COURTSIDE

BY TONY MAURO

Thankfully, Marshall's Stories Can Be Told

For many of Justice Thurgood Marshall's friends and admirers, a major concern of recent years was an ironic one—that Marshall, a man who lived by anecdote and storytelling, would die without his entire story being told.

More than once he told his law clerks that he would follow Justice Hugo Black's example and burn all his papers so that no one would learn his Supreme Court secrets. Those pronouncements encouraged his clerks to be brutally candid in their memos.

Repeated efforts to interest him in writing his own memoirs failed. Never a man who had much use for reporters, Marshall ignored or turned down virtually all requests for press interviews. Books about him by others have blossomed in recent weeks with uncanny timing and considerable detail. But several of their authors and other writers encountered nothing but resistance when they asked Marshall for inside details on the Court and his fellow justices. Columnist Carl Rowan, once hoping for an authorized biography, opened his book *Dream Makers, Dream Breakers* with the words, "This is not an authorized biography."

Even in retirement, it seemed, Thurgood Marshall would refuse to break his code of silence about his time at the Supreme Court.

Now, a week after his death, it appears those concerns may have been premature. It turns out that Marshall had something of a change of heart about posterity and began to cooperate with at least some official historical efforts. No hidden autobiography has surfaced, but possibly the next best thing remains.

'Tons' of Papers

The major lode will be Marshall's official papers, which instead of being burned were transferred last year to the Library of Congress, where the process of indexing is nearing completion.

"He did consider not leaving them," says David Wigdor, assistant chief of the Library of Congress' manuscript division. "But sometime soon after his retirement, he decided to have them preserved."

Many feared that the late Supreme Court Justice Thurgood Marshall would go to his grave without sharing his many stories for posterity.

Marshall's papers will be in good company at the library, joining those of Justices William Brennan Jr., William O. Douglas, and Robert Jackson, among many others. Some, in fact, speculate that Brennan's decision to leave his detailed papers to the library may have helped soften Marshall's curmudgeonly determination not to preserve his own.

Wigdor says that the Marshall papers are voluminous, going back to his days as a civil-rights lawyer. The early parts will supplement what Wigdor describes as "tons" of historical papers from the NAACP Legal Defense and Educational Fund, also on file with the library. Marshall served as director-counsel of the fund for 20 years.

Marshall's intention, according to Wigdor, was to make his papers available during his lifetime, once they were properly ordered and ready to review. Now that he is gone, the papers when ready will be available under "general restrictions," which means legitimate researchers, not casual browsers, will be able to view them.

Talking to the Generations

The other major concession to history that Marshall made in recent months was his participation in an oral history project funded by the Supreme Court Historical Society and conducted under the auspices of the Federal Judicial Center's history office.

The project's aim is to get all retired justices on tape recalling their lives and careers. Interviews with Brennan and Lewis Powell Jr. are under way—Warren Burger has so far not agreed to participate—but Marshall's were the furthest along, says the historical society's executive director, David Pride. The current interviews have been audiotaped only, but Pride is hoping that someday soon, interviews will be videotaped as well. "Imag-

SEE COURTSIDE, PAGE 10

COURTSIDE FROM PAGE 8

ine if we had John Marshall on videotape taking about *Marbury v. Madison,*" says Pride.

According to Dr. Cynthia Harrison, chief of the Federal Judicial Center's history office, Marshall sat for more than a dozen hours of interviews beginning in February 1992. The last interview took place on Nov. 19. All were conducted by Yale Law School Professor Stephen Carter, who had clerked for Marshall in the 1980-81 term.

"We would all, of course, have wished he were with us longer," says Harrison. "But we were delighted we started when we did and got as much accomplished as we did."

She credits Carter with producing a "rich series" of interviews, some of which she sat in on. They went in roughly chronological order, and by the last one "we completed a conversation about his whole career" on the Court. But, Harrison cautions, "we didn't get to ask every last question."

Marshall died before all parties had come to an agreement over release of the interviews. The plan now, say Pride and Harrison, is to hand over the transcripts to Marshall's family for the same kind of review that Marshall himself would have been entitled to do—revising and deleting as desired. The hope is that as much of the interviews as possible will be released publicly.

Answers and Revelations

Exactly what will emerge from Marshall's papers and interviews is unknowable as yet. Law clerks differ over how much attention Marshall paid to record-keeping. "He wasn't big on keeping stuff," says one former clerk, who recalls that early drafts of opinions were routinely tossed out during his year.

Marshall never shared Brennan's habit of keeping a near-diary of every case granted certiorari by the Court. Nor did he emerge from conferences with the nearly verbatim renditions that Harry Blackmun kept. Marshall's clerks often had to go to Blackmun, in fact, to find out who voted for what at conference.

But other Marshall clerks say that drafts of briefs, cert memos, and all other correspondence and notes were kept fairly rigorously. If so, they may shed light on the longstanding question about Marshall: Just how much did he alter the drafts of opinions that his clerks crafted?

Even if it is shown that Marshall's editing hand was light, clerks say that won't tell the whole story. Marshall called the shots with clear vision and knowledge of precedent, they say.

"His instructions were clear, he gave the marching orders, but he gave us leeway on how to get there," remembers one clerk. "It was a thrill to see something in *U.S. Reports* that was basically your work, or the work of three clerks. But he did the judging."

