

TM's Legacy

Ralph K. Winter†

Thirty years ago, in October 1961, Thurgood Marshall went on the bench. Since then, he has served as a Circuit Judge on the United States Court of Appeals for the Second Circuit, as Solicitor General of the United States, and as Associate Justice of the Supreme Court. His judicial career spanned an era in which the judicial branch has stood at the center of much controversy. Like any judge of his time who was called upon to rule on controversial matters, those aligned against his views have been highly critical of his work. Those aligned with his views have been lavish in their praise.

A couple of things have been lost in the clash of sound bites. First, the great bulk of Justice Marshall's judicial work, like that of all federal judges, consists of decisions that are largely ignored by both the media and politicized observers but are of critical importance to the legal system that sustains our economy and our civilization. As a law teacher and judge who continually encounters and uses this otherwise ignored body of Justice Marshall's work, I would stress that his jurisprudence has been extremely professional and is highly regarded by those who labor in less publicized areas of law.

Justice Marshall authored several major opinions in corporate and securities law, the fields in which I teach. His opinion in *TSC Industries v. Northway, Inc.*,¹ formulating the test for materiality, is one of the most cited decisions in securities law. *Herman & MacLean v. Huddleston*,² which held that private remedies under the 1933 and 1934 Securities Acts are cumulative, contains a very helpful analysis of the procedural and substantive interplay of the various express and judge-made avenues of relief under the Acts. *Reves v. Ernst & Young*³ brought light to the murky issues of what kinds of notes constitute securities for purposes of federal law. And *Kamen v. Kemper Financial Services*⁴ infused Rule 23(1) of the Federal Rules of Civil Procedure with good judgment by holding that the demand requirement in shareholders' derivative actions will generally be governed by the law of the state of incorporation. Finally, everyone, including his colleagues remaining on the Supreme Court,

† Judge, United States Court of Appeals for the Second Circuit; Adjunct Professor of Law, Yale Law School. Judge Winter served as Justice Marshall's first law clerk.

1. 426 U.S. 438 (1976).
2. 459 U.S. 375 (1983).
3. 494 U.S. 56 (1990).
4. 111 S. Ct. 1711 (1991).

should reread his dissenting opinion in *Sedima, S.P.R.L. v. Imrex Co.*,⁵ arguing against what has become the virtually unlimited reach of civil RICO.

Second, in evaluating a judge's work, one must look not simply to the results reached but also to the quality of a judge's opinions. Even in those decisions that inevitably spark political controversy, judges must employ reasoning that invokes legal criteria and then put that reasoning on paper. Such reasoning is rarely noted, much less subjected to analysis, by the great bulk of the media, which focuses solely on individual votes and outcomes and usually describes them in political terms. Justice Marshall's opinions in constitutional cases have been grounded in legal reasoning and highly respected by less politicized observers, including many who do not agree with the results reached.

Many observers believed that his concurring opinion in the *New York Times Co. v. United States*,⁶ the Pentagon Papers case, was the best of the several that were written in that celebrated case. The opinion examined the numerous statutory provisions governing the distribution of national security information and viewed those provisions against proposals for strengthening control over the distribution of information that had been rejected by Congress. Justice Marshall's opinion argued powerfully that Congress had specifically declined to authorize resort to the equity powers of federal courts to prevent such distribution and that issuance of an injunction would violate the separation of powers. His opinion in *Police Department of Chicago v. Mosley*⁷ remains the classic statement on the invalidity of laws restricting speech that are not content-neutral, and his dissent in *City of Richmond v. J.A. Croson Co.*⁸ is a classic statement of his position on race-conscious remedial measures.

Justice Marshall's judicial career has thus been outstanding. What is truly amazing, and I mean truly amazing, is that he was an historic figure before his judicial career. By the time "TM" (as his clerks affectionately refer to him) became a judge, he had been chased by gangs, received by Presidents (eagerly and not so eagerly), and had had his picture on the cover of *Time* magazine. (He won't like this, but that picture did not resemble Sidney Poitier.)⁹

By the time he went on the bench, TM had already completed two historic careers. One career was as a lawyer. That career began when he graduated first in his class from Howard Law School. There is no photograph of that class because its members were too rebellious even to agree to sit for a photo at the school's request. TM has said that was the first sign of the fuss that the students would cause later.

5. 473 U.S. 479, 500 (1985) (Marshall, J., dissenting).

6. 403 U.S. 713, 740 (1971) (Marshall, J., concurring).

7. 408 U.S. 92 (1972).

8. 488 U.S. 469, 528 (1989) (Marshall, J., dissenting).

9. Sidney Poitier portrayed Justice Marshall in a recent television miniseries, *Separate But Equal* (ABC television broadcast, Apr. 7 & 8, 1991).

By 1961, TM was probably the most famous lawyer in the United States, best known for winning 29 of 32 cases in the Supreme Court, including the *Brown* case. He and his small group of associates changed the face of American law by carefully orchestrating, and brilliantly arguing, a long line of civil rights cases that restored the role of the Fourteenth Amendment to its rightful place in American law. But TM was no fancy appellate lawyer who took only landmark constitutional cases. He was a courtroom lawyer who went where he was needed and tried all kinds of cases, including murder cases.

TM's second career prior to becoming a judge was as a civil rights leader at a time when the movement had a small political base, and when diplomacy and persuasion were its principal weapons. He was a master at both. With the intensity of his convictions and the aid of his extraordinary personality, he enlisted white political and other leaders, such as Henry Luce, in his cause and relentlessly addressed groups across the country with the theme that equal rights under law was not the cause of one group but was in the interest of all citizens. He thus was a major figure in making civil rights a part of mainstream American values.

