

# THURGOOD MARSHALL AND (AND VERSUS) JOHN W. DAVIS

Ross E. Davies<sup>†</sup>

The undated letter (obviously sent in late 1963) reproduced on the next page is a form letter (also obviously) sent by West Publishing Company to federal judges, announcing the company's annual distribution of snazzy appointment books<sup>1</sup> – just a little courtesy to foster good relations between the law publisher and the producers of some of the most valuable publishable law.<sup>2</sup> But it probably meant a bit more to the recipient of that particular letter, Judge Thurgood Marshall of the U.S. Court of Appeals for the Second Circuit. He must have smiled – perhaps nostalgically, perhaps grimly, perhaps both – when he read it. Here's why.

The letter begins with an announcement: "This year our special appointment book is dedicated to Honorable John W. Davis." It then goes on to touch on a few of Davis's accomplishments. Google him if you have an hour to spare. He lived a long time (1873-1955) and had a heck of a career.

Marshall already knew about Davis. Indeed, for lawyers of Marshall's generation, Davis was a courtroom celebrity and role model. In the early 1930s, when Marshall was a law student at Howard University, he sometimes skipped class to watch Davis argue cases at the U.S. Supreme Court. According to Marshall, Davis was an "unbelievable" lawyer, from whom he

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<sup>1</sup> Wayne A. Davies to Hon. Thurgood Marshall (n.d.), Box 7, Papers of Thurgood Marshall, Library of Congress, Manuscript Division (hereafter, "*Marshall Papers*").

<sup>2</sup> Cf. Wayne A. Davies to Hon. Thurgood Marshall (Nov. 9, 1961), *Marshall Papers* ("Your appointment as Judge of the U.S. Court of Appeals places you with the other Federal Judges in the position of a contributing editor to the Federal Reporter System, of which we are the publishers.").

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Dear Judge Marshall:

Under separate cover I am pleased to send our 1964 Executive Record and Travel Guide to you. This year our special appointment book is dedicated to Honorable John W. Davis.

John W. Davis, born in Clarksburg, West Virginia on April 13, 1873, died in Charleston, South Carolina, March 24, 1955, in the sixtieth year following his admission to the Bar. His legal career embraced some seventeen years as an active country lawyer, twice as many as head of a law firm in New York City, and between the two periods a decade of public service.

He also served the profession as President of The Association of the Bar of the City of New York and of the American Bar Association. He personally argued in the United States Supreme Court a total of about 140 cases, over and above the scores in which he appeared on the brief. His Supreme Court appearances culminated in two great arguments made in his eightieth year- the United States Steel case and the school segregation case.

We take this occasion to express to you and your staff our appreciation of the co-operation and assistance you have given us in the publication of your opinions, and extend to you our best wishes of the Season.

With esteem, I remain-

Yours very truly,  
WEST PUBLISHING COMPANY

*Wayne Davies*  
Executive Vice President

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“learned most of my stuff.”<sup>3</sup> Thirty-or-so years later, the letter from West Publishing Company (“West” for short from now on) might have prompted nostalgic memories of those good old days in Washington when Marshall could attend Supreme Court sessions in its small courtroom in the U.S. Capitol to watch Davis, or grim memories of those bad old days when he was attending law school in Washington because he could not attend his hometown, no-blacks-allowed law school at the University of Maryland. (Later in the 1930s, Marshall would lead the fight to correct that defect.<sup>4</sup>)

In the early 1950s, Marshall would again see Davis at the Supreme Court. By then, though, they were opposing counsel, and Marshall trounced Davis in *Briggs v. Elliott*, the South Carolina case decided with *Brown v. Board of Education* and the other school desegregation cases. Ten-or-so years later, the letter from West might have prompted nostalgic memories of those good old days when Marshall won the greatest of all civil rights courtroom victories, or grim memories (and current awareness) of the massive resistance that followed *Brown* and was continuing when the letter arrived. Indeed, the fact that West was celebrating what it called in the letter Davis’s “great argument[] made . . . [in] the school desegregation case”<sup>5</sup> must have been chilling. Here was the leading publisher of American law, manifestly confident that it could profitably remind judges of the work Davis did in *Briggs* when, among other things, he told the Court,

