Black Championed

New Deal, Civil Rights

By Alan Barth
Washington Post Staff Writer

Hugo LaFayette Black has long been recognized as one of the authentic giants in the history of the United States Supreme Court. He shaped the course of American constitutional law as powerfully, perhaps, as any other single jurist of the 20th century.

A police court judge, a prosecuting attorney, an influential lawyer in private practice in his native Alabama, a formidable champion of the New Deal in the United States Senate, Black was President Franklin D. Roosevelt's first appointment to the Supreme Court, serving as an associate justice for 34 years, from his installation in October, 1937, until his retirement this month at 85.

The imprint of his rural Southern background was always strong upon him—in his Populist impulses, in the style and intonation of his speech, in a modesty of manner, in colloquialisms of expression that belied his erudition and, above all, in an awareness of and sympathy for the problems of ordinary men and women.

Many who resisted the imperatives of the civil rights movement called Hugo Black a traitor to the South because he played a leading role in the 20th century emancipation of the American Negro. Many called him a radical because he believed in according freedom of expression to odious opinions and in assuring all the protections of due process of law to odious defendants. Those who admired the Justice attributed these beliefs to an inveterate commitment to the ideas of human equality and individual liberty.

Through the whole of his career, he was at the center of controversy. It never seemed to ruffle his poise or disturb his dignity; and he rarely sought to justify or explain his views except in his formal, written opinions as a member of the Court.

Wrote With Lucidity, Force

He wrote with extraordinary simplicity, lucidity and force. In a number of great causes—the right of indigent defendants to be given the assistance of counsel at public expense, for instance, and the right to equal representation in legislative bodies—dissents written by him in his early years on the Court came, in time, to win majority acceptance.

Although largely self-educated, he brought broad reading and great learning to his work as a jurist, often illuminating his opinions with apt references to history. Passionate in his convictions and often bitingly and even aggressively incisive in his expression of them, he nevertheless held the warm affection of almost every one of his colleagues on the Court. Over a 20-year span, he and Felix Frankfurter carried on an unrelenting intellectual conflict over the meaning and application of the due process clause of the 14th Amendment—a bitter battle between Titans—without any diminution of respect and regard on either side.

When Justice Black retired on Sept. 17 from the Supreme Court citing health reasons, he had served longer than any other justice except Chief Justice John Marshall and Justice Stephen J. Field. The record for length of service was held by Justice Field, who retired in 1897 after serving 34 years, six months and 11 days. Marshall was on the Court for 34 years, four months and two days.

One-fourth of the justices who have sat on the Court and one-third of the chief justices had served during Black's long tenure. At 85, he ranked as the third oldest sitting justice in the history of the Court. Justice Oliver Wendell Holmes stepped down in 1932 at the age of 91 and Chief Justice Roger B. Taney died in office in 1864 at 87.

Youngest of 8 Children

Hugo Black, born Feb. 27, 1886, in Clay County, Ala., was the youngest of eight children in the family of William Black, a farmer of Scotch-Irish descent. The circumstances of his childhood were neither privileged nor penurious. The family lived when he was very young in a log farmhouse with a privy at the rear. Soon after he was born, however, his father abandoned farming, moved to Ashland, a town of about 350 people, and became co-owner of a store.

The move to Ashland was made primarily to enable the children to attend school. Hugo contributed to the family finances by picking cotton and setting type for a weekly newspaper. He had time for sports; and he was encouraged in a natural bent for reading. Politics was a pervasive part of his environment. Although his father was a conservative Democrat and Hugo himself never strayed from the party, he was exposed during his youth to egalitarian ideas and the agrarian radicalism that William Jennings Bryan brought into the Democratic Party.

One of the ablest of Black's biographers, John P. Frank, says of this period: "The antimonopoly and rate regulation philosophies of the Populists and most of the rest of their social outlook on government and business have been a part of Black at least from young manhood. In terms of most of his social values, Black was an incipient New Dealer before he ever left home."

Attended Medical School

At 17, when he had graduated from a slightly glorified community high

school called Ashland College, Black went to medical school for a year. At the end of that time, bypassing any undergraduate college education, he entered the University of Alabama Law School.

There followed a year of law practice in Ashland, and in 1907 he went to Birmingham, rented a desk in an attorney's office for $7 a month, joined just about every fraternal organization in the city and did such odd legal jobs as he could get his hands on.

His first real case was a damage suit for 15 days' pay for work done by a Negro convict leased to a steel mill and kept overtime on the job. He won an award of $137.50 for his client. He won, also, appointment as a part-time police court judge for the city of Birmingham. This meant handling an enormous caseload of unfortunates, mostly black, charged with drunkenness, disorderly conduct and other petty offenses. Black brought both compassion and efficiency to the task.

