

The Confirmation of Thurgood Marshall to the United States Supreme Court

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I. INTRODUCTION

In 1967, a year when racial disturbances and riots left eighty-three people dead and as many as 3,210 people wounded,¹ President Lyndon Johnson announced the nomination of Thurgood Marshall to serve as the first Black American on the United States Supreme Court.²

Marshall's nomination in 1962 to the Second Circuit Court of Appeals had been opposed by all but two southern senators³ and it was possible that he would face southern opposition again. Three of the southern senators who lead the opposition to Marshall's first judicial nomination — Judiciary Committee Chairman James Eastland of Mississippi, John McClellan of Arkansas, and Strom Thurmond of South Carolina — were still on the Judiciary Committee.⁴

In addition, Marshall, whose success in *Brown v. Board of Education*⁵ had paved the way for the 1964 and 1965 civil rights bills, would face many of the same southerners who had been decisively defeated in their attempts to block that legislation.⁶ Indeed, by 1967, *Brown* and its progeny had established the foundation for a new framework of federal-state relations, a framework of congressional and federal court supremacy in the context of fundamental constitutional rights. Not since Reconstruction had national government asserted its hegemony over state institutions and values. If these senators were still disgruntled with these developments, Marshall's nomination would provide an opportunity to speak out.

Additionally, Marshall's nomination also came in the midst of public and con-

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The views expressed herein are my personal views and are not the views of any Senator or of the Judiciary Committee.

1. 1967 CONG. QUARTERLY ALMANAC 793 (1967). During 1967, racial riots or conflict flared in many cities around the nation. See generally REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (Kerner Commission Report) 1968.

2. PUBLIC PAPERS OF THE PRESIDENTS — LYNDON B. JOHNSON, BOOK 1 at 263-5 (1967); N.Y. Times, June 14, 1967, at 18, col. 1.

3. 1962 CONG. QUARTERLY ALMANAC 686, Vote # 175 (1962). Though these senators were not successful in blocking his nomination to the Second Circuit Court of Appeals, lead by Judiciary Committee Chairman James Eastland, they delayed confirmation an extraordinary eleven months.

4. 1967 CONG. QUARTERLY ALMANAC 48-49 (1967).

5. 347 U.S. 483 (1954).

6. See *infra* note 222.

gressional debate over measures to control race riots and organized crime; much of this debate had occurred in the Judiciary Committee.⁷ The discussion of crime control legislation had also been fueled by Supreme Court decisions defining constitutional constraints on criminal procedure; three of these decisions had been handed down just the day before Marshall's nomination. As Solicitor General, Marshall had supported compliance with these decisions,⁸ and as an Appeals Court judge he had demonstrated his willingness to apply these decisions fully.⁹ Senators who in 1967 were advocating law and order, including McClellan, would have an excellent opportunity to comment on these issues in the context of Marshall's confirmation.

Though it was predictable that the foregoing issues would be aired, it was not clear that southerners would also oppose Marshall's nomination on the basis of his race, nor was it certain that he would actually be confirmed. In the end, Marshall was confirmed. But before the vote was taken, Thurmond, Eastland, McClellan and Ervin used the nomination to voice their discontent with the new constitutional order. But many other members of Congress, including some southern senators, used the nomination as an opportunity to affirm their respect for Marshall — and indirectly, for all Americans, irrespective of race.

It is arguable that no other Black person could have provided such a rich opportunity to debate—and affirm—the new constitutional order. The record suggests that Marshall was confirmed, despite his negative symbolism to the South, because the sum of his experience transcended racial categorization. He had left the NAACP to serve as a federal judge and then assumed the mantle as Solicitor General of the United States. In these latter capacities, Marshall had dispensed justice to the nation as well as argued for it on behalf of the nation. By 1967, Marshall had not only moved beyond the boundaries of civil rights law, but had seen his legal theories ratified by the passage of the twentieth century civil rights acts. Though it was conceivable that his confirmation could have been significantly stalled, it would have been troubling — perhaps indefensible — if it had been scuttled.

II. THE PRESIDENT'S NOMINATION OF MARSHALL TO THE SUPREME COURT

At a brief open-air news conference on June 13, 1967, President Lyndon Johnson nominated Thurgood Marshall to serve on the United States Supreme Court.¹⁰ Johnson's remarks were brief. Johnson stated that he had notified the Chief Justice of the Supreme Court that he would send the nomination of Thurgood Marshall to the Senate to fill the vacancy created by the resignation of Associate Justice Tom C. Clark. Johnson reminded the press that Marshall was serving as Solicitor General and had resigned from the Second Circuit Court of Appeals to do so. Johnson asserted that in the history of the nation only six men had argued as many cases before the Supreme Court as Marshall. In conclusion, Johnson justified his decision by saying it was time to appoint someone like Marshall.¹¹

7. For a summary of McClellan's crime proposals, see 1967 CONG. QUARTERLY ALMANAC 848, 854. See also text accompanying *infra* notes 39-54, 130-35.

8. See *infra* note 74.

9. See text accompanying *infra* notes 93-102.

10. The vacancy became known shortly after February 28, 1967, when President Johnson nominated Ramsey Clark, son of Associate Justice Tom C. Clark, to serve as U.S. Attorney General. Shortly after this announcement, Justice Clark announced his retirement from the court. Telephone interview with Ramsey Clark, (Jan. 31, 1989); 1967 CONG. QUARTERLY ALMANAC 1167.

11. Before Johnson nominated Marshall, he had already appointed Blacks to a number of posts, includ-

I believe he has earned that appointment. He deserves the appointment. He is best qualified by training and by very valuable service to the country. I believe it is the right thing to do, the right time to do it, the right man and the right place. I trust that his nomination will be promptly considered by the Senate.¹²

In 1965, when Marshall was named Solicitor General, there had been speculation that Johnson was grooming him for the Supreme Court. In a *New York Times Magazine* article written shortly after that appointment, Marshall was asked whether Johnson had such a plan. Marshall answered, "Look, there's nothing to that, it's the purest of speculation. I can tell you the President made no promises, there were no deals, there was no talk of it. He wanted me for Solicitor General. That's all."¹³ As recently as last year, Justice Marshall said he was the "most surprised person in the world."¹⁴ According to Marshall, Johnson said, "I'm not gonna put you on the Supreme Court. . . . Don't bank on it, it's not there."¹⁵

But an aide to Johnson, Jack Valenti, remembers "a plan" despite public denials by both Johnson and Marshall. In a recent interview with Carl Rowan, Valenti revealed Johnson's thinking:

[Johnson] was determined that he was going to put a Black on the Supreme Court at the same time that he was trying to pass this monumental Voting Rights Act of '65. And I remember that in talking to me about it, he determined that he had to get somebody, a Black, who was going to survive the gauntlet of congressional intervention, hearings for confirmation. He wanted to so certify it so that there'd be absolutely no questions at all that this man would be confirmed and even lauded.¹⁶

When Rowan asked Valenti why Johnson would choose Marshall, who was such a red flag to the southern senators, Valenti responded that that was precisely the point:

[Johnson] thought Thurgood Marshall was a brilliant lawyer whose credentials as a courtroom lawyer were unsurpassed. And . . . he determined that he had to outfit Thurgood Marshall and armor him with the kind of battleplates that no opposition could penetrate. And I remember he said, 'By God, I'm gonna take Thurgood and I'm going to make him Solicitor General, and then when somebody says — Well, he doesn't have a lot of experience with the Supreme Court — . . . By God, that son-of-a-bitch will have prosecuted more cases before the Supreme Court than any lawyer in America. So how is anybody gonna turn him down?'¹⁷

Johnson may have strengthened Marshall's qualifications, but even before Marshall served as Solicitor General he was no stranger to the American public. He had been the subject of numerous articles touting his skills and abilities, articles which often contained complimentary quotes from attorneys whom Marshall had

ing Robert Weaver as Secretary of the Department of Housing and Urban Development. Johnson's judicial appointees included Courts of Appeal Judges William Hastie (3d Circuit) and Wade McCree (6th Circuit), and Federal District Court Judges Constance Baker Motley (N.Y.), Spottswood Robinson (D.C.), and Leon Higginbotham (Penn.). See 113 CONG. REC. H16443-44 (remarks of Senator Ernest Gruening of Alaska).

12. *New York Times*, June 14, 1967, at 18, col. 1.

13. *Zion, Thurgood Marshall takes a new 'Tush-Tush-Job'*, N.Y. TIMES MAG., Aug. 22, 1965, at 11. Another paper quoted Marshall: "[Johnson] made no promises — we didn't even discuss that . . . and I can tell you, it isn't even in the cards." *Washington Post*, Dec. 26, 1965, at E3, col. 4.

14. *Thurgood Marshall the Man* (WUSA-TV broadcast Dec. 13, 1987) (transcript at 11).

15. *Id.*

16. *Id.*

17. *Id.*

bested at the Supreme Court bar.¹⁸ By the time Johnson appointed Marshall to the Supreme court, his history and his contributions to American constitutional law were fairly well-known to Congress¹⁹ and the public. As a co-architect of legal doctrine which eliminated official American apartheid,²⁰ his work had affected the lives of millions of Americans, and had received editorial notice in major newspapers. President Johnson had indeed prepared Marshall to both withstand criticism and to receive praise. And the course of his confirmation encompassed both extremes.

