I had been clerking for Justice Marshall for two months when he called me to his study and asked me to read the materials concerning his nomination to the United States Court of Appeals for the Second Circuit. Within an hour, the Supreme Court Library had sent me a thick volume containing the transcripts of Marshall's confirmation hearings before a subcommittee of the Senate Judiciary Committee and of the debate on the Senate floor. Almost nine years later, I still feel a mixture of anger and sadness when I recall what I read—anger because the most significant lawyer of twentieth-century America was subjected to such humiliation, and sadness because, as late as the 1960s, key members of the United States Senate found it politically advantageous to publicly display such gross intolerance.

Thurgood Marshall was nominated to the Second Circuit by President Kennedy on September 23, 1961. Congress adjourned four days later without taking any action on the nomination. Marshall then received a recess appointment on October 5 and took his oath of office on October 23, becoming the second black federal circuit judge in the his-

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* Professor of Law, New York University. I served as Justice Marshall's law clerk during the 1984 Term. I have more than the usual share of debts. I am grateful to the Honorable Nicholas deB. Katzenbach for sharing with me his recollection of the events; to the Honorable Wilfred Feinberg, the Honorable Gregory Kellam Scott, and Professors Vicki Been, Christopher Eisgruber, Pamela Karlan, William Nelson, Burt Neuborne, Richard Pildes, and Howard Venable for their comments on an earlier draft; to the Public Services Department at the Library of the New York University School of Law, in particular to Carol Alpert, Ronald Brown, Elizabeth Evans, Gretchen Feltes, Leslie Rich, and Jay Shuman, for help that went well beyond the call of duty; and to Anthony Crowell, Washington College of Law, American University Class of 1997, and Frank Ferrell, Harvard Law School Class of 1995, for their research assistance. Of course, I am solely responsible for any errors that might remain. A prior version of this Essay was presented at a Brown-Bag Lunch and a Legal History Colloquium at the New York University School of Law. The generous financial support of the Filomen D'Agostino and Max E. Greenberg Research Fund at the New York University School of Law is gratefully acknowledged.

1 The recent biographies of Marshall deal with his appointment to the Second Circuit fairly summarily. See, e.g., Michael D. Davis & Hunter R. Clark, Thurgood Marshall: Warrior at the Bar, Rebel on the Bench 235-40 (1992); Carl T. Rowan, Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall 279-81 (1993). The bulk of this tribute is based on the review of primary historical materials that previously had not been examined.

2 Recess appointments for judicial positions were far more common in the 1950s and 1960s than they are today. For example, Chief Justice Earl Warren and Justice William Bren-
tory of our Nation. His nomination was resubmitted to the Senate on January 15, 1962. The Judiciary Committee, chaired by Senator James Eastland, Democrat of Mississippi, empaneled a subcommittee chaired by Senator Olin Johnston of South Carolina, and composed of Senators John McClellan of Arkansas and Roman Hruska of Nebraska.

The subcommittee's first hearing, which was not held until May 1, was uneventful. Only Senator Hruska, the sole Republican and the only member of the subcommittee ultimately to vote in favor of the nomination, was present. The two Senators from New York—both of them Republicans—appeared before the subcommittee to support the nomination and praised Marshall's accomplishments extensively. Senator Jacob Javits focused on Marshall's successes in "some of the most celebrated cases decided by our courts," including Brown v. Board of Education, and Smith v. Allwright, the Texas primary case. Senator Javits noted that in thirty-two appearances before the Supreme Court, Marshall had prevailed in twenty-nine, and that the New York State Bar Association had "found Mr. Marshall well qualified, which is a high rating in our book, and reserved for only a few." Senator Kenneth Keating added that the American Bar Association also found the nominee "well qualified," and quoted from a letter written by Governor Nelson Rockefeller of New York, also a Republican, which indicated that "Mr. Marshall has earned and enjoys the universal respect of the legal profession, beyond sectional and partisan limitations, by reason of painstaking care in his approach to the knotty problems of constitutional law." Senator Keating stressed the importance of prompt action on the part of the subcom-

3 See text accompanying notes 112-16 infra.
4 Carl Rowan states:
   It was soon obvious that . . . Johnston . . . had no intentions of holding hearings on Marshall soon, especially when . . . Eastland . . . was urging him to stall. Johnston was up for reelection in South Carolina, where Marshall's name was anathema and provoked swear words from thousands of white people, so Johnston had to fight Marshall.
C. Rowan, supra note 1, at 279-80.
7 321 U.S. 649 (1944).
8 Hearings, supra note 5, at 2.
9 Id.
10 Id. at 4.
11 Id. at 5.
mittee. Senator Hruska then asked Marshall some perfunctory questions about his background, and the hearing was adjourned only twenty-five minutes after it began.

This first hearing thus revealed a Democratic nominee with an outstanding record, strong bar association ratings, and committed Republican support in his state. One might therefore have expected Marshall's confirmation to proceed smoothly. But it did not.

The second hearing was delayed until July 12. Senators Javits and Keating reiterated their support and deplored the long delay. The Chairman of the Judiciary Committee of the Association of the Bar of the City of New York reported that his committee unanimously found Marshall "qualified and approved" to be a Second Circuit judge. He also noted that, under his recess appointment, by then in its ninth month, Marshall had served "with great distinction."

Then, ominously, the proceedings were turned over to L.P.B. Lipscomb, a member of the professional staff of the Judiciary Committee. He immediately confronted Marshall with the findings of a state trial judge in Texas that the National Association for the Advancement of Colored People (NAACP) and the NAACP Legal Defense and Educational Fund (LDF), which Marshall headed before his recess appointment to the Second Circuit, had solicited plaintiffs for lawsuits and financed litigation in violation of Texas law. Since Marshall had not been personally involved in the litigation that was the subject of this lawsuit, the questioning focused on LDF's relationship with U.S. Tate, the lawyer whose practices were at issue. Marshall patiently explained that Tate was retained by LDF but was not an LDF employee, that Tate's work was not supervised closely from LDF's headquarters, and that Tate occasionally initiated litigation without first obtaining Marshall's consent.

As Lipscomb's extensive badgering failed to reveal any personal involvement by Marshall in the activities found illegal by the Texas trial judge, Senator Everett Dirksen of Illinois, the minority leader, and Sen-

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12 Id. at 4-5.
14 Hearings, supra note 5, at 11-12.
15 Id. at 13. After the nomination had languished before the Senate for almost one year, the Executive Committee of the Association unanimously urged Marshall's confirmation. See 108 Cong. Rec. at 17,346.
16 Hearings, supra note 5, at 13.
17 See id. at 14-28. The document to which Lipscomb referred was Texas v. NAACP, No. 56-649 (7th Jud. Dist. Tex. June 7, 1957). The complaint against the NAACP was initiated by the state attorney general.
18 See Hearings, supra note 5, at 25.
19 See id. at 30.
20 See id. at 31-45.
ators Hruska and Keating expressed their impatience with this line of questioning.\textsuperscript{21} Senator Keating insisted that "we are not here concerned with investigating the NAACP,"\textsuperscript{22} but Senator Johnston ordered Lipscomb to continue.\textsuperscript{23}

