Thurgood Marshall: A Better Angel

Furrowing the brow of justice will be just one legacy

By Charlotte Snow

ABAJ/Ken Heinen

Just as Justice Thurgood Marshall has, in the words of fellow Justice and friend William J. Brennan Jr., "never stopped calling upon the 'better angels of our nature,' " he has never stopped calling upon the most passionate of his own.

"I enjoy the fight," Marshall told columnist Carl Rowan in a 1987 interview, the first he had granted in 20 years on the Court. "I agree with that old saying, that 'I love peace but I adore a riot.' You've got to be angry to write a dissent."

For almost six decades, Marshall has taken his anger to the courtrooms where he has clenched landmark decisions rather than fists. Since his college days, Marshall has been committed to bringing liberty and justice to all. Armed with the Constitution and a powerful message, Marshall has spent a lifetime fighting—and making a difference—for what he believes in.

His recent retirement, at the age of 82, has left a vacuum in the legal community and in the nation as a whole. For no other civil rights activist has furrowed the brow of justice as deeply as Marshall. "In this century, there's essentially no competitor because of the combination of his work as a lawyer and as a justice," said Mark Tushnet, a professor at the Georgetown University Law Center and author of *Thurgood Marshall, Civil Rights Lawyer*. "What I find most striking is his decision early in life to make a commitment to civil liberties and not waver from this commitment. There isn't anyone else who has done this."

Born in 1908, Marshall grew up in Baltimore, where his mother taught in segregated schools and his father was a Pullman car waiter and a steward at an all-white yacht club. During the late 1920s, Marshall left home and worked as a grocery clerk and as a dining-car waiter to put himself through Lincoln University in Oxford, Pennsylvania. His commitment to civil liberties, Marshall said in an interview in the June 1992 issue of the *ABA Journal*, began during these days at Lincoln.

"Lincoln was a school of all Negroes, with one or two exceptions, and an all-white faculty," he said. "We argued over general principles. And we were brainwashed. We discussed it (discrimination). What we discussed was, why did we have to take it? Why shouldn't we do something about it?

"The leader of that group at Lincoln was a guy named U.S. Tate. He was the leader who said we ought to do something about it. We desegregated the theater in the little town of Oxford. I guess that's what started the whole thing in my life."

After graduation from Lincoln in 1930, Marshall applied to the University of Maryland School of Law with the intention of following Tate's advice to stop talking and start doing. Already ablaze with ambition, Marshall's ire was heightened when Maryland rejected him on the basis of his race. He never forgot—and never let Maryland for-

get—this blatant act of discrimination. His inner fire flashed and didn't stop smoldering until 1935 when he won a lawsuit that forced the law school to admit a black student.

"Well, number one, they wouldn't let me go to the law school because I was a Negro, and all through law school I decided I'd make them pay for it," he told Rowan. "And so when I got out and passed the bar, I proceeded to make them pay for it. I enjoyed it no end."

Bringing about the legal demise of school desegregation wasn't just about Marshall settling a personal score. It was one spoke in a wheel of jurisprudence that revolved around the idea of law as a vehicle for social justice. Marshall embraced this philosophy while sitting in the classroom of Charles Hamilton Houston at Washington, D.C.'s all-black Howard University Law School, where Marshall had turned upon Maryland's rejection. Under Houston's guidance, Marshall's faith in the law as a means to right society's wrongs grew deeper.

"Houston stands head and shoulders above the others who influenced Marshall," Tushnet remarked.

For his vision and persistent efforts, Marshall has credited Houston with being the father of the modern civil rights movement. A summa cum laude graduate of Amherst College and the first black editor of the *Harvard Law Review*, Houston challenged Marshall and his other students to look to the law as the principal source of social change. When Marshall left Howard in 1933, Houston would ensure that he was more than a legal adviser. He would be a social engineer.

"Charles Hamilton Houston believed in the American Creed, and that Afro-Americans could achieve full equality through the existing judicial system," wrote Dr. Herbert Reid in the *Howard Law Journal*'s 1989 issue commemorating Houston. "Equally, he believed that if the American system would not include us in the American dream, we had to stop dreaming. . . . There was a restlessness in (him) which forbade him to compromise on the issues of Black advancement."

