

## THE WRONG SIDE

By Archousa Vanzetta Penn McPherson, Phi Boulé

One evening during my long-ago law school days, I was descending the stairs of the headquarters of the esteemed Association of the Bar of the City of New York, my mind fluttering with excitement over my moot court team's victory in the Northeast Regional competition. Suddenly I discerned a rather large shadow in my path and, looking up, I found myself gazing into the face of modern emancipation. There, garbed in all black and glaring impatiently at the lowly creature blocking his holy ascent was Justice Thurgood Marshall.

Alone with His Grace in the circular opulence of the stairwell and stricken with a near-fatal case of GERD, I could only mumble, "Good evening, Justice Marshall." He scowled and growled, continuing on his way as though a bothersome roach had crossed his path and escaped the ultimate punishment for doing so. It was to become my sole encounter with The Great One, but in later conversations with his friends and colleagues, I learned that his manner that evening was but a microcosm of his usual demeanor.

Had he, in empathy for the roach, been a fly on the wall of the Senate Judiciary Committee room during the political theater that was Elena Kagan's confirmation hearing, he would have had little reason to alter his demeanor. Ignoring the traditional admonition against speaking ill of the dead, Republicans, ferociously led by Alabama's junior senator, Jefferson Beauregard Sessions, trashed Marshall's name and his quintessentially American legacy.

Calling Marshall an "activist," Sessions severely criticized Kagan for "associating herself with well-known activist judges who have used their power to redefine the meaning of our Constitution and have the result of advancing that judge's preferred social policies." His view was affirmed by Sen. Jon Kyl (R-AZ), who added that he didn't consider Justice Marshall's judicial philosophy to be "mainstream." Then Orrin Hatch (R-UT) found it "hard to say" whether he'd have voted for Marshall's confirmation as a Justice of the Supreme Court.

Perhaps the confirmation process has indeed become a "vapid and hollow charade" as Elena Kagan wrote in 1995, but even if its meaning is still defensible, it is undeniable that, the "advice and consent" constitutionally required from the U.S. Senate is now litmus of a judicial candidate's political philosophy, rather than his or her judicial philosophy. In other words, senators and the American public are – and arguably have always been – far more interested in a nominee's beliefs than his or her prospective rulings.

Therefore, the attacks on Justice Marshall during the Kagan hearings recall the words of an oft-used chant during the Civil Rights Movement of the 1960's. Its interrogatory urging is particularly applicable here: "Which side are you on, boys? Which side are you on?"

Thurgood Marshall's side, upon which Elena Kagan expressly and publicly carved her own place, is symbolized by the end of the era of official public school segregation, whites-only primary elections, restrictive covenants barring blacks from buying or renting homes, racial segregation on public buses, and depriving prisoners of access to law libraries. The senators who consider him an "activist" clearly believe that, as a lawyer, Thurgood Marshall should have accepted for himself and all other African Americans an unconstitutional reality, and that, as a Justice, he should have shelved his power to implement the Constitution's safeguards.



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It is neither cynical nor unreasonable to believe that every Supreme Court nominee approaches the judgeship with an agenda. A seat on the court is the stuff of dreams. It is sought, coveted and cherished.

It is reserved for ambitious, usually intellectually gifted, professionally mature and politically savvy lawyers who see themselves as change agents. By the time they achieve the jurisprudential sovereignty to warrant the President's serious consideration, they have developed a world view, whether it is procedural or substantive – and it is usually the latter.

It would be cynical to suggest that they analyze issues and write opinions in pursuit of their world view regardless of the law. However, that their perspectives on the law and public policy – yes, public policy – are informed by their world view is squarely within the realm of plausibility. Otherwise, there would be no such thing as a liberal court or a conservative court. Because there are enough of the unique personas that comprise the nominee pool to populate liberal and conservative ideologies, and because the nomination/confirmation process is essentially a political process, nominating presidents and confirming senators look for lawyers who mirror their constitutional and statutory interpretations.

The Republicans' problem with Thurgood Marshall was that he was consistently doctrinal regarding individual rights, especially the then-burgeoning constitutional and statutory rights of African Americans to equal opportunity. In a way, these Marshall bashers are the philosophical heirs to the signers of the Southern Manifesto, which labeled the Warren Court's opinion in *Brown v. Board of Education* a "clear abuse of judicial power."

In short, Senators Sessions, Kyl and Hatch, among others, are on the wrong side. On the right side is the scowling judge on those stairs many years ago who spoke barely a word to me, but uttered volumes of righteous jurisprudence to the world. Ω