

Chilled Chambers: Constitutional Implications of Requiring Federal Judges to Disclose Their Papers Upon Retirement

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I. INTRODUCTION

It is the summer of 1787. The economy is in shambles. Court-houses have been closed down by angry mobs. The country is on the brink of chaos, and no central government has the legal authority to impose order. The nation's best hope, indeed its only hope, is a small assembly of delegates from twelve almost entirely independent states

(the thirteenth, Rhode Island, was too skeptical to even send anyone). For three swelteringly hot and often acrimonious months now, they have been debating and disputing topics ranging from the nature of man to the nature of a republic, while invoking thinkers from Montesquieu to Pericles. Some have left in protest. Others have left out of necessity (bills to pay; businesses to attend to back home). Yet, against the greatest of odds, through a grudging willingness to compromise (statesmen used to do that, back when there used to be statesmen), they are close to reaching an agreement that will change the course of their nation's history—and the world's as well.

But imagine what would have happened . . . if word had leaked.

What if, just a few weeks before the Convention's completion, someone hoping to derail its progress (several of its delegates, in fact, hoped to do just that) had told an enterprising journalist that the Philadelphia Convention was not, as had been its charge, amending the Articles of Confederation. Instead, it was abolishing the Articles and starting over from scratch. It was adopting an entirely new form of government, under which a distant authority would seize many of the states' powers and impose its will on a people not even permitted to directly elect most of the new authorities empowered to act in their name (the President, the Senate, and the Supreme Court). This, of course, was not what the state legislatures had in mind when they sent delegates to Philadelphia, and so the newspapers' front pages, in the wake of such a leak, might well have heralded: "Power Grab!" or "Coup D'Etat in Philadelphia!" (Both headlines would have been, as a factual matter, at least a little accurate.) And, in a rallying cry that would almost certainly have gained immediate traction and led a majority of the state legislatures to recall the delegates before they could complete their work, the most popular newspaper headline might well have proclaimed a simple demand with regard to the members of the rogue convention: "Bring Them Back Home!"

Of course, history took a different path—not because the reaction to news of the convention's direction would not have produced widespread outrage (it would have done so, and in fact did so once the signed Constitution was made public) but because no such leak occurred. Among the Convention's first acts was the adoption of perhaps its most important rule: "That nothing spoken in the House be printed,

or otherwise published or communicated without leave.”¹ As a result, the Constitution was not stillborn. Its drafters were able to deliberate over the document without worrying that opinions offered during debates might be used against them in the future. And its opponents were unable to derail the convention before its completion. Their only recourse was to oppose its ratification, which they did, and in fact came within a few votes of success in Massachusetts, Virginia, and New York.

Since then, and despite the recognition that “without secrecy no constitution of the kind that was developed could have been written,”² government “secrecy” has frequently been viewed with skepticism, while government “transparency” is widely championed as a benefit free of costs. The “closed door meeting” is suspicious, and the “whistleblower” is the hero (or, in 2002, *Time*’s Person of the Year).³ And to be sure, from the no-bid contracts of kleptocracies to the dirty tricks of Watergate, too much secrecy is dangerous, and a sufficient degree of transparency can expose the corruption, malfeasance, and incompetence that have too often plagued governments from Persepolis to Baton Rouge. But transparency comes with a cost, and at certain times, in certain contexts (like the political environment surrounding the Constitutional Constitution), that cost may outweigh the benefit.

One of those contexts concerns the deliberations of federal judges within and among their chambers. When the cost of transparency in that context rises to the level of unduly interfering with the

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1. Madison’s notes for May 29, 1787 transcribe this rule as the fifth “[a]dditional rule[.]” for the Constitutional Convention. *Madison Debates, May 29*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., http://avalon.law.yale.edu/18th_century/debates_529.asp (last accessed June 14, 2017). The two rules immediately preceding the “nothing spoken” rule also bear directly on the confidentiality of the proceedings: “That no copy be taken of any entry on the journal during the sitting of the House without the leave of the House. That members only be permitted to inspect the journal.” *Id.*

2. *United States v. Nixon*, 418 U.S. 683, 705 n.15 (1974).

3. *The Whistleblowers: 2002, PERSON OF THE YEAR: A PHOTO HISTORY*, http://content.time.com/time/specials/packages/article/0,28804,2019712_2019710_2019677,00.html (last accessed June 14, 2017).

ability of judges to carry out their constitutionally assigned responsibilities, principles of separation of powers preclude Congress from imposing that transparency. That is what this essay is about—whether, as has been repeatedly proposed, Congress can constitutionally require federal judges, upon retirement, to reveal their internal deliberations through the disclosure of their bench memos, correspondence with colleagues, initial votes at conferences, early drafts of judicial opinions, and other papers.

This essay builds on a related article, entitled *What Will Guard the Guardians*,⁴ which argues that inherent powers arguably given to the President and the executive branch should inform how we think about similar powers within the judicial branch. In contrast, the essay here considers a narrow issue of judicial power: a federal judge's ability to control her working papers upon retirement. Part I discusses the history of congressional regulation of government papers. While Congress has not imposed onerous disclosure requirements on itself (as shocking as that might seem) or on the judiciary (as of yet), it has extensively regulated what the Executive branch must disclose through the Freedom of Information Act ("FOIA"), the Presidential Recordings and Materials Preservation Act, and the Presidential Records Act. Part I begins by considering what those acts require and concludes by considering some of their largely unintended consequences.

