Books

Lawyers and social justice

by Michael E. Tigar

Crusaders in the Courts, by Jack Greenberg. Basic Books, 10 E. 53rd St., New York, N.Y. 10022. 212-207-7057. 1994. xxii, 643 pages. $30.

In the late 1940s a law student named Jack Greenberg read that a half-unit of credit was available to students who would work on civil rights cases. Although the hours were long for such a meager reward, Greenberg, a war veteran recently returned from the Pacific, signed up.

This experience may not have been transformative for this immigrant's son who had grown up in the socialist-Zionist milieu of the Bronx, where concerns for social justice were close at hand. But it did propel Greenberg into contact with Thurgood Marshall and the other great leaders of the NAACP Legal Defense Fund. Shortly after Greenberg graduated from law school he become an LDF staff lawyer. *Crusaders in the Courts*, an important and richly detailed book, is an account of the next 40 years in litigation to defend and extend civil rights.

It is the sort of book to give one's children, who, as they confront the path ahead, may not know how long and arduous the journey has been. The book also tells law students something about the role lawyers can play in social change, and even about the limits of that role. Lawyers are, after all, in charge of remembering. Sometimes their rememberings are trivial, as with the citation of a rule to govern procedure. Sometimes, the remembering is malign, as in quoting a harsh precedent so that the same thing may be done again. But in the most fulfilling and helpful sense, lawyers are to remember injustice in order to help prevent it in the future.

Casting our minds back, we will recall there was no federal civil rights legislation of consequence until the Civil Rights Act of 1964. We may also recall the ways in which the walls of segregation were breached, first tentatively and then more insistently. The African-American political ferment of the 1920s, 1930s, and early 1940s led to demands for change. Charles Hamilton Houston, Thurgood Marshall's mentor, played an early and decisive role in shaping the Legal Defense Fund's strategy. Houston was a principal architect of *Steele v. Louisville & National Railway Co.*, in which the Supreme Court held that a compulsory bargaining agent for railway workers had a "duty of fair representation." That is, the union could not foster discrimination in the workplace, nor in terms of employment. It had the duty to represent all the covered employees equally.

A new strategy

Steele, decided in 1944, vindicated a litigation strategy based on representing group interests. One must pause to ask what made this sort of approach possible? The "civil procedure" answer is that the Federal Rules of Civil Procedure, which became effective in 1937, broadened the availability of class actions. But there could not be suits without clients and theories.

The clients were among the newly militant African-Americans in the workplace and the community, and those contemplating advancement through education. The theory was more controversial. In African-American groups and among the white American left, there had been the old debate whether an integrationist strategy was preferable to some form of separatism.

The Legal Defense Fund took the position that integration was the best road to follow, for the African-American community and as a strategy for litigation. As Thurgood Marshall said to the Supreme Court in 1950, "We want to remove governmental restriction—if they want to, they can keep their prejudices." It is easier to act yourself into right thinking than to think yourself into right acting. If race hatred was to be exposed and eroded, ending forced segregation was the way to do it.

Greenberg chronicles the path to *Brown v. Board of Education* and beyond. The first task was to confront the old "separate but equal" teaching of *Plessy v. Ferguson*. One example of this early litigation related by Greenberg is particularly telling for me, as I teach at a law school desegregated by the Supreme Court's opinion in *Sweatt v. Painter*. Heamon Sweatt applied for admission to the University of Texas School of Law, but was refused because he was not white. His Texas lawyer, W.J. Durham, asked Thurgood Marshall and James Nabrit Jr. to help litigate the case.

Texas responded by setting up a "law school for Negroes," which it claimed was equal to the one for whites. The new school was in rented basement quarters and had neither library, nor law review, nor permanent faculty. Its teachers were part-time volunteers from UT Law School, and Charles McCormick, who also served as dean of The University of Texas School of Law, was its dean.

The NAACP had said that requiring literal compliance with "separate but equal" would eventually bring an end to segregation, which would prove to be too expensive. But nobody in May 1947 could know just how or when this transition would take place.

The State of Texas put on witnesses, including Charles McCormick, who swore that the two schools were equal. Sweatt's lawyers pointed out that the law schools could not possibly provide equality in all the things that matter in legal education, including the collegiality of studying and working with others. In 1950, the Supreme Court agreed, and the tone of its opinion

foreshadowed the holding in *Brown* that separate schools are inherently unequal.

The LDF lawyers—Marshall, Greenberg, Nabrit, and others—succeeded grandly at the law's most difficult game. They took an existing paradigm—"separate but equal," which had been devised to restrain claims for justice—and recast it as a promise that they demanded be fulfilled. Since the paradigm had been devised by judges and met the standards for judicial enforcement by injunction, they brought their claims to federal court.

Reliance on the courts

The LDF lawyers therefore gave courts dominated by judges appointed by Roosevelt and Truman the opportunity to agree that the promise must be enforced. By insisting on enforcement, they showed that the paradigm was itself fatally flawed—that both of its promises could not be kept. That is, that separate could not be equal.