In 1914, Black became county prosecutor. The most spectacular aspect of his career in this office grew out of his discovery that the police department of Bessemer, a Birmingham suburb, was running a third-degree torture chamber to get confessions from black defendants. He presented evidence to a grand jury, persuading it to charge the use of third-degree tactics "in a manner so cruel that it would bring discredit and shame upon the most uncivilized and barbarous community." Hugo Black never forgot what he learned in Bessemer.

After a brief tour of military service in World War I, Black engaged in private practice in Birmingham. Although he had few corporate clients, he achieved exceptional success as a personal injury lawyer and as counsel for labor unions.

In 1925, he ran for the U.S. Senate. Without organization support and with almost no financing beyond his own pocketbook, he reached every part of Alabama in his Model-T Ford, won the nomination and was elected.

Black's 10-year Senate career was marked by great vigor in two areas. He became a tough, formidable, implacable investigator, looking relentlessly into merchant marine subsidies, airline subsidies, utility lobbies and lobbying in general. Legislatively, Black was the sponsor of the bill that became the Fair Labor Standards Act, a major New Deal measure more commonly known as the wage-hour law.

Black was a stalwart champion of FDR's policies and programs in the Senate. When impatience with the Supreme Court's frustration of his major social reforms led the President to propose a Supreme Court reorganization scheme—generally referred to as the court-packing plan—Black supported it vigorously. He opposed the President, however, in regard to the National Industrial Recovery Act on the ground that it gave too much price-fixing power to business.

Harris & Ewing

Congratulated by Vice President Garner on nomination to Court in 1937.

By Harry Naltchayan—The Washington Post

Shown at 80 with Chief Justice Earl Warren in study, February, 1966.

Summoned by Roosevelt

Justice Van Devanter's retirement in 1937 gave Mr. Roosevelt his first opportunity to nominate a Supreme Court Justice. As John Frank tells the story, the President summoned Sen. Black to the White House and, taking an appointment form from a desk drawer, said: "Hugo, this is a form for the nomination of a Supreme Court Justice. May I fill in your name?" Black answered: "Mr. President, are you sure that I'll be more useful in the Court than in the Senate?" To this, the President answered: "Hugo, I wish you were twins because Barkley says he needs you in the Senate; but I think you'll be more useful on the Court." Black's nomination went to the Senate where it was promptly confirmed 63 to 16.

Not long after the confirmation, an anti-New Deal newspaper published stories showing that Black had been a member of the Ku Klux Klan. In fact, in September, 1923, at a time when he joined a variety of organizations in an effort to promote his fledgling law practice, he became a member of the Birmingham Klan unit. In June, 1925, when he declared his Senate candidacy, he resigned, believing that a Klan member ought not to run for public office.

Disclosure of this Klan membership to a national audience—it had been no secret in Alabama—produced a furor. There were widespread demands for Black's resignation or impeachment. Republican Sen. George Norris came to his defense. "Actually," he said, "Justice Black is being subjected to all this criticism because he is a liberal, because he wants to bring the Supreme Court closer to the people—not because he is a Klansman."

Made Radio Statement

Black himself retained his characteristic calm. Importuned by newspaper reporters, he declined comment until his return from a trip abroad, and then made a brief statement to the American people over the radio: "The

insinuations of racial or religious intolerance made concerning me are based on the fact that I joined the Ku Klux Klan about 15 years ago. I did join the Klan. I later resigned. I never rejoined. I never have considered and do not now consider the unsolicited card given me shortly after my nomination to the Senate as a membership of any kind in the Ku Klux Klan. I never used it. I did not even keep it. Before becoming a senator I dropped the Klan. I have had nothing to do with it since that time . . . I have no sympathy with any group which, anywhere or at any time, arrogates to itself the un-American power to interfere in the slightest with complete religious freedom."

Early in his long tenure on the court, Black became a leader and forceful spokesman for a changing group of justices who were called judicial activists. Felix Frankfurter was the most powerful and vocal exponent of those who were called advocates of judicial restraint. The labels are liable to be misleading.

Frankfurter and his adherents believed in marked judicial deference to the judgment of legislatures, while Black and his associates placed emphasis on the obligation of the judiciary to check headstrong legislative acts impinging upon individual rights protected by the Constitution. "The essential protection of the liberty of our people," he said, "should not be denied them by invocation of a doctrine of so-called judicial restraint."

Clashed With Frankfurter

On the other hand, Black believed that a true sense of judicial restraint required judges to stay strictly within the boundaries of the Constitution's language. "Judges," he put it, "take an oath to support the Constitution as it is, not as they think it should

United Press International

Justice Hugo L. Black

be. I cannot subscribe to the doctrine that consistent with that oath a judge can arrogate to himself a power to 'adapt the Constitution to new times.'"