Part II argues that a congressional requirement for retired judges to disclose their papers would be constitutionally suspect for three reasons. First, such a requirement would impede judges from carrying out their duties. The knowledge on the part of judges and law clerks that all judicial papers will be subject to public scrutiny would exert a chilling effect on the candid advice and communication that judges need in order to do their jobs. This chilling effect would hinder the decision-making of judges by discouraging the thoughtful pursuit of all sides of an argument. In addition, judges could no longer receive candid advice from law clerks, who historically have played a large role in crafting judicial decisions from behind the bench.

Second, such a requirement would mandate the disclosure of types of papers that have been historically protected, even in the face

4. Justin Walker, *What Will Guard the Guardians?: Combating Threats to an Independent Judiciary Through Lessons Learned from Theories of Inherent Executive Power*, 85 U. CINC. L. REV. (forthcoming, 2018).

of aggressive congressional intrusions into the executive branch's inner workings, such as FOIA and the Presidential Records Act ("PRA"). In particular, according to most interpretations of them, FOIA and the PRA provide exceptions for papers covered by attorney-client privilege and the attorney work product doctrine—a privilege and a doctrine that would arguably cover almost all the work-related papers of federal judges and their clerks. Attorney-client privilege is a long-recognized principle of common law that should protect legal advice communicated between judges and their staff members. In addition, Congress's codifying of the attorney work product doctrine shows that there is public policy in favor of lawyers having the freedom to prepare cases without external intrusion. This section argues that judges should be afforded those similar freedoms due to similar public-policy preferences.

Third, the very fact that Congress has never imposed disclosure requirements on its own members makes a congressionally imposed disclosure requirement for the judiciary suspect. As the weakest branch of government and the most removed from the people, the judiciary should not be subjected to disclosure requirements to which Congress does not subject itself.

II. DISCLOSING THE INTERNAL DELIBERATIONS OF GOVERNMENT: A BRIEF HISTORY AND A CONSIDERATION OF COSTS

A. Congressional Regulation of Congressional and Judicial Papers

In 1974, the Brownell Commission recommended that Congress pass legislation to require disclosure of the personal working files of all the branches of government.⁵ Congress, however, declined. From the founding through the present, documents made or received by members of Congress and their staffs in connection with official duties have been treated as members' private property.⁶ For example,

5. LUCIOUS D. BATTLE ET AL., FINAL REPORT OF THE NATIONAL STUDY COMMISSION ON RECORDS AND DOCUMENTS OF FEDERAL OFFICIALS 3 (1977) [hereinafter NATIONAL STUDY REPORT], <https://babel.hathitrust.org/cgi/pt?id=umn.31951d008187728;view=1up;seq=3>.

6. *Id.* at 21.

in 1966, Congress passed the FOIA, which sought to add more transparency to the government.⁷ Under FOIA, citizens could request files and information from all over Washington.⁸ Interestingly, Congress specifically exempted themselves from this act.⁹

Even without mandatory disclosure of congressional working papers, the official records of Congress are widely available to the public. Federal law states that Congressional records should be preserved with the National Archives and Records Administration (“NARA”).¹⁰ The term “Congressional records,” however, might not be as inclusive as it seems. An NARA director described the process of preserving Congressional records as “a courtesy to the Congress rather than prescribed under law.”¹¹ For working files of individual members of Congress, there are currently no regulations in place requiring any sort of disclosure.

The same is true for the papers of federal judges. Historically, federal courts, especially the Supreme Court, have maintained a tradition of judicial secrecy.¹² As members of the most insulated branch of government, federal judges have had a great deal of privacy when it comes to their personal chambers papers. The public has access to certain materials from every case, including transcripts and audio records of oral arguments and briefs.¹³ Yet the oral arguments and briefs only tell a small part of the story of each case. The files of a judge’s chambers, which typically include “official correspondence, case memoranda, law clerks’ work product, communications between [j]udges, and other non-record materials related to the decision-making process,” are unregulated under any current law.¹⁴ Rather, the papers

7. See 5 U.S.C. § 552 (2012).

8. See, e.g., 5 U.S.C. § 552(a)(1)(A).

9. 5 U.S.C. § 551(a)(1) (defining that “agency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—the Congress”). The federal courts are also explicitly excluded from the reach of the statute. 5 U.S.C. §551(a)(1)(B).

10. 44 U.S.C. § 2118 (2012).

11. Kenneth Thibodeau, *Special Feature Preserving Legal Information for the Twenty-First Century: Toward A National Agenda: NARA’s Electronic Records Archives Program*, 96 L. LIBR. J. 633, 633–34 (2004).

12. NATIONAL STUDY REPORT, *supra* note 5, at 25–26.

13. Eric Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787, 833–34 (2016).

14. NATIONAL STUDY REPORT, *supra* note 5, at 23.

of a federal judge are the property of that judge or his or her family after the judge's death.¹⁵ At any point, the judge or his or her family may decide to release parts of the collection of chamber papers to the public, but that is strictly a matter of personal prerogative.¹⁶

As a result, there is a wide range of means for disposition of judicial papers. Some judges opt to submit their papers to a library or repository where the papers can be made available to the public.¹⁷ This practice is encouraged by many in the legal and historical communities. For example, a manuscript published by the Federal Judicial History Office offers a persuasive plea for federal judges to publicize their papers and provides detailed instructions for how to go about doing so.¹⁸ At the other extreme, numerous justices have destroyed their working papers.¹⁹ In many cases, judicial working papers end up stored in boxes with a judge or his family.²⁰

Just because the issue is unregulated, however, does not mean that it has been ignored. On at least two occasions, Congress has empaneled committees tasked with evaluating the need for regulations. As previously discussed, the Brownell Commission recommended that judges' working papers, like those of the President and Congress, be considered the property of the United States.²¹ Specially for federal courts, the Commission's recommendation was that no more than fifteen years after a judge has left the bench, the judge's papers be made accessible to the public.²² No formal Congressional or judicial action was taken in response to this recommendation.

