THURGOOD MARSHALL

HIS TRIUMPH IN BROWN, HIS YEARS ON THE SUPREME COURT

Hunter R. Clark & Michael D. Davis

REVIEWS

Thurgood Marshall:
Warrior at the Bar, Rebel on the Bench

by Michael D. Davis & Hunter R. Clark, originally published in 1992.

The 1992 print edition has been republished in two parts as two ebooks. The first ebook *Thurgood Marshall: From His Early Years to Brown* covered Thurgood Marshall's youth, education, and the cases he argued leading up to the *Brown v. Board of Education* decision.

In the second part, *Thurgood Marshall: His Triumph in Brown, His Years on the Supreme Court*, the writers describe how Marshall and his team won the *Brown* case, the massive resistance which followed *Brown*, and Marshall's long career on the Supreme Court as he joined fellow justices in majority or minority votes on the Vietnam War, the Pentagon Papers, abortion, the death penalty and other issues in the late 20th century.

The reviews below are from the print edition.

"Michael D. Davis and Hunter R. Clark offer a masterfully written tale of an American legend." — Gannett News Service

"Filled with the same fire, passion and humor that drove Marshall's life,

Thurgood Marshall is a revealing portrait of a pioneering lawyer." —National Black Review

"Well-written, informative and lively." —People

"This important work, ably chronicled by Davis and Clark, is impressive.

Highly recommended." —Library Journal

"As a guide to the legal struggles of this American leader, this book is written clearly and with obvious affection and admiration for Marshall, and the law for which he fought." —Booklist

"Michael Davis and Hunter Clark have crafted a thoughtful, carefully researched and focused biography." —USA Today

"I highly recommend Thurgood Marshall by Mike Davis and Hunter Clark. This impressive book captures the sweeping drama and courageous struggles that have filled Thurgood Marshall's life and career. The story of Justice Marshall is that of one of the greatest Americans in the twentieth century. Davis and Clark provide a compelling portrait of Marshall's immense humanity and integrity in this fine biography." —Congressman John Lewis of Atlanta.

"Thurgood Marshall is a giant of a man at a time when giants are scarce and desperately needed. This wonderful biography takes his measure." —(Rev.) Theodore M. Hesburgh, C.S.C., President Emeritus, University of Notre Dame

"Davis and Clark have given us an engagingly written and conscientiously researched biography of a twentieth-century icon. It should be widely read and much discussed by all who care about the large, principled issues Justice Marshalls' life embodies." —David Levering Lewis, author of *W. E. B. Dubois: Biography of a Race*

"Michael B. Davis and Hunter R. Clark have written an interesting and informative biography of Supreme Court Justice Thurgood Marshall directed toward a general audience. The current work, with its fluid, readable style, reflects the authors' backgrounds in the popular press, where both have published extensively."--Mississippi Quarterly

HOW TO SHARE THIS BOOK

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HIS TRIUMPH IN BROWN,
HIS YEARS ON THE SUPREME COURT

HUNTER R. CLARK & MICHAEL D. DAVIS

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DEDICATION

This book is dedicated to the memory of Michael Demond Davis (1939-2003), my friend and co-author of *Thurgood Marshall: Warrior at the Bar, Rebel on the Bench* (1992, 1994), upon which this epublication is based. Scripture admonishes us, "From those to whom much is given, much is expected." (Luke 12:48) Mike Davis sure lived up to that one in the pursuit of justice and human rights.

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INTRODUCTION

The Lawyer as Hero: Thurgood Marshall's Legacy

I met Justice Thurgood Marshall (1908-1993) in the early 1970s when I was a teenager working as a page in the U.S. Supreme Court. My parents were his contemporaries, and, like millions of Americans, they knew him as "Mr. Civil Rights." As a lawyer, Marshall had won *Brown v. Board of Education* in 1954, effectively outlawing racial segregation. He became the first African American Supreme Court justice in 1967. But the 1960s had radicalized my generation, and Marshall's commitment to "working within the system" was unacceptable to me. I was "Black and Proud!" I wanted freedom *now*! Little did I know that Marshall, an icon to my parents but an Uncle Tom to me, was one of the most visionary and courageous leaders in our nation's history.

His vision was a hard sell to the black leaders of his day who had grown frustrated with the lack of progress toward racial equality. To some, the American system was irredeemable, and so they embraced Soviet communism. Others called for an alliance of the fledging civil rights and labor movements, but unions refused to let blacks in. Some saw the need for a mass political movement that would rally millions into the streets, but there was fear of provoking a violent white backlash. It would be decades before the advent of the mass media, and the coercive threat of national exposure, would make Rev. Martin Luther King's direct action campaign a viable option. With access to the political process barred—African Americans were routinely denied the right to vote—Marshall's challenge was to convince his colleagues that a litigation strategy was the solution, even though the Supreme Court's "separate but equal" decree in Plessy v. Ferguson in 1896 had permitted racial segregation.

Marshall's courage and skill as a lawyer carried the day. He had attended Howard University Law School where he met his friend and mentor Charles Hamilton Houston, Howard's law dean

Houston, an African American graduate of Harvard Law School, had turned Howard into a "laboratory" for civil rights litigation, calling his students "social engineers" whose mission was to overturn *Plessy*. Marshall finished at the top of his law class in 1933 and soon he took to the road, often with Houston— hero lawyers travelling through the South and elsewhere, investigating lynchings and filing anti-discrimination lawsuits. Decades later, Justice Marshall regaled colleagues and law clerks with harrowing tales of close call escapes from the Ku Klux Klan and others who threatened to kill him. Undeterred, he went on to establish the chain of legal precedents that laid the groundwork for *Brown*.

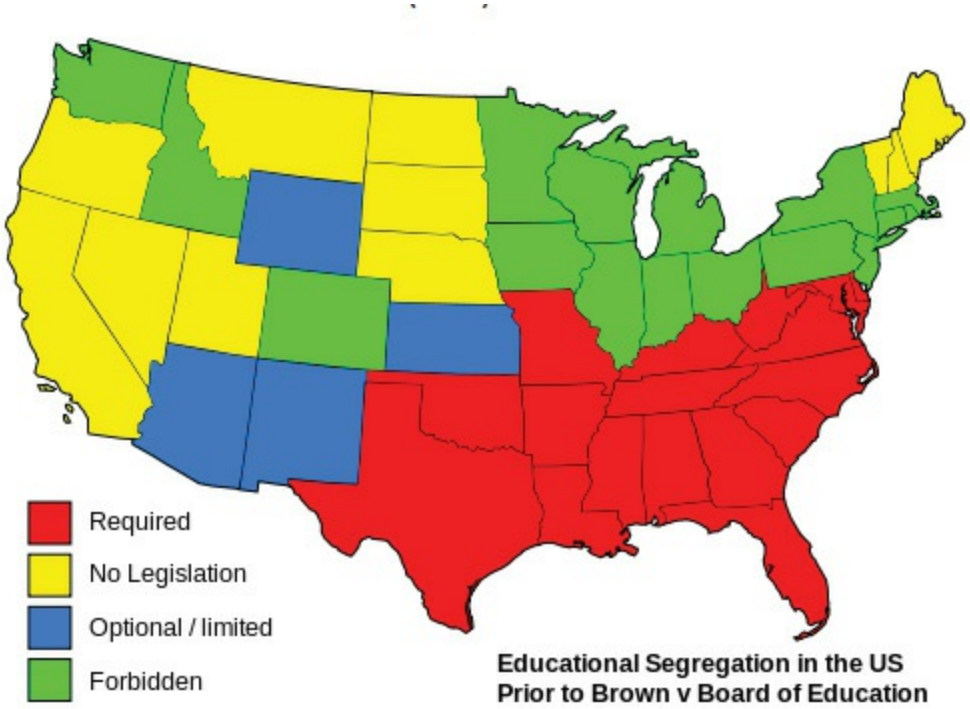
As a Supreme Court justice, he championed the view that government has an affirmative obligation to remedy economic, race, and gender inequalities. His conservative opponents accused him of judicial activism. As the Court moved to the right, he often found himself in dissent. Frustrated, he urged rights activists to avoid the courts and seek redress through the political process. That political process has since produced our first black president, Barack Obama.

Meanwhile, militants faulted him for not acknowledging the extent to which their radicalism made Marshall's moderate views more palatable. No matter. By the end of his life—he died in 1991—Marshall had put it all in perspective. "I don't know what legacy I left," he told an interviewer. "It's up to the people. I guess you could say, 'He did what he could with what he had.' I have given fifty years to it, and if that is not enough, God bless them."

Hunter R. Clark
July 17, 2014
Des Moines, Iowa

MAPS

EDUCATIONAL SEGREGATION PRIOR TO BROWN



Source: https://resourcesforhistoryteachers.wikispaces.com/USII.25

2. Map showing location of five school desegregation cases combined by US Supreme Court:

(1)Topeka, Kansas; (2) Clarendon County, S.C.; (3) Prince Edward County, Virginia; (4) Washington, D.C.; (5) Delaware

ONE:

Brown v. Board of Education (Part 1)

If you show your black ass in Clarendon
County again, you'll be dead.
—An attorney for the State of South Carolina

Clarendon County sprawls across the middle of South Carolina at the foot of the Blue Ridge Mountains. It is predominantly black, agricultural, and poor. After the Civil War, blacks were pushed inland off the magnificent coastal plantations where they had lived as slaves and onto Clarendon's unfertile lowlands. Some corn, soybeans, and tobacco can be grown there, and a few textile mills dot the landscape. Driving past pine, peach, and pecan trees, past gnarled oaks draped with Spanish moss, one realizes that this is the old South, where going to church is more important than going to school. Even today, as in Thurgood Marshall's time, there are probably four Baptist churches for every school building in Clarendon, mostly frame structures set up on bricks or stones.

On Sunday afternoon dusty black children play in the dirt in front of their ramshackle, tin-roofed houses while their grandmothers sit fanning themselves on rickety front porches in bonnets and colorful cotton print dresses, their Sunday best. Many of the children's feet bear bruises and cuts from running over the jagged edges of tin roofs that have blown off. No one could have known in 1950 that this lazy South Carolina backwater was about to serve as the focal point of the legal proceedings that would forever in the popular mind be associated with Topeka, Kansas, in the case that became known as *Brown v. Board of Education of Topeka.*

In May 1950, Harry Briggs Sr. and his wife, Liza, brought an equalization suit on behalf of one of their five children, Harry Jr., in U.S. district court. They demanded that the black schools in segregated Clarendon County be brought up to the standards of those for whites. Briggs, thirty-

four, was a navy veteran who had served in the South Pacific during World War II. He pumped gas and fixed cars for a living in his hometown of Summerton. Liza was a chambermaid at a local motel.

The Briggses were joined in their legal action by the parents of other elementary-school-age African-American children in Clarendon. But the suit was named for them because their names came first in the alphabetical order of plaintiffs. As the result of their legal action, they became the targets of harassment by whites. Both were fired from their jobs when they refused to drop out of the lawsuit. Briggs was philosophical in retrospect about the risks he took. He said, "We figured anything to better the children's condition was worthwhile." When the local NAACP chapter brought the situation in Clarendon to the attention of the national headquarters in New York, Marshall decided to take on the matter. The Briggses seemed to him to be courageous people. He would do whatever he could to help.

Linda Brown Smith, Ethel Louise Belton Brown, Harry Briggs, Jr., and Spottswood Bolling, Jr. during press conference at Hotel Americana June, 1964. New York Telegram and Sun photo by Al Ravenna.

On the face of it, they had a strong case. Over half the public school funds in Clarendon went to white schools, although the school system enrolled three times as many blacks as whites. In addition, Clarendon's annual per capita outlay for white students was almost a hundred times more than for blacks. Teachers' salaries were disparate, too, although the Briggses had won an earlier ruling that black teachers' pay be brought up to that of the white teachers in Clarendon.

Marshall seized on the favorable fact situation presented by the case. It was uncontestable that the black and white schools in Clarendon were unequal. He urged the Briggses to include in their suit a claim that segregation in public education was in and of itself unconstitutional.

They agreed.

Marshall was also heartened when the judge to whom the case was assigned turned out to be J. Waties Waring, a white native South Carolinian who was a supporter of blacks' rights. Appointed to the bench by Franklin Roosevelt in 1942, Waring had ruled in favor of Briggs in the suit to require equalization of black and white teachers' pay. Before that, in 1945, Waring had struck down the state Democratic party's attempt to bar blacks from voting in Democratic primary elections.

Although he was not sympathetic to blacks originally, Waring's beliefs were influenced heavily by his second wife, a native New Yorker who encouraged him to read Myrdal's *An American Dilemma* and to arrive at a new understanding of the white southerners' mentality as portrayed in such works as *The Mind of the South* by W. J. Cash. The judge's wife even went so far as to express publicly her view that "we don't have a Negro problem in the South; we have a white problem."

At the November 17, 1950, pretrial conference, Waring told Marshall that his brief should be revised so that his argument would become a frontal attack on segregation. Years later Waring recalled, "I pointed out to him, right there from the bench, that in my opinion the pleadings didn't raise the issue."

Waring told Marshall, "You've partially raised the issue, but of course the court can and may do what has been done so very, very often heretofore: decide a case on equal facilities— It's very easy to decide this case on that issue." Waring suggested, however, that the case be dismissed without prejudice and a new suit brought attacking segregation more directly. He told Marshall, "That'll raise the issue for all time as to whether a state can segregate by race in its schools."

Given the demographics of Clarendon County, Marshall was reluctant to take the approach suggested by Waring. The county was 70 percent black. Desegregation would not only mean allowing blacks to attend predominantly white schools; it would also mean forcing whites to

attend schools that were predominantly black. In Marshall's view this made *Briggs* a bad test case, because desegregation would be even less palatable politically and socially under these circumstances. Nevertheless, he gambled and followed Waring's recommendation.

Meanwhile, South Carolina governor James F. Byrnes prepared to defend the state's segregated school system. A former two-term U.S. senator, Byrnes had also served in the House of Representatives for a decade. He even sat on the U.S. Supreme Court briefly in 1941 before returning to the political life he loved. As a former justice, Byrnes knew the Supreme Court, and he knew that the Court's recent rulings spoke for themselves on the question of a state's obligation to provide equal educational facilities for its black residents.

The governor readily conceded that the black schools in South Carolina had endured "a hundred years of neglect." Aiming to head off a U.S. Supreme Court confrontation that he feared his state could not win, Byrnes pushed through the state legislature a $75 million bond issuance to upgrade the state's black educational facilities. "We must have a state school building program," he declared, adding, "One cannot speak frankly on this subject without mentioning the race problem. It is our duty to provide for the races substantial equality in school facilities. We should do it because it is right. For me that is sufficient reason."

At the same time, Byrnes sought authorization from the legislature to lease or sell public schools—in other words, to close or contract out public education—in the event desegregation was ordered. The Supreme Court could order public schools to desegregate, but he hoped that by privatizing education he would put the schools beyond the Court's reach in the same way that private clubs cannot have their memberships dictated by the courts. The schools would then be free to exclude blacks.

He also retained John W. Davis, the most distinguished appellate advocate of his era, to take on Thurgood Marshall and the NAACP Legal Defense Fund in the event the legal challenge went beyond the familiar home-field confines of the South Carolina courts.

Few men in American history have been more successful in the fields of law, politics, and

diplomacy than John W. Davis. Born in Clarksburg, West Virginia, in 1873, Davis attended law school at Virginia's Washington and Lee University and rose quickly in the legal profession, as well in the national Democratic party. From 1913 to 1918, he served as U.S. solicitor general, representing the United States in cases that came before the Supreme Court. Later he served as U.S. ambassador to Great Britain. In 1924 he became the Democratic nominee for president, selected on the 103rd ballot at a deadlocked convention.

But he waged a somewhat listless campaign against Calvin Coolidge, refusing to drop many of his wealthy "robber baron" clients, including J. P. Morgan, who were anathema to the William Jennings Bryan wing of the party. One critic predicted that, if elected, Davis would change the national anthem to "The Star-Spangled Banker." Coolidge prevailed; Davis captured only 29 percent of the popular vote. Afterward, he returned to private practice as senior partner in the law firm originally founded by him and his father, Davis, Polk, Wardwell, Sunderland & Kiendl. In addition to the House of Morgan, his clients included Standard Oil Co., AT&T, and Guaranty Trust Company of New York.

Davis, the appellate advocate Marshall admired most, had argued approximately 140 cases before the Supreme Court. Only two lawyers in history had appeared before the justices more: Walter Jones, who argued 317 cases between 1801 and 1850, and Daniel Webster of Massachusetts, who made nearly 200 appearances.

"Davis was the greatest solicitor general we ever had," Marshall, who was to hold the same post a half century later, once said. "You and I will never see a better one. He was a great advocate, the greatest." In his youth Marshall cut classes at Howard Law School to see the great John W. Davis at work before the Supreme Court. "Every time John Davis argued," Marshal recalled, "I'd ask myself, 'Will I ever, ever? No, never.'"

With Davis enlisted and in reserve, Byrnes placed the fate of South Carolina at the trial-court level in the hands of Charleston lawyer Robert McCormick Figg Jr., the state's most prominent corporate attorney, and Emory Rogers, an outspoken white supremacist. In late May 1951, the

two sides presented their opening arguments to a three-judge U.S. district court in Clarendon County. Figg and Rogers did not deny that the black and white schools in South Carolina were unequal. Instead, they asked the court for "a reasonable time" to correct the inequalities. They defended segregation as a "valid exercise of legislative power" and closed on an ominous note, warning that a desegregation order would trigger "dangerous tensions and unrest" throughout the state.

Marshall, for his part, urged the court to strike down South Carolina's segregation statute as unconstitutional per se. Also, Marshall relied on recent Supreme Court rulings won by him and the Fund to support his contention that the state's promise to remedy inequalities at some future point in time was insufficient to overcome the present, existing wrongs. As *Time* magazine observed some years later, "Marshall generally has a running start on opposing lawyers. The law he made yesterday is today's precedent."

He lost. A month later, in an opinion written by Judge John J. Parker with the concurrence of Judge George Bell Timmerman, segregation in South Carolina was upheld as a valid exercise of legislative authority. The sociological data offered by the Fund lawyers was dismissed; instead, weight was given to the judicial doctrine of *stare decisis,* or precedent.

In this case, the court found, *Plessy v. Ferguson's* separate-but-equal doctrine was the precedent that controlled the outcome; the recent Supreme Court ruling in *Sweatt* and *McLaurin* had not explicitly overruled *Plessy.* Parker concluded that it was "late in the day" to argue the validity of segregation. The court did, however, order the state to bring black schools up to par with those for whites "promptly."

Waring dissented bitterly, declaring that "segregation in education can never produce equality and...is an evil that must be eradicated." He went on, "This case presents the matter clearly for adjudication, and I am of the opinion that all of the legal guideposts, expert testimony, common sense, and reason point unerringly to the conclusion that the system of segregation in education adopted and practiced in the State of South Carolina must go and

must go now." He concluded, *"Segregation is per se inequality."*

Marshall appealed the ruling immediately to the Supreme Court. Meanwhile, South Carolina generally, and Clarendon County in particular, embarked on a crash program to upgrade the black schools, and equalize black and white teachers' pay, across the state. For a time, appropriations for the construction of black schools totaled more than double the amount for white.

In January 1952 the Supreme Court disappointed Marshall by remanding*Briggs v. Elliott* to the South Carolina district court with instructions that it ascertain the degree of progress toward equalization of the black and white schools. Justices Black and Douglas vehemently opposed the remand, insisting that the constitutional issues raised in the case were ready for the Court's consideration. Nevertheless, by the spring of 1952 the case was back in Judge Parker's South Carolina court. Waring had retired and been replaced on the three-judge panel.

Writing for a unanimous court, Parker found that Clarendon County had "proceeded promptly and in good faith" toward equalization. By his estimation, full equalization would be achieved by the opening of the coming school year, soon enough to satisfy the Constitution and the U.S. Supreme Court.

One of the attorneys for South Carolina looked at Marshall, seated across the counsel table. In a voice loud enough for everyone in the courtroom to hear, he told him, "If you show your black ass in Clarendon County again you'll be dead."

Marshall went back to the Supreme Court and appealed Parker's ruling in the summer of that year. *Briggs* was consolidated with four other desegregation suits brought by the Fund from other states around the country. Together the cases presented just about every conceivable form and variation of segregated schooling.

From the Eastern District of Virginia came*Davis et al. v. County School Board of Prince Edward County, Virginia, a* case similar to *Briggs.* The parents of black high school students in Prince Edward County challenged Virginia's segregation law and also complained that the black

schools were not equal to those for whites. As in South Carolina, a three-judge U.S. district court ruled against the blacks on the question of segregation itself, holding it to be within the state's power to order the separation of the races. The court agreed with the blacks, however, that the separate black and white schools should be made equal, and it ordered the black schools upgraded promptly.

From New Castle County, Delaware, came *Gebhart v. Belton*, brought on behalf of elementary- and high-school-age African-American children. Again, the blacks challenged the state's segregation law and in addition claimed that black schools and facilities were not equal to those for whites. This time they won. The Delaware Court of Chancery ordered blacks admitted to formerly white schools on the ground that the black schools were inferior. The Delaware Supreme Court upheld the chancellor's ruling but implied in its opinion that the schools could be resegregated once the black and white schools were equalized. The county appealed to the U.S. Supreme Court, arguing that the Delaware Supreme Court was wrong in ordering immediate desegregation.

From Kansas came the case by which the five consolidated cases became known, *Brown v. Board of Education.* In it, suit was brought on behalf of elementary-school-age children residing in Topeka, Kansas, challenging a Kansas law that permitted, but did not require, cities of more than fifteen thousand people to segregate their schools. Topeka segregated its elementary schools, although schools above the primary level were integrated. A three-judge district court took the extraordinary step of ruling that segregation had a detrimental effect on black children. Nonetheless, the court refused to order Topeka's elementary schools desegregated, since it found the black and white schools' facilities, curricula, and teachers' pay to be equal.

Last, out of Washington, D.C., came *Bolling v. Sharpe,* challenging segregated schooling in the nation's capital. Since Congress, under the U.S. Constitution, runs the District of Columbia, the question presented by this case was whether the Constitution prohibits the federal government from denying citizens equal protection. The legal issue presented by the case was

quirky and somewhat technical. The Fourteenth Amendment to the Constitution contains the equal-protection clause, but the amendment applies specifically only to the states; it is the Fifth Amendment that applies to the federal government, and while the Fifth Amendment guarantees citizens due process, it does not contain an equal-protection clause.

The Court docketed oral arguments in the five cases for December 7, 1952. Marshall and the Fund lawyers spent the summer preparing and submitting their briefs. Meanwhile, John W. Davis devoted himself and the resources of his enormous Wall Street law firm to the defense of segregation and the "Southern way of life."

Marshall took a decidedly sociological tack in his brief, as he had done in *Sweatt* and *McLaurin.* Relying heavily on the South Carolina testimony of Dr. Kenneth Clark and the published works of Clark and his wife, Mamie, Marshall tried to demonstrate the inherent evils of segregated education. Clark, who was black, was a protégé of Columbia University psychologist Otto Klineberg, one of his era's preeminent thinkers on race. Clark had done his undergraduate work at Howard University, where his views on social issues were influenced heavily by such instructors as Ralph Bunche and philosopher Alain Leroy Locke. He went on to earn his doctorate in psychology at Columbia.

Clark was noted for his doll tests, a technique that he and his wife, who also held a Columbia doctorate in psychology, had developed to gauge the attitudes of black children consigned to segregated schools compared with those of black children who received integrated educations. Black children of elementary school age were given dolls, some brown and others white. The children were asked, "Which doll looks most like you?"

Clark found that the children seemed to identify with the brown dolls, demonstrating an awareness of their own color or racial background. When asked which doll they liked more, or which doll was "good" and which "bad," the children demonstrated a marked preference for the white dolls, indicating unhappiness about being black, a lack of self-esteem. In other words, the children evidenced through their preferences a sense that it is better to be white than

black, that white people are better than black people.

"We were really disturbed by our findings," Clark observed. "What was surprising was the degree to which children suffered from self-rejection, with its truncating effect on their personalities and the earliness of the corrosive awareness of color." He continued, "I don't think we had quite realized the *extent* of the cruelty of racism and how hard it hit."