After a three-week recess, the hearings resumed on August 8.\textsuperscript{24} Senator Keating once again urged the subcommittee to speed its consideration of the nomination and noted the "marked contrast" between the treatment of Marshall and that of other nominees.\textsuperscript{25} He pointed out that W. Harold Cox, for example, was nominated to the United States District Court in Mississippi on June 20, 1961, and confirmed by the Senate only a week later.\textsuperscript{26} The difference in the treatment of Cox and Marshall was particularly striking because Cox, a staunch segregationist, was a college classmate of Senator Eastland. As to Marshall's nomination, Eastland reportedly had told Attorney General Robert Kennedy: "Tell your brother that if he will give me Harold Cox, I will give him the nigger."\textsuperscript{27}

\textsuperscript{21} See id. at 45-48.
\textsuperscript{22} Id. at 46.
\textsuperscript{23} See id. at 47. This hearing was followed by further speeches on the Senate floor urging Marshall's prompt confirmation and deploring the delay. See 108 Cong. Rec. at 13,584 (statements of Sens. Javits and Frank Lausche, Dem. Ohio); id. at 13,833 (statement of Sen. Steven Young, Dem. Ohio); id. at 14,673 (statement of Sen. Javits); id. at 14,714 (statement of Sen. Dirksen); id. at 15,215 (statements of Sens. Javits and Keating); id. at 15,528 (statement of Sen. Thomas Dodd, Dem. Conn.).
\textsuperscript{24} During the days leading to the hearing, Senators Javits and Keating made speeches on the Senate floor urging that this hearing be the last. See id. at 15,215 (statement of Sen. Javits); id. at 15,788-89 (same); id. at 15,541-42 (statement of Sen. Keating); id. at 15,691-92 (same). Senator Keating's remarks underscored Senator Johnston's delaying tactics:

Yesterday, after the date was set for the hearing, I made an effort to make certain that the next subcommittee hearing, scheduled for August 8 at 10:30 a.m., would be the last, and that a report would be made by the subcommittee upon the conclusion of that session. I secured the consent of that leadership on both sides of the aisle, who were very cooperative, to a proposed unanimous consent agreement which would have permitted the subcommittee to continue its hearing beyond noon on next Wednesday even if the Senate were in session. This would have enabled the subcommittee to meet for the maximum of 2 to 3 hours which counsel estimated was necessary to complete the record.

After obtaining the agreement of the leadership, the unanimous consent agreement was discussed with the chairman of the subcommittee. I regret to report that the chairman objected to the proposed request and indicated that he would not sit past noon on Wednesday. It was then suggested that the subcommittee meet at 9 a.m. on Wednesday, which would allow sufficient time under the counsel's estimate. This request also was turned down.

Id. at 15,541.
\textsuperscript{25} Hearings, supra note 5, at 55.
\textsuperscript{26} Id.
\textsuperscript{27} Victor S. Navasky, Kennedy Justice 252 (1971); see also C. Rowan, supra note 1, at 308.

Nicholas deB. Katzenbach, who was the Assistant Attorney General in charge of the Office of Legal Counsel at the time that Marshall was nominated and the Deputy Attorney General at the time he was confirmed (he later became Attorney General) doubts that East-
Senator John Carroll, Democrat of Colorado, who spoke in support of Marshall, asked for "an end to the delaying tactics which are unbecoming of a body such as the Senate," and noted that it was "deplorable that a man so respected and honored should receive such treatment from this body." He added that "[t]here is not the slightest doubt in my mind that when this matter goes to the floor of the U.S. Senate, and if given a chance to vote, it will receive overwhelming approval."

However, the rest of the hearing was devoted almost exclusively to further questioning by Lipscomb about the activities of U.S. Tate and his relationship with LDF. The subcommittee also probed Marshall's refusal during the course of the Texas investigation to permit the Texas Attorney General to examine certain corporate records of LDF, even though the Supreme Court had held in *NAACP v. Alabama* that a state could not compel the production of such records. Senator Keating expressed increasing exasperation with Lipscomb's questions: "If counsel is suggesting . . . that Judge Marshall must have the responsibility for every little action that is taken by any lawyer who has been appearing in an NAACP case, he is imposing a standard of responsibility which cer-
tainly goes way beyond any point of reasonableness." He added: "We did not investigate . . . Mr. Cox's law partners when we held hearings on [his] nomination[ ]."

The ordeal resumed on August 17. Senator Thomas Dodd, Democrat of Connecticut, extolling Marshall's legal career as "one of the most brilliant . . . in the history of the bar," urged prompt action: "[T]he reasons for the unconscionable delay in his confirmation have nothing to do with his legal competence or with his qualifications for this post. I believe, therefore, that it is not the qualifications of Judge Marshall that are on trial, but rather the qualifications of the Judiciary Committee itself."

Lipscomb's inquest then turned to Marshall's bar admissions. He observed that Marshall was a member of the bar of the State of Maryland and of numerous federal courts, but not of the bar of the State of New York, where Marshall had resided since at least 1938 or 1939. Marshall patiently explained that his practice was in federal court, and that he did not participate in cases before the state courts in New York.

Lipscomb next delved into Marshall's professional affiliations and alleged "Communist" ties. He questioned Marshall about the National Lawyers Guild, from which Marshall had resigned in 1949, in protest over the Guild's criticism of Judge Harold Medina's handling of a trial of eleven Communists. Lipscomb noted that the House Committee on Un-American Activities cited the Guild as a Communist-front organization as early as 1944. Marshall said in response that he had not been aware of the connection, and added: "Once it was listed on the Attorney General's list, I had every reason to believe that the accusations were correct. I believe that by that time I was already out of it." In response to further questions, Marshall stated that he was a member of the International Juridical Association for only about one year in the 1930s and that in 1936 he was the main speaker at a rally of the American League for Peace and Democracy. Lipscomb noted that in the 1940s—years after Marshall's fleeting association with them—these organiza-

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32 Id. at 90.
33 Id.
34 Id. at 101.
35 Id.
36 Id. at 102; see also id. at 8.
37 See id. at 102.
38 See id. at 105.
39 The convictions of these defendants were affirmed in United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951).
40 Hearings, supra note 5, at 105-08.
41 Id. at 106.
42 Id. at 105, 108.
tions were also listed as Communist fronts.\textsuperscript{43}

Lipscomb also challenged Marshall to explain a speech he delivered in Memphis in 1956, in which he reportedly said: "We have law, religion, and God on our side. They'll get tired of putting all faith and hope in the Devil."\textsuperscript{44} Marshall explained: "The other side—I mean groups like the Ku Klux Klan and the groups that defy law, God, and everybody else... I am not talking about people who disagree with reason... But anybody who takes a man out andlynches him, I believe is working with the Devil."\textsuperscript{45}

Lipscomb's questioning resumed on August 20 with further red-baiting, focusing on the activities of Doxey Wilkerson, a former Communist Party member who joined the faculty of Bishop College in Texas in 1959. Lipscomb had in hand an investigative report from the Texas House of Representatives, which stated that Wilkerson had organized student sit-ins on behalf of the NAACP. Amusingly, the Texas report cited, as proof of Wilkerson's subversiveness, that, unlike regular sit-ins, "which are usually unruly affairs which quickly evolve into wild, disorderly, and highly individualistic behavior," Wilkerson's, "in line with Communist policy, have been highly organized and completely disciplined."\textsuperscript{46}

Marshall explained that by 1959, LDF was run independently of the NAACP and denied any connection to Wilkerson.\textsuperscript{47} He stated that when he was active in the NAACP, he was responsible for "getting through the strongest resolution that anybody has ever adopted against Communists, fellow travelers in their effort to infiltrate the NAACP."\textsuperscript{48} He also added: "As long as I was connected with the NAACP, I made every effort and that is also substantiated by the latest book of the head of the Federal Bureau of Investigation."\textsuperscript{49} Nonetheless, Lipscomb introduced into the hearing record 36 pages (out of a full record of 209 pages) concerning Wilkerson's role in organizing sit-ins and his alleged links to the Communist Party.\textsuperscript{50}