The second episode of concern over judicial chambers papers came after the Justice Thurgood Marshall chambers papers became public just two years after his retirement from the bench. This quick release of Marshall's judicial papers, including many landmark cases

15. FED. JUDICIAL CTR., A GUIDE TO THE PRESERVATION OF FEDERAL JUDGES' PAPERS 1 (2d ed. 2009), [http://www.fjc.gov/public/pdf.nsf/lookup/judgpa2d.pdf/\\$File/judgpa2d.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/judgpa2d.pdf/$File/judgpa2d.pdf) (last accessed June 14, 2017) [hereinafter JUDGE'S GUIDE].

16. *Id.*

17. *Id.*

18. *Id.*

19. NATIONAL STUDY REPORT, *supra* note 5, at 26.

20. *Id.* at 25.

21. *Id.* at 39.

22. *Id.* at 41.

from his tenure on the bench, gave rise to concerns about the compromised “aura of secrecy” surrounding the Supreme Court.²³ To address these concerns, Congress held a hearing in 1993 “to consider a number of questions that are related to the preservation and publication of judicial records.”²⁴ Again, no legislation was passed as a result.

Professor Kathryn Watts has recently called for such legislation in her insightful and provocative article, *Judges and Their Papers*.²⁵ In it, Professor Watts argues for the importance of publicizing the papers of the federal judiciary.²⁶ Although it does not reach the same conclusion as Professor Watts with regard to the constitutionality of such regulation, this essay is not meant as a direct response to that article. We share Professor Watts’s interest in the workings of the federal judiciary and agree with her that there would be significant policy benefits to making retired judges’ papers available to the public.²⁷ We disagree, however, about the extent of the costs of such disclosures—and whether those costs violate the separation of powers when they are imposed on the judiciary by Congress.

B. Presidential Papers

For most of American history, presidential papers, like congressional and judicial papers, were historically regarded as the personal property of the office holder.²⁸ For that reason, many earlier Presidents chose to destroy their files or give them to family members rather than turn them over the public when they left office.²⁹ But this tradition began to change in the second half of the twentieth century.

23. Neil A. Lewis, *Chief Justice Assails Library on Release of Marshall Papers*, N. Y. TIMES (May 26, 1993), <http://www.nytimes.com/1993/05/26/us/chief-justice-assails-library-on-release-of-marshall-papers.html>.

24. *Access to Papers of Supreme Court Justices: Hearing Before the U.S. Senate, Governmental Affairs Subcomm. on Gov. Info. and Regulation*, 103rd Congr. (1993) [hereinafter *Hearing*] (statement of Joseph Lieberman), <https://www.c-span.org/video/?42815-1/access-papers-supreme-court-justices>.

25. Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U.L. REV. 1665 (2013).

26. *Id.*

27. *Id.*

28. NATIONAL STUDY REPORT, *supra* note 5, at 13.

29. *Id.*

In 1966, Congress passed FOIA.³⁰ As the preamble to the legislation states, the purpose of FOIA was “to clarify and protect the right of the public to information.”³¹ Under FOIA, any citizen may request access to executive branch records for any reason.³²

After FOIA was enacted, the American people had more access to government information than ever before, but access was not absolute. FOIA outlines 9 broad categories of papers that are exempt from disclosure.³³ For example, the President is not expected to grant public access to records that need to be kept secret in the interest of the national defense or foreign policy.³⁴ And—as discussed in greater detail below—the executive branch is not required to disclose (under the interpretation of FOIA by most courts) papers protected by attorney-client privilege and the attorney-work-product doctrine.³⁵

In the wake of the Watergate scandal, the presidential papers secrecy issue was thrust back into the national spotlight. Amidst allegations that President Richard Nixon was involved with the break-in of the Democratic National Headquarters office in the Watergate Hotel and the cover-up scheme that followed, the American people demanded answers. A legal battle ensued when a federal court issued a subpoena compelling Nixon to hand over tape recordings that might implicate him in the scandal.³⁶ Nixon fought the subpoena all the way to the Supreme Court. In *United States v. Nixon*, the Supreme Court was asked to determine whether the President of the United States had an inherent “executive privilege,” including total privacy of White House documents.³⁷ In deciding this case, the Court recognized the “President’s need for complete candor and objectivity from advisers.”³⁸ Despite the importance of confidentiality, however, there were several reasons why the Court found Nixon’s argument unpersuasive in this case. First, the subpoena at issue called only for an in-camera

30. 5 U.S.C. § 552 (2012).

31. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

32. 5 U.S.C. § 552(a)(3)(A).

33. § 552(b)(1)–(9).

34. § 552(b)(1).

35. See *infra* Section III.B.

36. *United States v. Nixon*, 418 U.S. 683, 687–88 (1974).

37. *Id.* at 703.

38. *Id.* at 706.

inspection of the tapes rather than full disclosure to the public.³⁹ Therefore, even sensitive material would be subject to the protections of the federal courts.⁴⁰ In addition, because the case was a criminal one, justice required that the tapes be turned over.⁴¹ In the end, the Court determined that Nixon's executive privilege was not absolute, and that he would therefore be required to turn over the subpoenaed tapes.⁴²

The nation's trust in the Office of the President was shaken after the tapes revealed Nixon's involvement in the Watergate scandal. Impeachment proceedings were initiated, leading to the president's eventual resignation. Following Nixon's resignation, his successor, Gerald Ford, signed into law the Presidential Recordings and Materials Preservation Act ("PRMPA").⁴³ Section 1 of the PRMPA was passed to further investigate Nixon; it directed the Administrator of General Services to collect all documents and tape recordings of Nixon or others in the White House during the Nixon Administration.⁴⁴ Again, Nixon attempted to protect his recordings, claiming executive privilege. Again, his case reached the Supreme Court.

