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HUGO BLACK AMONG FRIENDS

*Dennis J. Hutchinson**

HUGO BLACK: A BIOGRAPHY. By *Roger K. Newman*. New York: Pantheon. 1994. Pp. xiv, 741. \$30.

To the generation of law students born after Earl Warren retired, Hugo Black, who lived from 1886-1971, is now a shadowy figure. But to those who came to the profession during the “moral epoch” of the Warren Court,¹ Black was the living embodiment of the liberal judicial ideal. He wrote simply and passionately about freedom of speech and equal protection of the laws, he was steadfast against official oppression and petty brutality, and he took his bearings from the text of the Constitution — a copy was always tucked in his suit pocket. The image, which Black carefully crafted, belied an extremely complex personality whose influence on the Supreme Court went far beyond his own published opinions. Indeed, Black may have been the most influential member of the Court for the two decades following the outbreak of World War II. More than any other single Justice, Black molded the agenda of cases that the Court heard during the period and shaped the terms of discourse used by the Court to decide those cases. Even further behind the scenes, Black tacitly influenced scholarly evaluation of the Court’s performance: an ex-clerk would leap to Black’s defense in print² when he was criticized, and other allies turned debate over constitutional issues into a personalized comparison of the virtues of Black and Justice Felix Frankfurter.³

To the public, of course, Black was solely a creature of his opinions — brief, highly accessible odes to liberty, which he grounded in classical thought and constitutional history, and which he insistently tied to the text of the Constitution. These opinions hooked Roger K. Newman⁴ as an undergraduate: “In 1967,” he reports in

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1. See Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922 (1983).

2. See, e.g., JOHN P. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS (1948); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947).

3. See, principally, FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790-1955, at 264-66, 270-73 (1955); Fred Rodell, *Justice Hugo Black*, 59 THE AMERICAN MERCURY 135, 142-43 (1944); Fred Rodell, *Supreme Court Postscript*, THE PROGRESSIVE (May 27, 1946), at 5.

4. Research Scholar, New York University School of Law.

the Epilogue, entitled "Of Hugo and Me," "I was one of the young devouring Hugo Black's opinions. . . . What began as a curiosity became a frequent preoccupation and then, admittedly, an obsession. The long journey started" (p. 626). The end of the journey, nearly three decades later, is the most detailed study of Hugo Black that we have ever had or are likely to have. Mr. Newman has been tenacious, undaunted by Black's rather petulant decision to burn all of his conference notes and many of the materials in his case files — "You don't seem to want to pay the price of fame," his friend Virginia Durr chided (p. 610). The biography, needless to say, is authorized. Newman's Epilogue acknowledges the energetic support of the Black family, including both of the Justice's sons and daughter ("she started as a 'source' and turned into a dear friend" (p. 631)).

Newman does not imply that his work is designed to satisfy the Black family, however, and it is hard to see how it could. The most revealing details in the volume touch on private and sometimes embarrassing personal matters that shed little light on the Justice's views but appear intended to humanize him — if somewhat darkly. The resulting portrait is an even more overbearing husband and domineering father than appears in either the second Mrs. Black's published diaries⁵ or Hugo Black, Jr.'s deferential memoir.⁶ We learn, for example, that Sterling Black, Jr. — the Justice's grandson — was suspended from public high school for circulating an underground newspaper shortly after the Court heard argument in *Tinker v. Des Moines School District*.⁷ Newman suggests that Black's "vicious harangue" (p. 592) dissenting in *Tinker* was fueled by his disappointment with both his grandson and with his son, Sterling, the head of the New Mexico ACLU, who planned to challenge the suspension in court. "If the case ever reaches the [Supreme] Court, I will disqualify myself not only in it but in every other case in which the ACLU takes any part, no matter how small."⁸ The incident is arresting, but not as self-explanatory as Newman implies. By 1969, when the Court decided *Tinker*, Justice Black had long since publicly abandoned any hint of "absolute" protection for nonverbal speech. He was testy about sit-ins and flag-burning, and the neces-

5. ELIZABETH BLACK, MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK (1986).

6. HUGO BLACK, JR., MY FATHER: A REMEMBRANCE (1975).

7. 393 U.S. 503 (1969).

