MR. JUSTICE BLACK: SOME INTRODUCTORY OBSERVATIONS

by

EUGENE V. ROSTOW†

IT is a privilege for the Yale Law Journal to help celebrate the birthday of Mr. Justice Black, and his more than eighteen years of valiant service on the Supreme Court of the United States.

Our procedures for judging judges are not yet "scientific" in the ordinary sense. And they never will be, any more than other forms of historical evaluation. Whatever one's method, however, it is clear that Justice Black has had a formidable and constructive impact on the law, and that he has earned an honorable place in the small company of strong Justices.

Character and philosophy are the ultimate sources of a strong judge's power. Style and mind alone do not avail. To be a force in law, a judge's work must be spun from a single thread. He must draw on a coherent view of what the law is, and what it should be, in the light of its social, intellectual and moral purposes. The judge's philosophy need not be written down in a credo. But it must be there, if his work is to be more than a collection of fragments, without pattern or direction.

So with character. The test of judges is many-sided, especially for those on the Supreme Court of the United States. The Justices of the Supreme Court must balance historical and political forces of explosive power in defining the limits of their duty. They must be craftsmen of the law, capable of placing their work in the web of doctrine—for the order of the law is itself a goal of many social values. They must be expert participants in American politics and history. One of the most important qualities required of good Justices is that they be sensitive, but not too sensitive, to the changing political realities of a federal system; and equally sensitive to ideas intended to be beyond the reach of transitory majorities—to the necessarily general aspirations of human dignity found in the Constitution and in the dream of our public life. But finally, the Justices must be wise and humane judges, deciding cases that mean life or death, property or status, justice or injustice, to individual litigants and classes of litigants. It is sometimes easy to forget that a large part of American constitutional law arises in the setting of actual lawsuits; one can view the United States Reports as a hornbook of political theory only at the risk of missing the point.

In terms of these criteria, and in the light of what an outsider can know of the Court's work, Mr. Justice Black is an authentically strong judge, and a distinguished one. No one student of the Court will agree with all Justice Black's opinions, nor with all the positions and propositions that his opinions represent. Thus it should be. Justice Black is not interested in acolytes. He

†Dean of the Yale Law School.

has been seeking to persuade a mature audience to alter some of its most tenaciously held views. Justice Black knows better than anyone else that such a major effort will take time, and that it may do much good even if it is not, and should not be, fully successful. The work of the Court is necessarily collective. No judge, however strong, can expect to impose his views on an institution that must move slowly if it is to retain its peculiar function in the process of American politics.

Justice Black has done excellent work in many fields of law. His writing has been marked by distinctive habits of thought. He has almost invariably sought to re-examine the premises behind each problem that came to his hand. Thus he has served as a skeptical outsider on the Court, preserving his detachment, and insisting on a review of fundamentals, before accepting any given rule. In this way, he has developed a constitutional position which is always individual, and often provocative. The freshness of Justice Black's views has been well served by a simple lucidity of style, which has made his writing an instrument of abiding power.

This prefatory note is not the place for a comprehensive review of Justice Black's opinions. But two general aspects of his accomplishment as a judge may be mentioned here.

First, it is now clear that Justice Black has proposed a radical, and debatable, change in the relation of the Supreme Court to the Congress and to the state legislatures, a change that would in many areas greatly reduce the traditional power of the Court. Justice Black is never content to change precedents alone. With surprising zeal, he seeks to hammer out fixed rules of constitutional law. Such rules, he hopes, might bind future judges to refrain from actions that he would regard as unwarranted interference with the prerogatives of legislators. Many groups of opinions illustrate this aspect of his constitutional philosophy. He would remit to Congress, for example, almost the whole of the problem of dealing with state-imposed trade barriers that may be viewed as "discriminating" against or "unduly burdensome" to interstate commerce.[1] He would inter even the final memory of *Adkins v. Children's Hospital*[2] and like cases, strictly refusing to find due process problems in the substance of statutes regulating business conduct.[3] The elected legislature, he profoundly believes, must have the last word on a wide range of problems in any system that hopes to be democratic.

A second major feature of the constitutional universe of Mr. Justice Black is his conviction that the Supreme Court does have the right and duty to strike down as unconstitutional much legislative or executive action that might

1. H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 545 (1949) (dissenting opinion); Morgan v. Virginia, 328 U.S. 373, 386 (1946) (concurring opinion); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 784 (1945) (dissenting opinion).

2. 261 U.S. 525 (1923). See also, *e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936); Lochner v. New York, 198 U.S. 45 (1905).

3. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); United States v. Causby, 328 U.S. 256, 268 (1946) (dissenting opinion). See also Sun Oil Co. v. Burford, 319 U.S. 215 (1943).

abridge the free and democratic character of the political process: restraints on the citizen's freedom to vote; to agitate for political change; to speak, write or think as he prefers; and above all, to live in an atmosphere of calm assurance that he is protected against adverse action by the state, or by other citizens, save in accordance with strictly prescribed procedures of law. Except in a few conspicuous instances, Justice Black has steadily advocated the use of judicial power to enlarge and fortify the law's protection for personal and civil rights. His opinion in *Korematsu v. United States*[4] was a major failure; and that in *Duncan v. Kahanamoku*[5] was so cautious and limited that it did not succeed in repairing the damage, although its major premise is in conflict with that of the *Korematsu* case. Nor has Justice Black been altogether consistent in dealing with the problem of searches and seizures.[6] Variations of this order aside, Justice Black has become a leader in the most significant task confronting our system of law: the task of solving the problem of internal security in accordance with the tradition of law. He starts with the undeniable proposition that the state may defend itself against destruction, or attempted destruction. But the means chosen to attain this end, he insists, must be within the spirit and the control of the law. In his view, the law must reach out and impose its standards on the systems of administrative and executive action which now decide the rights of men and women to jobs, status and reputation in many areas of public and private life.[7]

Justice Black has taken on no cause more vital than this struggle to bring the internal security program into the law. It is a task that will take years of effort, on many fronts. It is not a problem the Supreme Court can solve alone. But the Court can help lead the way to a solution. Justice Black has already done memorable work in presenting the problem, and in sounding the alarm, though not all his arguments are of equal weight. For there can be no ambiguity about it. The security program has become a major threat to liberty. The possibility of arbitrary and uncontrolled action by officers of the state, often based on secret information, and governed by meaninglessly vague criteria of judgment, is now a threatening force in millions of lives. This totalitarian practice must not, and will not, endure. Twenty years from now, and perhaps sooner, Justice Black will appear as one of the key figures in the process through which the standards of the Constitution came to prevail over principles and practices of tyranny.

---

4. 323 U.S. 214 (1944).

5. 327 U.S. 304 (1946).

6. *Compare* United States v. Rabinowitz, 339 U.S. 56, 66 (1950) (dissenting opinion), *with* Wolf v. Colorado, 338 U.S. 25, 39 (1949) (concurring opinion); Trupiano v. United States, 334 U.S. 699, 710 (1948) (Vinson, C.J., dissenting, with Black, J., concurring).

7. See Justice Black's dissent in Orloff v. Willoughby, 345 U.S. 83, 95 (1953). See also Linehan v. Waterfront Comm'n, 347 U.S. 439 (1954) (Douglas, J., dissenting, with Black, J., concurring); Barsky v. New York Bd. of Regents, 347 U.S. 442, 456 (1954) (dissenting opinion); Wiemann v. Updegraff, 344 U.S. 183, 192 (1952) (concurring opinion); United States v. Lovett, 328 U.S. 303 (1946); *cf.* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 142 (1951) (concurring opinion).