Clark summarized many of his and his wife's conclusions in academic treatises, including a report for the White House Conference on Youth in 1950 entitled *Prejudice and Your Child.*

Davis would have none of it. In fact, he was ecstatic to read Marshall's brief and learn the extent to which it relied on what Davis referred to as sociological "fluff." He wrote in a letter to Figg, who had represented South Carolina at the lower court level, "I think I have never read a drearier lot of testimony than that furnished by the so-called educational and psychological experts." In Davis's mind, Marshall's psychological and sociological data did nothing more than demonstrate that even as early as the age of five, white children realized they were white, and black children realized they were black. "Presumably," he commented derisively, "they should have been found to ignore the evidence of their senses."

In his own brief, Davis pointed out contradictions between Kenneth Clark's South Carolina testimony and conclusions published by the Clarks in a 1947 article entitled "Racial Identification and Preference in Negro Children." Based on research that compared the attitudes of segregated southern black children with their northern counterparts from integrated backgrounds, the Clarks concluded, "The southern children... in spite of their equal favorableness toward the white doll, are significantly less likely to reject the brown doll (evaluate it negatively) as compared to the strong tendency for the majority of northern children to do so."

Davis used the Clarks' published conclusions against them to his advantage. He asserted, "While these experiments would seem to indicate that Negro children in the South are healthier psychologically speaking than those in the North, Dr. Clark appears to disagree. In any

case, the results obtained in the broader sample of experiments completely explode any inference that the 'conflicts' from which Professor Clark's Clarendon County subjects were found to suffer are the result of their education in segregated schools."

When he read Davis's brief, Governor Byrnes was moved to write to his attorney, "I liked your having Clark & Clark answer Witness Clark." Byrnes concluded, "I want you to know that this client is proud of his lawyer."

Marshall persisted on his course. In September, as the deadline for the submission of briefs grew near, he turned to Clark. What he wanted from Clark was a statement of his observations and conclusions arrived at over years of study and research regarding the harmful effects of segregation on children. Clark obliged. He wrote of the negative effects of segregation on blacks. Segregation, he concluded, produced negative, "self-destructive" tendencies, hostility, and aggression. It created feelings of inferiority that in time gave way to self-hatred. From that flowed anger, violence, and other forms of behavior that only served to reinforce existing, negative stereotypes.

Clark wrote of the harmful effects of segregation on whites as well. For white children, he determined, segregation produced "a distorted sense of social reality." It created "moral cynicism." Here, after all, was a country committed by its creed to all men being equal. Clark admitted that examining the total effect—morally, socially, and economically—of this kind of duality, hypocrisy, of double-think, double-speak, tested the bounds of scientific knowledge of the human psyche.

Marshall asked other noted psychologists, sociologists, and social scientists to endorse Clark's statement. They did. He appended to his brief in *Briggs* a concurrence in Clark's analysis signed by thirty-five of the most eminent social thinkers of their time: Jerome Bruner, Gordon Allport, and Samuel Stouffer of Harvard; Otto Klineberg, Robert Merton, and Paul Lazarsfeld o Columbia; Hadley Cantril of Princeton; M. Brewster Smith of Vassar; Arnold Rose of Minnesota and Alfred McClung Lee of Brooklyn College, to name but a few.

The day scheduled for oral argument drew near. Marshall drove his people, an integrated staff of brilliant young men and women: Robert L. Carter Jr., his top assistant, Spottswood W. Robinson III, Louis L. Redding, Jack Greenberg, Robert Ming Jr., Constance Baker Motley, Jame M. Nabrit Jr., Frank D. Reeves, and others. Carter would open, arguing *Brown.* Marshall would follow with *Briggs.* Robinson would argue the Prince Edward County case, which came from his home state. Marshall would also handle the Delaware case, along with Greenberg. And so on.

He reminded everyone that Charles Houston, his mentor, had taught him there was no such thing as too much hard work, study, or preparation. He told them to assume that they were preparing for Justice Frankfurter, known to be brilliant if pedantic and persnickety. He was probably on the blacks' side, but he *would ask the* toughest questions. If they were ready for Frankfurter, they were ready for anybody.

Meanwhile, Davis was confident, if not arrogant. The law was on his side because of *stare decisis,* precedent. He set to work on his brief with zeal and relish, writing much of it himself instead of assigning it to any number of brilliant young attorneys in his law firm. "There is nothing in the Fourteenth Amendment," he insisted, "which removes from the states...control of the educational process—so long as equal facilities are accorded the children of all races... The Supreme Court has decided the question...directly in three cases and by implication in several others."

Davis genuinely believed that segregation was better for both races, especially for blacks. He refused to believe that the majority of black parents wanted to expose their children to the insults and degradation that would be heaped on them in hostile, predominantly white schools. He believed that most blacks, like most whites, would prefer to be left alone with their own kind. He could not fathom that the Court would upset such a long-standing and ingrained social convention as segregation.

His attitude surprised many people who thought they knew him. As a presidential candidate in 1924, Davis spoke out against the Klan and its vigilantism. Prior to that, as solicitor general in

1915, he won a case that overturned Oklahoma's exclusion of black voters from primary elections. In 1929 Davis was even approached by Walter White, then director of the NAACP, about the possibility of Davis's joining its board of directors or legal arm. Davis demurred. In truth, he was a white supremacist who believed in the natural inferiority of blacks. He wrote to Byrnes as he prepared for his appeal in *Brown:*

> I do not believe that the only distinction between the races of mankind is to be found in the color of their skins. There are anatomical differences... I have been told, and I think it is true, that a cross-section of the hair of Mongolian races indicates that the hair is cylindrical. A similar cross-section of the hair of the Caucasian races indicates that the hair is elliptical, while a cross-section of the hair of the Negro race shows that it is flatter and more ribbon-like, hence kinky. Is it not conceivable that in addition to anatomical differences there are also differences in the intellectual processes, in tastes and in aptitudes?

Davis was beneficent enough to concede, however, that blacks should be allowed to achieve their "just level." And he thought that graduate education should be offered on a desegregated basis. He explained his views in a letter to Walter White: "I think there is a genuine distinction to be drawn in policy between the immature children in the primary schools and the more mature individuals who attend graduate schools.... Meantime we should both feel satisfaction in the genuine efforts...being made to bring about equality in the schools."

Marshall's reasoning ran in the opposite direction. In his brief he not only challenged segregation based on the practice's harmful effects, he questioned the whole idea of using race as a rational basis for any type of legislative decision making.

As Tuesday, December 9, 1952, approached, both sides made final preparations for their confrontation. Davis, joined much of the time by the attorneys from South Carolina as well as from Virginia, Kansas, and Delaware, moved with his personal staff into the Sheraton Hotel, near the White House in downtown Washington.

In preparation for the Brown court case the three lead lawyers gathered to discuss their final strategy. Pictured (left to right) are Harold P. Boulware, (Briggs case), Thurgood Marshall, (Briggs case), and Spottswood W. Robinson III (Davis case). The lawyers said that the Brown case hoped to end the "separate but equal" doctrine of the earlier Plessy decision and make it illegal to continue segregation in public schools. Courtesy, Library of Congress, World-Telegram & Sun Collection.

Marshall and his staff took up residence across the street in the Statler, which was integrated. It was uncharacteristic of Marshall not to stay in the home of friends or NAACP allies instead o paying for accommodations while on the road; the NAACP's money for his expenses was severely limited. But he decided on this occasion to rely on the Statler's amenities in order to get some much-needed rest so that he could put forth his best effort in this crucial appeal.

Marshall's friend and confidant William Hastie observed, "He drove himself to and beyond the limits of the human anatomy. He was at the point of exhaustion in trying to dispel the sense of defeatism that had inflicted itself on so much of black America."

His wife recognized what was happening to him. "He's aged so in the past five years," she noted. "His disposition's changed—he's nervous now where he used to be calm. The work is taking its toll of him. You know, it's a discouraging job he's set himself." She did not add to his burden by telling him that she was dying of cancer.

Outside the U.S. Supreme Court's bronze doors, beneath the marble inscription "Equal Justice Under Law," a line began to form shortly before dawn on the day of the oral argument. Those who wanted to observe the history that was about to be made knew that the Court chamber would accommodate only about three hundred spectators. The number of would-be observers,

black and white, bundled against the late-autumn chill, grew longer as the morning wore on. What began as a trickle, a few men, a few women, became a torrent of the curious and excited —one long, expectant, but well-behaved queue that by midmorning stretched down the marble front steps and spilled across the plaza onto the sidewalk.

Robert L. Carter Jr. opened the proceedings by presenting his side of the Kansas case, *Brown.* His discussion of the issues proceeded well enough until he encountered a barrage of tough questioning from Frankfurter. Basically Frankfurter tried to pry from Carter an open admission that the Court was being asked to outlaw segregation because the basis for it was nothing more than what Frankfurter referred to as "man's inhumanity to man." Yet was it not true, Frankfurter asked, that segregation had been upheld in past decisions of the Court and that Carter was therefore asking the Court to unsettle existing precedents and social customs and practices embodied in hundreds of state laws as well as in those Supreme Court precedents?

In point of fact, this was the NAACP's purpose. But after all the years of working around a direct challenge to *Plessy,* it was hard for Carter to come right out and ask directly that *Plessy* be overturned.

Marshall had no such hesitancy. After Kansas's rebuttal of Carter, he rose to argue *Briggs.* Clearly, firmly, and straightforwardly, he declared that segregation was humiliating and degrading. He characterized distinctions based on race as "odious and invidious." The Court had outlawed segregation in transportation, he contended; there was no reason not to outlaw it in education as well.

Frankfurter asked how Marshall could escape racism as a sociological fact. What about states or school systems in which blacks constituted a majority? Should the Court order whites to attend predominantly black schools, with black teachers? Then, presaging the busing controversy that the Court would be called upon to address almost twenty years later, he asked Marshall what was supposed to happen if whites simply resegregated themselves by moving or by gerrymandering school districts? Would the courts not have to order that the

desired school desegregation be brought about? Marshall's response implied that he was prepared to accept de facto segregation if it resulted naturally from geographic circumstances.

Justice Jackson then asked Marshall to compare blacks with American Indians. Suppose the Court struck down all classifications based on race? How would such a ruling affect the treatment, rights, and privileges of Native Americans traditionally distinguished by race?

Marshall deflected the inquiry with humor. "The biggest trouble with the Indians," he explained, "is that they just have not had the judgment or the wherewithal to bring lawsuits."

Jackson good-naturedly suggested, "Maybe you should bring some up for them."

Marshall demurred, "I have a full load now, Mr. Justice."

When Marshall finished, Davis rose to open his side of the case. A stately white-haired man of seventy-eight, his voice resounded, commanding the attention of the chamber with his formalistic, almost Victorian syntax. Paul Wilson, Kansas's young assistant attorney general, matched against Carter in *Brown,* reflected later on Davis's performance. "One need not have heard Mr. Davis's argument to know that a great lawyer was speaking… The esteem of the Court was reflected in the face of each of the justices."

Davis reminded the Court that segregation had been upheld countless times and that state after state had enacted laws calling for the separation of the races. All of this had been done since the Fourteenth Amendment. He asserted that segregation was a "great national policy" and that to undermine it would subvert the deference to local self-government that was the heart of the federal system.

He asked rhetorically, "Is it not a fact that the very strength and fiber of our federal system is local self-government in those matters for which local action is competent? Is it not of all the activities of the government the one which most nearly approaches the hearts and minds of people, the question of the education of their young? Is it not the height of wisdom that the manner in which they shall be conducted should be left to those most immediately affected by it, and that the wishes of the parents, both white and colored, should be ascertained before

their children are forced into what may be an unwelcome contract?"

Davis rejected Marshall's sociological assertions out of hand, dismissing them as "fragmentary expertise based on an examined presupposition." *Stare decisis* was what should count: "I respectfully submit to the Court, there is no reason assigned here why this Court or any other should reverse the findings of ninety years." He warned that equal, if separate, education was in danger of being "thrown away on some fancied question of racial prestige." It was a virtuoso performance.

Justice Harold Hitz Burton, Truman's first appointment to the Court in 1945, was a former Republican senator from Ohio whose social views were considered moderate. He challenged Davis, "What is your answer, Mr. Davis, to the suggestion...that...the Constitution is a living document that must be interpreted in relation to the facts of the time in which it is interpreted? Did we not go through with that in connection with child labor cases, and so forth?"

Davis responded that the Court should be guided by the framers of the Fourteenth Amendment and its equal-protection clause: since the framers did not end segregation, the Court should not take it upon itself to do so.

Despite this assertion, Davis, like his listeners, was well aware that constitutional interpretations changed as time went on. It was neither possible nor necessarily desirable to uncover and adhere strictly to the intention of the men who wrote the Constitution, or a particular amendment to it, every time a modern-day problem demanded. For example, the commerce clause, giving the federal government the power to regulate interstate commerce, had been expanded greatly by the Court over the years as America grew into a modern industrialized nation.

Frankfurter took up this point. "Mr. Davis," he asked, "do you think that 'equal' is a less fluid term than 'commerce between the states?'"

Davis inquired, "That what is unequal today may be equal tomorrow, or vice versa?"

"Yes, that is it," said Frankfurter.

Davis hedged. "I should not philosophize about it." He stuck to his contention, however, that the framers of the Fourteenth Amendment did not intend to outlaw segregation.

"What you are saying," Frankfurter concluded, "is that as a matter of history, history puts a gloss upon 'equal' which does not permit elimination or admixture of white and colored in this aspect."

"Yes," replied Davis. "I am saying that."

Marshall realized right away that Davis had blundered fatally. His argument failed to address Marshall's assertion that there was no *rational basis* for distinctions based on race. And without a rational basis the distinctions could not stand.

Davis was aware that Marshall's brief took this tack. But he chose to work around the argument rather than meet it head-on, relying instead on "the weight of the precedents" and Figg's earlier public-policy defense of segregation at the three-judge U.S. district court level. Davis had explained in a letter to Figg, "I have not cast [my argument] in the form of a defense of reasonableness, not wishing to adopt the battleground which the appellants evidently prefer."

In his closing remarks, Marshall rushed headlong into the breach. "It seems to me," he told the justices, "that the significant factor running through all these arguments up to this point is that for some reason, which is still unexplained, Negroes are taken out of the mainstream of American life in these states [that have segregated public education]." He continued, "There is nothing involved in this case other than race and color."

He concluded, "It seems to me that in a case like this that the only way that South Carolina, under the test set forth in this case, can sustain that statute is to show that Negroes as Negroes —all Negroes—are different from everybody else." This, Marshall insisted, had not and could not be done.

Justice Stanley Reed, who had made clear during the Court's deliberations of *Sweatt* and

McLaurin that he opposed overturning *Plessy,* asked Marshall what he thought of the idea that segregation was imposed by some state legislatures in the interest of maintaining law and order, in order to "avoid racial friction."

Marshall conceded that at the end of the nineteenth century racial attitudes were such that too much race mixing might have produced a violent backlash by racist elements within the South. Nevertheless, he said, "even if the concession is made that it was necessary in 1895, it is not necessary now because people have grown up and understand each other. They are fighting together and living together. I know in the South, where I spent most of my time, you will see white and colored kids going down the road together to school. They separate and go to different schools, and they come out and they play together. I do not see why there would necessarily be any trouble if they went to school together."

It went on for three days—the arguments, questions, answers, and rebuttals. When it was over, there was nothing to do but await the ultimate judgment of the Court. But at the Court's routine Saturday morning conference that followed the close of oral argument, it became clear that the justices were divided over whether to strike down the segregation statutes. Five appeared initially to be in favor of ending segregation: Black, Douglas, Burton, Frankfurter, and Sherman Minton, a liberal former Indiana senator who had been appointed by Truman in 1949. Four others leaned toward upholding *Plessy* as a matter of law: Chief Justice Vinson, Robert H. Jackson, Reed, and Clark. Frankfurter later wrote that if the Court had decided *Brown* in December 1952, the result "would have been catastrophic."

In an effort to arrive at unanimity, or at least a stronger majority, on a question with such far-reaching social implications, the Justices issued a *per curiam* order on June 8, 1953, docketing the parties to appear again for a second round of oral argument. At the reargument, and in the briefs they were to submit before then, the parties were to address themselves to five questions set forth in the order.

Essentially the questions focused on the Fourteenth Amendment: its history, the intent of the

men who wrote it, and the basis of the Court's power, if any, under the amendment to end segregation, should it choose to do so. Reargument was scheduled for Monday, October 12, 1953. Each side had four months to prepare.

TWO

Brown v. Board of Education (Part 2)

I insist upon one law for all men.
—Earl Warren

John W. Davis left the Supreme Court a happy and self-confident man after the end of the first round of oral arguments in *Brown.* On his way out of the building, he commented to T. Justin Moore, counsel for the State of Virginia, "I think we've got it won, five to four—or maybe six to three."

A few days later he wrote, "Unless the Supreme Court wants to make the law over, they must rule with me." A minority on the Court might try, as Davis put it, "to rewrite the law with some high-flying remarks on the iniquity of considering the irrelevant subject of race." He was convinced, however, that no "thoroughgoing" jurist would do so.

In June 1953, his law partner Allen Wardwell was solicited for a contribution to help pay for the preparation of the NAACP brief in response to the five questions. Davis forwarded the solicitation to South Carolina's governor Byrnes with a wry note advising that Wardwell "does not feel that he can contribute… I send it on the possibility that you might be willing to." Byrnes was not amused. He reacted by asking Senator Harry Byrd of Virginia to investigate the NAACP's tax-exempt status.

Davis refused to let the State of South Carolina pay him a fee, offering his work instead as a public service. He did, however, accept a silver tea service voted him by the South Carolina legislature as an eightieth birthday present.

Davis's self-assurance was short-lived. The federal government, invited by the Court to participate in the reargument, produced a brief that took the NAACP's side in response to the

five questions. Although the Eisenhower administration was reluctant to join the case, the justices' request was regarded more as an order than an invitation.

President Eisenhower himself had mixed feelings about segregation. After the Court finally ruled it unconstitutional in 1954, he told a group of southern governors, "I think personally the decision was wrong." An aide to the president claimed later, however, that while Eisenhower in fact favored the immediate desegregation of secondary schools and universities, "he did not believe this ought to be the result of any summary court order applying to immediate termination of every vestige of segregation." According to the aide, Eisenhower held the view that "in the primary schools a more gradual approach would diminish the probability that severe and very likely violent opposition would result in the event that little children were forcibly intermingled."

Nevertheless, the president allowed the Justice Department to use its own discretion in preparing the government's brief in *Brown.* Attorney General Herbert Brownell, a Nebraska native who went on to become a successful Wall Street lawyer and confidant of New York governor Thomas E. Dewey, assigned the brief to Philip Elman. Elman, a Democrat, was a Truman administration holdover who worked in the solicitor general's office.

This photograph shows interested members of the public waiting in line outside the Supreme Court for a chance to obtain one of the 50 seats allotted to hear the second round of arguments in the landmark Brown v. Board of Education case. The case involved four states (Kansas, Virginia, Delaware and South Carolina) and the District of Columbia. Among an impressive array of legal representation for the plaintiffs was Thurgood Marshall serving as chief council for the NAACP. The opposing side was led by John W. Davis, one time Democratic presidential candidate and expert on constitutional law. Courtesy, World-Telegram & Sun Collection, Library of Congress.

The first thing Elman did was move to have the reargument rescheduled to give the government more time to prepare. The Court obliged, extending the date three months, to December 1953. Elman made good use of the time. Working with a staff of eight, he produced a six-hundred-page examination of the Fourteenth Amendment. The thrust of his analysis was that the amendment's history was too clouded to be used as a guide by the Court. He wrote:

"In 1868 public schools had been hardly begun in many states and were still in their infancy. School attendance was, as a general matter, not compulsory."

He went on to explain, "The Negroes had just been released from bondage and were generally illiterate, poor, and retarded socially and culturally. To educate them in the same classes and

schools as white children may have been regarded as entirely impracticable."

He continued, "It is possible that state legislatures—while recognizing in the Fourteenth Amendment a clear mandate of equality—may have considered separate schools for colored children as a temporary practical expedient permitted by the Amendment. Many proponents of Negro education regarded separate schools as a more effective means of extending the benefits of the public school system to the colored people."

But, he concluded, even if nothing in its history indicated conclusively that the amendment was intended to abolish segregation in public education, it nonetheless "established the broad constitutional principle of full and complete equality of all persons under the law, and... forbade all legal distinctions based on race or color."

Meanwhile, the Supreme Court conducted its own research into the five questions, which was spearheaded by Alexander Bickel, a Harvard Law School graduate who clerked for Felix Frankfurter. Bickel spent the better part of a year working almost exclusively on this project. John W. Davis did not know it, nor did Thurgood Marshall or the government, but Bickel advised the justices that while the Fourteenth Amendment's legislative history did not specifically indicate that the framers intended to outlaw school segregation, the amendment did not prohibit Congress or the courts from outlawing the practice at some future time.

Davis read the government's brief with alarm. He and the other lawyers for the states agreed that "the Attorney General of the United States should not be consulted about this matter, as the present administration seems to be committed to do everything it can to abolish segregation in every form and we could not expect any help from that source." And Marshall's brief enraged Davis; he regarded it as a complete distortion of history.

Together with his colleagues, Davis hammered out his responses. The crux of his argument was that the framers of the Fourteenth Amendment "so clearly understood" that the amendment would not prohibit segregated schools that it was "not properly within the judicial power...to construe the Amendment so as to abolish segregation." Davis's side insisted that in

a segregated school system there was no discrimination against blacks if equal facilities were provided.

But neither the government's nor Marshall's brief triggered as deep a concern on Davis's part as did the sudden and unexpected heart attack that killed Chief Justice Fred Vinson in September; Davis always counted Vinson among the votes to uphold segregation. His trepidation was compounded by Eisenhower's choice of a replacement. In the fall of 1953, a popular California politician, Earl Warren, was sworn in as the nation's fourteenth chief justice.

Warren was elected to the first of three terms as governor of California in 1942. Four years later he became the first candidate to win both the Democratic and Republican nominations for that office. A bid for the Republican presidential nomination fell short in 1948, and Warren settled for the number-two slot on the Dewey ticket. He was defeated in a second try for the Republican presidential nomination by Eisenhower in 1952.

Davis's initial reaction to Warren's nomination was "The President could go further and do better." A burly, white-haired, grandfatherly man, Warren was regarded as an honest and forthright politician, in keeping with his devoutly held Baptist beliefs. But some observers questioned his intellectual depth. John Gunther's *Inside U.S.A.* described Warren in 1947 as "a man who has probably never bothered with abstract thought twice in his life." Gunther concluded, "He will never set the world on fire, or even make it smoke."

In reality, Warren had already stirred a national debate when he demanded the internment of some 110,000 West Coast Japanese Americans during World War II. He had been a membe of an anti-Asian organization, the Native Sons of the Golden West. He told a national governors' convention in 1943, "We don't want to have a second Pearl Harbor in California." President Roosevelt had acquiesced in the detentions.

Warren came to regret the decision. He said later, "Now that society in general is so much more aware of civil rights, interning them seems like a terribly cruel thing to do, and it *was* a cruel thing, especially uprooting the children from their schools, their communities and friends,

and having whole families transferred out to a strange environment and a less desirable environment."

Nonetheless, blacks welcomed Warren's nomination. In a 1952 interview with the *Pittsburgh Courier* the widest-circulating national Negro newspaper, Warren declared, "I am for a sweeping civil rights program, beginning with a fair employment practices act. I insist upon one law for all men."

During the 1948 presidential campaign, Warren called repeatedly for the enactment of voting rights and antilynching legislation. A remark made by Frankfurter suddenly took on an eerie prescience. Frankfurter called Vinson's death before the reargument of *Brown* "the first indication I have ever had that there is a God."

But Davis remained optimistic. On the eve of the reargument, he wrote to Justin Moore, "In the language of a famous general, we have got them and they will never get home."

