

Wit, Wisdom, and Compassion

By KEVIN T. BAINE

On January 27, 1993, the body of Thurgood Marshall lay in state in the Great Hall of the Supreme Court, resting in a flag-draped casket atop the bier that bore Abraham Lincoln's coffin a century ago. Only once before in the Nation's history had a Supreme Court Justice been so honored, but then never before had a man who sat on the Supreme Court so profoundly touched the lives of so many Americans.

Beginning in the early morning hours, those Americans came to pay tribute and say thanks to this giant of a man. Patiently, they waited in the winter cold. And then, silently, they filed under the pediment that bore the inscription "Equal Justice Under Law" and past the casket of the man who brought those words to life. All day long they came, and into the night, in a steady stream that reached 20,000 by the time the Supreme Court police began turning people away at 10:00 p.m.

Black and white, young and old, rich and poor, they came—their presence offering testimony to how this giant of a man had touched their lives. Elderly men and women, with tears of appreciation in their eyes, recalled the civil rights struggles that Marshall had fought for them. One placed a copy of the Supreme Court's decision in *Brown v. Board of Education* under Justice Marshall's portrait, with the words "We will always remember" written on the front. Others too young to remember stood in wonder, knowing that history had been written and their own freedom enlarged, by the man they came to honor. And still others, young schoolchildren without a sense yet of history, listened as their parents and teachers explained in hushed and reverential tones what this man had done for them. The children stood also as a reminder that it is the generations to come who will bear the full fruit of Thurgood Marshall's efforts.

Of all the tributes that have been extended to Thurgood Marshall, all richly deserved, none was more fitting, and none would have touched him more deeply, than the simple, silent tributes of the everyday people who came to the Supreme Court on that cold winter day. The Supreme

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Court had never before seen a day quite like it. But then again, the Supreme Court had never before seen a Justice quite like Thurgood Marshall. To be sure, there had been legendary figures who graced the Court in its first two centuries. And yes, their decisions had, since the earliest days of the Republic, shaped the course of American history. But never had a man who sat on the Supreme Court so commanded the love, and earned the heartfelt thanks, of so many Americans. Never before had there been a man whose life in the law so perfectly embodied the title "Justice."

It was, of course, Marshall's work before his appointment to the bench that earned him a special place in the hearts of Americans. There is no one in the long history of this country who used the law so successfully to effect social change. No one has come close, and in all likelihood no one ever will.

As Chief Counsel for the Legal Defense Fund of the NAACP, Marshall fought hard for the principle of racial equality, which he once defined, with simplicity and eloquence, as "getting the same thing, at the same time, and in the same place." He won landmark victories establishing equal rights in education, housing, voting rights, and public accommodations. The names of the cases he argued and won are familiar to all who have studied constitutional law — *Smith v. Allwright*,¹ holding that the exclusion of blacks from primary elections in Texas violated the Fifteenth Amendment; *Morgan v. Virginia*,² invoking the Commerce Clause to strike down a Virginia law requiring racial segregation of motor carrier passengers; *Boynton v. Virginia*,³ holding that segregation in bus terminal restaurants violates the Interstate Commerce Act; *Shelley v. Kraemer*,⁴ holding that the Fourteenth Amendment bars enforcement of racially restrictive covenants; *Sweatt v. Painter*,⁵ holding that the University of Texas's segregated law school violated the Fourteenth Amendment; and, of course, *Brown v. Board of Education*,⁶ holding that segregated public schools are inherently unequal and violative of the Fourteenth Amendment. The list goes on.

So firmly are those decisions imbedded in the legal landscape today that we can hardly imagine how they could have been decided any differently. But life was different when Thurgood Marshall began his legal crusade shortly after graduating from Howard Law School in 1933. It

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1. 321 U.S. 649 (1944).
 2. 328 U.S. 373 (1946).
 3. 364 U.S. 454 (1960).
 4. 334 U.S. 1 (1948).
 5. 339 U.S. 629 (1950).
 6. 347 U.S. 483 (1954).

required extraordinary vision, skill, and courage to develop and implement the strategy that produced the landmark decisions that we now take for granted.

One of the many joys of clerking for “TM,” as we affectionately called him, was to listen to the tales of his early civil rights struggles. There was not hatred or bitterness in his voice as he told of the threats to his physical safety and his narrow escapes from hostile mobs. For Marshall understood that the enemy was *hatred*, not the weak and misguided souls who fell victim to it. Nor was there in Marshall’s tales of triumph the slightest hint of boastfulness, for he was unchanged by the fame that he had achieved or the lofty positions to which he had ascended.

