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TRIBUTE TO THE LATE JUSTICE THURGOOD MARSHALL

*Mike Espy**

Most Americans know the accomplishments of the late Justice Thurgood Marshall—the General Counsel for the NAACP Legal Defense Fund who argued and won the *Brown v. Board of Education*¹ lawsuit before the Supreme Court and who was the first African-American to sit on that Court. These and many other achievements rightly place Justice Marshall in the highest echelons of leaders in American history.

Just as important to me as any single accomplishment, Justice Marshall was a living example of courage. He had the courage to act and speak when doing so put his reputation, livelihood, and life in jeopardy.

I grew up taking Justice Marshall's courage for granted. As an African-American growing up in Yazoo City, Mississippi, I had heard all the legendary deeds of Thurgood Marshall. In the 1950s, he was the knight in shining armor riding the legal circuit challenging the dragons of racial prejudice and discrimination. I had heard that when Marshall came south to fight for legal equality, people would whisper excitedly "Thurgood's coming." I had heard about the death threats and the verbal abuse he endured. I remember the violence that took the lives of many others in the fight for Civil Rights. Thurgood Marshall's exploits were larger than life.

In the 1960s, Marshall became the first African-American to sit on the United States Supreme Court. Although this achievement was a cause of great pride among African-Americans, it also removed him from the general public eye.

Much later, I had reason to take note of his courage firsthand. Shortly after I was sworn in as a congressman in January, 1987, Justice Marshall spoke to a convention of patent lawyers on the plans to celebrate the Bicentennial of the United States Constitution.² Rather than engage in the superficial nostalgia common—and expected of public officials—at the time, Marshall courageously spoke from his heart. He refused to "participate in the festivities with flag-waving fervor." To do so would be simplistic, he said, and would invite "a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the 'more perfect Union' it is said we now enjoy."

That document was vastly different from the Constitution we have today. According to Marshall, the "more perfect Union" we now enjoy was formed not by

* Secretary of the United States Department of Agriculture.

1. 349 U.S. 294 (1955).

2. Thurgood Marshall, *The Real Meaning of the Constitution Bicentennial*, reprinted in *EBONY*, Sept. 1987, at 64-68.

the men in Philadelphia, but by the Civil War, several constitutional amendments, and tremendous social change.

At a time when “original intent” was the judicial coin of the realm, Marshall had the courage to articulate the fact that the constitutional government we have with its respect for individual freedoms and human rights evolved over 200 years.³ In 1789, for example, the phrase “We the People” did not include slaves. The Constitution explicitly extended the slave trade until at least 1808. In addition, women did not receive the right to vote for another 130 years.

Because he questioned what was at that time the unquestioned glorification of that original document and its authors, Marshall received swift and sure condemnation. For example, the Washington Legal Foundation urged Marshall to resign from the Court because his speech reflected “a deep-seated bitterness and dislike that impairs his capacity.”⁴

But to me, his speech personalized the courage I had heard of so much as a child. It was Marshall’s courage that inspired generations of young African-Americans to achieve professional careers. It was that courage that drew me to public service.

Today, there are African-Americans serving as lawyers and judges at all levels of the legal profession—role models for young black children throughout Mississippi. When I was in high school that was not the case. Although improvements are still necessary, it is easy to forget how much the legal profession and all other professions have changed since I graduated from high school in the early 1970s. At that time, there were no African-American supreme court or circuit and chancery court judges in Mississippi. In fact, there were only a dedicated handful of minority lawyers practicing in Mississippi. We had precious few role models.

Many of my college classmates went on to become highly successful attorneys, doctors, accountants, and business executives. Would they have tried without Justice Marshall’s example? Perhaps, but, there is no doubt in my mind that we tried harder because of Marshall’s example, and we had the opportunity to succeed because of the doors he helped to open.

Without Marshall as a role model, I might never have dared to dream of becoming a lawyer. I might never have hoped to be elected to the United States Congress from Mississippi. I might never have believed that I could become the first African-American Secretary of Agriculture.

Thurgood Marshall inspired a generation of young people to push the limits of professional development. He did that by winning lawsuits, yes, but he also did it by the courageous example of his life. It is from that example that generations to come will achieve their full potential.

3. What Marshall did not say was that a very large part of that evolution took place as a direct result of his actions.

4. Ted Gest, *Justice Marshall's Minority Report*, U.S. NEWS & WORLD REP., May 18, 1987, at 12.

A TRIBUTE TO JUSTICE MARSHALL

*Stephen I. Glover**

Thurgood Marshall was a giant. This is true in a personal sense—the year I spent with him as a law clerk during the Supreme Court’s October 1981 Term remains one of the defining experiences of my life. But it is also true in a larger, more important sense. As much as any other man I can think of, he has shaped the way Americans live. Our society has changed, and we are all better off, because of his life’s work.