In *Nixon v. Administrator of General Services*, the Supreme Court reaffirmed its view that "privilege is necessary to provide the confidentiality required for the President's conduct of office."⁴⁵ Additionally, the Supreme Court adopted the view that executive privilege could continue even after a President left office.⁴⁶ Yet, despite its renewed commitment to executive privilege, the Supreme Court again was not convinced of Nixon's need to invoke the privilege. In part, the Supreme Court felt uncomfortable with this particular assertion of executive privilege because Nixon had asserted privilege "against the very Executive Branch in whose name the privilege is invoked."⁴⁷ According to the Court, "the fact that neither President Ford nor President Carter, the two executives that succeeded Nixon, supports [Nixon's]

39. *Id.*

40. *Id.*

41. *Id.* at 707.

42. *Id.* at 713.

43. Pub. L. No. 93-526; 44 U.S.C § 2107 (2014).

44. Pub. L. No. 93-526.

45. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 448 (1977).

46. *Id.* at 448-49.

47. *Id.* at 447-48.

claim detracts from the weight of his contention that the [PRMPA] impermissibly intrudes into the executive function and the needs of the Executive Branch.”⁴⁸ Further, in a line of thinking similar to that in *United States v. Nixon*, because access to the papers and recordings here was only to National Archive staff and not the public at large, the Court said the screening constituted “a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns.”⁴⁹

The dissenting Justices in *Nixon v. Administrator of General Services* offered harsh criticism of the majority opinion. The dissenters accused the majority of acting unconstitutionally in a hurried effort to punish former President Nixon.⁵⁰ In part, the dissenters argued that the PRMPA violates separation-of-powers principles because it allows Congress to exercise a coercive influence over another branch of government, abandoning the “constitutional tradition of noncompulsion.”⁵¹ Further, the dissenters argued that this opinion took too far the narrow exception carved out in *United States v. Nixon* to limit executive privilege only when the conduct of a criminal proceeding so required. Therefore, the dissent argued, *United States v. Nixon* “provides no authority for Congress’ mandatory regulation of Presidential papers” for only a generalized purpose.⁵²

The second part of PRMPA went beyond Nixon and the Presidency to create the National Study Commission on Records and Documents of Federal Officials, chaired by former Attorney General Herbert Brownell. The Brownell Commission was tasked with looking into all three branches of the federal government in order “to study problems and questions with respect to the control, disposition, and preservation of records and documents,”⁵³ and to make recommendations on such topics. Ultimately, the Commission recommended that all Presidential papers should be treated as property of the United States.

48. *Id.* at 449.

49. *Id.* at 451.

50. *Id.* at 505 (Burger, C.J., dissenting).

51. *Id.* at 511.

52. *Id.* at 516.

53. 44 U.S.C. § 3317 (repealed 2014); *see also supra* notes 5, 6, 12, 19–22, and accompanying text.

Taking the recommendation of the National Study Commission, Congress passed another piece of legislation concerning presidential papers. The Presidential Records Act (“PRA”) of 1978 established procedures for releasing executive papers to the public.⁵⁴ In addition, the PRA went further than FOIA because not only did the United States public have access to Presidential records—the public also actually owned Presidential records.⁵⁵ Yet, like FOIA, the PRA contained exceptions. For example, the PRA restricted access to “confidential communications requesting or submitting advice, between the President and the President’s advisers, or between such advisers.”⁵⁶

C. *The Consequences of Executive Branch Transparency*

During episodes of frustration with the government, the public demands more transparency and more process, and the open-records reforms passed in the wake of Watergate had a noble purpose: “to restore public confidence in government by providing insight into its workings and greater access to the deliberative process.”⁵⁷ But with the benefit of hindsight, it is important to ask two questions: First, has increased transparency actually solved any problems faced by the American people? Second, what have been the unintended consequences of these moves towards transparency and process?

Certainly, transparency has resolved some public grievances. Many advocates for government openness and transparency point out that it allows the public to keep a closer eye on its leaders. Agency officials and politicians are held to a higher degree of accountability when much of their work is performed in a public forum. Former Supreme Court Justice Louis Brandeis famously referred to transparency

54. MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 153 (rev. ed. 2010).

55. 44 U.S.C. § 2202 (2012) (“The United States shall reserve and retain complete ownership, possession, and control of Presidential records.”).

56. 44 U.S.C. § 2204(a)(5).

57. Jason Grumet, *When sunshine doesn’t always disinfect the government*, WASH. POST (Oct. 2, 2014) https://www.washingtonpost.com/opinions/laws-aimed-at-transparency-have-hindered-serious-debate/2014/10/02/7c5eb022-48dd-11e4-b72e-d60a9229cc10_story.html?utm_term=.44c852b18a6a.

as “sunlight” that could act as a “disinfectant[]” in previously dark, secretive places.⁵⁸

Yet, have transparency laws really solved the problems they were intended to address? One of those problems was deep public distrust of government after the Watergate scandal. But transparency laws have not restored the public’s faith in government. A recent poll conducted by the USA Today/Bipartisan Policy Center found that seventy-seven percent of those who responded felt that they could trust the government in Washington to do what was right “only some of the time” or “none of the time.”⁵⁹ Another study found that transparency laws do not eliminate perceived corruptions in government.⁶⁰

Further, rather than bringing political discussion into the light, transparency laws may actually drive them further underground. Discussions that might have taken place during an official proceeding now happen in private meetings in an effort to keep some communications “off the record.” To illustrate this point, one critic of transparency tells of a committee created to address a national crisis.⁶¹ According to the committee’s rules, if more than two members meet at one time, the meeting must be advertised in the Federal Register, which requires time and paperwork. To circumvent these inconveniences, members of the committee opted to come together only in two-person meetings. In solving a national crisis, no more than two people were ever in the same room sharing ideas or negotiating tactics. The result was not more transparency; the result was just less efficiency.⁶²

Not only have transparency laws often failed to solve problems, but in many cases they have also created—or at least contributed to—new ones. Among the biggest of those problems is a new, almost unprecedented, governing gridlock. As David Frum has written, “Reformers keep trying to eliminate backroom wheeling and dealing from American governance. What they end up doing instead is eliminating

58. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 89 (Melvin I. Urofsky ed., Bedford Books of St. Martin’s Press 1995) (1914).

