

a society." Through his rulings and subsequent writings, he reminded us that when our country was founded, the hope and promise of the Declaration of Independence and the Constitution were tarnished by the fact that the United States had over 500,000 slaves. Judge Higginbotham believed that equality for all under the law requires progressive interpretation of our founding documents and continued focus on the inequities that still exist.

As he put it, ". . . It is possible that with the obvious pride we have in the few who make it, that we may fail to recognize how long the road behind us is and how many there are on that road who still are deprived by history of the utilization of their talents. . . . We cannot become anesthetized by the success of a few and oblivious to the deprivation of the many."

In 1993, Judge Higginbotham retired from the bench and began a new phase of his quest to achieve racial equality under the law. Even after three decades of remarkable public service, Judge Higginbotham took no time to rest, often quoting Robert Frost's words, "I have promises to keep. And miles to go before I sleep." He focused his post-judicial life on the future, often asking who in the next generation would "carry the baton into the new millennium." As a professor at Harvard University, he poured his energy and passion into preparing tomorrow's leaders to take that baton. He taught numerous courses and many of his students recall his oft-repeated words: "If you do not stand up for something, you'll fall for anything."

Judge Higginbotham's work as a scholar and historian helped transform our Nation's perception of race in America. His thorough research of nearly 250 years of legal documents involving racial issues formed the basis for a flood of books and articles in which he dissected the many aspects of discrimination embedded in America's legal system. For example, he hosted a conference on the centennial of *Plessy v. Ferguson*, using the occasion to urge the young minds of the next generation to take full advantage of the hard-won opportunities created by *Brown v. Board of Education*. He once commented to a group of recent law school graduates, "What should be our theme to America? . . . It is that in the long, bloody and terrible history of race in America, there is no more time for foolishness." His words and his actions still compel each of us to face the ugly parts of our Nation's history as well as the glorious ones, and to respond, with commitment, to the public arena.

Many remember Judge Higginbotham as what we now call a multitasker, especially during his retirement. When he wasn't teaching, he was frequently in a car on the way to the airport, dictating one of the over 100 speeches he delivered each year. When not addressing audiences, he often could be found testifying in front of the Senate Judiciary Committee, attending monthly meetings of the United States Commission on Human Rights, serving on nu-

merous boards of trustees, including the New York Times and National Geographic, or arguing voting rights cases on behalf of the Congressional Black Caucus before the Supreme Court. He extended his fervor for equal justice overseas as a consultant to President Nelson Mandela on the formation of the South African Constitution and as an advocate for democracy education in South Africa.

Not surprisingly, Judge Higginbotham was recognized with numerous awards for his leadership as jurist, historian, scholar, advocate, mentor and ordinary citizen. His many honors include the Presidential Medal of Freedom, the Raoul Wallenberg Humanitarian Award, the NAACP Spingarn Medal, the ACLU Medal, the National Human Relations Award from the National Conference of Christians and Jews, the Silver Gavel Award from the American Bar Association, the Lifetime Achievement Award from the Philadelphia Bar Association, the Outstanding Young Man Award from the Philadelphia Chamber of Commerce, and honorary degrees from over 60 universities.

Judge Higginbotham is remembered by many, including me, as a true American hero: a giant among men, who began his life in the most modest of circumstances, yet rose to extraordinary heights. Rosa Parks, another American whose own story continues to inspire us, appropriately noted after his passing, "I think he really had a great idea that we are all equal people." Rosa Parks' words capture what I believe to be the essence of Judge Higginbotham's legacy: he helped pry open the doors leading to the American dream for ordinary people from all walks of life.

So in this month when we celebrate the achievements of African Americans, I am honored to pay tribute to Leon Higginbotham's life of courage and commitment to justice; of integrity and intellect; his life of advocacy and action, service and scholarship. Judge Higginbotham's life was a testament to the enduring power of the words "we shall overcome." Leon Higginbotham helped our Nation move closer to the ideal expressed on the building across the street from this chamber: "Equal Justice under Law." We are proud to have his wife, Evelyn Brooks Higginbotham, as well as numerous family members, friends, former clerks and colleagues here with us today as we honor his life and work and seek to keep the flame of Leon Higginbotham burning ever brightly.

