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Thurgood Marshall: Legal Strategist For The Civil Rights Movement

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African Americans and Civil Rights: A Reappraisal

Architects of the Civil Rights Movement

"Thurgood Marshall: Legal Strategist For The Civil Rights Movement"

by

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and

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THURGOOD MARSHALL:
LEGAL STRATEGIST FOR THE CIVIL RIGHTS MOVEMENT

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When considering the great lawyers in American history, the work of Daniel Webster, Clarence Darrow, and John W. Davis are often cited as examples of courtroom skill and eloquence. Yet among those who might be added to the list of the top legal advocates of all-time, no American lawyer would be more deserving or has had a greater impact on the quality of life in the United States than Thurgood Marshall. Born July 2, 1908 in Baltimore, Maryland, Marshall, will be remembered as the first African American to serve on the Supreme Court of the United States. He was appointed to that position by President Lyndon Johnson on August 20, 1967, after a period of service on the United States Court of Appeals for the Second Circuit and as Solicitor General of the United States, the federal government's highest ranking lawyer. Equally impressive, however, is his record as a catalyst for complex civil rights litigation. Marshall won 28 of 31 cases he argued in the nation's highest court[1] and was responsible for guiding many other cases in lower federal and state courts. Together these cases helped to bring down legal impediments and open up political, social, and economic opportunities for those who had previously been excluded solely because of their color.

Marshall has left his imprint on American jurisprudence

through his work of nearly three decades as the premier civil rights lawyer for the NAACP.[2] The litigation strategies that he formulated and implemented led to the dismantling of the shameful legacy of the "separate but equal" doctrine[3] and the crippling impact of jim crow[4] laws designed to keep African American people as second class citizens under the law.

What makes the work of Marshall more remarkable were the additional challenges he faced as one of only a few African American attorneys during the prime of his legal career.[5] For example, in his home state of Maryland there were only 32 African American lawyers in 1935, up from about 20 at the turn of the 20th century,[6] and there were less than 1500 in the entire country during the early 1950's.[7]

With so few lawyers it was difficult for Marshall to manage the complicated civil rights cases against better financed and larger opposing legal staffs. The small staff of the NAACP was comprised of six lawyers, seven secretaries, seven paralegals, and two bookkeepers. At one time the office would handle six Supreme Court appeals and Marshall personally would handle as many as 50 cases in lower courts during the same year. Marshall "logged an average of six thousand miles a year travelling from courthouse to courthouse across the country. The volume of his responsibility was three to four times that normally demanded of a lawyer."[8]

Funding for supplies and expenses was also meager. There were no computers and the NAACP offices had no modern equipment. Marshall worked from an old typewriter and carbon paper that had

been used over and over again. He and his staff often went for weeks without pay when money was needed for filing papers or paying train fare for attorneys handling cases in the field. One story related by a former NAACP lawyer who was working in Virginia during the early 1950's describes how he often had to request that Marshall bring money with him to pay for legal work that had been done months, even years earlier. The grave financial conditions were a result of the fact that the civil rights organization relied on donations and modest membership fees to finance its efforts.

Moreover, Marshall's courage was inspirational. The work was often dangerous and death threats were common. "In making trips to southern courthouses, there were many close calls. Threats of lynching, assault and murder were routine."[9] There were often rumors of contracts to take Marshall's life when he entered a hostile state to argue a case. Yet the mere whisper that Marshall was on his way would oftentimes breathe life into a cause without hope.

The work of Marshall came at enormous personal sacrifice to his family and his health. He was often away from home for months at a time working on cases throughout the United States. He was often very ill," simply ground into misery by dozens of trips from one corner of America to another to fight the myriad manifestations of racism."[10] Yet when tired or sick he seemed to gain strength from the famous words of his former law professor and mentor Charles Hamilton Houston, "I would rather die on my feet than live on my knees."

Through the adversity, there were many cases that were lost that should have been won. Because of hostile judges, fear by local African-Americans of becoming involved in civil rights battles, and threats against those people filing suits to enforce their rights, Marshall could never be sure whether a seemingly strong case would make it to court. It became necessary to learn how to manage risky litigation and reduce disappointments by cultivating a number of plaintiffs ready to file suit. It was expected that intimidation, harassment, and legal chicanery would follow causing many cases to be discontinued.