III. HOUSE AND SENATE COMMENTS BEFORE THE HEARINGS

Prior to the Senate confirmation hearings, several senators spoke in favor of the nomination. On the day of the nomination, Senator Robert Kennedy (D, N.Y.) praised Marshall as a symbol of the Negro's struggle for justice, as well as for equal rights before the law.²¹ Senator Gale McGee, (D, Wyo.) also spoke in favor of the appointment, saying it "symbolize[d] the fact that America has come of age as a democratic nation and as a responsible society."²²

Only Senator Strom Thurmond (R, N.C.) spoke against the nomination shortly after it was announced. Two days after the nomination, Thurmond placed in the record an editorial which argued that the close split of the Supreme Court in *Walker v. Birmingham*,²³ which had narrowly upheld a contempt conviction against Martin Luther King, Jr. for violating an injunction forbidding a demonstration, clearly illustrated the danger of appointing Marshall to the Court.²⁴ Thurmond said he would vote against Marshall to ensure a majority for the continuation of decisions like *Walker*.²⁵ Thurmond placed additional editorials in the record to support his view that Marshall's appointment "would make the court decidedly more liberal."²⁶

Although the House of Representatives has no formal role in the confirmation process, opinions pro and con were offered shortly after the nomination. Congressman Richard Ottinger (D, N.Y.), praising the nomination and expressed his hope that Marshall's race would not overshadow his "abundant qualifications."²⁷

18. See, e.g., Zion, *supra* note 13; Poling, *Thurgood Marshall and the 14th Amendment*, COLLIER'S MAGAZINE, Feb. 23, 1952 at 29; *Chief Counsel for Equality*, LIFE, June 15, 1955 at 141; *Thurgood Marshall, The Man in the News — Negro Strategist Sees South on the Run*, U.S. NEWS AND WORLD REP., Sept. 27, 1957, at 64; *Kenya Parley Clashes Sideline Advisor Marshall: Orator for Race Equality Joins Global Fight*, Washington Post, Jan. 24, 1960, at A9, col. 1 (covering Marshall's role as advisor at Kenya Constitutional Congress in London, 1960).

19. Marshall had undergone a lengthy confirmation process when he was nominated to the Second Circuit Court of Appeals in 1962. After an eleven month delay, Marshall was finally confirmed by a vote of 54-16. 1962 CONG. QUARTERLY ALMANAC 686, Vote #175.

20. The NAACP strategy which led to *Brown* was developed by a team of attorneys that included Charles Houston, William Hastie, and Marshall. See generally R. KLUGER, *SIMPLE JUSTICE* (1975).

21. 113 CONG. REC. S15,726.

22. *Id.* at S16,087. A number of other senators spoke in favor of the nomination. See e.g., *id.* at S16,407 (Bayh); *id.* at S16,394 (Hartke); *id.* at S16,632 (Hart); *id.* at S17,153-54 (Brewster); *id.* at S18,090 (Proxmire). On July 24, 1967, Proxmire introduced a resolution adopted by the Milwaukee County Board of Supervisors urging Proxmire and Nelson to "request the speedy confirmation of Marshall." *Id.* at S19,769.

23. 388 U.S. 307 (1967).

24. 113 CONG. REC. S16,057. The editorial argued that since Justice Tom Clark had been in the five-justice majority in *Walker*, his replacement by Marshall would shift the rulings in all such decisions subsequently.

25. Thurmond argued that "[i]n those cases which are of the utmost importance, as they bear upon basic constitutional issues, the addition of Mr. Marshall to the Court . . . will require the appointment of two additional conservative justices in order to change the tenor of future Supreme Court decisions." *Id.*

26. *Id.* at 16,381.

27. 113 CONG. REC. H15,962. Ottinger placed in the record a Christian Science Monitor news story

Arnold Olsen (D, Mont.) noted that the appointment was receiving "widespread approval throughout the country" and placed an editorial from the Black press in the record which characterized the appointment as "a fitting recognition of the important role by the more than 10 percent of citizens who are Negroes."²⁸

This praise must be contrasted with the harsh words of Congressman John Rarick (D, La.), who spoke against the nomination. Rarick argued that the nomination was an insult to the South.

[T]he poor, persecuted, occupied southland, the heel of judicial compulsion and forced to destroy their school systems this Fall is now compounded by the additional insult of having the agent who was used to forment the trouble now publicly lauded for his race-mixing [sic].²⁹

Rarick also reprinted in the record accusations made in 1965 by Congressman Joe Waggoner (D, La.) that Marshall had communist associations.³⁰ Mr. Watkins Abbitt (D, Va.) was the only other member of the House to condemn the nomination.³¹ The remainder of the commentary was favorable.³²

IV. THE COMMITTEE ON THE JUDICIARY HEARINGS

A. McClellan, Crime and the Constitution: Thursday, June 13, 1967

Thirty-one days after the nomination had been received by the Senate, Chairman James Eastland (D, Miss.) called the Judiciary Committee hearings on the nomination of Thurgood Marshall to order.³³

Both of Marshall's home state senators, Robert Kennedy and Jacob Javits of New York, were present and urged the Committee to approve the nomination. Javits reminded the Committee that even though Marshall's nomination to the Supreme Court was an "historic first," it was in fact his third confirmation.³⁴ Kennedy echoed Javits' sentiments, citing Marshall's qualifications and the impor-

suggesting that Marshall's nomination would "shift the balance in close civil rights cases to the liberal minority." *Id.* The article also considered the nomination timely, since it came only days after major race riots erupted in Tampa and Cincinnati. *See id.*

See also id. at H15843-44 (statement of William Ryan (D, N.Y.) noting with pleasure Marshall's residence in his district); and *id.* at H15817 (statement of Samuel Friedel (D, Md.) noting that Marshall would be the first Justice from Maryland since Roger Taney), *but cf. infra* note 225.

28. *Id.* at H15,979.

29. *Id.* at H15,967-68. Rarick later placed in the record an editorial by a Mississippi law professor from the Commercial appeal which accused Marshall of ignorance because he failed to answer detailed question on the 13th and 14th amendments propounded by Strom Thurmond during the Judiciary Committee confirmation hearings. 113 CONG. REC. APP. 4152.

30. *Id.* at H15,968. These allegations had been made shortly after Marshall was nominated to serve as Solicitor General, and were based on information developed by the House Committee on Un-American Activities. In April of 1967, Congressman Don Edwards (D, Cal.) opposed appropriation of additional funds on grounds that the appropriation would exacerbate racial tensions by giving congressional endorsement to allegation of communism levied against respected civil rights leaders including A. Phillip Randolph, HUD Secretary Robert Weaver, Ambassador Ralph Bunche, NAACP lobbyist Clarence Mitchell, and Solicitor General Thurgood Marshall. 113 CONG. REC. H8420-23.

Marshall's alleged ties to communism were to recur at several points during the confirmation process. *See text accompanying infra* notes 119, 127.

31. 113 CONG. REC. APP. A3297.

32. *See e.g.*, 113 CONG. REC. H16,546-47 (statement Richard Fulton (D, Tenn.), 113 CONG. REC. APP., A3365-56 (statement of Charles Vanik (D, Ohio)), *id.* at A3385 (statement of Jeffrey Cohelan (D, Ca.)).

33. NOMINATION OF THURGOOD MARSHALL OF NEW YORK, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES: HEARINGS ON THE NOMINEE BEFORE THE SENATE COMMITTEE ON THE JUDICIARY, 90th Cong., 1st Sess. 1 (1967) [hereinafter HEARINGS].

34. *Id.* at 1-2.

tance of Marshall's efforts to achieve equality for Blacks.³⁵ Eastland noted that Marshall had been rated by the ABA as "highly acceptable from the viewpoint of professional qualification."³⁶

Marshall's biography was entered into the record, and Marshall was asked if he wanted to make a statement to the Committee. Marshall declined, but offered that he was "perfectly willing to answer questions."³⁷

i. *McClellan*

The majority of the first day's questioning came from Senator McClellan (D, Ark.). McClellan opened by asking whether Marshall believed that crime was a problem that had begun to jeopardize the country's internal security. Marshall agreed that crime was a problem, but thought that the problem could be addressed.³⁸ Again seeking Marshall's agreement, McClellan suggested that crime in fact endangered national security. Marshall noted that McClellan's language suggested a "revolution" that Marshall did not see; Marshall expressed his "great faith in the ability of our country to meet any emergency."³⁹ McClellan pressed again, eventually wresting from Marshall a concession that there was "a great danger . . . a sufficient danger to require every arm of government to do everything that is constitutionally permissible to stop the increase, and indeed to cut it down."⁴⁰ "And that includes the Supreme Court?" asked McClellan. Marshall replied, "No question about it."⁴¹

With this concession, McClellan narrowed his focus, asking whether Marshall felt all voluntary confessions should be excluded from criminal trials. Marshall declined to answer, stating that if he did, he would be later forced to pass on cases which might come before him as an associate justice.⁴² Dissatisfied, McClellan pressed for "some impression as to the trend of [Marshall's] thinking and . . . philosophy."⁴³ At this juncture, Marshall suggested that McClellan read a brief Marshall had recently filed as Solicitor General in a confession case in which the government's position coincided with Marshall's own views.⁴⁴ McClellan continued to press and Marshall continued to refuse to comment on confession issues generally, and *Miranda v. Arizona*⁴⁵ particularly.⁴⁶

McClellan read a portion of a speech Marshall had made on *Miranda* and *Escobedo v. Illinois*.⁴⁷ During the speech Marshall disagreed with police officials who had

35. HEARINGS, *supra* note 33, at 2.

36. *Id.*

37. *Id.* at 3.

38. *Id.* at 3-4. McClellan had overseen hearings on anti-crime legislation. As chair of the Senate Judiciary Subcommittee on Criminal Laws and Procedure, McClellan presided over hearings on various anti-crime bills (including the Safe Street and Crime Control Act of 1967) in March, April, May, and July, 1967. McClellan lead his subcommittee to report out legislation which, among other things, contained broad authority for wiretapping, provided guidelines for the use of confessions in federal prosecutions, removed the jurisdiction of the federal courts to determine whether a confession was voluntary, and placed limitations on the availability of federal *habeas corpus*. See 1967 CONG. QUARTERLY ALMANAC 853-54.

39. HEARINGS, *supra* note 33, at 4.

40. *Id.*

41. *Id.*

42. *Id.* at 9.

43. *Id.*

44. *Id.*

45. 384 U.S. 436 (1966) (statements elicited from individuals in police custody declared invalid without warning of privilege against self-incrimination).

46. *Id.* at 9-10.