And it will be interesting to see if anywhere in the papers or the tapes we find evidence of Marshall's sometimes salty appraisals of his colleagues on the Court. Most of his friends doubt it.

Marshall had an old-fashioned loyalty to the Court and its privacy that overrode all his other impulses, his friends say. He held his tongue about his successor Clarence Thomas—with great difficulty, some note—and only one quote, apparently second- or third-hand, has seeped into print. "We've gone from chicken salad to chicken shit," Rowan quotes Marshall as saying after Thomas was confirmed.

Some of Marshall's best yarns about the Court, his best one-liners, may have accompanied him to the grave. But it is reassuring to know, as historians continue to take the measure of his greatness, that at least some of his written work and his firsthand observations will emerge. Exactly as he would have hoped, Thurgood Marshall gets the last word.

Tony Mauro covers the Supreme Court and legal issues for USA Today *and the Gannett News Service. His column on the Court appears every other week in* Legal Times.

Weather

Today: Mostly sunny, mild.
High 77. Low 57. Wind 8-16 mph.
Thursday: Sunny to partly cloudy.
High 81. Wind west 6-12 mph.
Yesterday: Temp. range: 67-83.
AQI: 70. Details on Page D2.

The Washington Post

116TH YEAR · No. 172 WEDNESDAY, MAY 26, 1993 R

Chief Justice Castigates Library

Rehnquist Calls Opening Marshall Files 'Bad Judgment'

By Joan Biskupic and Benjamin Weiser
Washington Post Staff Writers

Chief Justice William H. Rehnquist rebuked the Library of Congress yesterday for using "bad judgment" in making public the files of the late Justice Thurgood Marshall and warned that other Supreme Court justices might not give their papers to the library.

"Unless there is some presently unknown basis for the Library's action," Rehnquist wrote, "we think it is such that future donors of judicial papers will be inclined to look elsewhere for a repository."

Rehnquist said in his sharply worded letter to Librarian of Congress James H. Billington that he was speaking for a "majority of the active justices." On Monday, William T. Coleman Jr., a lawyer representing the Marshall family and the late justice's estate, asked the library to withdraw the files until he could meet with Billington to determine the justice's precise wishes.

A spokesman said yesterday the library, which has said it followed Marshall's wishes in opening the papers, had no comment on the chief justice's letter or Coleman's request. The

See COURT, A6, Col. 1

Chief Justice William H. Rehnquist said his letter reflects views of "majority of the active justices."

Rehnquist Rebukes Library of Congress Over Marshall Files

COURT, From A1

papers have remained open while the library reviews its records on Marshall's donation. Billington has been out of the country and returned to Washington yesterday.

The dispute over Marshall's papers, which provide a rare look into the workings of the contemporary court, erupted after The Washington Post began a series of articles Sunday based on the contents of the collection.

Coleman said he was certain that Marshall, who died Jan. 24, did not want his papers made public so soon after his death. He said Marshall had sought during his lifetime to preserve the court's confidentiality and would not have wanted his papers made available while justices with whom he served were still on the bench. Marshall donated the papers after his retirement in 1991.

Library officials have said they followed Marshall's wishes. A legal agreement that Marshall signed Oct. 24, 1991, says "the collection shall be available to the public at the discretion of the library" and that the papers "shall be limited to private study on the premises of the library by researchers or scholars engaged in serious research."

David Wigdor, assistant chief of the library's manuscript division, told The Post on Monday that Marshall met with library officials before signing the agreement. "Justice Marshall was very clear about what he wanted to do with his papers," Wigdor said. "He . . . wanted them to be available without restriction upon his death."

Since the publication of The Post's stories, scores of other reporters, lawyers and scholars have visited the library's manuscript division to examine the files on what traditionally is one of the most secretive institutions of government. Post reporters first looked at the Marshall files two weeks ago after learning of their availability while researching another story.

Rehnquist's letter is itself unusual. Supreme Court justices rarely become involved in the affairs of another government institution. "It's extraordinary," said the court's chief public information officer.

The chief justice wrote that a majority of justices were "surprised and disappointed" by the library's opening of the files.

"Given the Court's long tradition of confidentiality in its deliberations," Rehnquist continued, "we believe this failure to consult reflects bad judgment on the part of the library. Most members of the court recognize that after the passage of a certain amount of time, our papers should be available for historical research. But to release Justice Marshall's papers dealing with deliberations which occurred as recently as two terms ago is something quite different."

Columnist Carl T. Rowan, in an article today on The Post's op-ed page, said Marshall had told him that he was concerned about violating the court's confidentiality. Rowan said Marshall had backed out of an agreement to cooperate with Rowan on a book about Marshall's court years—forsaking a "guaranteed quarter-million dollars"—because of that concern. Rowan wrote the book without access to Marshall's private court files.

"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."

—Chief Justice William H. Rehnquist

Coleman, representing the Marshall family, complained that lawyers were using the files to determine new strategies for future cases.

"I will say that it is the worst thing I have seen happen in a long time around this town," said Coleman, transportation secretary in the Ford administration and a law clerk to Justice Felix Frankfurter in the 1948-49 Supreme Court term.

