PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF JUSTICE MARSHALL*

MONDAY, NOVEMBER 15, 1993

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, and JUSTICE GINSBURG.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our former colleague and friend, the late Justice Thurgood Marshall.

The Court recognizes the Solicitor General.

Mr. Solicitor General Days addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting this afternoon, the members of the Bar of this Court unanimously adopted a Resolution memorializing our regard for the late Justice Thurgood Marshall and expressing our profound sorrow at his death. With the Court's leave, I am honored to present this resolution to the Court.

---

*Justice Marshall, who retired from the Court effective October 1, 1991 (502 U. S. VII), died in Bethesda, Maryland, on January 24, 1993 (506 U. S. VII).

RESOLUTION

The members of the Bar of the Supreme Court of the United States met today to record our respect, admiration, and great affection for Thurgood Marshall, who served this Court as Associate Justice from 1967 to the time of his retirement in 1991. A lawyer and jurist of worldwide renown, Justice Marshall's legal career of almost 60 years embodied an unyielding commitment to equal justice under law.

While many great figures participated in the American struggle for civil rights and civil liberties, none was more important than Thurgood Marshall. His dedication to the living Constitution and legal institutions of America kept him focused on the importance of individual rights and liberties, not only for African-Americans, but also for women, the poor, and other underrepresented people. During his lifetime Thurgood Marshall dominated the legal landscape, tenaciously pushing race relations along the path of equality in courtrooms, classrooms, and corporate boardrooms.

A chronicle of the extraordinary life and contributions of this legal legend reveals the many facets of his character. As civil rights advocate, as Associate Justice of this Court, as mentor, as leader, as ambassador of good will, and as friend, he was a man of incredible vision and unquestioned commitment. We owe an enormous debt of gratitude to his devoted wife Cissy and his wonderful sons, Goody and John for sharing him with us and with the Nation. His inherent sense of fairness and his faith in the basic decency of the American people, inspired his advocacy, his writing, and his courage to imagine a better world and to make the imagined world real.

Born on July 2, 1908, in Baltimore, Maryland, to William and Norma Williams Marshall, young Thurgood attended the local elementary and secondary schools for "colored" children. His childhood memories of this segregated city—the unfair treatment and discrimination he experienced first hand—etched indelible impressions in his mind. His father worked as a Pullman car waiter and later as head steward at the Gibson Country Club. His mother taught elementary

school and made great sacrifices to send young Thurgood to college at Lincoln University in Chester County, Pennsylvania. She pawned her wedding and engagement rings to help pay his college expenses. Marshall also worked at numerous summer jobs to defray his expenses. Accepted one summer for the position as a helper on the Pullman trains, he inquired about obtaining a larger pair of trousers for his uniform to accommodate his long legs. The white conductor glared at him saying, "Look boy, don't you know that it is easier for me to get a new Negro than a new pair of pants!"

Graduating with honors from Lincoln in 1929, Marshall knew that rejection by the all white University of Maryland Law School was certain. He then made the fortunate decision to enroll at the Howard University School of Law in the District of Columbia. There he began his apprenticeship and with Dean Charles Hamilton Houston, a great constitutional scholar and creative genius who helped to develop the civil rights strategies. Thurgood and his Howard colleagues refined, defined, and implemented these strategies in the classrooms and eventually in the courts, leading to great victories in the 40's, 50's, and the 60's.

Marshall graduated first in his class from Howard in 1933 and began private practice in Baltimore. But most of his time was spent in voluntary support of the local NAACP. One of his first cases was against the University of Maryland Law School to force it to admit black students. He succeeded and was responsible for the first black law student's enrollment in 1935.

In 1936 Houston called Marshall to join him at the New York headquarters of the NAACP national legal staff. He was appointed chief legal officer in 1938, following in the steps of Houston. In 1940, Marshall helped to establish "the NAACP Legal Defense and Educational Fund, Inc." (popularly called the Inc. Fund or LDF) as a litigation and public education entity separate from the NAACP. He served with great distinction as its Director/Counsel until his appointment to the Federal Bench.

As the principal architect and exponent of the Inc. Fund's civil rights strategy, Marshall traveled constantly. He spent long hours, even days devoted to the civil rights struggle analyzing and arguing landmark cases. Even as he prepared for the ultimate civil rights battle in the 1954 school cases, Buster, his first wife, was struggling with her own fight against cancer. She never revealed how sick she was until after the *Brown* decision. Her personal struggle inspired Marshall to continue his fight for equal justice.