On December 7, 1953, before a packed Supreme Court chamber, the Court began hearing three days of reargument in *Brown.*

Pictured in this photograph are nine members of the Supreme Court that decided Brown v. Board of Education. Seated in the front row (from left) Felix Frankfurter, Hugo Black, Earl Warren, Stanley Reed, and William O. Douglas. In

the back row are Tom Clark, Robert H. Jackson, Harold Burton, Sherman Minton. The photograph was taken late in 1953, after President Dwight D. Eisenhower had nominated Warren to the Court, but before the U.S. Senate had confirmed him as Chief Justice. Courtesy, the Library of Congress, World-Sun & Telegram Collection.

Marshall stood by his research on the Fourteenth Amendment. He asserted that the amendment was clearly intended to "strike down all types of class and caste legislation." Segregation had to be struck down, he insisted, unless it could be shown that the framers had specifically intended to exclude segregation in public education from the class- or caste-based legislation that the amendment was enacted to prohibit.

He reiterated his contention that there is, in effect, no such thing as race and therefore no rational basis for distinguishing between individuals based on race. "Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate," he told the Court. But, he cautioned, "apply it further: make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men, and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation."

From this he concluded that the segregationists "would have to show—and we have shown to the contrary—they would have to show, one, that there are differences in race; and, two, that differences in race have a recognizable relationship to the subject matter being legislated, namely, public education." He asserted, "That is a rule that has been uniformly applied by this Court in all other challenges that a classification is unreasonable."

In his closing argument, he drove the point deeper. "The only way that this Court can decide this case in opposition to our position," he told the justices, "is that there must be some reason which gives the state the right to make a classification...in regard to Negroes, and we submit the only way to arrive at this decision is to find that for some reason Negroes are inferior to all other human beings."

He continued, “In order to arrive at the decision that [the segregationists] want us to arrive at, there would have to be some recognition of a reason why of all the multitudinous groups of people in this country you have to single out Negroes and give them this separate treatment.”

He asserted, “It can’t be because of slavery in the past, because there are very few groups in this country that haven’t had slavery some place back in the history of their groups.”

He went on, “It can’t be color, because there are Negroes as white as the drifted snow, with blue eyes, and they are just as segregated as the colored man.”

He concluded, “The only thing it can be is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.”

Davis rose for what was to be his final appearance before the Supreme Court. Now eighty, he had aged visibly in the year since the first round of oral arguments. His memory had failed somewhat, and he referred to notes throughout his presentation. In addition, his voice no longer carried as once it had. He told the Court, “The horn doesn’t blow as loud as it used to.”

He was compelling nonetheless. Alexander Bickel later recalled, “No one hearing [Davis] emphasize how pervasive and how solidly founded the present order was could fail to be sensible to the difficulties encountered in uprooting it.”

As he had in the first round of oral arguments, Davis stressed that the justices should be guided by established precedents and that segregation was a time-honored practice, sanctioned by past decisions of the Court. He insisted, “Somewhere, sometime to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance.” It was, in Davis’s view, “late indeed in the day” to uproot segregation on any “theoretical or sociological basis.”

He urged the Court to consider the practical consequences of a desegregation order. After all,

it would not only mean that blacks would attend schools where whites were in the majority; it would also mean that some whites would be forced to attend schools that were predominantly black. Referring specifically to Clarendon County, where black public school children constituted the majority, he asserted, “If it is done on the mathematical basis, with 30 children as a maximum...you would have 27 Negro children and 3 whites in one school room.” He asked rhetorically, “Would that make the children any happier? Would they learn any more quickly? Would their lives be more serene?”

He refuted Marshall’s claim that race was not a reasonable basis for making legislative distinctions. “No man,” he declared, quoting the renowned British prime minister Benjamin Disraeli, “will treat with indifference the fact of race. It is the key of history.”

In his conclusion Davis assured the Court of South Carolina’s intention to create equality of educational opportunity for all its residents, black and white, and implied that a desegregation order would jeopardize progress toward that end. He compared Marshall’s position to that of the dog in one of Aesop’s fables: “The dog, with a fine piece of meat in its mouth, crossed a bridge and saw the shadow in the stream and plunged for it and lost both substance and shadow.”

He went on, echoing what he had told the Court in December 1952, “Here is equal education, not promised, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?”

Years later, recalling Davis’s performance that day, Justice Stanley Reed observed, “His argument was outstanding beyond its usual excellence.” But it was Marshall, his position supported by the Justice Department,who carried the day.

At the December 12, 1953, Saturday conference that followed the reargument of *Brown,* Warren spoke first, making his feelings known unequivocally. In his view segregation was intolerable in a modern, democratic society.

“I don’t see how in this day and age we can set any group apart from the rest and say that

they are not entitled to exactly the same treatment as all others," he declared. The post-Civil War amendments were, as he interpreted them, "intended to make the slaves equal with all others." Addressing *Brown* specifically, he said, "Personally, I can't see how today we can justify segregation based solely on race."

He went on to assert that the separate-but-equal doctrine was based on "the concept of the inherent inferiority of the colored race." He challenged any fellow justice who believed blacks were inferior to say so openly. If no one was willing to do so, he called for a unanimous opinion to lend weight to the Court's ruling.

At first, it was not at all clear whether the new chief justice would be able to achieve the desired unanimity. Black, Douglas, Minton, and Murphy sided with him. Clark now leaned toward the NAACP position but, along with Warren and Murphy, wanted to fashion an order that would take into account conditions in different geographic areas, because a desegregation order would surely be met with strong resistance in the South.

Reed appeared still to favor segregation. Frankfurter was not allowing himself to be pinned down. He seemed to have his own ideas about how the decision should be framed, but he was keeping them to himself.

Justice Robert H. Jackson, like Frankfurter, was inscrutable. A New York aristocrat, he had served as Franklin Roosevelt's attorney general, been appointed to the Court by Roosevelt in 1941, and served as chief prosecutor at the Nuremburg trials. Initially a civil libertarian who aligned himself with Black and Douglas, he was by 1953 considered a judicial conservative.

Somehow Jackson wanted to express his view that in striking down the separate-but-equal doctrine, the Court was making a fundamentally political, rather than judicial, decision. He wrestled with the issue, drafting memorandums that indicated he might be preparing his own separate concurrence.

One of Jackson's law clerks during the early 1950s was William H. Rehnquist, an outspoken young conservative who had finished at the top of his class at Stanford University's law school.

Rehnquist went on to become an associate justice, and later chief justice, of the Supreme Court. In December 1952 Jackson had asked Rehnquist to prepare a memo setting forth his views on *Brown* on the eve of the case's first oral argument.

Rehnquist's memo, entitled "A Few Expressed Prejudices on the Segregation Cases," argued that the Court should uphold *Plessy v. Ferguson* and the separate-but-equal doctrine. "To the argument made by Thurgood, not John, Marshall," Rehnquist wrote, distinguishing between the director-counsel of the Fund and America's first chief justice, "that a majority may not deprive a minority of its constitutional right, the answer must be that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are."

Rehnquist continued, "I realize that [this] is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be reaffirmed." He concluded, "If the Fourteenth Amendment did not enact Spencer's *Social Statistics*, it just as surely did not enact Myrdal's *American Dilemma."*

When the memorandum surfaced in December 1971 during Senate consideration of Rehnquist's nomination to the Court, Rehnquist felt compelled to explain his position. In a letter to Senate Judiciary Committee chairman James Eastland, dated December 8, 1971, Rehnquist insisted, "The memorandum was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of his views at the conference of Justices rather than as a statement of my views."

Whatever Rehnquist's role or motives, Jackson himself flirted with a concurrence that would have been, if anything, stronger than the position ultimately taken by the Court. In one internal memorandum, he wrote:

"Since the close of the Civil War the United States has been 'hesitating between two worlds—one dead, the other powerless to be born.' War brought an old order to an end but as usual force proved unequal to founding a new one. Neither North nor South has been willing really

to adapt its racial practices to its professions. The race problem would be quickly solved if some way could be found to make us all live up to our hypocrisies."

Jackson went on to explain racism this way:

"The white South retains in historical memory a deep resentment of the forces which, after conquest, imposed a fierce program of reconstruction and the deep humiliation of carpet-bag government. The Negro is the visible and reachable beneficiary and symbol of this unhappy experience, on whom many visit their natural desire for retaliation."

In conclusion Jackson wrote, "That Negro segregation in the schools has outlived whatever original justification it may have had and is no longer wise or fair public policy is a conclusion congenial to my background and social and political views."

In the end, however, Warren succeeded in marshaling all nine justices behind his draft of a unanimous opinion, which he intended to be "short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory." This is exactly what it was. Warren read it from the bench on Monday, May 17, 1954, to an unsuspecting public and press corps.

Three lawyers, Thurgood Marshall (center), chief counsel for the NAACP's Legal Defense Fund and lead attorney on the Briggs case, with George E. C. Hayes (left) and James M. Nabrit (right), attorneys for Bolling case, standing on the steps of the Supreme Court congratulating each other after the court ruling that segregation was unconstitutional. Courtesy, Library of Congress, World-Telegram & Sun Collection.

It was the practice of the Court to deliver opinions on Mondays, with the author either reading aloud or summarizing the decision from the bench. There were few indications that this particular Monday would be the day for the delivery of *Brown.* Consequently, reporters were caught flat-footed at around one o'clock in the afternoon when Warren announced "the judgment and opinion of the Court in No. 1—*Oliver Brown et al. v. Board of Education of Topeka."* The wire services flashed the news to pressrooms around the country, and hundreds of anxious editors stopped the presses of their editions to await the details of the decision.

Warren read the decision aloud. Much of the text was devoted to a meticulous explanation of the cases' legal and historical background as well as a discussion of the value of public education in a modern society, so no one could be sure which way the Court had decided until he was two-thirds of the way through the fourteen-page opinion. As to the importance of education, he explained:

"Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."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Turnpike Bonds

Supreme Court Refutes Doctrine of Separate but Equal Education

The opinion went on to ask rhetorically, "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?

"We believe that it does," the Court declared. "To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to

be undone."

The decision quoted from the earlier decision of the Kansas court, which, despite its own findings of fact, ruled against the black plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial [ly] integrated school system."

Embracing the sociological perspective argued by Marshall, the Court declared, "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson* [the Kansas court's] finding is amply supported by modern authority."

In a footnote that was to divide generations of legal scholars over the question of how much weight should be accorded authorities that are not, strictly speaking, legalistic, the Court cited as support for its proposition a number of sociological sources, including Kenneth Clark's work and Gunnar Myrdal's *An American Dilemma.*

In conclusion the justices declared, "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

With this much said and done, the Court announced that it would hear reargument of the case in order to determine the appropriate remedy. On May 31, 1955, this would result in a decree that states must abolish segregation in their public education systems "with all deliberate speed."

After the decision Marshall said, "I was so happy I was numb." Not so for John W. Davis. He congratulated Marshall on the afternoon of his victory, although Davis's personal opinion was that the decision was "unworthy of the Supreme Court of the United States." Within a year of

the Court's final ruling, Davis was dead. One of his law partners said that the Court's decision in *Brown* killed him.

THREE

Massive Resistance

John Marshall has made his
decision, now let him enforce it.
—President Andrew Jackson

A black reporter described Monday, May 17, 1954, the day the Court delivered the unanimous opinion in *Brown,* as "the day we won; the day we took the white man's law and won our case before an all-white Supreme Court with a Negro lawyer. And we were proud."

Felix Frankfurter, in a personal note to Chief Justice Warren, said it was "a day that will live in glory." He added, "It is also a great day in the history of the Court." Justice Harold Burton, also in a note to Warren, called it "a great day for America and the Court." The justices' law clerks remembered it as a day on which they felt "good—and clean. It was so good."

Marshall himself saw the day as a turning point. The *Brown* decision, he said, "probably did more than anything else to awaken the Negro from his apathy to demanding his right to equality." He expressed a fervent optimism that integration would proceed in compliance with the Court's ruling.

"I think that, even in the most prejudiced communities, the majority of the people has some respect for truth and some sense of justice, no matter how deeply it is hidden at times," he told *Courier* magazine in August 1954. "If we keep up the educational process, as well as the legal suits, I have no doubt of our eventual victory. We now have the tools with which to destroy all govern-mentally imposed racial segregation. To hear some people talk, one would get the impression that the majority of Americans are lawless people who will not follow the law as interpreted by the Supreme Court. This simply is not true."

He believed the NAACP's ultimate goal was "to go out of business with a realization that race

is no longer a problem." But he made clear the goal could be achieved without forcing unwanted integration on private clubs or associations. Solving the race problem, he maintained, "doesn't mean a man is not to determine who comes into his home, or his country club. There are lots of people I don't want around my house."

In his interview with *Courier*, Marshall reiterated his abiding faith in the American legal system. "Lawsuits bring home to many people the fact that Negroes have rights as Americans which must be respected." At the same time, he cautioned, "We have made tremendous inroads in the South, but this does not mean that the battle is won."

"Some states will take longer than others," he told *U.S. News & World Report*. "The length of time, I wouldn't predict. Mississippi, Alabama, South Carolina and Georgia will take quite a while. I don't think Virginia will take long."

Unfortunately, the triumph was soon dimmed by Buster's death. She died on Friday, February 11, 1955, her forty-fourth birthday, in the Marshall's apartment at 409 Edgecombe Avenue in New York City.

Marshall had learned of Buster's terminal cancer in late 1954. Theirs was a loving and devoted marriage of twenty-five years, and was devastated by his wife's prognosis. Upon being told of her imminent death, he almost collapsed. For the next month and a half, he curtailed his NAACP activities and locked himself in their Harlem apartment, fixing meals and changing bedpans. He declined to see even his closest friends. "She would have done the same thing for me," he explained.

When she died, he said, "I thought the world had come to an end." Nevertheless, he remarried eleven months later, in December. Cecilia Suyat, "Cissy" to friends, was a diminutive woman of Filipino ancestry. Born on the Hawaiian island of Maui, she grew up in Honolulu. She moved to New York City in 1947 and, through the state employment agency, got a job as a secretary at the NAACP headquarters.

Shortly after Cecilia and Thurgood met, she wrote home to inform her family of her desire to

remain in New York. Her father replied, “By all means [stay], as long as you are self-supporting.” She completed a secretarial course at Columbia University, and her ambition was to become a court reporter. She recalled, “I wanted to learn how to use a stenotype. I would enjoy working.” But when Thurgood asked her to forgo her career for the life of a housewife and mother, she agreed. Cissy found satisfaction in providing what she called “a restful, peaceful, comfortable home.” The marriage produced two children: Thurgood Jr. and John, named after his grandfather Juan Suyat.

Cissy was called upon to share her kitchen with her husband, who still loved to cook. “I don’t mind it at all,” she once said. “He finds it relaxing. Heaven knows what goes in the pot, but it comes out delicious!” He soon taught her his culinary specialties. For “Turkish Delight,” which he also referred to as “creoled macaroni,” he simmered peppers and onions with bacon or salt pork, then added tomatoes, stuffed olives, and cheese, served with macaroni. In turn, he began to enjoy her favorite recreational activity, bowling.

Because the marriage took place so soon after his first wife’s death, around the Harlem cocktail circuit there was gossip that Cissy and Thurgood had started their romance while he was married to Buster. But Ersa Poston, who was married to Ted Poston, recalled, “Cissy was a beautiful woman, and they married soon after Vivian’s death because the ‘death etiquette’ at that time set six months as a reasonable time for remarriage. Thurgood was one of those men who needed to be married, and Cissy was very much like Vivian. She knew Thurgood was engrossed with the NAACP, and he had to make the Legal Defense Fund work.”

Ersa Poston continued, “He was a very handsome man, and women flocked around him. Women always wanted to get to know the leader and say they slept with him, but Thurgood passed all that by. It was human nature on the part of the women, like the women who follow today’s rock stars. Thurgood had a way of warming up to people. He never let anyone feel they were a stranger. He told jokes that everyone laughed at.

“Without being disparaging, some men are meant to be married. Some men need women to

take care of things, to organize their personal life, take care of the laundry and dry cleaning and when you come home the food is there and all you have to do is sit down and eat. Thurgood was so involved with his work that he was that kind of guy.

"Cissy, like Buster, provided the support Thurgood needed, and her cultural background made that possible. She didn't need to be in the limelight," Poston explained. "She brought an order to his life. When a partner dies you don't just lay down and die. In our social circle we saw no indication of an affair before Buster's death. But Cissy did fill a void in his life after the death of his first wife."

His victory in *Brown* secured, his period of mourning behind him, and his new life's companion at his side, in September 1955 Marshall left for a few days of rest and relaxation in Florida and Cuba. "I'm going to Havana," he told *Time* in an interview for the magazine's September 19 cover story. "Never been there; hear they treat a man fine." It was his first vacation in eight years.

Upon his return the NAACP embarked on one of the most massive litigation programs ever undertaken, designed to force compliance with the *Brown* decree. Marshall called the strategy "gradualism," which he defined as "working out integration problem by problem until it is finally achieved," without resorting to violence or illegal acts.

Chief counsel for the NAACP Thurgood Marshall spoke to the press in New York City on May 31, 1955 after the Supreme Court decreed an end to public school segregation as soon as feasible. At the news conference in New York City, Marshall told reporters ". . .the law had been made crystal clear" and added, "Southerners are just as law abiding as anyone else, once the law is made clear." He was speaking after Brown II, the court's second opinion in the Brown case, which ordered the implementation of the original ruling in a "prompt and reasonable" start towards desegregation. Courtesy, Library of Congress, World-Telegram & Sun Collection.

On March 12, 1956, nineteen southern Senators and sixty three Southern Congressmen signed a manifesto declaring their opposition to the *Brown* decision, described as "an unwarranted exercise of power by the Court, contrary to the Constitution." The justices were accused of having "substituted their personal political and social ideas for the established law of the land." The document concluded with a pledge by its signers "to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution and to prevent the use of

force in its implementation."

On May 13, 1956, Marshall addressed an NAACP fund-raising rally at the Memoria Auditorium in Raleigh, North Carolina, declaring, "We are still willing to negotiate [with local officials] as to when and how desegregation will take place." But he added, "We shall not negotiate as to *whether* it will take place."

Acknowledging the resistance to the Court's desegregation order, he warned his twenty-five hundred listeners, "There can no longer be any reason to hope for compliance [with the *Brown* decision] without going to the courts." Drawing an enthusiastic response, he continued, "We shall resort to the courts and ballot when there is no other way to work out integration. And we shall do this peacefully, lawfully, and in the true American tradition."

In a September 1956 interview with *Newsweek* magazine, he described the NAACP's litigation strategy. "If the local [NAACP] offices run up against a brick wall, they take the problem to the state conference of the NAACP. If the conference agrees with the local's judgment, the case is referred to me. If I think it advisable, we go into the courts." He continued, "In some places...the local office will have a friend on the school board. This friend will say to them: 'I don't have a majority now, and if you people come in, I'll never get one. Lay off for a while and I think I can work it out.' So the local office lays off."

He explained, "In some situations legal action is called for, in others it would serve no useful purpose. The NAACP has brought no legal actions in public schools in Mississippi or Alabama and few in Georgia or South Carolina. It has a number in Virginia, Tennessee, and others."

He tempered his conciliatory tone with a warning: "I'm the original gradualist. But let's make sure what we're talking about. If by gradualism you mean a policy of doing nothing, letting things drift and hoping for the best, I'm dead-set against it."

Meanwhile, desegregation proceeded in fits and starts. There was unexpectedly smooth progress in some areas, a disappointing lack of progress in others. In Missouri, where Marshall and Houston had won the historic *Gaines* ruling almost twenty years earlier, requiring the first

admission of an African American to the University of Missouri's law school, integration of the public schools occurred virtually without incident. In West Virginia, John W. Davis's home state, integration had begun in most counties even before the Court issued its "with all deliberate speed" implementing decree in May 1955. Marshall's native Baltimore proceeded with desegregation plans, as did Washington, D.C.

The Old Confederacy, however, took up arms against the Court, its most prominent political figures vowing to fight the Court's order county by county, school district by school district. In a November 1955 interview with *U.S. News & World Report*, Senator Sam J. Ervin of North Carolina called the *Brown* decision contrary to the laws of nature. "Every day they thunder at us that racial segregation is merely the product of racial prejudice," he complained "I do not believe this. In my opinion, men segregate themselves in society according to race in obedience to a basic natural law, which decrees that like shall seek like. Wherever and whenever people are free to choose their own associates, they choose members of their own race."

In a companion interview, Senator John C. Stennis of Mississippi declared, "The overwhelming majority of the people in most areas of the South do not want to integrate our schools. They will oppose to the utmost any effort to do so."

According to Stennis, the southern opposition was rooted in the fear that school desegregation would eventually lead to interracial marriage, which some southern states legally prohibited by laws that the 1967 Supreme Court ruling in *Loving v. Virginia* would finally overturn. Stennis insisted, "One of the most compelling reasons [for the opposition to desegregation] is the deep realization that placing the children side by side over the years in primary, grammar and high-school grades is certain to destroy each race. I don't know how many generations that would take. And we all believe that the bloodstream—the racial integrity of each group—is worth saving." He defiantly predicted a "generation of lawsuits."

Marshall found the argument ludicrous. "I think there is no foundation for it at all," he said. "I don't see any connection between that [interracial marriage] and schooling."

"On the other hand," he continued, "I don't think there should be laws against intermarriage. It's a purely personal problem, and the state has nothing to do with it. After all, the white person can say no."

He went on, "This intermarriage thing has been raised in everything we've tried to do." Southerners even used it as an excuse for barring blacks from voting in primary elections, claiming that blacks and whites standing in line together at polling places would form acquaintances that would lead to interracial sex. "There aren't any figures to back it up," Marshall explained. "Even where intermarriage is permitted by law, the number is insignificant."

"But," he conceded, "in the South, it's deep in their minds."

The Deep South's official policy of opposing school integration became known as "massive resistance" or "interposition." The latter term, taken from the period following the ratification of the U.S. Constitution, referred to the view that a state government had the right to interpose itself between the federal government and the state's citizens whenever Washington pursued a policy deemed by the state government to be unconstitutional. In Arkansas, for example, a state constitutional amendment was passed in 1956 calling upon the legislature to oppose "in every constitutional manner the unconstitutional desegregation decisions of...the United States Supreme Court." Not since the Civil War had the federal system come under such attack.

Moreover, by 1956 citizens had begun to take the law into their own hands. Rural areas saw a resurgence of the Ku Klux Klan, which traditionally drew its membership and support from uneducated, lower-class whites. And white business leaders across the South drew together to form what became known as White Citizens Councils, a sort of white-collar Klan, for the specific purpose of making it "difficult, if not impossible, for any Negro who advocates desegregation to find and hold a job, get credit, or renew a mortgage."

The NAACP itself came under attack. A number of states passed laws aimed at forcing the

organization to make public its membership and contributors' lists, information that could be used to target NAACP supporters for retaliation.

This threat in fact hampered the NAACP's desegregation drive. In 1957 NAACP membershi stood at around 350,000. The organization's income from dues and contributions totaled approximately $1,284,189. Of this amount, $682,906 was earmarked for the parent organization, $250,000 for the local branches, and $351,283 for the Fund. The totals represented a decline in both membership and contributions from the previous year. And the declines came at a time when the organization was matched against opponents whose litigation expenses were paid from state coffers.

There were beatings and lynchings. One of the most notorious incidents occurred in Mississippi in August 1955. Chicago teenager Emmett Till was dragged from the home of relatives he had been visiting, brutally beaten, and murdered because he had supposedly flirted with a white woman. The ghastly sight of the boy's mutilated corpse, displayed in an open casket at his Chicago funeral, shocked the nation. His accused murderers were acquitted by an all-white jury. One of the defendants, J. W. Milam, the woman's brother, explained, "I'm no bully. I never hurt a nigger in my life. I like niggers in their place. I know how to work 'em. But I just decided it was time a few people got put on notice."

The schools themselves became flash points for white rage. The riot in Sturgis, Kentucky, was typical. When nine black high schoolers attempted to enter previously all-white Sturgis High on opening day in September 1956, they were met by a mob of five hundred whites shouting, "Nigger, stay home!" Governor A. B. "Happy" Chandler dispatched national guardsmen to the scene. The next day, the guardsmen, bayonets drawn, escorted the blacks through the jeering rabble. But the following day the blacks did not show up for school.

