing cajoling memos and searching out compromise, Brennan sought to prevent further erosion of the Warren

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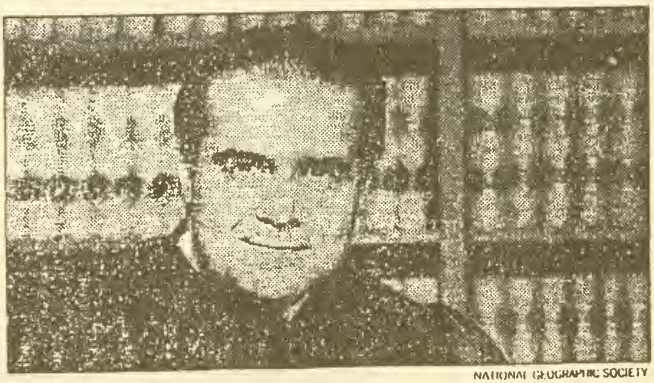
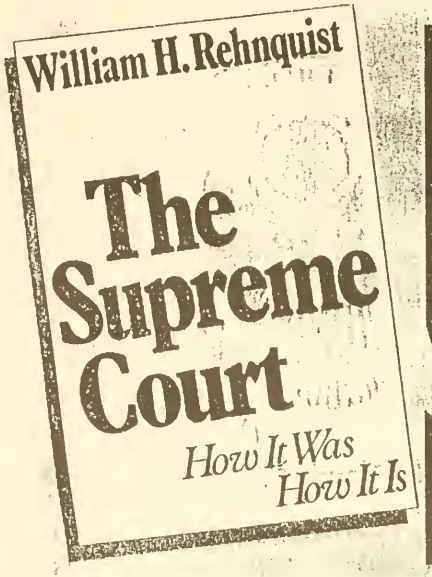


NATIONAL GEOGRAPHIC SOCIETY

Justice Antonin Scalia played a key role in the watershed 1988-89 term.

THE MARSHALL FILES

A kind of one-person, one-vote democracy prevailed in nearly everything the justices did during the period that Marshall was on the Supreme Court. They took few actions without consulting each other, as demonstrated here by the correspondence that resulted when Chief Justice William H. Rehnquist solicited his colleagues' views about the propriety of allowing the court's kiosk to sell copies of his book, left, about the court.



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1988

MEMORANDUM TO THE CONFERENCE

I have received a request from the Supreme Court Historical Society that they be allowed to sell my book at the Kiosk downstairs. I have thought over the various questions that might be raised, and tentatively it seems alright to me for the reasons outlined in the following paragraph. But I don't think it is enough that it just seems alright to me; if any of you have reservations about the idea, I hope you will express them by return memo.

As I said above, thinking this through as best I can it seems alright to me, but I shall be very much influenced by the views of any of those of you who feel otherwise.

Sincerely,

WR

BYRON R. WHITE

Dear Chief,

I see no reason to interfere with the sale of your book at the Kiosk in the Court building.

WILLIAM J. BRENNAN JR.

Dear Chief,

It seems to me that a book about the procedures of the Court is appropriately sold at the Kiosk. Therefore, it is very much "alright" with me that you make the arrangement requested in your memo of June 10.

SANDRA DAY O'CONNOR

Dear Chief,

Under the circumstances as you have outl them, I see no reason why you should not permit yo book to be sold at the Supreme Court Historical Society Kiosk.

In '88-89, New Justices S

PAPERS, From A1

court's legacy. But the Marshall papers underscore that the conservatives were bold, confident—and ultimately victorious.

The turn in the court's thinking is illustrated in the files on the deliberations in *Patterson v. McLean Credit Union*, a racial harassment case that Kennedy wrested away from Brennan in the spring of 1989.

The case stemmed from a lawsuit by Brenda Patterson, a black woman who had worked as a teller and file clerk at the McLean Credit Union in Winston-Salem, N.C. She sued the credit union, alleging that she had been harassed and denied a promotion because of her race.

She brought her case under a post-Civil War era law that says "all persons. . . have the same right. . . to make and enforce contracts." The law is known as Section 1981 because of its place in the statute books, and it was intended to make sure that blacks are as free as whites to engage in business. It had through the years become a significant counterpart to Title VII of the 1964 Civil Rights Act because, unlike that law, it allowed blacks to sue for unlimited money damages for job discrimination.

Main Question in Patterson Was On-the-Job Harassment

A key question in the Patterson case was whether that law applied to discrimination—in this case on-the-job harassment—that occurs after someone is hired. The 4th U.S. Circuit Court of Appeals had said no.

When the case got to the Supreme Court, Brennan disagreed with the lower court. So did four other justices, Marshall, Harry A. Blackmun, John Paul Stevens and Kennedy, according to a tally sheet in Marshall's files prepared after the justices voted following oral arguments in the case in October 1988.

Under the court's rules, the writing of the majority opinion is assigned by the chief justice, if he is in the majority, or, if he is not, by the senior justice who is. In the Patterson case, Brennan, as the senior justice in the majority, chose to write the opinion himself.

Brennan's first draft, dated Dec. 3, 1988, and written as if he had at least a five-justice majority, said Patterson had a claim under Section 1981. "Where a black employee demonstrates that she has worked in conditions substantially different from those enjoyed by similarly situated white employees, and can show the necessary racial animus, a jury may infer that the black employee has not been afforded the same right to make an employment contract as white employees," he wrote.

duct which occurs subsequent to the formation of a contract," that is, after the hiring decision is made.

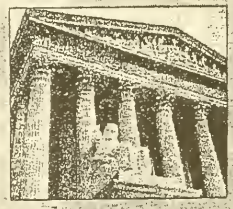
The next day, White joined Kennedy, and wrote his own proposed concurring statement that the public never saw. In it, in mocking tones, White called Brennan on his new reasoning.

"With all due respect, Justice Brennan's proposed ending to this lawsuit is as unsatisfying as the conclusion of a bad mystery novel: we learn on the last page that the victim has been done-in by a suspect heretofore unknown, for reasons previously unrevealed." White was referring to Brennan's sudden conclusion that Patterson could not win the harassment part of her case because of a procedural problem.

Brennan clearly no longer had a majority. On May 18, Rehnquist stepped in and reassigned the case to Kennedy for the majority opinion, which ultimately was joined by Rehnquist, White, O'Connor and Scalia.

The defeat did not sit well with Brennan. In an uncharacteristic display, he drafted a biting dissent attacking the court: "The court's fine phrases about our commitment to the eradication of racial discrimination. . . seem to count for little in practice."

Kennedy responded in kind, adding a footnote aimed at Brennan: Brennan, he said, "thinks it judicious to bolster his position by questioning the court's understanding of the necessity to eradicate racial discrimination. The commitment to eq



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FROM WHITE'S FIRST DRAFT

JUSTICE WHITE, concurri...

With all due respect, Justice... to this lawsuit is as unsatisf... mystery novel: we learn on... been done-in by a suspect he... previously unrevealed.

In January, Justice Byron R. White circulated the first draft of a partial dissent that broke from Brennan on the question of whether racial harassment was covered by the post-Civil War law. Chief Justice William H. Rehnquist and Scalia told White they would join him, according to memos in the Marshall papers.

Brennan was still counting on Kennedy.

On April 27, 1989, however, Kennedy circulated a draft dissent of his own, objecting to Brennan's conclusion that racial harassment was covered under the law as a breach of contract. Justices Sandra Day O'Connor and Scalia joined Kennedy immediately.

Brennan did not give up, the files show. He still thought he could keep the majority by putting a spin of sorts on Kennedy's approach: He would depart from his first draft by agreeing with Kennedy that Patterson did not have a racial harassment claim, but not because the law didn't apply to harassment. He would conclude her claim was barred because she did not make the proper allegations at trial—basically a procedural problem.

Then, he proposed, he would announce for the court that Section 1981 indeed can cover a properly presented racial harassment allegation.

Kennedy would not buy it. His second draft, contained in the Marshall files, stated that the law simply "does not apply to con-

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ity, fairness, and compassion is not a treasured monopoly of our colleagues in dissent."

In the end, both deleted those comments and the public never saw them.

Ruling in Wards Cove Generates Sharp Debate

Probably the most controversial job discrimination ruling of the 1988-89 session, and one that would later generate bitter arguments in Congress, was *Wards Cove Packing Co. v. Atonio.* In that June 5, 1989, case the court reversed part of a landmark 1971 ruling that prohibited employers from discriminating against minorities by requiring job applicants to have skills or academic requirements that were unrelated to the job.

At issue were seemingly neutral hiring practices—such as aptitude tests and height-weight requirements—that could end up excluding certain classes of people.

In the *Wards Cove* conflict, Asian and Alaskan natives said they were kept out of the better jobs at an Alaska salmon cannery. They alleged that the low-level cannery workers were hired from native villages in Alaska and through a longshoremen's union, while the higher paid workers got their jobs through word-of-mouth recruitment, nepotism and priority for former workers. As a result, the minorities alleged, the nonwhites were shut out of the best jobs.

Before *Wards Cove*, under established court precedent, aggrieved workers could claim that a collection of hiring practices was discriminatory without demonstrating specifically how each caused particular bias.

In the *Wards Cove* ruling, the court made such a demonstration mandatory. It said that an employee could not get to court if he was unable to specifically identify each hiring practice that caused his particular group to be excluded. The difference was crucial. Determining the exact impact of a variety of recruiting tests and interviews a company uses is difficult.

Scalia, according to the files contained in the Marshall papers, was the justice responsible for that change.

White had been assigned the majority opinion. In his drafts, he had tried to give plaintiff employees some flexibility in such situations. While it would be preferable for them to be specific, he wrote, it might not always be possible. They "should not be expected to do the impossible," he wrote. "Employee selection procedures may involve many factors, and if not possible to separate and challenge the impact of each of these factors, their collective result may form the basis" for a case.

Scalia protested to White in a memo. "Simply announcing in the abstract that 'where you can't do it you don't have to' creates an exception that promises to devour the rule."

Scalia wanted the court to hold that a complaining worker must be specific. "Undoubtedly it will sometimes be impossible for a plaintiff to prove causation even though it exists," he acknowledged. "But there is no field of the law in which we set up the rules of proof in such fashion that the genuinely injured person will always be able to prove his case."

Rehnquist and Kennedy told White they agreed with Scalia, and White dropped the exception. O'Connor joined them for the majority. The same four justices who dissented in *Patterson*—Brennan, Marshall, Blackmun and Stevens—dissented in *Wards Cove.*

When the *Wards Cove* decision was announced, employers said they would be better able to defend themselves against frivolous claims of bias.

The leaders of the country's major civil rights organizations, believing that their cause had suffered a grievous blow, sought congressional action.

During debate over reversing the specificity requirement and other key parts of the ruling, employers said if the standards for bringing lawsuits were too easy, they would be forced to resort to quota hiring to protect themselves. The Bush administration adopted that argument—calling the legislation a "quota bill"—until the final weeks of negotiations over what would become the Civil Rights Act of 1991.

Law Reverses Cases Involving Job Bias

In the end, Congress decided that if a worker can convince a judge that elements of a company's decision-making process cannot be separated for analysis, the entire process may be challenged as one employment practice. That new law also reversed the *Patterson* case and seven other job discrimination rulings, most from the 1988-89 term.

While it was plain that the Congress, not the court, would be the new avenue for civil rights activism, Brennan, who had joined the court in 1956, was able to eke out one last victory in 1990. But it was a struggle.