47. 378 U.S. 478 (1964) (the sixth amendment right to counsel was denied when a suspect in custody was denied the opportunity to consult with a lawyer).

claimed that *Miranda* and *Escobedo* had had an adverse effect on criminal law enforcement. McClellan inquired whether the speech indicated that Marshall agreed with *Miranda* and *Escobedo*. Again, Marshall declined to answer on grounds that it was improper for him as a nominee to the Court to answer such questions.⁴⁸ McClellan asked Marshall whether the Constitution required that evidence gained in violation of *Miranda* to be excluded,⁴⁹ whether a lawyer must be present during police interrogation,⁵⁰ and whether the fifth amendment required that counsel be present at a police lineup.⁵¹ Marshall refused to answer these questions as well.

McClellan gave up for the moment.⁵² He announced his regret that he had "not been able to get an answer that would disclose . . . [Marshall's] viewpoint on these vital issues."⁵³ A newspaper account of the grilling compared it to a fencing "thrust and parry . . . [which] continued for about an hour, with both men unyielding and unsmiling."⁵⁴

ii. *Bayh, Hart, Kennedy, Fong and Hruska*

The remaining senators speaking that first day spoke in support of Marshall. Birch Bayh (D, Ind.) noted that he shared McClellan's concerns about crime, but that he supported Marshall's refusal to answer McClellan's questions.⁵⁵

Philip Hart (D, Mich.)⁵⁶ and Edward Kennedy (D, Mass.) gave statements supporting the nomination. Kennedy noted that Marshall's confirmation would be historic not because Marshall was Black, but because he was so "perfectly prepared to become a Supreme Court Justice." However, Kennedy reminded the Committee that it could not ignore the fact of Marshall's race, since his achievement was "a symbol of the progress we as a nation have achieved," as well as a reminder of "how far we still have to go."⁵⁷

Hiram Fong (D, Haw.)⁵⁸ and Roman Hruska (R, Neb.) closed the commentary by supporting Marshall. Hruska reminded the Committee that it is the President's "prerogative" whether to nominate a liberal or a conservative, and that it is the Committee's duty to inquire into the integrity and competence of a nominee to decide "whether he is suitable for service on the Supreme Court."⁵⁹ On the basis of the record, Hruska announced that he would "cast a vote in favor of [Marshall's] confirmation."⁶⁰

Before the hearings adjourned for the day, McClellan announced that he had additional questions, and that he would be unable to attend the next day's hearing. McClellan asked Marshall if his answers would be the same. Marshall expressed his regret that that was, in fact, the case. After a few additional remarks, Eastland adjourned.

48. HEARINGS, *supra* note 33, at 11.

49. *Id.* at 12.

50. *Id.* at 13.

51. *Id.* at 14.

52. See text accompanying *infra* note 130 *et seq.*

53. HEARINGS, *supra* note 33, at 14.

54. N.Y. Times, July 14, 1967, at 12, col. 2.

55. HEARINGS, *supra* note 33, at 16.

56. *Id.* at 14.

57. *Id.* at 14. Kennedy also introduced into the record Thomas Dodd's (D, Conn.) statement in support of the Marshall nomination. *Id.* at 15-6.

58. Fong praised Marshall's qualifications, and noted that "one of the manifestations of those high qualifications is the fact that [Marshall] had the fine sense to marry a charming young lady from my native state." *Id.* at 16.

59. *Id.* at 17.

60. *Id.* at 17.

B. Ervin, The "Living Constitution," Civil Rights and States' Rights: Friday and Tuesday, July 14 and 18, 1967

i. *Judicial restraint*

Senator Sam Ervin (D, N.C.) began his questions with a soliloquy on the nature of the Constitution: the founding fathers "dream[ed] . . . that they could enshrine the fundamental principles of Government in a written Constitution and safely entrust the interpretation of that Constitution according to its true intent to the Supreme Court." Thus, according to Ervin, the Senate's duty was to determine whether a particular nominee would help "the American people . . . realize that dream," and that senators should confirm if they believed that a particular nominee "[would] make it more certain that the American people [would] realize that dream."⁶¹

Ervin began by getting Marshall to agree that criticism of the Supreme Court was generally proper.⁶² He next asked the Chairman to include in the record a 1958 resolution authored by thirty-six state Chief Justices urging the Supreme Court to "exercise . . . the virtue of judicial self-restraint."⁶³ Ervin asked Marshall to concede that the resolution constituted proof that "there is a widespread opinion . . . that the Supreme Court . . . [had failed] to confine itself to its allotted constitutional sphere." Marshall demurred, responding that the statement "[spoke] for itself."⁶⁴ Ervin raised the question of proper constitutional interpretation and suggested that the role of the Supreme Court was "simply to ascertain and give effect to the intention of [the] Framers." Marshall agreed "in general," but Ervin pressed for an absolute statement by asking Marshall to state his point of disagreement.⁶⁵ Marshall responded that "the Constitution was meant to be a living document." He explained that he believed that some of the Court's early decisions supported the "living document" approach to interpretation.⁶⁶ Although this line of questioning was abandoned for the moment, Ervin was to return to Marshall's "living constitution" characterization later.⁶⁷

ii. *"Voluntary" confessions*

Ervin turned to the issue of voluntary confessions and the exclusionary rule. Ervin asked Marshall whether the fifth amendment prohibited the use of voluntary statements by unrepresented defendants. Marshall said that it did not, but pointed out that the "real problem is whether a statement is or is not voluntary."⁶⁸ Sidestepping Marshall's interjection, Ervin sought to establish that the fifth amendment only precluded testimony obtained by clear compulsion. Arguing that the word "compelled" in the fifth amendment was "plain," Ervin asked whether the fifth amendment could apply to "testimony or extra judicial statements which [were] not compelled at all."⁶⁹ Marshall offered that if the case were before him, he would look at the law, precedents and facts to decide the case. But Ervin wanted Marshall to say explicitly that the "words [of the fifth amendment] . . . apply only to compelled testimony." To this question Marshall gave no an-

61. HEARINGS, *supra* note 33, at 25.

62. *Id.* at 26.

63. *Id.* at 26-27.

64. *Id.* at 27.

65. *Id.* at 49.

66. *Id.*

67. See text accompanying *infra* notes 104, 121, 167.

68. HEARINGS, *supra* note 33, at 51.

69. *Id.* at 52, 53.

swer.⁷⁰ Ervin concluded aloud that if Marshall had no opinions on the meaning of the Constitution, he "ought not to be confirmed."⁷¹ As Ervin, like McClellan, began to ask Marshall's opinions on *Miranda*, Marshall ceased sparring and, with minor exception, refused to discuss the subject.⁷²

Edward Kennedy appears to have anticipated these attacks on Marshall's criminal procedure views and had come to the hearing prepared. Kennedy placed in the record all of the briefs from criminal cases Marshall had filed on behalf of the United States as Solicitor General during the previous two terms. Kennedy said that the briefs would "show . . . that the Solicitor General has a full awareness of the needs and problems of law enforcement, as well as a conscientious regard for individual rights."⁷³ The Committee recessed until July 18th, at 10:30 a.m.

When the Committee reconvened, McClellan presided⁷⁴ and Ervin continued his questions concerning criminal procedure. Bringing *Escobedo*⁷⁵ to Marshall's attention, Ervin asked whether it was a departure from prior holdings. Marshall hedged, but eventually, though not explicitly, agreed.⁷⁶

iii. States' rights

Ervin led Marshall through a dialogue on Ervin's view of the Voting Rights Act of 1965,⁷⁷ and of *South Carolina v. Katzenbach*⁷⁸ which upheld its constitutionality.⁷⁹ Ervin had seriously opposed the Act, and in a series of questions to Marshall, reviewed and renewed his arguments that Congress had no power to suspend state control over elections under the fifteenth amendment.⁸⁰ Ervin contended that the Voting Rights Act provisions requiring certain southern states to obtain preclearance of election changes were in fact bills of attainder in violation of article I, section 9, clause 3.⁸¹ Ervin also maintained that the provision requiring voting rights cases to be heard in the District of Columbia violated the due process clause. According to Ervin, if this provision were constitutional, "then Congress has the power to provide that in all civil cases the only court that could have jurisdiction would be a Federal Court sitting in the island of Guam."⁸² Marshall responded that he did not agree with these contentions.⁸³

Ervin moved from *South Carolina v. Katzenbach* to another voting rights case, *Katzenbach v. Morgan*,⁸⁴ which banned the use of English literacy tests as a criteria for voting in Puerto Rico.⁸⁵ This case was important because it affirmed Congress' power to outlaw practices which were not constitutionally forbidden. Ervin wanted Marshall to admit that *Morgan* gave Congress, instead of the Supreme Court, the ultimate power to determine the constitutionality of statutes.⁸⁶ Marshall disagreed with Ervin's characterization, stating that "the record [spoke] for

70. HEARINGS, *supra* note 33, at 52, 53.

71. *Id.* at 53.

72. *Id.* at 54-62.

73. *Id.* at 63. In fact, Kennedy had Hart file the briefs in his behalf, and conveyed his remarks through a written statement to the Committee. *Id.*

74. *Id.* at 65. Eastland had missed a plane. *Id.* (statement of Senator McClellan).

75. *Escobedo*, *supra* note 47.

76. HEARINGS, *supra* note 33, at 66.

77. 42 U.S.C. § 1973(c).

78. 383 U.S. 301 (1966).

79. HEARINGS, *supra* note 33, at 66-68.

80. *Id.*

81. *Id.*

82. *Id.* at 69.

83. *Id.*

84. 384 U.S. 641 (1966).

85. HEARINGS, *supra* note 33, at 71-72.

86. Ervin: "[T]he Court held, in essence, that the Congress instead of the Court had the power to pass

itself."⁸⁷

iv. "The Living Constitution"

Ervin turned again to *Miranda*,⁸⁸ and asked Marshall if he would "still decline to answer questions about [the case]." Marshall said that he "would respectfully request that [he] not be required to answer questions involving *Miranda* in the areas that will come before the Supreme Court in the immediate future."⁸⁹ Thereupon, Ervin delivered a prepared speech which asserted that the Supreme Court misinterpreted the fifth amendment in *Miranda* by expanding the prohibition against compelled testimony to a prohibition against voluntary testimony."⁹⁰

Ervin briefly debated Marshall on the meaning of the due process clause. Ervin accused Marshall and the Supreme Court justices of reading their personal notions of fairness into the Constitution under the guise of constitutional interpretation. Marshall sharply disagreed.⁹¹ The accusation merely set the stage for Ervin's specific inquiries on the Supreme Court's recent interpretations of the sixth amendment in three right to counsel cases.

