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AN UNFORGETTABLE YEAR CLERKING FOR JUDGE HIGGINBOTHAM

*L. Barry Costilo**

Much has been written about the judicial opinions and scholarship of the great federal jurist A. Leon Higginbotham Jr. (the Judge). This Article is a personal and anecdotal recollection of an unforgettable year when I served as law clerk to the Judge in 1964 during his first year on the bench of the federal district court in Philadelphia. This commentary is about A. Leon Higginbotham, the man. After thirty-five years, my memory of the year with the Judge is still vivid.

The Judge, who, at thirty-five, was the youngest appointee to the federal bench in three decades, had just returned to Philadelphia after a brief but distinguished stint as a Federal Trade Commissioner, where he was the first African American to hold that position.¹ I had recently completed an appellate clerkship with a Pennsylvania Supreme Court Justice and was interested in learning about litigation at the trial level from a man who had an outstanding reputation as a trial lawyer in Philadelphia. The Judge was interested in someone who had prior law clerk experience. However, since he had already filled his single law clerk slot, he asked me if I would be willing to act as his court's bailiff and announce the opening of his court, even though I would in fact serve as his law clerk.² I agreed because I

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1. 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, 400 (1991).

2. My first appearance in district court was announcing: "Oyez, Oyez, Oyez. All manner of persons having anything to do before the Honorable Judge of the United States District Court, in and for, the Eastern District of Pennsylvania, may at present appear and they shall be heard. God save the United States and this Honorable Court. Court is now in session."

really wanted to work for the man. As it turned out, the other clerk had to leave the job shortly after he was hired, and I officially became the Judge's law clerk.

Little did I realize at the time that I was hired that in the course of learning about federal trial practice, the more valuable lessons of life not taught in law school would be taught through the Judge's example. He demonstrated how to treat individuals from all walks of life with dignity and respect, how to speak up for minorities and the oppressed within the confines of the law, how to take courageous and seemingly unpopular stands and yet have people applaud him for taking them, how to be a craftsman of the written and spoken word and to deliver those words in a way that would make a lasting impression, and how to deftly let lawyers know who were practicing before a young, newly appointed judge that they could not play games and get away with it. Not only was the Judge an affable and generous man—he was savvy. From his very first day as a trial judge, there was never any doubt as to who was in control in his courtroom.

From my first day on the job, I was struck with how the Judge went out of his way to accord respect to the people who were at the lower end of the courthouse bureaucracy. He knew all the elevator operators and file clerks by name and treated them with as much respect as the senior partners of the big law firms. If they had a problem, he tried to help them. As his law clerk, he always treated me as if I were a partner with him in a law firm. He treated his court reporter as a partner too. One would think that after having achieved so much success at such a young age, there might have been a hint of arrogance in the man; there was none, although he had tremendous self-confidence.

The Judge's own life experiences undoubtedly shaped his desire to uplift those who were unjustly oppressed because of their race or otherwise. He told me of his experience at Purdue University where, as a sixteen-year-old, he started out studying engineering. When he traveled to an out-of-town debate with the Purdue debate team, the hotel where the team was staying did not allow him to stay with his teammates because of his color; nor were African American students allowed to live in the dormitories at Purdue at the time. The sixteen-year-old Leon diplomatically spoke to the president of the university

about the situation and was curtly told: "Higginbotham, the law doesn't require us to let colored students in the dorm, we will never do it, and you either accept things as they are or leave the university immediately"³ These experiences caused the Judge to transfer to Antioch College and were motivating forces that led him to pursue the law as a means of effecting social change.⁴

In his first year on the bench, the Judge used his speeches to speak out on civil rights issues, something he could not do while he wore his black robe. The Judge received a slew of speech invitations because he was a superb public speaker, mixing substantive content with eloquent language and delivering both in his deep voice with perfect diction. The Judge was a handsome man who was six-foot-five and weighed well over 200 pounds, and when he spoke, people commented that his voice sounded like "the voice of God." In his speeches, the Judge would sometimes use colorful parables from the Bible to make his point.⁵

He also had a way of eloquently telling people things that they did not necessarily wish to hear, but which, nevertheless, uplifted them and won their respect. In 1964, he gave a speech to a national meeting of black Shriners and told them since equal opportunity laws were opening up employment opportunities to blacks, they needed to work hard to acquire the skills necessary to hold the jobs. Shortly afterwards, he spoke to a vastly different audience, an out-of-town meeting of the Young Lawyers Section of the American Bar Association, attended mostly by conservative white lawyers from the larger firms. He urged the audience members not to be blinded by their personal success and reminded them of their moral obligations to see that their law firms hire minorities and give them the same opportunities they had received themselves. Despite these not totally welcomed messages in the 1960s, the Judge received standing ovations from both groups.

3. John P. Frank, *Giant: A Higginbotham Memoir*, 142 U. PA. L. REV. 521, 522 (1993) (citations omitted).

4. *See id.* at 523.

5. The Judge grew up in a hardworking but poor household. The biblical parables and the rich vocabulary the Judge used undoubtedly have their roots in the only two books the Judge's parents owned, the Bible and a dictionary. *See* Lincoln Caplan, *Judging Leon: A Racial Conscience for America Is Back in the Ring*, A.B.A. J., Sept. 1996, at 68, 70.