#### AMENDMENTS SUBMITTED AND PROPOSED

SA 3979. Mr. FEINGOLD (for himself, Mr. WEBB, Mr. TESTER, Mr. BIDEN, Mr. SANDERS, Mr. KENNEDY, Mr. MENENDEZ, Mr. AKAKA, Mr. DODD, and Mr. OBAMA) proposed an amendment to amendment SA 3911 proposed by Mr. ROCKEFELLER (for himself and Mr. BOND) to the bill S. 2248, to amend the For-

eign Intelligence Surveillance Act of 1978, to modernize and streamline the provisions of that Act, and for other purposes.

#### TEXT OF AMENDMENTS

**SA 3979.** Mr. FEINGOLD (for himself, Mr. WEBB, Mr. TESTER, Mr. BIDEN, Mr. SANDERS, Mr. KENNEDY, Mr. MENENDEZ, Mr. AKAKA, Mr. DODD, and Mr. OBAMA) proposed an amendment to amendment SA 3911 proposed by Mr. ROCKEFELLER (for himself and Mr. BOND) to the bill S. 2248, to amend the Foreign Intelligence Surveillance Act of 1978, to modernize and streamline the provisions of that Act, and for other purposes; as follows:

On page 52, line 2, strike the quotation marks and the second period and insert the following:

#### "SEC. 709. ADDITIONAL SAFEGUARDS FOR COMMUNICATIONS OF PERSONS INSIDE THE UNITED STATES.

"(a) LIMITATIONS ON ACQUISITION OF COMMUNICATIONS.—

"(1) LIMITATION.—Except as authorized under title I or paragraph (2), no communication shall be acquired under this title if the Government knows before or at the time of acquisition that the communication is to or from a person reasonably believed to be located in the United States.

"(2) EXCEPTION.—

"(A) IN GENERAL.—In addition to any authority under title I to acquire communications described in paragraph (1), such communications may be acquired if—

"(i) there is reason to believe that the communication concerns international terrorist activities directed against the United States, or activities in preparation thereof;

"(ii) there is probable cause to believe that the target reasonably believed to be located outside the United States is an agent of a foreign power and such foreign power is a group engaged in international terrorism or activities in preparation thereof; or

"(iii) there is reason to believe that the acquisition is necessary to prevent death or serious bodily harm.

"(B) ACCESS TO COMMUNICATIONS.—Communications acquired under this paragraph shall be treated in accordance with subsection (b).

"(3) PROCEDURES FOR DETERMINATIONS BEFORE OR AT THE TIME OF ACQUISITION.—

"(A) SUBMISSION.—Not later than 120 days after the date of enactment of the FISA Amendments Act of 2008, the Attorney General, in consultation with the Director of National Intelligence, shall submit to the Foreign Intelligence Surveillance Court for approval procedures for determining before or at the time of acquisition, where reasonably practicable, whether a communication is to or from a person reasonably believed to be located in the United States and whether the exception under paragraph (2) applies to that communication.

"(B) REVIEW.—The Foreign Intelligence Surveillance Court shall approve the procedures submitted under subparagraph (A) if the procedures are reasonably designed to determine before or at the time of acquisition, where reasonably practicable, whether a communication is to or from a person reasonably believed to be located in the United States and whether the exception under paragraph (2) applies to that communication.

"(C) PROCEDURES DO NOT MEET REQUIREMENTS.—If the Foreign Intelligence Surveillance Court concludes that the procedures submitted under subparagraph (A) do not meet the requirements of subparagraph (B),

the Court shall enter an order so stating and provide a written statement for the record of the reasons for such determination. The Government may appeal an order under this subparagraph to the Foreign Intelligence Surveillance Court of Review.