Stovall v. Denno,⁹² *U.S. v. Wade*,⁹³ and *Gilbert v. California*⁹⁴ had been handed down just one day before President Johnson nominated Marshall to the Court. Marshall had participated in *Stovall* while on the Second Circuit, and had joined a Judge Friendly opinion which held that eyewitness identification of a suspect in custody who did not have counsel present was a violation of the sixth amendment.⁹⁵ The Friendly-Marshall opinion in *Stovall* had been vacated when the Second Circuit reheard the case *en banc*, and decided that the identification did not violate *Stovall*'s right to the assistance of counsel.⁹⁶ The Supreme Court subsequently had affirmed the *Stovall en banc* decision on the ground that its decisions establishing a right to counsel during pretrial identifications would apply only prospectively.

Ervin recounted for the Committee the facts of the *Stovall* murder, and, in classic cross-examination fashion, asked Marshall to affirm that each brutal detail had, in fact, occurred.⁹⁷ With this preface, Ervin accused Marshall of writing "into the

on the question whether the New York literacy test violated or was in harmony with the equal protection clause of the 14th amendment. Is that not exactly what they held?"

Marshall: "Subject to the final determination of the Supreme Court." *HEARINGS, supra* note 33, at 74.

87. *Id.*

88. *See supra* note 45.

89. *HEARINGS, supra* note 33, at 86.

90. *Id.* at 86-87.

91. *Id.* at 92-93. Testified Marshall: "It is . . . understood that [the Supreme Court justices] shall not use their personal views, and indeed, they take an oath not to." *Id.* at 93.

92. 388 U.S. 293 (1967).

93. 388 U.S. 218 (1967).

94. 388 U.S. 263 (1967).

95. *Stovall* came before a panel of the Second Circuit on Jan. 21, 1965, (JJ. Moore, Friendly and Marshall). The opinion from that decision, dated Mar. 31, 1965, was not reported, but is reprinted in *HEARINGS, supra* note 33, at 101-106. The Second Circuit sat *en banc* to reconsider the case on May 26, 1965, and reversed the Mar. 31 panel opinion on Jan. 31, 1966. 355 F.2d 731 (1966), reprinted in *HEARINGS, supra* note 33, at 106-18.

96. *Id.*

97. *Id.* at 93-99. The facts that Ervin recounted were essentially that just one day after the crime was committed, the police brought *Stovall* to the bedside of the only known witness to the vicious assault. This woman, herself had received multiple stab wounds in the course of an attack which left her husband dead. The woman identified the suspect, at a time when no counsel was present, or indeed had been appointed. *Stovall*, 455 F.2d at 733-34, reprinted in *HEARINGS, supra* note 33, at 108-109.

sixth amendment something that nobody had even suspected was there before."⁹⁸ Marshall responded sharply:

We did not write anything into the sixth amendment. We applied the law of the land . . . that when a man reached . . . arraignment, he was entitled to a lawyer. He reached that stage, he did not have a lawyer. So any identification question . . . should be withheld until he gets a lawyer.⁹⁹

Ervin charged that *Wade* and *Gilbert* had invaded the province of the jury — precluding the jury from evaluating the credibility of the eyewitness' identification. Marshall refused to agree.¹⁰⁰ In response, Ervin asked the Chairman to include in the record the cases containing "these rules that were invented by the majority of the Supreme Court of the United States for the first time on June 12, 1967, in the *Wade*, the *Gilbert*, and the *Stovall* cases."¹⁰¹ With this material, Ervin hoped to buttress his original statement that Marshall and the Supreme Court had read their personal notions of fairness into the Constitution under the guise of interpretation.¹⁰²

Acting Chairman McClellan engaged Marshall in a short round of questions asserting that the Supreme Court had made the law unstable and unreliable as a result of its recent "overrulings." Marshall admitted that the Court had sometimes changed its rulings, but that the "Constitution as a living document needs somebody to interpret it."¹⁰³ Ervin seized upon the "living document" statement, saying that what Marshall really meant was "that the Constitution is dead and we are ruled by the personal notions of the temporary occupants of the Supreme Court."¹⁰⁴ Marshall retorted: "I do not agree with your constantly referring to the Judges' personal views."¹⁰⁵ McClellan, Hart, and Ervin ended the session debating, through succinct one-liners, their differing views on the subject.¹⁰⁶

C. Thurmond's Quiz on the Thirteenth and Fourteenth Amendments and the Liberty Lobby Attack: Wednesday, July 19, 1967

On July 19, the hearings were convened with Eastland presiding. Eastland opened the questioning and asked Marshall to state his "philosophy of the Constitution and the general principles which [would] guide [him] in [his] interpretation thereof." Marshall said he would read the Constitution and apply it to the facts "without regard to any personal predilections one way or the other."¹⁰⁷ Eastland asked whether Marshall was "prejudiced against white people in the South." Marshall assured Eastland that he was not, and that he would give all

98. That is, that the police are barred in the absence of counsel from taking a suspect before eyewitnesses for identification purposes. *HEARINGS, supra* note 33, at 98-99.

99. *HEARINGS, supra* note 33, at 99.

100. *Id.* at 119-20.

101. *Id.* at 120.

102. *See, e.g.,* text accompanying *supra* notes 59-63.

103. *HEARINGS, supra* note 33, at 158.

104. *Id.* at 158.

105. *Id.*

106. Hart: "[T]he assignment of the Court is not . . . certainty but . . . justice, and sometimes justice requires overruling of previous decisions. . . ."

McClellan: "Can you make any justice out of turning a criminal loose because some policeman failed to give him a lawyer?"

Ervin: "[T]he beautiful words inscribed over the Supreme Court Building say 'Equal Justice Under the Law,' not justice according to the personal notions of the temporary occupants of the building." *Id.*

107. *Id.* at 160. When Eastland pressed on whether Marshall would take a position on a constitutional principle based on Marshall's "own sense of right and wrong," Marshall replied, "Well, my own sense of right and wrong is the Constitution itself." *Id.*

citizens equal and fair treatment.¹⁰⁸

i. *Thurmond*

Strom Thurmond next quizzed Marshall in an exchange which came to be known as the “sixty Constitutional questions.”¹⁰⁹ Thurmond began: “Judge Marshall, in view of the fact that your law practice . . . was concerned with the 13th and 14th amendments primarily, I would like to ask you some questions in your area of expertise.”¹¹⁰ Thurmond then peppered Marshall with a series of very specific questions on the purpose and legislative history of those amendments.

The first group of Thurmond’s sixty constitutional questions focused on the legitimacy of 19th and 20th century civil rights legislation. Through these questions, Thurmond implicitly suggested that both Congress and the courts had violated the Constitution by according civil rights protection to Blacks.¹¹¹ Marshall admitted that he did not know or did not remember the answers to many of these questions.¹¹²

Thurmond turned to questions on the scope of rights protected under the fourteenth amendment. He read, and asked Marshall to comment upon portions of legislative history. Thurmond asserted that these excerpts were relevant to the difference between “civil” and “political” rights, Congress’ power to invalidate state-imposed literacy tests, and whether the fourteenth amendment was intended to abolish poll taxes. In general, Marshall responded that the quotations Thurmond had offered were helpful in understanding the issues, but were not necessarily controlling.¹¹³ Marshall explained: “My point is . . . that this is a living constitution [sic], and it’s — you can’t expect the Court to apply the Constitution to facts in 1967 that weren’t in existence when the Constitution was

108. *Id.* at 161.

109. *See, e.g.,* TIME, Jul. 28, 1967, at 16.

110. HEARINGS, *supra* note 33, at 161.

111. *See id.* at 166. These questions were addressed in the famous Civil Rights Cases, 109 U.S. 3 (1888), readdressed in *Jones v. Mayer*, 392, U.S. 409 (1969), and will be considered once again in the case of *McLean v. Patterson*, *cert. granted* 108 S.Ct. 65 (1987), 805 F.2d 1143 (1986).

112. HEARINGS, *supra* note 33, at 161-76. The questions ranged from “who drafted the 13th amendment . . . ?” to the following exchange, in which Edward Kennedy intervened and illustrated the animosity of Thurmond’s attack.

Thurmond (to Marshall): “What constitutional difficulties did Representative John Bingham of Ohio see, or what difficulties do you see, in congressional enforcement of the privileges and immunities clause of article IV, section 2 through the necessary and proper clause of article I, section 8 [based on the House floor debate in April, 1862]?”

Marshall: “I don’t understand your question.” [Thurmond repeated the question verbatim]

Kennedy: “. . . I really don’t understand your question myself. . . . I really am confused as to what actually you are driving at. . . .”

Thurmond: “Well, I repeated the question twice. Would you like me to repeat it again? . . . I really don’t think I can make it any plainer if you know the answer.”

Kennedy: “I see.”

Thurmond: “It is just a question of whether you know the answer.”

Kennedy: “I see. . . .”

Thurmond: “Well, I could tell you that article IV, section 2, did not set forth the powers vested in the United States. That’s the answer.”

Kennedy: “That’s the answer. I see.” [Laughter in committee chambers]

Eastland: “Let’s have order. Proceed.” *Id.* at 163.

Marshall was able to supply answers to some of Thurmond’s detailed queries. Asked if he knew the substance of the Black Codes, Marshall recalled for the Committee, among other things, a Maryland statute which prohibited “Negroes from flying kites.”

Thurmond: “Is there anything else you wish to add?”

Marshall: “No, sir.” *Id.* at 163-64.

113. *Id.* at 171-73.

drafted."¹¹⁴ In response, Thurmond suggested that Marshall's doctrine would permit judges to expand their powers with impunity.