Thurgood Marshall waged extraordinary legal battles. For more than 30 years he fought discrimination wherever it arose—in education, in employment, in voting rights, and in the criminal law. As the lead LDF trial attorney, he worked closely with Charles Houston, William Hastie, William Coleman, Jack Greenberg, Lou Pollak, and other brilliant African-American and white lawyers who joined the civil rights vanguard. Together this distinguished team labored to implement a bold master plan for civil rights and litigate the cases that established the legal foundation for *Brown* and its progeny. Of Marshall's thirty-two civil rights cases before the Supreme Court, he won twenty-nine—an extraordinary record.

Clearly, each victory broke new ground. However, none was more important in American jurisprudence and in the lives of millions of people than the watershed decisions in *Brown* v. *Board of Education in Topeka, Kansas*, 347 U. S. 483 (1954); 349 U. S. 294 (1955). In these unanimous decisions, the Supreme Court began the process of dismantling racial segregation in the Nation's public schools.

The Court ruled that all children had the right to attend schools that were not segregated by race. The decision struck down racial discrimination in education and abandoned forever the doctrine of "separate but equal." With the help of Dr. Kenneth Clark, a noted black psychologist, Marshall demonstrated the harm to children who were forced into all black classrooms. Marshall argued persuasively and passionately for an end to this intolerable practice

and to the insidious justification based on the inherent inferiority of the black man.

Brown stands for the proposition that law can change the world and that the Supreme Court, as the interpreter of the law, can play a forceful role in fulfilling the highest human values. The importance of the *Brown* decision cannot be overstated. It repudiated the previous justifications for legally sanctioned discrimination in the public classrooms of America. Although elimination and erosion of the vestiges of discrimination moved very slowly, Marshall never gave up hope. He never despaired. He never stopped fighting for the elimination of inequality and injustice wherever it appeared.

As important as *Brown* and its progeny were, they should not eclipse Marshall's accomplishment in fighting segregation at the ballot box. As Marshall himself said: "I don't know whether the voting case or the desegregation case was more important. Without the ballot, you have no citizenship, no status, no power in this country. But, without the chance to get an education, you have no capacity to use the ballot effectively."[1] In winning the "white only" primary litigation, *Smith* v. *Allwright*,[2] Marshall teamed with Bill Hastie, his friend and former Howard Professor, to win for African-Americans a more significant voice at the ballot box. While the impact of this decision was not the immediate enlargement of the voting power of blacks, "it lent legitimacy to the arguments of lawyers [such as Marshall] who continued to complain to the United States Attorney General about discriminatory voting barriers in the South."[3] Ultimately, Marshall's efforts and those of his cooperating attorneys would forever change the face of city halls, state legislatures, governors' mansions, political parties, and political nominating conventions. Eventually America came to accept black

---

[1] Carl T. Rowan, "Dreammakers and Dreambreakers: The World of Justice Thurgood Marshall," Little Brown & Company (1993), p. 129.

[2] 321 U. S. 649 (1944).

[3] J. Clay Smith, Jr., "Emancipation: The Making of the Black Lawyer, 1844–1944," University of Pennsylvania Press (1993), p. 18.

candidates for political office at the local, state and Federal levels.

Marshall's work outside of the United States reflected the breadth of his concern for equity and fairness for people of color throughout the world. During the fifties and sixties the emerging independent nations of Africa turned to American constitutional scholars for assistance in shaping the legal framework that would govern the new rights and responsibilities of their citizens.

In 1961 Jomo Kenyatta, the great leader of Kenya, asked Thurgood Marshall for help. Marshall traveled to London and Kenya, working tirelessly for weeks with the Constitutional Conference of Kenya. He relied on the model of fundamental rights in the American Declaration of Independence and the Constitution. Marshall put into words a world in which Kenyatta's dream of an independent nation with a black majority population under the rule of law became a reality. Mindful of the hardships and inequities of black Americans struggling to end segregation and to become full participants in the democratic process, Marshall focused on the integrity of the electoral process, the legislative forum, and the role of the courts in interpreting the basic tenets of the law and in protecting the rights of the minority—in the case of Kenya a white minority.

In 1951 Marshall traveled to Japan and Korea to investigate the disproportionately high incidence of courts martials and disciplinary actions against "colored" soldiers. He found blatant disparities in charges and punishment imposed on black soldiers when compared to white soldiers in similar circumstances, especially in the Army. He challenged the unfairness of treatment and the absence of any modicum of due process in the "frontier justice" of the military courts. With his customary candor and persuasive arguments, Marshall was able to document these practices, to bring this situation into public view, and to enlist congressional pressure to curtail these discriminatory practices against black soldiers.