Working at the Supreme Court in any capacity is fascinating. But clerking for Justice Marshall—or the “Judge,” as he preferred to be called—was a particularly vivid and exciting experience. Most afternoons, the Judge would walk into the clerks’ office and settle down in a large armchair next to the door. He would always spend a little bit of time talking about the cases before the Court. Sooner or later, however, the Judge would start to tell stories. These stories spanned a truly remarkable life—growing up poor in Baltimore, attending law school at Howard, starting a law practice, trying desegregation cases for the NAACP, arguing before the Supreme Court, serving as Solicitor General, and then as a judge on the Second Circuit.

Many of the Judge’s stories were hilarious, and many were unprintable. Some were about mundane matters—I remember the Judge describing with mouth-watering vividness meals he’d had as a boy. Others provided a fascinating glimpse into history. The Judge would describe conversations with Earl Warren, and encounters with the Eisenhower, Kennedy, Johnson, and Nixon White Houses. Many of the stories, such as the descriptions of narrow escapes from Southern lynch mobs or hostile police, were terrifying. Whatever the subject matter, every story was told with a twinkle in the eye, a sense of humor, a deep understanding of human frailties, and a strong sense of compassion.

The same richness of experience that made our lives as law clerks so fascinating was the hallmark of Justice Marshall as judge. He had good lawyerly instincts and could analyze statutes and precedent with the best. But he also had a common sense, a wisdom, and a compassion that are rare among judges. For better or worse, a Supreme Court Justice must confront some of the most difficult social and moral issues of the day. Basic common sense, practical wisdom, and the ability to make a connection between legal technicalities and everyday life are the most important skills a justice can have.

Every Friday when the Court was in session, the Justices would meet to discuss cases. The Judge would always report back to his clerks after these conferences. He would sometimes tell us that he had found it necessary to provide an education

* Partner, Fried, Frank, Harris, Shriver & Jacobson; Law Clerk for Justice Thurgood Marshall, October Term 1981; Harvard Law School, J.D., 1980.

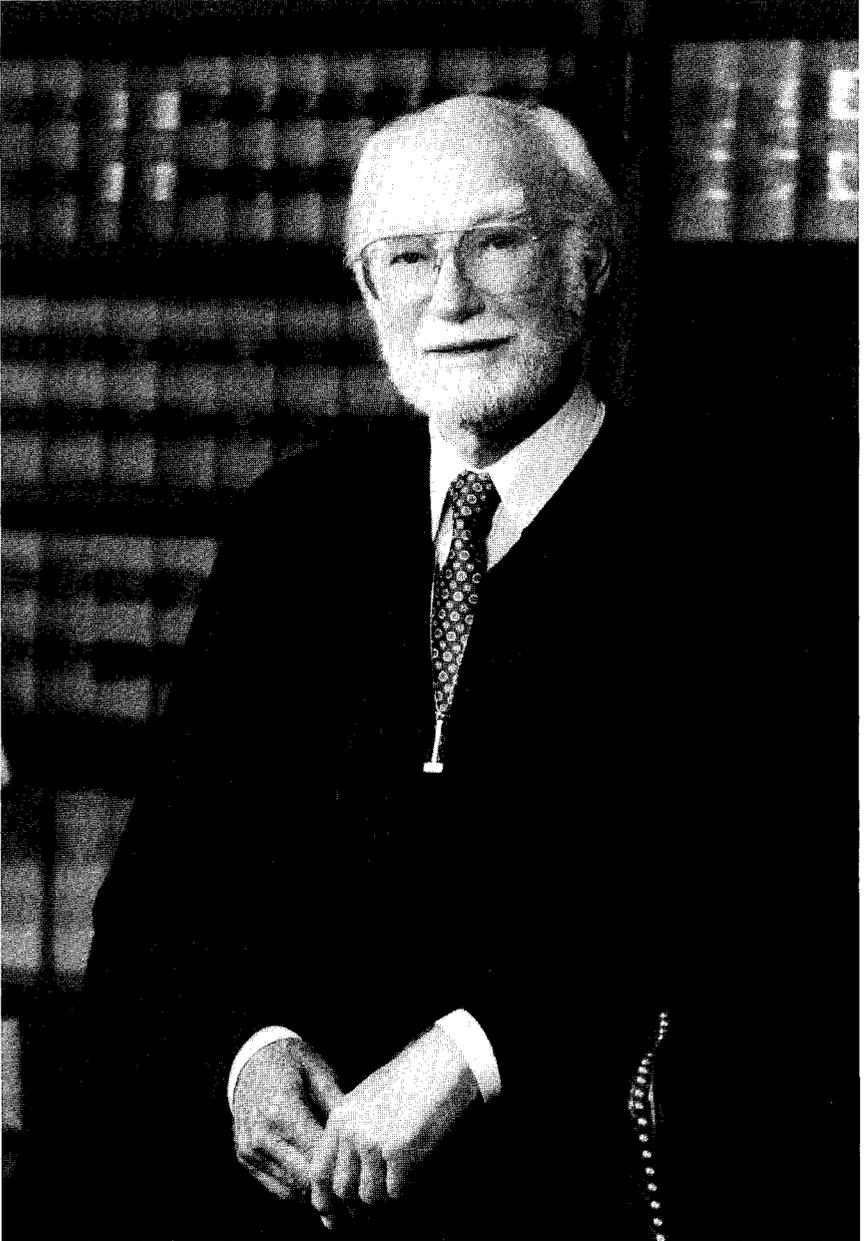
to the other Justices about the facts of life – what it was like to be a welfare mother, or what discrimination meant to a small child. He did not necessarily believe that the other judges were insensitive; rather, they simply had not led the kind of life that he had – there were things they just didn't know, and needed to be taught. In effect, Justice Marshall was the conscience, the human connection of the Court. This role is vital, and his presence will be sorely missed.