The new case arose from a congressional order that the Federal Communications Commission give preferential treatment to blacks and other minorities who apply for television and radio broadcast licenses. White-owned broadcasting companies said the policy violated the constitutional guarantee of equal protection of the law.

xchanges in the 1988-89 term, a watershed session for civil rights law, e sometimes heated. In one racial harassment case, Justice William J. n Jr. sought to forge a majority by proposing a compromise, prompting m from Justice Byron R. White. After Brennan failed to muster a majority, te a biting dissent attacking the court; in turn, Justice Anthony M. Kennedy a footnote aimed at Brennan. In the end, none of the material was published.

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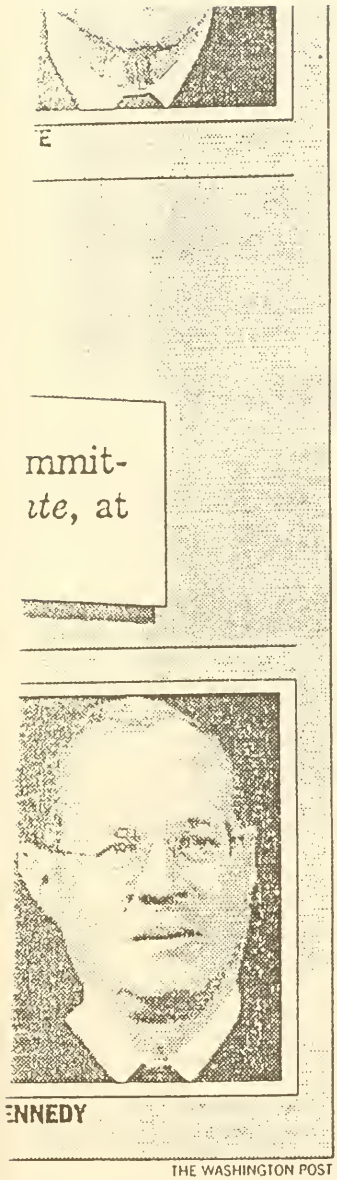

Brennan, in *Metro Broadcasting v. Federal Communications Commission*, began his drafts with an approach that would have been unprecedented in making it easy for governments to award contracts based on race.

But over several weeks, through five drafts, he backed off as he tried to attract Justices White and Stevens. One year earlier, those justices had voted against a Richmond program that set aside a certain percentage of municipal contracts for minorities. Eventually, Brennan came up with a narrow ruling likely to apply to only a few federal programs. Justices White, Stevens, Marshall and Blackmun joined him.

While he was wooing White and Stevens, Brennan strained not to compromise the interests of his liberal soulmate, Marshall. On June 26, one day before the Brennan opinion would be issued, Marshall wrote to Brennan one sentence: "I'm still with you."

That was among the last of the formal exchanges between the two friends while they both sat on the court. Less than a month later, Brennan suffered a small stroke. On July 20, he announced he would retire. Marshall announced his retirement in June of the following year.

Staff writers Benjamin Weiser and Bob Woodward and researcher David Greenberg contributed to this report.

NEXT: Justice Thurgood Marshall

USA Today May 25, 1993

COVER STORY

Justice tilted at court's windmills

Memoranda were flying on the correct spelling of 'marijuana'

By Tony Mauro
USA TODAY

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Marshall was writing at the time about a controversial speech he planned to give about the bicentennial of the U.S. Constitution.

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Marshall's friends and family are outraged. They insist that he never intended to breach the court's secrecy with release of his papers so soon after his Jan. 24 death.

Please see COVER STORY next page ▶

COVER STORY

Stuffy image a target

Continued from 1A

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What Marshall probably didn't anticipate is that his death would come so soon, giving the papers far more headline quality than they might have had five or 10 years hence.

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What they have found is the paper trail of a justice who gleefully tilted against court windmills and conspired to deflate its stuffy image.

"I do not care to ride in a station wagon attired in white tux and tails," was Marshall's scribbled response in 1973 to a detailed memo from colleague Potter Stewart setting forth the rules for use of the court's sole chauffeured limousine.

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A group of law clerks petitioned Chief Justice William Rehnquist in 1988, questioning the appropriateness of the annual court-sponsored Christmas party because some court employees "may be offended."

Marshall appeared from the files to be the only justice who agreed with the clerks, telling Rehnquist, "As usual, I will not participate (in the party). I still prefer to keep church and state apart." The party took place anyway on Dec. 16.

Also clear from the Marshall papers: The era of the paperless office has not dawned at the nation's highest court. A ceaseless flow of paper circulates among the chambers of the nine justices, nailing down lunch dates, chipping in for wedding gifts to the justices' children, as well as discussing cases.

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"I will not talk about other members of the court," Rowan quotes Marshall as saying. "And I will not reveal any memos or documents relating to how the court reached certain decisions." The two returned a $250,000 advance to the publisher.

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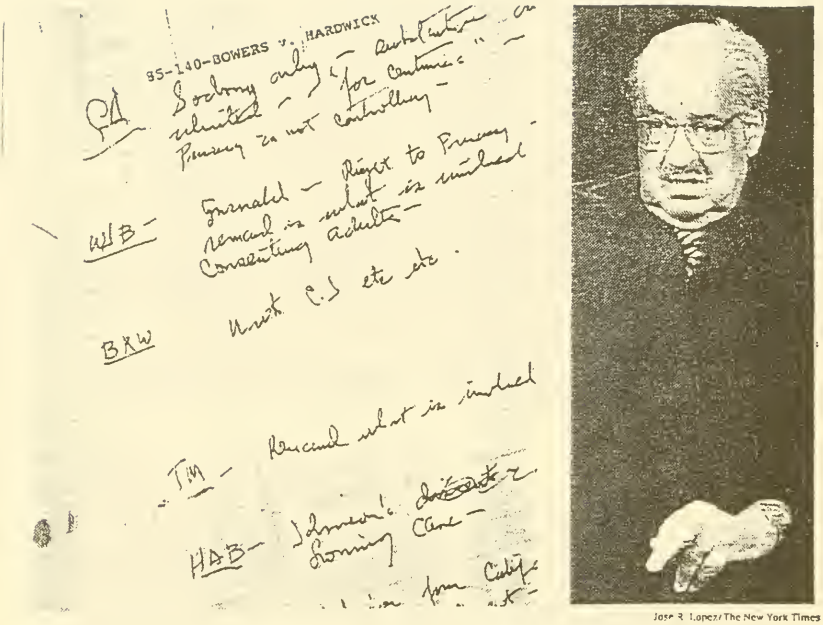


Jose R. Lopez/The New York Times

Among papers of Thurgood Marshall were his notes on Justices' comments in a Georgia sodomy case.

In Marshall Papers, Rare Glimpse at Court

By NEIL A. LEWIS
Special to The New York Times

WASHINGTON, May 24 — When the Supreme Court first considered whether the Constitution should protect private homosexual acts, the Justices showed little interest. Only two of the nine voted in 1985 even to hear the case of an Atlanta man arrested for having sex with another man in his own bedroom.

But over the next year and a half, the case known as Bowers v. Hardwick became a high-stakes poker game among the Justices, as conservatives and liberals on the Court struggled behind the scenes to make it a definitive constitutional statement on homosexual rights.

The twists and turns of the Georgia homosexuality case are detailed in the private papers of the late Justice Thurgood Marshall, which were made available to the public recently, only two years after he left the Court. The papers portray a group of Justices concerned with such minutiae as repairing the Court's front steps and conducting intricate negotiations to deal with the greatest moral and legal issues of the day.

Complaints About Timing

The documents provide an extraordinary glimpse of the behind-the-scenes evolution of cases involving abortion, the rights of homosexuals, criminal issues and civil rights. The release of a Justice's private papers to the general public so soon after his retirement is rare in modern Supreme Court history because it reveals much about colleagues still on the Court and about issues that are still hotly debated.

The Library of Congress said that Justice Marshall, who died at age 84 last January, agreed to have his papers made available to the public shortly after his death.

Mr. Marshall's longtime personal lawyer and friend, William T. Coleman, complained today about the decision of the Library to release the documents so soon after his death and while many of those Justice Marshall wrote about remain active on the Court. Mr. Coleman said in an interview that Justice Marshall initially wanted all

Continued on Page A16, Column 1

The New York Times

5/25/93

Papers Reveal Court's Moves, Large and Small

Continued From Page A1

his papers destroyed upon his death. But Mr. Coleman said he persuaded Justice Marshall to have the papers preserved for history.

Many of the details contained in the 173,700 papers, which take up more than 231 feet of shelf space at the Library, were first reported this week in The Washington Post and will provide material for scholars for years to come. The documents cover most of Justice Marshall's government career, including his life as a Federal appeals court judge and United States Solicitor General as well as his 24-year career on the Supreme Court beginning in 1967.

They chronicle how the ideological fulcrum inexorably shifted away from his liberal outlook that fit comfortably when he first joined at the Court but by the end of his career often left him in the role of dissenter on the margin.

Poring and Pondering

Although in his later years, Justice Marshall had little influence on the Court's majority opinions, the value in his papers is that they include many of the documents that other Justices circulated among themselves as they pondered seemingly insignificant administrative matters and also tried to cajole, exhort and plead with their colleagues as they tried to forge majorities in hotly contested cases.

The Marshall files show, for example, how Justice Sandra Day O'Connor, the Court's first woman, struggled with the early abortion cases, finding it difficult to set a decisive course, sometimes disconcerting her colleagues.

But as one of the authors of last year's opinion in an abortion case that reaffirmed Roe v. Wade, the 1973 ruling which first found a constitutional right to abortion, Justice O'Connor appears to have resolved her earlier uncertainty. The files also show how Justice Antonin Scalia sent memorandums to Justice David J. Souter shortly after the latter joined the Court in 1990 to gauge his receptiveness to overturn Roe.

Justice Souter has since thrown in his lot with Justice O'Connor and Justice Anthony M. Kennedy to uphold the core of the 1973 ruling.

Lone Dissenter on Death

After Justice William J. Brennan Jr. retired in 1990, Justice Marshall became the lone voice on the Court dissenting in all death-penalty cases, appending a brief footnote to the published opinions. But his records show that on occasion he tried, usually unsuccessfully, to persuade his colleagues personally, sometimes ruefully complaining when he lost that his colleagues' behavior was inexcusable.

The documents also show how near the end of his career he ceded much of the authority to write his opinions, by then almost always dissents, to his law clerks.

In one memorandum from a clerk to Justice Marshall in May 1991, a clerk identified by only the first name Mike complains that he is writing several dissents and does not have time for another and suggests that the case be given to Justice Harry A. Blackmun.

David J. Garrow, a historian who has been through the Marshall papers, said "Never before in American history have we had internal Supreme Court

A vote tally in Linda Wimberly v. Labor and Industrial Relations Commission of Missouri, a case in 1985, from the files of the late Justice Thurgood Marshall at the Library of Congress.

documents available within two years of the actual cases."

Mr. Garrow, who is completing a book entitled, "Liberty and Sexuality: The Right to Privacy and the Making of Roe V. Wade," also lamented that Justice Marshall did not keep detailed personal notes of his observations of the conferences, the meetings at which the Justices confer solely among themselves about the cases.

A More Impersonal Court

The papers also show, he said, how the direct interaction among the Justices lessened over the years with less face-to-face conversation and more exchanging of memorandums.

In complaining about the decision to make Justice Marshall's papers available to the public, Mr. Coleman said he thought it would discourage other Justices from donating their papers to the Library.