Similar incidents were reported in locales as diverse as Clay, Kentucky; Oliver Springs and Knoxville, Tennessee; and Matoaka, West Virginia. But nowhere else did the situation escalate to the level that was reached at Central High School in Little Rock, Arkansas.

Ironically, the racial climate in Little Rock was more open than in a great many southern cities. Blacks served on the police force, public facilities and transportation were integrated, and in a number of residential areas blacks and whites lived comfortably side by side. Influential businessmen, such as Winthrop Rockefeller, head of the Arkansas Industrial Development Commission, worked hard to avoid racial strife in order to foster a climate conducive to northern investment. But Governor Orval Faubus saw the race issue as a boon to his 1956 drive for a third two-year term. He exploited its vote-getting potential.

A little man with black, slicked-back hair and a wide grin, Faubus was a matchstick-chewing hick. In his youth he survived as best he could as a sharecropper and logger. To his credit, he possessed wily gumption, and though he lacked formal education, he could write. During World War II, he served in the infantry and was awarded the Bronze Star for bravery. He earned the nickname "Ernie Pyle of the Ozarks" for the war stories he sent home from the front for publication in local newspapers.

Faubus gravitated toward politics, and sometime after the war his editorial writing inspired Arkansas governor Sid McMath to hire him as his administrative assistant. Referring to Faubus's penchant for controversy, McMath once commented, "I brought Orval down out of the hills, and every night I ask forgiveness."

At the outset of his career, Faubus did not behave like a racist. In fact, he was thought to be rather fond of Negroes. He integrated the state transportation system early in his tenure as governor, and he increased the number of black employees in the state government. He appointed the first blacks to serve on the Democratic state committee and tried to have the whites-only primary abolished. By 1955, however, Faubus no longer found tolerance expedient.

Little Rock school officials responded to the 1954 *Brown* decision with, if not enthusiasm, then at least begrudging acceptance. In fact, the local school board adopted a desegregation plan in May 1955, before the Court handed down its implementation decree. Under the scheme, which became known as the "Blossom Plan," after Little Rock school superintendent Virgil T. Blossom,

Central High School in Little Rock was to be desegregated immediately, meaning in the fall of 1955. Other schools would be desegregated on a delayed basis, beginning in September 1957.

The local NAACP, headed by attorney Wiley Branton, objected to any delay in implementing the Court's desegregation order. But the board insisted on proceeding with caution. "Since our school system has been segregated from its beginning until the present time," school officials explained, "the time required in the processes as outlined should not be construed as unnecessary delay but that which is justly needed with respect to the size and complexity of the job at hand." The board wanted to integrate first at the high school level, with the oldest and therefore most mature students, then use that experience as a guide for implementing desegregation at the lower levels. By so doing, it would have "the opportunity to benefit from our own experience as we move through each phase of this plan, thus avoiding as many mistakes as possible."

Branton filed suit in U.S. district court to force the total and immediate desegregation of Little Rock's schools. Branton recalled, "It became rather obvious to the NAACP that the Little Rock board really was not going to move forward unless they were forced to. I filed that suit on behalf of Negro children and their parents, running through elementary, junior, and senior high school."

The suit was dismissed by U.S. district court judge John E. Miller, who found that the Blossom Plan represented an "utmost good faith" effort to integrate. Branton then enlisted Thurgood Marshall's help in appealing Miller's ruling to the U.S. Court of Appeals for the Eighth Circuit. The appeals court held that the Blossom Plan satisfied the Supreme Court's "deliberate speed" requirement. At the same time, the court made clear that it would countenance no further delays by school officials.

Marshall and Branton decided against an appeal to the U.S. Supreme Court. "We thought the [Blossom Plan] was...pretty sloppy," Branton said, "and we didn't want to run the risk of having the court adopt that one as a model for the nation."

Whatever good intentions the school board might have had were undermined by Faubus's intervention. Threatened by the growing popularity of gubernatorial candidate James Johnson, sponsor of the amendment to the state constitution that mandated opposition to court-ordered desegregation, Faubus made his move. He persuaded a private citizen's group, the newly formed Mothers' League of Little Rock Central High, to sue in state court in Pulask County to enjoin implementation of the school board's integration plan.

Faubus himself took the stand to testify that Arkansans were now solidly opposed to integration and that violence would likely result if blacks entered Central High. He warned ominously that a number of guns and knives had already been confiscated from students, black and white, who anticipated racial clashes.

Out of deference to Faubus, state trial judge Murray O. Reed ruled in favor of the Mothers' League. "In view of the testimony and the show of the threat of violence, riots, and bloodshed, and particularly the opinion of Governor Faubus," he declared, "I feel I can only rule to grant the injunction."

Federal courts supersede state courts on constitutional questions, such as the right to an equal education, and Marshall and Branton persuaded Judge Davies of the U.S. district court to nullify the state-court injunction. It looked, therefore, as if Central High's desegregation would proceed as planned.

Not so. In a startling act of defiance, Faubus appeared on statewide television on the evening of September 2, 1957, the day before school was scheduled to open and, citing "evidence of disorder and threats of disorder," announced the dispatch of 250 national guardsmen to Central High. It became clear almost immediately that those troops were not sent to protect the nine black students who would attempt to enter Central High the following morning from the anticipated mob of angry whites. Instead, the troops were in place to turn the blacks away and thereby prevent them from exercising their constitutional right to an equal education. Faubus vowed that if the blacks attempted to enter, "blood will run in the streets."

In an interview with *Time* magazine in September 1955, Marshall spoke of his admiration for his clients. “There isn’t a threat known to man that they do not receive. They’re never out from under pressure. I don’t think I could take it for a week. The possibility of violent death for them and their families is something they’ve learned to live with like a man learns to sleep with a sore arm.”

In Little Rock the brunt of the threats and pressure was borne by a woman named Daisy Bates, president of the Arkansas NAACP, by nine black teenagers, and by their parents hoping for successful integration of Central High.

Little Rock Nine and Daisy Bates posed in living room. Undated. Courtesy, the Library of Congress.

At the beginning of the school controversy, Bates was optimistic. She called Little Rock “a liberal southern city.” Her opinion changed a year later when a brick was thrown through her living-room window with a note attached: “Stone this time. Dynamite next.” But her resolve remained unshaken. On the evening of September 3, 1957, she spoke with parents of eight of the nine youngsters and arranged to escort the children to Central High, accompanied by two Little Rock police cars.

The ninth child, Elizabeth Eckford, whose parents Bates had failed to reach by phone the night before, traveled to school by bus, unescorted. Arriving before the others, she was set upon by a jeering mob. She heard someone yell, “No nigger bitch is going to get in our school. Get out of here!”

“I tried to see a friendly face somewhere in the mob,” she recalled. “I looked into the face of an old woman, and it seemed a kind face, but when I looked at her again, she spat on me.” She turned to the guardsmen for protection. Instead, one of them let white students pass through the ranks into the school but blocked her entrance. “I walked up to the guard who had let them [the whites] in. When I tried to squeeze past him, he raised his bayonet, and then the other guards moved in and raised their bayonets.”

Federal troops escorting Black Students from Little Rock High School. Courtesy, Library of Congress.

Crowd of students, the public, and 101st Airborne and National Guard troops waiting outside Central High School, Little Rock, Arkansas. September 5, 1957. Courtesy, Prints and Photographs Division, Library of Congress.

She heard cries of "Lynch her! Lynch her!" When she ran back to the bus stop, she heard someone shout, "Drag her over to the tree." Just then two whites intervened to avert what might have turned into a lynching. Benjamin Fine, covering events for the *New York Times,* and a local woman escorted Eckford away from the mob and to safety.

Meanwhile, Bates and the others heard over the radio that a black student had been attacked. They proceeded to the school, anyway, but were turned away by national guardsmen when they attempted to enter.

The unrest forced President Eisenhower's hand. Until Little Rock, Ike had skirted the school desegregation issue in a manner that was wholly characteristic of his approach to other crises, pretending that everything was normal and going about business as usual. His instinct was to distance himself from trouble and let things work themselves out.

Besides, he was ambivalent about civil rights. On the one hand, he gave free rein to the Justice Department to take the NAACP's side after the first round of oral arguments in *Brown*. In

addition, he held the right to vote sacred and would find it “bitterly disappointing” when, in August 1957, the Senate passed an emasculated version of his civil rights bill, which was originally intended to make it easier for the Justice Department to prosecute voting-rights denials. He termed the Senate action “one of the most serious political defeats of the past four years, primarily because it was such a denial of a basic principle of the United States.”

At the same time, he refused to assert the moral authority of his office to urge peaceful desegregation of the schools. For this reason, Supreme Court Justice William O. Douglas blamed Ike for much of the violent resistance to the Court’s desegregation orders. “There was tragedy in [Eisenhower’s] attitude,” Douglas wrote in his autobiography, “for if he had gone to the nation on television and radio telling the people to obey the law and fall into line, the cause of desegregation would have been accelerated. Ike was a hero, and he was worshiped,” Douglas explained. “Some of his political capital spent on the racial cause would have brought the nation closer to the constitutional standards. Ike’s ominous silence on our 1954 decision gave courage to the racists who decided to resist the decision ward by ward, precinct by precinct, town by town, and county by county.”

Eisenhower may indeed have emboldened Faubus and others, wittingly or not, when he told a press conference in July 1956, “I can’t imagine any set of circumstances that would ever induce me to send federal troops into any area to enforce the orders of a federal court.” He qualified the remark by adding, “I believe that [the] common sense of America will never require it.” But then he undercut the qualification: “I would never believe that it [sending in Federal troops] would be a wise thing to do in this country.”

A reporter asked Marshall whether Faubus’s actions represented a direct challenge to the authority of the federal government. He replied, “I don’t think there’s any question about that.” Despite his reservations, Eisenhower certainly saw it that way and was compelled to act.

In 1832, when President Andrew Jackson disagreed with a Supreme Court ruling that protected Cherokee Indian lands from encroachment by the state of Georgia, he commented

sarcastically, “John Marshall has made his decision; now let him enforce it.” John W. Davis reiterated the sentiment in one of his darker moments after his defeat in *Brown*. But Eisenhower was not so cynical about his role as chief executive, charged with enforcing the laws of the land. He wrote to a friend, “There must be respect for the Constitution—which means the Supreme Court’s interpretation of the Constitution—or we shall have chaos.” He vowed, “This I believe with all my heart—and shall always act accordingly.”

The president began by summoning Faubus to Newport, Rhode Island, where he was vacationing with his wife, Mamie, at a U.S. naval base. After lengthy discussions in which several other southern governors also participated, Faubus went before reporters on September 14, with Eisenhower looking on. He was supposed to issue a statement that had been agreed upon, and he did: “I have never expressed any personal opinion regarding the Supreme Court decision of 1954 which ordered integration. That is not relevant. That decision is the law of the land and must be obeyed. I now declare that I will assume full responsibility for the maintenance of law and order and that the orders of the Federal court will not be obstructed...”

But then Faubus tacked on two little words that were not part of the deal: “...by me.” The words left room for all kinds of unofficial maneuvering that Faubus could instigate or inspire but personally disavow. Eisenhower felt betrayed.

Marshall and Branton went back into federal court on Friday, September 20, and asked Judge Davies to order Faubus to relent. Davies ordered Faubus to withdraw the national guard. The governor complained but in a speech broadcast across the state, announced that he would comply. He demanded, however, that blacks not attempt to enter Central High until the situation calmed down.

But Daisy Bates and the nine high schoolers were not deterred. On Monday, September 23 they gathered at Bates’s house to ride to school together. An angry mob waited to greet them at Central High. When a carload of black newspapermen arrived ahead of the children, they

were attacked and beaten by the whites as local police looked on. While the crowd's rancor was focused on the reporters, the black students were hustled into the school through a side door. When the mob realized what had happened, it vented its rage on white journalists and photographers assigned to cover the events, assaulting them and smashing their cameras. Eventually, the blacks were removed from the school under police escort because authorities concluded they could no longer ensure the students' safety.

The next morning, when an unruly crowd of about two thousand gathered at the school, Little Rock mayor Woodrow Mann sent a desperate telegram to the president, formally requesting his help: "The immediate need for Federal troops is urgent.... Situation is out of control and police cannot disperse the mob."

Convinced that he had run out of options, Eisenhower reluctantly issued the order. By nightfall a thousand paratroopers from the U.S. Army's elite 101st Airborne Division, under the command of Major General Edwin A. Walker, had flown into Little Rock from their base in Fort Campbell, Kentucky. That night the president addressed the nation by television from the Oval Office. He conveyed his "sadness" over having to dispatch the troops. But he declared the firmness of his intentions.

> In [Little Rock], under the leadership of demagogic extremists, disorderly mobs have deliberately prevented the carrying out of proper orders from a federal court....Whenever normal agencies prove inadequate to the task...the president's responsibility is inescapable....Our personal opinions about the decision have no bearing on the matter of enforcement...Mob rule cannot be allowed to override the decisions of our courts....The foundation of the American way of life is our national respect for law.

In the morning a detachment from the 101st escorted the nine black students from Daisy Bates's house to school. When the whites moved forward against the blacks, they were dispersed by paratroopers, who advanced with drawn bayonets.

Over the coming weeks, the black students endured taunts, threats, and insults, but the desegregation of Central High School proceeded without violence. In November 1957 the last

federal forces were withdrawn.

Racial tension persisted, prompting the Little Rock school board to sue in federal court in February 1958 to delay desegregation for two and a half years. This time, a U.S. district court judge granted the school board's request for an injunction, finding the situation "untolerable" (sic). As the basis for his ruling, the judge cited "tension and unrest among the school administrators, the classroom teachers, the pupils, and the latter's parents, which inevitably had an adverse effect upon the educational program."

Marshall and Branton appealed the ruling to the U.S. Court of Appeals for the Eighth Circuit demanding that school integration proceed as planned. The appeals court held in their favor but stayed its own order so that the matter could be appealed directly to the U.S. Supreme Court by the Little Rock school board. The justices agreed to cut short their summer recess in order to hear the case, *Cooper v. Aaron*, in special session on September 11, 1958.

Marshall urged the justices to hold that public hostility to the Court's desegregation orders could not be used as an excuse by public officials to avoid integration. His brief stated, "This Court and other courts have consistently held that the preservation of the public peace may not be accomplished by interference with rights created by the federal constitution."

He gave no credence to Arkansas officials' contention that state authorities were incapable of maintaining law and order in the face of white resistance. Nor was he put off by threats to close the schools. "Even if it be claimed that tension will result which will disturb the educational process," he asserted, "this is preferable to the complete breakdown of education which will result from teaching that courts of law will bow to violence."

He concluded, "This case affords this Court the opportunity to restate in unmistakable terms both the urgency of proceeding with desegregation and the supremacy of all constitutional rights over bigots—big and small."

The justices met in conference immediately following the close of oral argument. To emphasize their impatience with any further delay in implementing *Brown*, they issued a *per*

curiam order, meaning a simple directive that includes no discussion of legal issues, the following day. The *per curiam* affirmed the Eighth Circuit appeals court; the Little Rock school board was at fault for delaying desegregation.

A complete opinion followed on September 29. In an unprecedented move designed to lend it weight and credibility, the decision was signed by all nine justices. The message was clear: Since arriving at the unanimous ruling in *Brown* four years earlier, none of the justices had wavered in their determination that the nation's schools be desegregated.

The opinion was written by Justice William Brennan and contained an impassioned defense of the federal system of government established under the U.S. Constitution. Under that system the federal courts, not the states, have preeminent power to interpret the Constitution.

Brennan used language suggested by Justice Black to state that by delaying desegregation Arkansas officials were not only depriving blacks of their right to an equal education; they were also posing a direct challenge to our constitutional form of government. He wrote, "As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It squarely presents a claim that there is no duty on state officials to obey federal court orders resting on this Court's deliberate and considered interpretation of the United States Constitution."

He continued, "Specifically, it involves actions by the Governor, Legislature, and other agencies of Arkansas... that they are not bound by our holding in *Brown*...that the Fourteenth Amendment forbids states to use their governmental powers to bar children from attending schools which are helped to run by public management, funds or other public property."

Brennan went on, "We are urged to permit continued suspension of the Little Rock School Board's plan to do away with segregated public schools until state laws and efforts to upset [the ruling in *Brown*] have been further challenged and tested in the courts."

He declared, "We have concluded that these contentions call for clear answers here and now."

The answers could not have been clearer. Referring to the oath of office public officials are required to take, Brennan declared,

"No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."

Brennan considered the Little Rock school board's claim that hostile white resistance made it impossible to move forward with desegregation. He rejected it out of hand, stating, "The constitutional rights of [black] respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and the Legislature....Law and order are not to be preserved by depriving the Negro children of their constitutional rights."

He blamed the hostility and resistance on the government of Arkansas: "The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action." This being the case, he went on, "the controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'state' shall deny to any person within its jurisdiction the equal protection of the laws."

He concluded, "The *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'"

Marshall had won. But even this forceful ruling failed to put matters to rest. A little more than a year after the Court issued its decision in *Aaron v. Cooper*, Arkansas's handling of racial matters was back before the justices, framed this time as *Aaron v. Faubus*.

Within days of the Court's ruling in *Cooper*, Faubus persuaded the Arkansas legislature to cut off funding for integrated schools. In addition, integrated schools were ordered closed for the remainder of the 1958-59 school year. When these actions were struck down at the U.S. district court level, the state appealed. Yet again Marshall and Branton found themselves before the Supreme Court, in October 1958, urging the justices to hold the line against Faubus.

They did, issuing another *per curiam* order upholding the district court and requiring the schools' reopening. The desegregation of Little Rock's schools finally proceeded peacefully as planned.

From London, the *Economist* prophesied that "like the Roman general [Fabian] whose name so closely resembles his own, Mr. Faubus may one day be commemorated by a reference in a military lexicon: Faubian tactics, or the techniques of fighting a losing battle in such a way as to cause the greatest loss to all concerned."

By the end of the decade, Marshall had argued seven major cases before the Supreme Court that resulted from resistance to, or unwillingness to enforce, *Brown*. He won all of them. In addition the Court used the *Brown* ruling as the basis for requiring the desegregation of public parks and recreational facilities, local transportation, and professional athletics.

Marshall's gradualism successfully eliminated government-sanctioned segregation from most aspects of American life. But as the 1950s drew to a close, the primary focus of the civil rights struggle shifted from the courtrooms to the streets. The well-reasoned legal brief contended for center stage with the strategies of direct action and civil disobedience. Marshall would play a key role in those activities as well.

FOUR

Civil Disobedience Versus the Old Guard

> I think Thurgood Marshall had this abiding concern that we didn't need to continue to put ourselves in harm's way. I think that, more than anything else, was his idea. He wasn't saying be "patient" and "wait," he was just saying that this is the way that he would do it, through the courts, and that we didn't need to have people spitting on us, pulling us off lunch-counter stools, and putting lighted cigarettes out in our hair.
>
> —Congressman John Lewis

On the U.S. Supreme Court Building's east pediment, a marble carving depicts Aesop's fable of the plodding, persistent tortoise who defeats the faster, more erratic hare in a race. Perhaps it is there to remind us that the Court moves more slowly, but more surely, than Congress. But the carving is also an appropriate analogy of events that took place in the late 1950s and early 1960s, as emerging civil rights organizations, such as the Southern Christian Leadership Conference, the Student Nonviolent Coordinating Committee, and the Congress of Racial Equality, grew impatient with the NAACP's use of legal gradualism as a tool of deliverance.

The catalyst for the conflict began on December 1, 1955, in Montgomery, Alabama when Rosa Parks, a forty-two-year-old black seamstress, took a seat on the Cleveland Avenue bus. Driver J. B. Blake ordered Parks and three other black riders to relinquish their seats to standing white passengers.

"Y'all better make it light on yourself and let me have those seats," he threatened. The other black passengers moved to the rear of the bus, but Rosa Parks refused to give up her seat to a

white man.

"When he saw me still sitting," Parks said, "he asked if I was going to stand up, and I said, 'No, = not.'"

Parks, a secretary at the local branch of the NAACP, was taken to jail. When NAACP branch secretary E. D. Nixon called to inquire about Parks, the police would not answer his questions. "They wouldn't even confirm that she had been arrested," Nixon said. Clifford Durr, a white NAACP attorney, telephoned the jail and was told Parks had been charged with violating Montgomery's bus segregation laws.

Some white local officials assumed Rosa Parks's defiance of Montgomery's laws and customs mandating that black riders sit in the back of the bus was instigated by the local branch of the NAACP. Others claimed she was the unwitting instrument of Communists seeking to parade the country's racial strife as a failed example of American democracy. Neither supposition was true. Rosa Parks simply personified black America's growing discontent and despair with segregation and discrimination.

Outraged, Jo Ann Robinson, a civic leader, and other black Montgomery women called their ministers the evening of Parks's arrest, a Thursday. They demanded some kind of public protest. A mass meeting was called for Friday night by Rev. L. Roy Bennett, an NAACP official, and a plan was made to begin a boycott of the buses Monday morning. Most of the city's bus riders were black. The ministers agreed to tell their parishioners about the proposed boycott from their pulpits Sunday morning. Montgomery did not have a black-owned radio station, so the task of spreading the word quickly to the city's fifty thousand black citizens proved a formidable one.

The twenty-seven-year-old pastor of Montgomery's Dexter Avenue Baptist Church agreed to use his church's facilities to mimeograph tracts and spread them throughout the city that weekend. His name was Martin Luther King Jr. King had preached his first sermon at the church only eighteen months earlier, on May 17, 1954. He had come to Montgomery from Atlanta after

deciding— much to the displeasure of his father, Martin Luther King Sr.—not to become associate pastor at the senior King's Ebenezer Baptist Church. King's wife, Coretta, was also unhappy with her husband's decision to move to deeply segregated Montgomery. In Boston, while her husband earned a graduate degree at Boston University's School of Theology, Coretta King, a graduate of Antioch College, had been a soloist in performances at the New England Conservatory. She sang in the choir of a white Presbyterian church there and had many white friends. In Atlanta she had participated in many social and cultural events at the Atlanta University Center and taken part in musical programs at her father-in-law's church. Atlanta, though not as culturally attractive for her as Boston, was still better than Montgomery. She knew life would be much different for her in segregated Montgomery. But King convinced Coretta to move to Montgomery with him after promising her they would only be there about two years.

Three weeks before Parks's arrest, King had rejected the presidency of the Montgomery NAACP branch because he felt he had not been in the city long enough to become a community leader. In his failed effort to convince his son to remain in Atlanta, King's father had warned that Montgomery's black religious leadership would not take kindly to a young minister from Atlanta with a theological degree from a white northern college.

Thirty-five thousand fliers were distributed over the weekend. "Don't ride the buses to work, to town, to school, or anywhere," they urged. A fleet of private automobiles was organized Sunday night to carry the boycotters to work Monday morning. The ministers formed the Montgomery Improvement Association (MIA) that week to conduct the boycott, and King agreed to direct it. The MIA's initial objective was not to end segregation on city buses, and this approach conflicted with the NAACP's standard policy of attacking segregation without qualifying reservations. The MIA's demands were simple. It wanted black riders treated with respect by white bus drivers. It wanted riders seated on a first-come basis, with black passengers seated from the back toward the front and white riders seated from the front

toward the back. It asked for the employment of black drivers on routes serving predominantly black neighborhoods. On instructions from its national headquarters, the Montgomery branch of the NAACP refused to take a formal role in the boycott because the MIA was not calling fo an end to segregated seating. But the city's NAACP members decided to join the boycott as individuals.

In a church basement meeting, five days after the boycott began, King told black citizens, "In spite of the mistreatment we have [met with], we must not be bitter and end up hating our white brothers." He added, "If we protest courageously, and yet with dignity and...love, when the history books are written in the future, somebody will have to say, 'There lived a race of people, of black people...who had the courage to stand up for their rights.'"

From New York, Marshall watched the boycott closely. He knew the NAACP could not continue to ignore this mass action by fifty thousand black Alabamans that was a daily story on the front pages of the nation's newspapers and the lead story each evening on network television. The NAACP's reluctance to embrace the boycott caused problems for NAACP executive director Roy Wilkins and Marshall when the association held its forty-seventh annual convention that year, in January 1956, in San Francisco.