Lipscomb continued his scrutiny, moving to Marshall's supervision of the litigation in \textit{Brown v. Board of Education}. He brought up an arti-

\textsuperscript{43} See id. at 106-09.
\textsuperscript{44} Id. at 115.
\textsuperscript{45} Id. Marshall indicated that other articles cited by Lipscomb had misquoted him: "I might point out that these newspapers that you have cited so far all have contained the most violent editorials condemning the school cases and everything around them, and certainly I would not expect them to report accurately what I said at any meeting." Id.
\textsuperscript{46} Id. at 126.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 127.
\textsuperscript{50} See id. at 127-63.
cle written by Alfred Kelly, a historian who contributed to the petitioner's brief. Kelly stated in his article that, while working on the portion of the brief that described the history of the equal protection clause, he "ceased to function as a historian ... The problem we faced was not the historian's discovery of the truth ...; the problem instead was the formulation of an adequate gloss on the fateful events of 1866 sufficient to convince the court that we had something of a historical case."51 He wrote:

It is not that we were engaged in formulating lies: there was nothing as crude and naive as that. But we were using facts, emphasizing facts, bearing down on facts, sliding off facts, quietly ignoring facts, and above all interpreting facts in a way to do what Marshall said we had to do ... .52

Kelly's article also stated:

[A]t 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 takes over, every time a white man draws a breath, he'll have to pay a fine."53

Marshall noted that in preparing the Brown brief he had sought the advice of about 100 historians and that Kelly had worked with a lawyer on one page of a 250-page brief.54 Marshall did not point out, as Kelly did when he later appeared before the subcommittee,55 that there was nothing unusual about the use of history in the Brown brief. As to his remark to Kelly, Marshall responded that he had been misquoted, adding: "This has never been my conviction, is not now and never will be."56

With that, Senator Johnston adjourned the hearing until Kelly could be located, stating that "there is adverse testimony here and we will have to see to determine whether this had happened."57 Senators Keating and Philip Hart, Democrat of Michigan, protested vigorously. Hart stated that "when historians note procedures in the Senate, this will provide a conspicuous chapter, and the sooner we terminate it the better";58 Keating termed the subcommittee's procedure "ridiculous" and

51 Id. at 164.
52 Id.
53 Id. at 166.
54 Id. at 165.
55 See text accompanying notes 60-62 infra.
56 Hearings, supra note 5, at 166.
57 Id. at 178.
58 Id. at 179.
"unlawyer-like."  
The final hearing on Marshall's confirmation, held on August 24, opened with Kelly's testimony. Kelly explained that he wrote his article for an audience of professional historians and in doing so had sought to emphasize the differences between law and history. He said:

The argument in the brief was not history; it was advocacy. It was, in short, a lawyer's brief, and the paper attempted to make that clear to an audience of historians.

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. . . .

Now the important point 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.  
Kelly also added that John Davis's brief for the respondents in *Brown* was "from a technical historical point of view, every bit as far from a balanced constitutional history of [R]econstruction as . . . the NAACP brief."

Kelly said that he remembered Marshall's statement about paying a fine for breathing. He quickly added, however:

But 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. The paper related this incident merely as one of a series of anecdotes which attempted to portray something of the nuances and coloration of a truly remarkable personality. To lift the remark out of context and treat it as a threat or even a philosophical observation is absurd, even grotesque, in its bizarre distortion of reality.

Lipscomb also called as witnesses two journalists who gave somewhat different accounts of Marshall's 1956 speech in Memphis in which he made the comment about the Devil. One journalist corroborated the statement that Marshall said he made, while the other related a slightly different version. During a break in this testimony of questionable relevance, Senator Keating introduced into the record a statement by Bernard Segal, who chaired the American Bar Association (ABA) committee that had reviewed Marshall's qualifications. It stated:

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59 Id. at 178. Following the hearing, there were further speeches on the Senate floor urging prompt action on Marshall's nomination. See 108 Cong. Rec. at 16,075 (statement of Sen. Thomas Kuchel, Rep. Cal.); id. at 16,300 (statements of Sens. Keating and Mike Mansfield, Dem. Mont.); id. at 17,182 (statement of Sen. Lausche).

60 Hearings, supra note 5, at 182.

61 Id. at 183.

62 Id. at 183-84.

63 See id. at 190-94.
[W]e interviewed . . . more than 50 judges and lawyers . . . including Justices of the Supreme Court of the United States, judges of U.S. courts of appeals of five different circuits, judges of U.S. district courts, two former Attorneys General and two former Deputy Attorneys General of the United States, and a fair cross section of practicing members of the bar. These included key advisers on judicial selection to the last four Presidents of the United States . . . . Our committee’s investigation developed that Mr. Marshall is a lawyer of the highest character and integrity, and of undoubted loyalty to the Government of the United States and adherence to the principle of ordered liberty under the rule of law. Justices of the Supreme Court and judges of other federal courts in various parts of the country before whom Thurgood Marshall appeared, attested to his legal competence, and lawyers associated with or opposed to him in litigation matters confirmed the excellence of his professional work . . . . We found every evidence that he has a keen appreciation of the canons of ethics of the American Bar Association and that he has complied with them in every respect, and we received no evidence to the contrary. Our committee . . . had no hesitancy whatever in unanimously concluding that Mr. Marshall was well qualified for this appointment.\textsuperscript{4}

The hearing ended with an acrimonious colloquy between Senator Johnston and Senators Hart and Keating about the delay in the proceedings.\textsuperscript{65} Senator Johnston indicated that the subcommittee would need some time to print the record of the hearings and to decide what reports to make to the full committee.\textsuperscript{66} Senator Hart stated that, together with four of his colleagues on the Judiciary Committee, he would move to discharge the subcommittee and to recommend the nomination to the Senate.\textsuperscript{67}

After the hearings concluded, Senator Javits threatened to move that the Senate take Marshall's nomination away from the Judiciary Committee altogether,\textsuperscript{68} and eventually delivered an ultimatum if the Committee did not act by September 7.\textsuperscript{69} Under increasing pressure

\textsuperscript{64} Id. at 192.
\textsuperscript{65} See id. at 207-09.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 207-08.
\textsuperscript{68} See 108 Cong. Rec. at 17,449.
\textsuperscript{69} For my own part, I believe that Friday, September 7, would be about the last practicable date for filing on the Senate floor a petition to discharge the committee from further consideration of the nomination. . . . [I]t has become apparent that each week an additional reason can be found by those on the committee who wish to block this nomination for delaying its consideration for still another week.

Id. at 18,357.

On September 7, before the Judiciary Committee had acted, Senator Javits inquired on the Senate floor about the procedure to be followed in discharging the Committee. See id. at 18,826. The possible discharge of the Judiciary Committee attracted the attention of the press.
from his colleagues, Senator Eastland called a meeting of the Judiciary Committee for September 7, and the Committee voted eleven-to-four to confirm Marshall. The four negative votes were cast by Senators Eastland, Johnston, McClellan, and Sam Ervin of North Carolina, all Democrats.

