

A TRIBUTE TO A SCHOLAR, A WISE JURIST,
AND A ROLE MODEL

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When asked to write a short tribute to the Honorable A. Leon Higginbotham, Jr., I instinctively responded “yes.” The opportunity to write about such a remarkable person and fine judge is truly an honor and a joy. I also believed that the task would be relatively easy because Judge Higginbotham has accomplished so much that is worthy of recognition and thanks. I correctly believed that my task would not entail any difficult searching for significant accomplishments to enumerate; rather, the toughest challenge proved to be selecting from Judge Higginbotham’s seemingly endless achievements and eloquent writings.

Judge Higginbotham’s career as a judge has been much more than the sum of his achievements. Throughout his tenure on the federal bench, Judge Higginbotham endeavored to do justice as a jurist, striving not only to help those less fortunate than himself, but also to train those who sought to follow in his footsteps. He set a remarkable example in the way that he conducted himself—always fair, decent, and caring.

The length of Judge Higginbotham’s tenure on the federal bench, in and of itself, warrants praise, for it spans twenty-nine years. On January 6, 1964, he was formally sworn in as a United States District Court Judge for the Eastern District of Pennsylvania, after being appointed to the position by President Lyndon B. Johnson. In 1977, after serving thirteen distinguished years as a trial judge, Judge Higginbotham was nominated to the United States Court of Appeals for the Third Circuit by President Jimmy Carter. He became Chief Judge in 1990. On March 5, 1993, Judge Higginbotham retired from the federal bench, ending almost three decades of judicial service.¹

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¹ See 2 ALMANAC OF THE FEDERAL JUDICIARY 19 (1993).

Judge Higginbotham left his mark on American jurisprudence, on teachers and students of the law, and most significantly, on those personally affected by the rule of law. He penned over 650 opinions—always written with clarity and demonstrating his familiarity with legal principles—covering the spectrum of substantive areas of the law.² Moreover, as a legal scholar, he published over fifty articles³ and authored *In the Matter of Color*,⁴ a national award-winning book.⁵ In addition, he has taught at the following law schools: Harvard, New York University, Stanford, Yale, and the Universities of Hawaii, Michigan, and Pennsylvania. Judge Higginbotham's love for the law is matched only by his contributions toward its improvement.

Judge Higginbotham also has led a varied and rich life apart from the bench. He has been a trustee of Thomas Jefferson University, Yale University, and the University of Pennsylvania.⁶ He has served as a Commissioner on the Federal Trade Commission and on the Pennsylvania Human Relations Commission.⁷ He has also served as Vice-Chairman of the National Commission on the Causes and Prevention of Violence and as a member of the Commission of Reform of Federal Criminal Laws.⁸ Finally, he has received countless honors, awards and honorary degrees,⁹ demonstrating the high esteem in which our society holds him.

Judge Higginbotham did not begin his life's journey earmarked for the law. Rather, in 1944, as a 16-year-old freshman engineering

² Judge Higginbotham's first judicial opinion was in a tax case, *Woodard v. United States*, 232 F. Supp. 831 (E.D. Pa. 1964). His last opinion, *Jones v. Ryan*, 987 F.2d 960 (3d Cir. 1993), involved a claim for habeas corpus relief based on alleged racial discrimination in the exercise of peremptory challenges to jurors.

³ See Toni M. Jackson & Helen J. Kim, *Judge A. Leon Higginbotham, Jr.: The Man, the Jurist, the Scholar*, 9 LAW & INEQ. J. at vii, viii-xiii (1991) (listing Judge Higginbotham's accomplishments).

⁴ A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD* (1978).

⁵ See Clifford S. Green & Stephanie Franklin-Suber, *The Unique Path of A. Leon Higginbotham, Jr.: A Voice for Equal Justice Through Law*, 9 LAW & INEQ. J. 397, 403 (1991) ("[Higginbotham's] book *In the Matter of Color* has received several national awards, including the Silver Gavel Award (American Bar Association), the National Bar Association Literary Award, the Frederick Douglass Award of the National Association of Black Journalists, and the Book Award of the National Conference of Black Lawyers.").

⁶ See Samuel M. Hughes, *Summing Up Leon Higginbotham*, PA. GAZETTE, Feb. 1993, at 18, 20 (reviewing Judge Higginbotham's life and career).

⁷ See 2 ALMANAC OF THE FEDERAL JUDICIARY 17 (1993).