In addition to the afternoon story sessions, we would meet almost daily with the Judge to talk about cases. These sessions were always tremendous fun. In an atmosphere of laughter and good-natured teasing, the law clerks would describe their analysis of a case. The Judge would listen and then state his views. Sometimes, we would be surprised by the position he would stake out and would argue that he had to rule another way. When we made this mistake, the Judge would always respond by saying, "There's only two things I have to do, stay black and die." These sessions gave us a clear picture of how the Judge viewed the Supreme Court and his role as a Justice. About a big commercial case, he would say, "This is just a fight between a couple of corporate fat cats." He believed that the Court had more significant business than the mediation of financial disputes. The cases he thought of as most important were the ones that pitted the individual against the government, the death penalty cases, the civil liberties cases. These, in Justice Marshall's view, represented the Supreme Court's mission.

More often than not, particularly in the later years of his tenure, the Judge was on the dissenting side of the cases he most cared about. When Justice Marshall hired his clerks, he would warn them that they had better like drafting dissents, because they could expect to prepare a lot of them. On the cases that were particularly important to him, he would instruct us to take out our acid pens and write as stinging a dissent as possible. To my mind, however, even the sharpest dissents are like a beacon to what judging should be. For they were inspired by the sense of decency, the compassion, and the humanity that were so characteristic of Marshall.

The Judge often wore a stern, forbidding face when he was on the bench or when he was photographed – it was what he described as his "hanging judge" face. And there is no question that he could be gruff. When he saw his clerks in the morning, he might shout out, "Hey, you knuckleheads." If he didn't like the draft of an opinion I had prepared, he would let me know in blunt terms. "It's no good," he would say. And when he disagreed with my conclusions on whether a petition for certiorari should be granted, he might scrawl "NO" in big capital letters across the top of my memo. The same gruff, blunt spirit was often on display in the courtroom. He had a real knack for asking the embarrassing, awkward question that would bring an advocate's argument to a dead stop. But the people who knew him never took this gruffness very seriously. His eyes would twinkle, and we knew that a joke, a smile, or a belly laugh were just beneath the surface. We knew that it was just the hard edge of the same personality that would keep us in hysterics for hours, and would insist that the Court's decisions be fair and compassionate.

It is hard to avoid clichés when writing about Justice Marshall. Phrases that might be hyperbolic when used to describe other men—the leading lawyer of our century, a true hero, a giant among men—are entirely appropriate when used to describe the Judge. He was a man of great goodness who dedicated his life to reshaping our society to reflect basic principles of fairness, justice, and equality. I feel particularly lucky, proud, and blessed to have worked for a man like this. The nation, too, is lucky to have had a man like this. His passing leaves a hole that cannot be easily filled. Ultimately, I think, the test of a great Supreme Court justice is not whether he or she is a skilled legal technician but whether he is prepared to do good, to do the right thing. Many lawyers have the mind to be a Supreme Court justice—relatively few have the heart. Justice Marshall was one of the few who did. And in the end, it was this heart that made him great.



CHIEF JUDGE JOHN R. BROWN