

MR. JUSTICE BLACK: A BIOGRAPHICAL APPRECIATION

JOHN P. FRANK†

"The scales of justice in his hands
will bring renewed hope to millions
of our common people. . ."

George W. Norris, 1937

A LAW clerk awaiting Mr. Justice Black's arrival in the morning will recognize the Justice approaching by the quick echo of footsteps in the marble halls. A moment later the Justice will pop in, his briefcase bulging with papers studied the night before. When he leaves in the afternoon for a hard set of tennis either at the Officers' Club or on his home court, his briefcase is renewed in bulk, his footsteps are only a little heavier. For Hugo Black at seventy is the very image of mature energy.

That energy is, as ever, rigidly controlled. One of the early surprises to Black's close associates is his capacity to listen. An energetic man whose trade is in the verbal arts tends to be talkative. If fame has touched him, making him automatically the lion of a group, he is oftentimes voluble; and if all this is combined with age, the result is commonly a flow downright irrepressible. Black, whose fluency and energy are in good part the basis of his career, can listen to a lawyer, a clerk, a stranger or a friend, with absorption. He will say his say when his turn comes.

This energy control, even in the minor affairs of life, is an example of Black's adjustment to the world. He has the capacity to commit himself with zest to whatever he is doing at the moment. Thus, he is intensely interested in his work, but it never becomes a monomania. He plays tennis as though his life depended on it, but does not talk the game away from the court. As an insatiable gardener, with equal devotion to his roses, his fig trees, his corn and his grapes, he immerses himself in the most patient of hobbies. In this, perhaps, he is only recreating his boyhood home, where Burpee's Seed Catalog was the book used second only to the Bible.

These odds and ends are current indications of the fact that Hugo Black is and has been for seventy years a man extraordinary for sheer, unrelenting vigor. Born the son of a rural storekeeper in an Alabama byway, he has moved vigorously up in those seventy years, largely self-educated and always self-started, to become a foremost exponent of the Jeffersonian tradition of personal liberty in America today.

While Black's background was limiting and, in the most exact sense, provincial, Clay County was no Tobacco Road, and Black is no splinter of white trash who made good. His circumstances, while such as to make him self-dependent at an early age, were not more severe than those of some of his

†Member of the Arizona Bar.

colleagues on the Bench. Indeed, his affectionate and easy relationship with his present Chief Justice may rest in part on the circumstance that each has come up the ladder from approximately the same rung, and has been unspoiled by the ascent. One trace of this climb is his continuing desire to help others along the road: his choice of law clerks is frequently dictated more by considerations of whom he can help than of who can help him.

As a boy, he led the normal life of an Alabama villager, and did the usual odd jobs. His later skill with words may have been foreshadowed by the fact that he was a better odd-hour typesetter at the local printshop than he was a cotton-picker. In this atmosphere, he learned politics, absorbing his first impressions when the Populists and William Jennings Bryan were seeking the vote.

After a touch of high school-type education at an institution glorified by the name of Ashland College, and following a dab of medical training, Black went to the University of Alabama Law School at the age of eighteen. It was not his first choice—he would have preferred to enter a liberal arts course, but the University found his credits inadequate. He went to law school, in short, because he was too poorly educated to go anywhere else. As one of his professors put it, Black “had the most to learn” of anyone in the school. He learned a good share of it, making the small school’s honors list.

After a brief try in Ashland, where a fire in his office put an end to his efforts to get rich on fifty-cent fees, he moved to Birmingham, broadened his acquaintance by joining every organization that would take him, and began a general practice. In a few years, he was judge of a criminal court of petty jurisdiction, a post that began to give him his extraordinary insight into criminal law enforcement. A term as prosecuting attorney did much to complete the job.

The result is that when Black writes on criminal procedure, he has seen what he is talking about. Habeas corpus or bail? When Black took over the prosecutor’s desk, the Birmingham jail was full of people being held indefinitely awaiting trial and meanwhile earning extra food fees for a rapacious sheriff. Black cleaned out the crowd and learned from observation the meaning of a speedy trial. Third degree? Black obtained his first touch of national notice—and some local criticism—when he broke up the third degree practices of the law enforcement authorities in Bessemer, Alabama, where it was not uncommon to tie a Negro to a door and lash him with a belt buckle until he confessed.