⁸ See *id.*

⁹ See *id.*

student at Purdue University, he had an experience which sparked a keen interest in pursuing a career in the law.¹⁰ As one of a dozen black students enrolled at the university, he was required to live in an unheated attic, while his white classmates resided in the university campus dormitories.¹¹ In the winter months, he went to bed with "earmuffs on, sometimes wearing shoes and several pairs of socks."¹² The Judge recalled that, "One night, as the temperature was close to zero, I felt that I could suffer the personal indignities and denigration no longer."¹³ The next morning, he asked the university president, Edward Charles Elliot, if there was some way the black students could sleep in heated quarters.¹⁴ President Elliot replied, "Higginbotham, the law doesn't require us to let colored students in the dorm, and you either accept things as they are or leave the University immediately."¹⁵

In 1978, reflecting upon his meeting with President Elliot, Judge Higginbotham, then a member of the Third Circuit, stated:

I knew then I had been touched in a way I had never been touched before, and that one day I would have to return to the most disturbing element in this incident—how a legal system that proclaims "equal justice for all" could simultaneously deny even a semblance of dignity to a 16-year-old boy who had committed no wrong.¹⁶

Both as a judge and as a private citizen, Judge Higginbotham has worked relentlessly to open the doors of legal and educational institutions to all individuals in America and in South Africa.¹⁷ In 1986, he demonstrated his commitment to help the powerless and to end racial discrimination when he dissented from a report by a University of Pennsylvania committee which recommended that the

¹⁰ See HIGGINBOTHAM, *supra* note 4, at vii-ix.

¹¹ See *id.* at vii.

¹² Neil A. Lewis, *Black Judge's Success Story Begins in Cold Attic*, N.Y. TIMES, July 19, 1991, at B7 (quoting Judge Higginbotham).

¹³ HIGGINBOTHAM, *supra* note 4, at vii.

¹⁴ See *id.*

¹⁵ *Id.* at viii. After this incident, Judge Higginbotham transferred from Purdue to Antioch College, where he studied sociology. Upon his graduation from Antioch, he attended Yale Law School. See *id.* at ix.

¹⁶ *Id.* at viii-ix.

¹⁷ See Green & Franklin-Suber, *supra* note 5, at 398 ("As a lawyer, civic leader, scholar, and educator, Leon Higginbotham has persistently—individually and in association with others, black and white—called for the establishments in America and South Africa to open the doors of society's institutions to all Americans and to all South Africans.").

University postpone divesting its securities from companies doing business in South Africa.¹⁸ In opposing the recommendation Judge Higginbotham asked:

Have blacks been given the right to vote, the core fundamental right of any democratic system? Have the pass laws and other laws giving effect to the policy of influx control been changed? Have the laws that force black migrant workers to live away from their families 11 months of the year . . . been changed? Has the Population Registration Act, which requires each and every member of the population to be classified as a member of one of four racial groups, a label which then determines where that person can live, where that person can go to school, what kind of education is received, where that person can work, and whether that person is able to travel freely in the country of his or her birth—has that Act been repealed? Tragically, for the 23 million blacks in South Africa, the answer to each of these questions . . . is "No."¹⁹

Judge Higginbotham has been a powerful, passionate and committed advocate for equal opportunity for all individuals. On the issue of equal opportunity, he stated: "I can think of no issues that are more important than quality of life in our society with options for all. . . . And I'm not talking about options for black people alone, or for women alone, but options for all."²⁰ Throughout his long and often arduous fight for equal opportunity for all, Judge Higginbotham has always emphasized the importance of equal opportunity and fair treatment regardless of race or religion. He stood firm against discrimination; often he was compelled to do so to avoid being its victim. In *Commonwealth v. Local 542, International Union of Operating Engineers*,²¹ the defendants moved to have Judge Higginbotham recuse himself from the case because he was a black jurist who was actively involved in his community. Steadfastly refusing to disqualify himself from the case, he wrote: "I am aware that Judge Higginbotham is not Senator Higginbotham, or Mayor Higginbotham, or Governor Higginbotham, but I also know that Judge Higginbotham should not have to disparage blacks in order

¹⁸ See Hughes, *supra* note 6, at 21.

¹⁹ *Id.* (alteration in original).

²⁰ Arthur S. Hayes, *A. Leon Higginbotham: Headed for the High Court?*, AM. LAW., Nov. 1987, at 85, 87 (quoting Judge Higginbotham).