During this year-long ordeal, not a single adverse witness appeared to contest the nomination. Despite his protracted questioning, Lipscomb was not able to elicit a single shred of credible evidence that suggested that Marshall committed ethical improprieties in soliciting plaintiffs, practicing law in New York, or drafting his brief in Brown. Even under the lax standards of the McCarthy era, which only recently had ended, he was not able to tar Marshall with a Communist label of any kind.

The nomination moved to the Senate floor for debate on September 11. Senator Johnston, who spoke first, argued fervently that Marshall was unqualified to be a judge. Without so much as acknowledging Marshall's role as the architect of the most significant constitutional litigation of the century, he began by arguing that "Thurgood Marshall shows he has not the qualifications to preside over the multitude of questions that will come before him, because he has practiced law for many, many years in but one narrow field of civil rights."

Johnston then turned to Marshall's bar admissions. Ignoring Marshall's persuasive and uncontested defense at the hearings, he stated:

[F]or 24 years, or nearly a quarter of a century, the nominee practiced law in a State where he had never been licensed. The flimsy excuse that he was not actually practicing law, but was merely a legal front in the State of New York, does not hold water, and I am sure would not hold water before a competent Federal judge if such a question were to come before him for a decision. . . .

The practice of law without a license by Thurgood Marshall certainly denotes a careless attitude toward the law of the land. . . .

. . . When he serves on the bench . . . will he be as loose with the law as judge as he was in observing the law before he became judge?

Despite Marshall's efforts to purge Communists out of the NAACP,
Senator Johnston cited Marshall’s membership in the National Lawyers Guild and his speech in 1936 to the American League for Peace and Democracy. He said that he did not “charge or even imply that Thurgood Marshall is a Communist,” or “question that Marshall was naive and made a mistake and that he was duped into being a speaker at this meeting. However . . . we should confirm nominations to the Federal court of individuals . . . who will not be naive when they serve in the Federal courts.”

Finally, ignoring Lipscomb’s inability to establish any connection between Marshall and the allegedly unlawful activities of the NAACP in Texas, as well as the ABA’s findings that Marshall committed no ethical violation, Senator Johnston charged that Marshall practiced “barratry” and “maintenance” in violation of the ABA’s Canons of Professional Ethics. Johnston then read to the Senate the full findings of fact and conclusions of law in the Texas case.

Senator Johnston’s statements were echoed by several of his Southern Democratic colleagues, primarily Senators Eastland and Strom Thurmond of South Carolina. Senator Thurmond, apparently endorsing the result in *Plessy v. Ferguson*, which *Brown* overruled, also blamed Marshall for his successful use of sociological evidence in *Brown*:

The favorable decisions which have been rendered by the Supreme Court . . . have hinged upon sociological involvements rather than legal questions. . . . The leading precedent in this field prior to [*Brown*] was *Plessy* against *Ferguson*, which was probably the last case in this area which was decided on the law and did not take into account the sociological implications which since that time have been foisted upon the courts. Without a doubt, the NAACP and its legal branch, the legal defense and educational fund under the guidance and control of the nominee, has been responsible for the shift in the Court’s reliance from the law to sociology.

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74 Id. at 19,009.
75 Id.
76 Id. Johnston defined “barratry” as “[t]he offense of frequently exciting and stirring up quarrels and suits,” and “maintenance” as “maintaining, supporting or promoting the litigation of another.” Id. (quoting Canons of Professional Ethics).
77 Id. at 19,009-13 (quoting Texas v. NAACP, No. 56-649 (7th Jud. Dist. Tex. June 7, 1957).
78 See id. at 19,016-21, 19,043-51.
79 See id. at 19,021-39. Senators Harry Byrd of Virginia, see id. at 19,013-14, and John Stennis of Mississippi, see id. at 19,020-21, both Democrats, also spoke against the nomination.
80 163 U.S. 537 (1896).
82 108 Cong. Rec. at 19,021.
Thurmond concluded: "[I]t certainly is not in the interests of the American people as a whole or the legal profession to argue extralegal considerations upon the Supreme Court as the basis for a decision of such constitutional importance."83

Marshall's supporters made brief statements praising the nominee, exposing the baseless nature of the objections, and criticizing the long delay.84 Their position was well captured by Senator Dodd:

> Few judicial nominees have come before the Senate so well recommended by their legal capacity and their personal character...

> For 12 months he has been subjected to the most searching investigation of every aspect of his life by prejudiced opponents of his nomination. The investigation has revealed nothing to the discredit of the nominee.

> For 12 months he has been subjected to all the harassment and humiliation which prejudice and pettiness can inflict and he has borne all with a dignity, a restraint, and a humility which constitute the most telling rebuke to his detractors.85

The vote on the nomination was fifty-four to sixteen in favor of Marshall. The sixteen negative votes were all cast by Democratic Senators from nine Southern states: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia; the remaining two Senators from these states, George Smathers of Florida and J. William Fulbright of Arkansas, both Democrats, were absent.86 Thus, almost one year after his initial nomination, Marshall's ordeal was finally over.

II

The chronology suggests that despite their lack of substantial support among their colleagues, Marshall's enemies in the Senate came close to derailing the nomination altogether. The Senate adjourned that year

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83 Id. at 19,026. Five years later, when Marshall was nominated for the Supreme Court, Thurmond badgered him with esoteric questions. He asked him, for example, who drafted the thirteenth amendment and which were the members of the committee that reported out the fourteenth amendment. See C. Rowan, supra note 1, at 301.


85 Id. at 19,040.

86 See id. at 19,055.

The Senators from the other two Southern states voted as follows. Ralph Yarborough and John Tower of Texas, and Estes Kefauver of Tennessee voted for Marshall; Albert Gore of Tennessee was absent. Of these four Senators, only Tower was a Republican.
on October 13, just one month after having approved Marshall’s nomination. If Senator Johnston had been successful in delaying the subcommittee on account of its asserted need to print the record of the hearings, or if Senator Eastland had been successful in delaying a vote by the Judiciary Committee, Marshall’s recess appointment would have lapsed at the time of the adjournment.

The Senate, of course, could have taken the matter away from the Judiciary Committee, as Senator Javits had urged, but the procedure was viewed as an extraordinary one and could well have compromised the outcome of the vote. Indeed, Senator Mike Mansfield of Montana, the majority leader, pointed out, in response to Senator Javits’s suggestion, that on the two occasions that year in which a committee had been bypassed, the measure had been defeated. He added: “[I]t is my firm—my very firm—belief that had we been able to get those matters out through the regular procedure of the committee system, both of the measures would have been passed in this body.” Thus, Senator Eastland’s control of the Judiciary Committee could well have frustrated the will of a comfortable majority of the Senate.

Moreover, while President Kennedy could have given Marshall a second recess appointment if the Senate had not acted in time, the statutory provision governing recess appointments provided, as it still does, that his salary would be paid only if he were ultimately confirmed, and then only retroactively. It is doubtful that Marshall’s financial situation would have permitted him to accept an appointment of this sort.

In contrast to the view that Marshall came close to not being a judge, the Kennedy Administration maintained that the nomination was never in peril. In an interview in 1964 Robert Kennedy stated:

Kennedy: Well, we appointed Thurgood Marshall, and there was a long delay on his finally being confirmed.

87 In fact, the Senate had scheduled to adjourn even earlier. See id. at 18,827.
88 See text accompanying notes 68-70 supra.
89 108 Cong. Rec. at 18,826.
90 Id.
91 According to Katzenbach, Javits’s efforts to take the nomination from the Judiciary Committee were an empty gesture. Even if the Senate had agreed to do so, the Southern Senators would have mounted a successful filibuster. Katzenbach Interview, supra note 27. The Senators from the Western states, though they supported Marshall, would not have voted to break it because they would not have wanted to weaken the filibuster mechanism. Id.

