A GIANT

ON AND OFF THE BENCH:

THE COMPLICATED LEGACY OF JUDGE A. LEON HIGGINBOTHAM

BY KEVIN TRAINER

Aloysius Leon Higginbotham is the most distinguished figure ever to sit on the U.S. Court of Appeals for the Third Circuit, future Supreme Court justices included. He is also, to an extent perhaps never fully appreciated, a major figure in late 20th century American life generally. So, the Bar Association's annual Summer Quarterly lecture honoring the man is entirely warranted. It is also an opportunity to examine Higginbotham's legacy and see what it might teach us about the larger questions of jurisprudence and legal process.

Born in segregated Trenton in 1928, Higginbotham entered college at 16 and graduated from Yale Law School at 24, where he excelled in the classroom and moot court. He came to Philadelphia after graduation. But being Black, none of the prominent Philadelphia firms would consider him (if prominent is the right word). He eventually secured a clerkship with Curtis Bok — heir to the publishing fortune, future state supreme court justice, and devout Quaker — who was then on the Court of Common Pleas. After clerking, and a short stint in Richard Dilworth's district attorney's office, Higginbotham joined, and soon became named partner of, the Philadelphia law firm Norris Schmidt Green Harris & Higginbotham. The firm quickly became a victim of its own success — four of its five original partners were lost to judgeships, two (Higginbotham and Green) to the federal courts.

Higginbotham remained in private practice for eight years. In 1962, at the age of 34, President Kennedy appointed Higginbotham to the Federal Trade Commission. At the time, Higginbotham was the first Black person appointed to that Commission and today remains just one of three. He ascended to the district court two years later at 36 and was elevated to the court of appeals at 49. By his retirement in 1993 at age 65, Higginbotham had spent 29 years as a federal judge and 31 in positions requiring presidential nomination or appointment.

There is more. Despite his day job, Higginbotham published hundreds of academic articles, gave thousands of speeches, taught regularly at Penn Law School, and produced two books on legal history, an output that would be impressive even if he had no judicial responsibilities. The books were the first and second volumes of what was to be a four-part series that would "reveal how, through the legal process, racial injustice was further perpetuated and how, eventually, it was partially eradicated."

Higginbotham began in 1619, the year colonists first brought enslaved Africans to Virginia, and was set to end in 1964, with the Civil Rights Act. Higginbotham also was said to have been at work on an autobiography. But he died before he could finish it or his opus.

Lyndon B. Johnson considered Higginbotham one of his closest advisers, though even Higginbotham acknowledged that Johnson probably had a few thousand of those. Clinton gave him the Presidential Medal of Freedom. Mandela identified him as one of the handful of important American intellectuals who aided the establishment of representative democracy in South Africa after the end of de jure white rule. When he died, he was compared not just to Thurgood Marshall but also to Bayard Rustin.

A Range of Achievement

There is a puzzle about Higginbotham, a puzzle that his life's work sets in sharp relief. By all accounts, Higginbotham was a gifted lawyer, pathbreaking judge, and notable public servant. Louis Pollak, a prominent scholar-judge in his own right, and who took Higginbotham's seat on the

OPPOSITE PAGE: Judge Leon Higginbotham at his confirmation to the FTC. Also pictured (left to right), are Clifford Scott Green (later U.S. District Court Judge E.D PA}; William H. Brown III (later Chairman EEOC); and J. Austin Norris, chairman of the firm Norris Schmidt Harris and Higginbotham. **THIS PAGE:** Higginbotham prepares to receive a Medal of Freedom award from President Bill Clinton in September 1995. *Photos from Wikimedia Commons and The William Clinton Presidential Library via Wikimedia Commons*

Eastern District when Higginbotham was elevated to the court of appeals (and whose father had practiced law with Cardozo), said in the Penn Law Review that "biographers will not have an easy time downsizing Higginbotham's life to fit within the covers of a book." To Pollak, "[w]hat chiefly matters … is the range of his achievement — primarily as a federal judge for 29 years — but also as a scholar and a teacher, and as an influential trustee both of Yale and of Penn," schools at which Pollak had served as law school dean. Pollak even speculated that had "President Carter … been reelected in 1980, or had Walter Mondale won in 1984 or Michael Dukakis in 1988, it is a fair surmise that Leon would by now be on the Supreme Court," for that "is where he has long belonged."

The range of Higginbotham's achievement, the breadth of his oeuvre, is without modern comparison. But as Pollak conceded, Higginbotham was "primarily" a judge. The puzzle about Higginbotham is that it is a bit difficult to say how he stacks up on those terms.

We have biographies of Cardozo, Hand, and Friendly, and several of Marshall. None for Higginbotham. Well-trained lawyers can recite the "Hand Formula" or sketch Cardozo's analysis of the relationship between legal duty and causation introduced in Palsgraf. No Higginbotham case made its way into any of my casebooks. Even viewing Higginbotham as the scholar-judge doesn't get him much further. If we want to learn about the initiation or implication of the slave trade in British North America or the failure of Reconstruction, we turn not to Higginbotham but to Nikole Hannah-Jones's 1619 Project (or to Sean Wilentz, its critic) and Eric Foner. And speculating, as Judge Pollak does, that Higginbotham was destined for the Supreme Court but never quite made it is not a boon for Higginbotham's reputation, but a disservice. For it puts Higginbotham in direct competition with Marshall, a competition that Higginbotham, distinguished as he was, cannot win. Besides, it inscribes Higginbotham on a long list of "nearly" men, a list that includes not just Hand but also Harriet Miers.