Doubtless Black thought back to those Bessemer days when he wrote *Chambers v. Florida*,¹ his eloquent condemnation of investigation by abuse. In that case four Florida Negroes had been sentenced to death on confessions obtained by procedures scarcely calculated to give them credibility. For the United States Supreme Court, Black concluded:

“No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional

1. 309 U.S. 227 (1940).

shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed, or persuasion.”²

The *Chambers* case was in 1940. Twenty-five years earlier, Black had prepared a grand jury report on the Bessemer outrages which concluded:

“Such practices are dishonorable, tyrannical, and despotic, and such rights must not be surrendered to any officer or set of officers, so long as human life is held sacred and human liberty and human safety of paramount importance.”

In Birmingham, Black learned the practical ways of sympathy for the unfortunate. A Negro who created a disturbance because of marital troubles might get off with a lecture on happy marriage from the young bachelor judge, but an old fraud who sold high-priced “charms” to the Negroes got full penalty. In his later role Black prosecuted a coal company that deprived its employees of fair pay by shortweighting them; and he put pressure on insurance companies to keep them from obtaining premature releases from injured employees. Still later, as a Supreme Court Justice, Black was to strive to make such releases less attractive to those who obtained them;³ but it is doubtful whether he has to this day brought his brother Justices to share the full his feelings.

An Army interlude in World War I started a ten-year interruption in Black's office-holding career. When he came back, a captain experienced in battle only on the parade grounds of an Oklahoma training camp, he settled down to the business of building a practice, making money and taking a wife.

At all three he was a success. The greatest success was his marriage to Josephine Foster, a Birmingham girl of good family, great vivacity and extraordinary charm. The home she made for her husband and their three children was a sanctuary from the political battles of the years to come, and in later days her table sparkled with some of the gayest, as well as some of the best, conversation in Washington. Her death four years ago was the darkest hour in these seventy years.

Black's postwar practice boomed. As a jury lawyer, Black was one of the small circle of unequalled great who by the standards of that time and the damage limitations of that place are comparable to Belli today. Between 1919 and 1928, Black's firm had over one hundred cases in the Alabama Supreme Court, mostly for injuries, and Black's biggest task was to hold the judgments he had induced juries to give. Fifty thousand dollars for an injured railroad worker was cut to thirty thousand by the court, and twenty-five thousand for an eye injury dropped to six thousand on review. As the Alabama court observed in one instance, Black had fully demonstrated “his ability to eloquently present the cause in the most forcible manner.”

Black as a jury lawyer was no poseur given to chuckling in his office at, for example, the jury who the Alabama Supreme Court said had “been rather too

2. *Id.* at 241.

3. See the succeeding article, Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 491 (1956).

liberal with the money of the defendant." The sincerity that was part of his stock in trade was genuine: in his eyes tort juries were instruments of justice too often frustrated by judges. He brought to the Supreme Court a determination to free juries of these limitations, and almost certainly he has done more than any other man to restore to juries in the twentieth century some of the freedom they had in the nineteenth.

The jury controversy bubbles quietly in the Supreme Court, unmarked by the flashing sensationalism of such problems as race relations or free speech, in which individual cases can be monumental. But Black's interest has caused the Court to take up a far greater portion of the Federal Employers' Liability Act and other federal jury cases than before; and today in both federal courts and state courts following the federal lead, there is much more jury latitude than twenty years ago.⁴ He himself, although he has not quite denied that the judge can *ever* take a case from a jury or set aside a jury verdict, at least has not seen a case during his almost twenty years on the Court where this was properly done. To him, the Seventh Amendment is as much to be honored as any other constitutional provision:

"The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or the jury must decide facts and, to the extent that we take this responsibility, we lessen the jury function. . . . As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function."⁵

By 1926, Black could afford financially to run for the Senate. After a grueling race against three candidates, each of whom had far more money and organized support than he, Black was elected. The keys to victory were two: Black's own background and views gave him a genuine appeal to the common people of the state that no other candidate could equal; and his endless vigor took him out among the voters at a pace no other candidate could follow.

As a campaigner, Black was rough and direct, making a straight class appeal to the common man as one of their own. He stressed his Clay County origins, his absence of railroad, power company and corporate connections. He was, in fact, as he said, the "candidate of the masses." As one weekly paper put the spirit that elected him, "he knows better how to sympathize with the common people."