"He clearly wasn't talking about having them released so soon," Mr. Coleman said. He characterized the release at this time as "shocking and despicable" and said it had caused deep dismay to Justice Marshall's widow, Cecilia, who is known as Cissy.

Mr. Coleman said he had been trying today to contact James H. Billington, the Librarian of Congress, to ask him to limit further public access but Mr. Billington was traveling in Asia and could not be reached.

Library Is Defended

David Wigdor, the assistant director of the Library's Manuscript Division, defended the Library's actions, saying they were explicitly approved by Justice Marshall in a contract signed in November 1991.

Mr. Wigdor said he was present with Mr. Billington when Justice Marshall signed the contract. "He was very clear about the fact that he wanted these papers made public upon his death," Mr. Wigdor said. "It sounded to me like a very informed decision that he had thought about pretty carefully."

The deed of the papers contains a clause saying that after Justice Marshall's death, they "shall be made available to the public at the discretion of the Library."

At issue is a clause in the contract that provides that the papers shall "be limited to private study on the premises of the Library by researchers or scholars engaged in serious research." Mr. Coleman said that precluded journalists and the general public from being given complete access.

By contrast, Justice Brennan, who retired in 1990, has donated his papers to the Library and allowed only selected researchers to view them, usually only on specific topics.

Mr. Wigdor said there was no typical method by which former Justices provided for their papers to be made public. Justice Arthur Goldberg donated his papers in 1988, many years after he had left the court, with no restrictions, while Chief Justice Earl Warren permitted no access for 16 years after his death, which occurred in 1974. Some Justices have restricted access until all the other Justices with whom they served are no longer on the Court.

A rare look at Justices while they're still on the Court.

Shifting Coalitions

The chronicle of the Bowers homosexuality case throughout the Marshall files describes a series of shifting coalitions, with each side trying to prevent the case from even being heard when it seemed the other side might prevail. In the end, a surprise shift by Justice Lewis F. Powell gave the victory to the conservatives and the law was upheld.

The Bowers case, typical of the kind of issues dealt with at the court which remain at the center of the nation's social agenda, is reviled by gay people as it remains the chief legal obstacle to equal rights for homosexuals.

Although Justice Powell disclosed his continuing ambivalence about the Bowers case in a 1990 speech at New York University Law School, the Marshall documents reveal a far richer history as the Justices imbued every move with calculations that produced a variety of shifting coalitions.

In the internal debate over whether to hear the case, the poker-playing strategies became evident in the fall of 1985. The two Justices who initially agreed to hear the case, Byron R. White and Chief Justice Warren E. Burger, apparently perceived an opportunity to state clearly that the Constitution did not protect homosexual acts. But soon the Court's liberals tried to have the case heard because they thought they could carry the day.

Playing Judicial Chess

Suddenly, however, Justice Brennan apparently perceived that the tide had turned and he quickly withdrew his vote, hoping that now there would not be the four votes needed to hear the case. Justice William H. Rehnquist swiftly countered by adding his name. Justice Marshall apparently disagreed with Justice Brennan, his fellow liberal, and left his name on the vote to hear the case.

It was a decision he came to regret.

After the case was heard and debated among the justices, Justice Powell informed his colleagues on April 8, 1986, that he was anguished by the case. He said he did not agree that "there was a substantive due process right to engage in conduct that for centuries has been recognized as deviant and not in the best interest of humanity." He said he was reluctant to "create another due process right."

Yet he was troubled by the fact that someone could be imprisoned for engaging in such behavior and thought it might violate the the constitutional prohibition against cruel and unusual punishment.

Justice John Paul Stevens wrote a memorandum to Justice Powell wryly upbraiding him for his indecision. He told Justice Powell that his views resemble a case in which the Court, with all nine members present, said it was "equally divided."

The files also contain a memorandum written to Justice Marshall by Daniel C. Richman, a law clerk who is now a law professor at Fordham University. The memo noted that the Bowers case is difficult because the statute does not explicitly prohibit acts between homosexuals but specific acts usually performed by homosexuals which do not lead to procreation.

Writing in capital letters for emphasis, Mr. Richman said he feared the Justices would either forget or be ignorant of the fact that such acts including anal and oral sex are also performed by heterosexuals. "THIS IS NOT A CASE ABOUT ONLY HOMOSEXUALS," he wrote. "ALL SORTS OF PEOPLE DO THIS KIND OF THING."

The Washington Post

THE MARSHALL FILES
Last of Three Articles

1st Black Justice Unyielding in Rights Crusa

By Fred Barbash and Joan Biskupic
Washington Post Staff Writers

In 1978, an anguished Justice Thurgood Marshall sat down with pen in hand and began drafting a personal plea to his colleagues about the case known as *University of California Regents v. Bakke*, the first real challenge to affirmative action that the Supreme Court had confronted.

Marshall feared that the court was going to strike down race preferences in university admissions, according to newly available papers from his Supreme Court files. A vote tally that he recorded during the court's discussions showed the case would be close.

"I wish to address the question of whether Negroes have 'arrived,' " he wrote. "Just a few examples illustrate that Negroes most certainly have not. In our own Court, we have had only three Negro law clerks here, and not so far have we had a Negro officer of this court. On a broader scale, this week's U.S. News and World Report has a story about 'Who Runs America.' They list some 83 persons—not one Negro, even as a would-be runnerup. . . ."

"The dream of America as the melting pot has not been realized by Negroes—either the Negro did not get into the pot, or he did not get melted down."

By the end of the case, a bare majority did agree that it was permissible for colleges to use race as one factor in admissions—although the force of the court's ultimate holding was clouded because so many justices wrote separate opinions. Marshall's published opinion struck out at the court for failing to end the persistent inequities that separate blacks from whites.

Marshall's writings in the *Bakke* case, including his handwritten first draft of the plea he wrote to his colleagues as well as a slightly revised typed version, are contained in the papers that the late justice left to the Library of Congress after his retirement in 1991.

The papers, which became available after his death in January, display what many court historians consider Marshall's most meaningful contribution to the court: a view of the real world beyond the briefs and formal arguments.

In the areas he most cared about—civil rights, criminal justice, privacy—Marshall was utterly certain about where he stood, unyielding, activist and just a tad difficult.

While other justices often couched disagreement in euphemisms, he was more direct: "I believe we are simply not in accord," he wrote to Justice Lewis F. Powell on June 16, 1986, refusing to compromise in an opinion he was

See PAPERS, A6, Col. 1

ASSOCIATED

Reporters pore over Marshall's files yesterday at the Library of C[illegible] as lawyer for [illegible]

Paper Trail Reflects Unwavering Activist

PAPERS, From A1

writing forbidding the execution of murderers found to be insane.

He let his law clerks know what he disliked, frequently scrawling "NO!" in giant letters on the face of some disfavored draft opinion.

When a subject did not interest or engage him, Marshall let others take the lead. His papers contain few examples of Marshall expressing himself on the more routine subjects that comprise the bulk of the court's annual docket.

In these matters, the papers underscore the extent to which he relied on his longtime friend, Justice William J. Brennan Jr. In a 1990 case involving social security benefits, for example, a Marshall clerk encouraged him in a memo to go one way, but noted "that WJB's clerk is advising" Brennan to go the other. Marshall's message back to the clerk was clear: Next to Brennan's initials, he jotted "add TM." The final decision in the case shows that Brennan and Marshall voted together.

The Brennan-Marshall relationship was among the closest between two justices in court history. The diminutive, smiling Irishman from New Jersey and the huge, gruff-sounding civil rights pioneer from Baltimore grew old together, retiring within about a year of each other after serving a combined 57 years on the court.

Marshall spent the first half of his legal career trying to influence the court from

"The dream of America as the melting pot has not been realized by Negroes—either the Negro did not get into the pot, or he did not get melted down."

—Marshall to fellow justices while considering *Bakke* case

whether the Constitution entitled a murder defendant to a state-financed psychiatrist to help him prove that he was insane when he committed the crime.

From the outset, all justices said yes, except William H. Rehnquist, then an associate justice. But the justices were divided over how broadly the opinion should be written. Marshall had the assignment of drafting the majority's opinion.

There were two main options: a decision that would make psychiatrists available only for defendants who faced execution, or a broader holding that would allow psychiatric assistance for all defendants accused of serious crimes. Marshall chose the more expansive view.

A majority of justices said they leaned toward Marshall's approach, but Burger was bothered by the breadth of Marshall's draft.

"The fact that this is a capital [death penalty] case is barely mentioned," Burger complained in a Dec. 8, 1984, memo. "The prospect of a capital sentence is critical to this case. I doubt that the [Constitution] requires states to provide expert witnesses generally to all criminal defendants. . . . Sorry to be so long, but these points are important."

Marshall refused to narrow his opinion. Burger then made another effort to find common ground, sending Marshall a note saying, "I can join you" if "you will insert" four words limiting the holding to death penalty cases.

Burger's attempt at compromise was typical of the give-and-take of opinion drafting. Marshall's response was not.

Addressing himself to his other six allies in the case and sending a copy to Burger, Marshall wrote on Jan. 3, 1985: "Since seven of us agree, my current plan is not to make the change suggested in the Chief's ultimatum."

Burger replied the same day, somewhat mystified. "I have a copy of your memo of today," Burger wrote. "I did not know I sent you an 'ultimatum.' I rarely start a new year with such! It states only the obvious to say that this holding applies only to a capital case, but if you and those who have joined do not agree, I will try my hand at a separate opinion."

Justices Sandra Day O'Connor and John

NAACP Legal Defense and Educational Fund, Marshall won two dozen important civil rights cases, including the 1954 *Brown v. Board of Education* ruling that declared an end to state-sponsored school segregation.

When President Lyndon B. Johnson appointed Marshall to the bench in 1967, the liberalism of Chief Justice Earl Warren, embodied in rulings such as *Brown*, was still strong.

But as appointments by Republican presidents turned the court in a more conservative direction, he and Brennan and Justice Harry A. Blackmun formed a consistent voice in opposition.

A consciousness of this special relationship comes through in the memos exchanged among them. "We three are in dissent in the above," Brennan wrote Marshall and Blackmun during a 1988 case concerning the legality of setting aside a percentage of government contracts for minority businesses. "Would you, Thurgood, take it on?"

"Dear Thurgood," Blackmun wrote later in the same case, *Richmond v. Croson*. "Please join me in your perceptive and incisive opinion. I may add a brief paragraph or two of my own."

Their common foe, often, was Warren E. Burger, who succeeded Warren in 1969 and served as chief justice until he retired in 1986. With Burger, Marshall could be ill-tempered, as demonstrated by their exchange of memos in a 1985 case, *Ake v. Oklahoma*.

The central question in the case was make the change. "I am still with you if you decide to accommodate the Chief's request," O'Connor said.

"You have my proxy either way," Stevens wrote, but "it would be advantageous to have his [Burger's] name on the opinion [rather] than to have him write separately."

Marshall stood firm. On Jan. 8, he wrote Burger a one-sentence memo, saying he had "carefully considered your memorandum and cannot see my way clear to making the change you suggest."

That left the chief justice on his own. He wrote a separate opinion, saying that in his view, the ruling applied only to capital cases.

Justice Was Advocate For Criminal Defendants

Burger liked to narrow the law; Marshall liked to stretch it. Particularly if it benefited the poor or minorities, Marshall would push it as far as he could. He believed that criminal defendants should have a chance to defend themselves at every turn and he tried to fight off other justices' attempts to restrict state prisoners' appeals of their cases to federal court.

In the 1986 case *Vasquez v. Hillery*, for example, Marshall battled with Powell over the fate of a convicted murderer who was black and alleged that blacks were systematically excluded from the grand jury that had indicted him.