In 1961 President John F. Kennedy nominated Thurgood Marshall for appointment to the United States Court of Appeals for the Second Circuit. He was given a recess appointment in October, 1961 and confirmed by the Senate in 1962. Unfortunately, his confirmation was stalled for a year by a group of segregationist Senators. Despite these tactics, Marshall served with distinction as an appellate jurist for several years. In 1965, President Lyndon Baines Johnson named him Solicitor General of the United States, the first African-American to hold that position. As the Nation's top appellate lawyer, Thurgood Marshall successfully defended before the Supreme Court the constitutionality of numerous statutes, including the 1965 Voting Rights Act which secured equal voting privileges for all Americans.

In 1967 President Johnson called Marshall to the White House and advised him of his intention to nominate Marshall to become an Associate Justice of the Supreme Court. As the first African-American in the history of the United States so honored, Marshall's becoming part of the Court showed how much he had changed the world. Typically, Marshall asked LBJ for a moment to share his news with his devoted wife Cissy before the press was advised. Characteristically, he also said to LBJ in a more serious tone, that he would "call them as he saw them." LBJ responded that he would expect nothing less. Although a bitter Senate confirmation fight erupted again, Marshall was confirmed and sworn in on August 20, 1967.

During his twenty-four year tenure on the Court, Justice Marshall served as the conscience of the Court. With firm and unwavering conviction, he aggressively challenged his colleagues and counsel on issues of racism, bigotry, sexism, sexual preference, and prejudice with his sharp mind, candid speech and powerful pen. His questions at oral argument would unerringly uncover the fundamental issues of fairness that lay at the core of the cases facing the Court. Often in concert with his great friend and ally, William Brennan, Marshall argued against artificial barriers to human dignity and individual rights. On many occasions Marshall dis-

sented vigorously from what he believed to be the Court's disregard for the rights of the elderly,[4] of women,[5] of unpopular political causes,[6] minors,[7] and native Americans.[8]

Justice Marshall's deep concern for protection of the Bill of Rights led him to denounce efforts to stifle free speech,[9] to defend his unwavering belief that the imposition of the death penalty was unconstitutional,[10] and to voice repeatedly his outrage about violations of the due process rights of criminal defendants.[11] In powerful words Justice Marshall's opinions expressed the agony and the pain suffered those facing charges. His concerns about their rights were particularly poignant because of his personal experiences as a young lawyer defending black citizens who had been unjustly accused and punished by the criminal justice system. Historians will certainly chronicle his impact on American jurisprudence.

Even with his extraordinary commitment of time and energy to the critical legal issues of the twentieth century, Thurgood Marshall still found time to enjoy great personal contentment with his beloved wife, Cissy. Cissy brought him love, compassion, and understanding. They enjoyed the proud moments of parenthood with their sons, Thurgood, Jr. ("Goody") and John. Justice Marshall took great pleasure in

---

[4] *Public Employees Retirement System* v. *Betts*, 492 U. S. 158, 182 (1989) (Marshall, J., Dissenting).

[5] *Personnel Adm'r* v. *Feeney*, 442 U. S. 256, 281 (1979) (Marshall, J., Dissenting).

[6] See *Munro* v. *Socialist Workers Party*, 479 U. S. 189, 200 (1986) (Marshall, J., Dissenting).

[7] See *Schall* v. *Martin*, 467 U. S. 253, 281 (1984) (Marshall, J., Dissenting).

[8] *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 615 (1977) (Marshall, J., Dissenting).

[9] See *Police Department* v. *Mosley*, 408 U. S. 92 (1972); *Amalgamated Food Employees Union Local 590* v. *Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968).

[10] See *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (Marshall, J., Concurring).

[11] See *U. S.* v. *Salerno*, 481 U. S. 739 (1987).

the fact that both his sons chose careers in the law—Goody as an attorney and counselor to Senator and now Vice President of the United States, Albert Gore, Jr., and John as a Virginia State Trooper and instructor for a statewide special services division. Marshall's grandchildren brought him great joy in his later years. He often regaled clerks with the latest stories of young Will and the determination of little Cissy!

Justice Marshall served as a beacon of hope for generations of men and women, young and old, African-American, Asian, Hispanic and white who simply sought equal opportunities to live, to learn, to work, and to share in the rights and liberties enjoyed by the majority of our great Nation. As we pay tribute to this extraordinary man of the law today, we must never forget his extensive contribution to American society. Thurgood Marshall made our country a better place for all citizens—as leader, fighter, and defender of the underrepresented.

