

# Making Law By Making Trouble

## A Law School Project Becomes a Supreme Court Case Against the Railroads

**To a High Court: The Tumult and Choices that Led to United States of America v. SCRAP**

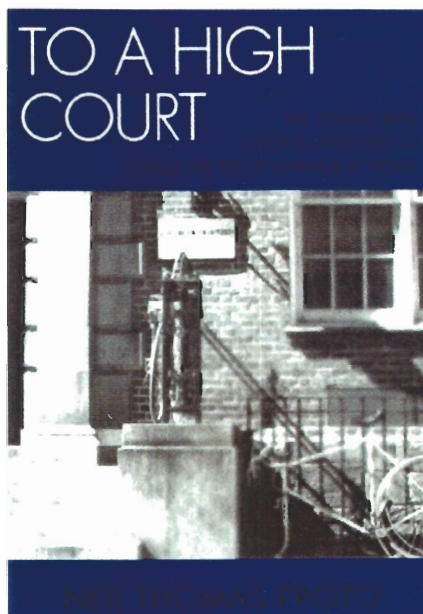
By Neil T. Proto

Hamilton Books, Lanham, Maryland

2006, 307 pages, \$26.00

From the late 1960s through the mid-1970s, America experienced upheaval bordering on chaos. Assassination, the continuing horror of the Vietnam War, tear-gassed campuses, government corruption and distrust of authority at all levels marked the era. As America reassessed its values, it also awakened to humankind's appalling degradation of the earth, after decades of unrestrained abuse. The Environmental Protection Agency was created, and Congress enacted a raft of legislation meant to protect the environment, including NEPA, the National Environmental Policy Act. Seeing opportunities for the reordering of priorities within the legal system, a new breed of public interest lawyer started to tap the potential of this new legislation. *To a High Court* tells the thoroughly engaging story of a band of inexperienced but smart and motivated law students who decided to test the reach of NEPA, taking on the Federal Government, Big Railroads and Covington & Burling in the process. Neil Proto chronicles the odyssey of the case from the abstract setting of a law school classroom to the end of a long road—argument before the United States Supreme Court in the first case in which it interpreted NEPA.

The story begins in the fall of 1971 at George Washington University Law School. Five law students, including Proto, sign up for a course taught by the law school's resident muckraker, John Banzhaf. The course requires involvement with a real-life project dealing with some aspect of public interest law. The students decide to challenge the Interstate Commerce Commission's failure to prepare an environmental impact statement before approving a railroad surcharge that discriminates against shippers of recyclable scrap. The group names itself SCRAP (Students Challenging Regulatory Agency



Procedures); it has no clear idea of what it is doing. Proto provides a first-person account of the law students' confusion, uncertainty and, ultimately, creativity as they barge into the ICC, inveigle bureaucrats into turning over documents, struggle to decipher the ICC's arcane procedures and generally make it up as they go along. The ICC pays little attention to SCRAP, but *The New York Times* notices, and SCRAP gains momentum, eventually suing in federal court. It seeks nothing less than a nationwide preliminary injunction, prohibiting implementation of the surcharge. The Railroads move to intervene; they, too, have started to notice SCRAP.

SCRAP is smart enough to know that it is up against the entrenched power of the Railroads and the ICC, the *ne plus ultra* of captive agencies. Proto illuminates the challenge facing SCRAP with his sidebar on the Railroads' greedy excess over the years in running roughshod over those too weak to stand up to them. For decades, the Railroads had little difficulty getting ICC approval of their rate increases, even as the people who controlled the Railroads systematically looted them, free of interfer-

ence from the ICC, and eventually drove them into bankruptcy. The procedure in place gives the ICC virtually unreviewable discretion to decide whether to suspend a requested rate increase for a seven-month period, pending a determination of its legality. Meanwhile, the Railroads are effectively insulated from judicial scrutiny of their overreaching, while the ICC takes its time making a final decision. It is a procedure that the Supreme Court has sanctioned. The ICC sees in NEPA no impediment to conducting business as usual. This is the setting in which SCRAP must persuade the court of its standing to argue that the new and untested statute, NEPA, applies to ICC rate-making.

The match-up is not so much David vs. Goliath as David vs. the three-headed monster: the ICC, the Railroads and Covington & Burling. Banzhaf and a newly minted lawyer represent SCRAP in court. They lack the experience of their adversaries but clearly are bright enough to engage the great J. Skelly Wright and the other members of the three-judge court convened to hear the injunction motion. SCRAP is relieved that Judge Wright is on the panel:

"Judge Wright understood government. He had been tempered by its good and evil. He was neither intimidated nor deferential to its exercise of power."

From the outset, Judge Wright gives the government no quarter, dissecting its position with the economical precision that is every lawyer's nightmare: "Maybe you will tell me how you can write a [forty-four] page brief...without citing *Calvert Cliffs* once. Can you explain that?"

Banzhaf declares that only a thousandth of the nation's annual trash accumulation "would fill this courtroom, probably the entire courthouse." But perhaps it is the ICC's smug insistence that the court is powerless to interfere with its rate-making procedure that carries the day for SCRAP. The court has no trouble finding that SCRAP has standing and, improbably, grants the preliminary injunction. SCRAP has stymied the Railroads. You can almost hear them: "Who are these people?"