Supposing the Justices of the Supreme Court, knowing that the Constitution was intended by its framers to mean one thing, should declare in their opinions that it means something else . . . deliberately come to a conclusion which was contrary to the meaning its framers meant to give . . . [would Congress] have no power concerning the judges [sic]?¹¹⁵

Marshall replied: "Not that I know of. . . ." Thurmond asked if there was any remedy "other than the laborious path of a constitutional amendment?" Marshall replied, "I stand by my answer. . . . I think we have a separation of powers That's the framework of our Government."¹¹⁶

Thurmond turned to miscegenation. He read to Marshall an 1866 statement made by a member of the Congress which proposed the fourteenth amendment. Thurmond asserted that the statement proved that the Supreme Court rulings striking down all race and color distinctions constituted "an alteration of the limited scope of the 14th amendment." Marshall disagreed, and reminded Thurmond that accurate interpretation required consideration of the entire debate. With this exchange, Thurmond concluded his questions.¹¹⁷

ii. *Eastland*

Eastland faced Marshall again, and raised the question of communism. Marshall admitted that he had quoted a book by Herbert Aptheker in *New York v. Giamison*.¹¹⁸ Eastland said he "didn't . . . want to leave the impression that [Marshall had] ever been a Communist or anything like that" but wondered whether Marshall knew that Aptheker had been "an avowed Communist and was the leading Communist theoretician in the United States." Marshall denied knowing this, and said that he would not have cited Aptheker had he known his background. Kennedy interjected a query on the manner in which the book was cited. This question gave Marshall the opportunity to explain that the book itself had not been the basis for his legal reasoning, and demonstrated that the Supreme Court had agreed with his decision.¹¹⁹ Kennedy also noted his support for Marshall's decision not to answer certain questions which had been posed, and asserted that it is not the responsibility of the Senate "to test out the nominees' particular philosophy."¹²⁰ Ervin sharply disagreed, and reprised the theme of judicial restraint:

"It is not only important for a Senator to determine whether the nominee has sufficient knowledge of the law or sufficient legal experience, but also to determine whether he is able and willing to exercise judicial self-restraint . . . whether or not he will base his decisions upon what the Constitution says

114. HEARINGS, *supra* note 33, at 172-73.

115. HEARINGS, *supra* note 33, at 174.

116. *Id.*

117. *Id.* at 175-76. Some time after Thurmond concluded, Senator Hart, decidedly tongue-in-cheek, expressed the view of more than one witness to the questioning:

"[A]ll of us [senators] were impressed by the research that Senator Thurmond has done. . . . I did learn that there was a Michigan Senator I never heard of before who said something a hundred years ago which time has proved probably would have been wrong. But I want to say that, for one, I am satisfied with the responses that the nominee has made."

Id. at 179. Senators Tydings and Edward Kennedy expressed similar support for Marshall, *see infra* note 120, and text accompanying *infra* note 119.

118. 342 F.2d 255, 279.

119. HEARINGS, *supra* note 33, at 176-77.

120. *Id.* at 179.

rather than upon what he thinks the Constitution ought to have said."¹²¹

iii. *Liberty Lobby's opposition statement*

Eastland called Michael Jaffe of Liberty Lobby to testify. Liberty Lobby opposed Marshall on grounds that he would exacerbate an alleged lack of public confidence in the Supreme Court.¹²² According to Jaffe, the Supreme Court's decisions were "revolutionizing virtually every area of American Life." Confirmation of Marshall would only aggravate this situation, and the Senate's refusal to confirm him would be a "vitally important contribution to the strengthening of our constitutional system of government."¹²³ Jaffe said that he had expected that Marshall would avoid "relevant and important questions" during the hearings, and accused Marshall of having a "record of duplicity and arrogance unparalleled by that of any nominee to high judicial office in recent times."¹²⁴

Jaffe's charges were sweeping. He accused Marshall of dishonesty before the Supreme Court in his presentation of historical fact in the *Brown* case.¹²⁵ Jaffe also stated that Marshall had "a cavalier attitude toward the law," since Marshall, who was a member of the Maryland bar, had failed to become a member of the New York bar even though he had spent twenty-four years in New York as legal counsel to the NAACP.¹²⁶ Jaffe alleged that Marshall had intentionally obstructed a Texas Attorney General's investigation of the NAACP's activities in that state, and had long-time associations with Communists and communist-front organizations.¹²⁷ Finally, Jaffe characterized Marshall simply as a "special pleader for the narrow special interest group," who should be "disqualif[ied] from serving in a position where he will be required to serve all of the people."¹²⁸ Jaffe summed up his remarks by adopting Ervin's view that Marshall should not be confirmed if he didn't have opinions on the meaning of the Constitution.¹²⁹

D. McClellan and Wiretapping: Monday, July 24, 1967

i. *McClellan*

Senator McClellan presided and opened the questioning for the day. McClellan said that he had decided to ask Marshall additional questions after reading Marshall's views on wiretapping.¹³⁰ McClellan was convinced that wiretapping and electronic surveillance were "absolutely indispensable to an effective war on organized crime." He asked Marshall whether the act of wiretapping, "where authorized by a court under proper procedures and guidelines, and so forth"

121. *HEARINGS*, *supra* note 33, at 180. Senator Tydings agreed with Ervin that judicial restraint was important in a nominee, but found Marshall's performance during the Thurmond questioning "great testimony" to Marshall's powers of restraint. *Id.*

122. *See HEARINGS*, *supra* note 33, at 181-86.

123. *Id.* at 181.

124. *Id.*

125. *Id.* at 181-82. These charges were based on an article written by Alfred Kelly, an historian who had worked with Marshall on *Brown*. The charges had been made in 1962, during Marshall's Second Circuit confirmation hearings, but were discounted then when the historian testified in support of Marshall.

126. *Id.* at 182.

127. *Id.* at 183.

128. *Id.*

129. *Id.* at 184.

130. *Id.* at 187. McClellan was referring to comments Marshall, as Solicitor General, had made to federal prosecutors in the wake of two cases wherein the government had confessed error on the basis of illegal wiretaps. *See id.* at 187-88. *See, e.g.,* *Berger v. New York*, 388 U.S. 41 (1967).

constituted an unconstitutional invasion of privacy.¹³¹ In so doing, McClellan implicitly asked Marshall to comment on the constitutionality of a McClellan bill under consideration in McClellan's subcommittee. Marshall answered that he believed current decisions of the Court had precluded electronic eavesdropping without prior judicial authorization, and that one decision had left open the possibility that procedures might be adopted to govern the authorization of such surveillance.¹³² McClellan, not satisfied, wanted an answer which applied to his legislative proposal; he asked Marshall whether it was necessarily "unconstitutional to provide by statute for such surveillance[.]" Predictably, Marshall would not answer directly, and said that "it would depend on the act."¹³³ McClellan asked whether "one could be drawn that is constitutional." Marshall said that this could be done, but refused to specify constitutional criteria. McClellan, exasperated, said that he had to find out Marshall's philosophy:

If there is a clash of philosophies, one of which is a danger to the country in my viewpoint, and the other makes the country safe, I have got to choose between them, and if I can't find out the philosophy of the nominee, how am I going to function?¹³⁴

McClellan went on to note that he would have no alternative but to vote against Marshall if he felt confirmation would jeopardize the nation. After further pressure from McClellan, Marshall did say that a constitutional bill could be drafted and that he had no doubt that crime could be fought within constitutional limits.¹³⁵ But that was as far as Marshall would go.

Hart said that McClellan's questions called for more than philosophical discussion. They called for an expression of "opinion . . . on a constitutional question which the nominee may be confronted with if he is confirmed."¹³⁶ McClellan reiterated his "need to know" and his belief that the Supreme Court's division on issues like wiretap authority "militated against society, and . . . served the welfare of the criminal."¹³⁷

ii. Ervin

Ervin announced that he had "one or two" questions for Marshall.¹³⁸ Ervin's first question asked Marshall to concede that, for fourth amendment purposes, there was no difference between seizing a conversation and seizing papers. Marshall refused to be definitive.¹³⁹ Ervin's second question was, in fact, another exposition on the responsibility of the Senate through the confirmation process to protect the American people from judges who would abuse the Court's power by failing to exercise self-restraint. Ervin noted that since it was almost impossible to correct a Supreme Court decision by constitutional amendment, there were no other constraints on the authority of Supreme Court justices.¹⁴⁰

Thurmond countered that the Supreme Court could not operate unchecked. Marshall agreed with Thurmond's assertion that Congress could limit the appellate jurisdiction of the Supreme Court. Marshall disagreed, however, with Thurmond's premise that Congressional disagreement with a justice's interpretation

131. HEARINGS, *supra* note 33, at 188.

132. HEARINGS, *supra* note 33, at 188.

133. *Id.*

134. *Id.* at 189.

135. *Id.* at 189-94.

136. *Id.* at 189.

137. *Id.*

138. *Id.* at 194-98.

139. *Id.* at 195.