“(D) USE OF PROCEDURES.—If the Foreign Intelligence Surveillance Court approves procedures under this paragraph, the Government shall use such procedures in any acquisition of communications under this title.

“(E) REVISIONS.—The Attorney General, in consultation with the Director of National Intelligence, may submit new or amended procedures to the Foreign Intelligence Surveillance Court for review under this paragraph.

“(F) RELIABILITY.—If the Government obtains new information relating to the reliability of procedures approved under this paragraph or the availability of more reliable procedures, the Attorney General shall submit to the Foreign Intelligence Surveillance Court such information.

“(b) LIMITATIONS ON ACCESS TO COMMUNICATIONS.—

“(1) IN GENERAL.—At such time as the Government can reasonably determine that a communication acquired under this title (including a communication acquired under subsection (a)(2)) is to or from a person reasonably believed to be located in the United States, such communication shall be segregated or specifically designated and no person shall access such a communication, except in accordance with title I or this section.

“(2) EXCEPTIONS.—In addition to any authority under title I, including the emergency provision in section 105(f), a communication described in paragraph (1) may be accessed and disseminated for a period of not longer than 7 days if—

“(A)(i) there is reason to believe that the communication concerns international terrorist activities directed against the United States, or activities in preparation therefor;

“(ii) there is probable cause to believe that the target reasonably believed to be located outside the United States is an agent of a foreign power and such foreign power is a group engaged in international terrorism or activities in preparation therefor; or

“(iii) there is reason to believe that the access is necessary to prevent death or serious bodily harm;

“(B) the Attorney General notifies the Foreign Intelligence Surveillance Court immediately of such access; and

“(C) not later than 7 days after the date such access is initiated, the Attorney General—

“(i) makes an application for an order under title I; or

“(ii) submits to the Foreign Intelligence Surveillance Court a document that—

“(I) certifies that—

“(aa) there is reason to believe that the communication concerns international terrorist activities directed against the United States, or activities in preparation therefor;

“(bb) there is probable cause to believe that the target reasonably believed to be located outside the United States is an agent of a foreign power and such foreign power is a group engaged in international terrorism or activities in preparation therefor; or

“(cc) there is reason to believe that the access is necessary to prevent death or serious bodily harm; and

“(II) identifies the target of the collection, the party to the communication who is inside the United States if known, and the extent to which information relating to the communication has been disseminated.

“(3) DENIAL OF COURT ORDER.—If an application for a court order described in paragraph (2)(C)(i) is made and is not approved,

the Attorney General shall submit to the court, not later than 7 days after the date of the denial of the application, the document described in paragraph (2)(C)(ii).

“(4) ADDITIONAL COURT AUTHORITIES.—

“(A) IN GENERAL.—The Foreign Intelligence Surveillance Court may—

“(i) limit access to communications described in paragraph (1) relating to a particular target if the Court determines that any certification submitted under paragraph (2)(C)(ii)(I) with respect to that target is clearly erroneous; and

“(ii) require the Attorney General to provide the factual basis for a certification submitted under paragraph (2)(C)(ii)(I), if the Court determines it would aid the Court in conducting review under this subsection.

“(B) FISC ACCESS.—The Foreign Intelligence Surveillance Court shall have access to any communications that have been segregated or specifically designated under paragraph (1) and any information the use of which has been limited under paragraph (5).

“(5) FAILURE TO NOTIFY.—

“(A) IN GENERAL.—In the circumstances described in subparagraph (B), access to a communication shall terminate, and no information obtained or evidence derived from such access concerning any United States person shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such access shall subsequently be used or disclosed in any manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person, or if a court order is obtained under title I.