A brilliant lawyer, constitutional scholar and jurist, Thurgood Marshall unselfishly dedicated himself to work for the NAACP Legal Defense Fund and for equal justice at the bar of this Court, altering not only the course of race relations in America, but also the broader legal landscape for future generations. His advocacy and his leadership advanced social and political understanding among all Americans. He virtually created the "public interest lawyer"—who fought for individuals and for a cause. Even as Thurgood Marshall and his loyal band of cooperating attorneys chipped away at the theory of "separate but equal," they painstakingly prepared the way for integration, weaving together the fabric of a just society born out of a dynamic melange of people from different ethnic, cultural, and racial backgrounds.

Throughout the early years, Thurgood Marshall showed extraordinary inner strength and character that were the hallmarks of his life's work. Marshall willingly confronted both great physical risks and enormous personal sacrifices. His life was often in danger; death threats were common. In making trips to southern courthouses, there were many

close calls. Threats of lynching, assault, and murder were routine.

Marshall's life and achievements continue to inspire young people to follow his example, to sustain the legacy of the civil rights movement, and to become advocates for equal rights under law. We must not forget, however, the powerful commitment that kept Marshall on a steadfast path. With limited resources at the Fund, Thurgood Marshall had to piece his cases together, literally and figuratively. For example, at LDF he had one old typewriter and carbon paper that had been used and reused. His secretary, legal assistants, and even Marshall himself sometimes went without pay for weeks when money was needed for filing papers or paying train fare for an LDF lawyer to appear at a trial. Even under these adverse conditions, Marshall never wavered. His drive and commitment led him to do whatever was necessary to get a case heard, to win the argument. Funds to support his litigation effort were collected in churches, at rallies sponsored by the NAACP, and from several financial angels who believed in the man and his mission. Pennies, nickels and dimes—the collection was always small but large enough to keep him going.

Contrast the Marshall experience with those of the thousands of black elected officials at the local, state and Federal levels today with multi-million dollar budgets, staffs, and support for the multifaceted work that they perform. Thurgood Marshall had no such resources. Today's governmental leaders function in a very different world. But, it is a world that could not exist without the pivotal foundation created by Thurgood Marshall in the voting rights challenges, starting with *Smith* v. *Allwright*. Changes in the political process occurred in the United States not by magic, but by strategic planning, hard work, sacrifices, and risk-taking.

As Paul Gewirtz, a former Marshall clerk, has observed, President Johnson's historic announcement captured the essence of Marshall: "Thurgood Marshall symbolizes the best

about our American society, the belief that human rights must be satisfied through the orderly process of law."[12] Robert Carter, a former LDF lawyer and currently a federal judge, commented on his mentor's most enduring characteristic. He focused on

> "[Marshall's] vivid, almost religious faith in the efficacy of the National Constitution in protecting the individual against government discrimination and abuse. He believed that the 13th, 14th and 15th Amendments to the United States Constitution were an updated Magna Carta, insuring equal citizen rights for blacks and that his mission was to see this concept of the Constitution become a firm facet of constitutional jurisprudence. He never faltered in this belief."[13]

This fundamental belief in the Constitution was the standard which Marshall held high as a civil rights lawyer and as a Justice of the Supreme Court of the United States. Justice Marshall brought to the Court a unique understanding of real life. Having spent most of his adult life working and living among "poor colored folks" Marshall "knew what police stations were like, what indignities emanated from rural Southern life, what the streets of New York were like, what the corrupt trial courts were like, what death sentences were like, what being black in America was like and he knew what it felt like to be at risk as a human being."[14] From these experiences Marshall could explain in graphic human terms to his colleagues on the Court the difference the law could make.

In a recent tribute, his colleague, JUSTICE SANDRA DAY O'CONNOR, poignantly captured his unique quality to demonstrate the impact of legal rules on human lives:

---

[12] Paul Gewirtz, "Thurgood Marshall," 101 Yale L. J. 13, 14 (1991).

[13] Robert L. Carter, Judge, U. S. District Court for the Southern District of New York, Journal of Supreme Court History 1992, Yearbook of the Supreme Court Historical Society, pp. 16–17.