None of TM's achievements came easily, not even becoming a judge. The Kennedy Administration had first insisted that he take a district judgeship, and when TM turned that down, it appeared that he might not get an appointment at all. Finally, he was nominated to the Second Circuit but on an interim basis. Interim appointment, thankfully no longer used, was a method by which judicial appointments were made while Congress was not in session. Instead of having life tenure, the judge served on an interim basis until confirmed or not confirmed. For TM the interim was long. His nomination, which occurred before the Voting Rights Act of 1965, languished in the Senate Judiciary Committee chaired by James O. Eastland of Mississippi, who shunted TM's nomination to a subcommittee chaired by Senator Olin Johnston of South Carolina.

I began working for TM on October 24, 1961. When I left in the spring or early summer of 1962, TM still had not been confirmed. I left and was replaced by Jim Freedman, now President of Dartmouth. Interestingly, within days after I left, the Senate confirmed TM. (He has been kind enough never to mention in my presence inferences that might be drawn from this sequence of events).

In spite of the strain of serving as a judge without having been confirmed, TM carried out his responsibilities with his characteristic good humor. It has been my experience that most famous men or women rarely live up to their press clippings. Unlike many household names, however, Thurgood Marshall, the person, lives up to, even outdoes, his press clippings. He is a warm, friendly, incredibly funny man, a totally lovable human being.

In his first year as a judge, he was a magnet for all the law clerks. Every morning he presided over a coffee hour attended by clerks from other chambers. The atmosphere was one of earthy stories, salty language, and booming laughter. (I did my best to adapt to this environment.)

TM has always been a keen observer of life, ready with a one-liner or anecdote summing up the issue of the moment. Discussing street crime, he once remarked that he was thinking of getting a large sign that read, "Just ask." Describing good detective work, he once explained, "When a man robs a bank, the first thing he'll do is get a new girlfriend. The old girlfriend will call the police. A good detective is the one by the phone when that call comes." And, as he once told me when discussing a mutual acquaintance who seemed to attract publicity, "He who tooteth not his own horn, will find his horn un-tooted."

TM's inexhaustible sense of humor has enabled him to laugh at, while combatting, the darker side of human nature. He has described how in the 1940's he forced a travel agency to leave New York because it was booking reservations for Florida hotels that discriminated. In his words, "I called this agency and asked to book a room at the _____ Hotel. I told the woman who answered that my name was Thurgood Marshall. Usually when I did that they would say 'I'm sorry we cannot accept your reservation,' and I would then get the agency booted out of New York. This time, though, the woman said 'Thank you, Mr. Marshall. Your reservation will be made. I hope you have a good vacation.' I then said to her, 'Excuse me, isn't this a restricted hotel?' She replied, 'Oh, Mr. Marshall, I didn't know you were Jewish.' I told her [lapsing into an exaggerated accent] 'Ahh've got NEWWSS for you.'"

TM also tells of confronting General MacArthur about the continued segregation of the Army during the Korean War despite presidential orders to desegregate. Each time TM brought up the name of a black soldier who had performed courageously in battle or efficiently in a staff position, the General would deny that the soldier was qualified to serve in an integrated unit. Just as the conversation reached an impasse, an all-white band passed by. TM asked the General whether he was also unable to find a qualified black musician.

On another occasion, during the Nixon Administration, TM, then a Justice, was ill in the hospital. A doctor informed him that the White House had asked for details of his condition. The doctor then asked whether TM minded if this information was passed along. TM said that he didn't care one way or the other so long as at the bottom of the report the doctor wrote in block capital letters, "NOT YET."

TM is a man who not only preaches tolerance but also practices it. In 1962, he was interviewed by the FBI concerning the appointment of a former southern governor to a federal position. The governor had previously vowed never to accept the desegregation of schools in his state. TM noted that he had irreconcilable differences with the man. However, he added, "I have got to say, though, that he spent twenty-five years in politics in that state and never became rich. He must be one of the most honest men around." Recently, at a meeting of lawyers, TM went out of his way to grasp the hand of Judge Robert Bork and share some kind words, after Bork's nomination had been defeated

in the Senate. TM and Judge Bork surely have different views on many things, but those differences were not enough to stop TM's basic humanity from coming through.

Some view TM as a cranky curmudgeon without realizing that such behavior is one of the longest running acts in legal history. Law clerks are rarely praised for good work or a conscientious performance. One day I braved a blizzard to travel from Madison, Connecticut, to the New York courthouse in Foley Square. When I arrived, on time, TM looked at me, looked out the window at the snow, and said, "Boy, now I know how stupid you really are." I also became accustomed to being called "knucklehead." I didn't mind that so much when, later, one of my successors told me that, after he had done a very good job on a project, TM had declared that the clerk was "almost a knucklehead."

One incident perhaps best sums up TM's tolerance, good humor, and basic humanity—and the extraordinary time of transition in which he lived and indeed helped shape. In 1962, while on the Second Circuit, TM went upstairs to another judge's chambers where a group portrait of the judges was to be taken. The photographer, in testing his equipment, had blown a fuse, and had sent for an electrician. When TM entered the chambers, the other judge's secretary said, "You must be the electrician." After he returned, he related this incident to me. Instead of taking umbrage at the secretary's remark, he resorted to his penchant for commenting on current affairs. This incident occurred when craft unions rarely had black members. TM said of the secretary's remark, "Boy, that woman must be crazy if she thinks I could become an electrician in New York City."