JUSTICE THURGOOD MARSHALL
. . . left access to library's discretion

Floyd Abrams, a New York lawyer who specializes in free speech cases, said, "My bottom line is that the court will survive this. . . . I am confident that the public will profit by being better educated about the actual functioning of one of our three branches of government."

Abrams, who has argued before the high court on several occasions, added: "It would be more than a little unusual for the library to now close papers that have already been open to the public. It will also be futile. Secrets cannot be rebottled."

At the library itself yesterday, a staff member said the crowd continued to grow. Other news organizations have begun reporting on particular cases and on the routine business of the institution.

The Associated Press reported that Marshall routinely turned down the many invitations that poured into his office, no matter what the occasion or host. Sometimes, he scrawled this simple message on the invitation: "No can do."

The files show that he denied requests to deliver the eulogy at the memorial service for Chief Justice Earl Warren, to shake hands with five visiting high school students and to attend a vice presidential lunch in honor of the shah of Iran.

Carl T. Rowan

The Library Betrayed Justice Marshall

The Library of Congress has betrayed the wishes of the late Justice Thurgood Marshall in an unconscionable way.

By releasing to the press more than 173,000 items of the late Supreme Court justice's papers, Librarian of Congress James H. Billington has done what Justice Marshall vowed he would never do: embarrass Marshall's Supreme Court colleagues by violating their trust.

I say this because I know that in 1988 Justice Marshall gave up a guaranteed quarter-million dollars, plus the likelihood of hundreds of thousands more, because he insisted upon honoring "the sanctity" of the Supreme Court conference room.

Justice Marshall and I had agreed that I would write his autobiography. In April 1988, after dozens of hours of very candid taped interviews, I said, "Thurgood, in an autobiography, readers will expect you to talk about your involvement in crucial decisions during your years on the court. They'll expect to read what you wrote and said in trying to influence other justices on such issues as school desegregation, affirmative action, abortion, pornography, capital punishment . . ."

"I will not talk about other members of the court," he snapped, irascibly, "and I will not discuss what goes on in the conference room. And I will not reveal any memos or documents relating to how the court reached certain decisions."

Days later, I wrote Justice Marshall saying that as a journalist I could not in good conscience write an "autobiography" that was bereft of materials on such issues. I said that he and I should return the publisher's money.

At stake was a lot of money for a man who had never had much. Justice Marshall faced the prospect of losing sudden wealth that he could bequeath to his children and grandchildren.

Justice Marshall was clearly angry over the thought of giving so much money back—as I saw in his letter to me of April 22, 1988, about his "refusing to violate the confidence of the Supreme Court's conference room." He said, "At no time did I ever promise to tell you or anyone else the discussions of papers used in our conferences. It just is not done."

So we, friends of four decades, gave the money back to the would-be publisher.

In 1991, I told Justice Marshall that his life story was too important to go untold, so I was writing an unauthorized biography called "Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall." "Go ahead," he said, "but I still ain't telling you what went on in the conference room. In fact, I've decided to burn my damn papers."

"Please don't do that," I said. "If we journalists and historians never get your papers documenting what you said and did, we'll have to rely on the papers of some other justices. Hell, you can't want that."

I was relieved when told that Billington and his aides had gone to Justice Marshall's chambers in 1991 and persuaded him to give his papers to the Library of Congress. But I was amazed to learn that in those negotiations the retired justice had not been represented by an attorney.

How, I wondered, could one of the great lawyers of this century turn over such vital and valuable documents without proper legal advice? I was told that Justice Marshall had said that "you wouldn't drag lawyers into a discussion with leaders of the prestigious Library of Congress. They would never do anything wrong."

Of course not!

The Library of Congress people are now claiming that Justice Marshall agreed to the unrestricted release of his papers after his death. I don't believe it. Why would Justice Marshall give up a veritable fortune in 1988 to protect "the confidence of the Supreme Court" and then three years later authorize Billington to violate that confidence in the most egregious way? No, don't suggest that senility put Justice Marshall into this mess!

There is another element of bitter irony here. Once Marshall's wife and associates warned him to bind down the Library in Congress in writing, he asked a lawyer friend to put a 10-year embargo on release of his papers. That lawyer apparently never followed through.

So now we have this feeding frenzy over the Marshall papers—and a lot of ill will in and outside the Supreme Court that will surely taint every future book and article about Thurgood Marshall's 24 years as the first African American on this nation's highest court.

THE WASHINGTON POST

David J. Garrow

There's Nothing to Fear in Those Papers

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.

BY GERALD MARTINEAU—THE WASHINGTON POST

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."

NGTON POST

LETTERS TO THE EDITOR

Library of Congress Honored Justice Marshall's Wish

McGeorge Bundy needlessly muddles his otherwise generally sensible discussion of the Thurgood Marshall papers by making two factually incorrect statements that are gratuitously unfair to the professional staff of the Library of Congress and implicitly demeaning to others ["The Marshall Papers: An Old Lesson," op-ed, May 30].

Mr. Bundy first suggests that we misled "a very old man" into thinking that the library would exercise some kind of continuing, restrictive discretion in determining who would get to see the papers and when after his death.