²¹ 388 F. Supp. 155, 156 (E.D. Pa. 1974).

to placate whites who otherwise would be fearful of his impartiality."²²

In support of his argument, Judge Higginbotham noted that many Jewish, Catholic, and Protestant federal judges were also active in their synagogues, churches, and communities. He went on to assert:

So long as Jewish judges preside over matters where Jewish and Gentile litigants disagree; so long as Protestant judges preside over matters where Protestant and Catholic litigants disagree; so long as white judges preside over matters where black and white litigants disagree, I will preside over matters where black and white litigants disagree.²³

On November 29, 1991, drawing upon his lifelong commitment to excellence and equal opportunity, Judge Higginbotham wrote an historic public letter to Justice Clarence Thomas.²⁴ In the letter, the Judge attempted to remind Justice Thomas that he was a beneficiary of the civil rights movement and that he should "remember the fundamental problem[s] of the disadvantaged, women, non-whites, and the powerless."²⁵ He wrote:

Over the next four decades you will cast many historic votes on issues that will profoundly affect the quality of life for our citizens for generations to come. You can become an exemplar of fairness and the rational interpretation of the Constitution, or you can become an archetype of inequality and the retrogressive evaluation of human rights. The choice as to whether you will build a decisional record of true greatness or of mere mediocrity is yours.²⁶

* * *

As I studied the life of the jurist, scholar, professor, humanitarian, and person whom I love as a friend and mentor, I understood the difficulty of paying tribute to a person such as Judge Higginbotham. In order truly to understand Judge Higginbotham,

²² *Id.* at 180.

²³ *Id.* at 181.

²⁴ See A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992).

²⁵ Kendall Wilson, *Problems on the Bench: Thomas Rulings "Cruel," Higginbotham Charges*, PHILA. TRIB., Sept. 29, 1992, at 1A (discussing Judge Higginbotham's "Open Letter" to Justice Thomas and its review of Thomas's tenure on the Court).

²⁶ Higginbotham, *supra* note 24, at 1008.

I turned to his former law clerks. Judge Higginbotham's clerks are a wondrously diverse group. However, they share one thing in common: they all love and respect Judge Higginbotham. The following is a very small selection of remarks made by former law clerks in letters they wrote to honor Judge Higginbotham in June of 1993.²⁷ I have organized their comments according to the personal attribute or specific experience to which they refer. I hope that through their eyes and experiences the reader will gain a feeling for the qualities and values that set Judge Higginbotham apart as a leader, scholar, and friend.

INSPIRATION

Audrey G. McFarlane, currently an attorney at Wilmer, Cutler & Pickering, recalls,

For me personally, what remains most prominent in my mind about my clerkship was the wonderful way in which you taught, nurtured and inspired your law clerks. It was awe inspiring to watch you tirelessly work on court business while taking time out to share your vast knowledge with your law clerks, as well as the students from your various classes, while producing a steady stream of scholarly articles. Through it all, you maintained an impressively modest and gracious demeanor, never failing to generously give credit to those around you who may have contributed in some way.

Gilbert Casellas, recently appointed as General Counsel of the United States Air Force, thanked Judge Higginbotham "not only for the professional opportunity we [your law clerks] were given but for the great fortune at having known you personally and being witnesses to and beneficiaries of your teaching, compassion and integrity."

TEACHING BY EXAMPLE

According to Bryan Blaney, an attorney in the United States Department of Justice, "In your seemingly tireless efforts—simultaneously exercised on the court, in your classrooms, in your travels to educate in speeches and in your scholarship and writing—you taught

²⁷ In June, 1993, Judge Higginbotham's former law clerks wrote letters to him when he was honored by the Alliance for Justice. The following remarks are drawn from those letters that are on file with the author.

by your example about commitment to ideals and dedication to purpose.”

Dr. Robert J. Kaczorowski, a professor at Fordham Law School, also praised Judge Higginbotham for leading by example. He said, “You gave me the wonderful gift of working with a judge who lived the integrity, the fairness, the compassion, and the intellectual rigor that characterize the judicial process at its best. The power of your example has affected me in enduring and deeply personal ways.”

Likewise, Michele Baker, an attorney at Hogan & Hartson, remembers his efforts to teach and support the next generation of lawyers: “You . . . showed us the value of ‘passing it on’ with your commitment to the student interns.”

COMPASSION

Susan Mann of the Securities and Exchange Commission tells a story which underscores Judge Higginbotham’s compassion and generosity:

While I am grateful for my clerkship because it offered me [the] chance to learn from observing one of the five brightest people I have ever met, the gift from that period that sticks with me is not an intellectual one. Your daughter had a high school classmate who had just lost his mother. His father was already dead. You stepped in to raise the money to make sure the young man and his younger sister had food, shelter, and an ability to continue with their educations.

WORK ETHIC

As notable as Judge Higginbotham has been for his intellectual abilities and passionate commitment to fair treatment for the dispossessed, his work ethic often stands foremost in the minds of former law clerks. Alice Brown, currently Assistant Counsel for the NAACP Legal Defense and Educational Fund, Inc., implored Judge Higginbotham to relax his work schedule in her June 18, 1993 letter. She asked,

[M]ay I respectfully make the following request. During your retirement, *please* reduce your work load. Moreover, if I may be so bold as to take this heresy one step further, may I suggest that you vow to change radically your work day by adopting a fourteen hour schedule rather than an eighteen hour one?

