THURGOOD MARSHALL: A TRIBUTE FROM A FORMER COLLEAGUE

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Implicit in the very concept of an organic, growing Constitution is the notion that the finest representatives of each successive generation will continue to breathe the vital spirit of the nation into it. Among my contemporaries Thurgood Marshall is the foremost example of this rare and yet indispensable type of man. He achieved national prominence as a staunch advocate of racial equality and social justice at a time when it was essential, but not fashionable, to be one. It is fitting that the leaders of the next generation of Black Americans should dedicate this publication to him. As a friend of both the Justice and his ideals, I am honored to add my voice to that of the many distinguished contributors who joined to praise his magnificient achievements.

From his youth in Maryland, Thurgood possessed proper dosages of both pugnacity and sagacity—the staple of which great advocates are made. He inherited both qualities. The Justice never tires of relating the tale of his grandfather, an incorrigible slave from "the toughest part of the Congo," who made his objections to servitude so widely known that his master finally said: "I brought you here, so I can't very well shoot you—as you deserve. On the other hand I can't, with a clear conscience, sell anyone as vicious as you South. So I'm going to set you free—on one condition. Get the hell out of the Eastern Shore and never come back." "And that," says Thurgood, "is the only time Massuh didn't get an argument from the old boy!"

Justice Marshall's father was a hard-working Pullman car waiter who demanded that his son strive for perfection. Thurgood tells the story of his coming home from school one day after hearing from all his friends, who had achieved fairly high grades on their examinations, that they had been rewarded by their parents for those marks. He said to his father, "You know, Pop, I got all those good marks and you haven't given me anything while all the other boys' fathers gave them presents." His father responded, "Give you presents for getting good marks? You ought to see the present I'd give you if you got bad marks!"

Thurgood's parents were militant believers in education and racial equality. His mother sold her engagement ring to send him to college. The Justice's father pressed him to explore and even surpass the bounds of his own intellect. He did this by teaching his son to argue, challenging his logic at every point, and forcing him to prove every assertion. "He never told me to become a lawyer," Thurgood has said, "but he turned me into one." The law was, indeed, the ideal profession for one who combined a passion for justice with a bard's genius. And the

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NAACP, born in an era of lynching and mob violence and dedicated to the use of the law both to right societal wrongs and educate the citizenry, was the perfect organization for Thurgood's talents.

Justice Marshall assumed the leadership of the NAACP Legal Defense and Educational Fund in 1940. The national perception of World War II as a struggle against racism gave added impetus to the Association's program of frontal assault on Jim Crow. The battle plan called for an initial strike at "racism's soft underbelly," inequality in graduate education. The maintenance of separate graduate schools, the Fund reasoned, was prohibitively expensive; and the outright denial of facilities to qualified black applicants was certainly unconstitutional. Marshall had emerged victorious from a preliminary skirmish in 1935 when he prevailed upon a state court to order the admission of blacks to the University of Maryland Law School, which five years earlier had refused him admission because of his race. Marshall's efforts bore fruit when the separate but equal rule as applied to higher education was abolished by the United States Supreme Court, which stressed the importance of both material and intangible factors in finding that the failure to admit blacks to the University of Texas Law School violated the Equal Protection Clause.[1]

Marshall and the NAACP finally toppled the invidious doctrine of *Plessy* v. *Ferguson* in *Brown* v. *Board of Education*.[2] Marshall's adversary in *Brown*, of course, was one of the greatest appellate lawyers who ever lived, John W. Davis. Davis approached the case, in which he served as counsel for the State of South Carolina, with an almost religious fervor. According to many of his colleagues, Davis' judgment was blinded by his zeal. The Supreme Court listened to the former Solicitor General's argument without interposing any significant queries, in awesome deference to his oratorical powers. The *Plessy* doctrine, Davis asserted, was graven in stone: "Somewhere, sometime, to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance." The aged barrister was so shattered by the Chief Justice's contrary opinion, one of his partners later said, that it killed him.