On the contrary, Justice Marshall clearly instructed me and two other staff curators at the library in a long meeting on Oct. 7, 1991, to make his papers available without restriction to the public when he died. He was in excellent intellectual form and in full control of the meeting. He had clearly reached his conclusion on a matter that justices of the court frequently discuss among themselves and have historically resolved in a wide variety of ways. We did not suggest this formulation to him; he specified it to us.

We then sent Justice Marshall a suggested legal instrument of gift on Oct. 21, 1991, offering to discuss any changes or modifications he might want. He returned the agreement signed and unchanged on Oct. 24. During his lifetime, neither he nor anyone on his behalf asked any questions or expressed any reservations to us about our agreement with him. (Nor did anyone ask questions or express reservations to us about this agreement when—as Justice Marshall had ordered—the papers were opened after his death last January. Such concerns were presented to us only after the recent newspaper articles on his collection.)

It seems implausible and even patronizing to imply that one of the most outstanding jurists of our time would not himself have specified restrictions if he had ever changed his mind. It seems equally unlikely that he would not have understood the modest and limited nature of the "discretion" that public repositories routinely seek and are granted in the legal documents of gift that are drawn up once a donor has clearly specified his intentions.

Mr. Bundy's second incorrect assertion is that the Library of Congress is specially vulnerable to outside pressures and thus might not be a dependable respository for future donors. Quite to the contrary, the Library of Congress has proved itself to be scrupulously faithful in honoring Thurgood Marshall's request—and in firmly resisting subsequent pressures even when they may be well-meaning and come from high judicial figures with concerns about Supreme Court procedures and from esteemed family and friends of the donor distressed about newspaper articles based on the donor's papers.

Mr. Bundy's idea of considering multiple repositories is of course eminently sensible in itself, but Mr. Bundy misleads potential future donors by suggesting that they should somehow be apprehensive about the Library of Congress because of his odd idea that "what the library fears today is the power of the press." What we and other libraries fear these days is that we may not get the funds necessary to sustain our mission.

Potential donors should feel reassured rather than apprehensive. Congress has an admirable record of sustaining the nation's library and has supported librarians of Congress for nearly two centuries despite pressure from many directions. Potential future donors can be confident that the Library of Congress will scrupulously adhere to whatever conditions they establish for the use of their papers—as we have done in the case of Justice Marshall and 12 other justices of the U.S. Supreme Court.

JAMES H. BILLINGTON
Washington

The writer is Librarian of Congress.

Marshall's Plan: Prod the Living

Why He Released His Papers

By Juan Williams

THURGOOD MARSHALL knew what he was doing when he gave the Library of Congress permission to open his papers after his death. Marshall was totally in charge of his wits when he signed documents setting conditions to govern the library's handling of his papers, and in fact he had a vision about their historical impact.

Marshall's widow, Cecilia, and his friend and lawyer, William T. Coleman, are right not to be happy with the front-page stories and frenzy surrounding the documents discovered by newspapers last week. Still, they're committed to ensuring that the library abides by the conditions Marshall set forth when he donated the papers—that the release be posthumous and the library use its discretion about whom to release the documents to, and for what. Their concerns stem from the fact that Marshall carefully guarded his privacy and that of the court—and indeed would have hated the furor his papers have created. Nonetheless, he ultimately decided that releasing his papers was a critical means to further his long-term goals.

First, Marshall knew how to say no. Any of his acquaintances will tell you that he frequently turned down requests for speeches, interviews and particularly for documents, and did so with relish. In extensive interviews with me in 1989-90, he repeated his pledge to "burn" his papers when he left office; even then, he would often offer such a statement with a mischievous grin—he was playing the role of a cantankerous judge.

But even the suggestion that he would destroy his papers caused concern. Pressure began to mount from his clerks, his friends and family, as well as from writers and librarians, all of whom insisted that the judge not play games with his legacy. Marshall was pressed to take steps to ensure that his story, an integral part of American history, be preserved for future generations.

Yet Marshall voluntarily relinquished a large sum of money to a book publisher in 1988 rather than risk involvement in a project that he feared would violate the court's confidentiality and sensationalize its deliberations. That experience led Marshall to conclude that he wanted no part of any book project. For instance, after I wrote a Washington Post Magazine profile of him in 1990, we discussed my helping him to write his autobiography. Yet he quickly shelved the idea. Besides his previous run-in with publishers, said Marshall, he didn't want to do the work necessary, as he was feeling his age. And he definitely did not want to have to respond to people upset with his view of history or current events.

However, pressure continued to build for Marshall to assist in the documentation of his contributions. Shortly before his death, he agreed to a videotaped interview about his legal work with a former clerk, Yale University law professor Stephen Carter. And he decided to give his papers to the Library of Congress on the condition that they not be opened for research until after his death. This was a major concession by Marshall, and one taken after much deliberation. He explained his change of mind to me by saying he felt that sending the papers to the Library of Congress would achieve two ends: The posthumous release of the documents would serve contemporary writers while freeing him from having to respond to critics.

Yet Marshall's maneuver also served a larger vision that he held near to his heart. By allowing his papers to be viewed immediately after his death, he was continuing his role as the Supreme Court justice who would not let his colleagues forget about the impact of discrimination and poverty as they deliberated on the laws of this land. The release of his papers is another reminder to the justices left behind that people are watching. Less advantaged Americans, once represented by Marshall at the justices' conference table, may now learn about some of the arguments and considerations that shape the court's rulings. A similar mindset allowed Marshall to be content with mostly writing dissents in the later years of his tenure on the court—dissents that were intended to lay a groundwork for changes in the court's rulings that might come long after his death.