I am reminded – and I hope it won’t be treated as a reflection on anybody – of Aesop’s fable of the dog and the meat: The dog, with a fine piece of meat in his mouth, crossed a bridge and saw the shadow in the stream and plunged for it and lost both substance and shadow. Here is equal education, not promised, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?<sup>6</sup>

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<sup>3</sup> Juan Williams, *Thurgood Marshall: American Revolutionary* 214 (1998); see also William H. Harbaugh, *Lawyer’s Lawyer: The Life of John W. Davis* 514 (1973) (“As Marshall finished, Julia Davis turned to his wife and congratulated her on his performance. ‘So you are the daughter of Judge Davis,’ Mrs. Marshall exclaimed. ‘My husband admires him so much.’”); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 Colum. L. Rev. 835, 863 (1982) (“For many years after, John W. Davis was warmly regarded by the NAACP for the power of his argument in *Guinn* [v. *United States*, 238 U.S. 347 (1915)],” the case in which the Supreme Court struck down Oklahoma’s “grandfather clause” as an infringement of the right to vote guaranteed by the 15th Amendment.).

<sup>4</sup> *Pearson v. Murray*, 182 A. 590, 594 (Ct. App. Md. 1936).

<sup>5</sup> Davies to Marshall, *Marshall Papers*, note 1 above.

<sup>6</sup> Transcript of Oral Argument, *Briggs v. Elliott* (Dec. 7, 1953) at 44, reprinted in 49A *Landmark Briefs*

Was it careful drafting or carelessness that generated a letter characterizing Davis's argument – but not the case in which he argued – as “great”?<sup>7</sup> It is too late to find out, I suspect. Either way, though, it would have been nice if the West executive who signed the letter (Executive V.P. and Editorial Counsel Wayne A. Davies<sup>8</sup>) had at least noticed the name on that copy of the letter and scribbled in the margin some sort of acknowledgment that Davis had lost – at the hands of the addressee – “the school desegregation case.”<sup>9</sup> Even better, Davies could have added, “Thank goodness!” But it was 1963. Schools from Boston to Richmond to Cleveland to San Francisco were still (and would long remain) racially segregated,<sup>10</sup> Martin Luther King was writing a letter in a Birmingham jail,<sup>11</sup> the KKK was active in the bombing-with-impunity business,<sup>12</sup> and the Supreme Court itself was the very model of racial segregation – nine white judges who hired only white law clerks<sup>13</sup> – and so on. In such an atmosphere, why wouldn't West have felt that sending a letter to American judges, celebrating a lawyer's argument in favor of segregation, was no problem?<sup>14</sup>

Between the hero-worshipping in the early '30s and the Goliath-felling in *Briggs*, Marshall met and chatted with Davis face-to-face on at least one occasion, and not at the Court. While preparing for the first round of *Briggs* arguments, he lunched with Davis. Marshall biographer Juan Williams

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and *Arguments of the Supreme Court of the United States: Constitutional Law* 492 (1975) (Philip B. Kurland and Gerhard Casper, eds.).

<sup>7</sup> According to one expert on West, careful attention to every detail was and is the essence of the company's editorial-reportorial culture. See Bob Berring, *Ring Dang Doo*, 1 Green Bag 2d 3, 4 (1997).

<sup>8</sup> The author of this little article is not aware of any family connection with the signer of the letter.

<sup>9</sup> See Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* at 186 (1994).

<sup>10</sup> See, e.g., *Morgan v. Hennigan*, 379 F.Supp. 410 (D. Mass. 1974); *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974); *Bradley v. School Board of City of Richmond*, 317 F.Supp. 555 (E.D. Va. 1970); *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979); *Johnson v. San Francisco Unified School District*, 339 F.Supp. 1315 (N.D. Cal. 1971), *vacated and remanded on other grounds*, 500 F.2d 349 (9th Cir. 1974).

<sup>11</sup> Taunya Lovell Banks, *The Unfinished Journey – Education, Equality, and Martin Luther King, Jr. Revisited*, 58 Vill. L. Rev. 471 (2013).