More importantly, supposing that Higginbotham's place in history depends primarily on his 29 years as a federal judge puts Higginbotham's judicial opinions center stage. Were Higginbotham to be judged by his opinions alone, he would be viewed as a wise and compassionate man, scrupulous with facts, facile with legal technicalities, and willing to push the boundaries when the timing was right. But with all due respect to the Judge (and to two of his brethren who, a few years back, hired me as a law clerk), laboring in obscure judicial vineyards an outwardly dull life make.

Are we thinking about Higginbotham the right way?

Higginbotham's True Significance

Unlike Judge Pollak, I don't think that Higginbotham's true significance is as a judge in the narrow professional sense of the word. Or as a judge-scholar or historian or legal theorist more broadly. Instead, Higginbotham's significance relates to something subtler: His decision, made explicit at 16 during his freshman year at Purdue, to dedicate his life to a version of the abolitionist tradition, and, subsequently, his willingness to infuse the moral passion that is an important part of that tradition into his legal work.

Take his most well-known opinion, issued in 1974 in the Commonwealth of Pennsylvania v. Local Union 542 case, when Higginbotham still was on the district court. In the underlying case, Pennsylvania and 12 individuals filed a class action complaint against Local 542 of the International Union of Operating Engineers, alleging that the union was not hiring Black operating engineers on account of their race.

After nearly two years of litigation, the defendants moved to disqualify Higginbotham. They claimed Higginbotham was personally biased against them because of a speech he had given at a meeting of the Association for the Study of Afro-American Life and History. In that speech, Higginbotham addressed the history of race discrimination in the United States and its many appalling legacies. He also endorsed civil rights more generally, and argued that, because of the Supreme Court's unwillingness to fully enforce the Reconstruction Amendments and their derivative legislation as to blacks, "we must make major efforts in other forums without exclusive reliance on the federal legal process."

Higginbotham rejected the defendants' motion. The opinion itself can be divided into two sections. The first, taking eight pages, is the holding. Here, Higginbotham states the defendants' claims, identifies the governing law, and applies that law to the operative facts. The section is meticulous, even verbose; and, given the charged atmosphere surrounding the motion, it is to me a tad boring. It has the "I do this, I do that" quality of a Frank O'Hara poem — this case on disqualification says this, that case on disqualification says that.

But the first section is not why the opinion is famous. It's just the section explaining why the defendants lose. The second section is why the opinion is famous. In it, Higginbotham explains not just why he would not withdraw from the case, "but why, in my judgment, it is absolutely essential that I not withdraw from this case." To support that judgment, Higginbotham explores a variety of themes adjacent to the legal question strictly posed: The role of judges in a diverse society; whether Black judges necessarily are impartial with respect to certain domains of legal questions, like whether whites can discriminate against Black people in employment matters; and, whether it is "permissible for Black judges to be scholars in the race relations field" at all.

It is clear the defendants were trying to provoke Higginbotham. I imagine they thought they would be advantaged whether their motion was granted or denied. Either Higginbotham would recuse, which they wanted, or refuse to recuse, which they did not want, but then Higginbotham would feel a kind of pressure throughout the remainder of the case, which could have tilted the scales in defendants' favor, if just a little. Higginbotham did not bite. The section is a tour de force.

An Unsolved Puzzle

Higginbotham's opinion in Local 542 also can be read critically, perhaps serving as an instrument to understand the puzzle I introduced above. As a coherent whole, Higginbotham's opinion oscillates between the moral rage that is an essential part of his abolitionist persona and reassurances that he views his judicial role as a limited one. Higginbotham said the "outcome of … case[s] will be directed by what the evidence shows, not by the race of the litigants," or by the race of the judge. When issuing judicial decisions, Higginbotham would "follow any mandate of the Supreme Court, or any applicable federal law," and that he "willingly accept[s]" the "dramatic difference between the role which legislator[s], politicians, and elected officials play in our society, … and the role which could be tolerated or expected from a federal judge."

It is easy to understand why a person of Higginbotham's position and character would adopt these limitations. Institutional norms do not allow just anybody to be an iconoclast, though the current Supreme Court is testing (or proving) that assumption. It is also easy to understand why Higginbotham favored incrementalism. Higginbotham was writing in 1974, at the end of the Nixon presidency, a presidency that began in the shadow of the King and Bobby Kennedy assassinations, and which was secured by the strong showing of George Wallace, the racist and segregationist Governor of Alabama, as a third-party candidate. And, just a decade before, Higginbotham's initial nomination to the District Court was held up by James Eastland, a Mississippi senator who was then the chair of the Senate Judiciary Committee, and who, like Wallace, was a committed racist and segregationist. According to an interview Higginbotham gave in 1976, once the elder Kennedy was killed, Eastland "held up indefinitely" all of the appointments of blacks as federal officials.

ABOVE: Clifford Scott Green is sworn in to the United States District Court for the Eastern District of Pennsylvania in 1972. Judge A. Leon Higginbotham, Jr. is pictured at far right. *Photo from Wikimedia Commons*

But Higginbotham's insistence that he was bound to follow the mandates of the law begs all the important question. There must be many cases where the conventional materials of judicial decision-making run out and the judge, if he is to decide the case rather than give up, is forced to make a legislative judgment. What else could that judgment consist in but the judge's values, temperament, life experiences, and conception of the legislative function?

By training a critical eye on Higginbotham, I reveal what I have no desire to conceal. I am consumed by Higginbotham's story. I want to know more. I'd want to know how, aside from genius and hard work, the Black son of a father laborer and mother domestic rose to the top of the American legal profession. I'd want to know what Higginbotham thought of 2016 or January 6, or of our country's immense problems more generally. And I want to know, from the great man himself, what I as a young lawyer am meant to do about it.

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