Chief Justice Rehnquist's current fit of anger—he threatened to deny the Library of Congress future donations of papers and accused the institution of "bad judgment"—is a tactic of intimidation. After all, the work of the court is based on the sanctity of the written word, through precedents, arguments and rulings. Unable to dictate to Marshall how his papers should be handled, he now tries to dictate to the Library of Congress. Is Rehnquist aware that, as Librarian of Congress James H. Billington notes, several other past and current justices (including Brennan, Burton, Goldberg, Douglas and White) have asked that all or part of their papers be made available immediately after, and in some cases even before, their deaths?

Marshall knew there were no sensational items in his papers, nor evidence of corruption or incompetence in the court. He did not guess that controversial newspaper stories would emerge from his papers, and in fact none have. The only news in the documents' release is that they have been made available so quickly. Marshall certainly did not intend to serve lawyers who now wish to find out which justices sank their losing cases. Nor did he want to assist those seeking to undermine the court's authority or cause discomfort to his friends still sitting on the bench.

But Thurgood Marshall ultimately felt an obligation to history. It is to his lasting honor that he ruled in favor of the people's right to know.

Juan Williams is writing a book about Thurgood Marshall.

The Thurgood Marshall Collection:
Press Stories Stir Furor over LC's Opening of Papers

On May 23, *The Washington Post* published the first of three articles on Supreme Court Justice Thurgood Marshall's papers, which he gave to the Library of Congress in October 1991. The articles have fueled a Washngton debate over who should have access to the papers and whether the Library should have allowed any access at all.

The 173,700-item collection dates back to Marshall's early career when he served as a lawyer for the National Association of Colored People (NAACP) (1940–61), followed by his service as a federal appeals court judge (1961–65), U.S. solicitor general (1965–67) and Supreme Court justice (1967–91).

The *Post* articles, which contain descriptions of the Supreme Court's activities and procedures during Justice Marshall's tenure, have sparked interest among researchers who have flocked to the Library of Congress's Manuscript Division to examine the papers. The collection includes memos the justices sent to one another, draft opinions and decisions, vote tallies and other details about the court's day-to-day activities and procedures.

However, not everyone outside the Library agreed that open access to Justice Marshall's papers shortly after his death on Jan. 24 is appropriate.

Justice Marshall, in an Oct. 7, 1991, meeting with LC officials and in his Instrument of Gift, signed Oct. 24, 1991, agreed that (1) during his lifetime, researchers could use his papers only with his written permission and (2) thereafter, the papers were to be open. The only "discretion" the Library routinely sought—and obtained—in the Instrument was the limited discretion to decide when the papers were properly cataloged and ready for use.

On Oct. 21, 1991, the Librarian wrote Justice Marshall, saying, "We will be happy to discuss any revisions you wish to propose" to the Instrument of Gift for Marshall's papers. The justice returned the Instrument unchanged and signed Oct. 24.

Nevertheless, several of Justice Marshall's family members, previous associates and colleagues on the high court were surprised and upset by the *Post* stories. They disputed the Library's statement that Justice Marshall wanted his papers made available to "serious" researchers and scholars upon his death.

William T. Coleman, the Marshall family's attorney, described the opening of the papers as "an act of destroying confidentiality." Former Chief Justice Warren E. Burger, who served on the high court with Marshall for 17 years, claimed that his colleague "was keenly aware that premature publication of internal exchanges would inhibit and perhaps seriously impair the court's work."

Chief Justice William H. Rehnquist, in a May 25 letter to Librarian of Congress James H. Billington, said the Library used "bad judgment" in its decision to grant such early access, adding that he spoke for "a majority of the active justices" in suggesting that some may choose to donate their papers elsewhere.

However, others, including librarians and legal scholars, have defended the Library's position. Juan Williams, a *Washington Post* reporter who interviewed Justice Marshall for an article in 1990, recalled that when he asked to review the justice's papers he was told, "They'll be available after I die."

On May 26, after a lengthy internal review, Dr. Billington met at length with William T. Coleman, the Marshall family's attorney; with Justice Marshall's widow, Cissy, and her son, Thurgood Marshall Jr.; and with Chief Justice Rehnquist to discuss the matter. He also issued a public statement to explain the Library's position. (The full text follows this article.)

The facts are clear. Dr. Billington; David Wigdor, assistant chief of the Library's Manuscript Division; and Debra Newman Ham, the division's specialist in Afro-American history, met with Justice Marshall in his chambers to discuss his donation on Oct. 7, 1991. Mr. Wigdor last week emphasized that Justice Marshall was very specific at the Oct. 7 meeting in stating his wish that his papers be made accessible after his death.

"Initially, he said that the collection should remain closed to all researchers during his lifetime," Mr. Wigdor recalled. "However, he also spoke favorably of two research projects about the Supreme Court that were currently under way. When I asked if he would consider making his papers available during

(Cont. on p. 252)

Marshall Papers *(Cont. from p. 231)*

his lifetime for specific projects, but only with his written permission, he agreed instantly. But that was the only restriction he placed on his donation.

