

A SPRIG OF LAUREL FOR HUGO BLACK AT 75

*from Fred Rodell**

It is risky to say of a man who is still so vibrantly alive that he is destined for immortality. Yet the risk seems small when the man is Hugo Lafayette Black, who in February celebrates—or, more probably, ignores—his 75th birthday. For there is about this man an unmistakable aura of greatness. It is not alone the greatness of his contributions to constitutional law over more than a score of continuing years—although it is for these that he, like Marshall and Holmes before him, will some distant day be best remembered. It is rather a greatness of mind and heart, a rare blending of intellectual keenness and courage with human compassion that is far easier to sense than to define. And though much of this magical dual quality marks his work on the Court and seeps from between the lines of his opinions for all who can read to see, it can only be felt full-strength in the living presence of Hugo Black himself.

My own first meeting with Black came in the early summer of 1937. He was then a U.S. Senator; I was doing a piece for a magazine on a law, the Merchant Marine Act, which was largely the product of his probing and his pen. He had given me meticulous directions how to find his office, but he need scarcely have done so. For, shortly after supper, when I reached that big and ugly barn, the Senate Office Building, every office was dark save one; one Senator alone was still at work. He got up from his desk to greet me—a compact man with the bounce of a boxer, the courtliness of a Southern gentleman, and that friendly yet strong-in-depth look in his steady eyes. Just what we talked of makes no matter; it went well beyond the Merchant Marine Act. My chief recollection is of coming away, very late that night, not merely informed but strangely warmed and inspired.

The experience is common to all who meet the man. For some years back, my seminar students in constitutional law have had audiences with several Supreme Court members. Their reactions to each of the Justices as human beings have never varied. They are always delighted by Justice Brennan's casual camaraderie. They are always impressed by the good-humored bear-like dignity of Chief Justice Warren. But it is Justice

* See Contributors' Section, p. 63, for biographical data.

Black who lingers longest in their talk and in their thoughts. For him they catch and keep a sort of affectionate awe, an awareness of having encountered briefly a man they will never after forget. How put such a man in words on paper, whole?

The Who's Who stuff is, perforce, but two-dimensional. And yet he has been on the Court so long that few, if they ever knew, remember anything (save one inflated, essentially insignificant fact) about Hugo Black's first 51 years—about how he climbed from the cross-roads cabin in deep-South cotton country where he was born, eighth child of a farmer father, to become one of the top leaders of the New Deal in Congress and Franklin Roosevelt's first Supreme Court appointment. The tale begins with a slight, wiry youngster in his early teens, giving up games to frequent the Clay County courthouse in Ashland, Alabama, during the few weeks court was in session, and sniffing in, spellbound, the acrid excitement of trial litigation. (He has since confessed to Walter Mitty-like dreams of glory as a famous advocate—but not of the greater kind of glory he was to achieve.) And just as thrilling as lawyers' duels with words, inside the courthouse, were the outdoor speeches, later in the year, of Populist and Bryan-Democratic orators which interspersed political torch-light parades.

With both law and politics in his blood, by infusion rather than birth, Black, after a year's stint of medical study, turned ineluctably to law school and the bar. Before long, he was widely known as one of his state's leading trial lawyers, with cross-examination his special forte. Perhaps because of the brand of oratory he had soaked up back in Ashland, his clients came almost exclusively from the ranks of Roosevelt's "common men"—farmers, workers, small tradesmen, beaten-down Negroes—although the power and iron and lumber companies and the banks were soon bidding high for his talents. Top among these talents were two—and both are still marks of the man today. One is an extraordinary quality of intellect which loses nothing in depth for being sharp and quick and clean; an Alabama lawyer said of him, years ago, that when on his feet in court, he had "a triple-decker mind" in that he could simultaneously listen to a witness, foresee what the witness was going to say next, and plan what questions he, Black, would ask after the witness had said what Black foresaw he was going to say. Black's second special talent as a trial lawyer—and ever since—is more subtle and more rare. It is a mildness of voice and manner, stemming from his unassuming humility, which almost wholly masks the firmness and power behind it and leads all who oppose him to underestimate him—once.

Black was thus underestimated by all four of his prominent rivals—

a former governor, a former state supreme court justice, a big-shot businessman, and a well-known lawyer who later became Senator John Bankhead—when in 1926, at the age of 40 he decided to give up his \$40,000-to-\$50,000-a-year law practice and indulge his long-dormant leaning toward politics by running for the U.S. Senate. He won the race going away; and so the “Clay County hill-billy” (his own phrase) went up to Washington, looking the very antithesis of a typical Southern senator but soon to be acknowledged by his colleagues as the most back-breaking worker among them, as a bright new star so militantly liberal that one of them dubbed him an “evangelical progressive,” and as an investigator so penetrating that committees to which he did not belong would borrow him to do their examining for them. A New Dealer for six years before there was a New Deal, he handily won a second term while F.D.R. was winning his first.

