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HUGO LAFAYETTE BLACK: IN MEMORIAM

Philip B. Kurland†

THE RECENT DEATHS OF HUGO BLACK AND DEAN ACHESON certainly mark the end of an era. The last of the giants spawned by the New Deal are now gone—James F. Byrnes retired from the scene some years ago—and the inheritance of the New Deal has probably gone with them. It is not that the two shared very many attributes or values. Acheson was the closest thing to a Whig aristocrat that democratic America is likely to produce; Black was a man of the people. The former typified the notion of government for the people; the latter, government of the people. But such disparities are also of the essence of the New Deal: eclectic, heterogeneous, motley; nationalistic, paternalistic, concerned.

The fact is that neither of these men made their deepest marks on our history until after the demise of Roosevelt. Neither of them was an epigone. Each was an original. The one bent the Constitution to his understanding of it; the other framed our foreign policy for a nation newly emerged into world dominance. Whether one agrees with Black's reading of the Constitution or of Acheson's formulation of our foreign policy—and I am quick to admit that I disagreed substantially with both—one must acknowledge that, in their respective fields of endeavor, each was probably the most influential American of his time. Perhaps it is a sign of my old age that, in looking about me today, I see no giants to fill their shoes. I see only a world of Lilliputians in which pygmies are regarded as Brobdingnagians.

My sense of grief is not based on personal acquaintance. I knew each of these men only slightly. But my sense of personal loss is nevertheless great. There is a void and there should be an anxiety as to how that void is to be filled. Obviously Mr. Acheson is not the assigned topic of my lament. But it is appropriate to note that, just as the loss of Justices Black and Harlan marked the end of a judicial epoch, so, too, does the loss of Messrs. Black and Acheson mark the end of a political era. Nor was the work of the one irrelevant to that of the other. Black the egalitarian and Acheson the aristocrat both had a commitment to excellence, both had what was known in

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I have not documented the obvious propositions I have put forth here. A close study of Black's opinions is certainly to be expected. I did not regard this as either the appropriate time or the appropriate place. Nor did I think that I was the appropriate person for such a task. For among those engaged in the business of Court watching, I am one of the less sympathetic to Mr. Justice Black's point of view, but not the least appreciative of his importance.

bygone days as "style," both had become redundant in our present social climate that they were so influential in forming.

We have a strange custom of attributing the role of the Supreme Court in our government to its Chief Justice. Thus we speak of the Marshall Court, the Taney Court, the Hughes Court, etc. As a substitute for a chronological description, the names of the Chief Justices are appropriate. As an indication of the leadership on the Court such appellations are accidental. Even with the "Great Chief Justice," who undertook the writing of the Court's opinions in such abundance, it is probably invalid to attribute to him the responsibility for the genius that was the Court's under his presidency. The Court is a collegial body—perhaps less so today than in the past—but no single member however powerful his intellect and whatever his title has dominated the Court's thought and action.

To deny such domination, however, does not require the rejection of the patent fact that some Justices are and have been more important than others. Certainly the center chair gives an additional authority, but not necessarily an additional power. Certainly, too, longevity of service has proved to be of great importance in permitting a Justice to effect his will in the adaptation of the Constitution to his times. But the Chief Justiceship by itself, witness Chief Justice White, and length of tenure by itself, witness Samuel Nelson, John Catron, Robert Grier, is not adequate to assure that a Justice will make his mark on our Constitutional jurisprudence. Length of tenure may be a necessary but not a sufficient condition for judicial greatness. The Chief Justiceship is neither a necessary nor a sufficient condition, except as the occupant of that chair lends his name if not his ideas to the period of his service.

Mr. Justice Black was Franklin Roosevelt's first appointee to the Supreme Court. And so, just as his death denotes the end of a judicial epoch, so too his appointment marked its beginning. If any single judicial name is appropriate for historians' use as an appellation for the evolution of our Constitution from the stage of "freedom of contract" to that of "freedom of expression," it should be Black's.

Three and a half decades is sufficiently long to dim most memories. And yet it was from the beginning of his career on the bench that Black began to move the Court to his own way of thinking. In one sense, his early efforts toward justifying governmental authority over the economy and social welfare were of a different character from the work of his later years, in another even the early days reveal a pattern that has been followed throughout his tenure. For Black proved early to be doctrinal in his approach, creating or discovering broad principles which he sought to bring the Court to accept.

Almost never was he successful in selling the Court on his doctrine. Almost always was he successful in bringing the Court around to the conclusions he would reach by way of his doctrine. A few examples must suffice.

His broad reading of the affirmative grant of power to the national government contained in the commerce clause did indeed come to fruition in the cases sustaining the Civil Rights Act of 1964. But his arguments for such a reading began with a Court that decried almost all government restraint on private economic power. On the other hand, his doctrinal reading of the negative implications of that same clause, that there were no restraints on state regulation of economic matters except as spelled out by congressional action, never was accepted. But the results have been largely consistent with that reading, except in the face of patent discrimination by a state in favor of its own citizens.

It was Mr. Justice Black who pressed the argument that all of the Bill of Rights were encompassed, some way or another, within the fourteenth amendment's limits on state government. Again, he never succeeded in convincing his brethren that his was the proper reading to be afforded to the fourteenth amendment. Today one has to look long and far, however, to discover limits that the Bill of Rights places on the national government that are not also regarded as limitations on state power by reason of the fourteenth amendment.