"I've dealt with several Supreme Court justices in this and other matters," added Mr. Wigdor, who has been with the Library since 1975 and has served in his current position since 1985.

Marshall was not the first to order his papers opened upon his death. "Different justices have handled their papers in different ways," said Mr. Wigdor. "But all of them understand the significance of their papers and know what they want to do with them. In my experience with a variety of donors over the years, the justices are more familiar with and have a better understanding of these collections than do many other people in public life."

On Oct. 21, 1991, Dr. Billington sent the Instrument of Gift to Justice Marshall, with a cover letter saying, "We will be happy to discuss any revisions you wish to propose." Justice Marshall returned the Instrument unchanged and signed Oct. 24.

On June 30, 1992, the Library sent to Justice Marshall an essay describing his collection. On July 8 Justice Marshall "sent word that he was pleased with our description of the collection," Dr. Billington recently said. The essay, written by Debra Newman Ham, was destined for the Manuscript Division's widely circulated 1991 acquisition report and as such, Dr. Billington pointed out, was "in effect, an invitation to use the Marshall Collection."

The Library received Justice Marshall's papers in December 1991 and completed processing the collection in September 1992. When Justice Marshall died on Jan. 24, the papers were officially opened. The first research request was made and granted on Feb. 2, 1993. (The LC *Information Bulletin* described the col-

The Marshall Papers: A Chronology

☐ **Jan. 29, 1965:** First LC request for Thurgood Marshall's papers.

☐ **Feb. 8, 1965:** Marshall responds, "I have no personal papers. They all remained in the files of the NAACP and NAACP Legal Defense and Educational Fund Inc."

☐ **Oct. 4, 1977:** Another Library of Congress solicitation, from John Broderick, then chief of the Manuscript Division, writes: "Mutually acceptable restrictions may, of course, be placed upon the use of a collection."

☐ **July 2, 1991:** Librarian of Congress James H. Billington makes solicitation after Marshall first announces his retirement.

☐ **July 22, 1991:** Justice Marshall writes Dr. Billington: "I contemplate leaving my papers to the Library of Congress when I finally retire."

☐ **Sept. 4, 1991:** Dr. Billington writes Marshall thanking him for news of July 22 and invites him to lunch.

☐ **Oct. 7, 1991:** Dr. Billington; David Wigdor, assistant chief of the Manuscript Division; and Debra Newman Ham, Afro-American specialist in the division, are summoned to visit Marshall in his chambers. Marshall tells group that his papers will be available with permission during his lifetime and after his death without restrictions.

☐ **Oct. 21, 1991:** Dr. Billington sends letter to Marshall forwarding Instrument of Gift: "We will be happy to discuss any revisions you wish to propose. If it is satisfactory in its current form, simply sign and return. . . ."

☐ **Oct. 24, 1991:** Justice Marshall signs Instrument of Gift, without change, donating papers to the Library.

☐ **Dec. 1991–Jan. 1992:** Marshall's papers, initially 147,800 items (eventually 173,700), arrive at the Library.

☐ **Feb. 27, 1992:** Dr. Billington sends letter to Marshall, along with the completed Instrument of Gift, thanking him again and saying, "We are certain that researchers visiting the Library of Congress to use them through ensuing generations will agree that these papers embody the life and career of an American ceaselessly at work toward his ideal of a just society."

☐ **June 3, 1992:** Processing begins on Marshall's papers in the Manuscript Division.

☐ **June 30, 1992:** James Hutson, Manuscript Division chief, sends letters to Marshall and other justices asking them to review and approve staff essays describing their papers for publication in 1991 acquisitions report.

☐ **July 8, 1992:** Marshall's assistant, Janet McHale, calls Janice Ruth of the Manuscript Division about the essay to say Marshall "is pleased with it—no problem—no changes needed."

☐ **Sept. 30, 1992:** Processing completed; shortly thereafter, Ms. Newman Ham calls Ms. McHale to report that papers are ready for use.

☐ **Jan. 24, 1993:** Marshall's death; his papers become available to researchers.

☐ **Feb. 23, 1993:** Dr. Billington sends letter to Mrs. Marshall following his attendance at Marshall's funeral, expressing condolences, asking her to visit the Library to see how LC processed the collection and enclosing a copy of the Manuscript Division 1991 acquisitions report describing the Marshall holdings.

The Instrument of Gift

Following is the Instrument of Gift signed by Thurgood Marshall Oct. 24, 1991, donating his papers to the Library of Congress. It was sent to him Oct. 21, 1991, with a cover letter offering to discuss any changes he wished to propose. Justice Marshall returned it unaltered:

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

2. Use. 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.

3. Reproduction. Persons granted access to the Collection may obtain single-copy reproductions of the unpublished writings contained therein.

4. 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 the Library.

5. Disposal. It is agreed that should any part of the Collection hereinabove described be found to include material which the Library deems inappropriate for permanent retention with the Collection or for transfer to other collections in the Library, the Library may dispose of those materials in accordance with its procedures for the disposition of materials not needed for the Library's collections.

In witness whereof, I have hereunto set my hand and seal this 24th day of October 1991, in the city of Washington, D.C.