Inevitably, the high court hears the case, in February of 1973. Solicitor General Erwin Griswold neatly summarizes what SCRAP has wrought:

"We have a remarkable situation here. Five law students ... have tied up all the railroads in the country and with the aid of the District Court have prevented the railroads from collecting \$500,000 to a million dol-



lars a month for the past [eight] months on shipments of recyclable materials.”

Indeed. Proto describes the scene in the Supreme Court from the perspective of the law student novice, but his eye for subtle detail misses little. Griswold’s morning coat is “slightly faded from wear,” a tangible reminder of his vast experience in this court. The C&B lawyer’s overweening confidence bespeaks his awareness that his coat “fits him perfectly” and he is wholly in his element: “He is at that moment more than the nation’s Railroads. He is Covington and Burling—powerful in its own right, savvy, connected, and thorough in its knowledge of the law at an expense I cannot fathom.” Proto sees the two as mystical figures, larger than life. Together, they embody the awesome power of the United States government and the corporate chieftains who have sought to harness it in their rapacious grasping for personal gain. They seem to own the courtroom. Proto’s description of the unfolding spectacle, highlights SCRAP’s intense distrust of its adversaries as its lawyers go toe to toe with the big guys. As Griswold declares that standing never could be premised on a construct as unfocused as “something that deals with the public in general, ... [h]

muses for a moment further, and with the simple gesture of raising his forefinger as if emerging from discerning, deep contemplation, he draws attention to himself—like the teacher, like the mentor, or, to me, like the wizard. ... No one on the bench disrupts the flow of his thought. No one interrupts or questions him.”

SCRAP’s theory of “injury in fact” is nothing if not imaginative. Each member claims that not only the public in general, but he himself has been deprived of the right to enjoy and use the forests and rivers where he lives, as a result of discarded recyclable material, which is the result of the use of natural resources instead of recycled material to produce goods, which is due to the Railroads’ discrimination against scrap shippers. Luckily for SCRAP, proof of causation is a matter for another day, and the court buys the argument. Quite remarkably, the United States Supreme Court recognizes the standing of five law students to challenge the Railroads on an equal footing.

*To a High Court* is consistently perceptive and a pleasure to read. A large part of the story’s appeal is its setting in the personal lives of SCRAP’s members (along with Proto’s insightful digressions on the depre-

lations of the coal industry, the ghost of Louis Brandeis, student anti-war demonstrations, Frank Norris and the insidious interlocking directorates of the nineteenth century). Proto examines not only the legal issues in the case and their historical backdrop, but also the everyday context in which SCRAP’s members worked, played and thought. The law students who pressed this case are real people who worried about law school and the bar exam, tried to manage the distraction of romantic interests and were driven by deeply held philosophical beliefs. For the rising generation of public interest lawyers, SCRAP’s story is a compelling case study of the power of resourcefulness, determination and audacity. And, for at least some of the unreconstructed lefties among us, the story evokes recollections of our idealism and innocence as law students, long before *Bush v. Gore*, when we were high on *Marbury v. Madison*, the singular place of the judiciary in our society, and the inscription on the Supreme Court building: “EQUAL JUSTICE UNDER LAW.” ■

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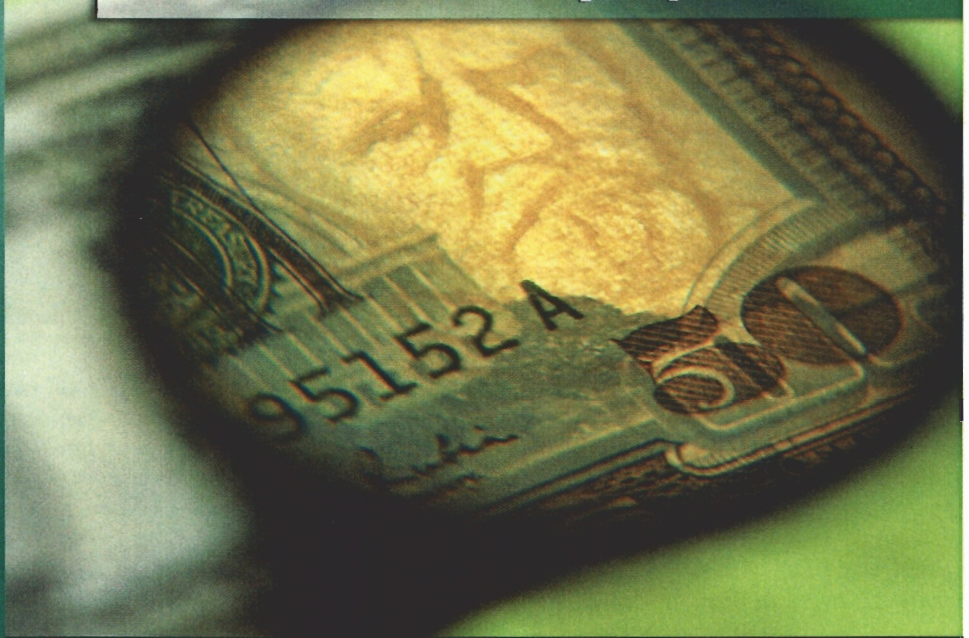


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