Until the Civil Rights Act of 1964, almost the entire burden of extending human rights through the legal process in the postwar period fell upon the federal courts, with occasional help from the executive branch. Greenberg's book helps us remember and celebrate the role of Article III judges, fulfilling their oaths and their constitutional duty to defend countermajoritarian principles rooted in the Constitution. There is an unfortunate tendency these days to minimize, and even to deride, the resort to courts as protectors of rights. As an example, on January 25, 1993, the day after Thurgood Marshall died, Justice Clarence Thomas filed a concurring opinion in *Graham v. Collins.* The opinion contained an all-out attack on the LDF's capital punishment litigation strategy, calling it the work of "a small number of ambitious lawyers and academics on the Fund's behalf."

Greenberg's book is a decisive answer to Justice Thomas's contentions, if one sees LDF history not as lawyers' victories but as responses to the demands of African-Americans for human rights. LDF's arraignment of the criminal justice system and its inherent racial bias is emphatically not the product of professorial imagination but of grim reality. Its decision to launch a litigation strategy is in the best tradition of its earlier victories. Only the Supreme Court's decision in *McCleskey v. Kemp,* barring consideration of systemic racial bias in administration of the death penalty, has kept the issue from being more fully explored in the Court's opinions.

The LDF lawyers were an essential part of the struggle for change as it shifted focus from education to public accommodation, to housing, jobs, and the criminal justice system. They were counsel in some of the most significant constitutional decisions in the nation's history. Greenberg draws on the trove of LDF records to tell that story.

A lack of charity

To have been an LDF leader during this difficult period required tenacity and singleness of purpose at the time the battles were being waged. There are, however, moments in Greenberg's book when one wishes that the distance of years and the savor of victory had led him to be more charitable to his allies and opponents.

For example, I was taken aback by Greenberg's characterization of Dean McCormick's *Sweatt v. Painter* testimony: "If the thought of testifying honestly had crossed his mind he would have had to consider that the state legislature would retaliate with devastating disapproval." This comes close to accusing McCormick of perjuring himself, saved only by the apparent qualification that perhaps McCormick didn't have a thought about testifying differently. I asked our librarians to unearth the *Sweatt* transcript—the actual typewriter carbon copy on onionskin—and spent a joyous couple of hours reading over the words of familiar figures.

Fair-minded people can differ, but I don't find McCormick's testimony dishonest or false. Make no mistake, McCormick should have spoken up for integration of the law school. His fears about the political and social consequences of accepting integration were misplaced, and he had a duty to assert leadership. But reading McCormick's testimony as a trial lawyer, I can see how carefully he wove his version of events and focused on the literal truth—such things as square feet of space per student and the debatable value of law reviews.

More troubling is Greenberg's unwillingness to rethink old disputes with his allies in the civil rights movement, and his repetition of some unflattering and surely undeserved castigation of those with whom he disagreed. For example, the 1963-64 period in Danville, Virginia, saw a tactical dispute between more conservative and more militant African-American leaders. At the center of this controversy was a lawyer named Len Holt who did a lot of good work and had the confidence of many people in the movement for change. Greenberg dismisses the controversy with Holt by saying, "[W]e thought he wasn't a very good lawyer or reliable." This is too curt, too dismissive, and does less than full justice to the historical record.

There is a disturbingly similar lack of charity toward the National Lawyers' Guild and its members, and the young LDF lawyers in Greenberg's own office who urged him to be more receptive to the defense of embattled radical leaders such as Angela Davis. Greenberg does not even mention the significant contributions of many influential lawyers and groups, such as Arthur Kinoy and the Center for Constitutional Rights, nor some leading cases won by non-LDF attorneys, such as *Dombrowski v. Pfister.*

This is not to say that Greenberg should alter his views of these events, only that one of the lessons we need to learn about change is how to behave toward our allies—and even our opponents of good will.

I have a broader concern about taking history so personally, illustrated by Greenberg's statement about May 1963: "I won a group of sit-in cases in the Supreme Court." Who won? Lawyers are privileged to stand at the center of social change only because some clients risked something for their principles and then came to them for help. It is easy to slip into saying that "I the lawyer" won, just like an obstetrician may say "I delivered the baby." But such figures of speech mask someone else's real struggle to bring something about.

The sit-in cases came to be because

young black men and women took risks to speed the pace of change. Greenberg was among the courageous lawyers who came to their defense despite the misgivings of more conservative leaders. The eventual Supreme Court victory was a vindication for the lawyers who helped, but mainly for the young people whose action and tactics propelled nonviolent resistance to the centerpiece of the civil rights movement. This decisive shift meant that the movement would no longer be content only with such victories as the courts might eventually give, but would engage in a broader political offensive for its goals.

Many of us can close our eyes and remember a segregated social landscape. We open our eyes and see today's human rights tasks. When we think of how far we have come, the tales well told in this book inform us and help us teach those who have forgotten or who never knew. When we assess what we must do, this book helps us chart our course.