For Mr. Justice Black, the first amendment ban on inhibition of speech and press was an absolute. When he said in an extrajudicial presentation that even libel and obscenity were protected by the first amendment, some of his most ardent supporters suggested that he really didn't mean to be so doctrinaire. When we look at the Court's opinions over the recent decades, however, we note the destruction of the concept of libel by way of *New York Times v. Sullivan* and its progeny. We note, too, that there is little of what was once considered obscene that is not now protected as within the propertities of ordinary discourse.

Mr. Justice Black's role in the step-by-step process that led to the school desegregation cases may be less patent, but no less real. We should not forget that the attempts by the Court at admitting black Americans into the American polity on an equal status started before *Brown v. Board of Education*, perhaps with Black's appointment to the Court. So, too, in the other area for which the Court has been damned and praised because of its action, the reapportionment cases, Black had moved toward the results of *Baker v. Carr* and its necessary implications in 1946, long before the Warren Court era.

I have noted but a few of the fundamental changes in the reading of the Constitution brought about by the Supreme Court during Mr. Justice

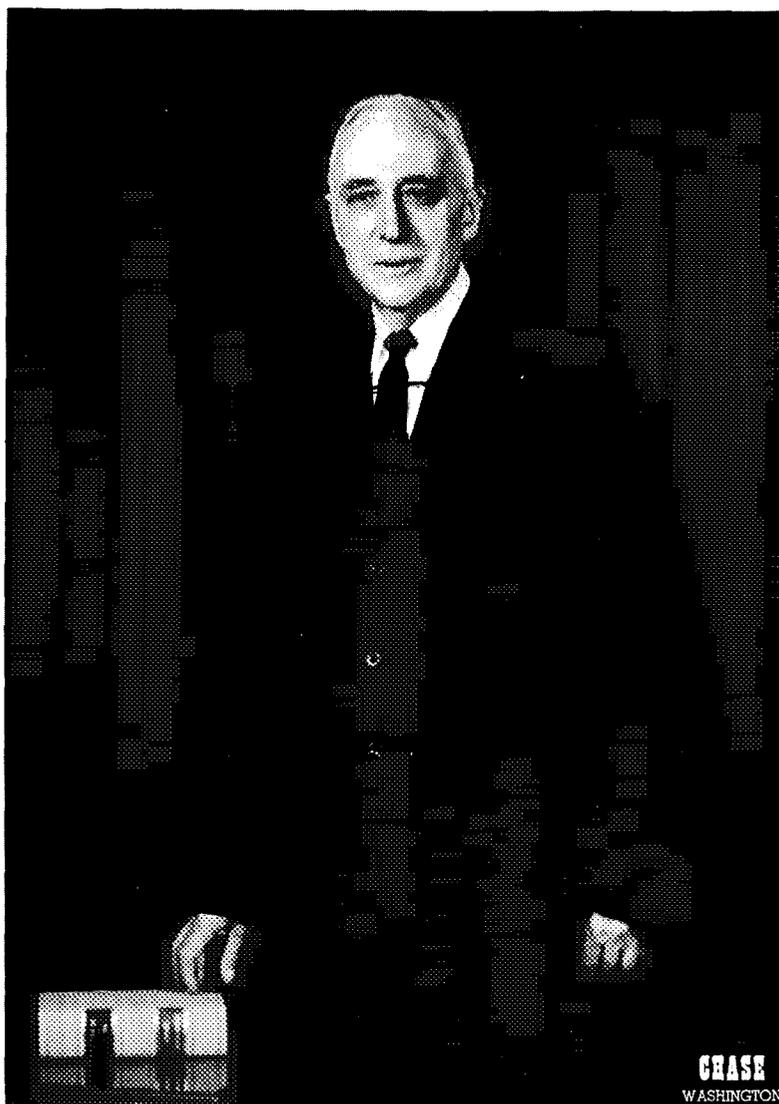
Black's tenure. It could be mere coincidence that the Court, in each instance, moved the way that he would have it move. No student of the Court will give much credence to such a thesis. It was Black who played a vital role in the transmogrification of our Constitutional law. Certainly neither Hughes, nor Stone, nor Vinson, nor Warren, nor yet Burger—Black served with five of our fifteen Chief Justices and thirty of our ninety-eight Justices—had as much responsibility for making the Constitution what it is today as did Mr. Justice Black. For better or worse, our Constitution reads today pretty much as Mr. Justice Black has always wanted us read it. And so, for the reasons that history has accorded the accolade the "Great Chief Justice" to John Marshall, it may well come to recognize Hugo Black as the "Great Justice." No other Justices have left such a deep impression on our fundamental document. None is likely to do so in the near future.



HUGO L. BLACK

.....
I understand that it is rather old-fashioned and shows a slight naivete to say that "no law" means no law, but what it says is, "Congress shall make no law."

.....
*And being a rather backward country fellow, I understand it to mean what the words say.**



JOHN M. HARLAN

*. . . But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason. . . .**

* *Mapp v. Ohio*, 367 U.S. 643 (1961) (Harlan, J. dissenting).