140. *Id.* at 196.

could be grounds for impeachment. Noting that he had been "afraid" Marshall would take that position, Thurmond concluded.¹⁴¹

McClellan closed the final hearing session, amid predictions that Marshall would win easy confirmation.¹⁴²

E. The Senate Judiciary Committee Vote

On August 3, 1967, the Senate Committee on the Judiciary met and reported to the full Senate Marshall's nomination with a recommendation that he be confirmed.¹⁴³

Before voting on the Marshall nomination, the Committee addressed a number of issues unrelated to the nomination. However, toward the end of the meeting, Senator Hart gently "renewed the request that [the Committee] move favorably on the nomination to the Supreme Court [of] . . . Thurgood Marshall."¹⁴⁴ Before considering Hart's request, however, Eastland asked how long the opponents of the nomination would have to do a minority report. Thurmond suggested thirty days,¹⁴⁵ and Hart quipped that with "the research you . . . put into those questions a month ago, I would think a couple of weeks [would] permit you to make a very persuasive presentation of your views."¹⁴⁶ Tydings humorously suggested that a "couple of hours" would probably be sufficient,¹⁴⁷ but Hart offered Thurmond a week. Thurmond reiterated his request for thirty days, but when Hart offered two weeks, Eastland agreed.¹⁴⁸

By unanimous consent obtained from all senators the previous day, the Committee had agreed to register Senator Smathers' (D, Fla.) opposition vote in spite of his absence on August 3rd. And at the August 3rd meeting, the Committee agreed to withhold publicity on the vote until the absent senators, Dirksen, Long, Bayh and McClellan had had an opportunity to record their votes.¹⁴⁹

The vote was 11-5 and had split on north-south lines.¹⁵⁰ This was no surprise. Bayh, Fong, Hart, Hruska, Kennedy and Tydings had all announced their intention to vote for Marshall at the outset of the hearings. And Burdick, Dirksen, Long, and Scott had all voted to confirm Marshall as a Circuit Court judge in 1962.¹⁵¹ Despite the close questioning Marshall had received from Ervin, Thurmond and McClellan, the newspapers had predicted confirmation. In fact, *Time* magazine had suggested that the southerners' grilling of Marshall had made confirmation even more likely.¹⁵² Other "insiders" had also predicted the confirma-

141. *Id.* at 196-97.

142. *Id.* at 198.

143. SEN. REP. NO. 13, 90th Cong., 1st Sess. 1 (1967).

144. REP. OF PROCEEDINGS, COMM. ON THE JUDICIARY, COMM. BUSINESS EXEC. SESS., 90th Cong., 1st Sess., Aug. 3, 1967, p. 10.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 10-11.

149. *Id.* at 11-12.

150. SEN. REP. NO. 13, *supra* note 143. Only eleven of the sixteen senators on the Committee were actually present to vote.

Those voting for Marshall: Thomas Dodd (D, Conn.), Philip Hart (D, Mich.), Edward Kennedy (D, Mass.), Edward Long (D, Mo.), Birch Bayh (D, Ind.), Quentin Burdick (D, N.D.), Joseph Tydings (D, Md.), Everett Dirksen (R, Ill.), Roman Hruska (R, Neb.), Hiram Fong (D, Haw.), Hugh Scott (R, Penn.).

Those voting against Marshall: James Eastland (D, Miss.), Sam Ervin (D, N.C.), John McClellan (D, Ark.), George Smathers (D, Fla.) and Strom Thurmond (R, S.C.).

151. 1962 CONG. QUARTERLY ALMANAC at 686, vote #175.

152. TIME compared Thurmond's "sixty fine print constitutional questions" to "a white registrar administering a literacy test designed to confound even the best-educated Negro" and a "Yahoo-type haz-

tion. Joseph Rauh, at the time a lobbyist and lawyer for the Leadership Conference on Civil Rights, said that there was "no question that Marshall would be confirmed, just a question of when it would occur."¹⁵³ Likewise Jack Greenberg, Marshall's successor at the NAACP Legal Defense Fund also recalls that "no one doubted that he'd be confirmed."¹⁵⁴

F. The Committee Report

i. *The Majority Report*

After the delay agreed to at the August 3rd Judiciary Committee meeting,¹⁵⁵ the Committee submitted its fifty-one page report to the Senate on August 13, 1967. The majority, in a brief three and one-half pages, recommended to the Senate the confirmation of Marshall's nomination in glowing terms. Their recommendation was based upon Marshall's extraordinary legal qualifications, and discounted concerns about his legal philosophy.¹⁵⁶ Significantly, the majority stated their agreement with Marshall's decision to preserve his judicial independence by refusing to answer hypothetical questions on issues which might come before him if he were confirmed to sit on the Court.¹⁵⁷

The majority also attempted, with some ambivalence and inconsistency, to address the relevance of race to the Marshall nomination and confirmation. On the one hand, the majority insisted that Marshall's nomination would make history, not because Marshall is Black, but because of his unique qualifications.¹⁵⁸ Simultaneously however, the majority recognized because that confirmation would be a symbolic act of government, as well as "a sign of progress,"¹⁵⁹ which would endorse the importance of Marshall's legal work to achieve interracial equality "within the framework of American Democracy and of law."¹⁶⁰

The majority closed by offering Marshall's confirmation as a hopeful event in a dispiriting year. The nation would be "benefited" by the confirmation.¹⁶¹

ing" which had "made it more unlikely that any serious Senator would want to question him seriously." *TIME*, July 28, 1967, at 16. Other newspapers predicted confirmation, *see, e.g., Hearing on Marshall Opens with Quizzing by McClellan*, *Washington Star*, July 13, 1967, at A2, col. 1. *See* text accompanying *supra* note 109.

153. Telephone interview with Joe Rauh (Jan. 29, 1989).

154. Telephone interview with Jack Greenberg (Jan. 29, 1989). A review of Leadership Conference on Civil Rights, and NAACP papers on file at the Library of Congress reveals no evidence of lobbying or other activity to secure Marshall's confirmation. When asked about this apparent lack of activity, Greenberg said "there was nothing to do; Johnson would make sure Marshall was confirmed." *Id.*

Ramsey Clark, Johnson's Attorney General, had been far less sanguine. He recalls that though it was likely that Marshall would be confirmed, unforeseen circumstances could have disrupted to nomination. Telephone interview with Ramsey Clark (Jan. 31, 1989).

155. The Committee on the Judiciary had customarily reported Supreme Court nominations to the full Senate immediately after the Committee vote. Rutkus, *The Speed With Which Action Has Been Taken on Supreme Court Nominations In The Last 25 Years*, at v, CONG. RES. SERV. 87-576 GOV, Jul. 7, 1987. However, in Marshall's case, the Committee submitted the report 18 days after the Committee vote, on Aug. 21, 1967. *Id.* Over the last 25 years, a greater delay occurred only in connection with one nomination, that of Clement Haynsworth, in 1969, which took 34 days. *Id.* at 15, Table 2.

156. "It may be said that Judge Marshall both in private practice and in public office has demonstrated those qualities which we admire in members of our highest judicial tribunal: thoughtfulness, care, moderation, reasonableness, a judicial temperment, and a balanced approach to controversial and complicated national problems." SEN. REP. NO. 13, *supra* note 143, at 2.

157. *Id.* at 3.

158. *Id.* at 2.

159. *Id.*

160. *Id.*

161. *Id.* at 3.

ii. *Minority Reports*

Forty-five of the remaining forth-seven pages consisted of Ervin's minority views supplemented by a substantial appendix.¹⁶² He opened with a lengthy statement on the importance of the Supreme Court to the American constitutional plan. According to Ervin, the Founders dreamed that they could "enshrine" both the "fundamentals of the government" and the "liberties of the people" with a "Supreme Court composed of mere men" who knew that "[the people's] dream . . . would depend on whether the men chosen to serve as Supreme Court Justices would be able and willing to lay aside their own notions and interpret the Constitution according to its true intent." Ervin contended that the addition of Marshall would thwart that dream.¹⁶³

Ervin expected that he would be called "a racist," but reassured the Senate that ideology, not race, explained his opposition.¹⁶⁴ Ervin argued that Marshall lacked the self-restraint necessary "to lay aside his personal notions of what a constitutional provision ought to say and to base his interpretation . . . solely upon its language and history."¹⁶⁵ According to Ervin, the Supreme Court had violated the Constitution, and that Marshall would do so as well. The Court had already "usurped" Congress' power to delineate new rights by constitutional amendment, and had shown "solicitude" toward criminals and "indifference" toward crime victims, even though victims were "as much entitled to justice as the accused."¹⁶⁶ He ridiculed Marshall's "living Constitution" approach: "When they say the Constitution is a living document, they really mean that the Constitution is dead, and that activist Justices as its executors may dispose of its remains as they please."¹⁶⁷

Ervin labelled Marshall a judicial activist for several reasons: Marshall's background as an activist litigator, his allegedly expansive view of the Due Process Clause and embrace of right-to-counsel criminal procedure guarantees as a Second Circuit judge, and his endorsement of Supreme Court decisions that approved broad Congressional power to enforce the fourteenth and fifteenth amendments.¹⁶⁸ If confirmed, Ervin predicted that Marshall would "align himself with the judicial activists now serving on the Supreme Court."¹⁶⁹

[Marshall's] elevation to the Supreme Court at this juncture in history would make it virtually certain that for years to come, if not forever, the American people will be ruled by the arbitrary notions of Supreme Court Justices rather than by the precepts of the Constitution. For these reasons, my duty to my country forbids me to advise and consent to Judge Marshall's appointment to the Supreme Court.¹⁷⁰

Senators Eastland, McClellan and Thurmond co-authored a minority statement of two paragraphs. They concurred in Ervin's views and served notice that they would present their views on the floor of the Senate.¹⁷¹ McClellan wrote separately to stress his belief that crime was "the greatest internal threat to our Na-

162. SEN. REP. NO. 13, *supra* note 143, at 5.

163. SEN. REP. NO. 13, *supra* note 143, at 5.

164. *Id.* Ervin stated, "I know that in [opposing Marshall] I lay myself open to the easy, but false charge that I am a racist. I have no prejudice in my mind or heart against any man because of his race. I love men of all races. After all, they are my fellow travelers to the tomb." *Id.*

165. *Id.* at 8.

166. *Id.* at 9-10.

167. *Id.* at 11.

168. *Id.* at 13-14.

169. *Id.* at 16.

170. *Id.* at 16-17.