8. Pp. 592-93. It is not clear whether Black's statement came in a letter or in a telegram, nor is it clear when Sterling Black received it. The footnote and source-citing apparatus in Newman's book is confusing. Footnote signals appear to drop randomly, and the notes collect abbreviated cites that may span several paragraphs. Too often, specific quotations or facts lack a specific source. The author is conscious of the problem (p. 634), but his cure is unsuccessful.

sity for public order became a frequent theme. At the same time, the Justice never hesitated to give imperative advice to his children or to his wives — his first wife died in 1952 — often in fiercely uncompromising terms. “Vicious harangues” on a range of topics came frequently at this point in the Justice’s life.

Newman’s account of *Tinker* fails to pull Black into sharp focus, but more importantly, it ignores other work that helps to explain the tenor of Black’s famous dissenting opinion. Laura Kalman’s authorized biography of Justice Abe Fortas reports:

By the 1968 term one of Warren’s clerks considered the tension between Black and Fortas “one of the most basic animosities on the Court.” In every case Fortas cared about — *In re Gault*, *Powell v. Texas*, *Time v. Hill*, *Snyder v. Harris*, *Epperson v. Arkansas*, *Tinker v. Des Moines School District* — Black was on the other side. . . . Black long had contended that the due process clause of the Fourteenth Amendment incorporated the constitutional guarantees of the first ten amendments and applied them to the states. It followed that he would disagree with Fortas, who did not believe in full “incorporation” and who argued that courts properly could interpret due process as a broad guarantee of fairness.

The feud between the two men also became personal, and one of their brethren said, “I blame that on Black.”⁹

Mr. Newman notes before his discussion of *Tinker* that the “tension” between Black and Fortas “was the only source of true friction on the Court” at the time (p. 590), but he neglects to mention that Fortas was the author of *Tinker* or that the flare-up with Black was only the culmination of a series of pointed, and increasingly sarcastic, exchanges between the two that had largely remained within the Court until *Tinker*.

Perhaps the problem is that Mr. Newman’s long-simmering stew has too many ingredients in the pot. Newman reports in his Epilogue that he did research in thirty-three states at more than one hundred institutions and conducted more than one thousand interviews (pp. 640-42). As the *Tinker* episode illustrates, however, the enormous archive of data does not necessarily always come together to create an illuminating context or to provide a persuasive explanation of Black’s motivations or objectives. The wisdom of Justice Black’s convictions is self-evident, at least in his opinions before his last few years on the Court, of which Mr. Newman reluctantly concedes that “Black’s Constitution had become all anchor and no sail, all umbra and no penumbra. As he aged and his tendons shrank, so did the joints in his Constitution lose their elasticity” (p. 594).

9. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 321 (1990) (footnotes omitted).

Justice Black's retreat from an expansive application of the Bill of Rights — at least of the First and Fifth Amendments — poses only one of the paradoxical puzzles of his thirty-four plus years on the bench. In an unsparing essay that deserves more attention than it is likely to receive, Michael Klarman declares:

Black, who had joined the Ku Klux Klan in 1923 to enhance both his budding political career and his credibility as a litigator performing before Klan-dominated Alabama juries, developed a reputation as one of history's great defenders of minority rights. Black, the Bible Belt Baptist, authored most of the Court's strict church/state separation opinions of the post-war era. And Black, a hero (along with Douglas) to millions of mid-century political liberals, compiled a voting record during his last half dozen years that can only be described as reactionary — dissenting, sometimes alone, in cases such as *Griswold*, *Harper*, *Katz*, *Witherspoon*, *Hunter v. Erickson*, *Sniadach*, *Tinker*, *Goldberg*, *Winship*, *Boddie* and *Cohen v. California* (and seriously contemplating doing so in *Swann*).¹⁰

Mr. Newman casts little light on these problems. *Everson v. Board of Education*¹¹ and *McCullum v. Board of Education*¹² — the watershed church and state cases — are dispatched in five pages, largely with quotes from others. The late cases, beginning with *Griswold*, tend to get short shift, if any, perhaps because they collectively belong to the “anchor” period of Black's constitutional thought.