Consistent with this statutory provision, however, Marshall could have drawn a salary if he had been given a recess appointment to a new vacancy, rather than to the one that he was then filling. Because the Senate would have understandably seen such a move on the part of the Kennedy Administration as encroaching upon its prerogative to deny consent to a presidential nominee, it is highly unlikely that Marshall would have been confirmed following this second recess appointment.
[New York Senators] Keating and [Jacob] Javits raised a fuss continuously. We didn’t raise too much [sic] because I’d had a conversation with Jim Eastland that before it was over he’d put it through. There wasn’t any reason to get all excited about it. I told Thurgood Marshall that he’d be appointed. So he was relaxed. And eventually it went through.

Martin: Eastland did say okay?
Kennedy: Yes. He never kept back any Negro judge. He might have delayed them, but he never caused us any trouble...  

Apparently, Senator Eastland, whatever his flaws, had a strong reputation for keeping his promises.\footnote{Robert Kennedy in His Own Words: The Unpublished Recollections of the Kennedy Years 369 (Edwin O. Guthman & Jeffrey Shulman eds., 1988) (alterations in original). Consistent with this story, Katzenbach stated that Senator Eastland had given his word that he would not stand in the way of Marshall’s confirmation. Katzenbach Interview, supra note 27. According to Katzenbach, Marshall probably knew about Eastland’s assurances. Id. Katzenbach also maintains these assurances probably also were known to Senator Javits, Marshall’s major champion, and that Javits used the nomination as an occasion to shore up his position with black voters in New York. Id. Katzenbach recalls that Javits used every opportunity to have his photograph taken with Marshall. Id. President Kennedy was annoyed by this behavior and on one occasion instructed Katzenbach to accompany Marshall to the hearings to underscore that Marshall was the Kennedy Administration’s—not Javits’s—nominee; Katzenbach’s efforts to have his picture taken next to Marshall, however, were unsuccessful, as he was edged out by Javits. Id. \footnote{Id.}}

President Kennedy publicly shared his brother’s optimism. In response to a direct question about the nomination on August 22, 1962, he indicated: “I am confident, in fact I am sure that the Senate will not adjourn, and I’ve been given those assurances, that the Senate will not adjourn without action being taken by the United States Senate on the Thurgood Marshall appointment.”\footnote{News Conference of Aug. 22, 1962, reprinted in Kennedy and the Press: The News Conferences 303, 305 (Harold W. Chase & Allen H. Lerman eds., 1965).}

The statement suggests, however, that as the nomination languished and adjournment approached, the President became sufficiently concerned about Eastland’s initial “okay” to seek further assurances. Moreover, these assurances appear not to have come from Eastland but from the Senate leadership, which presumably controlled the adjournment date.

III

During his tenure, President Kennedy placed twenty judges on the courts of appeals;\footnote{They were Carl McGowan and J. Skelly Wright on the D.C. Circuit; Paul Hays, Irving Kaufman, and Thurgood Marshall on the Second Circuit; J. Cullen Ganey and William Smith on the Third Circuit; J. Spencer Bell and Albert Bryan on the Fourth Circuit; Griffin Bell and Walter Gewin on the Fifth Circuit; Harry Phillips on the Sixth Circuit; Roger Kiley and Luther Swygert on the Seventh Circuit; Pat Mehaffy and Albert Ridge on the Eighth Circuit;} Marshall was the only black. Four of these nominees
were rated exceptionally well qualified by the ABA; nine, including Marshall, were rated well qualified; six were rated qualified; and one was rated not qualified.\textsuperscript{97} The comparison between the treatment of Marshall's nomination and that of the other individuals is telling.

The confirmation hearings of all nineteen of Kennedy's other nominees were completed in a single day; in Marshall's case, they took place over six separate days spread out over almost four months.\textsuperscript{98} For the other nineteen nominees, the questioning was conducted by the subcommittee members alone; in Marshall's case the task was turned over to a special counsel. For the other nineteen nominees, the subcommittee did not call any witnesses, but in Marshall's case it called a historian and two journalists, even though their testimony was at best marginally relevant.

In the case of eighteen of the other nominees, no adverse witnesses appeared. Those eighteen hearings lasted, on average, under twenty minutes. In Marshall's case there were also no adverse witnesses, but the hearings lasted nearly six-and-one-half hours. In fact, Marshall's hearings lasted longer than the hearings of the eighteen other nominees put together. Even in the remaining case, in which two witnesses alleged gross ethical improprieties, and in which the nominee had been the subject of a formal disciplinary proceeding, the hearing lasted less than four hours—less than two-thirds the length of Marshall's.

The hearings for the other uncontested nominees were wholly perfunctory, focusing, in many cases, on the source of the friendship between the nominee and the sponsoring Senator. In contrast, Marshall's hearings probed deeply into minutiae of all kinds. The hearings of the other nominees did not reveal any independent research on the part of the subcommittee's staff into the nominees' backgrounds, yet extensive research was obviously conducted on Marshall prior to his appearance before the subcommittee.

On the Senate floor, there was no debate prior to the confirmation of any of the other nineteen nominees.\textsuperscript{99} In contrast, the debate on the Marshall nomination was acrimonious and lasted five hours.\textsuperscript{100} In the other nineteen cases, the approval was made by voice vote; in Marshall's case there was a roll call vote and sixteen recorded votes in opposition.

\begin{itemize}
  \item James Browning and Ben Cushing Duniway on the Ninth Circuit; and Delmas Hill and Oliver Seth on the Tenth Circuit. This list does not include judges nominated by President Kennedy but confirmed after his assassination, or appointees to the Court of Claims or the Court of Customs and Patent Appeals.
  \item The ratings appear in the transcripts of the hearings. See note 98 infra.
  \item To prepare this tribute, I read, in their entirety, the transcripts of all 20 hearings. The transcripts are on file with the New York University Law Review.
  \item I performed a computer-based search using the Congressional Information Service Master File I.
  \item See C. Rowan, supra note 1, at 281.
\end{itemize}
As to the delay in processing Marshall's nomination, the most relevant comparison is between his treatment and that of the other three individuals who, like Marshall, were initially nominated in late September 1961, close to the end of the Senate session; received recess appointments on October 5, 1961; and were renominated in January 1962. The hearing on Walter Gewin, a segregationist rated extremely well qualified by the ABA, was held on January 24, and he was confirmed on February 5. The hearing on Griffin Bell, rated well qualified by the ABA, was held on January 30, and he was also confirmed on February 5. The hearing on Paul Hays, rated qualified by the ABA, was held on March 5, and he was confirmed on March 15. In sharp contrast, for Marshall, rated well qualified by the ABA, the first hearing was not held until May 1; the hearings were not completed until August 24; and he was not confirmed until September 1—and then only after his supporters exerted intense pressure on the Judiciary Committee to report the nomination to the full Senate.