This restlessness infected Marshall. Just three years after graduating from Howard and setting up private practice in Baltimore, he headed to New York City where Houston had accepted the position of special counsel to the National Association for the Advancement of Colored People. Marshall, at Houston's calling, became the NAACP's new assistant counsel and together the two argued—and won—scores of civil rights cases. A few years later, a lack of funds forced Houston back into private practice and left Marshall ready to step the stones Houston and his entourage of young lawyers had laid in place. Those stones would lead Marshall, as chief legal director of the NAACP, to the dismantling of the "separate but equal" clause of *Plessy v. Ferguson*—the discriminatory bulwark placed in front of the schoolhouse door.

The early victories that marked Marshall's way included the 1944 *Smith v. Allwright* decision that gave blacks the right to vote in Democratic primary elections; the 1948 *Shelley v. Kraemer* decision that prohibited the use of race-restrictive housing covenants; and the 1950 decisions that opened university classrooms to black law, graduate, and nursing students.

In 1954, just four years after Houston's death, *Plessy* toppled at the feet of Marshall. Though some argued that the high costs of equalizing facilities would force schools to integrate, Marshall took a direct route to overturn the separate but equal doctrine. He maintained that because *Plessy* violated the 14th Amendment's right to equal protection under the law it should be wholly struck down. If it stood against the Constitution in the name of injustice, Marshall wanted the law changed, not accepted or worked within. Using reason and sound jurisprudence, Marshall eventually garnered the support of the other NAACP lawyers.

"He was a very good conciliator," Tushnet said. "He was able to persuade people to go along with what he wanted to do."

In going along with Marshall, Houston's social engineers erected a living monument to their mentor—the 1954 *Brown v. Board of Education* landmark decision. Out of the 29 cases that Marshall won in 32 appearances before the Supreme Court, the *Brown* ruling has had the most resonance. By setting legal precedent for the end of discrimination in education, Marshall bore out the legacy of Houston's message that

IR&R Award to Honor Thurgood Marshall

In honor of retired Supreme Court Justice Thurgood Marshall's efforts to secure civil liberties for all Americans, the Section of Individual Rights and Responsibilities has successfully urged the ABA Board of Governors to establish the Thurgood Marshall Award.

Created not only to recognize Marshall, the award is also designed to encourage the continued support of civil rights causes. By unanimous vote, the IR&R Council chose Marshall as the award's first recipient.

"In the judgment of the council, no one better epitomizes a lifetime of dedication to civil rights under the law than Thurgood Marshall," said Philip Lacovara, Section chair. "He overcame great barriers and became one of the leading lawyers of the era. His service as a Supreme Court Justice and as the first person of color on the Court added distinction to his career as a lawyer advancing the cause of the underrepresented."

Although the Section may consider nominees from outside the profession, future recipients primarily will be members of the bar who have made long-term contributions to the advancement of civil rights. As Lacovara noted, "In and of itself, his name will serve as a statement of the level of achievement of award recipients."

When asked how he felt about receiving the award, Marshall responded in his legendary penchant for frankness: "I'll talk about the award when I get it."

The Section will present the award at the Thurgood Marshall Award Dinner held during the ABA's annual meeting in San Francisco. The dinner will begin at 7:30 p.m. on Saturday, August 8, in Continental Parlor 4 on the Ballroom Level of the San Francisco Hilton.

"Naming the award after Thurgood Marshall is a fitting tribute to his legacy," said Stephen Carter, a Yale law professor who clerked for Marshall during the 1980-81 term. "He spent a career in defense of real, individual human beings in the courtroom, on the bench, and elsewhere."

—*Charlotte Snow*

doing something about social ills meant effecting change from within the existing system.

"He was, for us, the ultimate champion," Eleanor Holmes Norton, the District of Columbia's representative in Congress, told the *National Law Journal* at the time of his resignation. "It was largely his influence that made peaceful the route the equal rights struggle for blacks took. The *Brown* decision, not the Montgomery bus boycott, was the watershed moment for black Americans."

During Marshall's close to 25 years as NAACP counsel, his trust in the legal system had taken on other forms than winning watershed cases in the courts. In 1951, he investigated the court martial of black soldiers serving under Gen. Douglas MacArthur in Korea and Japan and secured the reduction or dismissal of their sentences. And in 1960, he helped draft Kenya's constitution, in which he wrote an entire section that stands as a pillar of protection against due process of law violations.