The presentation of Black's Klan membership is the most unsatisfying treatment in the book, though it is not clear whether Black or Newman is more at fault. The basic facts of his involvement are now well-known. Black joined the Klan in 1923. Fearing unfavorable publicity in the future, he executed a letter of resignation in July of 1925, which he left on file with local Klan officials. He then proceeded to campaign for the U.S. Senate as the Klan's implicit candidate in the 1926 election. After a decade in the Senate, where Black fought aggressively for the New Deal in general and for organized labor in particular, President Franklin D. Roosevelt named Black in 1937 to fill the first Supreme Court vacancy in Roosevelt's administration. Following Black's confirmation, a newspaper reporter broke the Klan story — complete with photostatic copies of relevant documents — and a political firestorm erupted. President Roosevelt was acutely embarrassed, and Black was under pressure to resign from the Court even before he formally took his seat. The storm subsided only after Black made an eleven-minute national radio broadcast, heard by the second largest audience in history; Edward VIII's abdication speech the previous year was first.

10. Michael Klarman, Book Review, 12 L. & His. Rev. 399, 401 (1994).

11. 330 U.S. 1 (1947).

12. 333 U.S. 203 (1948).

Black's brief statement made two points: that he had been a member of the Klan for a short time, but, at greater length, that he vigorously opposed bigotry in all forms. He took his seat on the Supreme Court three days later.

Newman devotes an entire chapter, almost twelve pages, to the Klan question. From 1937 on, Black was highly defensive about his prior Klan membership. Newman recounts nearly a dozen explanations from the Justice about why he joined in the first place — most of which Black provided privately to friends and staff over a period of thirty years. Some of the excuses contradict each other, and the cumulative effect has the ring of special pleading. He was a joiner, and the Klan was simply one more fraternal order (p. 99); or, the Klan was so powerful socially and politically in Birmingham that he could not afford not to join (pp. 96-97); he never gave a dime to the Klan; or he paid ten dollars so that a Klan recruiter would stop pestering him (p. 96). He provided the least plausible excuse to a friend during his first month on the Court: "When I joined the Klan, it was not anti-Catholic or anti-Jewish. With other progressive Democrats, I went in to prevent it from falling into the hands of machine politicians. We succeeded and I quit when I saw the Klan was going in the wrong direction" (p. 98). Twenty years later, he told a group of law clerks, "if you wanted to be elected to the Senate in Alabama in the 1920s, you'd join the Klan too" (p. 100).

The nagging question is not what Black's motivations in fact were in 1923, but what effect a lifetime of guilt had on his judicial career. Newman never accuses Black of calculation, but he strongly implies that early in Black's career the Justice inflated his rhetoric in opinions condemning racial discrimination for instrumental reasons that included enhancing his own standing within and without the Court. During his first two years on the Court, by Newman's account, Black worked fourteen hours a day with only modest results. His early opinions often sounded like Senate speeches, and Justice Harlan Fiske Stone indiscreetly criticized Black's work to the columnist Marquis Childs, who promptly reported Stone's complaint. Stone even wrote Felix Frankfurter at Harvard Law School and suggested that he surreptitiously tutor Black (p. 275). To Newman, *Chambers v. Florida*,¹³ in October Term 1939, provided Black with the opportunity to prove himself to his colleagues and to expiate his youthful fraternal sins. Black wrote a forceful opinion for the Court in *Chambers* invalidating the criminal convictions of young black defendants who had been subjected to the third degree. "Any doubts about Black's commitment to the Constitution and civil liberties," writes Newman, "were quickly stilled. Com-

13. 309 U.S. 227 (1940).

mentators heaped praise on him; to his supporters it was vindication" (p. 283).

Black's vindication was compromised four years later. For the consummate liberal, *Korematsu v. United States*¹⁴ is as inexplicable as it is disgraceful. Writing for a six-man majority, Black sustained the constitutionality of the compulsory removal of one hundred and twenty thousand residents of Japanese descent — including seventy thousand citizens and fifty thousand aliens — from the West Coast during World War II. Black justified the military order on the ground of practical exigencies: "Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."¹⁵ Eugene Rostow condemned the decision in *The Yale Law Journal*,¹⁶ and it quickly became the *Dred Scott* of its day.