MICHAEL E. TIGAR *is Joseph D. Jamail Centennial Chair in Law at The University of Texas at Austin.*

Unintended consequences

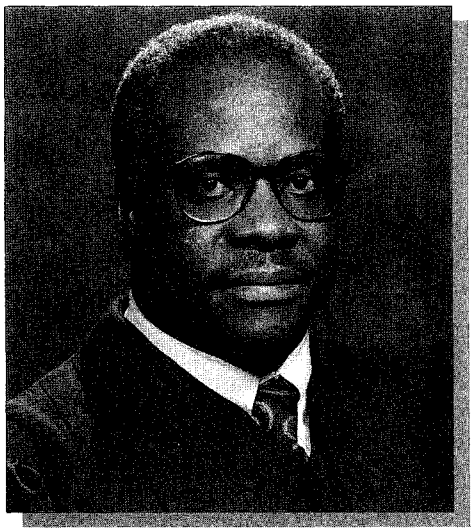
by Albert P. Melone

Critical Judicial Nominations and Political Change: The Impact of Clarence Thomas, by Christopher E. Smith. Praeger Publishers, 88 Post Road West, Westport, Ct. 06881. 800-225-5800. 1993. 192 pages. $47.95.

Nominations to the U.S. Supreme Court in recent years have attracted the interest of the media and a large segment of the public. Personal ambitions and the clash of political forces combine to create compelling drama. Christopher Smith's book, *Critical Judicial Nominations and Political Change: The Impact of Clarence Thomas*, contributes to our understanding of these events by focusing on the unintended consequences of nominations to the Supreme Court.

Readers intrigued by the Clarence Thomas nomination will find the author's treatment a useful reminder of events. Professor Smith shows that the charges of sexual harassment, and the events surrounding them, transformed the confirmation controversy from the nominee's professional qualifications and the future direction of the Supreme Court into a catalytic political event. The Senate hearings served to mobilize women as candidates and as voters, having a profound impact on the 1992 congressional elections and to a lesser extent the presidential election.

The author's chief purpose is to propose a new conceptualization of judicial nominations. It is this part of the book that needs work; indeed, Smith admits as much. Yet this aspect of the book reveals a mind at work, a struggle to make sense of events. As important as this intellectual process is to creation of new understandings, the reader is left with the impression that the author has the beginning of an idea, not a concept that possesses, as of yet, intellectual maturity.



Associate Justice Clarence Thomas

Four characteristics

The author defines critical judicial nominations as those serving "...as catalytic events for important changes in politics and public policy that were not anticipated by the political actors who initiated the nominations" (p. 11). The concept has four characteristics. First, a critical nomination may involve unsuccessful as well as successful nominations. Second, critical nominations must trigger important political events, not minor ones. Third, critical nominations result in consequences that go beyond changes in legal doctrine. Fourth, the nominations must result in consequences unanticipated by the political actors responsible for making the appointment.

The last three of Smith's four necessary conditions for a critical nomination suffer from excessive vagueness. He does not inform us how to identify an "important political event" except in slightly less vague ways. But Smith does offer a few examples from history to illustrate his idea. Most notable are the nominations of John Marshall and Abe Fortas. However, both instances also illustrate the difficulty with the concept.

The author claims that President John Adams could not have anticipated the impact John Marshall would ultimately have on the role of the Supreme Court in American society. Yet Adams appointed his trusted secretary of state because of his Federalist views. Adams had every reason to believe that Marshall would support Federalist policies. Marshall did not disappoint Adams, nor anyone else who might have believed in a strong central government. Consistent with conventional wisdom, the author mistakenly asserts that Marshall's employment of judicial review is his true claim to fame because by so doing the chief justice made the Supreme Court a main player in the nation's political life. Smith is correct that this is something Adams could not have anticipated. However, today's use of the judicial review doctrine is not what Marshall decided in *Marbury v. Madison*. Strictly

speaking, Roger Taney's infamous *Dred Scott* opinion and not *Marbury* is a more appropriate precedent for judicial review as the doctrine is commonly understood today.

Smith argues that the ill-fated nomination of Abe Fortas for chief justice was a serious miscalculation by President Lyndon Johnson because it ultimately resulted in the transformation of the Supreme Court from a liberal to a conservative institution. Yes, Johnson made a serious miscalculation. But it is difficult to believe that the Court would not have been transformed at some point in the relatively near future. Recall that the attack on the Court did not begin with the Fortas nomination. The ideological right wing and the Republican party had for years been critical of the Court. With or without the Fortas debacle, the Court's place in political life would have changed if only due to the certainty of death and the collapse of support for liberalism within the body politic.

The author freely admits there are problems with his conceptual framework and that it needs more work. Nevertheless, Smith's volume is valuable because it reminds us that law and politics are convergent phenomena. Even if one accepts the dubious assertion that law and politics can be separated in judicial decision making, it is indisputable that courts play political roles. The scholar-author invites us to engage in a fascinating activity: to entertain the idea that judicial nominations may have consequences that few people may foresee at the time. Because it stimulates our awareness of this possibility, Smith's book is a worthwhile read.

ALBERT P. MELONE *is a professor of political science at Southern Illinois University.*