59. Grumet, *supra* note 57.

60. Samia Costa, *Do Freedom of Information Laws Decrease Corruption?*, 29 J. L. ECON. & ORG. 1317 (2013).

61. Grumet, *supra* note 57.

62. *Id.*

governance itself”⁶³ Negotiations are messy because each side must make concessions that can look to their supporters like “selling out” until they are balanced out by the other side’s concessions, and it is difficult for elected officials to bargain with one another effectively if transparency laws require that their internal dialogue be made public.⁶⁴ That is one reason why a requirement of secrecy was among the Constitutional Convention’s first rules.⁶⁵ The presence of rolling cameras or a stenographer recording a transcript requires politicians to constantly reinforce their own positions rather than cutting to the chase at a bargaining table. As a recent critic has noted, “It’s hard to negotiate in earnest while striking ideological postures for TV cameras.”⁶⁶

In “The Transparency Trap,” Frum tells a story of “how the system used to work” before transparency laws got in the way.⁶⁷ When Lyndon Johnson had just been elected president, one of his first tasks was to pass President Kennedy’s stalled tax cut plan. In order to pass the plan, Johnson needed the help of an old friend from his days in the Senate, Harry Byrd. Byrd was the chair of the Senate Finance Committee, the body holding up the Kennedy tax cuts. In a private lunch that took place in a room adjoining the Oval Office, Byrd and Johnson struck a deal that served the interests of both parties.⁶⁸ The heart of the deal was that Byrd would let Kennedy’s tax cut plan out of committee if Johnson could limit the budget to under \$100 billion.⁶⁹ The details of this private meeting might never have come to light if not for the presence of a third man, Johnson’s advisor Jack Valenti.⁷⁰ Because of

63. David Frum, *The Transparency Trap*, THE ATLANTIC (Sept. 2014), <http://www.theatlantic.com/magazine/archive/2014/09/the-transparency-trap/375074/>.

64. See Matthew Yglesias, *Transparency: The Good and the Bad*, THINK PROGRESS (Feb. 22, 2010), <https://thinkprogress.org/transparency-the-good-and-the-bad-c8bd60bfbf5d#.e5t7dqcc7>.

65. See *supra* note 1 and accompanying text.

66. Jonathan Rauch, *The Case for Corruption*, THE ATLANTIC, March 2014, <http://www.theatlantic.com/magazine/archive/2014/03/the-case-for-corruption/357568/>.

67. Frum, *supra* note 63.

68. ROBERT CARO, THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER 476–77 (2012).

69. *Id.* at 476.

70. See *Id.*

his willingness to negotiate behind closed doors, Johnson was able to save Kennedy's tax cut plan.

Now, the days when a President can privately negotiate to save a deal are long gone. In place of secret lunches in the Oval Office, the names of every person who comes in and out of the White House are subject to public disclosure.⁷¹ At the same time, budgets are often left in limbo and politicians threaten government shutdowns rather than continuing negotiations. In the name of reform, Americans have weakened political authority.⁷²

Further, most Americans do not even take advantage of the transparency offered by government. How many people wake up every morning to catch the latest developments in the Federal Register? Instead, among those most benefitted by increased transparency are lobbyists and special interest groups. For lobbyists, transparency lets them keep track of their competitors—who is visiting whom, for how long, and for what purpose.⁷³ As a result, rather than remaining accountable to their constituents, who are less likely to closely follow all legislative proceedings, members of Congress face more pressure from the lobbyists, who are able to keep a close eye on events and “confirm that the politicians to whom they have contributed deliver value.”⁷⁴ Deliberation, collaboration, and compromise are difficult to bring about when monitored by special interests, as it is hard “to summon the courage to explore bipartisan collaboration with one's most intense constituents always peering over one's shoulder, intent on punishing any violations of orthodoxy.”⁷⁵

To be sure, it can be argued that skeptics (not to mention outright critics) of open-records laws overstate the costs of such laws and understate their benefits.⁷⁶ Perhaps. Our point is merely that those

71. See, e.g., Josh Gerstein, *W.H. defends Bush visitors policy*, POLITICO (June 16, 2009), <http://www.politico.com/story/2009/06/wh-defends-bush-visitors-policy-023805>.

72. Frum, *supra* note 63.

73. *Id.*

74. *Id.*

75. Grumet, *supra* note 57.

76. Gary D. Bass, Danielle Brian, and Norman Eisen, *Why Critics of Transparency Are Wrong*, BROOKINGS (Nov. 24, 2014), <https://www.brookings.edu/research/why-critics-of-transparency-are-wrong/>.

costs, to at least some degree, exist, while some of the benefits promised by laws mandating transparency are not always clear.