171. *Id.* at 50.

tion's Security" and that the Supreme Court "had contributed to the current lawless trend . . . in their interpretation . . . of the Constitution . . . favor[ing] the criminal to the injury of society."¹⁷²

V. THE SENATE DEBATE AND VOTE

A. The Senate Debate

On August 29th, 1967, Senator Robert Byrd (D, W.V.) asked that the nomination of Thurgood Marshall be laid before the full Senate for its consideration.¹⁷³ Claiborne Pell (D, R.I.), spoke first, urging his colleagues to confirm Marshall.¹⁷⁴ The following day, discussion of the nomination resumed, and Philip Hart expressed his hope that the Senate would once again "advise and consent to the nomination of this very distinguished American lawyer." As he had done during the Committee hearings, Hart touted Marshall's qualifications based on his experience and record before the Supreme Court including *Brown*, his service on the bench, and his service as Solicitor General.¹⁷⁵

Applauding Marshall's qualifications, Senator Jacob Javits supported confirmation.¹⁷⁶ To ease concerns about Marshall's ideology, Javits offered examples of other Justices who surprised their pundits.¹⁷⁷ Javits further pointed out that much of the opposition to Marshall was based on disagreement with particular Supreme Court decisions, not with Marshall, and that this was a misuse of the confirmation process.¹⁷⁸

Several other senators expressed their confidence in Marshall. Senator Fong commended Marshall's qualifications and his judicial temperament. Fong predicted that Marshall would serve with such distinction as former Chief Justice John Marshall had enjoyed nearly two centuries before.¹⁷⁹ Senator Tydings lauded Marshall for his contributions to the constitutional law, for giving "renewed strength to the fabric of our democratic society," and for making "equal rights for all citizens a living reality."¹⁸⁰ John Tower (R, Tex.) also urged confirmation because so many "leading lawyers and jurists had attested to Marshall's qualifications."¹⁸¹

Robert Kennedy compared Marshall to Justices Story, Holmes, Brandeis and Chief Justice Marshall, praising the nominee for retaining his skill and humanity throughout his legal career.¹⁸² Ralph Yarborough (D, Tex.) simply stated that Marshall's successes before conservative and liberal courts attested to his competence.¹⁸³ Edward Kennedy argued that no nominee had come before the Senate more qualified than Marshall; therefore, it would be "superfluous and redundant," to dwell on his qualifications.¹⁸⁴ Confirmation, according to Kennedy, should not hinge upon personal philosophy but upon "background, experience, qualifications, temperament, and integrity": on these criteria, Marshall should be

172. SEN. REP. NO. 13, *supra* note 143, at 51.

173. 113 CONG. REC. S24,437.

174. *Id.*

175. *Id.* at S24,541.

176. *Id.* at S24,639-40.

177. "I predict with respect to Thurgood Marshall that he is going to surprise a lot of his critics. He has a rendezvous with history. He is a man of deep conscience. He cannot be taken for granted at all . . . He is too good a lawyer and too patriotic an American to be taken for granted. . . ." *Id.* at S24,640.

178. *Id.*

179. *Id.* at S24,645.

180. *Id.* at S24,646.

181. *Id.*

182. *Id.*

183. *Id.* at S4,647.

184. *Id.* at S24,646.

confirmed.¹⁸⁵

Support for the confirmation was far from absolute. A vocal group of senators opposed the appointment. Ervin was the first senator to rise in opposition. Before making his own remarks, Ervin included in the record an opposition statement by Senator Stennis (D, Miss.).¹⁸⁶ Stennis emphasized that the selection of Supreme Court justices was "one of the gravest responsibilities entrusted to the Senate." As such, both qualifications and philosophy were relevant to confirmation.¹⁸⁷ Stennis promised to vote against Marshall because Marshall had refused to answer questions about his personal philosophy.¹⁸⁸ The senator characterized Marshall's refusals as not only "haughty and overguarded," but a "bold affront to the authority of the Senate."¹⁸⁹

Ervin then spoke for himself. His remarks were as much a polemic against the individual rights' jurisprudence of the Supreme Court as they were an argument against Marshall's confirmation.¹⁹⁰ Emphasizing the importance of judicial restraint to the constitutional system, Ervin argued that Marshall was

by practice and philosophy a legal and judicial activist . . . [who would] join other activist Justices in rendering decisions which will substantially impair, if not destroy, the right of Americans . . . to have the Government of the United States and the several states conducted in accordance with the Constitution.¹⁹¹

Ervin further criticized judicial activism on the Court, citing *Harper v. Virginia Board of Elections*,¹⁹² as an example of a change in interpretation of legal precedent which destined "America . . . for an uncertain unconstitutional future."¹⁹³ Ervin then criticized a number of other Supreme Court decisions which, in his view, embodied a judicial activism that threatened the stability of the Republic.¹⁹⁴ Like Stennis, Ervin promised to vote against Marshall in order to "prevent the Supreme Court as well as Congress and the President from selling your constitutional birthright for the pottage of tyranny."¹⁹⁵

Elmer Holland (D, Fla.) characterized Marshall as a "constitutional ultra-liberal and an activist who would break down long-established constitutional interpretations, . . . destroy *stare decisis* . . . [and] substitute [his] own social philosophy for

185. 113 CONG. REC. S24,646.

186. 113 CONG. REC. at S24,583.

187. *Id.*

188. *Id.*

189. "[Marshall's] conduct before the committee and his reluctance to express himself reveal[ed] his basic philosophy more clearly than anything he could have said. It displayed a dangerous contempt for the legislative branch and suggests a philosophy so repugnant to most Americans and a majority of the Senate that it cannot be revealed until the nominee is safely installed on the Court." *Id.*

190. Much of Ervin's statement was virtually identical to the views he had expressed in the Committee Report. See text accompanying *supra* notes 161-69. Compare SEN. REP. NO. 13, *supra* note 143, at 5-16 with 113 CONG. REC. S24,583-87, S24,5839.

191. 113 CONG. REC. S24,589.

192. 383 U.S. 663 (1966) (striking down poll taxes, as a requirement for voting on grounds that the poll tax was inconsistent with the equal protection clause and therefore unconstitutional).

193. 113 CONG. REC. S24,587.

194. See *United States v. Guest*, 383 U.S. 745 (1966) (Black citizen's constitutional rights to uninhibited interstate travel upheld); *Morgan*, *supra* note 84 (english literacy requirement for voting struck down as a violation of equal protection); *South Carolina v. Katzenbach*, *supra* note 78 (Voting Rights Act of 1965 upheld); *Brown*, (*supra* note 5), and *Bolling v. Sharpe*, 347 U.S. 303 (1954) (decisions calling for desegregation of the nation's public schools); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (state prohibition of legislation to prevent housing discrimination struck down); *Miranda*, *supra* note 45 (statements elicited from individuals in police custody declared invalid without warning of privilege against self-incrimination).

195. 113 CONG. REC. S24,591.

the long-established law.¹⁹⁶ Holland, like Ervin, anticipated the charge of racism: he would vote against the appointment not because of Marshall's race but because he could not be "balanced and impartial" when future civil rights cases came before him.¹⁹⁷ Senator Hart assured Ervin and Holland that racism was not being charged; Hart also stated that Marshall had not been nominated because he was Black, and should not be confirmed for that reason.¹⁹⁸

Eastland also opposed Marshall, and asserted that Marshall's record demonstrated he would use the Court as an instrument to manipulate "social policy."¹⁹⁹ Eastland argued that the Court was already rewriting the Constitution, and that four judicial activists on the Court were responsible for expanding the rights of criminals.²⁰⁰ He felt, based on Marshall's performance on the Second Circuit that the addition of Marshall to the Supreme Court would create a dangerous majority on the Court in favor of broad interpretation of statutes permitting removal in cases involving constitutional rights, thereby, "opening the floodgates for persons to come into federal court."²⁰¹

Eastland further accused Marshall of denying due process to a litigant when Marshall cited a book which had not been placed into evidence and which the litigant had not had the opportunity to discredit.²⁰² This was all the more egregious, said Eastland, because the author of the book was communist Herbert Aptheker, and the introduction was by W.E.B. DuBois, "a lifetime fellow traveler who in later years formally embraced communism."²⁰³ Noting Marshall's assertion that he did not know that Aptheker was a communist, Eastland implied that Marshall had to before the Committee: "It strains the powers of belief to the breaking point to think that Judge Marshall could have been unaware of who Herbert Aptheker was when he cited his book."²⁰⁴

Eastland cited a list of 5-4 decisions by the Court in which Justice Clark's vote had been necessary to deny those constitutional claims. This was Eastland's evidence that Marshall would further "diminish[] . . . the quality of the performance of the Supreme Court."²⁰⁵ Eastland warned that Marshall's "living document" theory would irrevocably lead to the loss of liberty rather than its preservation.²⁰⁶

Adding his voice to those who had opposed Marshall, Thurmond also delivered a statement that was as critical of the Court as it was of Marshall. He asserted that Supreme Court decisions had generated hostility and dissatisfaction throughout the country, and that efforts to overturn these decisions by constitutional amendment had failed.²⁰⁷ With the failure of this check on the Court, only the confirmation process remained to limit the Court's almost unrestrained power.²⁰⁸

196. 113 CONG. REC. S24,635. Holland also cited *Harper* as an example of "destructive constitutional principles . . . [which] . . . destroy the right of every citizen to rely upon the plain meaning of the Constitution and the earlier decisions of the U.S. Supreme Court in construing it." *Id.* at S24,365-46.

197. 113 CONG. REC. at S24,638.

198. *Id.* at S24,638-39.

199. *Id.* at S24,640.

200. *Id.*

201. *Id.* at S24,642. Ervin notes Marshall's decision in *New York v. Galamison*, *supra* note 118, involving a federal statute permitting the removal of state criminal cases to federal courts. The Supreme Court interpreted the statute as allowing removal only in cases where it could be conclusively shown that the prosecution itself was a denial of a constitutional or statutory right. *Greenwood v. Peacock*, 384 U.S. 808 (1966).

202. 113 CONG. REC. S24,642.

203. *Id.* See text accompanying *supra* note 118.

204. *Id.* at S24,642-43.

205. *Id.* at S24,643.

206. *Id.*

207. *Id.* at S24,647-48.

208. 113 CONG. REC. S24,648.