The question about *Korematsu* is why Black felt he had to justify the executive order, especially on constitutional grounds. The point is far from hypothetical. Until the last minute, Justice Douglas was prepared to dissent and had circulated an opinion dissenting on statutory rather than constitutional grounds. The split among the Justices was thus 5-4, with Black holding the decisive vote. One wonders, though Newman does not ask, why Black did not adopt Douglas's position. The wartime necessity justification was no longer relevant; two weeks after the court announced its decision, the Army canceled the total exclusion order. Was Black reluctant to second-guess judicially the ailing President whom he had embarrassed at the time of his appointment? Was he even more unwilling to condemn constitutionally General John L. DeWitt, who issued the exclusion order and who was an old Alabama friend (indeed, the man with whom Black briefly stayed when he was elected to the Senate in 1926)? Newman reports that *Korematsu* "troubled Black for the rest of his life" (p. 318), but not enough for him to recant his role — unlike Earl Warren, who supported exclusion as Attorney General of California but who declared it "wrong" in his *Memoirs*.¹⁷ Justice Black was unrepentant to an interviewer in 1967:

I would do precisely the same thing today, in any part of the country. I would probably issue the same order were I President. We had a situation where we were at war. People were rightly fearful of the Japanese in Los Angeles, many loyal to the United States, many undoubtedly not, having dual citizenship — lots of them. They all look alike to a person not a Jap. [p. 318]

14. 323 U.S. 214 (1944). See ROGER DANIELS, *THE DECISION TO RELOCATE THE JAPANESE AMERICANS* (1975); PETER IRONS, *JUSTICE AT WAR* (1983).

15. 323 U.S. at 216.

16. Eugene V. Rostow, *The Japanese American Cases — A Disaster*, 54 *YALE L.J.* 489 (1945).

17. EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 149 (1977).

The sentiment chillingly echoes General DeWitt's testimony to a congressional committee more than twenty-five years before, which Newman quotes: "A Jap's a Jap. It makes no difference whether he's an American citizen or not. There is no way to determine their loyalty" (p. 313). Black's identification with General DeWitt's "plight" suggests that the Justice always saw the case from the perspective of the policymaker on the scene and not from the perspective the judge faced with creating constitutional, or at least statutory, precedent. Black made a career of condemning judges who used the Due Process Clauses of the Fifth and Fourteenth Amendments to substitute their policy judgments for those of legislators and administrators. *Korematsu* stands as a lesson learned too well.

If *Korematsu* was the personal low point of Black's judicial career, *Adamson v. California*¹⁸ was the high point. Black's dissent in *Adamson* argued that the Due Process Clause of section one of the Fourteenth Amendment "incorporated" the protections of the first eight Amendments against the actions of the states. It was his "most important" opinion, Black told Newman, "no question about it" (p. 352). Newman adds little to previous accounts of the substance of the *Adamson* debate. He concedes that "Black's was an advocate's history: he proved too much and ignored or swept away all doubtful evidence" (p. 354). And, once more, we hear about Black's thin skin: he suspected Frankfurter of instigating Charles Fairman's forceful critique in the *Stanford Law Review*¹⁹ in return for Fairman "get[ting] a job at Harvard" (pp. 356-57). Black even considered, but abandoned, having his law clerk, Louis Oberdorfer, write a rebuttal to Fairman (p. 357). "Like the snake that kept rising up, Fairman's article was always on Black's mind," Newman says. "He had no doubt he was right historically" (p. 359). In any event, Black was deeply invested in his position. He had staked his intellectual reputation on the opinion, and his entire judicial strategy depended on developing a formula for restricting judicial discretion in the interpretation of the Due Process Clauses while nonetheless reaching what he viewed as liberal results. Or as he told an interviewer in 1967: "If I didn't find that this was [the section one drafters'] view, my career on the Court would have been entirely different. I would not have gone with due process and I'd be considered the most reactionary judge on the Court" (p. 353) — evidently an unacceptable consequence.

Or at least it was until 1964. Newman explains Black's drift to "the other side from those liberals" (p. 543 quoting Black) as a

18. 332 U.S. 46 (1947).

19. Charles Fairman, *Does the 14th Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

function of events overtaking the man. The critical case, according to Newman, was *Bell v. Maryland*,²⁰ involving sit-ins:

Formerly [Black] had treated dissenters as heroes indispensable to progress, who helped the country live up to its highest aspirations. Now he disparaged protest groups and their leaders: he considered them ambitious, misinformed, dangerous agitators. A very different Black was focusing on constitutional limitations of a very different sort. [p. 551]

