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Black Judge Tells Thomas of Need to Protect Civil Rights : Law: Open letter reminds justice of debt he owes those who fought for equality, implores him to protect others.

February 14, 1992 | HENRY WEINSTEIN | TIMES STAFF WRITER

In an unusual open letter, a prominent black federal judge has bluntly reminded Supreme Court Justice Clarence Thomas that he owes a considerable debt to the civil rights movement and has implored him to reject the current court's "retreat from protecting the rights of the poor, women, the disadvantaged, minorities and the powerless."

"When I think of your appointment to the Supreme Court, I see not only the result of your own ambition, but also the culmination of years of heartbreaking work by thousands who preceded you," wrote A. Leon Higginbotham Jr., a federal appeals court judge in Philadelphia.

"I know that you may not want to be burdened by the memory of their sacrifices. But I also know that you have no right to forget that history," wrote Higginbotham, 63, who authored "In the Matter of Color," a 1978 book about race and the American legal process. "Your life is very different from what it would have been had these men and women never lived."

The lengthy letter, both scholarly and personal, was published in the current issue of the University of Pennsylvania Law Review. Prominent legal scholars said they had never seen anything like it.

Higginbotham, who was appointed as a federal district judge in 1964 by President Lyndon B. Johnson and was elevated in 1977 to the federal appeals court by President Jimmy Carter, asserted pointedly that Thomas was not "the most competent" candidate for the Supreme Court seat vacated last year by Justice Thurgood Marshall, the high court's first black.

And he noted that as recently as 25 years ago, because of laws prohibiting interracial marriage, Thomas could have been imprisoned for marrying his current wife in Virginia. He writes that--but for the work of civil rights lawyers--Thomas could not live in the Virginia house where he currently resides.

Many prior justices have grown on the job, Higginbotham noted, and he presented Thomas with a clear challenge: "You can become an exemplar of fairness and the rational interpretation of the Constitution, or you can become an archetype of inequality and the retrogressive evaluation of human rights."

Higginbotham declined comment on his letter, which he mailed to Thomas on Nov. 29. He did not say if Thomas had responded.

Thomas, through his secretary, also declined comment. However, during his bitterly contested confirmation hearing last fall, Thomas frequently reminded the Senate Judiciary Committee of his personal battle to pull himself up from a childhood of poverty and racial discrimination, primarily with the assistance of his grandparents and a group of Roman Catholic nuns.

He also said: "I have been an aggressive advocate of giving minorities the opportunity and the occasion to develop potential."

Harvard University constitutional law expert Laurence H. Tribe said it was "unprecedented" for a federal judge to publicly write such a letter to a sitting Supreme Court justice. Other legal scholars agreed.

"I've never seen anything quite as direct, quite as blunt and quite as particularized as this letter," said Colin Diver, dean of the University of Pennsylvania Law School.

In the prologue, Higginbotham said he felt at first that he should write Thomas privately, but said he decided to make the letter public "because your appointment is profoundly important to this country and the world, and because all Americans need to understand the issues you will face on the Supreme Court."

Prominent among those issues is the right to privacy, a subject on which Thomas was closely questioned during his confirmation hearing. The "only persistent protector of privacy and family rights has been the U.S. Supreme Court, and such protection has occurred only when a majority of those justices had a broad vision of human rights," Higginbotham wrote.

Then, in an allusion to abortion, Higginbotham wrote: "Will you at your moment of truth assume that the Constitution protects you and your wife against all forms of deliberate state intrusion into family and privacy matters . . . but nevertheless that it does not protect the privacy rights of others, and particularly women, to make similarly highly personal and private decisions?"

The letter includes detailed references to prior cases and anecdotes about how both Higginbotham and Thomas, now the only black on the high court, benefited from attending Yale Law School.

In the letter, Higginbotham described a meeting the two had in 1980 when Higginbotham received an honorary degree from Holy Cross College in Worcester, Mass. where Thomas was a trustee.

Some of the most striking passages are in sections on the impact of the work of civil rights lawyers and Thomas' criticisms of civil rights organizations.

Higginbotham stated that "the moral tone of America" was changed by Brown vs. Board of Education, the landmark 1954 Supreme Court decision that outlawed racial segregation in public schools, creating a milieu that made it easier for Thomas to attend Holy Cross and Yale Law School.

"You should ask yourself every day what would have happened to you if there had never been a Charles Hamilton Houston, a William Henry Hastie, a Thurgood Marshall and that small cadre of other lawyers . . . who laid the groundwork for success in the 20th Century civil rights cases? Couldn't they have been similarly charged with, as you have phrased it, bitching and moaning and whining when they challenged the racism in the administrations of prior presidents, governors and public officials?" Higginbotham wrote.

The letter pointedly questioned Thomas' self-description as a "black conservative" and his alliance with individuals who opposed civil rights legislation and lawsuits designed to end racially discriminatory practices.

"I must confess that, other than their own self-advancement, I am at a loss to understand what it is the so-called black conservatives are so anxious to conserve," Higginbotham wrote.

And he said that if conservatives, including President Bush, who opposed passage of the 1964 Civil Rights Act had had their way, "there would have been no such agency as the Equal Employment Opportunity Commission for you to chair."

Several law professors praised the letter's content and its tone. "I think Judge Higginbotham was trying to draw Justice Thomas' attention to the very real opportunities and the very real success he has had only because of the civil rights movement and only because that movement was able to overcome the intransigence of his current allies," said University of Pennsylvania law professor Lani Guiner, who was in Thomas' class at Yale Law School and has worked on civil rights cases for the NAACP Legal Defense Fund.

"I would hope that it is the first in a continuing drumbeat, particularly from black intellectuals to Judge Thomas that whether he accepts it or not, we are going to keep the pressure on," said New York University law professor Derrick Bell, a Thomas critic.

Yale Law School Dean Guido Calabresi, who supported Thomas' confirmation, said the letter "moved me to tears" and said he hoped it would influence Thomas in a positive way.