[14] *Id.*

> "His was the eye of a lawyer who had seen the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice."[15]

Whether in the majority or in dissent, Justice Marshall's faith in the Constitution encompassed more than the racial issues of his civil rights days. Indeed, he saw the protection provided by the Constitution as extending beyond color and racial constraints to preventing official governmental abuse of any disadvantaged person. For example, Marshall staunchly believed that equal protection meant equal—regardless of color. In *Peters* v. *Kiff*[16] Justice Marshall delivered the opinion of the Court upholding a white defendant's claim that the Constitution was violated by the exclusion of blacks from the petit and grand juries. "The existence of a constitutional violation does not depend on the circumstances of the person making the claim."[17]

Rejecting the argument of his dissenting brethren that the white defendant was not harmed by the exclusion of blacks on the jury, Marshall wrote convincingly that the exclusion of any large segment of the community from juries "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."[18]

Justice Marshall's belief that equal treatment transcended racial equity is evident in many of his opinions and dissents while a member of this Court. Even with the changing judicial philosophy that marked the majority opinions in his later years on the bench, he continued to write most often

---

[15] Sandra Day O'Connor, "A Tribute to Justice Thurgood Marshall: The Influence of a Raconteur," 44 Stan. L. Rev. 1217 (1992).

[16] 407 U. S. 493 (1972).

[17] 407 U. S. at 498.

[18] 407 U. S. at 503-504.

in dissent about the Court's neglect of the unfortunate in our society.

Some have characterized Justice Marshall as "a storyteller" or "a curmudgeon." Neither description is accurate nor appropriate to capture the essence of the man. Marshall was indeed a raconteur. But he used his personal experiences with the indignities of the legal system as a means to help his colleagues better understand why such behavior and abuse should not be tolerated. His sometimes gruff demeanor reflected his impatience with the slow pace of true integration in America.

Although he had confronted the depths of bigotry, hatred, and selfishness, he never turned bitter but always aimed at "doing the best you can do with what you've got." Justice Marshall held fast to his fundamental belief in equality under the law. His position was never sugar-coated nor served up as a softball. During the bicentennial celebration of the Constitution, Marshall shocked many when he refused to speak in platitudes about the document.

Instead, he reminded us that the Constitution did not condemn slavery; rather the Constitution was defective at the start. Marshall observed that:

> ". . . the credit belonged not to the framers who wrote the Constitution in 1787, but to those in the ensuing 200 years who refused to acquiesce in outdated notions of liberty, justice and equality, and who strived to better them. The true miracle was not the birth of the Constitution, but its life.
>
> "I plan to celebrate the Bicentennial of the Constitution as a living document. . . including the Bill of Rights and the other amendments protecting individual freedoms and human rights."[19]

In August 1992, for example, Marshall could not resist reminding the leadership of the American Bar Association of

---

[19] Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," 101 Harv. L. Rev. 1, 2, 5 (1987).

the historical exclusion of black lawyers from the organization, even as it bestowed upon him its highest honors. His comments on that occasion were quintessential Marshall. "We've come a long way (pause), but we certainly know how far we have to go. I hope you will stick with me in fighting the fight for full civil rights and full civil liberties."[20]

The legacy of Justice Marshall will live on in the men, women, and children whose lives and souls he touched and all of those who benefited from his legal triumphs. He dared to use the law as an instrument of social change, and history will record that he succeeded. He humanized legal theories and dared to challenge the morality of law that crushed the human spirit and denied black citizens the opportunity for a decent life. The Bar of the Supreme Court speaks for all the lawyers, judges, and citizens of this country when we say: Thank you, Mr. Justice Marshall, for opening our hearts and never letting us forget that our society can only succeed when the least among us have the same opportunity as the most privileged.

Wherefore, it is accordingly

RESOLVED, that we, the Bar of the Supreme Court of the United States, express our profound sorrow that Associate Justice Thurgood Marshall is no longer with us; we express our admiration for his deep understanding and commitment to equal justice under law, and our respect for his dedication to the rule of law in a just society; we repeat our sincere appreciation for his use of the law as an instrument of social change in the quest to eliminate the stigmatic injury of racial discrimination; and it is further

RESOLVED, that the Solicitor General be asked to present these Resolutions to the Court and that the Attorney

[20] Appleson, "ABA Supports the Right to Abortion," Reuters, Ltd., August 11, 1992.

General be asked to move that they be inscribed upon the Court's permanent records.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. I recognize the Attorney General of the United States.

Attorney General Reno addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The Bar of this Court met today to honor the memory of Thurgood Marshall, Associate Justice of the Supreme Court from 1967 to 1991.

