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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.