Thurgood Marshall was a gifted raconteur, and law clerks for all of the Justices learned early on that an important part of their year at the Court was to sit and listen to TM’s stories—stories of his father’s life as a Pullman car porter, his own childhood growing up in a city where he was forbidden to use the public restrooms, his work as a busboy at an exclusive all-white club, his travels throughout the South, his confrontations with General Douglas MacArthur during a 1951 trip to Korea to investigate discrimination in the military, his defense of black men charged with capital crimes before hostile white juries, his confirmation battles, his life on the Court, and his deep affection for President Lyndon Johnson and Chief Justice Earl Warren.

Through those stories, we got a glimpse of history and a glimpse as well of what made Thurgood Marshall such a great lawyer and judge. His stories overflowed with wit, wisdom, and compassion. He understood human nature and human suffering. And he could, through a simple story, evoke a laugh and simultaneously make a point that would never be forgotten. This was a special talent that contributed in no small measure to his success as an advocate and a judge. After his retirement from the Court, Justice Sandra Day O’Connor, who sat on the Court for ten of Justice Marshall’s twenty-four years, wrote of how she had been “personally affected by Justice Marshall as raconteur”:

It was rare during our conference deliberations that he would not share an anecdote, a joke or a story In my early months as the junior Justice, I looked forward to these tales as welcome diversions from the heavy, often troublesome, task of deciding the complex legal issues before us. . . . I realized that behind most of the anecdotes was a relevant legal point. . . .

Occasionally, at Conference meetings, I still catch myself looking expectantly for his raised brow and his twinkling eye, hoping to hear, just once more, another story that would, by and by,

perhaps change the way I see the world.⁷

As a Justice, Thurgood Marshall had an instinctive feel for the human impact of the Court's decisions. By the time a case reaches the Supreme Court, the real-life concerns of the litigants can sometimes get lost in the shuffle of legal arguments and precedents. Justice Marshall had a knack for bringing the arguments back to earth and reminding everyone of what was at stake for those who were affected by the Court's decisions.

In his later years at the Court, Marshall found himself on the losing end of more than his share of cases. He did not bear those losses lightly. The work of the Court was not to him a mere intellectual exercise, but the solemn task of doing justice. When the Court's sense of justice departed significantly from his own, the result could weigh heavily upon him. He was deeply distressed by what he saw as the Court's wavering in the area of school desegregation, and he could never understand the thinking that would condemn a fellow human being to his death, no matter how heinous his offense against humanity. In 1972, Justice Marshall joined with a majority of his colleagues in *Furman v. Georgia*⁸ to strike down the death penalty as it was then applied in the United States. In the last days of the 1975 Term, a different majority reinstated the death penalty in *Gregg v. Georgia*.⁹ Justice Marshall dissented and, uncustomarily, read his dissent from the bench. "To be sustained under the Eighth Amendment," Marshall said, a penalty must "'compor[t] with the basic concept of human dignity at the core of the Amendment,'" and the death penalty "ha[d] as its very basis the total denial of the wrongdoer's dignity and worth."¹⁰ Marshall read the words with a passion that matched the intensity of his feelings on the subject. When Court adjourned that day, he left the building with none of his usual banter and good cheer. The following day, he was hospitalized after suffering a heart attack.

It was widely assumed that Marshall left the Court a frustrated and angry man. But Marshall was a man at peace with himself, and at the televised press conference that he held upon his retirement in June 1991, he laid to rest any suggestions that he left the Court with rancor. Asked about a press report that stated he was "frustrated" and "angry," Marshall retorted with feigned annoyance: "That's a double-barreled lie."

7. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217-18, 1220 (1992).

8. 408 U.S. 238.

9. 428 U.S. 152 (1976).

10. *Id.* at 240.

Marshall's wit was on display for the Nation that day. As he walked into the conference room packed with reporters and cameras, someone shouted out, "How do you feel?" Without missing a beat, Marshall shouted back, "With my hands!" The roomful of reporters rocked with laughter. When everyone had settled down, a reporter noted that in his letter to the President, Marshall had cited his advancing age and medical condition as the reasons for his retirement. "What's wrong with you?" the reporter asked. Marshall's voice boomed back: "I'm gettin' old and fallin' apart!"

Marshall's modesty was also on display. Asked how he would like to be remembered, this man who had helped change the collective conscience of a nation said simply: "He did the best he could with what he had."

Thurgood Marshall had a clear and simple vision of what he sought to achieve. "Years ago," he would say, "a Pullman porter told me that he had been in every city in this country . . . and he never had to put his hand up in front of his face to be reminded he was a Negro." When that was no longer true, Marshall believed, there would be freedom at last. And when that day comes, as it surely will, it will be in no small part due to the heroic efforts of Thurgood Marshall.

