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BOOK REVIEW

UNLIKELY HEROES. By Jack Bass. New York: Simon and Schuster, 1981. Pp. 352. \$14.95.

*Reviewed by David B. Filvaroff**

The Supreme Court usually is given popular credit for shaping the constitutional law that served as catalyst and support for the dramatic changes in race relations which occurred in the United States in the 1950's and 1960's. This credit is largely appropriate because the Warren Court held ultimate responsibility and exercised ultimate authority. To focus solely — or even primarily — on the influence of the Supreme Court during this era, however, works a major distortion. The lower federal courts played a crucial role in influencing the course of the legal and social change that came to be called the civil rights revolution. Indeed, recognition of that role not only contributes to a better understanding of how and why the relevant legal principles evolved as they did, but it also illuminates the human drama and personal cost of those lower federal court judges who were directly involved in the effort to dismantle the pervasive racial caste system of the deep South.

Jack Bass, coauthor of an earlier work treating the changes that have overtaken the political climate of the South,¹ attempts in *Unlikely Heroes* to tell the story of the judges of the Fifth Circuit who repeatedly faced the challenge and frustration of implementing the rich promise of *Brown v. Board of Education*² and its progeny. The account is based on extensive research and many interviews, not only with judges but also with others, both in and out of government, who played a role in the civil rights movement.

For more than a decade following *Brown I* and *Brown II*, federal judges sitting in the South were put to a severe test. A number were found wanting: they were either unable or unwilling to give

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1. J. BASS & W. DeVRIES, *THE TRANSFORMATION OF SOUTHERN POLITICS* (1976).
2. 347 U.S. 483 (1954) (*Brown I*), remanded for entry of remedial order, 349 U.S. 294 (1955) (*Brown II*).

effect to controlling decisions; indeed, a few actively sought to thwart implementation of clear constitutional mandates. Some federal judges, however, greatly distinguished themselves by their commitment to making real the civil and political rights that for too long had been egregiously denied to blacks and other minorities. *Unlikely Heroes* pays tribute to those judges who played the most important roles in the civil rights drama: Court of Appeals Judges John R. Brown, Richard T. Rives, Elbert P. Tuttle, and John Minor Wisdom, each of whom sat on the Fifth Circuit during this turbulent period. The book also recognizes then District Judges Frank M. Johnson, Jr., of Montgomery, Alabama, and J. Skelly Wright, of New Orleans.³ Together, these six men formed an interactive group within the Fifth Circuit, the jurisdiction from which most of the civil rights litigation of the era arose.⁴

These judges unquestionably deserve great honor, but the stature *Unlikely Heroes* accords them requires preliminary comment. Bass properly lauds these judges for their attributes of scholarship, legal craftsmanship, fidelity to principle, commitment to protection of civil rights, and, perhaps most importantly, perseverance in the face of insult and threat — qualities of the highest order which all judges and lawyers might seek to emulate. For their service to law and racial justice, these men were subjected to threats, vilification, hate mail, abusive phone calls, and isolation from former friends and associates. The indignities and intimidation these judges suffered were real and painful, yet they continued with vigor and confidence to pursue the responsibilities they saw as theirs. Striving to preserve honor and integrity in the face of intense personal and professional pressure, these men achieved a form of heroism for which recognition is highly appropriate. But in telling the story of these six white judges and reliving many of the events which comprised the civil rights movement of the period, Bass slights the heroism of others who, though lacking both the protections and insulation of power, position, and judicial life tenure, risked their lives and livelihoods in pursuit of human dignity and social and economic justice. To be sure, Bass devotes a chapter to the courageous work of several civil rights attorneys such as Richard Sobol who worked through the New Orleans Office of the Lawyers Constitutional Defense Committee to represent the vic-

3. Judge Johnson later was elevated to the Court of Appeals for the Eleventh Circuit and Judge Wright to the District of Columbia Circuit.

4. The Fifth Circuit was reorganized recently, with Alabama, Georgia, and Florida separated from the Fifth Circuit to form the new Eleventh Circuit.

tims of racial prejudice. But the book accords little depth of recognition to the leaders and workers of the civil rights movement and the other real heroes of the "revolution" — those black people, usually individually powerless and often poor, who had to stand forward and assert their constitutional rights before the majestic processes and personnel of the law could even begin to function on their behalf. A full account of these other men and women, of course, would require a different book from the one Bass chose to write. Nonetheless, a greater deference to the crucial role played by these nonlawyers would have aided greatly in maintaining a perspective on the nature of the judges' "heroism."