Marshall continued to litigate on behalf of the underdog until 1961 when President John F. Kennedy appointed him to the United States 2nd Circuit Court of Appeals. From the bench, Marshall penned 150 opinions—none of which has overturned. In 1965, President Lyndon Johnson recognized his character and achievement by naming Marshall the new solicitor general. After two years of serving this post with high standards of professionalism, Marshall went back to the bench. This time he would be the first African American to interpret the 178-year-old Constitution from a seat in the chambers of the United States Supreme Court.

In his 24 years as a Supreme Court Justice, Marshall saw the pendulum swing. When he joined the Warren Court in 1967, Marshall found a niche within the activist majority and upheld free speech and privacy rights in several key decisions. In 1968, he wrote the majority opinion in *Amalgamated Food Employees v. Logan Valley Plaza*, which gave unions the right to picket enterprises located on private property.

In 1969, the majority ruled in the *Stanley v. Georgia* decision that a man could have obscene materials in his home. "If the First Amendment means anything," Marshall wrote, "it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch."

As a member of the Burger Court in the early 1970s, Marshall slipped into the minority. And by 1989, the Rehnquist Court had left him with only one solid philosophical ally—William Brennan. For Marshall, the shifting of the Court from a liberal to a conservative bent meant the turning away from decades of hard-won civil rights gains.

"It is difficult to characterize last term's decisions as the product of anything other than a deliberate retrenching of the civil rights agenda," Marshall said in a 1989 speech at the annual meeting of the federal judges of the Second Circuit. "We have come full circle. We are back full circle."

Even when it seemed that the circle had closed, Marshall continued to urge change by way of the Constitution. Marshall considered the Constitution a living document that not only allowed change but required it. In 1988 on the eve of the bicentennial celebration, Marshall gave a speech in which he describes the U.S. Constitution as "kicking and screaming" at its birth.

"I do not believe that the Constitution was forever 'fixed' at the Philadelphia Convention," he said at the speech delivered in Hawaii. "Nor do I find the wisdom, foresight and sense of justice exhibited by the framers particularly profound.

"To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war and momentous social transformation to attend the system of constitutional government and its respect for the individual freedoms and human rights we hold as fundamental today."

Marshall spent his later years on the Court working through the power of dissent to rid the Constitution of its defects and to support criminal, privacy, and abortion rights. In 1980, Marshall wrote that the majority had "sanctioned *sub silentio* criminal prosecutions based on compelled self-incriminating statements" by failing to allow the defendant in *Rawlings v. Kentucky* to challenge the seizure of his items found in a friend's purse.

In a 1983 death penalty case, the Court held that the defendant's due process rights weren't violated merely because his counsel was "manifestly ineffective." In his dissent, Marshall, the only Justice who had ever defended a man accused of murder, wrote: "Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process."

Marshall let his opinion be known on meaningful access to abortion as well. In 1980, he dissented from the majority's opinion in *Harris v. McRae*. Marshall wrote, "The predictable result of the Hyde Amendment will be a significant increase in the number of poor women who will die or suffer significant health damage because of an inability to procure necessary medical services."

How to Serve the Poor Better

A symposium is being planned to bring together lawyers, managers and paralegals who work with the poor to discuss how to use technology to better serve those clients.

The National Clearinghouse for Legal Services will hold a "Uniting Advocacy Symposium" on September 25-26 at the University of Chicago Law School.

A dinner is also being planned to help celebrate the organization's 25th anniversary and to kick-off the symposium.

Judge Abner J. Mikva, Chief Judge for the U.S. Court of Appeals, D.C. Circuit (and a former chair of the IR&R Section), will deliver a keynote address.

Those interested should request a registration form from the National Clearinghouse for Legal Services, Attention: Pat Gordon, 407 S. Dearborn, Suite 400, Chicago, IL 60605 (Phone 312/939-3830).

The fee for the dinner and symposium is $75 if postmarked before August 25, and $95 after. Students may attend for $50, or $70 if postmarked after August 25.