From his birth in Baltimore, Thurgood Marshall's life was one of public service. He was raised by loving parents who instilled in him confidence in himself and pride in his heritage, and the habits of mind, force of will, determination of character, and skill in advocacy that would serve him and his country so well in later years.

Justice Marshall received his early education in the segregated public schools of Baltimore, beginning in the elementary school where his mother taught. He went on to attend Lincoln University, and between his sophomore and junior years married his first wife, Vivien, who lent her patience and support to his struggles, defeats and triumphs for 25 years, until her untimely death in 1955. After college he was denied admission to study law at the University of Maryland because of his race—an injustice he would rectify five years later when, only two years out of law school himself, he obtained an order from the Maryland Court of Appeals directing the University to enroll his client as its first black law student.

That victory was made possible by the legal education Marshall received at Howard University, where he prospered under the tutelage of Charles Houston, William Hastie, and

other members of the faculty, and graduated as valedictorian in 1933. It also marked the beginning of his association with the NAACP, which Marshall joined as a full-time staff lawyer in 1936. There, his law school mentors became colleagues in the fight for equal rights for all Americans under the law.

Justice Marshall's name first appeared on a brief in this Court in 1940, in the case of *Chambers* v. *Florida*. He presented his first oral argument in this Court three years later in *Adams* v. *United States*, besting the United States on a technical point of federal jurisdiction over criminal conduct. From that year through his departure from the NAACP Legal Defense Fund in 1961, Marshall argued sixteen times before this Court, in cases whose names read today like a map of crossroads on the journey to equality: *Smith* v. *Allwright*, striking down "white primaries" that kept black Americans disenfranchised; *Morgan* v. *Virginia*, forbidding enforcement of state segregation laws on buses and trains travelling in interstate commerce; *Patton* v. *Mississippi*, invalidating convictions returned by juries from which African-Americans had been systematically excluded; *Sipuel* v. *Board of Regents* and *Sweatt* v. *Painter*, requiring the admission of qualified black students to previously all-white state law schools; *McGhee* v. *Sipes*, reported as *Shelley* v. *Kraemer*, forbidding state enforcement of restrictive racial covenants in land deeds; *Boynton* v. *Virginia*, holding that refusing service to a black man at a public restaurant in a bus terminal violated the Interstate Commerce Act; and, of course, *Brown* v. *Board of Education* and *Cooper* v. *Aaron*, in which this Court finally acknowledged that "separate" could not be "equal," and rejected the constitutional doctrine that had justified *de jure* segregation.

After the triumph of the *Brown* victory, Marshall was forced to endure the heavy blow of the death from cancer of his first wife, known affectionately as "Buster." During the period of continued frenetic activity that followed, however, it was his good fortune to meet and marry Cecilia Suyat, his

partner and companion for the remainder of his life, and to have two fine sons, Thurgood Jr. and John William.

In 1961 President Kennedy nominated Marshall to a seat on the United States Court of Appeals for the Second Circuit—only the second African-American to be named to the federal appellate bench. The Senate approved the nomination almost a year later, after a bruising battle that reflected not upon the qualifications of the nominee, but rather upon the power and prejudices of his political opponents. In his relatively brief tenure on the Court of Appeals, Judge Marshall authored, by one count, 118 majority opinions—not one of which was reversed.

Judge Marshall left the Court of Appeals in 1964, when President Johnson called upon him to put his formidable powers of advocacy to use before this Court once again, this time as Solicitor General of the United States. In his three years in that office, Solicitor General Marshall argued nineteen additional cases before this Court. These cases reflected the full range of the government's business, from the assessment of estate taxes, to the interrelationship between judicial and administrative authority, to the complexities of securities and antitrust law. Several, however, reflected his continuing passion for the protection and advancement of civil rights.

In *Harper* v. *Virginia State Board of Elections*, for example, the United States as *amicus curiae* successfully urged the Court to invalidate poll taxes that burdened the right to vote. In *United States* v. *Guest* and *United States* v. *Price*, the government successfully urged reinstatement under the federal criminal civil rights statutes of indictments brought against state officers and private citizens who cooperated in the violation of other citizens' civil rights, including those accused of the abduction and murder of civil rights workers James Chaney, Michael Schwerner and Andrew Goodman. In *Katzenbach* v. *Morgan*, the Court upheld, at the Solicitor General's behest, the validity of the Voting Rights Act's prohibition on disenfranchisement, through an English literacy test, of voters educated in Puerto Rican schools; and in *Reit-*

man v. *Mulkey*, the Court ultimately accepted the position supported by the United States, as *amicus curiae*, that the voters of a State could not enshrine in their fundamental law a public endorsement of private discrimination. Finally, the Solicitor General argued the government's position in *Westover* v. *United States*, a companion case to *Miranda* v. *Arizona*—perhaps the only case of his career which the future Justice may not have been altogether sorry to see his client lose.

