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There's Nothing to Fear in Those Papers

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In an astounding and unprecedented public letter, Chief Justice William H. Rehnquist has accused the Library of Congress of using "bad judgment" in allowing researchers to examine the Supreme Court files of the late Justice Thurgood Marshall. Speaking even more strongly, columnist Carl T. Rowan alleges that the library has "betrayed" Marshall's true wishes [op-ed, May 26], and Marshall family lawyer William T. Coleman Jr. has vituperatively denounced what he calls the library's "irresponsible" and "despicable" behavior.

Justice Marshall's court papers, covering the years 1967 through 1991, were opened to research this past January, after Marshall's death, without any public comment or controversy. I and other students of the court began making productive use of the Marshall files in early February, more than three months before The Washington Post highlighted their availability. What has angered the chief justice, Carl Rowan and William Coleman is not actual historical research in the Marshall papers, but newspapers' sudden, subsequent decisions to herald the papers' availability as front-page news.

Any careful and thoughtful review of the Library of Congress's conduct in handling the Marshall papers can come to no conclusion other than that the library has acted with consummate professionalism at each successive turn. The librarian of Congress, James H. Billington, and two of his professional staff members, David Wigdor and Debra Newman Ham, first met with Justice Marshall in October 1991 to discuss his already-expressed intent to donate his papers to the library. As all three of these historians clearly recall, and as Wigdor's contemporaneous, handwritten notes explicitly document, the outspoken justice expressly informed them that he had decided to give his papers to the library and that after his death they were to be available "without restrictions."

Three weeks later, when Billington forwarded to him a proposed "Instrument of Gift" indicating that after Marshall's death "the Collection shall be made available to the public," and soliciting "any revisions you wish to propose," Justice Marshall -- one of America's most experienced lawyers -- signed the deed of gift without delay and without amendment. Unless Rowan or Coleman is now seeking to imply that Justice Marshall was by October 1991 no longer fully able to correctly express his own wishes, and that hence they two years later are more dependable sources of the justice's wishes than he was himself, their claims deserve nothing more than polite dismissal.

In the months leading up to Justice Marshall's decision to give his papers to the Library of Congress and to open them upon his death, researchers' use of justices' papers had been a topic of considerable discussion among the justices. Both Justice Sandra Day O'Connor and Chief Justice Rehnquist had personally remonstrated with retired Justice William J. Brennan Jr. over his allowing researchers to examine some of his earlier case files at the Library of Congress, and on Dec. 19, 1990, Brennan circulated a memorandum defending his practices to all of the court's members. Brennan forthrightly explained that he had concluded many years earlier that such research "would serve the public interest" by fostering "responsible scholarship" that would "promote awareness and understanding of the Court."

Anyone who has done research in the Brennan or Marshall papers can readily attest that the court will suffer little if any embarrassment from journalists' and historians' access to even such recent court files. In case after case, and especially in such hard-fought areas as civil rights, abortion and the death penalty, most any researcher will come away deeply impressed by the intensity and care with which the justices -- and their clerks -- pursue the court's work. Neither Justice O'Connor nor the chief justice should fear researchers' use of Justice Marshall's files, for the thousands upon thousands of memos repeatedly show the court in a most serious and committed light.

Thurgood Marshall, unlike earlier justices such as Harold H. Burton and William O. Douglas, took relatively minimal notes during the justices' private weekly conferences. Thus in the long run his papers will be less valuable -- and less intrusive -- with regard to such innermost discussions than are those of other justices. But Marshall's files nonetheless oftentimes show how the justices are compelling human beings as well as impressive public servants.

In February 1990, a lighthearted Harry Blackmun informed his colleagues that with the four more senior members of the court out of town, he was "acting chief justice."

"It occurs to me that in this happy state of affairs things ought to be done, such as reassigning cases, striking some as too difficult to decide, setting July and August argument sessions, closing the building now for a week or two, scheduling square dancing in the Great Hall, and obtaining a Court cat to chase down the mice and 'Boris,' who, I am told, is the rat upstairs. I have discussed this with many who labor in the building and find unanimous consent for all these worthy projects." Later that same day, Justice O'Connor replied, "By all means, sign me up for the square dancing."

Chief Justice Rehnquist's public letter was untoward and unwise. His court has suffered no harm at the hands of either Thurgood Marshall or the Library of Congress. And if Thurgood Marshall could look down and see the posthumous public tizzy of these last few days, he no doubt would be laughing far too uproariously to join in Carl Rowan's and William Coleman's overheated diatribes.

The writer received a 1987 Pulitzer Prize for his book "Bearing the Cross."