IV

There are several plausible explanations for the opposition to Marshall, though none is wholly satisfactory. First, it might be attributed to the Southern Senators' racist views. While their comments at the

101 See V. Navasky, supra note 27, at 244, 247, 266-67 (labeling Gewin as segregationist); see also note 98 supra.
102 See 1962 Annual Report, supra note 2, at 617.
103 See id.
104 See id. at 614.
105 In response to a request from Clarence Mitchell, Director of the Washington Bureau of the NAACP, the Congressional Quarterly performed a survey of the Senate treatment of President Kennedy's nominees to the federal courts—both district courts and courts of appeals. It found, on the basis of the 57 judges that had been confirmed by June 1, 1962, that "Senate confirmation is usually made within a month after Presidential nomination." Letter from David T. Beale, Editorial Research Reports, Congressional Quarterly, to Clarence Mitchell, Director, Washington Bureau, NAACP (undated) (on file with the New York University Law Review). It further found that only four cases were delayed "for an unusually long period of time." In three of these cases, the nominees had been rated "unqualified" by the ABA. It termed Marshall's case "quite unique," since he had been rated "well qualified" by the ABA. Id.
106 Katzenbach states that Eastland was a strong believer in senatorial courtesy, and was willing to defer on judicial nominations to the judgments of the Democratic Senators from the home states of the nominees. Katzenbach Interview, supra note 27. He adds that if New York had had a Democratic Senator, it is likely that Marshall's confirmation would have been uneventful. Id. With the benefit of hindsight, one might wonder whether the opposition was based on concern on the part of the Southern Senators that Marshall might one day be a Supreme Court nominee. According to Katzenbach, the Kennedy Administration did not view Marshall's appointment to the Second Circuit as a stepping stone to higher office. Katzenbach Interview, supra note 27.
hearings and on the floor of the Senate were not overtly racist, these Senators might have found intolerable the prospect of a black federal judge.

This hypothesis is somewhat weakened by the fact that in 1961 President Kennedy also nominated two blacks to the district courts—the first two ever—and they both sailed through the Senate. James B. Parsons was nominated to the Northern District of Illinois on August 10, 1961; his hearing, which lasted twenty minutes and was uncontested, was held on August 17; and he was confirmed on August 30. Wade McCree was nominated to the Eastern District of Michigan on September 18, 1961; his hearing, which lasted only ten minutes and was also uncontested, was held on September 22; and he was confirmed on September 23.

Perhaps, however, the prospect of a black circuit court judge was harder for the Southern Senators to take. Here, the only precedent was William Hastie, who was nominated by President Truman to the Third Circuit in 1949. Despite his extensive government experience, it took the Senate nine months to confirm him. Senator Eastland, who did not yet chair the Judiciary Committee, led the opposition. Ultimately, however, the vote was nine to one in the Committee and unanimous on the Senate floor. While Hastie's difficulties might be seen as providing some support for the hypothesis, the sample is too small to support a definitive conclusion.

Second, it is possible that the Southern Senators were pandering to the racist views of their constituents. They might have felt no need to oppose Parsons and McCree because their nominations, unlike Marshall’s, were not high-visibility events: these attorneys did not enjoy

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107 See 1961 Cong. Q. Almanac 375.
108 The transcript of the hearing is on file with the New York University Law Review.
110 The transcript of the hearing is on file with the New York University Law Review.
111 See 1962 Annual Report, supra note 2, at 618.
113 See id. at vii-viii.
114 See id. at 240.
115 See id. at 236-40.
116 See id. at 240.
national reputations and had not been leaders of the civil rights move-
ment. Hastie, in contrast, did play a central role in this movement, but
he did so in the 1940s, before the victory in Brown had propelled civil
inghts to the center of the political debate.

There are several sources of support for this second hypothesis. Ap-
parently, Senator Johnston needed an occasion to prove his staunch seg-
regationist credentials for the benefit of the South Carolina voters, and
Senator Eastland was pleased to help him out. Despite his shocking
conduct of the hearings, Johnston was a relative moderate among the
Southern Senators and faced some criticism in South Carolina for being
less of a hard-liner on race issues than his colleague Senator Thur-
mond.

Moreover, some of the letters that President Kennedy received in
connection with the nomination were virulently racist. For example, a
North Carolina resident wrote: “As a sober minded thinking person I
beg you not to put that renegade trouble making race mixing radical
Thurgood Marshall in as judge. Please don’t make this mistake by all
that is holy Mr. President do not be a traitor to the white race.” It is
difficult, however, to know what to make of a small number of such let-

N Nomination, N.Y. Times, July 9, 1962, at 13; Marshall’s Confirmation As U.S. Judge Is
Urged, N.Y. Times, July 18, 1962, at 30; Dodd Demands Action On Marshall Nomination,
at 36; Warren Weaver, Jr., Marshall’s Standing as Lawyer Is Challenged in Senate Hearing,
N.Y. Times, Aug. 18, 1962, at 22; Warren Weaver, Jr., Hearing on Thurgood Marshall Is
Recessed Again, N.Y. Times, Aug. 21, 1962, at 1; Action and Inaction—Both Bad, N.Y.
Times, Sept. 1, 1962, at 18; Thurgood Marshall Backed by 11-to-4 Committee Vote, N.Y.
Times, Sept. 8, 1962, at 1; Fighter for His People, N.Y. Times, Sept. 8, 1962, at 1; Mr. Mar-
shall Moves Ahead, N.Y. Times, Sept. 9, 1962, at 12 (editorial); Warren Weaver, Jr.,
Thurgood Marshall Confirmed By Senate, 54-16, for Judgeship, N.Y. Times, Sept. 12, 1962, at
1.

See G. Ware, supra note 112, at 190.

See Katzenbach Interview, supra note 27.

Id.

Telegram of Henry V. Carver, Bessemer City, N.C., to President Kennedy (Sept. 25,

For other intemperate letters to the President, also on file with the New York University
Law Review, see, e.g., Letter of Hank Dickerson, Dallas, Tex., to President Kennedy (Oct. 6,
1961) (“I hope in the future you will consider your appointments more thoroughly and not
appoint a man who has fought for the very things that we despise.”); Letter of J. Hall, Her-
os Bend, Cal., to President Kennedy (Sept. 26, 1961) (“Your appointments to public office
are appalling.—Including the latest, Thurgood Marshall. How can you face your God and His
country . . . ?”); Letter of Howard W. Roberson, Democratic Candidate for Congress, 23rd
Dist. of Ill., to President Kennedy (undated) (“I want you to know that I protest the nomina-
tion of Thurgood Marshall as U.S. appellate judge. Are you gents out to kill the Democratic
Party?”); Letter of Mrs. Wallace Rubin, New Orleans, La., to President Kennedy (Oct. 4,
1961) (“What purpose is accomplished by putting Thurgood Marshall . . . in the position of
federal appellate judge. He may be an outstanding lawyer but his complete bias toward social-
ism is obviously well known.”).
ters, however repugnant they might be.

Newspaper accounts of the nomination also raised charges of racism, although they did not address the question of whether the Southern Senators were serving as a conduit for the views of their constituents. In May 1962, a *New York Times* editorial asked: "Can it be that the Senate's record length of delay... is due to the fact that he is a Negro—one who as counsel to the N.A.A.C.P. won twenty-nine victories out of thirty-two cases involving racial discrimination in which he appeared." Following the favorable vote by the Judiciary Committee, another editorial noted: "[I]t is long past time for a convincing demonstration that when a highly qualified man is named to Federal court bench his complexion will not be a determining factor against him."

Marshall subscribed to the view that the Southern Senators were motivated by political expediency rather than personal animus. He is quoted as saying: "They really don't hate me as a person, even though they barked real loud and called me everything but a child of God. They had to watch out for their political hides and they did whatever they had to do."