“(B) CIRCUMSTANCES.—The circumstances described in this subparagraph are circumstances in which—

“(i) as of the date that is 7 days after the date on which access to a communication is initiated under paragraph (2), a court order described in paragraph (2)(C)(i) has not been sought and the document described in paragraph (2)(C)(ii) has not been submitted; or

“(ii) as of the date that is 7 days after an application for a court order described in paragraph (2)(C)(i) is denied, the document described in paragraph (2)(C)(ii) is not submitted in accordance with paragraph (3).

“(6) EVIDENCE OF A CRIME.—Information or communications subject to this subsection may be disseminated for law enforcement purposes if it is evidence that a crime has been, is being, or is about to be committed, provided that dissemination is made in accordance with section 106(b).

“(7) PROCEDURES FOR DETERMINATIONS AFTER ACQUISITION.—

“(A) IN GENERAL.—Not later than 120 days after the date of enactment of the FISA Amendments Act of 2008, the Attorney General, in consultation with the Director of National Intelligence, shall submit to the Foreign Intelligence Surveillance Court for approval procedures for determining, where reasonably practicable, whether a communication acquired under this title is to or from a person reasonably believed to be inside the United States.

“(B) REVIEW.—The Foreign Intelligence Surveillance Court shall approve the procedures submitted under subparagraph (A) if the procedures are reasonably designed to determine, where reasonably practicable, whether a communication acquired under this title is a communication to or from a

person reasonably believed to be located in the United States.

“(C) PROCEDURES DO NOT MEET REQUIREMENTS.—If the Foreign Intelligence Surveillance Court concludes that the procedures submitted under subparagraph (A) do not meet the requirements of subparagraph (B), the Court shall enter an order so stating and provide a written statement for the record of the reasons for such determination. The Government may appeal an order under this subparagraph to the Foreign Intelligence Surveillance Court of Review.

“(D) USE OF PROCEDURES.—If the Foreign Intelligence Surveillance Court approves procedures under this paragraph, the Government shall use such procedures for any communication acquired under this title.

“(E) REVISIONS.—The Attorney General, in consultation with the Director of National Intelligence, may submit new or amended procedures to the Foreign Intelligence Surveillance Court for review under this paragraph.

“(F) RELIABILITY.—If the Government obtains new information relating to the reliability of procedures approved under this paragraph or the availability of more reliable procedures, the Attorney General shall submit to the Foreign Intelligence Surveillance Court such information.

“(c) TITLE I COURT ORDER.—If the Government obtains a court order under title I relating to a target of an acquisition under this title, the Government may access and disseminate, under the terms of that court order and any applicable minimization requirements, any communications of that target that have been acquired and segregated or specifically designated under subsection (b)(1).

“(d) INSPECTOR GENERAL AUDIT.—

“(1) AUDIT.—Not less than once each year, the Inspector General of the Department of Defense and the Inspector General of the Department of Justice shall complete an audit of the implementation of and compliance with this section. For purposes of such audit, the Inspectors General shall have access to any communications that have been segregated or specifically designated under subsection (b)(1) and any information the use of which has been limited under subsection (b)(5). Such audit shall include an accounting of such segregated or specifically designated communications that have been disseminated.

“(2) REPORT.—Not later than 30 days after the completion of each audit under paragraph (1), the Inspectors General shall jointly submit to the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives and the Select Committee on Intelligence and the Committee on the Judiciary of the Senate a report containing the results of the audit.

“(3) EXPEDITED SECURITY CLEARANCE.—The Director of National Intelligence shall ensure that the process for the investigation and adjudication of an application by an Inspector General or any appropriate staff of an Inspector General for a security clearance necessary for the conduct of the audits under this subsection is conducted as expeditiously as possible.

“(e) APPLICABILITY.—Subsections (a) and (b) shall apply to any communication acquired under this title on or after the earlier of—

“(1) the date that the Foreign Intelligence Surveillance Court approves the procedures described in subsection (a)(3) and the procedures described in subsection (b)(7); and

“(2) 1 year after the date of enactment of the FISA Amendments Act of 2008.”