It was during Black's reelection campaign that the hostile *Montgomery Advertiser* dug up in detail and spread throughout Alabama the fact which most Americans best remember about his pre-Court life. (Five years later, a Pittsburgh reporter won a Pulitzer prize simply by copying stories from the *Advertiser's* old files and so spreading the fact across the nation.) The fact, of course, is that Black in his younger days had briefly belonged to the Ku Klux Klan. That he joined the Klan thoughtlessly as a then-chronic joiner who signed up as well with the Masons, the Moose, the Oddfellows, the Knights of Pythias, and scores of others makes the fact, if no less unpalatable, at least less important. But that it was blown up to a plain implication of bigotry by those who wanted to keep him off the Supreme Court because he was too liberal for their taste was vicious and absurd; ignored was the fact, among many others, that Black, a Baptist, had been one of Catholic Al Smith's strongest Southern supporters in the 1928 presidential race. And after the storm was over, the man without an atom of religious or racial intolerance in his body settled down in 1937 to a judicial career that has ever since marked him as one of the greatest champions of human equality, regardless of color, race, or faith, ever to grace the Court and put meat and meaning into the words of the Constitution.

For the law, to Black, is not and has never been a juggling of concepts, a cross-play of principles, a writing of rules. It is rather an intricate tool which, in skillful, humanitarian hands, can be used to make life better, or at least less hard and unfair, for the real men and women with whom the law always deals. As he said, soon after he came on the Court, in the course of a decision overturning the murder conviction of four young Southern Negroes whose confessions had been tortured

out of them: "Under our constitutional system, courts stand against any wind that blows as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. . . . No higher duty, no more solemn responsibility, rests upon this Court than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed, or persuasion." This same deep empathy for people as people, especially for the less fortunate, underlies Black's whole judicial philosophy, be the case in question a criminal conviction, a recondite bit of statutory construction, or a seemingly cut-and-dried problem in contracts or corporate law.

But empathy alone would be easy—and unpersuasive. Black always bolsters his impulse to vote the humanitarian way with a wealth of careful scholarship such as few of his fellows can ever match in depth or range. By rigorous self-education which started in his youth and for years included a book-a-day diet during every summer, Black has made himself the best-read man on the Court, as he was in the Senate—not in the formal rigmarole of technical legal niceties but in the broader and more broadening realm of Western thought and ideas. The thousands of books in his library on history, economics, political theory—a dozen subjects that touch, or ought to, on law—have been not only read but marked, and it rarely takes him more than a minute to find a quote or reference he wants to use.

Hence the massive scholarly backing behind such hallmarks of Black's judicial slant and landmarks of his Court career as his lone dissent, while a freshman Justice, against the long-established rule that due-process "persons" include corporations; his early protest, carried on in case after case, against judicial protection of commerce from state regulations and taxes without any prior Congressional act or OK; his crusade, that came to a head in the four-man *Adamson* dissent, to have the Bill of Rights applied whole to the states under the aegis of the Fourteenth Amendment; his increasingly successful insistence on Court review of each suspect or tainted FELA or Jones Act decision where the court below has denied recovery; his related resolve to maintain intact the right of jury trial in personal injury or death cases and in criminal cases as well; and, especially of late, his zeal to have the Court protect absolutely, under the absolute words of the First Amendment, the first four freedoms. On some of these, as on other matters dear to his humane heart and scholarly mind, Black has won but a partial victory if any victory at all. And yet it may some day make much sense to apply to a

wider range of reference the words with which Black closed his *Dennis* dissent, on a note of wishful and almost wistful prognostication: "There is hope, however, that in calmer times, when present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."

Inevitably, then, Black must be compared to Holmes, who also lost most of his big judicial battles on the Court—and with whom there are other points of striking likeness. Thus, Black is, as was Holmes, a deeply book-learned man, although the two achieved their learning in utterly disparate ways:—Holmes almost by osmosis from his background, upbringing, and early education; Black in spite of his. Black (with Douglas) is, as was Holmes (with Brandeis), the acknowledged leader of what, for all its fuzziness, can only be called the Court's liberal wing. Since that wing is, as it was in Holmes's day, more often than not in the minority, Black's greatest and most eloquent exhortations for a dynamic, unstuck-in-the-mud-of-the-past brand of judicial liberalism have usually been spoken, as were Holmes's, in dissent. And one last similarity comes into the picture if only by inferred projection:—it is simply that, though Holmes may have lost most of his big battles while he lived, his ideas were due, after his death, to win the war. So might Black's.

But Black can be contrasted to Holmes as easily as compared. Where Holmes spent all of his adult life as a lawyer-teacher-jurist and knew nothing of other government processes except second-hand, Black served eleven active years in the nation's top legislative body and knows much that Holmes could never have known about the intimate day-to-day workings of government in action—a knowledge of incalculable value on a Court so often called on to interpret laws or occasionally overturn them. Again, where Holmes, though wisely tolerant, viewed affairs—and cases—with Olympian detachment plus a touch of amused or annoyed condescension, Black passionately cares about the stuff of life that the Court deals with through law and about the part the Court can play in running the government on behalf of the people. So too, where Holmes, with his way-up-there air of skepticism and serenity, saw the Court's proper role, in his own image, as a comparatively passive observer of what went on in the nation below, Black sees the Court's role, likewise in mirror of himself, as an active participant in what goes on in the nation all around it. In this sense, Black's judicial philosophy stems, as Holmes's did not, from that of John Marshall, the great Chief Justice who never blinked at using the Court, the law, and the Constitution as tools toward whatever ends he cared to achieve. Indeed, there is in

Black a mid-Twentieth Century amalgam of the best of Marshall with the best of Holmes.

This man is meant for the ages. No future Supreme Court Justice, a hundred years hence or a thousand, will ignore with inner impunity the myriad brilliant insights, learned analyses, yes, and fervent faiths that mark, in majority or dissent, his judicial record. The pity is only that Hugo Lafayette Black in person—he of the warm wisdom and quiet courage and gentle strength—cannot, as will his opinions, live forever.