Powell wrote to Marshall that an improperly composed grand jury might be grounds for invalidating an indictment, but that he

Justice Thurgood Marshall could be stubborn and unyielding at times, as the exchange reproduced here shows. The memos come from the 1984-85 case Ake v. Oklahoma. *Then-Chief Justice Warren E. Burger found Marshall's opinion in the case too broad and offered a compromise consisting of four words. Marshall, characterizing Burger's offer as an "ultimatum," refused to give ground. Burger, while joining in the judgment, was left to write a separate opinion to make his point.*

BURGER

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-5424

GLEN BURTON AKE, PETITIONER *v.* OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

[December ——, 1984]

JUSTICE MARSHALL delivered the opinion of the Court.

Marshall's draft, circulated Dec. 20, 1984

Dear Thurgood:

I can join you if, at page 13 second full paragraph, you will insert after "that" four words "in a capital case."

Regards,

WEB

Chief Justice Warren E. Burger's response, dated Dec. 27

Since seven of us agree, my current plan is not to make the change suggested in the Chief's ultimatum.* Please let me know if you agree.

Sincerely,

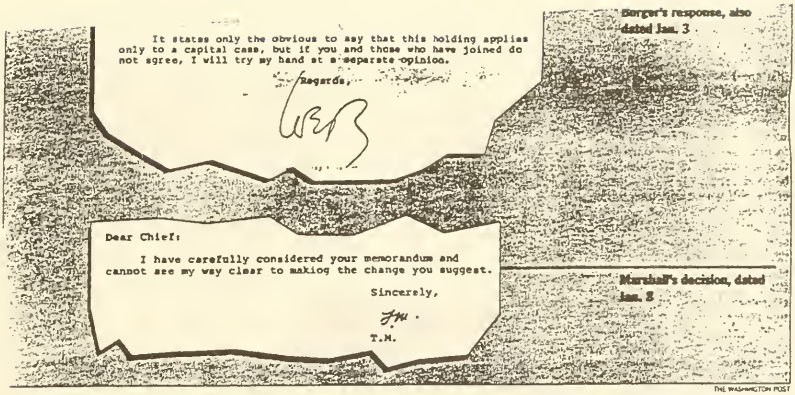
T.M.

Marshall's memo of Jan. 3, 1985, to Justices Brennan, White, Blackmun, Powell, Stevens and O'Connor

Dear Thurgood:

I have a copy of your memo of today.

I did not know I sent you an "ultimatum." I rarely start a new year with such [illegible] "ultimatum." I rarely start a new year with such



was concerned about the timeliness of Vasquez's appeal. Powell noted that Vasquez, who was sentenced to death in 1962, had not raised the issue in federal court until 1978. "It could well be that the court's opinion in this case will encourage convicted persons with long sentences to defer seeking relief in federal courts "until retrial becomes difficult or impossible," he said in a Nov. 7, 1985.

Marshall, after detailing the prisoner's repeated attempts to appeal to state and federal courts over the years, added, "[I]t is hard for me to believe that any prisoner would voluntarily sit in jail for years, knowing he has a meritorious claim that could result in his freedom."

Unlimited Time to Review Grand Jury's Selection

In the end, Marshall wrote for the majority that a defendant's conviction should be reversed if he was indicted by a grand jury that was chosen in a discriminatory way, no matter how much time has passed since the indictment. Powell and two other justices dissented.

Small things were a matter of principle, too, for Marshall. In October 1990, he received the customary circular from the chief justice inviting the associate justices to attend the annual "Christmas recess party" at the court.

From Marshall came a dissent: "As usual, I will not attend the Christmas Party, but I will pay my share of the bill. I still believe in separation of church and state."

Staff writers Ben Weiser, Bob Woodward and researcher David Greenberg contributed

Justices upset over library's release of M

They said information about the high court was made public too soon. They may look for other repositories.

By Aaron Epstein
INQUIRER WASHINGTON BUREAU

WASHINGTON — Suddenly, the Supreme Court finds itself shorn of its inner secrets — and powerless to do much about it.

The justices, embarrassed over the decision of the Library of Congress to make public the late Justice Thurgood Marshall's files on court cases as recent as 1991, threatened yesterday to deposit their papers somewhere else when they retire or die.

"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," Chief Justice William H. Rehnquist wrote to Librarian of Congress James H. Billington after the justices met in an extraordinary closed-door session.

Rehnquist conceded that Marshall gave the library the discretion to decide who could see the 173,700 items in his files. But he chided library officials for using "bad judgment" by failing to consult any member of Marshall's family or the court, which has a "long tradition of confidentiality in its deliberations."

The Marshall files became available to the public in January, but went largely unnoticed until the Washington Post reported some of the contents in articles this week.

The files provide a rare glimpse into the court's confidential discussions and internal jockeying during Marshall's 24 years on the bench.

Public access to the Marshall papers so soon after his death is a radical departure from past practice. Other former justices barred public access to their papers for 10 years or more after their deaths, presumably to prevent embarrassment to those still serving.

"Most members of the court recognize that after the passage of a certain amount of time, our papers should be available for historical research," Rehnquist wrote. "But to release Justice Marshall's papers dealing with deliberations which occurred as recently as two terms ago is something quite different."

The chief justice's letter ended with a judicial threat: "Unless there is some presently unknown basis for the library's action, we think it is such that future donors of judicial papers will be inclined to look elsewhere for a repository."

Washington lawyer William T. Coleman Jr., representing Marshall's estate, called the library's decision irresponsible. Marshall, who retired in 1991 and died at age 84 in January, did not want his papers to be made public so soon after his death, Coleman maintained.

But library staff members said Marshall told them in October 1991 that he wanted the papers "opened upon his death" and later signed an agreement stating that after his death "the collection shall be made available to the public at the discretion of the library."

So far, the library has refused Coleman's request to close public access to the papers.

A sampling of Marshall's files showed that:

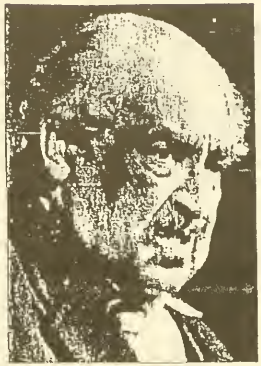
• The liberal Marshall scrawled this blunt critique in the margin of a 1985 dissent written by the conservative Rehnquist: "Unadulterated B.S." Rehnquist's dissent, in a school prayer case, argued against the concept that a constitutional wall separates church and state.

• Sometimes justices change their votes after reading a draft of a colleague's opinion. For example, John Paul Stevens wrote to Rehnquist in a 1979 criminal case: "Your opinion is most persuasive. Although I voted the other way ... I am inclined to think I'll end up by joining you." He did.

• Retired Justices William J. Brennan Jr. and Lewis F. Powell Jr. were especially persuasive. In a 1984 age-discrimination case, Rehnquist changed his vote because, he wrote Powell, "your opinion is sufficiently convincing on the point that I will not dissent." On the same day, Justice Sandra Day O'Connor informed Powell: "You have persuaded me also."

• Sometimes a justice's switch alters the outcome. It happened when Powell changed his mind and cast the decisive vote to uphold state criminal laws barring homosexual acts between consenting adults, a decision Powell later said he regretted. In a 1988 case about the power of a city to ban news racks from sidewalks, Justice Byron R. White originally drafted what he thought would be the majority opinion backing the ban. Brennan drafted the dissent, objecting strenuously to "providing the fertile soil from which censorship grows." The dissent "persuades me" to switch sides, Justice Antonin Scalia wrote in another memo. And suddenly, Brennan's dissent became a 4-3 majority opinion.

• Court control of its proceedings



Associated Press

Thurgood Marshall gave the Library of Congress power to say who could see his papers.

Marshall's papers

has been a major worry. In 1979, for example, then-Chief Justice Warren E. Burger fumed after CBS broadcast audio tapes of oral arguments, even though the arguments themselves are public events. Upon learning that the National Archives sold copies of the tapes to professors for educational purposes, Burger wrote to other justices: "I have always thought that the claim of use of these tapes for 'teaching' is a complete phoney."

• Occasionally, Marshall's drafts were too strong even for his allies. In 1991, Marshall circulated a proposed dissent attacking the court majority for limiting defendants' rights so drastically that "it can be characterized only as lawless." In a memo to Marshall, Justice John Paul Stevens praised "your excellent dissent," adding: "I wonder if the word *lawless* is not too strong. ... After all, when five members of the court agree on a proposition, it does become the law." Marshall omitted the word and it did not appear in his published opinion.

• The justices' law clerks sometimes abandon lawyerly language in recommending that petitions be denied. Wrote a clerk in a 1987 case: "Petitioner is a litigation-happy kook who in the last two years alone has filed 15 actions against persons he feels have wronged him."

A6 THURSDAY, MAY 27, 1993

Fresh Insights Into Suprem

■ **Law:** Justice Marshall's files show, for example, that Sandra Day O'Connor, a swing vote in sensitive cases, sometimes agonized over her votes for months.

By DAVID G. SAVAGE
TIMES STAFF WRITER

WASHINGTON—On Nov. 9, 1987, the Supreme Court was faced with a clear-cut decision. William W. Thompson sat on Oklahoma's Death Row, awaiting execution for a murder he committed when he was 15 years old.

Could the state put Thompson to death, or is it cruel and unusual punishment to execute someone so young?

The newly released files of the late Justice Thurgood Marshall suggest that the decision was anything but simple for Justice Sandra Day O'Connor, the court's swing vote in the most sensitive cases ranging from abortion and civil rights to religion and the death penalty. The Marshall papers, which now can be examined in the reading room at the Library of Congress, show that O'Connor often held up the court's work for months while weighing her vote.

In a Jan. 22, 1988, memo to Justice John Paul Stevens, O'Connor said she was not ready to join his 20-page draft opinion striking down Thompson's death sentence

"Dear John,

"This is a difficult case for me. I am still not at rest on it and will not make a final decision until I see the dissenting opinion.

"Sincerely, Sandra."

She would wait until a week before the court adjourned before finally announcing her decision, one that was so limited it forced the court to take up nearly the same issue the next year.

The insight into O'Connor is just one of many nuggets of Supreme Court life found in the Marshall files—173,000 pages of documents said to take up 230 feet of shelf space. They include material from Marshall's days as an NAACP attorney, U.S. solicitor general, a federal appeals court judge and finally his 24 years on the high court, ending in 1991.

While the files do not appear to offer startling revelations about the justices or the normally secretive high court, they nonetheless shed new light on how hard cases are resolved. Often, it takes many months and many drafts for the justices to find a result that garners the support of at least five of them.

The accumulated memos and legal drafts also reaffirm the view of the court as "nine little law firms," as ex-Justice Lewis F. Powell once put it. Rather than arguing with each other around the conference table, or by twisting arms in the hallways, the justices work through their disputes by exchanging polite, lawyerly memos.

The papers show that by the 1980s, the aging Marshall did very little writing. In case after case, he simply scrawled in blue crayon across a draft opinion of one of the liberal justices the words "Join" or "Am With WJB," referring to William J. Brennan.

On occasion, he offered a pointed rebuttal. In 1985 Chief Justice William H. Rehnquist had drafted a dissent in a school prayer case from Alabama, arguing that the Constitution was not intended to require a separation between church and state.

"Unadulterated B.S.," Marshall scribbled on the draft.

This week, Marshall's family and Rehnquist voiced anger at the librarian of Congress for releasing the papers so soon after Marshall's death.