Black campaigned for full public use of Muscle Shoals and for prohibition enforcement. He never, despite a short previous dalliance with the Klan, later sensationalized, followed the Klan's line. It supported two of his opponents in the 1926 race, and after his later alliance with Catholic Tom Walsh in the

4. See, generally, Green, *supra* note 3.

5. Galloway v. United States, 319 U.S. 372, 407 (1943) (dissenting opinion).

Senate, his support of Al Smith in 1928, and his opposition to the Klan's idol Tom Heflin in 1930, the Klan was his flat enemy in the re-election campaign of 1932.

Black's support of public power and fertilizer production at the Shoals was popular in Alabama, particularly in the northern portions of the state, and his prohibition stand was that of most Alabamans. Both personally and politically, his prohibitionism was ardent. Black's own family had seen vivid evidence of the evils of drink during his boyhood. While time has brought him to believe that drinking cannot be stopped by statute—and, indeed, he now takes one drink a day himself at a doctor's suggestion, though with no perceptible pleasure—he doubtless still regrets that this is so. Of the noble purpose of the great experiment, he has never had any doubts.

Once in the Senate, Black set out to educate himself. He was, it must be remembered, still an essentially uneducated man, with little better than a bad high school training. The Senate became his university; George Norris and Bronson Cutting, two of his professors; and the Library of Congress, his bookshelf. Today the *Annals* of Tacitus are at his fingertips, his many-volumed Livy is thoroughly marked with his jottings, and evidences of Macaulay crop up again and again in his opinions. Such self-education took great effort, and left no time for idle occupancy of the Senate floor. As the *Mobile Register* put it, "Alabama makes a good senatorial average, with one senator [Heflin] talking incessantly, and one not at all."

In ten senatorial years, spanning the transition from complete Republican dominion under Coolidge and Hoover to the peak of New Deal ascendancy, Black became an established leader of the most militant liberal group. The Senate of the United States is a co-operative body, and it is rare that one senator can fairly claim total credit for any one accomplishment. Black would certainly not do so. But he played important roles in three major New Deal measures:

1. The establishment of the TVA, in which Black was an effective lieutenant of George Norris.

2. The adoption of the Public Utility Holding Company Act of 1935,⁶—the Wheeler-Rayburn Act—which almost certainly would never have succeeded without the Black lobby investigation. That investigation made him a nationwide sensation as he revealed the almost incredible devices of the utilities opposing the bill, including forged telegrams and petitions, bribes, and million dollar advertising campaigns which extended to direct corruption of newspapers. The backlash of this investigation made Black one of the most hated of the New Dealers as well as one of the most effective. He became the *bête noire* of the Hearst press, particularly as his investigations went on into the Liberty League in 1936. Raymond Clapper wrote in 1935, "If the death sentence finally goes into the utilities bill, it will be another notch in the gun of Hugo Black."

6. 49 STAT. 803 (1935), 15 U.S.C. §§ 79-79z-6 (1952).

3. The enactment of the Wage-Hour Act of 1938,⁷ which, while it passed after Black's Supreme Court appointment and is the product also of many other hands, was a direct result of his years of agitation for a thirty-hour week bill. Black, greatly influenced by the English economist G. D. H. Cole, and himself a thorough student of European social legislation, had long campaigned against low Southern wages. To him, the once dominant Southern viewpoint that wages of eight cents to twenty cents an hour were among blessings of God to the South was "indefensible. I do not believe our civilization requires any such sacrifice on the part of any large percentage of our people."

Today there are few who would doubt that the TVA and the Wage-Hour law are fundamental to the prosperity of the South; and the passing of the Insulls and the Hopsons of the holding company era is mourned by none. Black was a significant member of the team that wrought these accomplishments. In the Wage-Hour fight he was forced to proclaim that he was as good a Southerner as the best of them, with as great a loyalty to Dixie and with as many ancestors in the Civil War. The event proves that he saw his region's interest truly. Another twenty years may show that in his persistent opposition to segregation he was equally foreseeing the eventual welfare of the southeastern states, which he unashamedly loves and in which he spends as much as possible of his life.

On the evening of August 11, 1937, Senator Black went to the White House at the request of the President. It had already been quietly intimated to him by his friend and colleague then and now, Sherman Minton, that the President would offer Black the Supreme Court vacancy created by the resignation of Willis Van Devanter. The next day President Roosevelt sent the name of Hugo Lafayette Black to the Senate.