King left Montgomery shortly after the boycott began to address the convention and received an enthusiastic welcome from the delegates, including NAACP field secretary Medgar Evers o Mississippi. While Thurgood Marshall and Roy Wilkins were taking the tortoise's cautious approach toward events unfolding in Montgomery, King's presence at the convention inspired a group of insurgent delegates, led by Evers, to call for the NAACP's immediate and unequivoca support of the bus boycott and Reverend King.

The delegates met in Evers's hotel room on the first night of the convention and drafted a three-page resolution supporting Montgomery's nonviolent bus boycott and Martin Luther King Jr. as its leader. Marshall and Wilkins were angered when they learned the delegates intended to bring their Montgomery resolution to the convention floor the following morning. They went

to King's hotel room later that night to discuss the boycott and question King about his leadership.

Marshall bluntly told King the NAACP had marched, boycotted, and picketed since 1917, but none of its protests involved deliberately breaking laws or staging mass sit-ins that resulted in the arrests of hundreds of its members. He reminded King that the NAACP had just months earlier won a landmark U.S. Supreme Court decision, *Brown v. Board of Education.* Marshall asked King if he believed his tactics of civil disobedience and nonviolence could win some of the major battles the NAACP had painstakingly fought in the courts since King was a child. King quietly told Marshall he did not know.

Threatened with a runaway convention, Wilkins asked Marshall's advice. Marshall and Fund deputy legal counsel Robert L. Carter told Wilkins the Fund should agree to assume responsibility for the legal battles that would undoubtedly come from the Montgomery boycott. That, they hoped, would quiet rebellious delegates trying to force the NAACP to endorse the boycott and King.

Wilkins, the grandson of Mississippi slaves, graduated from the University of Minnesota and served as editor of the *Kansas City Call,* a black newspaper. Wilkins presented an aristocratic bearing and was prominent in Kansas City's black social world. Walter White hired him in 1932 to edit the NAACP's monthly magazine, the *Crisis,* and to direct the association's publicity campaigns and press relations. Wilkins moved to New York City and took an apartment at 409 Edgecomb Avenue, the "finest address in Harlem," where Thurgood Marshall and his wife were to live several years later. As Walter White had done earlier, Wilkins exercised an ironclad control over the NAACP. This created friction between him and NAACP branch secretaries who believed the rights organization should be governed by a more democratic process.

Marshall told Wilkins privately later that night that the NAACP would have to become involved in the Montgomery protest. Wilkins relented, but not completely. He announced on the convention floor the next morning that the NAACP would give "careful consideration" to

the MIA and the Montgomery bus boycott as an example of a new civil rights tactic and that the Fund would cover the legal expenses. The delegates cheered. But he was not ready to allow the venerable civil rights organization to fully embrace Martin Luther King Jr.

After the convention the NAACP began a vigorous nationwide campaign to raise money to cover the boycott's legal fees. This campaign angered King. In a confidential letter to Wilkins, King accused the NAACP of raising money "in the name of our movement." Wilkins told King al funds raised to support the MIA should be channeled through the NAACP because Thurgoo Marshall had committed the Fund to pay the boycott's legal expenses and provide bail money for protesters who were arrested. He argued that the venerable NAACP was more organized than the embryonic MIA and already had in place a national fund-raising apparatus. The NAACP was receiving thousands of dollars in small donations in the hundreds of letters pouring into its office each day from people interested in supporting the Montgomery boycott.

Wilkins warned King to keep their dispute over the money secret. "I certainly do not need to stress at this time that it would be fatal for there to develop any hint of disagreement as to the raising and allocation of funds," he wrote in a confidential letter. In a conciliatory response King said, "We are quite conscious of our dependence on the NAACP." He also mentioned that his Dexter Avenue Baptist Church had purchased a thousand-dollar institutional lifetime NAACP membership.

Though Roy Wilkins was the NAACP's executive director, in the minds of most black Americans Thurgood Marshall *was* the NAACP. It was his name that appeared foremost in newspaper stories about NAACP activities, and it was his picture that accompanied those articles. Wilkins directed the association from the security of its Fifth Avenue headquarters, while Marshall traveled as its front-line warrior through hostile southern towns, often at great personal risk.

After the *Brown* victory Marshall believed the NAACP was nearing the end of its twenty-yea battle to end school segregation and integrate public accommodations. Black America now looked forward to the full implementation of the 1954 Supreme Court decision desegregating

schools. Wilkins confidentially told close friends he believed the NAACP should wait until the Montgomery boycott was over before it made a public assessment of the usefulness of King's methods of nonviolence and civil disobedience.

NAACP attorney Wiley Branton said Wilkins was concerned the NAACP's involvement in th boycott would severely tax the organization's resources at a time when it needed all its strength to ensure compliance with the Supreme Court's recent *Brown* decision. "The association had just won its biggest legal battle and was now marshaling its forces and resources for the inevitable battles of implementation that were coming," Branton said. "Roy just couldn't see how the NAACP could take on a new and different kind of struggle at such a critical time."

White gangs began attacking black protesters. King and other MIA officials were arrested on charges of "disturbing the peace" and "failure to move on." Thurgood Marshall was one of the first lawyers to rush to King's defense, despite the disagreement between King and Wilkins over fund-raising. After his release King issued a statement supporting the NAACP and recognizing the work it had done.

"We must continue our struggles in the courts, and above all, we must continue to support the NAACP," King said. "Our major victories have come through the work of this organization. One thing the gradualists don't seem to understand: We are not trying to make people love us when we go to court, we are trying to keep them from killing us."

The MIA increased its demands and asked for an end to segregated seating. King felt the boycott was effective and now believed a total victory was possible, not just a still-segregated but more equitable seating policy that the MIA initially sought. Marshall agreed to take the issue of segregated buses to court.

Marshall and Carter went to Montgomery, and Carter argued the boycott case on May 11, 1956, in federal district court from a brief written by Marshall. On June 4, six months after Rosa Parks refused to relinquish her seat, the panel of three white judges ruled against segregated

bus seating. The city appealed the decision to the U.S. Supreme Court. It was a strange turn of events. For the first time, southern blacks were asking the Supreme Court to uphold a decision made by white southern judges.

Four months later, in October, the Supreme Court upheld the lower court's decision. Without a hearing, the court affirmed that Alabama's laws segregating bus passengers were unconstitutional because they denied equal accommodations to all riders. Montgomery's black citizens continued to boycott until the Supreme Court order was legally executed. On December 20, federal marshals formally notified city officials that they must comply with the decision. The next day, Montgomery's citizens sat wherever they wanted to on the city's buses. A new era in civil rights was born.

"We have discovered a new and powerful weapon—nonviolent resistance," King told a victory meeting at the Holt Street Baptist Church.

The Montgomery victory spread King's reputation as a rising civil rights leader far beyond Montgomery. *Jet* magazine published his picture on its cover and called him "Alabama's Modern Moses." A *New York Times* profile described King as a speaker whose oratory "overwhelms the listener with the depth of his convictions." After a fund-raiser in New York City, a tabloid reported King received "the kind of welcome [the city] usually reserves for the Brooklyn Dodgers after more than ten thousand New Yorkers came to Concord Baptist Church to hear him speak about the Montgomery boycott."

The Montgomery victory and King's public recognition of the NAACP's historic civil rights role should have brought Martin Luther King Jr. and the National Association for the Advancement of Colored People together as allies, united against a common enemy. Instead, it drove them apart. On June 1, 1956, Alabama attorney general John Patterson won a state court order putting the NAACP out of business in Alabama. Patterson argued the NAACP was "organizing supporting and financing an illegal boycott by Negro residents of Montgomery." The court agreed. It ordered the NAACP to stop all activities in Alabama, including fund-raising, collection

of dues, and membership drives. When the NAACP resisted a corollary court order to surrende its membership lists and contribution records to Patterson, it was fined $100,000 and held in contempt.

The Alabama NAACP disbanded. Wilkins privately blamed King and the MIA. The ban ha come at a critical time in the NAACP's fight to fully implement school desegregation. The association needed its state branches to develop cases to test the implementation of the *Brown* decision. It took eight years for the NAACP to win a Supreme Court order voiding th Alabama ban.

In Birmingham, Rev. Fred Shuttlesworth, an itinerant Baptist preacher who had been convicted in 1941 of producing moonshine whiskey in a backwoods still, had an idea he thought might help the NAACP continue its Alabama activities. He formed the Alabama Christian Movement for Human Rights. The NAACP now had a surrogate organization through which i could continue its activities in the state. Many former NAACP members joined. Alabama's white press charged that the creation of the new civil rights group was an obvious attempt to circumvent the court order.

The MIA's Montgomery success inspired similar assaults against segregated buses in two other southern cities. King and his volunteer workers took their nonviolent campaign to Tallahassee, Florida, and Birmingham, Alabama. Direct action and nonviolence were winning major victories quickly and thrusting King into the civil rights spotlight. But the Montgomery victory, won with the legal help of Thurgood Marshall and the Fund, did little to heal the rift between the NAACP and the SCLC.

King returned to Atlanta in 1957 to become associate pastor of his father's Ebenezer Baptist Church and to begin plans for organizing the Southern Christian Leadership Conference, which in 1968 emerged from the MIA. King's growing national recognition as a new kind of civil rights leader disturbed the city's entrenched black leaders.

"Atlanta's older black leadership did not want King to return to the city," John Lewis noted,

who now represents Georgia in the U.S. House and who was a former chairman of the Student Non-Violent Coordinating Committee.

Atlanta had been a sleepy southern town where the white power structure catered paternally to the city's older, more moderate black leaders. The black leadership had quietly negotiated a few minor racial concessions from Atlanta's white establishment in closed-door meetings that received little public attention or fanfare.

Former *Atlanta Daily World* managing editor George Coleman said, "It [the older leadership] was proud it had been able to keep the lid on for so long, and they didn't want Martin to bring his Montgomery tactics to Atlanta and rock their safe little boat."

The few concessions the old guard had been given did little to change life for most black Atlantans. True, they convinced police chief Herbert Jenkins to hire the city's first black police officers. However, instead of working out of the Atlanta police department's headquarters on Decatur Street with the rest of the force, the sixteen recruits held roll call and maintained lockers in the basement of the black YMCA at 22 Butler Street. Black officers were assigned to the 6:00 P.M. to 2:00 A.M. shift—the "Black Watch"—and only patrolled Atlanta's black business districts, such as Hunter Street, Auburn Avenue, and Northside Drive. Black police officers could not arrest white suspects, even for murder; they could only detain a suspect until a white patrolman arrived to make the formal arrest.

At Grady Memorial Hospital there was a waiting room for white patients and one for blacks. The city's ambulances were segregated. There were segregated waiting rooms at the train and bus stations, and water fountains and restrooms were plainly marked "White" and "colored." Black students could not attend the University of Georgia at Athens or Georgia Tech in Atlanta or play on the city's whites-only tennis courts and golf courses.

Just up the street from King's church stood Wheat Street Baptist Church, an imposing concrete building that its pastor, Rev. William Holmes Borders, called "God's mighty fortress on Auburn Avenue where the doors swing open on welcome hinges." Borders was a tall, affable

preacher who wore homburg hats and chesterfield overcoats on Saturday nights when he strolled down "Sweet Auburn Avenue," taking the church's "tithe" from street-corner crap games. He had been educated at northern white colleges, but on Sunday mornings he displayed no trace of his elite educational background as he delivered electrifying call-and-response sermons in the finest tradition of the southern black Baptist preacher.

Though he was a member of the city's established black leadership, unlike most of his colleagues he was as comfortable with citizens on street corners in Vine City, Atlanta's black ghetto, as he was in the office of Mayor William B. Hartsfield. Borders was one of the first members of the old guard to support Martin Luther King Jr. and his nonviolent mass movement, and he frequently walked picket lines with college students.

Borders was a lifelong Republican, as were many of Atlanta's other most prominent black leaders, such as real estate broker Q. V. Williamson, insurance executive T. M. Alexander Sr., *Atlanta Daily World* publisher C. A. Scott, and Martin Luther King Sr.

Most of them lived on Atlanta's comfortable West Side, along Hunter Street and out on Mosely Drive, in large brick houses that sat on spacious, well-kept lawns. They bought their obligatory personal five-hundred-dollar lifetime NAACP memberships, and those who owned businesses bought thousand-dollar institutional memberships. They believed Atlanta was on a safe, if slow, path toward racial harmony and progress.

As in Montgomery, in Atlanta many conservative black leaders did not want King's massive demonstrations to promote racial progress. Atlanta called itself "the city too busy to hate," even though the Ku Klux Klan held frequent marches on Peachtree Street and burned crosses at rallies atop nearby Stone Mountain. Scott used his newspaper's editorial pages—and its news columns, too, much to the displeasure of his managing editor, George Coleman—to criticize the fast-paced civil rights movement King was bringing to the city. Scott had a standing order in his newsroom that King's picture was not to appear on the *World's* front page.

The city's white Republican politicians, such as Alderman Rodney C. Cook, were always

welcomed at Scott's office on Auburn Avenue, and *World* editorials clearly reflected Scott's embrace of the slow and cautious attitudes of the white power structure. The paper carried full-page advertisements from grocery stores that sought black patronage but would not hire black clerks and from the city's two major department stores, Rich's and Davidson's, where black women could buy two-hundred-dollar dresses but could not sit and drink a ten-cent cup of coffee in the cafeteria. "C.A.'s racial politics were tied directly to the *World's* advertising revenues," managing editor Coleman said.

The publisher sat each Sunday morning in the Scott family pew at Ebenezer Baptist Church peering up through his horn-rimmed glasses as Rev. Martin Luther King Sr. preached fiery sermons from a high mahogany pulpit that looked like a ship's prow. In 1960, Scott approached the pastor one Sunday after church and asked him to persuade his son to confine his civil rights efforts to national issues and leave local Atlanta race relations to the older leadership. But in a few months hundreds of Atlanta's college students were launching sit-ins, and Martin Luther King Jr.'s civil rights activities continued to increase. The senior King's joining the Democratic party was the last straw. Scott left Ebenezer and joined a Methodist church on the other side of town.

Atlanta was the home of Morehouse, Clark, Spelman, and Morris Brown colleges, Atlanta University—where W. E. B. Du Bois had taught—two theological seminaries, and a school of mortuary science. Their students came from all over the United States. Martin Luther King Jr graduated from Morehouse College in 1948. Most of the schools' northern students had not experienced overt segregation firsthand until they arrived in Atlanta. Many were from affluent families that sheltered them from even the subtle vestiges of segregation and discrimination. These students, though insulated in the sprawling, protective academic community on the Westside, which had been built with Rockefeller family money, became quickly aware of racial and political conditions in the city and the state. "Getting off the train in Atlanta for the first time and finding myself in the 'colored waiting room' was like finding myself in another world,"

said divinity student Cecil L. Franklin—the brother of singer Aretha Franklin—who came to Morehouse College from Detroit as a freshman in 1957. Many of the male students worked as waiters serving the white southern aristocracy at Atlanta's Piedmont Driving Club, as Thurgood Marshall had done years earlier at Maryland's Gibson Island Club. And, like Marshall, they had been subjected to racial slurs and degradation.

On a dark night in Anniston, Alabama, the Morehouse College swimming team, traveling in the college's Ford station wagon to a meet, was refused service at a gas station. And on a trip to the Spring Hill Debate Tournament in 1960, the college's debating team was ordered to ride in the "colored" car on the Peach Queen train from Atlanta to Mobile.

At Morehouse, Harvard-educated Dr. Arthur H. Brisbane was giving his students—among them Julian Bond, who would later be refused a seat in the Georgia legislature because he opposed the Vietnam War—their first exposure to constitutional law, explaining the importance and significance of Supreme Court decisions like *Plessy v. Ferguson* and the Dred Scott decision. Brisbane explained the protections afforded black citizens under the Constitution.

On February 1, 1960, America saw its first "sit-in" demonstration. Four black students from North Carolina Agricultural and Technical College, in Greensboro, took seats at a Woolworth lunch counter. The tactic spread across southern cities.

The Richmond 34 was a group of Virginia Union University students who participated in a nonviolent sit in at the lunch

counter of Thalhimers department store in downtown Richmond, Virginia, February 22, 1960. Courtesy, Wikimedia Commons.

Two months later, Atlanta's black college students were eager to participate in the "Movement," despite warnings from city officials and the entrenched black leaders that a sit-in would disrupt the city's race relations. But the students were not long inclined to march to the slow beat of Atlanta's old guard's drum. "We refused to be known as the 'students who slept' while the world changed around them," said Morehouse college student Harvey Miller.

At NAACP headquarters in New York, the rapidly developing sit-in movement concerned Thurgood Marshall and his colleagues. Marshall knew the legal expenses of what promised to be "thousands of jailed students" across the South would be much more than the NAACP could bear alone, in both money and legal talent. He called two of his old friends, Atlanta lawyers A. T. Walden and Donald Hollowell. Walden was a long-practicing attorney known as the "dean" of Atlanta's black attorneys. Hollowell was a much younger man with offices near Atlanta University and many friends among the students and faculties of the black colleges.

Walden and Hollowell told Marshall that A. D. King, Martin's brother, was holding meetings with several student-body presidents at Frazier's Restaurant on Hunter Street. They told Marshall the students had not sought advice or help officially from the local NAACP branch but were holding their own counsel with Martin Luther King Jr.—and members of his Southern Christian Leadership Conference. The lawyers said they believed it was only logical to assume that before long Atlanta would have its own sit-in demonstration.

In April 1960 a group of students met with the presidents of Atlanta's black colleges in the office of Atlanta University president Dr. Rufus Clements. The group included Marion Wright (now Marion Edleman) and Roslyn Pope, Danny Mitchell, Lonnie King, Michael D. Davis, Don Clark, James Felder, and Julian Bond. The students told the college presidents they had organized a sit-in strike and were going to launch it in two days.

Morehouse College president Dr. Benjamin Elijah Mays was not surprised by the news. He had

been a fierce fighter for human rights for more than half a century and encouraged racial pride from Morehouse students in mandatory chapel sessions held each weekday morning in Sales Hall. Mays constantly reminded Morehouse students that they "must be interested in something bigger than a hamburger." Mays had been involved with the NAACP since his days as a professor of religion at Howard University in the 1930s and had known Thurgood Marshal there.

The college presidents urged caution. They were burdened with the surrogate parental responsibility for their students' welfare and safety, and they knew any sit-in demonstration could result in violence. They offered a compromise. The college presidents told the students they would raise several thousand dollars for the publication of full-page advertisements in the city's newspapers so the students could publicly express their dissatisfaction with Atlanta's segregated public accommodations. They said this would be more effective than a sit-in demonstration. The students agreed.

They went to the reading room of Treavor-Arnett Library, on the Atlanta University campus, and drafted the document "An Appeal for Human Rights," modeled on the Bill of Rights. Two days later, it appeared in the *Atlanta Constitution,* the *Atlanta Journal,* and even the *Atlanta Daily World.* The following day nearly fifteen hundred students launched the Atlanta sit-in, and three hundred were arrested. A white woman who watched the students march through downtown Atlanta told the Associated Press, "I didn't know there were that many niggers in college."

Again, Benjamin Mays was not surprised. Nor did he feel betrayed by the students. In fact Mays had anticipated the students' actions; shortly after the meeting with the students adjourned, he had called his friend Thurgood Marshall to seek his legal help. Mays knew the students were impatient with what they saw as the futility of waiting for the courts to move and the slow and only partial implementation that often followed court decisions. Mays later said the college presidents knew "in our collective wisdom that, advertisement or no

advertisement, the students were going to sit-in."

Mays also called members of Atlanta's old guard the day of the student meeting. He told them he believed a sit-in was imminent and asked them to support the student demonstrations. The old guard called its white friends in city government—Mayor William B. Hartsfield and police chief Herbert Jenkins—to make sure the students would be peacefully arrested and not attacked with police dogs, billy clubs, and water hoses, as had been done in other southern cities. Marshall called Walden and Hollowell—the NAACP's "Atlanta attorneys"—and they arranged to bail the students out of jail and plead their defense.

Walden, Hollowell, and a third attorney, Horace Ward, now a federal district court judge in Atlanta, arrived at the Atlanta City Jail with Morehouse College dean Brailsford R. Brazeal as the first bus load of arrested students drove up. Surprisingly, three members of Atlanta's old guard came, too. T. M. Alexander Sr., Q. V. Williamson, and Rev. William Holmes Borders brought money and the deeds to their property to pledge as collateral for the students' release. Atlanta had weathered its first mass demonstration.

On April 15, 1960, the Student Nonviolent Coordinating Committee (SNCC) was organized at Shaw University in Raleigh, North Carolina. As civil rights demonstrations and white resistance to them increased that year, the Congress of Racial Equality (CORE) and SNCC began "Freedom Rides" to test the enforcement of federal laws banning segregation in interstate bus terminals, restaurants, and waiting rooms. For years black riders had traveled on buses throughout the South carrying jugs of water and bags of fried chicken because they could not eat in terminal restaurants. Southern interstate bus routes were called "the chicken bone express" by black travelers.

The first Freedom Ride left Washington, D.C., on April 28, 1961, when seven black and six white passengers began a trip through Virginia, the Carolinas, Alabama, Georgia, and Mississippi on the way to a CORE conference in New Orleans. When the Greyhound bus arrived at the terminal in Anniston, Alabama, an angry mob pounded on the doors with pipes and

chains and slashed the tires. The mob was angry because the riders had attempted to use the facilities in the Anniston terminal. Most terminals remained segregated despite the law. City police officers escorted the bus out of town, where it was chased along Highway 78 by fifty cars carrying about two hundred white men. The driver pulled the bus off the highway when the tires began to go flat. He leaped from the bus and fled into a nearby field.

Freedom Rider Mae Frances Moultrie Howard stands by a burning Greyhound bus in Anniston, Ala.on May 14, 1961. Courtesy, Federal Bureau of Investigation.

The mob descended on the crippled bus, breaking the windows with axes and trying to force open the doors. A firebomb was tossed through the broken back window. Flames raced through the bus. The passengers tried to force open a door, but it was barricaded by the mob.

Alabama state investigator E. L. Cowling, who had followed the bus, quickly realized what was about to happen. He drew his pistol and held the mob at gunpoint while the riders escaped the burning bus. But as they ran, coughing from the acrid smoke, they were struck with clubs and chains. A few minutes later, the Alabama State Police arrived, and the mob dispersed after the troopers fired a volley of warning shots into the air. Injured riders were taken to the Anniston hospital and treated for their injuries and smoke inhalation.

Undaunted by violence in Alabama, more than a thousand Freedom Riders continued the protests across the South. In Montgomery six hundred federal marshals were called to protect Freedom Riders. In Mississippi three hundred Freedom Riders, including fifteen Catholic priests were jailed. The rides resulted in the desegregation of 120 interstate bus terminals when, five

months after the rides began, the Interstate Commerce Commission enforced its order to end segregated buses and the use of segregated terminal facilities.

Wilkins remained concerned about the tactics of the newer civil rights organizations despite the fact that Marshall and the Fund were now handling most of the Movement's legal matters. Wilkins was offended by some student leaders who were calling the NAACP "ineffective" and "conservative." He often said that CORE and the SCLC "get people in jail, and we have to get them out."