On June 13, 1967, President Johnson nominated Thurgood Marshall to fill the vacancy on this Court created by the retirement of Justice Tom Clark. The first African-American to join this Court, Justice Marshall took his seat on October 2, 1967. In his 24 terms on the Court, the Justice delivered a total of 769 opinions, including 322 majority or plurality opinions, 84 concurrences, and 363 dissents. In every case, he could be counted on to combine a deep respect for the law and for the institutional role of the Court, with an equally deep appreciation of how both the law and the Court's decisions actually affected real people in an uncloistered world.

Justice Marshall's first opinion for the Court reflected his abiding concern that criminal defendants be afforded the professional assistance and procedural protections that would assure that justice was being done in the courts. In *Mempa* v. *Rhay*, he spoke for a unanimous Court in holding that the Court's earlier decision in *Gideon* v. *Wainwright*, requiring appointment of counsel for indigent defendants in felony cases, applied at "every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," including a post-probation sentencing proceeding. Similarly, his opinion for the Court in *Bounds* v. *Smith* confirmed that prison authorities were required to make their prisoners' right of access to the courts meaningful—while reserving to those authorities appropriate discretion to determine whether they would do so by providing adequate law libraries, furnishing professional assistance, or through some other means.

Even when he found himself in disagreement with the Court's holdings in criminal matters, Justice Marshall could write eloquently to remind us all that as eternal vigilance is the price of liberty, so vigilant protection of the rights of others is the price that we must be prepared to pay to preserve the rights we take for granted for ourselves. In *United States* v. *Salerno,* for example, he dissented from the Court's holding that Congress and the courts could constitutionally provide for the pre-trial detention of certain defendants deemed to present a threat to the public safety. Whatever our views on that particular issue, we can all recognize the wisdom of Justice Marshall's warning that:

> "Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of . . . unchecked power. . . . But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves."

Although a believer in consensus, compromise, and precedent, Justice Marshall could be implacable when his conscience and his legal judgment led him to conclude that one of this Court's conclusions was in error. His long and scholarly concurring opinion in *Furman* v. *Georgia* set forth his carefully considered view that capital punishment was excessive, unnecessary, and morally unacceptable. Having reached that conclusion, he steadfastly refused to depart from it during the remainder of his tenure on the Court, consistently dissenting in cases where the Court upheld imposition of the death penalty, and from innumerable denials of certiorari in capital cases.

Justice Marshall retained, of course, advocate Marshall's pressing interest in issues of equal protection of the laws and the safeguarding of fundamental rights. In his second term on the Court the new Justice delivered the opinion in *Stanley* v. *Georgia*, holding that a person could not be prosecuted for mere possession of obscene material in his own home. Rejecting what he termed "the assertion that the State has the right to control the moral content of a person's thoughts," he made clear that

> "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

A few years later, Justice Marshall wrote for the Court in striking down more than minimal state residency requirements imposed on a citizen's right to vote. He supported the enforcement of a constitutional right of privacy, and argued in dissent for a fundamental right to childhood education, and for close constitutional scrutiny of legislative schemes that he believed denied some citizens equal treatment or opportunity solely on the basis of their wealth. In his early years on the Court he lent his powerful voice and personal experience to its consideration of cases involving the continuing struggle for desegregation; and when he believed that the Court had strayed from the correct path on those issues or in cases involving related questions of affirmative, race-conscious remedies for past discrimination, he did not hesitate to raise that voice in public dissent.

Justice Marshall's contributions to the work of the Court extended, of course, far beyond cases dealing with criminal prosecutions and civil rights. During his time on the Court, he authored important opinions in areas as diverse as securities law, federal environmental law, Indian law, and tax law. In all contexts, his fundamental concern for ensuring both fair procedures and substantial justice—and his sense of the law as functional and evolving, rather than static and formalistic—remained steadfast.

In *Shaffer* v. *Heitner*, for example, Justice Marshall led the Court in holding that defendants could not be held to answer to suit in Delaware merely because they owned stock and other intangible assets with a nominal legal situs in that State. His opinion carefully traced the historical development of limitations on state court jurisdiction, and concluded that the functional standard that had gradually evolved for purposes of *in personam* jurisdiction, focusing on "the rela-

tionship among the defendant, the forum, and the litigation," should be applied to *in rem* jurisdiction as well. In adopting that standard, he wrote for the Court that:

> "'[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage. . . . The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant."