These comments should not be taken as in any way denigrating the significance of the contributions made by these judges. *Brown II* left to the lower federal courts the herculean task of remodeling the *de jure* segregated school systems in the South and adjoining states. The Supreme Court appropriately delegated the implementation of its mandate to the lower courts, but it did so with little instruction on how compliance was to be achieved, especially in the face of massive evasion and defiance by state and local authorities. In seeking to implement *Brown*, the lower courts confronted the disinterred doctrine of "interposition,"⁵ legislative enactments thinly disguised — if disguised at all — to hide their segregative intent, and pronouncements from the highest levels of state officialdom that *Brown* and its progeny would be resisted unrelentingly, regardless of cost. Moreover, the judges' task could not stop with the effort to desegregate public education. The full implications of *Brown* — a sweeping invalidation of governmental segregation and discrimination in all its various forms — required the Fifth Circuit to confront almost every element of southern society. The battle for legal equality moved to libraries and other public buildings, bus and transportation services, parks, golf courses, swimming pools and to the electoral process itself. Each attempt to remove the vestiges of white supremacy intensified community hostility. It was an era of intimidation and violence, of simple-minded and sophisticated resistance to law and to court orders. Historian C. Vann Woodward characterized the period as a time when, "All over the South the lights of reason and tolerance and moderation began to go out."⁶

5. Long discredited, interposition is the doctrine that would permit a state to "interpose" its sovereignty to protect its citizens whenever it determines that the federal government has exceeded its authority.

6. C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* 165 (2d ed. 1966).

To meet the demands of these events, the Fifth Circuit, under the leadership of Judges Brown, Rives, Tuttle, and Wisdom, often had to act swiftly and decisively to protect litigants whose constitutional rights otherwise would be forfeited to obstructive delay or evasion. The reluctance or refusal of several district court judges to act in timely or proper fashion compelled the detailed design or issuance of injunctive orders by the Court of Appeals itself. Moreover, faced with issues not yet squarely resolved by prior Supreme Court decisions, these Fifth Circuit judges were required to extrapolate and carry forward the development of the basic law. They ventured into untested areas of the law with unagination and intelligence not only in delineating constitutional substance, but also in fashioning effective relief and in the utilization of sometimes novel procedures. The Court of Appeals thus successfully served one of its major purposes within the federal system by functioning as an intermediate forum for further evolution of already enunciated principles and by developing and testing solutions to new problems, all without requiring immediate and conclusive pronouncement by the highest tribunal. Though it ultimately approved most of the Fifth Circuit resolutions, the Supreme Court too often simply denied certiorari or acted without full opinion. The Court relied heavily on the Fifth Circuit — and, on occasion, on the Fourth and Sixth Circuits as well — to meet the burdens which its general pronouncements created. Most specifically, the unduly long eight year hiatus between the *Brown* decisions and *Goss v. Board of Education*,⁷ the Supreme Court's next major school desegregation opinion, left the lower federal courts with precious little guidance and support in seeking to frame the kinds of relief which would implement effectively the mandate of *Brown* even in public education.

In addition to detailing the progress of school desegregation within the Fifth Circuit, Bass treats the long and complex effort to open the voting booth to blacks. He traces the relationships between the actions of successive presidential administrations, the courts, and Congress. Bass tells again of the Montgomery bus boycott, of the jeering crowds which faced children seeking desegregation of the New Orleans schools, and of the trauma of Birmingham, with its police dogs and fire hoses.

Bass also devotes more than a chapter of the book to the dramatic clash between the federal government and the State of Mis-

7. *Goss v. Board of Educ.*, 373 U.S. 683 (1963).

Mississippi over the admission of James Meredith to the University of Mississippi. This historic confrontation, fueled by the actions of Ross Barnett, Mississippi's recalcitrant and politically motivated governor, is carefully detailed, with full attention to the role of the Fifth Circuit. Barnett's equivocating private negotiations with the Kennedy Administration and his open defiance of court orders directing the admission of Meredith to the state university ultimately sparked violence on the Ole Miss campus and led the Fifth Circuit to hold the governor in contempt. Standing firm in the center of this constitutional maelstrom, the judges of the Fifth Circuit sustained the principle of the supremacy of federal law, dividing significantly only on the issue of whether the criminal contempt charges brought against Barnett required a jury trial, a question certified to the Supreme Court, which answered it in the negative.

Not surprisingly, the work of the Court of Appeals generated substantial controversy. The inevitable protest from politicians and others who would have maintained the structure of segregation was loud and strong. Likewise, a number of Fifth Circuit decisions provoked more or less traditional divisions within the court itself. In one highly unusual dissenting opinion,⁸ however, Judge Ben Cameron accused his fellow Judges Brown, Rives, Tuttle, and Wisdom, whom he labeled the "The Four," of having "stacked" the panels assigned to decide important civil rights cases.⁹ The charges were stinging and ultimately resulted in some internal changes in the procedures of the court. Bass wrestles with the allegations and, after analysis of the cases cited by Judge Cameron, concludes that the panels did not produce biased results. Bass, however, does not deal directly with a crucial element of Cameron's indictment: that the method of assignment was itself improper and gave a wholly inappropriate appearance of bias, whether real or not.

Unlikely Heroes is designed for both the lawyer and the general reader. It does not purport to offer careful legal analysis of constitutional doctrine or to measure the Fifth Circuit's actions during this era against any articulated concept of the proper role of the judiciary in a federal system. To the extent that Bass raises any questions about the propriety of the judges' conduct or decisions, he appears to conclude that they were fully justified by the

8. *Armstrong v. Board of Educ.*, 323 F.2d 333, 352 (5th Cir. 1963) (Cameron, J., dissenting).

9. *Id.*

nature of the issues presented and by the demands of the times. Whatever its intended audience, however, the book would have benefited from a less erratic use of citations and the inclusion of additional detail on a number of the cases.