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AN ARTHURIAN TALE

*Aryeh Neier**

RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER. By *Arthur Kinoy*. Cambridge, Mass.: Harvard University Press. 1983. Pp. 340. \$20.

As Arthur Kinoy sees it, he probably saved the United States from a fascist takeover with a brilliant argument to the United States Supreme Court. The immediate issue was whether the Court would uphold President Richard Nixon's claim that his office gave him inherent power to conduct warrantless electronic eavesdropping in circumstances in which the President asserted that there was a threat to the domestic security of the United States. Far more was at stake, however, according to Kinoy:

Once the cover of legality was established for the suspension of the constitutional guarantees of individual liberty, the road was open, at the sole discretion of the President, to utilize the lists, carefully compiled by the FBI, of hundreds of thousands of citizens who were potential dangers to the establishment. Secret documents even then specified the concentration camps that could be used. No warrants would be required for wholesale roundups of these security dangers, and they could be held, by executive decree, without bail or trial. Fascism would have arrived, in Huey Long's words, "wrapped in an American flag."

It is now absolutely clear that the Nixon Administration was seeking this legal cover for experimenting with the abandonment of constitutional government [P. 31.]

The Supreme Court's unanimous decision emphatically rejecting the claim of inherent power,¹ says Kinoy, "left the administration in total disarray" (p. 35). Moreover, the date of the decision had a significance not previously recognized — at least so far as this reviewer is aware. It was announced by the Supreme Court on June 19, 1972. Kinoy speculates that the break-in at the Watergate offices of the Democratic National Committee on June 17, 1972 took place when it did because someone at the Nixon White House received advance word of the adverse decision and went in to remove the bugs and microphones that had been installed there successfully three weeks ear-

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1. *United States v. United States District Court*, 407 U.S. 297 (1972).

lier. In this scenario, the Nixon administration's plan had been to get the Supreme Court to legitimize electronic eavesdropping such as it had undertaken at the Watergate, but the plan had gone awry when the Court, moved by Kinoy's eloquence, had balked. Kinoy even goes so far as to speculate that "the never-explained eighteen-minute erasure of the confidential Nixon tapes of that Monday morning involved an explanation to the President of the real reasons for Saturday night's break-in, and its relation to Monday morning's Supreme Court decision," though he acknowledges that whether this was the case may "never be known" (p. 38). Such doubts aside, Kinoy asserts:

[O]ne fact emerges sharp and clear beyond dispute. The conspiracy that was involved in the strange events of those June days was not a relatively simple conspiracy to "obstruct justice" or to "cover up" White House involvement or to buy an election through corruption and bribery. What was fundamentally involved was a conspiracy to move away from American constitutional government. It was a conspiracy which had at its heart the creation of a legal sanction for experimentation with a brand of fascism [P. 38.]

As Arthur Kinoy looks back over his career, he finds that many of the legal struggles in which he engaged were comparably momentous. For example, if renowned liberal Judge Jerome Frank had had the courage of his convictions in 1953 when Kinoy and two colleagues went to the judge's home in New Haven to argue for a last minute stay of execution in the Rosenberg atomic bomb spying case, he "might, in a profound sense, have changed the course of American history" (p. 125). And what embarrassed the United States Department of Justice under Attorney General Robert F. Kennedy into enforcing federal civil rights laws in the South was a lawsuit filed by Kinoy. "If the movement itself and the people's lawyers² had not taken the offensive in the courts," according to Kinoy, "there never would have been any action . . . by the federal Justice Department" (p. 255). And so it has gone.

Early in his book, in passing, Arthur Kinoy acknowledges his "predilection for exaggeration in the interest of driving home a point" (p. 29). Regrettably, he does not seem aware that this predilection also carries with it a cost. Exaggeration, in the case of this book, may obscure Kinoy's real achievements. Though these were perhaps not in a class with stopping the beast of fascism with one overpowering argument in the United States Supreme Court, Kinoy does deserve considerable credit for helping to transform litigation into a tool of political struggle. He has been in the forefront of those who have recognized that a lawsuit is far more than an instrument for securing a particular judicially ordered result. It is also a means of expressing a point of

2. The term "people's lawyers" is used throughout this book as a synonym for Kinoy and his associates.

view in a dramatic way; of turning the tables on powerful officials whose actions ordinarily go unquestioned; of organizing and giving a voice to those who may otherwise feel powerless; of forcing the disclosure of information that one's antagonists in a struggle may not wish to reveal; of enlisting support for a cause from individuals and institutions that respond favorably to certain legal arguments; and, as Kinoy points out repeatedly, going on the offensive and achieving even a momentary victory in court has a great impact on the morale of those struggling on behalf of the cause.³

As he relates in *Rights on Trial*, Kinoy embarked upon this approach to litigation at the outset of his career as a lawyer in the late 1940's when he worked for the United Electrical, Radio and Machine Workers of America (UE), a union whose officers had declined to sign affidavits, required under the Taft-Hartley Act, to the effect that they were not Communists. Failure to sign such affidavits deprived unions of their right to appear in ballots in National Labor Relations Board representation elections and denied them the right to be certified by the NLRB as a collective bargaining representative. Denial of these rights made the UE vulnerable to a variety of attacks and, in the red-baiting atmosphere of the times, it suffered a considerable onslaught from congressional investigating committees and from others. Kinoy helped to frame a counteroffensive that included suing members of Congress for violating first amendment rights. Though his lawsuit went nowhere, it helped to galvanize a spirit of resistance among beleaguered UE members. What he learned from this experience was reinforced a decade later in battles in which he participated on behalf of blacks in the South engaged in the civil rights struggles of the late 1950's and of the 1960's, and helped to shape his approach, and the approach of a good many other lawyers, to "cause" litigation.

Among the attractive features of Arthur Kinoy's autobiography is that the considerable zest that he has brought to the practice of cause litigation, and his own sense of excitement about struggle, are reflected in his writing. His writing is also highly readable. For this reviewer, however, a distracting feature is the book's subtitle, *The Odyssey of a People's Lawyer*, and the constant use of terms such as "people's lawyers" and "people's movements." At one point, for example, he writes that, "the people's movement was putting it squarely to us as people's lawyers" (p. 250). Yet the only definition he supplies is that "the people's lawyer represents movements of people who throughout the history of this country have struggled to protect and advance their elementary rights and interests against attempts by the government or big business to undermine or derail them" (p. 2). It is possible, it seems to me, to sympathize with many of the particular struggles to

3. See, e.g., p. 201 ("[O]nce again I sensed the critical importance of even the most limited legal victories to the fighting morale of people in struggle.").

which Kinoy has devoted his talents and energies and, at the same time, to find it insufferably self-righteous for him to lay claim to being the "people's lawyer," as if the antagonists of his clients, or those who happen not to be involved in those struggles, were something other than "people."