In his last years on the Court, Marshall channeled the embers still burning from his days with Tate at Lincoln and his years at the side of Houston into dissents that spoke of his life's lessons. "What marked those dissents was a candor that cut through legal abstractions to the social reality and human suffering underneath," Kathleen Sullivan, a Harvard law professor, wrote in a tribute to Marshall. "With his departure goes part of the conscience of the Court—a reminder of the human consequences of legal decisions."

While clerking for Marshall during the 1980-81 term, Stephen Carter, a Yale law professor, found a "principled human being who believed deeply that people of good will can be persuaded by logical argument." Marshall, Carter said, "possesses a sharp legal mind and a rapier-like wit, and he's not reluctant to use either one or both in combination."

When he stepped down from the High Court in June of 1991, Marshall didn't take all of his passion, conscience, reason, and humor with him, for his mammoth body of legal work and his inspirational example that he leaves behind will continue to speak to the better angels of our nature through clarity of thought and purpose.

"Although his voice will be missed, as a great legal figure of the 20th century, he existed for a higher purpose than to cast one out of nine votes on the Supreme Court," Carter said. "His greatness doesn't reside in the eloquence of his dissents or opinions but in a lifetime spent in the service of justice with little hope for personal return and in a respect for the rule of law, which is what people across the political spectrum are lacking today."

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How to Stem the Erosion *(from page 15)*

counsel out of their fee award, the award was no longer a "reasonable" award as required by Section 706(k).

Section 113 of the Act authorizes the award of expert fees in cases under Section 1981, Section 1981A, and Title VII.

Awards of interest

Although prejudgment interest has become a standard remedy in Title VII cases, and although the remedy is essential in light of the usual long period before recovery, federal agency defendants have been exempt from paying interest because of the decision in *Library of Congress v. Shaw*, 478 U.S. 310 (1986).

Section 114 of the Act authorizes awards of the same interest to compensate for delay in payment as are available in cases against private parties.

Suit-filing expansion

Section 114 of the Act extends the suit-filing period in federal-sector cases until 90 days after receipt of the final agency decision or the decision of the EEOC on appeal from such a decision.

This will be to make it easier for plaintiffs to obtain counsel because of the longer period available for pre-suit investigation. This change should provide enough time to salvage the case if the plaintiff mistakenly names the agency as the defendant, instead of the head of the agency.

Section 115 extends the suit-filing period in age discrimination cases until 90 days after receipt of a Notice of Right to Sue from the EEOC.

Affirmative action

Section 116 provides that nothing in the amendments made by the Act shall be construed to affect lawful court-ordered remedies, affirmative action, or conciliation agreements.

Other provisions

Congress also enacted a Technical Assistance Training Institute (Section 110), an Education and Outreach program for groups (such as Hispanics) who have not been well served by the EEOC (Section 111), provisions dealing with the employment discrimination rights of employees of the House of Representatives (Section 117), encouraged the voluntary use of Alternative Dispute Resolution mechanisms (Section 118), created a Glass Ceiling Commission (Sections 201-210), created a compensatory-damages remedy, a means of enforcement, and limited judicial review, for Senate employees (Sections 301-319), extended Title VII to presidential appointees not requiring Senate confirmation, gave the EEOC jurisdiction over the charge (subject to the president's power to designate another body) and cease-and-desist authority (Section 320), extended Title VII to state employees, such as the personal staff of elected officials, who were previously not covered by the statute, and gave the EEOC jurisdiction over the charge and cease-and-desist authority (Section 321).

Having accomplished all this, Congress chose to speak on the question whether the Act applies to pre-Act claims which can still be challenged and to pending cases.

Epilogue

Although Congress has over the past decade overturned with greater and greater frequency Supreme Court decisions limiting the scope and effectiveness of the civil rights laws, the 1991 Act is a watershed. Never before had Congress dealt with such an intense series of assaults on the bedrock principles that there ought to be effective ways to challenge discrimination and effective remedies when one had done so.

The sheer eccentricity of the Court's reasoning in some of these decisions, and the lack of a sense in Congress that the Court recognized the over-arching importance of these principles went far to persuade Congress that strong action was essential.

Having crossed this large a watershed, and having overcome the shrill rhetoric of the administration, Congress is likelier to take corrective action in the future if there is another such erosion of civil rights protections.

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