III. CONGRESS CANNOT REQUIRE DISCLOSURE OF JUDGES' PAPERS WITHOUT UNCONSTITUTIONALLY INFRINGING ON THE INDEPENDENCE OF THE JUDICIARY

For three reasons, Congress cannot constitutionally require judges to disclose their work papers, even after judges retire. First, the requirement would chill the discussion that is necessary between a judge and her clerks and between a judge and other judges. Second, the requirement would make public the very kinds of papers that even FOIA and the Presidential Records Act exempt from disclosure—attorney-client communication and attorney work product, exceptions the Supreme Court depended on when it upheld the constitutionality of disclosure in *Nixon v. GSA*. Third, the requirement would upset the balance of power between Congress and the judiciary because Congress has not imposed similar requirements on itself.

A. *The Chilling Effect*

As former Supreme Court Justice Lewis Powell put it, judicial decision-making depends on “candid discussion, a willingness to consider arguments advanced by other Justices, and a continuing examination and re-examination of one’s own views.”⁷⁷ Judges and those who work for them need the freedom to think freely, explore multiple sides of an argument, and do everything possible to reach a fair and accurate conclusion. But if members of the judiciary knew that all of their work product would be published, their internal deliberations could be chilled.

Consider, for example, an episode that Professor Watts describes at the beginning of *Judges and Their Papers*.⁷⁸ In 2012, journalist Jan Crawford reported that Chief Justice Roberts had changed his position about the constitutionality of the Affordable Care Act after

77. Lewis F. Powell, Jr., *What Really Goes On at the Supreme Court*, in JUDGES ON JUDGING: VIEWS FROM THE BENCH 105, 106 (David M. O’Brien, ed., 5th ed. 2016).

78. Watts, *supra* note 25, at 1667.

initially voting at Conference to strike down the law’s individual mandate as neither a tax nor an exercise of Congress’s power to regulate interstate commerce.⁷⁹ Watts used this example to highlight the extreme secrecy surrounding Supreme Court proceedings. Yet—regardless of whether Crawford’s reporting was accurate—we think the episode illustrates the need for secrecy. We *want* judges to be able to change their minds when they believe the law compels it, and we do not want them to be worried about whether a change of mind will leave them open to criticisms of being a “flip-flopper,”⁸⁰ a label that Chief Justice Roberts’s critics were quick to affix to him after Crawford’s article.⁸¹

Just as we want judges to be able to explore all sides of an issue, we want their advisors to feel free to do the same. As the Supreme Court once said of presidential advisors, “A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.”⁸² Law clerks sometimes play an important role for judges, one extending beyond just research and writing; they can also serve as trusted advisors for their judges. On occasion, they provide unique viewpoints on legal issues. More frequently, but just as importantly, they provide a sounding board, helping judges try out arguments and test new ideas.

But if a clerk’s ideas and arguments are later made public, it can cause trouble for the former clerk. The best-known example of this is the controversy caused by the disclosure of a (very much misguided)

79. Watts, *supra* note 25, at 1667.

80. See Richard W. Stevenson & Janet Elder, *The 2004 Campaign: The Poll; Poll Finds Kerry Assured Votes In Initial Debate*, N.Y. TIMES (Oct. 5, 2004), http://www.nytimes.com/2004/10/05/washington/the-2004-campaign-the-poll-poll-finds-kerry-assured-voters-in-in.html?_r=0 (“Mr. Bush’s strategy of portraying Mr. Kerry as an unprincipled flip-flopper appears to have stuck in the national consciousness. Sixty percent of registered voters said Mr. Kerry told people what they wanted to hear rather than what he really believed, about the same level as throughout the spring and summer. The corresponding figure for Mr. Bush was 38 percent.”).

81. Sherry F. Colb, *Was It Wrong for Chief Justice Roberts to “Flip Flop” on Obamacare?*, VERDICT (July 11, 2012) (arguing that being open to changing one’s mind in the light of the evidence and of the views of one’s colleagues on the bench does not warrant the “flip-flop” label), <https://verdict.justia.com/2012/07/11/was-it-wrong-for-chief-justice-roberts-to-flip-flop-on-obamacare>.

82. United States v. Nixon, 418 U.S. 683, 708 (1974).

bench memo that William Rehnquist wrote when he was clerking for Justice Robert Jackson during *Brown v. Board of Education*. When Rehnquist was nominated to the Supreme Court, and then later nominated to be Chief Justice, the memo almost cost him his confirmation. If he had known that his memo would be made public in the future, his fear of the damage it could do to his career might have chilled him from writing it and giving his boss the advice he had been hired to provide.

It's easy to say that because Rehnquist was on the wrong side of *Brown*, we should not worry about whether his advice would have been chilled had he known his memo would be disclosed. But history does not always move in the direction one prefers. For example, it is disconcerting to many progressives that several generations ago, it was considered extreme to believe that the Second Amendment protected an individual right to bear arms, and it was considered mainstream to believe that there are no practical limits to Congress's commerce power. Today, what was once a fringe belief about the Second Amendment is now binding precedent, and what was once mainstream with regard to the Commerce Clause (not to be confused with main stream of commerce) is now a nonstarter when defending, for example, the ACA's individual mandate. Woe to the law clerk who endorsed the limited interpretation of the Second Amendment or the expansive interpretation of the Commerce Clause in her twenties, and then, thirty years later, attempts in 2017 to win confirmation to the bench by a Republican Senate.

We cannot know—or at least we likely cannot agree about—which legal positions that are mainstream today will be fringe positions in a generation; nor can we know which positions now on the fringes will become conventional in the future. And more to the point, law clerks cannot know, which leaves them one of two choices when writing bench memos and opinion drafts about controversial subjects: be fearless or pull their punches. The former is preferable. The latter is more likely. (Not all men are angels; nor are all women; and certainly not all law clerks, who tend to be, as Sam Houston once said of Jefferson Davis, “as ambitious as Lucifer.”⁸³)

83. *Jefferson Davis*, THE CIVIL WAR PROJECT, <https://thecivilwarproject.com/the-south-2/jefferson-davis/> (last accessed June 15, 2017).