That willingness to regard legal history and traditions with a respectful but sharp eye, and to modify or reject them forthrightly if they no longer served their purposes in the modern context, was characteristic of Justice Marshall's jurisprudence. He believed deeply in the law; but he saw the law not as an impersonal abstraction, but as a living instrument in the service of a living people. In reflecting on the bicentennial of the United States Constitution, Justice Marshall cautioned pointedly that:

> "We must be careful, when focusing on the events which took place in Philadelphia two centuries ago, that we not overlook the momentous events which followed, and thereby lose our proper sense of perspective. If we seek, instead, a sensitive understanding of the Constitution's inherent defects, and its promising evolution through 200 years of history, [w]e will see that the true miracle was not the birth of the Constitution, but its life."

Indeed, as the Justice again reminded us, while precarious and imperfect in its origins, "[o]ver 200 years [the Constitution] has slowly, *through our efforts,* grown more durable, more expansive, and more just."

Both at the Bar of this Court and on its bench, Thurgood Marshall played an uncommonly important and historic role in those efforts. Were he here now, he would, I think, admonish us to remember that the great work is not finished. His labors may be concluded, but he has left the living law, and the Constitution, in our care.

MR. CHIEF JUSTICE, on behalf of the lawyers of this Nation and, in particular, of the Bar of this Court, I respectfully request that the resolutions presented to you in honor and celebration of the memory of Justice Thurgood Marshall be accepted by the Court, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Ms. Reno and General Days, the Court thanks you on behalf of the Bar for your presentation today in memory of our late colleague and friend, Justice Marshall.

We ask that you convey to Chairman Louis H. Pollak and the members of the Committee on Resolutions our profound appreciation for these Resolutions. Your motion that they be made part of the permanent record of the Court is hereby granted.

Thurgood Marshall's service to the public spanned sixty years, twenty-four as an Associate Justice of the Supreme Court of the United States. For almost a quarter of a century he was an important voice in shaping the decisional law of the Supreme Court. His contributions to the Court, and especially to American Constitutional law, demonstrate his dedication, desire and insightful perspective on the key issues of our time. His legacy of decisions as a jurist speaks for itself.

In his twenty-four years on the Supreme Court bench, Justice Marshall wrote 322 full opinions for the Court, 84 concurrences and 363 dissents. Although chiefly known for decisions championing the rights of indigent litigants and

criminal defendants which both of you have adverted to in your presentations, his influence extended well beyond those issues. He authored, for example, in the opinion for the Court in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, and *FCC* v. *Florida Power Corp.*, watershed decisions interpreting the Constitution's prohibition against the governmental taking of private property without just compensation. These cases show how Justice Marshall contributed across a wide range of constitutional law.

The great majority of Supreme Court Justices are almost always remembered for their contributions to constitutional law as a member of this Court. Justice Marshall, however, is unique because of his contributions to constitutional law before becoming a member of the Court were so significant. Beginning with his solo practice in Baltimore in the early 1930s, and extending through his tenure as chief legal counsel for the NAACP Legal Defense and Education Fund, he became a champion of minorities, the poor, and individual rights. He fought many rounds in the battle against school segregation, a battle which culminated with his victory in the case of *Brown* v. *Board of Education.*

Justice Marshall argued 31 additional cases before this Court, thirteen as a private attorney and eighteen as Solicitor General of the United States. He won twenty-eight of those cases. Included in those cases are some that both of you mentioned, *Smith* v. *Allwright*, *Shelley* v. *Kraemer*, and *Sweatt* v. *Painter.* These efforts alone would entitle him to a prominent place in American history had he never entered upon judicial service.

We who sat with him during the time on the Court learned to value his wise counsel in Conference. We also looked forward to those occasions on which he would recount some of his experiences as a civil rights lawyer in often bitterly hostile towns and distinctly unfriendly courtrooms. He had the remarkable facility—not given to most storytellers—of not re-telling the same story to the same audience. Many of these stories had a humorous twist to them, but they also gave us a sense of what he had been up against in many of

his cases. His forays to represent his clients required not only diligence and legal skill, but physical courage of a high order.

As a result of his career as a lawyer and judge, Thurgood Marshall left an indelible mark not just upon the law but upon his country. Inscribed above the front entrance to this Court building are the words, "Equal Justice Under Law." Surely no individual did more to make these words a reality than Thurgood Marshall.