Thurgood Marshall was critical of King, though King's growing national prominence was not as threatening to Marshall as it was to Wilkins, who held the nation's premier civil rights position. Marshall said school desegregation was "men's work" and that King and his followers were using "the bodies of children" to achieve their civil rights objectives. Marshall characterized King as "a boy on a man's errand." When one of King's aides, Ella Baker, took two student leaders to visit Marshall, he told the students that he disapproved of the tactic "jail without bail" and that the Fund's job was to "get people out of jail, not get them in." In remarks to his legal colleagues, Marshall referred to King as an "opportunist," a "first-rate rabble-rouser," and a "coward." Those were strong words of disapproval from a man who nearly thirty years earlier had sat with other black students in the whites-only section of a Pennsylvania movie theater, who had been chased from rural southern towns by angry whites, and who had masqueraded as an Alabama sharecropper while investigating a lynching. King received a letter from NAACP board member Jackie Robinson asking him not to criticize the NAACP in public. Robinson urged him to control statements by "individuals who are knocking the NAACP and promoting the SCLC." King felt it was the NAACP that was "knocking" the SCLC, and in his response he made clear he was aware of Thurgood Marshall's verbal attacks on him:

I have no Messiah complex, and I know that we need many leaders to do the job. I have refused to fight back or even answer some of the unkind statements that I have been informed that NAACP officials said about me and the Southern Christian Leadership Conference. Frankly

I hear these statements every day, and I have seen efforts on the part of NAACP officials to sabotage our humble efforts I am sure that if criticisms were weighed it would turn out that persons associated with the NAACP have made much more damaging statements about SCLC than persons associated with SCLC have made concerning the NAACP....The job ahead is too great to be bickering in the darkness of jealousy, deadening competitions and internal ego struggles.

Morehouse College president Benjamin Mays also attempted to resolve the differences between the NAACP and the SCLC. He privately asked King and Wilkins to "discourage anyone in your organization from taking a crack at either the NAACP or the SCLC."

Robinson's letter asking King to help end the conflict between the SCLC and the NAACP did not reveal the former baseball player's deeper concern for the future of the NAACP and his realization that it needed to change with the times. That came later, in an interview with writer Louis Lomax:

The NAACP must adopt mass action as a matter of policy or accept the consequences. There are no two ways about it. The students and many of the adults want mass action. Either we employ it or suffer. We are not meeting the needs of the masses. We don't know the people; the people don't know us. I have been asked by many people to form a new civil rights organization that would be closer to the masses. I am all for a new organization if we can do it without interfering with what the NAACP is doing. We must do something. We can't go on as we are today.

Dr. John Morsell, executive assistant to Roy Wilkins, disagreed with Robinson: "We [the NAACP] can hardly advocate or condone a policy of mass civil disobedience except under extreme conditions because that would require the complete abandonment of the philosophy of operations which has sustained us for fifty years."

But Marshall's criticisms of King and mass demonstrations were tempered by his willingness to defend members of the Movement and Martin Luther King Jr. himself. It was clear Marshall

and the NAACP would soon have to fully support the Movement, and Marshall was the force from within that changed the NAACP's position.

"The NAACP was not just the 'old guard,'" said attorney Juanita Jackson Mitchell, whose mother, Lillie Mae Jackson, had been president of the NAACP's Baltimore branch in the 1930s and 1940s and whose husband, Clarence Mitchell II, was the NAACP's Capitol Hill lobbyist in the 1950s and 1960s. "It was the 'old folks guard,' and if it was to survive it had to attract younger members, the students walking the picket lines, sitting-in and going to jail, people who were joining and working in the more progressive rights groups, and Thurgood Marshall and Jackie Robinson knew this long before Roy did."

Thirty-two years later, Congressman John Lewis, offered his perspective on the evolution of Marshall's position:

I think it was difficult for some of the old guard leaders to understand the nature of a mass movement. They didn't understand the power, the philosophy of nonviolence. They had reservations about Montgomery and the leadership of Dr. King, but even there I think they tried to be supportive. I think some of them felt threatened on the local level as well as on the national level. This was something new, this was something different, they didn't know how to deal with it. White southerners didn't know how to deal with it and the black leadership, the old guard, didn't know how to deal with it because we had been programmed or taught that we should use the court to seek to redress our concerns, our grievances.

Lewis said that in the summer of 1961 Marshall told students on the campus of Fisk University in Nashville, Tennessee, that the Freedom Rides should be discontinued and a test case challenging segregated buses taken to court. "I don't think some of the NAACP leaders and Thurgood Marshall understood at that time the importance of creating a mass movement," Lewis said. "In a mass movement you can involve more than just the plaintiffs, more than the lawyers, the sort of just professional civil rights workers, but you can involve the masses to help increase the tempo of change." However, Lewis continued, "I think later Thurgood Marshall

came to appreciate the power of mass movement."

Lewis said he attended meetings where Marshall, Wilkins, and Whitney Young of the Urban League debated civil rights tactics.

"The NAACP was not there in the beginning, but later, when we needed help, needed someone to go into federal court, we had the NAACP Legal Defense Fund," Lewis said. "So on many occasions when we got arrested, when we went to jail, the NAACP responded with lawyers like Donald Hollowell, A. T. Walden, and James Nabritt. The NAACP had lawyers all across the South, so when we would go to jail, even though Thurgood Marshall disagreed with our techniques, he would make available the legal expertise and the legal resources of the Inc. Fund, Jim Nabrit, Constance Baker Motley, Robert Carter, and a battery of just very bright and very smart people."

Lewis attributed Thurgood Marshall's verbal attacks on Martin Luther King Jr. to Marshall's fear that King's tactics "invited violence. I think Thurgood was concerned more than anything else about the young people's well-being. He did not want to see us get hurt, he didn't want to see us get killed, and he knew that jail was not a pleasant place. He didn't want to see young people, young college students and these pretty young women from Fisk University and Spelman College, stay in jail. Thurgood was a very warm, humane, and humorous person.

"There was a young lady named Diane Nash, a student from Howard University who transferred to Fisk. She was from Chicago, a very beautiful, a very charming woman, who was a coordinator of the Freedom Rides, and even today when I see Thurgood he asks me, 'John, what happened to Diane Nash, what happened to that beautiful woman?' He saw these young people and was concerned about them. He thought the South was so crazy, so backward, that something could happen to a group of young people in the jails of Mississippi, Alabama, and Georgia. And he was right. People did get shot. People did get killed."

Lewis concluded, "I think Thurgood Marshall had this abiding concern that we didn't need to continue to put ourselves in harm's way. I think that, more than anything else, was his idea. He

wasn't saying be 'patient' and 'wait,' he was just saying that this is the way that he would do it, through the courts, and that we didn't need to have people spitting on us, pulling us off lunch-counter stools, and putting lighted cigarettes out in our hair. I think that was his overriding concern, because Thurgood Marshall was one of those and still is one of these imposing figures. To hear him and see him during my days in Nashville come to a little church or to the Fisk University gym was an inspiration. I grew up hearing about Thurgood Marshall, and the first time I met him was like meeting a legal savior."

At NAACP conventions the question continued to be asked: Should the NAACP use direc action as official policy to make further progress against discrimination and segregation? The delegates had seen it work in Montgomery and other cities, but the NAACP's legal gradualism was still getting results in the courtroom without the violence often generated by mass demonstrations.

The NAACP was slow to change because its bureaucracy made change difficult. Convention delegates could offer resolutions but could not make policy. Rank-and-file members had no role in setting the association's civil rights agenda because the executive board was reluctant to relinquish its absolute control over policy. It refused to directly address the issue of mass actions.

In March 1960, Marshall called sixty-two lawyers, representing more than one thousand mass-demonstration defendants in the South, to a conference in New York City. Marshall told the *New York Times* on March 20, "The state use of disturbing the peace laws to convict demonstrators...would be challenged as a violation of the 14th Amendment." On April 7 Marshall said "the whole force of NAACP" would be committed to the students.

Marshall's promise signaled a dramatic change in the NAACP's position on mass demonstrations. Marshall's prior support of the Movement had come through his work as the director of the Fund—legally a separate organization—but now he was speaking for the NAACP.

The change signaled by Marshall's words of commitment were soon followed by the NAACP's

actions. The NAACP sent Herbert Wright, its national youth secretary, south to conduct lega training classes for young people participating in sit-ins.

In March 1961 Roy Wilkins publicly supported the newer rights organizations and their activities for the first time. He said that school desegregation was still the most important tool in the long struggle for equality but that there was room in the struggle for other tactics. In an address to Atlanta's black students at Sisters chapel on the Spelman College campus he praised the nonviolent protests but held fast to the NAACP's contention that school desegregation was the "cornerstone" of civil rights progress. "Everything, of course, is tied to the school desegregation suit, not only here, but throughout those southern areas still resisting the inevitable."

On December 4, 1961, Gloster Current, national director of branches, sent a memorandum to NAACP offices in major cities telling them to press for jobs for blacks in national retail stores such as Sears and Montgomery Ward. Current's directive told NAACP members the association would support picket lines. It was further evidence the NAACP was recognizing the power of direct action.

Earlier that year Marshall and the Fund took the legality of sit-ins to the Supreme Court in *Garner v. Louisiana.* Garner and fifteen other students were arrested in Baton Rouge after they refused to leave a Kress department store, a drugstore, and a bus terminal. The charge alleged their actions "would foreseeably disturb or alarm the public." The students were found guilty and given thirty-day jail terms and hundred-dollar fines. The convictions were upheld by Louisiana's supreme court. NAACP lawyers Marshall, Jack Greenberg, A. P. Tureaud, and Johnnie A. Jones appeared before the Supreme Court on December 31, 1962. Marshall headed the team and wrote the brief, and Greenberg argued the case.

Marshall's brief contended the state court's decision affirming the convictions was not based on evidence of guilt and therefore conflicted with recent Supreme Court decisions. He said the students were neatly dressed and quiet, that no one was "disturbed or alarmed," and that

there was no disorder. Furthermore, he contended, the students were convicted under a state law that was "vague and indefinite." In conclusion Marshall argued that "disturbing the peace" statutes could not be used to enforce racial segregation in public facilities: "The lower court's decision, if allowed to stand, would be completely subversive of the numerous decisions throughout the federal judiciary outlawing state-enforced racial distinctions. Indeed, the segregation here is perhaps more insidious than that accomplished by other means, for it is not only based upon a vague statute which is enforced by the police according to their personal notions of what constitutes a violation and then sanctioned by state courts, but it suppresses freedom of expression as well."

The Supreme Court reversed the convictions of all defendants. Chief Justice Earl Warren, writing for the majority, said, "The undisputed evidence shows that the police...were left with nothing to support their actions except their own opinions that it was a breach of the peace for the petitioners to sit peacefully in a place where custom decreed they should not sit. Such activity...is not evidence of any crime and cannot so be considered either by the police or the courts."

The NAACP quickly took credit for winning the sit-in case, but those inside the civil rights movement knew it was Thurgood Marshall who had welded legal gradualism to the mass movement. Juanita Jackson Mitchell said, "It was Thurgood Marshall, more than anyone else who changed the NAACP's position on Martin Luther King Jr., the sit-in movement, and direct protest action.

Even during his time in Baltimore, when we boycotted stores and walked picket lines on Pennsylvania Avenue, Thurgood was always two or three steps ahead of the established leaders."

Marshall's performances before the Supreme Court had won him respect, even from enemies of the civil rights movement; Senator Richard B. Russell, a Georgia Democrat, said Marshal exercised "an almost occult power" over the Supreme Court justices.

The NAACP had concentrated most of its civil rights efforts in the South because discrimination in the North was less extreme and less insidious. In the South the association focused on schools, voting, and public accommodations. In the North voting and public accommodations were not such pervasive problems, so the emphasis was on employment opportunities, housing, and the elimination of de facto segregation in schools caused by racial housing patterns.

The nation's first census, in 1790, reported that blacks constituted 20 percent of the population and that 90 percent of them lived in the South. At the beginning of World War I, 80 percent of the nation's blacks lived in the eleven states of the Old Confederacy, but the nation's racial geography was rapidly changing. Lured by employment opportunities in labor-short defense plants and shipyards, blacks broke the shackles that had bound them to southern sharecropping fields for generations. By 1960 nine million, or 48 percent, of the nation's black population lived in the North or the West. There were half a million blacks in Philadelphia; blacks comprised 23 percent of Chicago's population, 14 percent of New York's, and 51 percent of Washington, D.C.'s; and five hundred thousand blacks lived in the Los Angeles metropolitan area.

Racial segregation and discrimination in the middle of a free society was still a paradox in the 1960s, and the Montgomery bus boycott provided an opportunity to display the power of direct protest and ultimately brought divergent civil rights organizations together. A proliferation of protest organizations had emerged where in the past one or two had carried the burden. New leaders and different strategies gained prominence. Protest was now a symbol of social conflict and a medium through which blacks could let white America know how deeply they resented segregation and discrimination.

On August 28, 1963, 250,000 black and white Americans converged on Washington, D.C., to participate in a day of protest before the Lincoln Memorial. They came from all parts of the country to protest unemployment, police brutality, and discrimination in housing and

employment and to support President John F. Kennedy's civil rights bill, then in Congress. It was the largest protest demonstration in the history of the United States. The march was the idea of A. Phillip Randolph, militant head of the Brotherhood of Sleeping Car Porters and Maids, and was organized by Bayard Rustin, former field secretary of CORE. Every black civil rights organization was represented, along with integrated organizations representing labor, churches, and civic associations.

SCLC's Martin Luther King Jr., CORE's James Farmer, the NAACP's Roy Wilkins, Randolph, an SNCC's John Lewis were the principal speakers. The march offered evidence there was suppor in America for an open, desegregated society. It culminated with King's historic "I Have a Dream" speech, which ended, "And when this happens...we will be able to speed up that day when all God's children, black men and white men, Jews and gentiles, Protestants and Catholics, will be able to join hands and sing the words of the old Negro spiritual, 'Free at last! Free at last! thank God Almighty, we are free at last!'"

The March on Washington brought most of the nation's civil rights organizations together. It forged a united front that was ready to abandon the jealous rivalries and disputes over techniques and tactics that had threatened to dissipate their collective energies. A breed of new leaders took their place on the civil rights battlefield with the older warriors.

FIVE

A Strange Trio: Thurgood Marshall, James Eastland, and Robert Kennedy

Tell your brother...I will give him the nigger.
—Senator James O. Eastland

In 1961, Thurgood Marshall wanted Attorney General Robert F. Kennedy to recommend that the president appoint him to the U.S. Court of Appeals for the Second Circuit. Years later, he related the story of his confrontation with the attorney general to a Columbia University interviewer, speaking matter-of-factly, without any trace of the bitterness he had felt at the time:

Kennedy told him, "Well, you can't go on the Court of Appeals."

Marshall responded, "There is an opening."

Kennedy said, "But that's already filled."

Marshall replied, "So."

Instead, Kennedy offered to recommend Marshall for a U.S. district court judgeship. "You don't seem to understand," Kennedy said. "It's this or nothing."

Marshall answered, "I do understand. The trouble is that you are different from me. You don't know what it means, but all I've had in my life is nothing. It's not new to me. So good-bye." With that, Marshall walked out.

Marshall wanted nothing less than a seat on the appeals court, which he regarded as an important position.

At the time, the federal court system was comprised of eleven judicial circuits. The Second

Circuit encompassed New York, Connecticut, and Vermont.

The appeals court for each circuit took appeals from the circuit's district, or trial, courts. There were nine appeals court judges for the Second Circuit. They usually sat in panels of three to hear the cases brought before them. Appeals from circuit court decisions could be taken directly to the U.S. Supreme Court, the apex of the pyramid that is the federal judiciary.

The job Kennedy offered Marshall was a step below the appeals court level. At the time of Marshall's conversation with Kennedy, there were forty-three district court judgeships in the Second Circuit alone. Appeals court judgeships were, of course, much rarer, and by 1961 only a single black, William H. Hastie, had ever been appointed to one.

Hastie had become the first black to serve in the federal judiciary when President Roosevelt named him to a district judgeship in the Virgin Islands in 1937. President Truman's appointment of Hastie to the Third Circuit, in Philadelphia, in 1949 made him the first black circuit court judge.

U.S. Supreme Court justices are commonly, but by no means exclusively, appointed from among the ranks of federal appeals court judges. When Associate Justice Charles E. Whittaker resigned in the spring of 1962, the president met in the Oval Office with his top advisers to discuss a possible replacement, and Hastie was mentioned. Kennedy had won the black vote in the 1960 election; in return for this black voter support, civil rights groups expected him to appoint African Americans to influential positions.

Presidential confidant Clark Clifford opposed naming Hastie to the High Court. He argued that while Hastie's performance on the bench was distinguished, it fell short of greatness, and he did not feel that the president should name a black just for the sake of naming a black.

After some discussion of other possible candidates, including Harvard law professor Paul Freund, Secretary of Labor Arthur Goldberg, and Texas lawyer Leon Jaworski, Kennedy decided to nominate from within his own White House circle a young assistant attorney general, Byron R. White. A former Rhodes scholar from the University of Colorado and Yale Law School, White

had been a star running back for the National Football League's Pittsburgh Steelers and Detroit Lions. He seemed to personify the president's New Frontier ideal of the well-rounded, liberal scholar-athlete.

Meanwhile, despite whatever he might have said to Marshall in person, Robert Kennedy lobbied furiously to win Marshall's Second Circuit appointment. As Burke Marshall (no relation), assistant attorney general for civil rights during the Kennedy administration, noted, "Marshall was a very distinguished lawyer...and his appointment [to the federal bench] was, accordingly, meaningful in terms of the desirability of appointing the best qualified judges." Moreover, Kennedy wanted to reward Marshall for his gradualist approach to civil rights.

For Marshall, the implication of an appeals court appointment was obvious: He would be but a step away from a seat on the U.S. Supreme Court.

Ordinarily, a man of Marshall's reputation and stature would have been a welcome addition to any court. Yet it took an unsavory but necessary compromise on the part of President Kennedy and his attorney general to win the U.S. Senate's confirmation of Thurgood Marshall's first appointment to the federal bench, which in fact turned out to be the seat on the U.S. Second Circuit Court of Appeals that he wanted.

In the summer of 1962, blacks remained frustrated by the slow pace of progress toward equality. Martin Luther King Jr.'s SCLC, SNCC, and other groups, with their strategy of direct action involving boycotts, civil disobedience, nonviolent sit-ins, and mass demonstrations, had succeeded in dramatizing American racial injustice in the South and in focusing the attention of the nation and the world on it. This caused considerable embarrassment for the Kennedy administration at a time when America sought to compete effectively worldwide with Soviet communism and other repressive ideologies. At the United Nations and in other international forums, Soviet leader Nikita Khrushchev, Cuban ruler Fidel Castro, and other Communist spokesmen pointed to the racial turmoil in America as evidence of American hypocrisy in human rights.

In the mind of the president, direct action, with its cycle of escalating black demands followed by increasingly violent white backlash, threatened to rend America's tenuous social fabric. Black and white Freedom Riders were attacked and brutally beaten, their buses sometimes burned, by angry white mobs wielding ax handles, bicycle chains, and baseball bats. Local law enforcement authorities, sympathetic to the rabble, frequently stood by idly as the violence transpired or even conspired to bring it about.

Meanwhile, resistance to court-ordered desegregation gathered momentum. In Mississippi, Governor Ross Barnett resisted the efforts of a black man named James Meredith to enroll in the all-white University of Mississippi. Rioting by segregationist whites ensued. Again federal marshals were called to the scene of what was but one of dozens if not thousands of efforts to evade or defy civil rights decrees. After fewer than two years on the job, the president found himself confronted with the prospect of fighting the Civil War all over again.

Throughout the 1960 presidential campaign, John Kennedy had dramatized the plight of blacks. In Wisconsin, for example, Kennedy admonished his supporters, "The Negro baby has one-half, regardless of his talents, statistically has one-half as much chance of finishing high school as the white baby, one-third as much chance of finishing college, one-fourth as much chance of being a professional man or woman, four times as much chance of being out of work." He promised that if elected he would use the power and the prestige of the presidency to help.

At the Democrats' national convention in Los Angeles, he issued an appeal to black delegates. "My friends," he told them, "if you are sober-minded enough to believe, then—to the extent that these tasks require the support, guidance, and leadership of the president of the United States—I am bold enough to try." The black delegates responded with their support, backing Kennedy over liberal Minnesota senator Hubert Humphrey, an outspoken, longtime civil rights advocate.

On the eve of the election, Kennedy again demonstrated his commitment to black Americans.

In doing so, he may have saved Martin Luther King Jr.'s life.

In October, King and thirty-six other demonstrators were arrested and charged with trespassing during a sit-in at Rich's department store in Atlanta, where when they had demanded to be served at the whites-only lunch counter. The incident occurred at a time when the city was beset with racial unrest. In fact, Mayor William B. Hartsfield had proposed a two-month period of calm, during which time he promised to review the demands of the protesters for the desegregation of Atlanta's public accommodations.

After his arrest at Rich's, King was charged by DeKalb County officials with violating the conditions of a probationary sentence he had received for a minor traffic violation the previous May. He was detained at the Fulton County Jail.

King's attorney, Donald L. Hollowell, worked feverishly to secure King's release. Hollowell was shocked when King was unexpectedly brought before DeKalb County judge Oscar Mitchell on October 25 in handcuffs and leg irons. Judge Mitchell declared that King's "trespassing" at Rich's was a violation of his probation on the traffic charge. He sentenced King to four months at hard labor and remanded him immediately to Georgia's Reidsville State Prison.

Hollowell returned to his Hunter Street office and worked through the night preparing a brief designed to prevent King from being transported to Reidsville the next morning. But when he took it to the DeKalb County courthouse shortly before 8:00 A.M., he was told that King had already been taken to Reidsville during the night. For King, it was a harrowing journey along obscure and isolated Georgia back roads where cross burnings and lynchings were not uncommon.

Hollowell, King's aides, and the King family feared that King would be murdered on the way to the prison. Hollowell was confident that he could get Judge Mitchell's ruling overturned, but he feared for King's immediate safety. Prisons in the Deep South were notoriously dangerous, and Reidsville, in rural Tatnall County, had earned a reputation for being one of the worst. King's supporters feared a lynching or some scenario in which King would be shot while allegedly

trying to escape. Even without the authorities' complicity, the Baptist minister might find himself at the mercy of violent, racist inmates.

News of King's predicament spread. The White House was flooded with requests for federa intervention. Northern senators, congressmen, and governors called on President Eisenhower to order a federal investigation. In a show of unity, all the major civil rights organizations called for King's immediate release. The national elections were just a few days away.

Eisenhower drafted a statement affirming King's right to protest segregated facilities and remarking that the sentence for the traffic violation appeared unusually severe. But for some reason, the statement was never released. Meanwhile, the Republican presidential nominee, Vice President Richard M. Nixon, remained silent, fearing the loss of the southern white vote The Democratic nominee, John Kennedy, decided to act.

One of Kennedy's Atlanta advisers, attorney Morris Abrams, suggested that Kennedy issue a statement supporting King, an idea endorsed by Kennedy's adviser on minority affairs, Harris Wofford. Then Kennedy called Coretta Scott King in Atlanta to try to allay her fears; he told her that he understood that she was worried about her husband's safety and that he shared that concern and wanted to help. Next, Robert F. Kennedy, who was his brother's campaign manager, called Judge Mitchell. The following day, October 27, Mitchell agreed to King's release.

News of Kennedy's phone call to Coretta Scott King spread quickly across the nation. CBS and NBC chartered small planes and flew correspondents and camera personnel to Reidsville to cover King's release. At a press conference held in front of the prison, the voice of a black inmate rang out from inside the walls: "Long live the King!"

Later that day Hollowell received a telephone call from Thurgood Marshall. Marshall kidded him, "Say, Hollowell, they tell me that everybody got King out of jail but the lawyers." He told Hollowell that the NAACP would pay the legal expenses arising from the Rich's sit-in and King's alleged probation violation.

King expressed his gratitude for Kennedy's efforts: "I am deeply indebted to Senator Kennedy,

who served as a great force in making my release possible. It took a lot of courage for Senator Kennedy to do this, especially in Georgia...He did it because of his great concern and humanitarian bent." King's father was grateful as well. A lifelong Republican because a Republican president freed the slaves, he promised to deliver Kennedy a "basketful of votes."

On election night black voters demonstrated their appreciation and affection at the polls, thereby guaranteeing Kennedy's election. Black support helped put Illinois, Michigan, Texas, South Carolina, and arguably Louisiana into Kennedy's electoral vote column. Without some combination of these states, Kennedy would not have won what turned out to be the closest presidential race in U.S. history, with the two candidates separated by a slim 112,881 popular-vote margin. John F. Kennedy owed African Americans a political debt.