To be sure, the precise extent of the chilling effect of a disclosure law on judges and law clerks is not certain because we cannot know how much judges and clerks will worry about the papers one day being used against them. But make no mistake: those papers *will be* used against them. We need look no further than the last round of hearings for a Supreme Court nominee, when Senators made now-Justice Kagan defend bench memos she had written to Justice Thurgood Marshall as a twenty-eight year-old law clerk. A typical criticism came from Senator Jeff Sessions (now President-elect Trump's Attorney General) when he said, "From issues such as guns to abortion to crime control, Kagan's memos unambiguously express a leftist philosophy and an approach to the law that seems more concerned with achieving a desired social result than fairly following the Constitution."⁸⁴

In her article, Professor Watts argues that a benefit of requiring disclosure of judicial papers is that it would "discipline the work of judicial law clerks."⁸⁵ By this she means that if law clerks are aware that their work may be publicly available in the future, then they "may take greater care in ensuring that their recommendations adhere to the law rather than to their own personal preferences."⁸⁶ Maybe. But clerks tend to think they are adhering to the law, even when they, perhaps subconsciously, let their personal preferences cloud their view of the law. (There are probably a few judges out there who do the same.)

The "discipline" imagined by Professor Watts is a disservice to the judge that law clerk is serving—especially if the judge is not over-delegating to her clerk. Consider two hypotheticals. In the first, the clerk agrees with what she expects her judge's legal conclusion to be; in that instance, we wouldn't want the clerk to pull her punches in explaining her reasoning for a legal conclusion because that clerk is helping the judge articulate the reasoning for a conclusion the judge believes correct. In the second hypothetical, the clerk disagrees with what she expects the judge's conclusion to be and pens a bench memo setting forth the reasons why. This may lead to a judge maintaining her initial conclusion but strengthening its support by ensuring that the

84. Robert Barnes, *Relevance of Kagan's work as clerk of Supreme Court debated*, WASH. POST (JUNE 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/13/AR2010061304744.html>.

85. Watts, *supra* note 25, at 1705.

86. *Id.*

reasoning underlying it rebuts the clerk's arguments. Or, more rarely, a judge might even change her initial conclusion because of the strengths of the clerk's reasoning. In either instance, the judge is aided by the dialogue—dialogue of a sort that occurs every day in judicial chambers across the country, and that should be encouraged, not chilled. Such is the nature of Justice Powell's reference to "candid discussion, a willingness to consider arguments advanced by other Justices, and a continuing examination and re-examination of one's own views."⁸⁷ Such is the nature of judicial decision-making.

B. Attorney Privilege and Work Product

Although the Supreme Court held in *Nixon v. GSA* that similar concerns about chilling advice in the executive branch do not preclude Congress from seizing a former President's papers, the Court reasoned that privileged papers were protected by the statute in question and the regulations that were expected to effectuate that statute. In other words, it was conceivable that Congress could require the disclosure of *some* presidential papers in violation of the separation of powers if it did not require the disclosure of *all* presidential papers. But in the context of judges' papers, the categories of papers that the Court relied on Congress to protect from disclosure encompass nearly all the papers that judges and their chambers produce. That's because, whereas FOIA and the Presidential Records Act protect attorney-client communications and attorney-work-product papers from disclosure, any requirement for judges to disclose their work papers would almost by definition mean the disclosure of those types of papers: communications between a judge and her clerks or between judges and other judges are analogous to attorney-client and attorney-work-product communications.

One of the oldest common-law principles recognized by our legal system is that of attorney-client privilege. This principle protects communication between an attorney and client in confidence for the purpose of rendering legal advice.⁸⁸ The purpose is to encourage "full and frank communication between attorneys and their clients, thereby promoting broader public interests in the observance of law and the

87. Powell, *supra* note 77, at 106.

88. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 68 (AM. LAW INST. 1998).

administration of justice.”⁸⁹ While typically thought of in the context of private attorneys, courts have applied that attorney-client privilege to government attorneys.⁹⁰

Should those in government office have conversations with their attorneys protected under attorney-client privilege? Congress seemed to think so when it drafted the PRA. Under 44 U.S.C. § 2204, Congress included categories for which the President may restrict access to Presidential records. Included in those exceptions are “confidential communications requesting or submitting advice, between the President and the President’s advisers, or between such advisers”—communications among colleagues whose relationship is similar to the relationship between a judge and a law clerk.⁹¹

Another historically significant policy that our country has protected is the confidentiality of attorney work product. Under the work product doctrine, an attorney is never compelled to disclose his or her “mental impressions, conclusions, opinions, or legal theories” during discovery.⁹² This doctrine was created by the Supreme Court, recognizing that “it is essential that a lawyer work with a certain degree of privacy,” in order to have an efficient and effective justice system.⁹³ Congress later codified the doctrine into the Federal Rules of Civil Procedure. Then, when drafting FOIA, Congress returned to the attorney work product doctrine when it exempted from FOIA inter-agency memoranda and letters that would not be discoverable in litigation.⁹⁴

The work of judges and their clerks is highly analogous to attorney-client communications and attorney work product. Like a partner at a law firm or a general counsel at a company, a federal judge is a lawyer familiarizing herself with a case. And like a junior associate working for a supervisor and representing a client, a clerk is an agent of the judge—acting, in some ways, as the judge’s attorney. The clerk provides counsel on legal matters, conducts legal research, and makes legal arguments on behalf of the judge. The clerk’s memos are not policy memos; they are legal memos. The clerk’s draft opinions are

89. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

90. Adam M. Chud, Note, *In Defense of the Government Attorney-Client Privilege*, 84 CORNELL L. REV. 1682, 1703–04 (1999).