But on Wednesday, Librarian James Billington said the papers will continue to be open to the public. This is in line with the wishes of the late justice, he said.

The files themselves are laden with highly personal notes. They mostly contain multiple drafts of court opinions, broken only by one-sentence memos.

Marshall himself rarely joined in the debates, except when the issue was civil rights for minorities.

His file on the 1978 Bakke case, the first to test the constitutionality of official racial preferences in school admissions, fills nine inch-thick folders. Included is a four-page handwritten statement by Marshall, the first black justice.

"I repeat, for the next to the last time, the decision in this case depends on whether you consider the action of the regents [of the University of California] as 'admitting' certain students or as 'excluding' certain other students. Toward one end we see 'complete equality,' affirmative action to remove the vestiges of slavery by 'root and branch'. Toward the other end we see 'quotas,' the 'Constitution as color blind,' etc. Take your choice," Marshall wrote.

"I wish to address the question of whether Negroes have arrived," he continued. "We are not all equals. As to this country being a melting pot—either the Negro did not get in the pot or he did not get melted down."

In July, 1978, after months of exchanging drafts, the justices announced a compromise ruling in the Bakke case that set the standard for every subsequent ruling on affirmative action. The government may not use rigid quotas, but it may take race into account as one factor when enrolling students, hiring employees or awarding contracts.

In recent years, as the Marshall papers make clear, the court's rulings nearly always turned on O'Connor's decision, often reached after weeks of deliberation and in separate opinion.

In the Oklahoma death penalty case, Justice Stevens argued that because juveniles are not given the same rights or responsibilities under the law, they should not be given the ultimate punishment.

A day after his draft had been circulated among the justices, Marshall sent back a one-sentence note.

"Dear John,

"Please join me.

"Sincerely,

"T.M."

That meant Marshall was signing on to Stevens' opinion. Soon, similar notes arrived from Justices

WASHINGTON EDITION LOS ANGELES TIMES

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ıe Court

Brennan and Harry A. Blackmun.

A few weeks later, Justice Antonin Scalia circulated a sharply worded dissent arguing that state lawmakers and jurors, not the Supreme Court, must decide who deserves the death penalty.

Rehnquist and Justice Byron R. White sent out one-sentence memos announcing they had joined "Nino" and his dissent. One court seat was vacant then, as Anthony M. Kennedy had not yet been confirmed by the Senate, so the outcome depended on O'Connor. A 4-4 tie would affirm the Oklahoma courts and send Thompson to the executioner.

Finally, on June 23, seven months after the case had been argued, O'Connor sent around the building a brief draft opinion announcing her conclusion

She voted with the liberals to vacate Thompson's death sentence because Oklahoma's law did not specifically set a lower limit for capital punishment. But she added that she did not think the Constitution automatically forbade the death penalty for all juveniles.

Because of the narrow wording of her concurring opinion, the decision affected only Thompson, and the justices voted then to take up the constitutionality of capital punishment for a 16-year-old murderer.

A year later, O'Connor split the difference again. She agreed that the Constitution did not absolutely bar the death penalty for a murderer who was as young as 16 or mildly mentally retarded. But she voted with the liberals to reverse the death penalty because the jurors had not been urged to consider leniency because of special circumstances of the defendant.

While most of Marshall's files contain exchanges of legal wording, they are not all serious. As good lawyers, the justices carefully put on paper the details of even parties and receptions.

"We will begin as usual as 3:30 p.m. with refreshments in the West Conference Room and ultimately conclude with a 'sing-a-long' in the East Conference Room," the chief justice said in a June 24, 1991, memo on the annual "farewell party" for the departing law clerks. "There will be a Supreme Court trivia contest loosely modeled on the format of 'It's Academic' and 'Jeopardy,' " he wrote. The festivities were to end, he said, with a performance from "the musically talented law clerks [who] have formed a singing group called the 'Stouthearted Men.' "

A few days before, Rehnquist had sent around a memo noting "Byron [White] will celebrate his birthday on Saturday. . . . Let us follow the usual procedure and have wine in the Justices' Dining Room after the conference on Thursday."

For once, there were no dissenters.

High Court Correspondence

After Thurgood Marshall died last January, the 173,700 items he left to the Library of Congress were made available to the public. Included are the justices' secret memos to each other and unpublished draft opinions written as they sought colleagues' votes and honed the court's rulings. Some excerpts:

ON REQUEST FOR OFFICIAL CAR AFTER RETIRING

To: Thurgood Marshall

I am sympathetic to the request you make in your letter of July 25th—not merely in the abstract, but because in all probability I will be in the same boat you are within a couple of years—but after thinking the matter through I do not believe I can accede to it.

—William H. Rehnquist

ON TV COVERAGE OF SWEARING-IN

To: Rehnquist

In order to make the arrangement attractive to President Bush (and later Presidents) I think we should allow minimally intrusive on-floor camera and even lights. The President's men are going to want good theater and attractive close-ups. As far as I am concerned, an Investiture Ceremony, unlike an oral argument, is for show and not for go, and awareness of the cameras' presence is no problem.

—Antonin Scalia

ON FAREWELL PARTY FOR LAW CLERKS

To: The court's staff

Because of the unusually high caliber of this year's law clerks, it seems appropriate to make the farewell party for the clerks this year a little more elaborate than usual. . . .

. . . Some of the musically talented law clerks have formed a singing group called the "Stouthearted Men," and at the conclusion of the Supreme Court trivia contest this group will reminisce about the present term of the Court in song.

—Rehnquist

ON MISUSE OF LANGUAGE

To: Scalia

I might as well take this opportunity to make my annual tirade against the use of the kindly word "parameter." I have stated before that I shall join no opinion in which that mathematical term is employed. I feel much the same about "viable," but I have lost that battle here. The medical profession must suffer silently. But I shall fight the good fight of the mathematician about "parameter."

—Harry A. Blackmun

Los Angeles Times

ment-reminder notices are so obnoxious and intrusive you might pay just to avoid seeing them. One shareware program I used would put up a nag screen at random moments while the software was in use, requiring users to acknowledge reading the reminder before they could resume work.

Other authors appeal to the user's conscience and sympathy. I recently came upon this appeal in an impressive Macintosh shareware color drawing program written by Sean Bergin of County Kerry, Ireland: "StudioCraft was written by an individual to be used by individuals. I have a wife and two young children who would, I am sure, be delighted if StudioCraft turned out to be a success. That success depends on you, and people like you, trying it, liking it and sending me a paltry $35."

I have sent payments over the years for many shareware programs I've used heavily. But writing today's column has prompted me to look over my hard disk and identify a few I never paid for. I'll be sending several checks in coming days. Maybe you should do the same.

om Service Here, ood for Thought

The new owners, for their part, intend to convert the building into a maharishi-inspired university. But to help finance the school, they have decided to keep half the rooms open for guests, make much needed repairs and create a New Age of enlightened innkeeping.

In the guest rooms, grooved metal rings have been placed on light bulbs and filled with "aroma oils," which vaporize from the heat. Smoking will soon be prohibited in all 300 rooms. And cheap room rates of $49.95 a night are a plus.

There are also meditation rooms, with a photo of the 81-year-old maharishi. But the kitchen no longer offers such earthly temptations as alcohol and red meat.

So some guests have been doing their meditating across the street at the Lone Star Saloon, where bartender Julie Mertz sympathizes with thirsty travelers. "If you're paying for a hotel room, it should be up to that person what they want to drink or eat," she says.

But Bruce M. Beal, the hotel's chief operating officer, says all guests, even nonbelievers, will benefit from the inn's unique brand of service. "If we have five or six people meditating, people will feel that somewhere," he says. "They'll have a wonderful quality of sleep."

Marshall's Files Offer Businesses Hint on Justices

By Paul M. Barrett
Staff Reporter of The Wall Street Journal

WASHINGTON – The private files of the late Justice Thurgood Marshall provide a rare behind-the-scenes peek at why the Supreme Court so often frustrates business with ambiguous rulings.

The papers, unexpectedly released by the Library of Congress just four months after Justice Marshall's death, shed additional light on hundreds of cases related to business. They portray a group of justices who pay scrupulous attention to detail in some instances but appear on other occasions to be uninterested in hammering out a consensus to clarify confused areas of the law.

One recurring theme that emerges is the frequent failure of the justices in their private conferences to agree on rationales for their decisions. As internal memos and draft opinions begin to circulate, anxiety surfaces over how far a decision should reach. But rather than wrestle over basic principles, the justices go their own way or settle for hesitant rulings that leave larger questions unanswered.

A 1991 decision on the constitutionality of a Florida property tax provides a vivid example. At issue was whether a Florida tax on intangible property, such as accounts receivable and shares of stock, interfered with interstate commerce. According to a memo by Justice Harry Blackmun dated Dec. 7, 1990, the shaky initial vote was 6-2 to uphold the tax, with Justice Sandra Day O'Connor not participating because of a conflict of interest.

But the majority was actually moving in several directions. Justice John Stevens thought the tax was unlawful but wanted to affirm because the plaintiff, a unit of Ford Motor Co., hadn't shown how it had been harmed. Justice Antonin Scalia " 'did not understand' John's explanation," noted Justice Blackmun, but would affirm for other reasons. Justice David Souter "leaned toward affirmance," but wasn't sure. "The Chief [William Rehnquist] initially passed . . . but after the discussion leaned toward affirmance. Byron White stated that he 'never did understand' [the legal test applied in such cases]

Please Turn to Page B2, Column 3

Marshall's Papers Hold Hints

Continued From Page B1

and was inclined, 'some way or another,' to affirm."

Assigned by Chief Justice Rehnquist to write the majority opinion, Justice Blackmun added to the confusion by flipping his vote and proposing that the tax be invalidated; to do otherwise would require overturning high court precedent, he said. Suddenly, Justice Blackmun became the lead dissenter, joined by Justices Marshall and Anthony Kennedy. Justice Stevens wrote an opinion for what appeared to be a five-member majority.

But on May 9, 1991, Justice Souter sent this ambivalent missive to Justices Blackmun and Stevens: "Because John's opinion comes out to where I hoped to be when we voted on this, I feel a little bit of a rotter in joining Harry's dissent. But so I believe I must do." Deadlocked, 4-4, the high court 10 days later upheld the tax without issuing an opinion.

In some cases, a justice will try to provide the business world with specific guidance on a pressing legal issue, only to be cajoled out of it by his colleagues. The Marshall papers illuminate how this occurred in the months leading up to a March 1991 decision in which the court declined to set specific constitutional guidelines for punitive damages.

Unlike compensatory damages, which reimburse a plaintiff's losses, punitive damages are meant to punish or deter harmful conduct. Business interests claim punitive damages have escalated out of control; consumer advocates counter that they appropriately check wrongdoing.

The Supreme Court stepped into the debate by agreeing to examine an $840,000 punitive award against Pacific Mutual

associates of the Marshall family and a majority of the current justices have attacked the Library of Congress for making the Marshall papers available to the public just two years after he retired. More broadly, critics assert that releasing the papers so soon after a justice's stepping down will inhibit candid deliberations. The Library of Congress insists it had Justice Marshall's written permission to release his papers upon his death.

While that controversy is likely to continue, attorneys are likely to begin doing reconnaissance in the library's manuscript room. What, a lawyer might ask, does Justice Souter think about the question of whether the Supreme Court ever may issue rulings that apply only in the future rather than retroactively?