Third, the Southern Senators might have been expressing their anger at the results of Marshall's litigation. For example, on the floor of the House, Representative Robert Nix, Democrat of Pennsylvania, stated:

"[I]t becomes quite evident that he is being opposed solely because, through his earnest endeavors and tireless efforts a myth has been exploded; because a vicious practice born of the slave system and nurtured since the Reconstruction period—a practice which continued brutalities and injustices against the Negro—is now being struck down."

Similarly, following Marshall's confirmation, on September 25, 1962, an article by Eric Sevareid in the *Evening Star* noted:

The four southern Senators of the Judiciary Committee who deliberately stalled committee action on the nomination of Mr. Marshall to the Circuit Court of Appeals and then voted against Judge Marshall, can only have regarded him as [a] symbol and his nomination as a symbolic case. They have bitterly opposed the Supreme Court decision on school desegregation as a wound in both the flesh and the spirit of the Constitution, and they considered their opposition to the chief instigator of that decision, therefore, as a perfectly logical expression of

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125 108 Cong. Rec. at 17,712.
doctrinal consistency.\textsuperscript{126} Marshall agreed with this assessment: "I'm just a symbol to them—a symbol of something that is destroying their view of the Constitution."\textsuperscript{127}

There are, however, some weaknesses with this hypothesis. If Marshall was the most forceful advocate of a legal theory that threatened the political careers of the Southern Senators, in some sense they should have been pleased with his nomination. In fact, in urging the President to appoint Marshall, William T. Coleman, Jr., had argued:

I know that the first reaction of a politician might be that such an appointment would infuriate the South. But when you look at it realistically, the South would be happy. Thurgood Marshall sitting in New York would handle no matter which would adversely affect the interest of the South. In addition, it would remove him from the active combat in the racial segregation cases.\textsuperscript{128}


\textsuperscript{127} L. Fenderson, supra note 124, at 108-09.

\textsuperscript{128} Letter from William T. Coleman, Jr., to Frank D. Reeves, Special Assistant to the Presi-
Moreover, while the Louisiana Senators had blocked the promotion of J. Skelly Wright to the Fifth Circuit because, as a district court judge, he had ordered the desegregation of the New Orleans schools, when he was nominated to the D.C. Circuit in early 1962, he did not encounter opposition. There were no adverse witnesses at his hearing, which lasted only twenty minutes, and he was approved by the Senate by voice vote.

A fourth hypothesis is that the Southern Senators were using the Marshall nomination to send the Kennedy Administration a message about the likely fate of civil rights legislation. Indeed, there is a striking correlation between the votes on Marshall's nomination and those on the two major legislative victories of the civil rights movement in the mid-1960s: the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The Marshall nomination could thus be seen as a prologue to future battles.

Six of the fifty-four Senators who had cast positive votes on Marshall were no longer in the Senate in 1964. Forty-four of the remaining forty-eight Senators voted in favor of the Civil Rights Act; the four negative votes were cast by one Democrat (Robert Byrd of West Virginia) and three Republicans (Barry Goldwater of Arizona, Bourke Hicklenlooper of Iowa, and John Tower of Texas). All sixteen opponents of Marshall voted against the Civil Rights Act.

With respect to the Voting Rights Act, eleven of the fifty-four Senators who had cast positive votes on Marshall were no longer in the Senate in 1965, and two more did not cast votes on this legislation. Forty of the remaining forty-one Senators (all except Senator Tower) voted in favor of the Voting Rights Act. Fifteen of Marshall's sixteen opponents were still in the Senate, though one did not cast a vote. The remaining fourteen votes were all negative.

On the other hand, perhaps such a message was not really needed. In 1961 and 1962, the Administration had no interest in proposing civil rights legislation, and believed that the Southern Senators would mount a successful filibuster.

It is not important here to determine whether the attacks on Marshall were fueled primarily by the Southern Senators' own racist views, by their attempts to pander to the racist views of their constituents, by
their anger at the successful attack on segregation, or by their hope that strong opposition to Marshall would diminish the Administration's appetite for introducing civil rights legislation. However characterized, the opposition was symptomatic of the extent to which, despite Marshall's efforts, the goal of racial integration was still elusive.

V

Also important to the story is the ambivalence of the Kennedy Administration's support of Marshall. Civil rights groups, which were pressing for the appointment of blacks to federal judgeships, had pushed Marshall with particular vigor.134 Robert Kennedy had initially urged Marshall to accept a district court judgeship, thinking perhaps that this lower-level appointment would be less controversial,135 but Marshall had refused. Juan Williams states:

Marshall recalls arguing face to face with Robert Kennedy, who was trying to get him to take a district court job instead: "He said, 'Well, you can't go on the Court of Appeals.' I said, 'There is an opening.' He said, 'But that's already filled.' I said, 'So?' He said, 'You don't seem to understand. It's this [the district court job] or nothing.' I said, '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 goodbye.' And I walked out."136

Once the nomination became stalled in the Senate, neither the Attorney General nor any members of the Administration testified on Marshall's behalf.137 Such testimony would have been unusual, but not un-

134 See V. Navasky, supra note 27, at 243; Katzenbach Interview, supra note 27.
135 Katzenbach disagrees with his characterization; he maintains that because of Marshall's prominence such an appointment would have attracted the same opposition. Katzenbach Interview, supra note 27.

There appears to be an inconsistency in this story. From the beginning of the Kennedy Administration to May 19, 1961, there were no vacancies on the Second Circuit. See 1962 Annual Report, supra note 2, at 614. That day, Congress created three new judgeships, and Marshall was eventually nominated to one of them. See id. Thus, it cannot have been the case that one position had been filled at the time that Marshall talked to Robert Kennedy and that another position became vacant later.

Katzenbach maintains that the discussion about the district court judgeship took place before the creation of the new Second Circuit position, when in fact there was no opening on the Second Circuit. Katzenbach Interview, supra note 27.
137 It is noteworthy that, during the 1950s, Attorney General Kennedy had worked as chief counsel to the Senate Rackets Committee under Senator McClellan, one of the two subcommittee members to oppose the nomination. See V. Navasky, supra note 27, at xvii.
In fact, one of Marshall’s Republican supporters criticized the Kennedy Administration on this account. During the floor debate on the nomination, Senator Hugh Scott, Republican of Pennsylvania, stated:

I believe that had Pennsylvania been a little more zealous and had there been a little more activity from that direction this result might have been accomplished much earlier.

... [H]ad the Attorney General appeared in person, for example, with Thurgood Marshall at the time of the original hearing, perhaps the very presence of the Attorney General and his well-known persuasiveness might have caused the subcommittee to act with somewhat greater celerity or would have accelerated its desire to cooperate with the President of the United States and the Attorney General.

Moreover, an extensive search of records at the John Fitzgerald Kennedy Library did not reveal any correspondence from the Administration urging the Senate to act responsibly. Nicholas deB. Katzenbach, who was the Deputy Attorney General at the time that Marshall was confirmed, believes in retrospect that perhaps Robert Kennedy should have made more efforts on Marshall’s behalf. He maintains, however, that a more aggressive posture on the part of the Administration...
tion would not have reduced the delay or improved the Senate's treatment of Marshall.143

VI

When I had finished reviewing this sad chapter in our history, I asked Justice Marshall what he wanted me to do next, assuming that he would ask me to help draft a speech or an article. Instead, he told me that I should just return the books to the Supreme Court Library.