Newman mentions in passing two other factors that influenced Black, but they require more emphasis. First, the Court had changed, and for the first time in two decades, Black was no longer its philosophical leader. Warren, Douglas, Brennan, and Goldberg, later replaced by Fortas, did not share Black's anxieties about using the Due Process Clauses expansively. Personally, Black was alienated from the liberal wing of the Court. Douglas, always more an ally than a friend, had fallen from grace in Black's eyes due to his colorful personal life. Goldberg and Fortas were unshaken by Black's growing peevishness, which seems to have made Black dig into his new positions even more deeply. Second, street protest offended Black's sense of order, particularly as it exploded bloodily in the South. To protect the protester was to sanction violence, which Black found incongruent with the Constitution. Black had been reviled in many parts of Alabama for supporting the desegregation decisions in 1954 and 1955, and his reputational wounds from that period were finally healing. Constitutionalizing sit-ins threatened the rapprochement. Newman quotes remarks from Warren that ring true, even if they reflect no credit on either Justice: "Hugo just wants to be buried in Alabama" (p. 551).

Still, Hugo Black had one "grand finale" (p. 613) in him — *New York Times v. United States*,²¹ the Pentagon Papers Case — which he thought was "the most important First Amendment opinion of his career" (p. 617). Newman tries to crank up a dramatic climax to square with Black's estimation of his swan song, but neither the political nor the doctrinal stakes seem to match the Justice's pride of authorship. Nonetheless, Newman concludes: "The nation survived the publication of the Pentagon papers; indeed it became stronger as a result. Without such cases and without judges willing to affirm the commands of the First Amendment, the sounds of hobnailed boots might well be heard marching in the night" (p. 619; footnote omitted).

The Pentagon Papers episode provides a monumental conclusion to what Newman designed as a monumental book. The monument commemorates Black's civil rights jurisprudence, especially

20. 378 U.S. 226 (1964).

21. 403 U.S. 713 (1971).

his opinions on the First Amendment, rather than his entire judicial career. Perhaps six hundred richly detailed pages of text is enough. Black, however, was more than the Bill of Rights and the Fourteenth Amendment. He had a reputation within the Court as a master tactician who worked well with very different people and who used his forensic and temperamental skills to great advantage. Newman quotes Justice Harry Blackmun as recalling that even in his eighties, Black was a "canny, lovable manipulator . . . ever the politician, ever the Senator still" (p. 601). Newman never shows us examples of those talents in action, which is a shame. Newman's substantive omissions are even more unsatisfactory. He barely touches on Black's judicial view of the Commerce Clause, a critical issue during the New Deal, and he provides only one paragraph on the civil jury — one of Black's great passions.²² Newman totally neglects Black's important writings on antitrust law,²³ federal jurisdiction and abstention,²⁴ and labor law.²⁵ The final omission is the least understandable. Black's political career in Alabama was rooted in the labor movement, and his crowning achievement in the Senate was federal minimum-wage legislation. His judicial opinions never shirked from protecting the rights of labor, statutory or constitutional.²⁶ Notwithstanding the gaps in coverage, and they are far from trivial, Hugo Black has been fortunate in his chosen biographer. Mr. Newman is sympathetic, to say the least: Black's enemies are his enemies, and Black's friends, often literally, are his friends. Author and subject were obviously comfortable with each other. The resulting volume may include a few unattractive vignettes but nothing that would threaten friendship.

22. See, e.g., *Dairy Queen v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).

23. See, e.g., *United States v. Von's Grocery*, 384 U.S. 270 (1966); *Eastern R.R. Presidents Conference v. Noerr Motor Freight Co.*, 365 U.S. 127 (1961); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959); *Timken Roller Bearing v. United States*, 341 U.S. 593 (1951); *Kiefer-Stewart Co. v. Joseph Seagram & Sons*, 340 U.S. 211 (1951); *AP v. United States*, 326 U.S. 1 (1945).

24. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Younger v. Harris*, 401 U.S. 37 (1971).

25. See generally Ivan C. Rutledge, *Justice Black and Labor Law*, 14 UCLA L. REV. 501 (1967). When Justice Frankfurter mounted a campaign against review of pro-employer judgments under the Federal Employer's Liability Act (FELA), Black led the successful counter-attack. See Dennis J. Hutchinson, *Felix Frankfurter and the Business of the Supreme Court, O.T. 1946-O.T. 1961*, 1980 SUP. CT. REV. 143, 155.

26. See, e.g., *Giboney v. Empire Storage & Ice*, 336 U.S. 490 (1949); *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U.S. 287, 299 (1941) (Black, J., dissenting); *Milk Wagon Drivers' Union v. Lake Valley Co.*, 311 U.S. 91 (1940).