This seemingly technical question can have big financial ramifications when the high court strikes down corporate or individual taxes. If a ruling applies retroactively to all parties who have paid an invalid tax, the taxing authority may find that it owes hundreds of millions of dollars. But if the court may sometimes announce that its decisions aren't retroactive – that they only apply in the future – then refund checks don't get sent.

The court has struggled for years with this issue and is trying again this term to fashion a clear rule in a case involving hundreds of millions of dollars in retirees' state income taxes. One of the unknowns – until now – is Justice Souter's position. In a March 1991 memo in the Marshall papers, he tells his colleagues, "I am disposed to preserve the judicial option to rule purely prospectively" if the alternative is a crushing financial blow to government.

insurance Co. A clear majority of the justices thought that the award passed muster. In November 1990, Justice Blackmun took a crack at an opinion that included a numbered list of 10 "procedural and substantive concerns" that lower courts should address. Among the concerns were that punitive damages should be "proportional" to the offense, that they should reflect whether the defendant was aware of its wrongdoing.

Justice Stevens wasn't satisfied with the Blackmun effort, but couched his complaint in conciliatory tones. "Dear Harry," he wrote. "This was a challenging assignment, and I compliment you for the way you have handled it." But he went on to urge his colleague to drop the 10 constitutionally mandated guidelines. Among his reasons was a desire to encourage state legislatures and courts to fashion such rules for themselves.

Chief Justice Rehnquist had similar concerns. "I will swallow my reservations," he wrote to Justice Blackmun, only if a series of changes were made to "remove the impression that this opinion lays down standards which would enable anyone to 'measure' the constitutionality of punitive damage awards."

With indications that Justices Scalia and Kennedy were also uneasy about the opinion, Justice Blackmun reluctantly made all of the requested changes and preserved his majority. The resulting opinion is certainly flexible but didn't provide lower courts and litigants with the guidance many were seeking. In fact, the Pacific Mutual ruling has been manipulated both to affirm big punitive awards and to limit them.

"Few Supreme Court cases have caused as much confusion," says Victor Schwartz, a Washington lawyer who represents business interests. The chaos got so great that the justices took the unusual step of agreeing to revisit the issue only two terms later; a ruling is expected by late June.

Although the Supreme Court's confidential communications are often a testimony to tentativeness, they do contain nuggets of practical use. In their in-house correspondence, justices sometimes express views on questions that the court hasn't yet formally addressed. Energetic lawyers can dig up these statements and fine-tune their arguments accordingly.

This is one of several reasons why

Layoff Notice Case

Defense contractors may be excused from a federal law requiring 60 days' notice for workers about to be furloughed, a federal court in St. Louis has ruled.

The ruling is significant because it appears to give defense contractors special leeway to take advantage of an exemption to the notice law. That exemption relaxes the notice requirement when a mass layoff is caused by unforeseeable events.

The case was brought by unions representing more than 1,000 General Dynamics Corp. employees who were laid off in 1991 after the U.S. Navy canceled the $4.4 billion A-12 fighter-plane project. The unions alleged that General Dynamics failed to comply with the law, which requires notice to employees included in furloughs of at least 500 workers. The law, called the Worker Adjustment and Retraining Notification Act of 1988, also requires that employees get advance notice of large plant closings.

In an opinion dismissing the unions' case, Judge Jean Hamilton concluded that defense contracting is a "unique" industry in which companies have come to expect that contracts won't be terminated, even when projects are over budget and behind schedule.

The case "defines a set of circumstances that many defense contractors often find themselves in," particularly in the current environment of budget constraints and post-Cold War defense cutbacks, said Stephen Tallent, a Washington labor lawyer who represented General Dynamics in the case.

Although the company knew of the project's troubles more than a year before it was canceled, Judge Hamilton wrote, "a contractor exercising commercially reasonable business judgment would not necessarily conclude on the basis of this information that the . . . contract would be canceled." In the past, cancellations of such contracts have been rare because "In most cases the government would find a way to renegotiate the contract terms," the judge said.

Rod Tanner, a lawyer for the unions, said the company knew the A-12 contract might be terminated. "If the members of the board of directors were entitled to advance warning, then so were the rank-and-file members," he said. Mr. Tanner said the unions are considering whether to

This one just ends by [illegible]

THE KANSAS CITY STAR.

MID-AMERICA EDITION

Papers give glimpse of tax case jockeying

Desegregation case thinking unveiled in late justice's archives.

By ANDREW C. MILLER
Washington Correspondent

WASHINGTON — Late in 1989, as the U.S. Supreme Court was poised to overturn the Kansas City school desegregation tax, Justice William Brennan circulated a brief, two-sentence letter to Chief Justice William Rehnquist.

"Dear Chief," Brennan wrote on Nov. 2, three days after oral arguments in the case. "I change my vote in the above (case) to join Byron (White). If, accordingly, I am to assign the opinion for the court, I assign it to Byron."

By forming a new majority, Brennan cemented together a narrow 5-4 decision in which the court upheld property taxes imposed to pay desegregation costs in the Kansas City School District.

See **MARSHALL, A-14,** Col. 1

William Brennan . . . changed his vote

Marshall papers show court's thinking in school case

Continued from A-1

Brennan's shift on one of the most important cases decided in 1990 is revealed in files of the late Justice Thurgood Marshall, which were opened recently by the Library of Congress. Marshall died in January at the age of 84.

Marshall's papers offer a glimpse at the inner workings of the court as it dealt with one of the most bitterly contested cases in the 1989-90 term.

The court's Kansas City ruling was hailed by civil rights advocates, who called it possibly the most significant desegregation decision in a decade. It was assailed by conservatives who said it would lead to tax bills by court decree. And, days later, Senate Republicans began an unsuccessful effort to enact a constitutional amendment preventing judges from ordering property tax increases.

The dispute over desegregation taxes in Kansas City turned on an overriding issue — how far can federal judges go to remedy constitutional violations?

In an important nuance, the court ruled that U.S. District Judge Russell G. Clark went too far when he nearly doubled property taxes on his own in 1987. But the court upheld a 1988 appeals court ruling, which said Clark could instead order the school board to impose the taxes.

DEAR CHIEF

"Dear Chief," Brennan wrote on Nov. 2, three days after oral arguments in the case. "I change my vote in the above (case) to join Byron (White). If, accordingly, I am to assign the opinion for the court, I assign it to Byron."

That ruling, a rare victory for civil rights advocates in an increasingly conservative judicial era, was made possible by Brennan's shift. While Brennan offered no elaboration for his shift, the timing of his letter suggests that he might have been swayed to reverse his vote by oral arguments, which had been held just three days earlier.

Allen Snyder, a Washington lawyer who argued the case for the Kansas City School District, said he remembered Brennan as being "relatively quiet" during the oral arguments.

After Brennan's shift, the drafting of majority and dissenting opinions evolved without wrinkles. White, considered the main swing vote, wrote a majority ruling that changed little from his first draft. The same was largely true for the dissent, written by Justice Anthony Kennedy.

Marshall's consideration of the case began in April 1989, when he received a four-page typed memorandum from one of his law clerks, setting out the case and the clerk's recommendations.

The case, the clerk insisted, was not worthy of the court's attention.

Clark's order "arguably reaches past the authority to desegregate" that the court had enunciated in 1964 and 1971 cases, the clerk wrote. "Even so," the clerk added, "I recommend that you vote to deny cert," the court's term for declining to hear the appeal.

"This kind of school desegregation litigation is relatively rare these days," the clerk said. "There is arguably little need for the court to reach out and craft general rules. Moreover, this is a monster litigation reaching back 10 years. It ought to be put to rest." Yet, the clerk said, some justices might want to take up the case, "and you may want to defensively deny."

Ultimately, the court decided to hear the Kansas City case and scheduled oral arguments for Oct. 30.

After Brennan's shift on Nov. 2, White wrote his first draft of the majority opinion in a little bit more than a month. Reviewing the draft, a clerk recommended

See ARCHIVES, A-15, Col. 1

A-15
Thursday, May 27, 1993
The Kansas City Star

Archives give look at justices

Continued from A-14

that Marshall join White.

For the clerk, the major issue was whether White's writings foreclosed a district court from ever ordering a tax increase on its own.

"In fact, there is broad language in the opinion suggesting that a (district court) can," the clerk said. "However, the opinion does say that the (district court) abused its discretion in ordering a tax itself here, because there was a less intrusive remedy: namely, doing what the (court of appeals) said the (district court) should do in the future — direct the district to submit a levy itself, and then enjoin state laws that restrict the levy."

After using a blue pencil to place his initials "TM" atop a copy of White's draft, he wrote White four days later, joining his opinion.

On the same day, Justice Sandra Day O'Connor said she agreed with some technical, side conclusions in White's draft. But on the key issue she held out for Kennedy's draft, writing that she would "await further writing on the remedies ordered by the courts below."

A day later, the lines were clarified. Kennedy said he would be "writing separately in this case." Because each justice's files include writings of other justices, Marshall's file also shows the evolution of Kennedy's dissent.

Kennedy, in his first draft, wrote that "it is difficult to see the difference between an order to tax and direct judicial imposition of a tax."

After Kennedy's first draft, he quickly signed up the three other dissenters — Rehnquist, O'Connor and Justice Antonin Scalia. All agreed that Clark was wrong to directly levy the tax increase. They also argued that the route suggested by the appeals court was wrong.

Kennedy's draft, however, spurred White to significantly sharpen his arguments.

It is clear, he added in a new draft, "that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation."

In his last draft, Kennedy responded.

"The majority appears to concede that the Missouri tax law does not violate a specific provision of the Constitution, stating instead that state laws may be disregarded on the basis of a vague 'reason based on the Constitution.' " But that suggestion, Kennedy said, does not follow from White's reliance on an 1867 case, which dealt with whether a court can set aside state taxation limits.

Six days later, on April 18, 1990, the court issued its ruling.

THE KANSAS CIT STAR.

May 29, 1993 MID-AMERICA EDITION

Marshall's notes reveal court's work on Cruzan case

By ANDREW C. MILLER
Washington Correspondent

WASHINGTON — Facing a case that literally involved life and death issues, U.S. Supreme Court justices settled on their votes just three days after the oral arguments in the 1990 case of comatose Nancy Beth Cruzan.

Yet it took a laborious six months until the majority coalition was assembled by Chief Justice William Rehnquist in the court's first-ever foray into the right-to-die issue. Then, just a week later, the court announced its 5-4 ruling that Missouri was justified in sustaining the life of Cruzan, who had been comatose for seven years.

Newly released files from the late Justice Thurgood Marshall suggest that the Cruzan case was anything but simple for the justices. Although they took their time, the historic opinion was not subject to the kind of extensive jockeying among justices seen on some cases.

Instead, the justices were cautious. They agreed on their reasoning early. They avoided involving the incendiary issue of abortion. They didn't switch votes, despite a slight hint of a 4-4 deadlock at one time. And although the five separate opinions in the case went through a total of 16 drafts, all the changes were relatively minor.

On a more subtle level, the court's deliberations illustrated its inner workings in other ways, too:

- In two early conferences, justices switched votes on whether to hear the case at all. Marshall's notes show that Justice Byron White first indicated he would vote to hear the case, then switched. Justice Antonin Scalia first voted to not hear the case, then switched.
- When the voting lineup was clear

See **NOTES, A-16,** Col. 1

Cruzan

A-16 The Kansas City Star Saturday, May 29, 1993

Notes reveal court's work

Continued from A-1

after oral arguments, the four dissenters were urged by Justice William J. Brennan Jr. to write separately. Their response indicated their independence. Only one wrote a separate opinion — Justice John Paul Stevens.

