

COURTSIDE

BY TONY MAURO

Thankfully, Marshall's Stories Can Be Told

For many of Justice Thurgood Marshall's friends and admirers, a major concern of recent years was an ironic one—that Marshall, a man who lived by anecdote and storytelling, would die without his entire story being told.

More than once he told his law clerks that he would follow Justice Hugo Black's example and burn all his papers so that no one would learn his Supreme Court secrets. Those pronouncements encouraged his clerks to be brutally candid in their memos.

Repeated efforts to interest him in writing his own memoirs failed. Never a man who had much use for reporters, Marshall ignored or turned down virtually all requests for press interviews. Books about him by others have blossomed in recent weeks with uncanny timing and considerable detail. But several of their authors and other writers encountered nothing but resistance when they asked Marshall for inside details on the Court and his fellow justices. Columnist Carl Rowan, once hoping for an authorized biography, opened his book *Dream Makers, Dream Breakers* with the words, "This is not an authorized biography."

Even in retirement, it seemed, Thurgood Marshall would refuse to break his code of silence about his time at the Supreme Court.

Now, a week after his death, it appears those concerns may have been premature. It turns out that Marshall had something of a change of heart about posterity and began to cooperate with at least some official historical efforts. No hidden autobiography has surfaced, but possibly the next best thing remains.

Tons' of Papers

The major lode will be Marshall's official papers, which instead of being burned were transferred last year to the Library of Congress, where the process of indexing is nearing completion.

"He did consider not leaving them," says David Wigdor, assistant chief of the Library of Congress' manuscript division.



Many feared that the late Supreme Court Justice Thurgood Marshall would go to his grave without sharing his many stories for posterity.

"But sometime soon after his retirement, he decided to have them preserved."

Marshall's papers will be in good company at the library, joining those of Justices William Brennan Jr., William O. Douglas, and Robert Jackson, among many others. Some, in fact, speculate that Brennan's decision to leave his detailed papers to the library may have helped soften Marshall's curmudgeonly determination not to preserve his own.

Wigdor says that the Marshall papers are voluminous, going back to his days as a civil-rights lawyer. The early parts will supplement what Wigdor describes as "tons" of historical papers from the NAACP Legal Defense and Educational Fund, also on file with the library. Marshall served as director-counsel of the fund for 20 years.

Marshall's intention, according to Wigdor, was to make his papers available during his lifetime, once they were properly ordered and ready to review. Now that he is gone, the papers when ready will be available under "general restrictions," which means legitimate researchers, not casual browsers, will be able to view them.

Talking to the Generations

The other major concession to history that Marshall made in recent months was his participation in an oral history project funded by the Supreme Court Historical Society and conducted under the auspices of the Federal Judicial Center's history office.

The project's aim is to get all retired justices on tape recalling their lives and careers. Interviews with Brennan and Lewis Powell Jr. are under way—Warren Burger has so far not agreed to participate—but Marshall's were the furthest along, says the historical society's executive director, David Pride. The current interviews have been audiotaped only, but Pride is hoping that someday soon, interviews will be videotaped as well. "Imag-

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ine if we had John Marshall on videotape taking about *Marbury v. Madison*," says Pride.

According to Dr. Cynthia Harrison, chief of the Federal Judicial Center's history office, Marshall sat for more than a dozen hours of interviews beginning in February 1992. The last interview took place on Nov. 19. All were conducted by Yale Law School Professor Stephen Carter, who had clerked for Marshall in the 1980-81 term.

"We would all, of course, have wished he were with us longer," says Harrison. "But we were delighted we started when we did and got as much accomplished as we did."

She credits Carter with producing a "rich series" of interviews, some of which she sat in on. They went in roughly chronological order, and by the last one "we completed a conversation about his whole career" on the Court. But, Harrison cautions, "we didn't get to ask every last question."

Marshall died before all parties had come to an agreement over release of the interviews. The plan now, say Pride and Harrison, is to hand over the transcripts to Marshall's family for the same kind of review that Marshall himself would have been entitled to do—revising and deleting as desired. The hope is that as much of the interviews as possible will be released publicly.

Answers and Revelations

Exactly what will emerge from Marshall's papers and interviews is unknowable as yet. Law clerks differ over how much attention Marshall paid to record-keeping. "He wasn't big on keeping stuff," says one former clerk, who recalls that early drafts of opinions were routinely tossed out during his year.

Marshall never shared Brennan's habit of keeping a near-diary of every case granted certiorari by the Court. Nor did he emerge from conferences with the nearly verbatim renditions that Harry Blackmun

kept. Marshall's clerks often had to go to Blackmun, in fact, to find out who voted for what at conference.

But other Marshall clerks say that drafts of briefs, cert memos, and all other correspondence and notes were kept fairly rigorously. If so, they may shed light on the longstanding question about Marshall: Just how much did he alter the drafts of opinions that his clerks crafted?

Even if it is shown that Marshall's editing hand was light, clerks say that won't tell the whole story. Marshall called the shots with clear vision and knowledge of precedent, they say.

"His instructions were clear, he gave the marching orders, but he gave us leeway on how to get there," remembers one clerk. "It was a thrill to see something in *U.S. Reports* that was basically your work, or the work of three clerks. But he did the judging."

And it will be interesting to see if anywhere in the papers or the tapes we find evidence of Marshall's sometimes salty appraisals of his colleagues on the Court. Most of his friends doubt it.

Marshall had an old-fashioned loyalty to the Court and its privacy that overrode all his other impulses, his friends say. He held his tongue about his successor Clarence Thomas—with great difficulty, some note—and only one quote, apparently second- or third-hand, has seeped into print. "We've gone from chicken salad to chicken shit," Rowan quotes Marshall as saying after Thomas was confirmed.

Some of Marshall's best yarns about the Court, his best one-liners, may have accompanied him to the grave. But it is reassuring to know, as historians continue to take the measure of his greatness, that at least some of his written work and his firsthand observations will emerge. Exactly as he would have hoped, Thurgood Marshall gets the last word.

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