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JUSTICE THURGOOD MARSHALL: A REMINISCENCE

BY
KENNETH W. SIMONS*

When I received the news that Justice Thurgood Marshall had died, I felt both sadness and a kind of shock. I was saddened, that a man who had devoted his life to civil rights and social progress had died so soon after his retirement, without much opportunity to enjoy a calmer, less turbulent life. And it was startling to realize that he is no longer with us. It is difficult even to conceive of American law in the second half of the 20th century without the voice, and the presence, of Thurgood Marshall.

During the 1981-1982 Term, I clerked for Justice Marshall. Thurgood Marshall was not simply a fine Justice. He was not simply a superb lawyer. He was not simply a generous, decent human being. Thurgood Marshall was a man who changed the world we live in. He changed the way we think about civil rights. He changed the way we think about law.

In this brief space, I will offer some memories of my experience clerking for Justice Marshall, and I will try to provide some perspective on Justice Marshall's extraordinary accomplishments.

Clerking with Justice Marshall from 1981-1982 was remarkable in many ways. First, I recall our lively discussions of cases. For every case, just prior to argument, the four law clerks would sit down with the Justice and explain how we thought the case should come out, and what questions he might want to ask. We were often insistent; we would tell him how he "had" to vote. Whenever he heard that, he would pretend to be incensed, and he'd tell us, "There are only two things I *have* to do—stay black, and die."

Our discussions were freewheeling. We clerks would usually take the liberal view that we believed in or that we thought he would believe in. Justice Marshall would usually disagree with us strenuously, call us "knuckleheads," and ridicule our arguments. At first we were perplexed. Over time, we realized that he was provoking us to articulate the best arguments for our position. The strategy worked.

A second special aspect of working for Justice Marshall were his stories. As soon as we began clerking, in mid-summer, we began to hear them. Unlike his wealthier colleagues with summer homes, Justice Marshall came into the office almost every day. We therefore had the opportunity to hear a steady stream of tales, many about the Civil Rights Movement. Justice Marshall was never preachy. But he brought his points home. He gave us some sense of what it was like to be a civil rights lawyer back in the 30's, 40's, and 50's.

For example, Justice Marshall told of a fairly typical work method when he

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challenged desegregation in Southern towns. His colleague would drive, and he would sit in the back seat, typing the papers to be filed in court the next morning. Often he would stay at the homes of the black plaintiffs. (At that time, of course, motels and hotels were not open to blacks.) More than once, he was literally run out of town by whites who discovered what he was up to. Justice Marshall told these stories without conceit; they were just the facts of his life, of his education into American law.

Justice Marshall also told a story about being hospitalized for pneumonia when Richard Nixon was President. Nixon inquired to the medical staff about Justice Marshall's health. With the first couple of inquiries, Justice Marshall was appreciative. But as the inquiries continued, Justice Marshall started getting suspicious about Nixon's motivation. Why was Nixon so curious about the longevity of a liberal Supreme Court Justice? Finally, Justice Marshall asked the hospital staff to send a very brief note back to Nixon. The note consisted of two words: "Not yet."

I am often asked what it was like to work with a man of such stature and accomplishment. What was Justice Marshall really like? Justice Marshall could be gruff, intimidating, or aloof. When I clerked for him, he was certainly bitter about the conservative direction of the Court. But with time, his softer, generous side emerged. He invited the clerks to his house several times. For each of the clerks, he paid out of his own pocket for an engraved, bound volume of all opinions we had worked on during the term. He knew all the staff of the Court on a first-name basis—the custodians, the library staff, the guards, the parking attendants. And he was devoted to his family.

What was Thurgood Marshall's legacy as a lawyer? As a Supreme Court Justice? With respect to his legacy as a lawyer, I'll merely state the obvious—the nation owes *Brown v. Board of Education*¹ to Thurgood Marshall. He masterminded the legal strategy that persuaded the Supreme Court to dismantle the "separate but equal" doctrine. And one should not underestimate the difficulty of that task. The strategy required careful groundwork. Even after Marshall had devoted years to developing other precedents, precedents that one might think made the *Brown* ruling unavoidable, the Court was initially badly split in its deliberations over the *Brown* decision. If not for Marshall's earlier judicial victories and his arguments in *Brown*, I believe that the Supreme Court could not have rendered a unanimous decision in *Brown*, at least not in 1954.²

With respect to Marshall's legacy as a Supreme Court Justice, he was a powerful voice for civil rights, especially the rights of the dispossessed. His voice was consistent over the years, whatever the contemporary political climate. It was a voice of experience, of understanding. It was the voice of a lawyer who had been run out of town because of his skin color, a lawyer whose

¹ 347 U.S. 483 (1954).

² For general background, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF Brown v. Board of Education AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975).

clients the state had put to death. It was a human voice.

Many of Justice Marshall's most famous opinions are dissents. His dissent in *San Antonio Independent School District v. Rodriguez*³ is a wonderful example of his strengths as a Justice. In that case, the majority upheld a school finance scheme despite its significant impact on access of the poor to an equal education. In dissent, Justice Marshall made two important points. First, he convincingly demonstrated that the multi-tiered Equal Protection analysis that the Supreme Court had been employing was largely smoke and mirrors: the different levels of scrutiny obscured the fact that the Court usually balanced a host of factors in order to decide whether discrimination violates the Constitution. But second, and just as important, Justice Marshall asserted that a balancing test is better because it captures the real world and is not simply an abstraction. Such a test tries to measure the ways in which the financing scheme actually impedes poor people from obtaining a quality education.

Time and time again, Justice Marshall came back to this theme: law is state power imposed on real people. He was much less interested in doctrinal niceties than in whether the law made a tangible difference in people's lives. His consistent, vivid reminders of the concrete social context of legal decisions are probably his most enduring legacy as a Supreme Court Justice.

Contrary to the popular view, Justice Marshall was not a doctrinaire, knee-jerk liberal. Consider *Loretto v. Teleprompter Manhattan CATV Corp.*,⁴ a case decided the year of my clerkship. Justice Marshall surprised many observers by writing a relatively conservative majority opinion finding that any permanent physical occupation of property constitutes a "taking" requiring just compensation.⁵ Of course, Justice Marshall was one of the most liberal Justices of the past thirty years, but his views on any given case could not be taken for granted.

Justice Marshall's majority opinions are generally less memorable than his dissents. Not many of his majority opinions would be considered landmarks.⁶ One obvious reason was the ideological composition of the Court while Marshall was Justice. Had Justice Marshall served for 23 years with Earl Warren, one can be sure that his influence on the shape of the law would have been much greater. Another reason was Justice William Brennan's greater seniority, which permitted Brennan to write a greater number of important majority opinions.⁷

³ 411 U.S. 1, 70 (Marshall, J., dissenting) (1973).

⁴ 458 U.S. 419 (1982).

⁵ The case held that a law requiring a landlord to permit a cable company to attach a box and cables to the the landlord's building is a taking of property, even if the physical intrusion is only minor and serves important public purposes.

⁶ Of course, there are important exceptions. *E.g.*, *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding that the private possession of obscene matter in one's home cannot be made a crime).

⁷ One example during the year of my clerkship is *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that a state law violated equal protection by requiring children of illegal aliens

I will remember Thurgood Marshall as a great Justice, a great lawyer, a great storyteller, a great man. Immanuel Kant once defined dignity as that which has no price. Thurgood Marshall had dignity. He answered to no one. He followed his convictions, not for praise or publicity, but because he believed, because he cared. We should all learn to care so much.

but not other children to pay a tuition fee).