91. 44 U.S.C. § 2204(a)(5) (2012).

92. FED. R. CIV. P. 26(b)(3)(B).

93. *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947).

94. 5 U.S.C. § 552(b)(5) (2012).

not draft speeches or draft white papers; they are drafts of a legal analysis. Even when a clerk interacts with other judges' clerks, the clerk does so as an agent of the judge, representing the judge's interests in the outcome of a legal dispute. It is for these reasons some judges tell their clerks that a clerk's job is to be the judge's lawyer.

C. *An Unprecedented Change in the Balance of Powers*

Any congressional regulation of judge's papers is also suspect for an additional reason: such regulation would represent an unprecedented intrusion into the inner workings of the judiciary, imposing on that branch requirements that Congress does not impose on itself.

First, consider how unprecedented such a regulation would be. Never has Congress required a single federal judge to disclose a single paper produced by a judge or a clerk during the discussion and deliberations surrounding any case.⁹⁵ That history itself is strong evidence that Congress—despite the obvious benefits of such papers to students of history, legal theorists, and insatiably curious Article III “junkies”—lacks the authority to act in this field. As the Supreme Court has stated in a similar context, Congress's “prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed.”⁹⁶

Second, consider the one-sidedness of Congress's regulation of the judiciary in relation to the “critical insight of checks and balances theory,” namely “that the relative power of the branches is central to preservation of the equilibrium among them.”⁹⁷ Even though the public has as much (and likely more) interest in legislators' papers, Congress has no rules in place concerning the disclosure of its own papers.

95. Regarding the traditional view of a judge's chambers papers being the judge's property, see Watts, *supra* note 25, at 1675–76. Professor Watts states that “[f]rom the time of our nation's founding, the Justices of the Supreme Court and judges of the lower federal courts have treated their papers as ‘private property, protected by and alienable according to the laws of private property.’” *Id.* (quoting ALEXANDRA K. WIGDOR, *THE PERSONAL PAPERS OF SUPREME COURT JUSTICES 3* (1986)).

96. *Plaut v. Spendthrift Farm*, 514 U.S. 211, 230 (1995) (holding unconstitutional, as a violation of the separation of powers, a statute requiring Article III courts to reopen final judgments entered before the passage of the statute).

97. Lee S. Liberman, *Morrison v. Olson: A Formalist Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 351 (1989).

Those in favor of mandatory judicial disclosure have not been concerned that Congress might seem self-serving in putting into place for the judiciary regulations from which the Congress itself is free, reasoning that “Congress does much of its work in the public eye.”⁹⁸ But those Congressional documents that are analogous to judicial working papers are *not* made public. Members of Congress are not compelled to publicize communications with their staff. The off-the-record meetings between Members of Congress where the vast majority of politicking and decision-making happens are nowhere in the Congressional record. Therefore, if Congress were to require that law clerk memoranda or transcripts from conferences with other judges were subject to public disclosure, Congress would be regulating the judicial branch in a way that it does not regulate itself. This is a point recognized by one Senator during the Congressional hearing on access to papers of the Supreme Court Justices: “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 doesn’t necessarily follow that the Congress has the power to legislate an answer in this case for the courts.”⁹⁹

The dissenters in *Nixon v. GSA* recognized the potential for congressionally required disclosure of another branch’s papers to upset the Constitution’s balance of power. “Consistent with the principle of noncoercion, the unbroken practice since George Washington with respect to congressional demands for White House papers has been, in Chief Justice Taft’s words, that while either house of Congress may request information, it cannot compel it.”¹⁰⁰ But even assuming the dissenters were wrong within the context of executive branch papers (it will come as no surprise to hear we’re not so sure they were), the dynamic is different in the context of judicial branch papers. The President has numerous ways to protect his branch of government, from formal mechanisms like federal law enforcement officers (not to mention the Marines), to informal mechanisms of influence like the bully pulpit. Aside from cooperation and mutual respect between the coor-

98. Watts, *supra* note 25, at 1733.

99. See *Hearing, supra* note 24 (statement of Joseph Lieberman).

100. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 509–10 (1977) (quoting WILLIAM HOWARD TAFT, *THE PRESIDENCY* 110 (1916)).

dinate branches of government, the “least dangerous branch” is dependent above all on one thing for the preservation of its authority and the imposition of its will: the public’s confidence in its decisions.

In other words, unlike the President or the Congress, the courts’ authority is directly related to the quality of its decision-making. If Congress enacts a disclosure law that dilutes the quality of judicial decisionmaking, it will weaken the very foundation of the judiciary’s authority. It is a far more direct alteration of the balance of power than when Congress does the same to the executive. That is not to say, of course, that Congress cannot regulate the judiciary. It is only to say that Congress cannot make it harder for the judiciary to discharge its constitutionally-assigned duties.

IV. CONCLUSION

The tradition of federal judges’ control of their own working papers is as old as the tradition of judicial independence. The current system of private ownership of chambers papers provides judges with an environment in which they can think freely through legal arguments and vigorously explore all possible solutions before arriving at a conclusion. Congressionally mandated disclosure of judges’ working papers would compromise this environment and thereby upset the constitutionally ordained balance of powers. Like other attorneys who enjoy the protections of attorney-client confidentiality and attorney work privilege, judges and their law clerks must be free from outside intrusions that impair the performance of judges’ constitutionally-imposed duties. There are many places in government where transparency affords the public greater benefits than costs. The chambers of federal judges—where an uninhibited exploration of the law’s meaning ought not be chilled by fears of future critics—are not among them.