In one South Carolina case a very courageous local farmer named Levi Pearson filed suit against the Clarendon County Board of Education to obtain a single school bus so that African-American children would not have to walk several miles to the county's only school for non-whites. White students had several buses and several schools. While the suit was pending, the white owned bank and feed store refused Pearson credit to purchase seed and fertilizer for his farm and local merchants refused to buy his products.[11] When the case finally came to court it was dismissed because of a technicality regarding Pearson's farm and where he paid his property taxes.[12]

When Marshall entered the case, the skilled litigator recognized that such problems should be avoided in the future. In beginning the case a second time Marshall would seek a "firm, unified group of twenty plaintiffs..."[13] Since the legal resources were scarce and civil rights litigation difficult to win, Marshall

was prepared to make a difficult choice in the South Carolina case. He informed the African-Americans in Clarendon County who were interested in proceeding with a new case that, " if [they] could assemble twenty sturdy plaintiffs who would stay the course... the NAACP would bring a major test case there. If not, it would take the fight elsewhere." [14]

Marshall's quick decision making ability helped him focus needed attention to the cases that would have the greatest impact on the largest number of people. His careful planning was characteristic of the strategies and training given to him by Charles Hamilton Houston. Following the philosophy that good civil rights litigation was neither accident or luck, Houston attempted to implement the "Margold Strategy"[15] in the school desegregation cases. The essence of the strategy was to focus on the "equal" part of separate but equal. Since it was well known that far less money was spent on public schools and other facilities for non-whites than for whites, Houston believed in the "idea of making it too expensive for the South to maintain segregated schools."[16] Houston began his early cases with the Margold research as part of his approach. Houston shared the Margold strategy with Marshall as he carefully guided Marshall's early career.

In fact Houston helped Marshall achieve his first major civil rights victory during 1935 in the case which desegregated the University of Maryland's law school.[17] Marshall was particularly pleased with the victory against the University of Maryland since he could not attend his home state's law school in 1930 because of

its whites-only admissions policy. "Houston's close supervision of Marshall's work in Murray was Marshall's real introduction to the careful practice of law. Marshall quickly appreciated the importance of attention to detail..."[18] It was this attention to detail that helped him adjust to the shifting sands of desegregation litigation. It is important to remember that Marshall managed hundreds of cases in many states at the same time. Some of these cases involved the same legal issues, but each had important differences.

As with Houston before him, Marshall recognized the need to take charge of the increasing load of civil rights litigation. When he took charge of the NAACP's legal efforts, he treated the matter like the war it was. He recognized that an army requires a commanding General to lead it, a clear authoritarian chain of command, and loyal troops to carry out the mission. Someone had to take ultimate responsibility for all major decisions. Clearly, Marshall was the man who took charge. One litigation colleague described Marshall as a "you-do-it-your-way guy as long as your way was his way... making it clear that he was the architect, the coach and everything had to be built his away."[19]

Under Marshall's guidance victory after victory was achieved. Not only had Marshall been successful desegregating professional schools,[20] but also prohibiting discrimination in the sale of housing,[21] and desegregating the United States army during the Korean war.[22]

Of all the innovations Marshall brought to complex civil

rights cases, the use of social science research to support his legal claims proved to be the most controversial. That strategy, which is still considered controversial,[23] helped to shape the role of the courts as a protector of individual rights through the examination of the measurable consequences of certain types of government action. In the famous *Shelley v. Kraemer* case,[24] Marshall persuaded the Supreme Court to strike down agreements in real estate deeds which prohibited the private sale of property to African-Americans. Social science researchers had established the harmful economic effects of segregated housing. Although Marshall focused on the legal aspects of the case, he conducted a symphony of sociologists, economists and fifteen amicus curiae organizations designed to influence the court's decision. These efforts were "designed to impress the Supreme Court with the broad coalition that opposed racial covenants."[25]