The day he was inaugurated was one of the happiest days in the history of black America. It was also one of the most bitterly cold January days in memory. But the sky was clear, and sunlight bathed the east front of the capitol. The nation's leaders— senators, congressmen, the nine justices of the Supreme court, the ranking members of the military and civilian departments of government—were assembled in top hats and tails to observe an occasion fraught with symbolism. The oldest man ever to serve as president was departing; the youngest man ever elected to the office was about to assume it. In his inaugural address, Kennedy stated: "The torch has been passed to a new generation of Americans—born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage, and unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world."

The energy, the vitality, the devotion, with which this new generation would set about the task of defending freedom would "light our country and all who serve it," he vowed. And, he promised, "The light from that fire can truly light the world."

For blacks Kennedy's message offered hope that America would break with the discriminatory

practices of the past and adhere to the nation's ideals: justice, freedom, equality for all, life, liberty, property, and the pursuit of happiness. Almost a century had elapsed since the post-Civil War amendments to the Constitution bestowed full citizenship upon the eighteen million Americans of African descent whose forebears were emancipated by Lincoln. But on the frigid January day on which John Kennedy became the thirty-fifth president, there were few blacks among the assembled dignitaries: no black senators, no black cabinet officers, no black Supreme Court Justices. African Americans were not even conspicuous by their absence from the ranks of the powerful.

It was a fact of life: Racial inequality permeated American society at every level, from the rural South to the teeming ghettos of the great northern cities. Thurgood Marshall had indeed won *Brown v. Board of Education.* Segregation violated the law of the land. In custom and in practice, however, segregation was the rule—in housing, in the workplace, and in education. In the South blacks were routinely denied the right to vote, as well as access to public facilities and accommodations. Violence and coercion against blacks were common, and commonly unpunished.

A lot was expected and demanded. In an article for the *Nation* that appeared soon after the president's inaugural, Martin Luther King, Jr., called for "really far-reaching" progress in civil rights, including the passage of a major civil rights bill. As a practical matter, however, Kennedy regarded this as an impossibility. Like every American president since Reconstruction, Kennedy was forced to confront the power and influence of southerners in the Congress, where the actual work was done in powerful committees whose chairmen, chosen on the basis of seniority, in effect set Congress's legislative priorities. Because they controlled key committees, southern senators and congressmen hostile to civil rights had the power not only to block specific civil rights legislation but also to undermine the president's entire legislative agenda.

Kennedy was frank with King about political realities. He warned that efforts to get a civil rights bill through Congress might prove counterproductive: "If we go into a long fight in

Congress, it will bottleneck everything else, and still get no [civil rights] bill." By "everything else" Kennedy meant legislative items, such as the increased minimum wage and federal aid to education, that were not directly related to civil rights but considered of great importance to blacks.

For much the same reason, Kennedy balked at King's demand that the president fulfill his campaign pledge to "give segregation its death blow through the stroke of a pen" by issuing executive orders banning discrimination in the award of federal contracts, in federally financed housing, in hiring on federally supported hospital and highway construction, and more.

Nevertheless, Kennedy was aware of the political debt he owed the nation's blacks. He also knew that the civil rights movement represented an awakening of the minds and spirits of African Americans that could not be ignored or reversed. Besides, both he and his attorney general were men who operated on the basis of moral imperatives, not just political expedients. They believed deeply that, at a minimum, every American is entitled to expect that his or her rights will be protected and enforced. As attorney general, the nation's top law enforcement officer in charge of the federal government's law enforcement apparatus, including the FBI, Robert Kennedy was the administration's point man on civil rights. Even in the enforcement and execution of those laws already in effect, he would find his power wanting.

On the surface there was little indication that Robert Kennedy had much familiarity with, or concern for, civil rights or the black American predicament. He confided as much to his biographer Arthur M. Schlesinger Jr., admitting, "I won't say I stayed awake nights worrying about civil rights before I became attorney general." During the early 1950s, Kennedy focused his energy on rooting Communist influences out of the government, serving as special counsel to Senator Joseph McCarthy's Senate Investigative Committee on Un-American Activities. Late in the decade, he turned his attention to organized crime, earning a reputation for ruthlessness as the crime-busting chief counsel to the Senate rackets committee. He played a major role in

exposing Mafia influence in the organized labor movement, especially within the United Brotherhood of Teamsters; its president, Jimmy Hoffa, became one of his most celebrated antagonists.

Besides, Robert Kennedy was skeptical about the feasibility of creating brotherhood by government fiat, demanding racial tolerance at the point of a gun. He told Schlesinger, “People have grown up with totally different backgrounds and mores, which we can’t change overnight.” In time, he believed, blacks would simply be absorbed into the melting pot like other ethnic groups, including his own Irish. Whatever might have been his initial instincts or predilections, however, he expressed to Schlesinger soon after his appointment his “fundamental belief that all people are created equal.” From that he said, “it follows that integration should take place today everywhere.” The challenge was how to bring integration about.

First, Kennedy realized that he would have to overcome obstacles that existed within the very Department of Justice that he headed. The department was, quite simply, not geared up to go to war for civil rights. Zealous litigation on behalf of blacks denied the right to vote, or against school systems that continued to discriminate, would be essential. So would leading by example. Yet out of almost one thousand Justice Department lawyers based in Washington, only ten were African Americans.

Moreover, FBI director J. Edgar Hoover was outright hostile to civil rights. This partially explained why there were no black FBI agents by 1961. Recruiting black agents was crucial to investigating civil rights violations in the South. Southern blacks feared local white law enforcement officials because many of them were sympathetic to the Klan. For the same reason, blacks were reluctant to share information with white FBI agents, especially since they knew that those agents cooperated frequently with local officials.

Getting Hoover to agree to make changes presented its own peculiar set of problems. Hoover disliked the Kennedy brothers as much as he disliked their civil rights policies. He undercut the

attorney general's credibility by questioning his qualifications. He once remarked sarcastically that Kennedy was well equipped to be the nation's top lawyer: He had never practiced law or tried a case in court. When Bobby Kennedy sought Hoover's advice about whether to accept the appointment, Hoover remarked dryly that being attorney general was a good job and, since it was offered, he should take it. Later it became standard practice for tour guides at the FBI Building in Washington to inform visitors that J. Edgar Hoover's tenure as FBI director began in 1924, a year before the attorney general, Hoover's ostensible superior, was even born.

At the same time, however, firing Hoover was out of the question. Members of the Kennedy family, including the new president, had been subjects of FBI surveillance. As a result, Hoover possessed incriminating information that, if made public, would cause considerable embarrassment for the nation and the Kennedy family. It was insinuated that John Kennedy, before he became president, had had affairs with actress Marilyn Monroe and Judith Campbell, whose other lovers included entertainer Frank Sinatra and Sam "Mo Mo" Giancana, a Chicago mobster.

Besides, civil rights was not the only item on Robert Kennedy's personal agenda. He realized that he would need Hoover's experience, credibility, and connections in order to achieve his declared, immediate, and overriding national law enforcement objective: the infiltration and subversion of the Mafia in America.

Second, the extent to which federal marshals could be used to protect civil rights activists from vigilante violence in the South was limited. Marshals were often little more than deputized citizens, ill equipped and untrained for the sheer numbers and violence of the southern mobs. The president could federalize the national guard, but beyond a point the loyalty of local guardsmen could not be guaranteed. At the extreme was the option of calling out the U.S. Army and imposing martial law. But that would be tantamount to fighting the Civil War all over again, and one could argue that by the end of Reconstruction the outcome of the first Civil War had at best yielded mixed results.

It was clear that the entire federal law enforcement apparatus needed to be reformed. What was called for in the face of massive southern resistance was in effect a national police force, which did not exist and would, even if it did, be suspect from a constitutional standpoint. Even legal scholars as committed to civil rights as Thurgood Marshall conceded this point. “The law is quite clear that the federal government is not the policing authority,” Marshall admitted. “That...some of us can understand, but the average layman cannot understand it.”

Eventually the attorney general and his advisers concluded that the best solution to the civil rights problem in the South was to guarantee the voting rights of African-American citizens. Through the vote blacks could exercise a considerable degree of power over their own destinies by electing officials who would use the power of the state to expand and enforce, rather than limit or altogether deny, their freedom. The Justice Department during the Kennedy years in fact undertook an unprecedented amount of litigation to ensure voting rights enforcement.

Until change could be secured through the ballot box, the president would have to take whatever measures he could to improve the lives of blacks. Foremost among these, the attorney general recommended, should be the appointment of judges sympathetic to the need to protect the rights and physical safety of all American citizens.

Certainly the courts had made a positive difference for blacks. While the Congress had failed to enact sweeping civil rights legislation and while presidents had been personally hostile to civil rights or restricted in their options, the courts had responded. As the efforts and successes of Thurgood Marshall and other advocates demonstrated over the years, the courts could serve as an effective force for social change in America.

For these reasons, Robert Kennedy recommended Thurgood Marshall’s appointment to the Second Circuit Court of Appeals. What could send a better message to the president’s black supporters than the appointment of such a fine civil rights lawyer to the federal bench? In addition, there were few, if any, stronger messages that the president could send to those who opposed his commitment to civil rights. As Burke Marshall later put it, the nomination was

indeed “symbolic in a very important and useful way.”

Nevertheless, the appointment of a single black judge, even if he were to become only the second black ever named to a U.S. court of appeals, seemed like a token gesture. Privately some of Marshall’s supporters wondered whether he would be able to advance the cause of black equality from the bench as effectively as he had as a lawyer.

Marshall himself had mixed feelings about the move. “I had to fight it out with myself,” he admitted. “But then I knew I had built up a staff—a damned good staff—an excellent board, and the backing that would let them go ahead. And when one has the opportunity to serve his government, he should think twice before passing it up.” He went on, “I’ve always felt the assault troops never occupy the town. I figured after the school decisions, the assault was over for me. It was time to let newer minds take over.”

What stood between the president and Marshall’s appointment was a Mississippi senator, James O. Eastland.

Eastland was a senior Democrat who since 1956 had chaired the Senate’s Judiciary Committee, to which all judicial appointments, as well as all civil rights legislation, were referred. Through his use of that position, Eastland came to personify the southern political establishment’s irrevocable hostility to black advancement. “What are the two southernmost points in the United States?” pundits asked rhetorically. “Key West, Florida, and James O. Eastland.”

A wealthy landowner, Eastland was from the Mississippi Delta’s Sunflower County, which boasted the registration of less than 3 percent of its eligible black voters. The county had become the focus of the nation’s attention a few years earlier as the result of Emmett Till’s being lynched there.

Eastland himself indulged in the most rudimentary race baiting. He charged that the NAACP was Communist oriented and backed by organizations “of all shades of red, the blood red of the Communist party.” During a reelection campaign, he bragged that as chairman of the

Senate Judiciary Committee's Subcommittee on Civil Rights he had bottled up 127 pieces of civil rights legislation. "Not one [of those bills] ever emerged" to go before the full committee and Senate, he told his supporters. *Time* magazine called Eastland the "nation's most dangerous demagogue." Clarence Mitchell, an NAACP leader, branded him a "mad dog loose in the streets of justice."

The young attorney general was surprised to find the Mississippian in a conciliatory mood on the subject of Marshall's appointment when he discussed it with him early in the Kennedy administration. Eastland signaled that he might be amenable to a deal. If the president appointed Eastland's college roommate Harold Cox to a recently vacated district judgeship in the South, in the Fifth Circuit, where most of the civil rights "agitation" was occurring, Eastland would allow the Marshall nomination to go to a full committee vote. Later, when Eastland met with Robert Kennedy, he told him, "Tell your brother that if he will give me Harold Cox, I will give him the nigger."

Kennedy agreed. Harold Cox of Mississippi became the president's first nominee to the federal bench. Shortly thereafter, on September 23, 1961, the president forwarded Marshall's nomination to the U.S. Senate. Despite his promise, Eastland maneuvered to keep the Marshall nomination from coming to a committee vote for almost a year. In the interim the president gave Marshall a recess appointment.

The hearings conducted by the Judiciary Committee's Subcommittee on Nominations dragged on over the course of six days, scattered throughout May, July, and August in the spring and sweltering summer of 1962. Marshall found himself subjected to a grilling by southern senators and committee counsel L. P. B. Lipscomb. The legitimacy of the Fund's tax-exempt status was called into question. Marshall himself was charged with violating the American Bar Association's Code of Professional Responsibility by soliciting clients for desegregation cases. He also came under attack for his alleged involvement with the Lawyer's Guild, which was backed by the Communist party, and for alleged Communist influence within the NAACP.

The dramatic high point of the hearings came when Lipscomb challenged Marshall's handling of the five questions posed by the Supreme Court at the end of the first round of oral arguments in *Brown* in 1953. Lipscomb based his accusations on a paper delivered by Professor Alfred H. Kelly of Wayne State University at the annual meeting of the American Historica Association in Washington, D.C., in December 1961.

In his paper, "An Inside View of *Brown versus Board"* Kelly set out his account of the summer he and scores of other noted historians and academicians worked with Marshall and other Fund lawyers helping to frame the NAACP's answer to the five questions, which related to the intention of the framers of the Fourteenth Amendment. Kelly wrote:

"I was trying to be both historian and advocate...and the combination, as I found out, was not a very good one. I tried to draw conclusions which were at odds with the thing which most impressed me at the time—the damning modifications of the civil rights bill in the House and its apparent identity in purpose with the Fourteenth Amendment. I was facing for the first time in my own career the deadly opposition between my professional integrity as a historian and my wishes and hopes with respect to a contemporary question of values, of ideals, of policy, of partisanship, and of political objectives. I suppose if a man is without scruple this matter will not bother him, but I am frank to say that it bothered me terribly."

Lipscomb's goal was clearly to cast doubt on the integrity of the work that was the basis for the NAACP's brief. He also tried to use Kelly's paper to raise doubts about Marshall's character and his personally held views of whites. He implied that Marshall was a racist. He directed the subcommittee's attention to a section of Kelly's paper that described Marshall's personality:

"The sudden shifts of mood he displayed on occasion were nothing short of astonishing. One morning in his office, he related to John Hope Franklin of Yale and myself, with tears in his eyes and a voice dulled with the cumulative grief of three hundred years, the experiment of a leading sociologist with a group of little colored girls, who were given their choice of playing with two sets of dolls, one white or Caucasian, one black or Negro. Even at three years of age,

he said, the little colored girls preferred the white dolls, describing the black dolls as 'bad' and 'not nice' and the white dolls as 'pretty' and 'good.'"

"As Marshall told the story, he seemed bowed down under an unbearable burden of tragedy.

"Sometimes Marshall could reveal a mood of sudden savagery and bitterness. Customarily he referred to the Mason and Dixon line as 'the Smith and Wesson line.'

"On one occasion he read with savage delight from an Iowa frontier paper which portrayed a local Negro community as a mass of illiterate apes. For him, he made clear, this epitomized the white man's attitude toward his people.

"On still another occasion at an evening session at which I found myself playing devil's advocate with a bit too much enthusiasm and lack of tact, Marshall stopped suddenly and speaking into the growing silence around the table said:

"'Alfred, you are one of us here and I like you. But'—and this in a voice of terrible intensity—'I want you to understand that when us colored folks take over, every time a white man draws a breath, he'll have to pay a fine.'"

When Lipscomb finished reading the passage he paused a beat, then looked across at Marshall and asked, "Is it still your conviction that when the colored folks take over that every time a white man draws a breath he will have to pay a fine?"

Marshall responded, "That has never been my conviction, is not now and never will be."

When asked whether Kelly had misquoted him, Marshall replied, "I am certain he has on that point."

Subcommittee chairman Olin D. Johnston of South Carolina, who was opposed to the nomination, requested that Kelly be called to testify in person. The hearings were then adjourned until Kelly could be located and brought to Washington.

It had been almost a decade since Kelly and Marshall had met. During that time, the historian had lost none of his admiration for the man he helped win *Brown.* Kelly opened his testimony before the subcommittee with a ten-minute statement that immediately dashed any hopes the

segregationists might have had of finding in him a willing and supportive ally.

"First," he began, "let me emphasize very strongly my firm belief in the integrity, honor, and decency of Judge Thurgood Marshall." He went on, "It is my opinion that he is a man of the highest professional standards and ideals and that he is a credit to the American bar and to the federal judiciary."

Next, Kelly defended the NAACP's interpretation of the Fourteenth Amendment's legislative history. He stated, "The argument in the brief was not history; it was advocacy. It was, in short, a lawyer's brief...This does not mean that the brief falsified facts, that it lied, or even that it necessarily reached false conclusions. Within a large sense, most Reconstruction historians believe it did not... The important thing here is that within the ethics of the legal profession, Thurgood Marshall's professional obligations required him to handle his available evidence in this fashion... Again, he was functioning as an advocate, not as a historian."

Kelly added, "It may be worthwhile to observe, by the way, that the brief prepared by the late John W. Davis for the respondents in *Brown v. Board* is, from a technical historical point of view, every bit as far from a balanced constitutional history of Reconstruction as is the NAACP brief. Again, Mr. Davis's brief was not history; it was advocacy. Yet no one has indicted him for having argued his case adequately for his clients. No doubt he would have been open to a charge of professional dereliction and malpractice had he done otherwise."

Kelly dispelled the notion that Marshall harbored racist sentiments. He testified that he did indeed recall Marshall saying that "when we colored folks take over, every time a white man draws a breath he'll have to pay a fine." But he insisted the remark was "mordant humor, given exclamation by a man possessed of a powerful sense of humor, and who expresses something of the excitement of verbal exchange in humorous hyperbole of this kind." He assured the subcommittee, "To lift the remark put of context and treat it as a threat or even a philosophical observation is absurd, even grotesque, in its bizarre distortion of reality."

Asked about Marshall's feelings about communism, Kelly said, "I have...heard Marshall

express personally his powerful conviction that communism and Marxism are fatal pitfalls for the

American Negro which must be avoided like the plague.

On more than one occasion Marshall in my presence bespoke his intense conviction that the destiny of the American Negro is to be

fulfilled in terms of the American constitutional system. What he wanted for the Negro, he made clear, was first-class citizenship. I have heard him say, 'We want no more; we will not take less.'"

In conclusion Kelly stated, "It is my conviction that Thurgood Marshall's victory in *Brown v. Board,* consistent as it was with the highest ethics of the legal profession, has already earned him a permanent position of honor in American history. And as a constitutional historian, I believe strongly that in his new capacity as a federal judge, he will prove to be an outstanding and preeminent judicial figure."

The Judiciary Committee passed Marshall's nomination on to the full Senate without recommendation. On September 11, 1962, he was confirmed for the Second Circuit seat by a vote of fifty-four to sixteen. The deal was complete. Eastland got Cox; Kennedy got Marshall.

Cox proved to be one of President Kennedy's most embarrassing judicial appointments. The man was a racist, and an injudicious one at that. He complained bitterly when the Justice Department brought suit to defend blacks' voting rights. From the bench on one occasion, he called black litigants in a voting rights matter "a bunch of niggers...acting like a bunch of chimpanzees." Cox turned out to be what Roy Wilkins predicted at the time of his nomination: "Another strand in the barbed-wire fence of Negro Mississippians, another cross over their weary shoulders, and another rock in the road up which their young people must struggle." No judge was ever overruled more on appeal of civil rights cases than Harold Cox of Mississippi.

By contrast, Thurgood Marshall found himself in the judicial mainstream on the U.S. Second Circuit Court of Appeals in New York City. During his four-year tenure, he wrote ninety-eight

majority opinions, none of which was reversed by the U.S. Supreme Court, and contributed eight concurrences. He wrote only twelve dissents.

In one case, *United States v. Wilkins,* he broke new ground regarding double jeopardy, protecting criminal defendants from being tried more than once for essentially the same crime. Marshall's opinion held that the Fifth Amendment protection against repeated prosecutions at the federal level also applied to the states by virtue of the Fourteenth Amendment's guarantee of due process.

In *United States v. Denno,* Marshall concurred in the trial court's ruling that an lawyer for the accused should have been present in the hospital room where the defendant was taken to be identified by a crime victim. Subsequently, in *Stovall v. Denno,* the Supreme Court adopted the position taken by Marshall.

Several other cases indicate Marshall's emerging liberal perspective. In *Keyishian v. Board of Regents of the University of the State of New York,* he wrote for the majority that New York laws requiring members of the state university's faculty to sign loyalty oaths raised significant questions under the U.S. Constitution. The Supreme Court agreed and struck the laws down, ruling that they violated the First Amendment by unnecessarily restricting free speech and vital thought.

I n *People of the State of New York v. Galamison,* Second Circuit judges found themselves confronted with the kind of case that cut close to Marshall's heart. Galamison and about fifty others were arrested and prosecuted under a number of laws for disrupting road and subway access to the New York World's Fair. Their objective, according to their attorney William Kuntsler, was to protest "the denial of equal protection of the laws to Negroes in the City, State and Nation with reference to housing, education, employment, police action and other areas of local and national life too numerous to mention." A majority of the court upheld the protesters' convictions.

Marshall wrote a lengthy dissent arguing that since the protesters were challenging the denial

of rights provided by law, they were in effect acting under the color of the law's authority. He was careful to draw a distinction between peaceful protest and criminal conduct:

"For example, if the petitioners arrested and prosecuted for violating the truancy law had merely sought to induce parents not to send their children to a segregated school which denies the 'equality of law' guaranteed by the Constitution, this in my opinion could be [protected activity] while, on the other hand, a charge of third degree assault might very well not be covered."

He also insisted that each demonstrator should have been given a separate hearing to determine the demonstrator's motivations.

This would have imposed a substantial burden on the court system and thereby discouraged prosecution.

But it cannot be said that he unwaveringly followed a liberal line. A common generalization about liberal jurists is that they are sensitive to the rights of the minority when those rights conflict with the majority's will. Naturally, Marshall was sensitive to civil rights issues, yet he did not always side with minorities against the government.

For example, in *Seneca Nation of Indians v. United States,* he upheld the government's power to condemn land on an Indian reservation for the Allegheny Reservoir Project. At issue was the secretary of the army's decision to widen a road through Seneca territory. Writing for the court's majority, Marshall stated simply, "It is hard to see how a four-lane road will interfere with communication among the Senecas so much more than a two-lane road." In dissent, Judge Moore pointed out that the land was given to the Senecas by treaty and declared, quoting Justice Hugo Black, "Great nations, like great men, should keep their word."

Another common characterization of liberals is that they are quick to uphold criminal defendants' rights. This was true of Marshall, who knew firsthand that in the South "uppity' blacks were routinely harassed or scapegoated by law enforcement authorities. In *United States v. Fay,* he argued in dissent that the Supreme Court ruling prohibiting the use of illegally seized

evidence in criminal prosecutions should be applied retroactively. This would have made anyone convicted with illegally seized evidence eligible for a new trial. The Supreme Court ultimately rejected Marshall's view, concluding that opening up past convictions to challenge would "tax the administration of justice to the utmost."

Marshall's concern about the government using its power to violate the rights or privacy of individuals did not necessarily extend beyond the criminal justice arena, however. In *United States v. Rickenbacker,* he upheld the conviction of a man who refused to provide census data, dismissing the appellant's claim that a 1960 census questionnaire constituted "an unnecessary invasion of my privacy." Instead, Marshall concluded, "The authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively."

Overall, his Second Circuit performance managed to silence, for the most part, critics who claimed that, because his expertise as a lawyer was in civil rights litigation, he lacked sufficient familiarity with other fields of law to function effectively as a judge. Writing for the *New York Times Magazine,* columnist Sidney Zion noted, "In some of the early tax cases Thurgood's lack of knowledge was embarrassing. I recall one case where a question he asked indicated that he didn't even understand the *concept* of a corporation. It was not a nice moment for anyone in the courtroom."

Newsweek praised him, however, for broadening his academic scope "to fill in the blanks from tax law to admiralty law." In *Mertens v. Flying Tiger Line, Inc.,* for example, his majority opinion maneuvered deftly through the intricacies of international law, allowing survivors of an international airplane crash to collect more damages than they would otherwise have been allowed under the Warsaw Convention. Summing up his Second Circuit tenure, *Newsweek* concluded that Marshall "acquitted himself well enough."

Well enough for what? The answer came on a humid afternoon in July 1965 when a lunch with friends was interrupted by a phone call from President Lyndon Baines Johnson.