■ Justice Sandra Day O'Connor, frequently a swing vote who decides late on issues, instead issued a concurring opinion early in the Cruzan case. But no other justices joined her.

■ Scalia, a conservative loner on many cases, apparently knew he was outvoted on his view that the court had no role in such cases. He issued his separate opinion late, however, in an apparent protest rather than issuing it early in an attempt to win converts. Like O'Connor, he won no backers, either.

■ Marshall's files show that no opinion drafts ever analyzed whether the "right to die" was part of the constitutional right of privacy, a right the court has applied to abortion. Some analysts had predicted the conservative wing might use the Cruzan case to rewrite the right to privacy. Even so, the possibility of abortion arising in the deliberations was raised in private memos to Marshall by a clerk.

The Cruzan case was considered the most significant case of the 1990 term.

It came to the court from the Missouri Supreme Court. The state court had rejected Cruzan's parents' request to cut off artificial feeding, ruling that there was not "clear and convincing evidence" of what their daughter's own wishes would be.

In its ruling, eight Missouri Supreme Court justices ruled that persons whose wishes are clearly known have a constitutional right to have their life-sustaining treatments discontinued. But in the case of Cruzan, the court ruled 5-4 that Missouri could sustain her life because her family had not shown by "clear and convincing evidence" that she would have wanted the treatment stopped.

It was the same 5-4 split by which the court's conservative bloc had upheld most of Missouri's restrictive abortion law the year before.

Marshall's files begin with tally sheets over whether to hear the appeal by Cruzan's parents.

At an initial conference in March 1989, there were only two firm votes to consider the Missouri Supreme Court's ruling. A traditional but unwritten rule requires four votes.

With the issue unresolved, they met again on July 3, 1989. Coincidentally, it was the same day in which hundreds of abortion-rights protesters sat outside the court. They were awaiting a decision that was handed down in the highly publicized Webster abortion decision from Missouri.

By then there were the minimum four votes to accept the Cruzan case — Justices Stevens, Scalia, Anthony Kennedy and Harry Blackmun. White, after more study, had decided to let the

See JUSTICES, A-17, Col. 1

HOW THE JUSTICES STOOD ON THE CRUZAN CASE

On July 3, according to Justice Thurgood Marshall's tally sheet, four justices agreed to review the Cruzan case. That is the minimum needed to review, or grant certiorari. Five months later, Marshall's tally sheet shows, five justices vote to affirm the Missouri Supreme Court decision.

	TO HEAR CASE		MISSOURI DECISION	
	Granted	Denied	Reversed	Affirmed
Rehnquist, Ch. J.		X		X
Brennan, J.		X	X	
White, J.		X		X
Marshall, J.		X	X	
Blackmun, J.	X		X	
Stevens, J.	X		X	
O'Connor, J.		X		X
Scalia, J.	X			X
Kennedy, J.	X			X

The Star

Justices proceeded cautiously

Continued from A-16

Missouri Supreme Court ruling stand. He later maintained that view, voting with the majority.

Those who wanted to accept Cruzan for argument included two justices who favored the Missouri holding and two who wanted to reverse it. Kennedy and Scalia agreed with Rehnquist's majority opinion on that point; Blackmun and Stevens opposed it.

A law clerk's memorandum, written just before the Dec. 6 oral arguments, noted that the court could use either the privacy analysis of Roe vs. Wade, the abortion case, or another standard dealing with due process. Either way, the clerk said, the result would be the same: "The decision whether to accept or reject medical treatment is a decision about one's body, control over which is at the center of the right to privacy."

After oral arguments, the court again convened behind closed doors. Marshall's tally sheet recorded the same voting lineup as the ultimate 5-4 split announced six months later. Rehnquist, White, O'Connor, Scalia and Kennedy formed the majority. The dissenters were Brennan, Marshall, Blackmun and Stevens.

As the senior justice in the majority, Rehnquist had the choice of assigning the author of the majority opinion. Taking the route chief justices usually take in important cases, he assigned it to himself.

Three days later, Brennan wrote to the other dissenters. Addressing it to "Thurgood, Harry and John," in order of their seniority, he wrote: "We four are in dissent in the above. I suggest that, because of the significance of this case, perhaps each of us might want to write his own." Only Stevens did so, however.

The first draft emerged from Rehnquist in mid-February, followed by O'Connor's concurring draft on March 21. Each went to all eight other justices according to the court's procedures.

Rehnquist's draft offered mostly the same language that he ultimately issued months later.

O'Connor wrote narrowly, saying that Rehnquist's decision raised the prospect that the Constitution might be read to require states to honor instructions left through living wills or surrogate decision-makers.

"In my view," she said, "such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment."

Although no one signed on to her opinion, it was crucial in one respect. Since the four dissenters would clearly view such advance instructions as constitutionally enforceable, O'Connor's opinion provided a fifth vote for that area of the decision.

On March 21 a second draft arrived from Rehnquist. It included perhaps the most significant change he made in the drafting process. But it was a relatively minor change, indicating the few changes his draft underwent.

In his initial draft, Rehnquist had written, "It cannot be disputed that Cruzan's interest in life is of the same order as her interest in refusing life-sustaining medical treatment."

His second draft changed it to this: "It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available as surrogate decision makers."

William Colby, the Kansas City lawyer who argued the case for the Cruzans before the Supreme Court, called Rehnquist's change "fine-tuning" to make it more factually correct and add better constitutional analysis.

Five days later, on March 26, 1990, O'Connor issued her second draft. Atop it, written in blue pencil, Marshall indicated that it didn't meet his standards. He wrote: "3-29, wait for WJB," meaning Brennan's draft.

Then Stevens' issued his draft dissent in early May. Marshall wrote "4-4 join," apparently signalling that the court might be tied. The identity of the unidentified justice, if someone was reconsidering a vote from the closed-door conference, is unclear.

Although Marshall decided quickly on many cases, it wasn't until mid-May that he finally wrote Rehnquist, saying he would "await further writing," the polite court shorthand to say he would not sign the draft.

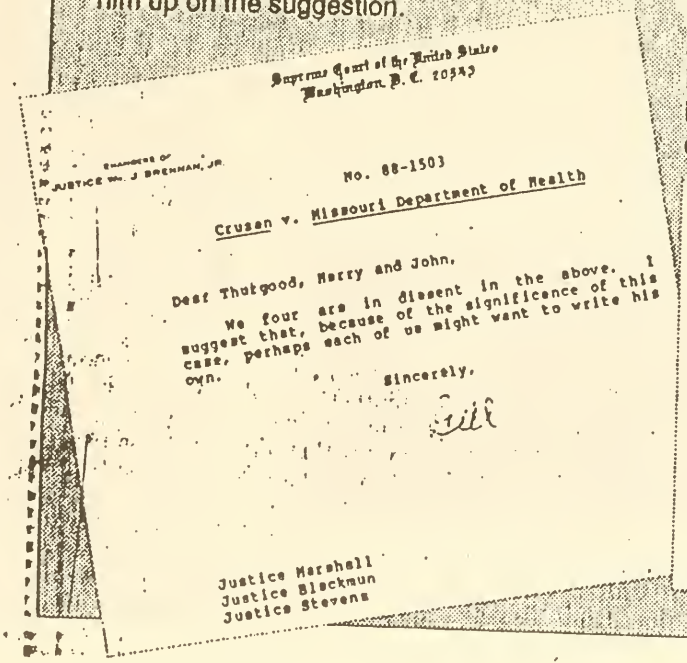
Shortly thereafter, Brennan, who was Marshall's frequent ally, issued his own draft dissent. A second draft by Brennan changed his arguments little but added one of his most strident sentences: "A state's legitimate interest in safeguarding a patient's choice cannot be furthered by simply appropriating it."

After Scalia issued his draft and nobody joined it, Kennedy added his name to Rehnquist's opinion on June 18. By then, the court was within days of the end of its term, and all the justices fell into line.

On June 25, the court's decision was released. Rehnquist's majority ruling began just as his first draft had: "Petitioner Nancy Cruzan was rendered incompetent as a result of severe injuries sustained during an automobile accident."

Later the same year, after Cruzan's parents produced new evidence of their daughter's wishes to die rather than live in a vegetative state, a state judge allowed her feeding tube to be removed. Missouri did not appeal the case, and she died Dec. 26, 1990.

On Dec. 11, five days after oral arguments, Justice William Brennan suggests that he and his three dissenting colleagues write separate dissents. In the end, only Stevens takes him up on the suggestion.



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

No. 88-1503

Crusan v. Missouri Department of Health

Dear Thurgood, Harry and John,

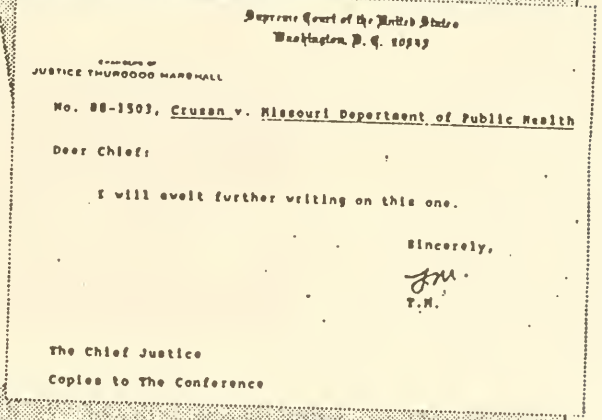
We four are in dissent in the above. I suggest that, because of the significance of this case, perhaps each of us might want to write his own.

Sincerely,

Bill

Justice Marshall
Justice Blackmun
Justice Stevens

On May 9, after reviewing one of Chief Justice William Rehnquist's draft opinions, Marshall, in the polite language of the court, informs Rehnquist he will not sign on to his opinion.



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

No. 88-1503, Crusan v. Missouri Department of Public Health

Dear Chief:

I will await further writing on this one.

Sincerely,

T.M.

The Chief Justice

Copies to The Conference

The Star

8 A The Dallas Morning News Saturday, May 29, 1993 H

Liberal justices initially opposed reviewing Dallas flag-burning case

Court papers show conservatives engineered move but split on its merits

By Steve McGonigle
Washington Bureau of The Dallas Morning News

WASHINGTON — The U.S. Supreme Court's liberal justices initially opposed reviewing a Dallas case that the court used in June 1989 to declare flag-burning a constitutionally protected form of free speech.

According to recently released court papers, five conservative justices engineered the review but then divided on the case's merits. A preliminary vote showed three conservatives joining three liberals to strike down the Texas law.

But one of the conservatives, Justice Sandra Day O'Connor, later switched her vote, and one of the liberals, Justice Harry Blackmun, was uncommitted while the first drafts were being circulated. The final outcome was in doubt until Justice Blackmun announced that he would supply the crucial fifth vote to invalidate the law.

"I struggled with this difficult and distasteful little (big?) case, but I join your opinion," Justice Blackmun wrote in a note to Justice William Brennan, who wrote the majority decision.

The ruling stirred a national debate about the limits of political speech and prompted Congress to pass a federal law to protect the flag. That law was overturned by the Supreme Court in June 1990.

None of the nine justices who participated in the Texas flag case has spoken publicly about the deliberations. But papers maintained by Justice Thurgood Marshall provide some insight into the court's actions.

Papers on the Texas flag case were made public by the Library of Congress after Justice Marshall died in January. They are among 173,000 documents that Justice Marshall donated to the library after he retired in 1991.

The availability of the Marshall papers was disclosed this week by *The Washington Post*, which published extensive excerpts.