The Judge's self-confidence, courage, and sense of fairness were tested in one of the first cases to which he was assigned. The case, tried before a jury, involved the criminal trial of a defendant named Jacob ("Jake") Welty who was accused of armed bank robbery. Welty wore no mask during the robbery. The defendant was a tough-looking character who was identified by at least six eye-witnesses who were in the bank. But Welty's lawyer, who was an adroit cross-examiner, questioned the perceptions of each of the eye-witnesses in a dramatic manner. The Judge—as did I—believed that the defendant was clearly guilty, but the jury was out for several days despite the overwhelming evidence of guilt.

The Judge debated with himself whether he should give the jury an "Allen charge," a charge—which was at the time upheld by the courts as being within the trial judge's discretion to give⁶—that placed considerable pressure on holdout jurors to reconsider their position in light of the views of the majority. The Judge decided to give the charge and within an hour or so the jury returned a guilty verdict. While his charge was legally supportable, the Judge felt that he had unduly influenced the jury under the circumstances, and without any motion by the defendant's lawyer, the Judge declared a mistrial on himself. It took courage and a deep sense of fairness for the Judge to acknowledge on his own that he believed he had made a mistake, even though the law did not require that he declare a mistrial.⁷ I later learned that Welty had been subsequently convicted; justice had been done.⁸

Another early case before the Judge involved an appeal from a Social Security administrative determination that a poorly educated, middle-aged coal miner from Appalachia suffering from a severe

6. See *Allen v. United States*, 164 U.S. 492, 500-01 (1896); see also *Lowenfield v. Phelps*, 484 U.S. 231, 237-38 (1988); *United States v. Jorge*, 865 F.2d 6, 11 (1st Cir. 1989).

7. The Judge's concern about judicial coercion resulting from the Allen charge was subsequently recognized by various courts of appeals, including the Third Circuit, which have discouraged trial judges from using it. See *United States v. Fioravanti*, 412 F.2d 407, 417-21 (3d Cir. 1969); Matthew M. Barasch, *District of Columbia Survey: Criminal Procedure: Antideadlock Jury Instructions in the District of Columbia*, 35 CATH. U. L. REV. 1179, 1180 (1986).

8. See *United States v. Welty*, 287 F. Supp. 580 (E.D. Pa. 1968), *rev'd in part*, 426 F.2d 615 (3d Cir. 1970).

case of black lung disease was not entitled to disability benefits because there were office jobs, like secretary or typist, on an administratively approved list of jobs for which the miner was theoretically “qualified.” The miner, who was present in the courtroom, appeared twenty-five years older than his age and looked like a cadaver, with sunken eye sockets and cheeks. His appearance mirrored the medical report in the record. While the standard of judicial review from this administrative determination was very narrow, the Judge somehow found a way to reverse the disability determination and no appeal was taken.

Although the Judge was willing to go to the legal limit to protect the poor and the oppressed, regardless of race, it was clear from our discussions that he had a healthy respect for the principle of *stare decisis* and generally was well within the legal mainstream in interpreting and applying precedent, particularly in economic matters. Often, his first question to counsel arguing a motion was, “What case best supports your position?” This is a simple question, but not always asked. The Judge’s respect for precedent gave him high credibility with judicial colleagues whose legal philosophies may have differed from his own.⁹

The Judge was loved and respected by his law clerks. My most recent memory of the Judge is from the spring of 1998, when a large number of his former law clerks, research assistants, and secretaries came to Cambridge, Massachusetts, from throughout the United States—one person came from South Africa—to attend a reunion with the Judge. The reunion dinner was held at Harvard’s Kennedy School, where the Judge taught, and each person spoke of his or her experience with the Judge. Each story was very personal and more moving than the one before it and all centered on the Judge’s qualities as a human being. The stories ran the gamut from the Judge’s penchant for junk food to his dedication and stamina, which enabled

9. Throughout his judicial career, the Judge continued to be “basically a centrist judge, respectful of precedent and judicial tradition.” Edward R. Becker, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1813, 1815 (1999). “His gift, though, was to weave progress with orthodoxy.” Eleanor H. Norton, *In Memoriam: A. Leon Higginbotham, Jr.*, 112 HARV. L. REV. 1829, 1831 (1999).

him to work later in the evenings than his ambitious law clerks—no matter how hard they tried to keep up with the Judge.

One of his law clerks, who came from an underprivileged background and whose law school grades by his own account were not quite up to the level expected of United States Court of Appeals law clerks, described his job interview with the Judge. He was surprised that he received the interview at all and was primed to answer questions about law school and his prior experience. Instead, the Judge, whose father was a factory laborer and mother a domestic, wanted to know what the applicant's father did for a living, what he was like, and what he imparted to his son. By the end of the interview, the Judge had asked the applicant little about himself. The applicant was shocked by the interview and viewed it as a bad sign that the Judge was not interested in him. To his surprise, he was offered the job and worked much harder than any of his fellow clerks, fully justifying the Judge's faith in him.¹⁰

The opinions that the Judge wrote document his immense contribution to the law. The books and articles written by the Judge manifest his academic contributions to the literature relating to civil rights and the history of race and the law. But these activities do not record the personal side of the Judge as a role model to those young lawyers who had the opportunity to see how a great man responded everyday to the plight of the human condition. To those of us who were privileged to serve as his law clerks, this was the greatest reward we could possibly receive.

10. Videotape: Higginbotham Reunion (SPATS Productions 1998) (on file with author).