In his most famous case, *Brown v. Board of Education*,[26] Marshall continued his use of social science research, combined with careful legal planning, to persuade the Supreme Court to rule unanimously that separate public schools are inherently unequal. The *Brown* litigation in the Supreme Court occurred over a four year period and resulted in three opinions. Marshall was known as an emotional, sometimes angry warrior while preparing his cases, however, in court he was a model of composure and control. In his memoirs, former Chief Justice Earl Warren praised Marshall's composure and skill. Warren recalled that "Marshall made no emotional appeal, and rationally argued the legal issues in a

manner as cold as steel."[27]

Marshall's reputation as a careful and persuasive writer was also well known. Former Supreme Court Justice Hugo Black also described Marshall the lawyer as a man of character and ability. During the early 1960's when Justice Black was asked by historian Irving Brant who should be the next man appointed to the Supreme Court, Black suggested it should be Marshall. Showing Brant one of Marshall's briefs Black said "any man who writes that brief deserves to be on this court."[28] Hugo Black administered the oath of office to Marshall when he joined the Supreme Court.[29]

Marshall's scholarly work as a jurist was also exceptional. As a member of the Federal Court of Appeals for the Second Circuit he authored 118 majority opinions, not one of which was overturned by the Supreme Court. After being elevated to the high court, he delivered 769 opinions in his 24 terms on the court.[30]

During his work on the court he never forgot the struggles suffered by the poor and disenfranchised that he had represented when working for the NAACP. He tempered his respect for the law with the need to be ever mindful that one of the primary roles for the Constitution was to protect the powerless. In his final opinion issued the day of his retirement, he cautioned that the court should not use its power to "squander" its "authority and legitimacy ... as protector of the powerless."[31]

Marshall always understood that it was only through lawyers and the courts that the rights of unpopular people and their unpopular causes could be protected. Often referred to by his

supporters as the "conscience of the court," those who may have disagreed with his views on particular cases recognized that he alone could bring decades of personal observation and litigation experience in the area of civil rights into the Supreme Court's decision making. As his colleague, Justice Sandra Day O'Connor observed: "[h]is was the eye of a lawyer who had seen the deepest wounds in the social fabric and used law to help heal them."[32]

Whether as a lawyer or jurist, Marshall maintained a principled view that civil rights were entitled to vigorous protection. His interest in enforcing the Constitution in general and its equal protection principals in particular were rooted in his personal experience with racial discrimination and his unwavering respect for constitutional government and the rule of law. Perhaps the values that Marshall held so dear are best captured in his own comments about the value of equal rights under the law. In a 1979 speech he said "the goal of a true democracy such as ours ... is that any baby born in the United States, even if born to the blackest, most illiterate, most underprivileged negro in Mississippi, is, merely by being born and drawing its first breath in this democracy, endowed with the exact same rights as a child born to a Rockefeller."[33] It was Marshall's lifelong struggle for true equality under the law for black and white, rich and poor, male and female, that sets him apart from all others that went before and all those who will come after. While many disagreed with his goal, none can dispute his record of accomplishment. His contributions shaped America and moved the

Nation closer to a society where all people may be judged by the content of their character rather than the color of their skin.

Suggested Student Learning Activities

1. Visit the Civil Rights Museum in Birmingham, Alabama.

2. Visit the United States Supreme Court in Washington, District of Columbia.

3. Read any of the cases mentioned in this essay and the accompanying briefs filed on behalf of the litigants.

4. Read any of the biographies of Thurgood Marshall mentioned in this essay.

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Endnotes

1. Drew S. Days, Resolution in Tribute of the Late Justice Thurgood Marshall, Vol. 114 S. Ct. CXIX, CXXXIV (November 15, 1993).

2. Marshall was appointed to the NAACP's top legal job in 1938 upon the recommendation of his former law professor and mentor, the Great Charles Hamilton Houston. Houston left the post to return to Howard University Law School as Dean. Marshall was paid an annual salary of $8,500. Carl T. Rowan, Dream Makers, Dream Breakers, (New York: Little, Brown and Company, 1993) 81-83.

3. The doctrine of separate but equal emerged from the Supreme Court's controversial decision in Plessy v. Ferguson, 163 U.S. 537 (1896). Plessy rejected the position that the Constitution prohibited state imposed racial segregation in public facilities. The decision resulted in the passage of laws requiring separation of the races in all aspects of public life from schools and neighborhoods to hotels and trains, especially in states located in the South.