No one could say that it was, in the superficial sense, a popular appointment. The Court-packing fight had just been fought and lost, with Black supporting the President every inch of the way. Today the Supreme Court no longer has the force of the conservative-controlled organs of public opinion solidly behind it, but in 1937 the Court was the last stronghold of the political and economic forces that had been repeatedly defeated at the polls. From the viewpoint of the vehicles of opinion that these forces controlled—vehicles that already had every reason to hate Black—the President's attack on the Court had been as sacrilegious as an attack on a Vestal Virgin might have seemed to a Roman. Now that one attack had been fought off, to get Black on the Court would be to lose everything that had been saved—a thought that almost certainly occurred to the President, with reverse twist, when he made his selection.

And so no one ever took the Bench with a worse press. But there were occasional contrary notes. The labor unions the country over were for Black. Even the Canadian delegation at a boilermakers' convention asked the privilege

7. Fair Labor Standards Act of 1938, 52 STAT. 1060, 29 U.S.C. §§ 201-19 (1952).

of recording their "faith and confidence" in the Justice. George Norris, long since the grand old man of American liberalism, said:

"He is a worthy representative of the common people. He understands their hopes and ambitions, and their liberties in his hands will be safe."

* * *

It is now almost twenty years later, and we can begin to measure the validity of the Norris forecast. Has Black been a worthy representative of the common people? The concept is mystical, and necessarily the measure must be subjective; different generations may give different answers. But there has been time enough since 1937 for some perspective to develop. We can now dimly perceive that the thirties were the climax of an American revolution with deep roots; that the enemy to be overthrown was economic anarchy; and that the insurgents were the farmers and industrial workers of the country, in particular, seeking to take over the management of the nation's economy. Hugo Black was one of the captains of that revolution; he was a strong force in it. And he, of those in the New Deal tide who reached the Bench of the Supreme Court of the United States, was the one who most clearly in personal origins and career was himself a true part of the farmer-labor movement.

On the Supreme Court, Justice Black has been a consistent, year-in and year-out representative of the economic aspirations of the common man. This does not mean that in particular cases his judgment has necessarily coincided with immediate group interests; other values sometimes conflict. A notable example was his *Bethlehem Steel* decision,⁸ which left to Bethlehem some highly inflated gains of World War I, but in so doing precipitated the more rigorous profit controls of World War II. Similarly in the *Steel Seizure* case,⁹ his conclusion that the President might not seize private property in peacetime was, in the immediate situation, to labor's disadvantage; yet in a longer view it is approximately as much a protection to labor as it is to all other groups. But the overwhelming bulk of Black's decisions on economic matters, within such real limits of policy as there are in the business of judging, are about what the great mass of Americans (at least in the thirties) would have wanted if they could clearly have understood the stakes. Black has well understood their "hopes and ambitions" in the antitrust and other trade regulation, the labor, and the agricultural matters before the Court.

More important, in his hands, as Senator Norris said, their liberties have been safe. The greatest single problem raised by the creation of a welfare state has been that a state aggressive enough to regularize the economy may also be aggressive enough to regularize human thought, or advocacy, or behavior in areas that, in the earlier American tradition, were none of the business of the state. A clear example is the application of the commerce power to vitalize labor unions followed by the extension of regulation to control the views of their officers. Many a conservative of the 1930's predicted that personal liberty

8. *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942).

9. *Youngstown Sheet & Tube Corp. v. Sawyer*, 343 U.S. 579 (1952).

would fall with the expansion of government, and today many an early enthusiast for the age of reform fears that these critics may have been alarmingly right.

For almost twenty years, Justice Black has preached the solving doctrine that the government should at the same time be both all-powerful and all-weak: that over the economy it should have all the power needed to cope with the problems of each day, and that over the thought, speech and spirit of the citizen it should have no power at all.

This much at least of what he conceives to be the Jeffersonian tradition, the Justice has systematically carried into our times. No one ever scared harder; and his faith in the redoubtable qualities of the Republic enables him to be unconcerned at the sea of political perils that, we are so regularly told, surrounds us.