PURSUIT OF EQUAL JUSTICE FOR ALL

Edward S.G. Dennis, Jr., former United States Attorney for the Eastern District of Pennsylvania and Assistant Attorney General, Criminal Division, United States Department of Justice, noted that “you have worked tirelessly for the betterment of our society, and even though you have retired from the federal bench I know that your agenda is overflowing with worthy projects. Your enthusiasm in pursuit of a more equitable society and a just world is an inspiration to us all.”

Similarly, Brenda S. Spears, Secretary, New York City Housing Authority, wrote how “[y]our work . . . reminded us all of our obligation to strive to see the value in all people, regardless of color or social condition.”

IMPORTANCE OF HISTORY

Thomas M. Gannon, a trial attorney in the criminal division at the Justice Department, spoke of your “long and patient inquiry into the nation’s uneven progress in translating the great principles of the Declaration and the Constitution—as amended—into living realities for all Americans.”

OPPORTUNITY FOR INDIVIDUAL GROWTH

Professor Margaret Chon of the Syracuse University College of Law highlighted her individual growth based on “the irreplaceable opportunity under your demanding and gentle, experienced and generous, guidance, to examine [her] visions for a just society under the rule of law.”

KEEPING STATISTICS IN PERSPECTIVE

A most powerful reminder of how Judge Higginbotham never permitted others or society to limit him came from Professor Michael A. Fitts, of the University of Pennsylvania Law School. He reported:

In sorting out the hundreds of positive conversations and interactions I have had with the Judge over the years, one stands out. Late one evening during my clerkship, we were arguing over some question on—of all things—the application of statistics to a particular problem. Like many recent law school graduates, I was full of wonderful theories that were just that—theories. Finally, as the debate seemed to be going nowhere, the Judge turned to me,

and said, "If I always believed in statistics, I would still be living in the Trenton ghetto."

FEELING PRIVILEGED

Larry I. Palmer, Vice President and Professor of Law, of Cornell University said it most simply: "It was a privilege to work under such a distinguished member of the federal judiciary. I have fond memories of my clerkship and shall be forever indebted to you for your leadership during a critical juncture in my career."

Similarly, John Q. Barrett, then Associate Independent Counsel under Iran-Contra Independent Counsel Lawrence Walsh, summed up his experience as follows: "As your [law] clerk, I was privileged to learn directly from your work and example that the law, when it is studied with care and historical understanding and utilized with judgment and practical vision, can be an instrument of justice in particular cases and for all people."

* * *

Judge Higginbotham used to remind his law clerks when we did not see the wisdom of his position on a particular case that he was the judge—as though we needed reminding—and that only he would be accountable for his opinions. Thus, he always got the last word. Fortunately for me, on this occasion, I will have the last word.

In my mind, what makes Judge Higginbotham one of America's greatest jurists is not simply that he had extraordinary intellect, commitment, judgment, and vision, but that he always gave of himself completely to ensure that the rule of law was fairly applied and that all people benefitted from his intellect, passion and scholarship. Indeed, there is not a human being I am aware of who was ever turned away from the chambers of the Honorable A. Leon Higginbotham, Jr. of the United States Court of Appeals for the Third Circuit. As his senior law clerk for two years, I witnessed many occasions when he did not have the time to spare, yet, he always made time for people irrespective of the person's status or station in life.

As frustrating as it sometimes was to watch him write that additional letter of support or thanks to people whom he did not know, when doing so would cause the chamber to close at 2:00 a.m. instead of midnight, I always appreciated the importance of his

lifelong commitment to making each person whom he encountered feel special. It made a difference for me right from the start of our relationship. When my father, a retired master sergeant and then a janitor, wrote Judge Higginbotham about his son, then a first-year law student at Stanford, the Judge simply could have tossed this unsolicited letter in the proverbial circular file. But, two weeks after writing him and two days after his unappreciative son said, "Dad, how could you embarrass me like this and write Judge Higginbotham to ask for a job for me," my father mailed me a photocopy of a full-page letter which Judge Higginbotham had written commending him for the sacrifices that he made for his son. When I interviewed for my clerkship, Judge Higginbotham began our conversation by asking why he had not heard from my father during the last two years. I thought, "He remembers."

When a Higginbotham clerk meets another Higginbotham clerk, there is an immediate bonding. We know that each of us has benefitted from his fine example, sage counsel and unending love. For me, aside from my parents, he was, is, and always will be the person who has had the greatest influence on my life. Without him, I would be wealthy, but lost. Because of him, I and many other Higginbotham law clerks have focused on doing what little we can to improve the lives of the students whom we teach and the American public which we serve. Perhaps, in so doing, we pay tribute to Judge Higginbotham in the only way that matters to him—by example.