(signed) Thurgood Marshall

Accepted for the United States of America

(signed) James H. Billington
The Librarian of Congress
November 8, 1991

lection on Feb. 22, 1993.) *The Washington Post* first came to use the papers May 5.

In response to critics' charges that making the papers available to the press violates Marshall's stipulation in his Gift of Instrument that access be granted only to "researchers and scholars engaged in serious research," Dr. Billington last week noted that, as Justice Marshall was aware, the Library has a long-standing policy of granting access to a broad range of researchers, including authors, lawyers and journalists.

(Every patron who visits the Manuscript Division must be over college age, engaged in serious research that the manuscript collections can support and obtain a library user's card, which requires showing a photo ID and describing the general purpose of the work.)

Mr. Wigdor firmly denied charges by Crystal Nix and Sheryll D. Cashin, two of Justice Marshall's former law clerks, that the Library was violating its "previous practice of withholding recent documents" about recent court cases written by the justices.

"The Library has never established its own special restrictions on access to elements of a collection donated to the Library," he declared. "Only two sets of restrictions can be imposed: those set by the donor of the material and official restrictions and procedures that the information security statutes and regulations apply to security-classified materials."

Mr. Wigdor added that during the key Oct. 7, 1991, meeting, he and Justice Marshall discussed the fact that the latter's papers contained some classified items from his days as U.S. solicitor general. Mr. Wigdor discussed the measures the Library employs to protect such information, which is made available only to individuals with the proper clearance.

"We have conducted a thorough review of our internal documents and dealings with Justice Marshall," said Dr. Billington in his May 26 statement. "We remain confident that we are carrying out his exact intentions in opening access to his papers after his death on January 24. In so doing, we have followed traditional library practice of strict adherence to the donor's explicit instructions. This has been our practice with collections left to the Library by all donors, including 12 other recent justices of the Supreme Court. To do otherwise is a breach of contract and a violation of the trust placed in the Library by the donor." —*Barbara Bryant*

(Text of Dr. Billington's statement begins on next page)

Following is the complete statement of Librarian of Congress James H. Billington on the Library's handling of the papers of Justice Thurgood Marshall, issued May 26:

We were surprised and distressed by the concerns voiced by the Marshall family, Chief Justice Rehnquist, the Honorable William Coleman and others over the opening of the papers of the late Thurgood Marshall, Associate Justice of the Supreme Court and a giant figure in the history of the civil rights struggle.

I have met today with the Marshall family, the Chief Justice and Mr. Coleman to discuss their concerns, review the Library's discussion and correspondence with Justice Marshall and explain the Library's guiding philosophy on access to its collections.

We have conducted a thorough review of our internal documents and dealings with Justice Marshall. We remain confident that we are carrying out his exact intentions in opening access to his papers after his death on January 24.

In so doing, we have followed traditional library practice of strict adherence to the donor's explicit instructions. This has been our practice with collections left to the Library by all donors, including 12 other recent justices of the Supreme Court. To do otherwise is a breach of contract and a violation of the trust placed in the Library by the donor.

Requests in the wake of recent articles to impose additional restrictions on Justice Marshall's papers run counter both to this basic principle of custodianship and to Justice Marshall's expressed intentions to us. We have the greatest sympathy for Chief Justice Rehnquist, Justice Marshall's family and others who have voiced concern. But the Library must honor the expressed wishes of one of our great jurists. Open access to the papers, as called for in Justice Marshall's instrument of gift, must be maintained.

Crucial to a free and democratic society is open access to information, limited only by formal secrecy classification and by specific restrictions laid down by the donors of papers.

In the case of Justice Marshall, following his death, the use of the papers "is limited to private study on the premises of the Library by researchers or scholars engaged in serious research."

One of the concerns that has been raised is that journalists ought not to be considered researchers. The term "researchers," under Library policy, has always referred to adults working on specific research projects, be they authors, journalists or lawyers. Justice Marshall was aware that journalists used Library manuscript collections; indeed, during our meeting on his papers in October 1991, he mentioned with approval to me a particular book by a journalist on a fellow Supreme Court justice using his papers in the Library.

All who seek to use the Marshall papers—or any other open papers in the Library's manuscript collection—must register, present a photo I.D., state their names, addresses, institutional affiliations and their research projects. Casual tourists and high school students are turned away. Undergraduates are normally encouraged to go elsewhere, although any adult may use the Library's general collections.

There has been some confusion over the "discretion" allowed to the Library under the terms of Justice Marshall's Instrument of Gift, signed Oct. 24, 1991. As in the case of other collections, the "discretion" sought and obtained by the Library involved only the technical determination by our archival staff of when the papers were organized and ready for use. It is an abuse of such "discretion" to impose restrictions on access other than those proposed by the donor.

Under the Instrument, his papers were to be made available during his lifetime to researchers "only with my written permission." After his death, "the collection shall be made available to the public at the discretion of the Library."

Justice Marshall was quite clear in his meeting with me and other Library specialists earlier that month that he wanted his papers to be opened upon his death. He and we, of course, did not know when that would be.

Justice Marshall had ample opportunity to add restrictions if he so chose. In my letter of Oct. 21 forwarding the Instrument of Gift to Justice Marshall for his signature, I wrote: "We will be happy to discuss any revisions you wish to propose."