To this day, I wonder why he asked me to read the materials concerning his nomination to the Second Circuit. I have not been able to answer the question with any degree of certainty.144

Justice Marshall did not hand out assignments arbitrarily, so he must have had a reason for requesting that I undertake this project. It is possible that at the time that he asked me to read the materials, he was thinking of using this research for a specific project, but that he had changed his mind by the time I finished. I doubt that this was the case, because I read the materials over the course of only one day. Moreover, as far as my co-clerks and I knew, Justice Marshall had not accepted any speaking engagements, and it was not his practice to write articles for law reviews.

I am also comfortable discarding the possibility that Justice Marshall singled me out to do this research for some particular reason. When he needed help with some project, Justice Marshall often walked from his study, across the secretarial suite, to an office that I shared with another of his clerks (our other two co-clerks had an office upstairs, but spent considerable time in our office). He would then give his instructions to whoever happened to be there. In the case of this assignment, I was the only clerk in the office at the time that he walked in, and so he asked me to do it.

I have also determined that this was not a project that he handed out to law clerks every year. I have talked to a fairly large number of Justice Marshall's clerks—both before and after me. Many were aware that he regarded the events leading to his confirmation to the Second Circuit as particularly traumatic ones, but, as far as I can tell, I was the only one to have been asked to undertake this research.

My best guess is that either consciously or subconsciously, Justice Marshall wanted to underscore his struggle—not his well-known struggle as a child growing up in segregated Baltimore, as a young man rejected from the University of Maryland School of Law because he was

143 Id.
144 Perhaps I should have asked him. I am sure, however, that he would have said something like this: "It is my job to give you work and your job to do it."
black, or as a lawyer threatened with physical violence in countless Southern towns—but his struggle even after he had reached the apex of his profession. During the year that I worked for him, Justice Marshall often regaled my co-clerks and me with fascinating stories about his years as a civil rights lawyer. Despite the passage of more than four decades, he was able to describe in great detail the strategy that led to Brown. Each tale would bring hauntingly to life the grave dangers that he and his colleagues faced whenever they went to the South to litigate a case. Occasionally, though less frequently, he also talked about his childhood and about his legal education. Given the state of race relations in our country, it is hardly surprising that the road Marshall travelled through the 1940s and 1950s was far from smooth.

By 1962, things might have been different. Marshall was no longer a young lawyer representing the least powerful group in our society in its attempts to challenge the established order. His professional successes were by then legendary, and the central principle for which he fought had been endorsed repeatedly and unanimously by the Supreme Court.\footnote{145} He was, moreover, the nominee of a popular President. One would have hoped that he had left behind, both literally and figuratively, the days when he had to fear Southern-style lynchings or death at the hands of small-town sheriffs.\footnote{146}

Yet, in important ways, little had changed. The individuals who tried to destroy Marshall had more exalted titles than the local sheriffs of his past. They exhibited somewhat more polish than the white bullies who once told him, “‘Nigguh . . . I thought you oughta know the sun ain’t nevah set on a live nigguh in this town.’”\footnote{147} But they, too, were trying to destroy Marshall—to destroy those attributes most dear to him:


\footnote{146} See Richard Kluger, Simple Justice 223-26 (1976).

\footnote{147} Id. at 224 (quoting Marshall). While Marshall was undeniably brave, he could also be sensible: “So I wrapped my constitutional rights in cellophane, tucked 'em in my hip pocket . . . and caught the next train out of there.” Id. (quoting Marshall).
his reputation as a patriotic citizen, and as a lawyer of integrity and distinction.

At Justice Marshall's funeral service on January 28, 1993, Chief Justice William Rehnquist, certainly not an ideological soul mate, observed:

As a result of his career as a lawyer and as a judge, Thurgood Marshall left an indelible mark not just upon the law but upon his country. Inscribed above the 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.148

But in 1961, when Marshall had already completed the most important part of his life's work, he was made to suffer for an entire year to obtain a circuit court judgeship for which he was clearly qualified.

One could read into this saga a message of unremitting despair. A process that was little more than a formality for white attorneys became a hellish one for Marshall on account of his race and of his success in moving a resistant nation toward racial integration.149 So, one might ask, what hope could there possibly be for poor black children attempting to obtain a good education, or for black adults of lesser talents attempting to obtain jobs and decent wages?

I do not think that this is the lesson Justice Marshall would have wanted me to extract from his ordeal. Perhaps his most impressive quality was the optimism that he was able to maintain despite all of the obstacles his country placed before him. While he was well aware of the grave difficulties that lay on the road to racial equality, he also believed that, though slowly and with regular backtracking, society would move in the right direction.

At a reunion of law clerks a few years ago, Justice Marshall stated with great emotion that his dream was for the poorest black child in Mississippi to have access to the same quality of education as a child born into the Rockefeller family. He observed that this dream was unattainable, but that progress had been made and would continue to be made. Moreover, he said, even if we never quite get there, it is still a wonderful dream to have.

So, too, the dream of a political process that treats all fairly may be a distant goal, perhaps also an unattainable one. But recalling the events of 1961 and 1962 also reminds us of important ground that we have covered. Marshall's later confirmations, as Solicitor General in 1965 and Associate Justice of the Supreme Court in 1967, though not entirely

149 One cannot credit Robert Kennedy's characterization that Marshall was "relaxed" throughout the ordeal. See text accompanying note 93 supra. His stories about his confirmation to the Second Circuit made clear that the experience had been traumatic.
pleasant, were far less traumatic affairs. It was not only that President Johnson was more skillful at dealing with the Southern Senators or more committed to Marshall personally than President Kennedy had been. Neither was the difference attributable primarily to Marshall’s distinguished service as a circuit judge and later in the Justice Department. More importantly, the political landscape began to change throughout the 1960s as a result of the progressive enfranchisement of Southern blacks—a process that, though greatly accelerated by the Voting Rights Act of 1965, finds its origin in Marshall’s successful challenge to all-white primaries in Smith v. Allwright.

In 1987, another contested judicial confirmation proceeding underscored how far we had come. Regardless of what one thinks about the defeat of Judge Robert Bork’s nomination to the Supreme Court, one cannot help but be struck by the fact that the decisive votes were cast by white Democratic Senators unwilling to alienate black voters to whom they owed their electoral victories. It was a far cry, indeed, from the days when Senators Eastland and Johnston and their cronies did not have to worry about black voters, because they and their political ancestors had engineered an electoral system in which the vast majority of blacks were denied the right to vote.

Similarly, regardless of what one thinks about the election of President Clinton, one must recognize the truth in William Coleman’s apt suggestion in a eulogy at Justice Marshall’s funeral service, just a week after the President’s inauguration:

We observe the President here. Please do not think us ungracious when we wonder aloud if a son of Arkansas would be here if Thurgood Marshall in that hot summer of 1958 had lost, not won, the Little Rock school case. Would he be here if Marshall had lost, not won, the important voting rights cases? Could there be a Cabinet reflective of the American people if Marshall had lost Brown v. Board of Education or the voting rights cases or had not established the precedents for recognizing similar equal protection rights for women?

Justice Marshall wanted me to understand this chapter in his struggle. I believe that he would have wanted others to understand it as well.

150 But see note 83 supra (discussing Senator Thurmond’s questioning).
151 For example, in Mississippi, Senator Eastland’s state, the percentage of the black voting-age population that was registered to vote jumped from 6.7% in 1964 to 59.8% in 1967. See Frank R. Parker, Black Votes Count: Political Empowerment in Mississippi after 1965, at 31 (1990).