4. The phrase "Jim Crow" which originated from a popular minstrel show act and song, became associated with the many laws throughout America designed to separate the races. The practical effect was to render African Americans second class citizens. See, C. Van Woodward, The Strange Career of Jim Crow (New York: Oxford Univ. Press 1977, 1982 3rd ed.) 7.

5. The first African-American lawyer admitted into practice in the United States was Macon Bolling Allen in 1844. He was a member of the Bar of the State of Maine. See, J. Clay Smith, Jr. Emancipation, The Making of the Black Lawyer 1844-1944 (Univ. of Penn. Press, Phila., 1993) p. 8-9.

6. Joseph C. Reid, The African American Lawyer: Historical Sketch, 28 Maryland Bar Journal 37, 39 (1995).

6. Joseph C. Reid, The African American Lawyer: Historical Sketch, 28 Maryland Bar Journal 37, 39 (1995).

7. Gilbert Ware, From the Black Bar, Voices for Equal Justice (G.P. Putnam's Sons, New York, 1967) xxix. Only about 232 of the Black lawyers admitted in the early 1950's were in the South where most of the early civil rights litigation took place.

8. Michael D. Davis & Hunter R. Clark, Thurgood Marshall, Warrior at the Bar Rebel on the Bench, (Birch Lane Press, New York, 1992) 21. In 1951, the NAACP Legal Defense Fund lawyers travelled 72,000 miles litigating civil rights cases. See, Jack Greenberg, Crusaders in the Courts (Basic Books, New York, 1994) 81.

9. Days, supra, at CXXV.

10. Carl T. Rowan, at 7.

11. Richard Kluger, Simple Justice (Knopf, New York, 1976) 3-17.

12. Ibid.

13. Ibid. at 18.

14. Ibid. at 18.

15. The "Margold Strategy," which was developed by Nathan Margold, a Rumanian born lawyer of Jewish heritage. He drafted a 218 page report outlining an attack on public school desegregation. His work was financed by an organization of lawyers and activists who comprised a group known as the "Garland Fund." The report focused on the lack of equal school funding throughout the South. Although much of what Marigold suggested was never used, many of his conclusions about unequal funding and the suggestion to use the courts to shape the law were the key to the early civil rights movement. See Kluger, Simple Justice at 134-139.

16. Mark V. Tushnet, Making Civil Rights Law - Thurgood Marshall and the Supreme Court, 1936-1961 (New York: Oxford 1994) 12-13.

17. Murray v. Maryland 182 A. 590, 169 Md. 478 (1936).

18. Tushnet, at 15.

19. Rowan, supra, at 6. Quoting former civil rights colleague and now federal Judge Spottswood Robinson III who Marshall had hired to file civil rights litigation in Virginia and who assisted in key litigation in South Carolina.

20. See Sweat v. Painter, 339 U.S. 629 (1950); McLauren v. Oklahoma State Regents, 399 U.S. 637 (1950). These Supreme Court cases ordered the desegregation of state graduate schools.

21. Shelley v. Kraemer, 334 U.S. 1 (1948).

22. Davis and Clark, supra at 120-133 (describing Marshall's efforts to desegregate the military using a combination of investigative, negotiation and litigation skills and strategies).

23. See Harold Cruse, Plural but Equal (New York: Morrow and Co., 1987) 68-69. Cruse questions the validity of using social sciences data to quantify racial harm.

24. Note 21, supra.

25. Peter Irons, The Courage of Their Convictions (Free Press, New York, 1988) 68-70 (describing the Shelley litigation planning process).

26. 347 U.S. 483 (1954).

27. Earl Warren, The Memoirs of Chief Justice Earl Warren (Doubleday, New York, 1977) 287.

28. Roger K. Newman, Hugo Black; A Biography, (Pantheon, New York 1994) 591.

29. Ibid.

30. Days, 114 S.Ct. at CXXX.

31. Payne v. Tennessee, 111 S.Ct. 2597, 2619 (Marshall, Dissenting) (1991).

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

33. 115 F.R.D. 349, 354 (1979); Transcript, WUSA-TV's Searching for Justice, Three American Stories," Sept. 13, 1987.