Justice Black is the extreme proponent in public life of the view that there should be no restrictions whatsoever on freedom of speech. Since the days in the Senate when he opposed the practice of censoring books imported from abroad, he has adhered to the simple view that the First Amendment is the greatest of American liberties, and that the words "no law abridging the freedom of speech, or of the press" mean, quite simply, that there should be no law that abridges either. The Amendment is, he has said,

"precise enough to mark out an area over which Government should have no power at all The language of the First Amendment indicates to me that the Founders weighed the risks involved in such freedoms and deliberately chose to stake this Government's security and life upon preserving liberty to discuss public affairs intact and untouchable by government."¹⁰

There have been occasions when the most zealous of his admirers wish that the Justice had gone a step farther in the civil libertarian's direction. He has shown a curious indifference to the expansion of the power to search and to seize;¹¹ he went along with all his Brothers on the black day when the Court upheld the wartime power to issue racist decrees;¹² and he was not publicly recorded as dissenting from the denial of review of the Eighth Circuit decision that first upheld the validity of the Smith Act,¹³ and laid the ground work for the regression of recent years—although that case came at a time when the Court's liberal bloc might have been strong enough to build solid foundations for freedom of speech.

But that the extreme exponents of civil liberty find so little to quarrel with is a sure indication that Black has indeed been ardent in freedom's cause. He has

10. Commencement Address by Justice Black, Swarthmore College, June 6, 1955. See also the succeeding article, Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464, 475 at n.33 (1956).

11. Examples are very numerous. See, e.g., *Harris v. United States*, 331 U.S. 145 (1947).

12. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

13. *Dunne v. United States*, 138 F.2d 137 (8th Cir.), cert. denied, 320 U.S. 790 (1943).

done much to improve criminal procedure, to protect freedom of religion, and above all to guard freedom of speech. Along with Justice Douglas, he is probably the American in public life most completely out of sympathy with the concept of "internal security," as that mellifluous symbol is currently so generally used.¹⁴ It may be that the country will never recover from its fear psychosis of recent years; that it will never return to the era when an American could speak his mind or read his books without the fear that his words were being recorded or his titles turned over to secret police files. The country did recover from a lesser but similar binge in the twenties, in part because it had the charts of Holmes and Brandeis to guide the recovery. If the teachings of Black—and Douglas—perform a similar function for another generation, the Justice will have done his largest service.

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Personally, time has mellowed Black, and reduced his at most only occasional bite. Years ago, his friends rarely heard him speak a harsh word of anyone no matter how great his political enmity may have been; now they never do. Occasionally excitable and often intense, he is nonetheless a practicing exponent of the doctrine of malice toward none. Few spirits are so little rusted with rancor.

His personal routine is simple. Work, gardening, reading, tennis and a trip to Alabama or Florida whenever possible, have become habits. He has a few old friends whom he enjoys, and not the slightest interest in Washington's social life or glamor. An occasional bridge game, based on a recently mastered Goren, can occupy him thoroughly and is played with the same remarkable intensity and yet indifference to result with which he played Monopoly with his children years ago. He takes pride in the accomplishments of his children, and his grandchildren are his delight. His is a life without envy, from which whatever there was of personal ambition has completely gone out.

What of the future? Justice Black can retire when he will, knowing that he is already established as one of the great Justices beyond any serious alteration of reputation by future events. From now on out, as for some years past, his income will be unaffected by whether he works or not; and the Court routine, though itself a pleasure, interferes with other satisfactions. In this era, when moderation is the watchword and a "liberal" is someone who fights merely to retain some part of the accomplishments that Black's legislative generation won, an old New Dealer in public life has a certain air of obsolescence. Moreover, on those matters of individual liberty which are of the greatest concern, Black is in a minority so small as to be virtually hopeless. One is reminded a little of Mr. Justice Roberts, who after his retirement used to joke that he could not stay in the business of selling justice at a discount of eight to one.

14. The Justice has dissented from each step in the upholding of the "loyalty" and "security" systems; and in close cases, his views have affected the result. See, *e.g.*, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951).

And yet none of Justice Black's friends thinks that his quitting time is here. A great and to some extent personal work remains to be done. His opinions on the subject dearest to him, freedom of speech, are oddly fragmentary; most of the powerful free speech dissents have been by Justice Douglas, and yet the views of the two are not quite the same. Not only is there work to be done, but there remains a great capacity to do it. The Justice has been in seemingly hopeless minority many times before—in the 1926 race, in the Republican Senate in the 1920's, in the Wage-Hour fight of the early thirties, and as the first New Dealer on the Court—and he has lived to see the balance shift. Perhaps it will again.

In any case, whether for the Bench or for the garden—

Birthday Greetings.

And Good Luck.