Justice Marshall, who had often absented himself from law classes to watch Davis perform, painstakingly prepared for the argument by addressing, in moot court form, grueling batteries of questions propounded by distinguished legal scholars. The NAACP's brief was a Brandeisian classic, detailing the psychological trauma of inferiority suffered by black school children. Marshall delivered an impassioned plea for equality to the Justices, who peppered him with penetrating questions. During reargument on the legislative history of the Fourteenth Amendment, the Court asked whether it had the power to outlaw segregation. Marshall's answer was a thundering "Yes." He ultimately prevailed and Chief Justice Warren's admonition that "separate educational facilities are inherently unequal" became the law of the land.

Thurgood's power as an advocate sprung from a deep sense of justice and the ability to infuse others with the righteousness of his beliefs. Senator Russel complained that Marshall exercised "an almost occult power" over the Justices of the Supreme Court. Indeed, he won 29 of the 32 cases he argued before that

1. Sweatt v. Painter, 339 U.S. 629 (1950).
2. 347 U.S. 483 (1954).

tribunal for the NAACP, involving the most important issues of the civil rights movement. And Marshall's record of success as Solicitor General was equally magnificent. As the Justice Department's third ranking judicial officer he defended the propriety of federal prosecution of the murderers of civil rights workers,[3] enforced the Voting Rights Act,[4] and assured the viability of fair housing legislation in California.[5]

Three-and-one-half years on the Second Circuit did nothing to tarnish Thurgood's impressive record of success with the Supreme Court. Not one of his 118 majority opinions was reversed. His opinion for this court in *U.S. ex rel. Hetenyi* v. *Wilkins*,[6] presaged the Supreme Court's decision in *Benton* v. *Maryland*,[7] extending the Fifth Amendment's protection against double jeopardy to state prosecutions. His dissenting opinions bore eloquent testimony to his concern for the dignity and inviolability of the individual. Indeed, in one of these, Thurgood's view that an accused had a right to counsel during a hospital bed identification was ultimately adopted by the Supreme Court after the Second Circuit, sitting *en banc*, had disagreed with then-Judge Marshall's stance.[8]

My most abiding memory of Thurgood on this court, however, was his ability to infuse his judicial product with the elements of the advocate's craft. As an attorney Thurgood stressed "the human side" of the case. As a judge he wrote for the people. (And would not we all be enriched if more judges exhibited this concern for the consumer?) He possessed an instinct for the critical fact, the gut issue, born of his exquisite sense of the practical. This gift was often cloaked in a witty aside: "There's a very practical way to find out whether a confession has been coerced: ask, how big was the cop?" But behind this jovial veneer is a precise and brilliant legal tactician who, to quote his 1966 Law Day speech in Miami, was able "to shake free of the 19th century moorings and view the law not as a set of abstract and socially unrelated commands of the sovereign, but as an effective instrument of social policy." Thurgood was able to sear the nation's conscience and move hearts formerly strangled by hoary intransigence. And, because of him, we are all more free.

The majesty of the Supreme Court has not muted his voice; it can be heard, always resonant and unhalting, urging the dignity of the individual and equality for the disadvantaged. He speaks these days most often in dissent, but assures us that he votes with the majority "every time they are right." Thurgood's cause is far from dead. The recent Presidential election with its massive turn-out of Southern blacks is an impressive testimonial to his work. And the battery of rights enjoyed by the accused presents still further evidence of his achievements. Thurgood raised his lonely voice twenty-five years before throngs marched at Selma—and the luster of his accomplishments will abide long after he retires from the Court. Future reformers will memorialize him as Learned Hand did Oliver Wendall Holmes: "To them he will indeed in his field be the premier knight of his time; his armor is the lightest, his sword the deftest, his attack the most impetuous and the most relentless."

I, most fortunately, can also treasure him as a friend.

3. United States v. Guest, 383 U.S. 745 (1966); United States v. Price, 383 U.S. 787 (1966).
4. Katzenbach v. Morgan, 384 U.S. 641 (1966).
5. Reitman v. Mulkey, 387 U.S. 369 (1967).
6. 348 F.2d 844 (2d Cir. 1965), *cert. denied*, 383 U.S. 913 (1966).
7. 395 U.S. 784 (1969) (per Marshall, J.).
8. Stovall v. Denno, 388 U.S. 243 (1967).