<sup>12</sup> Margalynne J. Armstrong, *Are We Nearing the End of Impunity for Taking Black Lives?*, 56 Santa Clara L. Rev. 721 (2016).

<sup>13</sup> Justice Felix Frankfurter, who hired William T. Coleman in 1948, had retired in 1962. Chief Justice Earl Warren would not re-cross the Court's clerical color line until 1967, when he hired Tyrone Brown. See Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* 22 (2006).

<sup>14</sup> Cf. Dennis J. Hutchinson, *A Century of Social Reform: The Judicial Role*, 4 Green Bag 2d 157, 166-68 (2001); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* pt. 1 (1991).



*Thurgood Marshall (left) and John W. Davis. Photographs courtesy of the Library of Congress, reproduction numbers LCDIGppmsc01271 and LCDIGhec21517.*

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describes the reaction of Marshall's colleagues at the National Association for the Advancement of Colored People:

[W]hy, some asked, was he going out of his way to sit down and break bread with an old segregationist like Davis?

"John Davis was the enemy," said [NAACP staffer June] Shagaloff. "He was everything that we were fighting. How could Mr. Marshall go to lunch with him?" When Shagaloff and some other NAACP staffers confronted him about it, Marshall explained, "We're both attorneys, we're both civil. It's very important to have a civil relationship with your opponent."<sup>15</sup>

Which is not to say that Marshall had any illusions about the man he was dining with, or any respect for Davis's stance on segregation, or any hesitation about pushing back against Davis and the interests he represented, but, rather, it is to say that Marshall valued and practiced lawyerly civility, even when the stakes were at their highest, differences at their deepest, and offense might most easily be taken.

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<sup>15</sup> Williams, *Thurgood Marshall: American Revolutionary* at 215.

Thus, when the closing moments of Davis's first oral argument in *Briggs* included some oddly trimmed and juxtaposed quotes from the writings of W.E.B. DuBois that inaccurately portrayed DuBois as a supporter of segregated schools,<sup>16</sup> Marshall's response moments later in the opening of his argument was restrained. He took an early opportunity (during an exchange with Justice Felix Frankfurter about the writings of Gunnar Myrdal) to caution the Court that, "when you take judicial notice [of someone's writings], "we have to read the matter, and not take portions out of context."<sup>17</sup> We may never know whether Marshall's subtle rebuttal was effective, nor whether a blunt and angry denunciation of Davis's legerdemain would have been more or less effective. But we do know, from a remark Marshall made later, how he felt at the time: "Here was the Devil quoting phony Scripture."<sup>18</sup> We also know who won the case.

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**D**id any of what I've talked about here occur to Marshall when he saw that letter from West back in 1963? Who knows? I certainly don't. What I do know is that I have done some digging in Marshall's papers at the Library of Congress and, as best I can tell, during his years on the bench Marshall: (1) engaged in a good deal of correspondence with West, mostly about the mundane details of making sure the company accurately reported his judicial opinions; (2) he (or someone in his office) routinely filed carbon copies of letters he sent to West, including thank-you notes and other replies relating to small revisions of his opinions and to law books West sent or offered to send him; and (3) the 1963 letter discussed in this article is the only letter from West about its annual "special appointment book" distributions that Marshall bothered to keep, and there is no carbon copy of a thank-you note or other reply filed with it.

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<sup>16</sup> See Transcript of Oral Argument, *Briggs v. Elliott* (afternoon of Dec. 10, 1952) at 9, reprinted in 49 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 338 (1975) (Philip B. Kurland and Gerhard Casper, eds.) (hereafter, "*Briggs Argument*"); Richard Kluger, *Simple Justice* 574 (1975; pbk. ed. 1977); see also *id.* at 546; Harbaugh, *Lawyer's Lawyer*, note 3 above, at 500.

<sup>17</sup> *Briggs Argument* at 341.

<sup>18</sup> Carl T. Rowan, *Dream Makers, Dream Breakers: The World of Justice Thurgood Marshall* 200 (1993); see also *id.* at xv-xvi.