Fanfare for the Common Man

Inscribed above the front entrance to the
Supreme Court building are the words "Equal justice
under law" Surely no one individual did more
to make those words a reality than Thurgood Marshall.
—Chief Justice William H. Rehnquist

Retired Justice Thurgood Marshall looked forward to administering the oath of office to Vice President Albert Gore, but on Inauguration Day, Wednesday, January 20,1993, he was too ill to make the twenty-two-mile trip from his Lake Barcroft home in Fairfax County, Virginia, to the West Front steps of the United States Capitol. His former colleague on the Supreme Court, Justice Byron R. White, substituted for him at the ceremonies installing only the second Democratic administration in a quarter century. On Sunday, January 24, at two P.M., just four days after William Jefferson Clinton became the nation's forty-second president, Thurgood Marshall died of congestive heart failure at Bethesda Naval Medical Center in Maryland. He was eighty-four.

Years earlier, when asked about the possibility of his retiring from the increasingly conservative Court, he jauntily replied, "Don't worry, I am going to outlive those bastards." It was probably fitting that if some of the "bastards" survived him, at least he refused to die on the watch of one of the Republican presidents whose appointments had propelled the Court from the liberal left Thurgood embraced to the conservative right he abhorred.

As news of his death spread across Washington, D.C., the nation, and the world, tributes to his life and achievements mounted. Newly elected President Clinton declared, "He was a giant in the quest for human rights and equal opportunity in the whole history of our country and

every American should be grateful for his contributions." Senator Edward M. Kennedy of Massachusetts, whose brother had given Marshall his first appointment to the federal bench in 1961, called him "a living embodiment of our nation's highest ideals." Congressman Kweisi Mfume, chairman of the Congressional Black Caucus and a Maryland Democrat from the streets of Marshall's native Baltimore, said, "He gave the Constitution the power the Framers articulated but did not practice, that Lincoln affirmed but did not perfect."

Alluding to the fact that he had, as an advocate, already earned his place in history before ascending to the Court, Harvard law professor Laurence Tribe, a leading constitutional scholar, called him simply "the greatest lawyer in the twentieth century."

Civil rights leader Jesse Jackson spoke for millions of grateful people when he said, "For most of us who grew up under segregation, we have never known a day without Thurgood Marshall hovering over us to protect us."

Sherman A. Parks Jr., a forty-two-year-old black lawyer and president of the Topeka, Kansas, school board that was sued in *Brown,* reflected on how Marshall had changed his life in particular: "I am a black male, and now I am an attorney and the president of the school board that spawned the case."

Among past and present justices, even his ideological opposites voiced deep admiration. Retired chief justice Warren E. Burger recalled that, as a lawyer, Marshall "literally took his life in his hands" to try civil rights cases in the south. Justice Clarence Thomas, who replaced Marshall as the only African American on the Court, characterized him as "a great lawyer, a great jurist and a great man."

In a moving eulogy delivered from the pulpit of Washington's National Cathedral, where the nation's leaders gathered on January 28, 1993, Chief Justice William H. Rehnquist also heralded Marshall's personal bravery, which Marshall himself downplayed when he spun his entertaining yarns, his war stories.

"Some of these stories had a humorous twist to them," Rehnquist said, "but they also gave a

sense of what he had been up against. His forays to represent his clients required not only diligence and legal skill but physical courage of a high order."

The sixteenth chief justice proceeded to make an extraordinary pronouncement: "Inscribed above the front entrance to the Supreme Court building are the words 'Equal justice under law.' Surely no one individual did more to make these words a reality than Thurgood Marshall." Thus, with the all-inclusive phrase "no one," Rehnquist ranked Marshall alongside Washington, Jefferson, and Lincoln. This statement was from the same man who, as a law clerk some thirty years earlier, had urged that *Plessy's* separate-but-equal doctrine be upheld.

At five P.M. on the Sunday that Marshall died, Thomas Snyder of Washington, D.C.'s Gawler's Funeral Home dispatched a van to remove Marshall's body from the Naval Hospital's morgue and bring it to Gawler's, a stately, red brick mortuary on upper Wisconsin Avenue in the District of Columbia's affluent Friendship Heights subdivision.

Gawler's was one of Washington's oldest funeral parlors, established in 1850. Joseph Gawler, a cabinet-maker by trade, produced coffins as a side line in his small, three-story frame house on Pennsylvania Avenue, one block from the White House.

Over the years, Gawler's has handled the funerals of some of the nation's most prominent people, among them: presidents Woodrow Wilson, William Howard Taft, Franklin D. Roosevelt, Dwight D. Eisenhower, John F. Kennedy, and Supreme Court justices Oliver Wendell Holmes, Harlan Stone, Fred A. Vinson, Robert H. Jackson, Felix Frankfurter, Hugo Black, Earl Warren, Ab Fortas, Potter Stewart, and Arthur J. Goldberg.

Despite its reputation as the mortuary of the powerful and famous, some members of Washington's old-line black elite wondered about the Marshall family's decision to use Gawler's instead of McGuire's Funeral Home across town on Georgia Avenue. McGuire's, owned by a fourth-generation African-American Washington family, had traditionally buried the city's socially prominent black citizens since the turn of the century. "I guess they understood Thurgood was an integrationist to the very end," observed one of Thurgood's former law clerks.

Gawler's morticians prepared Marshall's body, draped his Supreme Court robe around him, and placed him in a pine coffin. "Justice Marshall's family said he wanted a simple pine casket," Thomas Snyder explained, "and we had one in our inventory." The coffin was taken to Gawler's Eisenhower room. "There was a brief, private viewing just for Mrs. Marshall, family members, and a few close friends," Snyder said.

At 9:30 A.M., Wednesday , January 27, Thurgood's pine coffin, covered with an American flag, was carried up the thirty-six steps of the Supreme Court through a somber phalanx of robed current and former justices and placed on a massive Vermont marble catafalque in the building's Great Hall outside the courtroom. Throughout the day and into the evening, some 18,000 people filed past the bier to pay their final respects to "Mr. Civil Rights." His sons, lawyer Thurgood Marshall, a member of Vice President Gore's staff, and John William Marshall, a Virginia state police officer, took turns standing vigil over their father's remains.

Early next morning, the grounds of the National Cathedral at the corner of Wisconsin and Massachusetts avenues, in the city's fashionable upper northwest quadrant, resembled a civil rights mass meeting of the 1960s. People—black and white, Jew and Gentile—who had been active in the civil rights movement and perhaps had not been together since the dark days of Montgomery, Selma, Atlanta, and Little Rock, a quarter century earlier, exchanged greetings in the unseasonably balmy, overcast January weather. The black war wagons of the U.S. Secret Service and uniformed officers from the Metropolitan Police force, the U.S. Park Service, the U.S. Capitol Police, and the Executive Protection Service appeared to stretch for miles, while uniformed policemen patrolled the area with dogs.

It might indeed have been a scene reminiscent of Birmingham, Alabama, decades before, when Police Chief Bull Connor's officers turned their vicious dogs and billy clubs on civil rights demonstrators. But on this day the law enforcement authorities were not concerned with the presence of people like Julian Bond, John Lewis, Jesse Jackson, Lonnie King, Marian Wright Edelman, and the scores of other veterans of the civil rights movement. The officers had not

come to prevent black people from getting a meal at a lunch counter, attending classes at a southern school, or riding in the front seat of a Greyhound bus to Jackson, Mississippi. Instead, they were there to protect the President and Vice President of the United States and the leaders of Congress, including most of the members of the U.S. Senate and House of Representatives, along with every living current and former member of the Supreme Court. All were there to pay tribute to Thurgood Marshall.

Salutations were kept short because everyone seemed anxious to find seats in the crowded mahogany pews of the National Cathedral. The coffin, draped this time with the flag of the Episcopal Church, of which Marshall was a devoted member, was wheeled into the main chapel where it rested in front of 4,000 mourners, not all of whom were renowned. Among them were seventy-year-old Miriam Johnson and her sixty-seven-year-old friend Agnes Miles, who rode a bus all night from their homes in Birmingham, Alabama, to be there. “And we rode on the front seats,” Mrs. Johnson said, knowing her comment was a testimony to Thurgood Marshall’s career.

By 10:30 A.M., when Edward Madison Nassor began the prelude, “Land of Rest,” on the fifty-three-bell Bessie J. Kibbey memorial carillon, it was clear to those in attendance that Thurgood Marshall’s funeral would be more a celebration of his life than a mourning of his passing. He was described variously by those who eulogized him as a practical joker, a good-humored curmudgeon, and a champion of the weak and oppressed.

Ralph K. Winter, a judge on the United States Court of Appeals for the Second Circuit in New York, served as a law clerk in the early 1960s for Judge Marshall of the same court. He spoke of how, during the 1940s, Marshall would call travel agencies to uncover whether their booking practices were discriminatory and, if so, get them shut down. On one occasion, he was surprised when a travel agent reserved him a room in a Florida hotel. “Excuse me, is this hotel restricted?” Marshall asked.

“Oh, Mr. Marshall,” replied the agent, “I didn’t know you were Jewish!” Feigning black dialect,

Marshall responded, “Ahh, sister, have I got news for you!”

Winter went on to relate that Marshall’s favorite appellation for his law clerks was “knucklehead,” concluding, “I’m prouder of the title ‘knucklehead’ than any other one I’ve ever had.” An old friend, William T. Coleman, the former transportation secretary who also worked on *Brown,* observed, “History will ultimately record that Mr. Justice Marshall gave the cloth and linen to the work that Lincoln’s untimely death left undone.” He went on to wonder aloud, as the justices looked on and listened, whether the civil rights cause would have suffered the same reversals at the hands of a more conservative court if Thurgood Marshall had been available to represent the NAACP, instead of thrust into the role of a dissenting, minority justice.

Coleman concluded with his gaze resting on the new President. He asked rhetorically, “Could a son of Arkansas be president if Marshall’s efforts had not been successful? Please do not think us ungracious when we wonder if a son of Arkansas would be here today if Marshall, in that hot summer of 1958 had lost, not won, the Little Rock school case. Could there be a cabinet reflective of the American people if Marshall had lost *Brown v. Board of Education}”*

Vernon E. Jordan, former head of the National Urban League and a close adviser to President Clinton during the new administration’s transition, delivered what was perhaps the most poignant appraisal of Marshall’s life and work. His mission, said Jordan, was “to cleanse our tattered Constitution and our besmirched legal system of the filth of oppressive racism and to restore to all Americans a Constitution and a legal system newly alive to the requirement of justice.”

He added, “He was a teacher who taught us to believe in the shield of justice and the sword of truth, a role model whose career made us dream large dreams and work to secure them, an agent of change who transformed the way an entire generation thought of itself, of its place in our society, and of the law itself. Farewell, Mr. Civil Rights. Farewell, Mr. Justice Marshall. We thank you for all you have done. Good night, sweet prince, and flights of angels sing thee to thy

rest."

With that, the choir of Howard University raised their voices in "The Battle Hymn of the Republic," which Marshall often commented should be made the national anthem. Their exuberant rendition brought members of the audience to their feet to join in the singing. Soon the massive cathedral reverberated with the hymn's righteous indignation over slavery, injustice, and oppression, its solemn vow to trample the grapes of wrath. "Mine eyes have seen the glory of the coming of the Lord..."

The choir concluded the services with "Lift Every Voice and Sing," the James Weldon Johnson poem set to music that is known as the Negro National Anthem. The President and Mrs. Clinton joined in the singing without having to refer to the lyrics printed on the funeral program. Afterward, the cathedral's great organ burst forth with Aaron Copland's "Fanfare for the Common Man," and this most uncommon man's plain pine coffin was wheeled from the chapel and placed in a waiting hearse. Thurgood Marshall was buried the next day across the Potomac River, in Arlington National Cemetery, in the Supreme Court circle.

But his story was not yet over, for intrigue and controversy were to follow him even to his grave.

Within a month of his burial, Columbia University released to the general public transcripts of interviews that were taped during the 1970s for the university's oral history project. By agreement with the justice, the transcripts had been sealed until after his death. The transcripts contained extraordinarily candid, often intemperate, observations about some of the leading characters and personages Marshall had dealt with in his day. His comments, often critical, sometimes laudatory, always colorful, were hardly out of character. Yet they ignited a firestorm of controversy because of their potential for changing the favorable, longstanding perceptions accorded some of the leading figures in modern American history.

Marshall was especially biting in his criticism of Robert F. Kennedy, who, as attorney general, brokered the devil's pact with Mississippi senator James O. Eastland that had made Marshall a

federal appeals court judge. His brother the President was, according to Marshall, "a very sweet man." By contrast, he said, "Bobby was like his father [Joseph P. Kennedy], He was a cold, calculating character. 'What's in it for me?' I mean, not like his brother. He had no warm feelings. None at all."

He went on to say that the then attorney general "was primarily interested in getting the president reelected He constantly pushed [President] Kennedy to push the dates back on which he would make these [civil rights] moves. It would have gone much faster but for that."

He was critical of black leaders, as well. Conceding that Dr. Martin Luther King Jr. was a "great" leader, he nonetheless maintained that King "wasn't worth diddly squat as an organizer." He complained, "All he [King] did was to dump all his legal work on us, including the bills. And that was all right with him. So long as he didn't have to pay the bills."

He reiterated his long-standing animus against Malcolm X, explaining, "I just don't believe that everything that's black is right and everything that's white is wrong. I think that anybody in their right mind knows it, and that's what they [the Black Muslims] were preaching."

He characterized Black Muslims generally as "the nicest, sweetest, most decent people you will ever run across." But he insisted, "I wouldn't agree with anything a Muslim ever said, any time, any place." He concluded with regard to Malcolm X, "In the end he kept wanting to talk to me, and I kept telling him to go to hell." The Black Muslim leader was slain in Harlem in 1965.

Some of his most vitriolic remarks were directed against President Dwight D. Eisenhower, whose conduct in the immediate wake of *Brown* he called "despicable." He also attacked General Douglas MacArthur's refusal to desegregate army units under his command.

"I questioned him about the continuation of segregation in the army," said the justice, recalling his visit to Korea in 1951, "and he said he was working on it. And I asked him how many years he'd been working on it. And he said he didn't really remember how many. He said he didn't find the Negroes qualified, and when he found them qualified they would be integrated. Well, we didn't part that friendly."

Again, his warmest praise was reserved for Lyndon Johnson, the president who appointed him to the Supreme Court and who, according to Marshall, was "a lovely guy" who "died of a broken heart." Marshall insisted, "If he'd been reelected, he'd have been still alive today."

Recalling the occasional phone calls he received from his old drinking buddy shortly after the former president left office, Marshall revealed, "He would call me for the express purpose of getting out of it. He would say, 'No moaning at the bar,' or something like that. And then he'd say, 'Okay, now, go have a drink.' I'd say, 'Providing you do.'"

As revealing as the Columbia University transcripts were, however, a far more explosive controversy erupted in May 1993 when the Library of Congress released the late justice's papers, including correspondence and case files, from his years on the Court. The case files contain confidential notes and internal memoranda between Marshall, his law clerks, and the other justices, as well as draft opinions in various stages and other related materials. Taken as a whole, the papers, which consist of some 173,700 items and occupy roughly 231.6 linear feet of shelf space, provide a rare glimpse into the internal workings of the Court and the modus operandi of the various justices who jealously guard their privacy and the confidentiality of their deliberations.

Reaction to the documents' release was swift and strident. In a sharply worded letter to Librarian of Congress James H. Billington, dated May 25, 1993, Chief Justice Rehnquist accused the library of exercising "bad judgment" in making the papers available so soon after Marshall's death. Many of the issues the papers dealt with still confronted the justices, and many of the justices Marshall worked with, and whose thoughts and sentiments his papers reflected, still sat on the Court.

"Most members of the court recognize that after the passage of a certain amount of time, our papers should be available for historical research," Rehnquist conceded. "But to release Justice Marshall's papers dealing with deliberations which occurred as recently as two terms ago is something quite different."

Claiming to speak for a majority of the justices, who he said were "surprised and disappointed" by the opening of Marshall's files, Rehnquist warned, "Unless there is some presently unknown basis for the library's action, we think it is such that future donors of judicial papers will be inclined to look elsewhere for a repository."

The Marshall family protested the documents' release as well. On Friday, May 21, 1993, Cissy Marshall said through her attorney, William T. Coleman, "My husband had great respect for the court and its tradition of confidentiality. I am certain he never intended his papers to be released during the lifetime of the justices with whom he sat and I am surprised that the Library of Congress has chosen to release them at this time."

Coleman added, "All I can say is that we were shocked and utterly surprised at his [Billington's] attitude. We thought that he acted improperly, and that he was turning something that was a great contribution—namely the preservation of the papers—into an act destroying confidentiality, which certainly adversely affected the Court and the way they do business." Convinced that lawyers were somehow using the files to formulate strategies for future cases, Coleman, who clerked for Justice Felix Frankfurter during the Court's 1948-1949 term, complained, "I will say that this is the worst thing I have seen happen in a long time around this town."

Billington, for his part, insisted that he had merely carried out the late justice's "exact intentions." He refused to restrict the public's access to the collection. "The library must honor the expressed wishes of one of our great jurists," he maintained. To do otherwise, he contended, would be "a breach of contract and a violation of the trust placed in the library" by Justice Marshall. He concluded, "Open access to the papers, as called for in Justice Marshall's instrument of gift, must be maintained."

The instrument of gift itself, signed by Justice Marshall on October 24, 1991, provides, in relevant part:

I hereby dedicate to the public all rights, including copyrights throughout the world, that I

may possess in the Collection.

Access. With the exception that the entire Collection shall be at all times available to the staff of the Library for administrative purposes, access to the Collection during my lifetime is restricted to me and to others only with my written permission. Thereafter, the Collection shall be made available to the public at the discretion of the Library.

Use. Use of the materials constituting this gift shall be limited to private study on the premises of the Library by researchers or scholars engaged in serious research.

Reproduction. Persons granted access to the Collection may obtain single-copy reproductions of the unpublished writing contained therein.

Aside from the question of how the files might be used by lawyers to prepare cases for argument before the Court, there seems to be little in the collection that is in the nature of a striking revelation, or an embarrassment for the Court. In fact, the files reflect a dignified and thoughtful collegiality among the justices, who work hard and diligently, strive admirably to arrive at consensus, and document even their most informal communications in order to avoid misunderstandings. The files appear to contain few handwritten notes or vote tallies taken by Marshall during conferences. Evidently, he was not a prodigious note-taker or, more often than not, chose not to include his notes in the collection.

The case files do reveal intensive jockeying back and forth among conservatives, liberals, and centrists over such volatile issues as abortion, civil rights, and sex discrimination. For example, in 1989, the Court apparently came within ten days of overturning *Roe v. Wade,* which established women's constitutional right to abortion. Late in the term, Rehnquist circulated the last of four drafts of a proposed majority opinion in *Webster v. Reproductive Health Services* that would have upheld a Missouri law imposing severe abortion limitations. Three justices, in proposed dissents, were prepared to pronounce *"Roe* no longer lives." In the end, however, Rehnquist failed to hold the majority he felt he had, and *Roe* was reaffirmed, if somewhat weakened. In *Webster,* Justice Harry Blackmun, Roe's author, was able to declare, "For today, at least, the law of abortion stands undisturbed."

The files also reveal that during the 1988-1989 term, personal rancor surfaced between

Justices William Brennan and Anthony Kennedy over the Court's commitment to racial equality. In *Patterson v. McLean Credit Union,* Brenda Patterson, an African-American woman who worked as a teller and file clerk for a credit union in Winston-Salem, North Carolina, sued her employers for racial harassment and the denial of a promotion. At issue was whether Patterson was entitled to unlimited monetary damages since the discrimination she complained of had occurred after, not before, she was actually hired.

Brennan said yes, that Patterson's claim to damages was valid. He prepared a majority opinion, but subsequently found himself in dissent. Bitter over the defeat he was about to suffer on what he regarded as a crucial civil rights issue, he prepared an angry opinion which charged, "The court's fine phrases about our commitment to the eradication of racial discrimination...seem to count for little in practice."

Incensed, Justice Anthony Kennedy prepared his own opinion that included a footnote rebuking Brennan, who, he wrote, "thinks it judicious to bolster his position by questioning the court's understanding of the necessity to eradicate racial discrimination." He concluded, "The commitment to equality, fairness, and compassion is not a treasured monopoly of our colleagues in dissent."

Ultimately, both Brennan's attack and Kennedy's rebuke were dropped from the final versions of their opinions.

The files show that Marshall found himself at odds with Justice Lewis Powell during the 1985-1986 term over a capital punishment case, *Vasquez v. Hillery.* Vasquez, who was black, was sentenced to death in 1962. He challenged his conviction on grounds that blacks had been systematically excluded from the grand jury that indicted him. Since Vasquez did not raise this particular issue in federal court until 1978, Powell wrote to Marshall on November 7, 1985, expressing concern over the timeliness of Vasquez's appeal. He asserted, "It could well be that the court's opinion in this case will encourage convicted persons with long sentences to defer seeking relief until retrial becomes difficult or impossible."

Marshall wrote back, “[I]t is hard for me to believe that any prisoner would voluntarily sit in jail for years, knowing he has a meritorious claim that could result in his freedom.” He ended up writing the majority opinion, which held that a conviction could be reversed at any time after it is demonstrated that an indicting grand jury was improperly constituted. Powell and two others dissented.

What these and hundreds of other examples demonstrate is that liberal and conservative justices tend to disagree, which comes as no surprise. But if the Court is, more or less, what it appears to be, why then the desire on the part of the justices for secrecy?

Any outsider who has ever tried to probe the Court’s internal workings or gain access to the justices knows that the Court is like what used to be said of the Kremlin: It is a closed society, an enigma wrapped inside a mystery locked up in a riddle. Critics have contended that the Court’s denial of access to its deliberations is wholly inappropriate within the context of a democratic society.

While he was a federal appeals court judge, Warren E. Burger once said, “A court which is final and unreviewable needs more careful scrutiny than any other. Unreviewable power is the most likely to self-indulge itself and the least likely to engage in dispassionate self-analysis. In a country like ours, no public institution, or the people who operate it, can be above public debate.” Yet when he became chief justice, Burger instituted a Draconian regime of secrecy.

He was not alone. Even justices who have been the most ardent defenders of First Amendment freedoms and the public’s right to know have been xenophobic in their defense of the Court’s secrecy. Hugo Black, an absolutist about free speech and press, burned many of his papers before his death so that their contents could never be revealed.

Thurgood Marshall contemplated destroying his papers as well. On July 24, 1980, Mrs. Anna T James, law librarian at Texas Southern University’s Thurgood Marshall School of Law, wrote to the justice, requesting that he deposit at least some of his papers at her institution. “The name of our law school implies that a collection of documents about your career is housed at our

institution," she wrote. "To that end, we have begun to acquire materials which focus on three stages of your career: civil rights attorney, solicitor general, and jurist. To enhance this project, we would like to discuss the possibility of you donating a portion of your judicial papers and personal memorabilia to our library."

Marshall rejected her request out of hand. In a tersely worded reply dated July 31,1980, he wrote, "I have your letter concerning the possibility of my placing a collection of documents about myself in your institution. I have very little to contribute because upon my death all of my personal records will be destroyed."

Obviously he changed his mind, which should have come as no surprise to anyone who knew him. As former National Security Adviser McGeorge Bundy wrote in a column for the *Washington Post,* "Are we not allowed to suspect that part of him really wanted his papers to be fully and promptly used? I myself suspect that he would have read [about this controversy] with some pleasure. He was never a stuffy man."

As to what the documents reveal about the Court as an institution and the individual justices as people, Charles Rodell's observation in his remarkable book *Nine Men: A Political History of the Supreme Court From 1790 to 1955,* is apt. "Supreme Court Justices," he wrote, "off the bench as well as on it—are deemed by the myth to be, properly, apolitical persons, unaffected by what goes on in the nation outside their marble temple, aloof and remote from the workaday world. Myths or no myths, solemn show or no solemn show, the Supreme Court is nothing other than nine sometimes wise, sometimes unwise, but always human, men." And, of course, these days, women. Thurgood Marshall was one of the wisest, and most human, of those who ever served there.

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