The Dallas Morning News independently examined records on the flag case.

The case stemmed from the 1984 arrest of Gregory Lee Johnson, an avowed revolutionary, for burning an American flag outside Dallas City Hall. The incident occurred during the Republican National Convention in Dallas.

Mr. Johnson was convicted by a Dallas County jury of violating the Texas law that outlawed "desecration of a venerated object." His punishment was assessed at one year in jail and a $2,000 fine.

In April 1988, the Texas Court of Criminal Appeals overturned the conviction, ruling that the law was an illegal infringement on free speech.

The Supreme Court accepted the case in October 1988 on the votes of Chief Justice William Rehnquist and associate Justices Byron White, O'Connor, Antonin Scalia and Anthony Kennedy — one more than the minimum vote required.

Justice Marshall and fellow liberal Justices Brennan, Blackmun and John Paul Stevens voted to deny review, according to a vote tally by Justice Marshall.

The only written insight into the voting was a memo to Justice Marshall from one of his law clerks, Debra Cohn, who called the Texas law "a poor vehicle for addressing the constitutionality of flag desecration laws."

After the court heard oral arguments in March 1989, a straw poll showed that the justices were divided 6-2 in favor of overturning the Texas law. Justice Marshall placed a question mark beside Justice Stevens' name.

The tally sheet noted the dissenters as the chief justice and Justice White. Justice Brennan, the senior justice on the prevailing side, was assigned to write the majority opinion.

The first draft of Justice Brennan's opinion was circulated June 3. It drew the immediate support of Justices Marshall, Scalia and Kennedy — one shy of the five votes needed to form a majority.

Justice Rehnquist circulated the first version of his dissent June 7. Justice White asked to join the opinion two days later. On June 13, Justice Stevens sent around his own, separate dissent.

The two remaining justices — O'Connor and Blackmun — waited until Justice Brennan circulated his third draft June 19 to reveal their intentions. Justice O'Connor joined the dissenters; Justice Blackmun joined the majority.

It was not clear whether Justice Brennan and the chief justice wrote multiple drafts to attract other justices to their positions. Wording changes were described by the authors as "stylistic."

The notes that announced the justices' positions were brief, saying that the author wished to be joined to the majority or dissenting opinion. Justice Blackmun was the only justice to indicate that his decision was difficult.

NATIONAL

Welfare program

After a decade of national experimentation, no program has done as much to raise the earnings of people on welfare as one in Riverside County. The philosophy is unromantic: get a job, any job, even a low-paying, unpleasant job.
Page 46A.

More National news, Pages 48-49

Janice McClung works at a cafeteria in Riverside, Calif., where a county program helped her reduce her dependence on welfare.

16 Section 1 Chicago Tribune Sunday May 30 1993 ★

Nation/world

Marshall files pierce high court's secrecy

Invasion of privacy stuns justices

By Linda P. Campbell
Chicago Tribune

WASHINGTON—The controversy over the disclosure of the late Justice Thurgood Marshall's papers just two years after he retired from the Supreme Court underscores the secrecy surrounding almost everything the justices do.

Unique among the three branches of the federal government, the high court eschews the spotlight.

The justices have banned television cameras from their courtroom—though many state court trials are televised and the federal courts are experimenting with it—for fear lawyers will posture for the TV audience.

They admonish their clerks not to talk with reporters or discuss cases with anyone outside of chambers.

And no one but the justices are allowed in the weekly conferences at which they vote on cases.

As a result of these unwritten rules, the court operates in an aura of detachment from the public unlike any other major government institution in Washington. The justices firmly believe that they protect the integrity and impartiality of the court by letting their written opinions speak for them.

So, newspaper revelations based on previously confidential documents about some of their recent work stunned them with "almost a sense of invasion of institutional privacy," as William and Mary College law professor Rodney Smolla put it.

There is nothing new about a retired justice's papers publicly revealing details of the court's inner workings. But it usually happens years, if not decades, after the justice has died.

Marshall's papers pierce the court's mystique by humanizing the justices not from a historical perspective but as living, breathing, hard-working individuals who treat each other with extreme courtesy despite passionate differences of opinion, agonize over the difficult issues they must decide and can be both caustic and light-hearted in their communications with each other.

AP photo

Thurgood Marshall's papers show a high court of living, breathing individuals, not icons.

ing that he had followed Marshall's express wishes about opening the collection.

"We have nothing but respect for the court and its members. But we cannot serve as the court's watchdog," Billington said in a statement last Wednesday after meeting with Rehnquist, Marshall's relatives and the family's lawyer.

Pointing out that other reporters and scholars have gotten court documents and written books based on them, Billington said, "We are surprised to have the Library of Congress called upon to enforce a tradition of confidentiality which the court itself has yet

The documents appear to reveal nothing shocking. Some illuminate the development of the most controversial decisions in recent terms. Others are as poignant as the letter telling Marshall that a Virginia Death Row inmate asked to be buried with a copy of the dissent Marshall wrote when the court denied the man's plea for a stay of execution.

The papers show how opinions evolve, sometimes changing to garner enough votes or respond to criticisms from dissenting justices.

For example, the files on Garcia vs. San Antonio Metropolitan Transportation Authority, which involved whether federal fair employment laws apply to state agencies, contain a flurry of memos among the justices as they debated reargiuing the case after Justice Harry Blackmun, chosen to write the majority opinion, changed his vote near the end of the 1983-84 term.

When the case was reargued the following term, Blackmun's view prevailed, and he wrote the opinion saying state agencies are subject to the Fair Labor Standards Act.

The collection also shows Marshall's blunt candor, as in Batson vs. Kentucky, where he brushed aside suggestions from his close friend and ideological ally, William Brennan, that he tone down a concurring opinion. Marshall refused, saying the decision, which barred prosecutors from eliminating prospective jurors based on their race, did not go far enough to end racial discrimination in jury selection.

"I see no reason to be gentle in pointing that out," Marshall wrote Brennan, "and I doubt that pulling my punches would make the situation any better."

The papers on Roe vs. Wade, the 1973 case declaring a constitutional right to abortion nationwide, include a memo from Blackmun to his fellow justices suggesting that his statement announcing the ruling from the bench be distributed to reporters to keep them from "going all the way off the deep end" in writing about the decision.

But Brennan tells Blackmun, a relatively new justice, that the court never records the opinion announcements to "avoid the possibility that the announcement will be relied upon as the opinion or as interpreting the filed opinion." The statement was not distributed, according to a reporter who covered the ruling.

Not so much the gist of the revelations in Marshall's papers but the fact that they are available for public consumption prompted Chief Justice William Rehnquist to rebuke Librarian of Congress James Billington for exercising "bad judgment" in releasing Marshall's papers so soon.

But Billington refused to be put in the position of protecting the court's self-imposed secrecy, insisting clearly to establish

Billington countered claims that Marshall had directed the library to release the papers only to "serious" scholars by saying the library's policy always has included journalists, lawyers and authors in its definition of "researchers."

But, he said, "casual tourists and high school students are turned away" from the library's carefully regulated manuscript collection, and "undergraduates are normally encouraged to go elsewhere."

Legal scholars said all courts need a certain level of secrecy so that judges can thrash out their ideas, take positions that they later can back away from and even passionately attack each other's views without their disagreements becoming ugly public feuds.

"There is a legitimate interest in a degree of confidentiality because it improves the quality of the deliberations for a court," said Smolla, who runs an annual seminar on the court. But, he said, the court should not carry a mystique that gives its work "a spiritual overtone."

University of Chicago professor Dennis Hutchinson, a specialist in court history, said previous books written using internal court documents have not "hindered the robust interplay" among the justices.

"The chief justice grossly overreacted," said Hutchinson, who is writing an unauthorized biography of Justice Byron White. "It's important to demystify an insutution and understand it for what it is."

The court's penchant for secrecy is wound up in its desire to keep the institution free from political influence so the public will respect its opinions and follow them as the law of the land.

Justices David Souter, Sandra Day O'Connor and Anthony Kennedy pointedly referred to the importance of the court maintaining its integrity in last year's Planned Parenthood vs. Casey ruling, which reaffirmed Roe while upholding several Pennsylvania abortion regulations.

"The court's power lies ... in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the judiciary as fit to determine what the nation's law means and to declare what it demands," the justices wrote.

"The court must take care to speak and act in ways that allow people to accept its decisions ... as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the court is obliged to make."

Linda P. Campbell, a member of the Tribune's Washington bureau, covers the Supreme Court.

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June 23, 1993

The Honorable Joseph Lieberman
Chairman
Senate Subcommittee on Regulation and
Government Information
Washington, DC. 20510

Dear Senator Lieberman:

Knowing that your subcommittee recently held a hearing on this and related issues I want to express, on behalf of the Special Libraries Association, our concern over the recent uproar about the decision of the Librarian of Congress to release the donated papers of the late Justice Thurgood Marshall.

The Special Libraries Association is an international organization serving more than 14,000 members of the information profession, including special librarians, information brokers, and consultants serving business, the media, hospitals, science, trade associations, government, academic institutions, law firms, museums, nonprofit organizations, and finance, to name a few.

It is clear that Justice Marshall placed no restrictions on the accessibility of the papers he donated to the Library of Congress. In the "Instrument of Gift" letter which he signed in October of 1991 it states that while the entire collection be restricted during his lifetime, "thereafter" it was to be open and "available to the public at the discretion of the Library." In our opinion, the Librarian of Congress and his staff adhered to the wishes of the paper's donor.

While we might agree that the opening of the papers was ill-timed, coming so close on the heels of Justice Marshall's death, there was no limiting clause in the donor letter signed by him. The Justice was in control of his papers when he signed that letter and provided leeway to the Librarian of Congress to make them available.

We are aware that there have been requests by the Marshall family and current members of the Supreme Court that the Library of Congress close access to the papers. We would oppose any such move. We would also ask that Congress take no action to limit the accessibility of the papers.

What type of precedent might such an action set? What if, in another case, a former government official's papers were legally open for public review and they revealed that other officials were guilty of wrongdoing. Would we want those parties to be able to close off access to protect themselves and their colleagues?

We are not dealing with proprietary information from a private sector entity. These are documents prepared by an individual (and his colleagues) who served on the Supreme Court -- a branch of the U.S. Government.

The owner of the collection, Justice Marshall, deemed it appropriate for the Library to open up the papers and the Librarian of Congress followed his wishes. His papers must remain open and accessible.

Sincerely,

David R Bender

David R. Bender, Ph.D.

DRB/sms

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June 18, 1993

The Honorable Joseph I. Lieberman
Chairman
Subcommittee on Regulation and Government Information
Senate Committee on Governmental Affairs
605 Senate Hart Office Building
Washington, DC 20510-6256

Dear Senator Lieberman:

On behalf of the American Library Association, I submit the enclosed statement of support for the Library of Congress' decision to open access to the papers of Justice Thurgood Marshall. Please include it with the record of the hearing you chaired on June 11, 1993, concerning Public Papers of Supreme Court Justices: Assuring Preservation and Access.

The American Library Association wholeheartedly supports the decision of the Library of Congress to open access to Justice Marshall's papers, pursuant to Justice Marshall's plain instructions, and urges that access to these highly significant documents remain open for the benefit of the public.

The Library's decision is consistent with the highest professional standards of librarianship and is representative of the finest spirit of our constitutional republic.

The Association urges Congress to support the Library's decision and to refrain from any attempts to reverse it.

Sincerely,

Marilyn L. Miller

Marilyn L. Miller
President
American Library Association

MLM:plm

Enclosure