



## **Thurgood Marshall: Inspirational Advocate as Lawyer and Judge**

**By George Bundy Smith**

On Sept. 11, 1958, my twin sister, Inez Smith, and I were among the first persons in line outside of the Supreme Court of the United States in Washington, D.C. Both of us were going into our senior years in college, she at Jackson College of Tufts University in Medford, Mass., and I at Yale College in New Haven, Conn. We would go on to the Yale Law School together and graduate in 1962.

The occasion for our being in line so early was the argument of *Cooper v. Aaron*, a case from Little Rock, Ark., that had created worldwide attention. As the time wore on, the crowd became larger and larger, and we were glad that we had arrived early and were virtually assured of getting into the courtroom where space was limited. When we finally were ushered in, to our dismay, the officers seated us from back to front which meant that although we were among the first in line, we did not have front row seats. Was this the beginning of a disappointing outcome in the case?

In September 1957, approximately one year earlier, I set sail on a ship known as the *Mauretania* to spend my junior year in France. Even as my mother, brother Sidney, and twin sister drove from Washington, D.C., to New York to board the *Mauretania*, I wondered if I had chosen the wrong time to leave the country. Nine young African Americans had attempted to enter Central High School in Little Rock, Ark., and had been met by then-governor, Orville

Faubus, who declared that no black student would enter that all-white school.

Despite the fact that I was then not trained to do anything, I wondered if my presence in America could spell the difference between success and failure. I decided to go on to France basically because, in order to be effective in the fight against segregation, I needed to continue my education.

Many in the line outside of the Supreme Court had come to hear Thurgood Marshall argue on behalf of the African Americans who were trying to get an education. The Little Rock School Board and the Arkansas authorities contended that there should be a delay in the enforcement of desegregation in Little Rock. In arguing for immediate compliance with the mandate of *Brown v. Board of Education of Topeka*, that schools segregated on the basis of race were unconstitutional, Marshall gave one of the finest arguments ever heard in the Supreme Court. Thurgood Marshall was even then a hero to many African Americans who, like me, grew up under the repressive yoke of racial segregation. In my own case, I was forced to attend a Division II high school, I could not use the library in my neighborhood or play on the playground near my house. I could not attend the movie theater or eat in the restaurants in the nation's capital.

It was while I was in junior high school in Washington, D.C., that I learned that he, and others, were trying to eliminate racial segregation in America. By the time I stood in line in September 1958, I had already decided to become a lawyer to help end a system of separation that could not and cannot be justified. Marshall's argument on that September day was a simple one. African Americans were entitled to their rights immediately and not in the distant future. He continued that it would be wrong for those who had bitterly fought against ending segregation in Little Rock to be able to say that they had won and that they could now return to Central High School in triumph.

My sister and I left the Supreme Court that day feeling that no Justice or person could deny the force of Marshall's argument and that the African-American students should win the day. Our assessment was confirmed when, the next day, Sept. 12, 1958, the Supreme Court announced a *per curiam* decision affirming the order of the Eighth Circuit Court of Appeals that desegregation must go forward immediately. The opinion stated that because the school year was at hand, an immediate decision was necessary and the basis for the Court's decision would come later.

We are now some 50 years from the 1957 effort on the part of the Governor of Arkansas and others to thwart the education of African-American students in Central High School. On Sept. 29, 1958, the Court gave its reasons for ordering immediate implementation of a plan of desegregation. The opinion (358 U.S. 1) begins by announcing that it is the opinion of all of the nine Justices of the Court, and by specifically naming the Chief Justice (Warren) and Justices Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan and Whitaker. In its opinion, the Court stated:

The constitutional rights of 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. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by law or ordinances which deny rights created or protected by the Federal Constitution."

*Buchanan v. Worley*, 245 U.S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights.

Marshall's legal advocacy and persistence did not end when he became the first African American to sit on the Supreme Court. For example, his uncompromising opposition to the death penalty on the ground that it was cruel and unusual in violation of the Eighth Amendment demonstrates his advocacy on the Court.

In 1972 in *Furman v. Georgia*, (408 U.S. 238), Justice Marshall joined Justices Douglas, Brennan, Stewart and White in declaring unconstitutional the imposition of the death penalty as cruel and unusual in the manner in which it was imposed. Chief Justice Burger and Justices Blackmun, Powell and Rehnquist dissented.

When the Supreme Court ruled the death penalty constitutional in *Gregg v. Georgia* (428 U.S. 153), in 1976, Justice Marshall, along with Justice Brennan, continued to oppose the death penalty. Justice Douglas had been replaced on the Court by Justice Stevens. He, along with all of the other Justices on the Court, found the death penalty enacted in Georgia after *Furman* constitutional.

Justice Marshall's view was that the death penalty was excessive and was contrary to evolving moral standards. He would maintain that position until he left the Court, forcefully rejecting the views of others on the Court that his position was incorrect.

I met Marshall for the first time while I was a student at the Yale Law School. I was introduced to him at a coffee shop by Professor Lewis Pollock. He had come to New Haven to deliver an address on equality. Many of us who were advocates for civil rights in the 1950s and 1960s remain so today. While much progress has been made, even greater progress remains to be made. It is up to present and future generations to remember the contributions made by Thurgood Marshall, the advocate as a lawyer and as a Justice of the Supreme Court, and to continue and expand their efforts to make America an inclusive society.

**Editor's note:** Judge Smith is a partner at Chadbourne & Parke LLP and was a judge in the New York State Court of Appeals from Sept. 24, 1992 through Sept. 24, 2006. His sister, Judge Inez Smith, is a member of the bench of the District of Columbia Court of Appeals, the highest court in the District of Columbia. ♦