Thurmond vowed to vote against Marshall because he believed Marshall did “not consider himself bound by the original intent and understanding of the framers of the Constitution.”²⁰⁹ Further, Thurmond would also reject confirmation because Marshall’s failure to answer the detailed questions Thurmond had posed during the hearings had demonstrated Marshall’s lack of qualifications.²¹⁰

Thurmond charged Marshall with ignorance of the law in areas where he had been touted as expert. This turn of argument revealed the assertion underlying many of Thurmond’s questions to Marshall — that the fourteenth amendment was of limited scope and was never intended to cover political rights; therefore, many current interpretations of the fourteenth amendment, including Marshall’s, were baseless.²¹¹ Thurmond said he would oppose confirmation because Marshall, like other judicial activists, would be “more intent on rewriting the law than in applying it.”²¹²

Robert Byrd delivered the final speech in opposition to the nomination. Byrd argued that the duty of confirmation was an important one, and that senators could not neglect that responsibility.²¹³ Although Byrd rarely opposed presidential nominees because he believed the President should have the benefit of the doubt, he could not support Marshall. To answer anticipated charges of racism, Byrd listed the names of the thirteen Black judges he had voted to confirm.²¹⁴ Byrd claimed he would like to vote for Marshall, because “he is a Negro,” but that he had a duty to avoid basing his decision solely upon that issue. Byrd was also convinced that Marshall’s history would prevent him from being impartial on civil rights matters, and that his activist tendencies would exacerbate the trend toward liberality in matters of criminal procedure.²¹⁵ After Byrd spoke, the Senate voted overwhelmingly to confirm Thurgood Marshall.²¹⁶

The final vote was 69-11. With the exception of Robert Byrd, the northerner who most frequently voted with the southerners, the opposition was entirely from the South: Robert Byrd, James Eastland, Allen Ellender (D, La.), Sam Ervin, Lister Hill (D, Ala.), Spessard Holland, Ernest Hollings, Russell Long (D, La.), John Sparkman (D, Ala.), Herman Talmadge (D, Ga.), Strom Thurmond.²¹⁷ In addition, several absent southern senators who opposed the nomination — Stennis, McClellan, Russell and Smathers — registered their opposition through “pairing,” a “gentleman’s agreement” between legislators on opposite sides of an issue to withhold votes if one or the other is absent to prevent the outcome from being affected.²¹⁸ Six southern senators did vote in favor of confirmation: William Fulbright (D, Ark.), Albert Gore (D, Tenn.), William Spong (D, Va.), Ralph Yarborough, Howard Baker (R, Tenn.), and John Tower.

Senator Byrd announced that eight additional senators would have voted in favor of confirmation had they been present.²¹⁹ Thus, while the official vote

209. *Id.*

210. 113 CONG. REC. S24,648.

211. *Id.* at S24,649-53.

212. *Id.* at S24,654.

213. *Id.*

214. *Id.* at S24,655. In addition to expecting charges of racism, Byrd also anticipated the repercussions of those charges: “I shall vote against the confirmation of [Marshall’s] nomination realizing that, from a purely political standpoint, my vote will probably not be a good one.” *Id.* at S24,654.

215. *Id.* at S24,655-56.

216. *Id.* at S24,656.

217. *Id.*

218. *Id.*

219. *Id.* at S24,646. Those were Alan Bible (D, Nev.), Ernest Gruening (D, Ala.), Vance Hartke (D, Ind.), George McGovern (D, S.D.), Lee Metcalf (D, Mont.), Edmund Muskie (D, Me.), Joseph Montoya (D, N.M.) and George Murphy (R, Ca.).

count was 69-11, according to the record, eighty-one senators favored the confirmation, and fifteen opposed the nomination.

At the time of the full Senate vote, Marshall's nomination had been pending before the Senate seventy-eight days, much longer than other nominees in the last twenty-five years. The three nominees who immediately preceded Marshall were confirmed rather rapidly — Byron White in eight days, Arthur Goldberg in twenty-six, and Abe Fortas (for Associate Justice) in fourteen.²²⁰ Some subsequent nominees have received more lengthy consideration, but of thirteen nominees since Marshall, only five were pending longer than Marshall, and four of those nominees — Abe Fortas (1968) (for Chief Justice), Clement Haynsworth (1969), Harold Carswell (1970), and Robert Bork (1987) — were rejected.²²¹

VI. CONCLUSION

A. Racism, Ideology, and Symbolism

Charges of racism were not formally levelled at Marshall's opponents, yet several times during the debate these charges were anticipated and rebutted. Marshall's opponent's denied that their opposition was race-based. Rather, they said that their questions, speeches and votes were based on their concern that Marshall would exacerbate what they characterized as a dangerous pattern of judicial usurpation. Indeed, in the abstract, the opponents did address valid issues of constitutional law, the resolution of which did depend on legal ideology and philosophy.

When the opposition to Marshall's nomination is viewed in the context of voting patterns on racial equality legislation, a more accurate characterization of the opposition emerges. In this context, the opposition appears to be an integral part of the larger pattern of southern opposition to the advancement of civil rights for Blacks. This pattern is clearly discernible in the voting records of southern senators on the major civil rights legislation of 1964, 1965, and 1968.²²²

The opposition to Marshall must be understood in the context of southern opposition to the new doctrines and ideology that resulted in meaningful and enforceable equality. Poll taxes, segregated schools, unbridled police discretion, prohibited interracial marriage, absolute states' rights, and strict constitutional construction had the instrumentalities of American apartheid. Their retention

220. *RUTKUS*, *supra* note 155, at v.

221. *Id.* Fortas' nomination for Chief Justice was effectively rejected when a cloture motion was decisively defeated and his nomination withdrawn.

222. All of the southern senators who opposed Marshall's confirmation also opposed the Civil Rights Act of 1964, which outlawed racial discrimination in public accommodations, employment, and federally-funded programs. Of the six southern senators who voted to confirm Marshall, one voted for the Civil Rights Act of 1964, three opposed it and two were not in the Senate at that time. *See* 1964 CONG. QUARTERLY ALMANAC 696, vote # 180 (1964).

All of the southern senators who opposed Marshall also opposed the Voting Rights Act of 1965, which outlawed racial discrimination in voting and imposed severe federal regulation of elections in states where Black voter participation had been suppressed. Of the six southern senators who voted to confirm Marshall, two voted for the Voting Rights Act of 1965, two voted against it, and two were not in the Senate at that time. *See* 1965 CONG. QUARTERLY ALMANAC 1042, vote # 78 (1965).

All of the southern senators who opposed Marshall also opposed the passage of 1968 Fair Housing legislation. Of the six southern senators who voted to confirm Marshall, two voted for the Fair Housing legislation, one voted against it, one was part of a pair, but would have voted against the act, and two were not in the Senate at that time. *See* 1968 CONG. QUARTERLY ALMANAC 9-S, vote # 30, 31 (1968).

All of the southern senators who opposed Marshall's nomination to the Supreme Court had also voted against his confirmation for the Second Circuit Court of Appeals. Of the six southern senators who voted to confirm Marshall's Supreme Court nomination, three also voted to confirm his nomination to the Second Circuit, one did not vote, and two were not in the Senate at that time. *See* 1962 CONG. QUARTERLY ALMANAC 686, vote # 175.

had been defended in the courts and the Congress. In 1967, those battles were not yet over, but the handwriting had been on the wall since the close of debate on the 1964 and 1965 civil rights bills. As a result of these bills, the future of race relations would be different, and the voting constituencies of the southern senators would change.²²³

These realities, as well as the strong support for Marshall, suggest why there was no attempt by the southern senators to stop Marshall's confirmation. Had southern senators attempted a filibuster, it is likely that cloture would have been invoked. Marshall's confirmation did provide an opportunity for some southern senators to communicate their loyalty to southern institutions, and their adherence to a legal ideology which would leave those institutions free from restraint. But it would have been difficult to mount a filibuster — the traditional instrument of civil rights opposition — to prevent the confirmation of a man whose life had been devoted to the advancement of constitutional equality. In 1962, Marshall's confirmation to the Second Circuit had been delayed eleven months. This time Marshall was confirmed in seventy-eight days. The times had indeed changed.

B. The Implications of Marshall's Confirmation

According to some sources, President Johnson counted the appointment of Marshall as one of the two or three greatest accomplishments of his presidency.²²⁴

Indeed Marshall's confirmation did accomplish at least three things which had never occurred before. First, the appointment added to the court a member whose life's work had been dedicated to advocating and securing racial equality, and thus confirmed that civil rights achievements could qualify one for Supreme Court service.

Second, Marshall's confirmation placed on the Court a member whose theoretical understanding of equality had been altered and enriched by exposure to the myriad manifestations of racial subordination. Marshall's confirmation created the possibility that Marshall, indelibly influenced by experiences unique among his fellow justices, might forcefully urge the Court to invest the Equal Protection Clause with content worthy of its aspiration, and with tools equal to its corrective task. After all, the last Supreme Court justice from Marshall's home state of Maryland, Roger Taney, had authored the infamous *Dred Scott*²²⁵ majority opinion which summed up all that Marshall had worked to correct.

Third, and quite simply, Marshall's appointment to the Court broke remaining barriers to inclusion and pluralism in America's highest judicial institution. Marshall's confirmation led the country to consider the quixotic possibility that exclusion of African-Americans from the United States Supreme Court might be unacceptable, indeed, perhaps unthinkable. The confirmation of Marshall signalled a weak spot in "the last remaining color barrier in high public service — save for the Presidency itself."²²⁶

223. In 1964, only 43% of Blacks eligible to vote were registered. In whole numbers, while nearly 2.2 million Blacks were registered, more than 2.8 million remained unregistered. Indeed, Lyndon Johnson won the 1964 presidential election by a margin (1,314,421 votes) that was less than half the number of unregistered Black voters. *Revolution in Civil Rights*, at 70, CONG. RES. SERV. (1965).

224. Telephone interview with Ramsey Clark (Jan. 31, 1989). See also *Thurgood Marshall the Man* (WUSA-TV broadcast, Dec. 26, 1987) (transcript at 17).

225. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). This irony was identified in an editorial published several days after the nomination in the Baltimore Afro-American, *Right Thing, Right Time, Right Place, Right Man*, June 24, 1967, at 5, col. 1.

226. H. ABRAHAM, *JUSTICES AND PRESIDENTS*, 291 (2d. ed. 1985). Telephone interview with Ramsey Clark (Jan. 31, 1989).