He proposed none. He signed the Instrument of Gift with no changes on Oct. 24.

The restrictions placed by Supreme Court justices on access to their papers have varied with the individual. Justice Marshall is not the first Justice to ask that his papers be opened immediately following his death. Associate Justice Burton gave unlimited access after his death. Associate Justice Douglas permitted major portions of his papers to be made available immediately on his death. Associate Justice Goldberg allowed his papers to be open during his lifetime (but after he left the Court). Justice White's Instrument of Gift allows access to individual researchers with his permission during his lifetime, then no access for 10 years. Chief Justice Warren allowed no access to his papers until 1985.

Some have argued that opening Justice Marshall's papers now threatens the privacy of Supreme Court deliberations. The Library does not hold itself above the law; it obeys federal document classification edicts and follows the restrictions imposed by donors of papers. We have nothing but respect for the Court and its members. But we cannot serve as the Court's watchdog.

In the recent past, as is well known, outside the Library of Congress, both journalists and scholars have gained access to Supreme Court documents and produced articles and books on its deliberations. We are surprised to have the Library of Congress called upon to enforce a tradition of confidentiality which the Court itself has yet clearly to establish.

In the case of Justice Marshall, the Library has sought his papers since 1965, even before he was appointed to the court. On July 2, 1991, after Justice Marshall announced his impending retirement, we again wrote him asking him to donate his papers to the Library of Congress.

In a letter on July 22, 1991, Justice Marshall said he was considering the Library's invitation.

On Oct. 7, 1991, David Wigdor, assistant chief of the Manuscript Division, Debra Newman Ham, the Manuscript Division's specialist in African-American history, and I met with Justice Marshall in his chambers. The Justice set the agenda. He was fully in charge and clearly told us to make his papers accessible after his death. There was no extended discussion of various options or restrictions, although we discussed how restricted access would be provided during his lifetime and how security classified materials from his service as Solicitor General would be protected. The Justice accepted a suggestion by David Wigdor that during Marshall's lifetime the papers would be available to researchers with his written permission—a common provision.

On Oct. 21, I sent Justice Marshall an Instrument of Gift, with a covering letter. In that letter I wrote that we would "be happy to discuss any revisions you wish to propose. If it is satisfactory in its current form, simply sign and return both copies to me."

Justice Marshall proposed no revisions. He signed the Instrument of Gift unchanged on Oct. 24 and sent it back to me.

In December 1991, we began moving Justice Marshall's papers—173,000 items in all—to the Library. Processing them began in June 1992 and was completed last September. On June 30, 1992, we sent a draft to Justice Marshall of an essay describing his papers—an essay destined for the Library's 1991 *Acquisitions Report*—asking for comments or corrections. On July 8, 1992, his assistant, Janet McHale, called the Library to say that Justice Marshall was pleased with the essay and welcomed its publication, which was in effect an invitation to use his papers.

The Library received no requests to use the Marshall papers during the Justice's lifetime. On January 24, 1993, Justice Marshall died, a towering figure mourned by the nation. Dr. Ham and I were among those who attended the memorial service in the National Cathedral. In accordance with his wishes, his papers were opened. (By May 5, when a *Washington Post* reporter arrived, six researchers had already used the collection.) On Feb. 23, 1993, I wrote to Mrs. Marshall, expressing my sympathy, asking her to visit the Library and the Marshall Collection.

Restricting or suspending access to the Marshall papers now would cast doubt on the Library's ability to carry out the instructions of a deceased donor. In the public interest, and in accordance with the expressed intent of one of our great jurists, we cannot in good faith suspend or otherwise restrict access to the Marshall papers, as some have requested.

We remain confident that we are complying with Justice Marshall's intentions regarding access to his papers. We are deeply concerned that the language of the Instrument of Gift may have been misunderstood by some. I have therefore directed Library staff to develop language for use in subsequent Instruments to reexamine access policies and ensure that future donors' intentions are not subject to any misinterpretation outside the Library.

We are genuinely sorry that we cannot accommodate the desire of many good people to restrict access to his collection. No desire to do so or countervailing view of Justice Marshall's intentions was communicated to the Library before the press articles. We particularly sympathize with the concerns that have since been expressed to me by the family and by many in the judiciary system about what has appeared in the press.

Six-Month Plan *(Cont. from p. 236)*
Resources as vital to the plan's success: Human Resources should have adequate staff with the expertise to do the complex job; the Library's personnel data bases, both those maintained at LC in the past and at the National Finance Center since July 1990, must be accurate and up to date.

Timeliness. The six-month plan puts special emphasis on ending undue delays in the personnel process: "It is essential that our competitive selection process not only be fair and equitable, but timely. As our personnel specialists learn the new system, we want the process to move along expeditiously."

Monitoring of Consultant Contracts/Performance Standards of Managers. Finally, the six-month plan looks toward better oversight and monitoring of the Library's personnel services and consultant contracts to ensure that contractors are recruited from diverse sources. It aims at revising existing criteria for measuring senior level performance in the areas of equal employment opportunity and affirmative action. It also looks toward implementing a performance plan for managers and supervisors at the GS–15 level and below.

—Helen Dalrymple