Black and Frankfurter clashed repeatedly on this issue in a series of cases decided by the court in the 1940s, especially in regard to interpretation of the due process clause of the Fifth and Fourteenth amendments.

In Frankfurter's view, due process of law "conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."

To Black, this seemed to give altogether too much leeway and discretion to judges. Nothing in the Constitution, he contended, justified a transient majority of the Court in deciding at any given time what constituted "eternal verities" or rights "basic to our free society" or "standards of what is deemed reasonable and right."

United Press International

Playing tennis at 79 in 1965.

The authors of the Constitution themselves, he insisted, had expressly fixed these standards in the Bill of Rights; and courts had authority to do no more than apply the prohibitions of the Bill of Rights to legislative enactments or to prosecutorial practices. "I deeply fear for our constitutional system of government when life-appointed judges can strike down a law passed by Congress or a state legislature," he wrote, "with no more justification than that the judges believe the law is 'unreasonable.'"

Black argued throughout his career on the bench that the due process clause of the 14th Amendment was designed to make the articles of the Bill of Rights (originally applicable only to the federal government) binding as well upon the states. This view was set forth by him in a major dissenting opinion in a case called *Adamson v. California* decided in 1947.

He never succeeded in persuading a majority of the Court to accept this view. One by one, however, through a process of selective incorporation, the Court has ruled over the years that the 14th Amendment protects against infringement by the states the liberties accorded by the First Amendment, the Fourth Amendment, the Fifth Amendment's privilege against self-incrimination, the Sixth Amendment's rights to notice, confrontation of witnesses and the assistance of counsel, and the Eighth Amendment's prohibition of cruel and unusual punishments.

Played a Dominant Role

These decisions, taken together, wrought a revolution in the criminal law of the United States—a revolution in which Justice Black played a dominant role. In sum, they assured to criminal defendants in every part of the country almost all of the protections guaranteed in the country's federal courts.

Nevertheless, it was in regard to First Amendment rights—the freedoms of conscience, expression and association — that Black did his most important work and expressed himself with the greatest force. In this area particularly, he believed in taking the Constitution altogether literally. He was, in short, an absolutist or strict constructionist.

"My view," he wrote, "is, without deviation, without exception, without any ifs, buts or whereases, that freedom of speech means that government shall not do anything to people, or, in the words of the Magna Carta, move against people, either for the views they have or the views they express or the words they speak or write. Some people would have you believe that this is a very radical position, and maybe it is. But all I am doing is following what to me is the clear wording of the First Amendment that 'Congress shall make no law . . . abridging the freedom of speech or of the press.'"

Black applied this absolutist attitude not only to all political expression, no matter how "subversive," but to all forms of censorship and to all kinds of laws punishing libel. "So far as I am concerned," he said, "I do not believe there is any halfway ground for protecting freedom of speech and press. If you say it is half free, you can rest assured that it will not remain as much as half free."

Differed With Holmes Test

He had scant patience with Justice Oliver Wendell Holmes' "clear and present danger" test adopted by the Court and argued vehemently against it in a dissenting opinion in the *Dennis* case that found leaders of the Communist Party guilty of "advocating" overthrow of the government.

"Freedom to speak and write about public questions," he declared in another opinion, "is as important to the life of our government as is the heart to the human body. In fact, this privilege is the heart of our government. If that heart be weakened, the result is debilitation; if it be stilled, the result is death."

Black took an almost equally absolutist position with respect to the First Amendment's stricture against any law "respecting an establishment of religion or prohibiting the free exercise thereof." He was the author of powerfully argued opinions of the Court limiting the use of public money for aid to church-related schools and forbidding the recitation of prayers or Bible readings in public schools.

In these decisions, he called effectively upon his knowledge of history to show that such limitations upon any governmental encouragement of religious worship, far from being hostile to religion, were, in fact, essential to the maintenance of religious liberty.

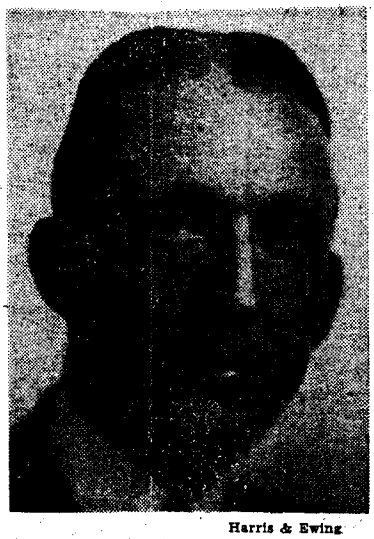
Married Minister's Daughter

In 1921, when he was almost 35 years old, Hugo Black married a minister's daughter, Josephine Foster. Their marriage of 30 years ended with her death in 1951. It was, according to family friends, a marriage of singular happiness and companionship, yielding two sons and a daughter.

After six extremely lonely years as a widower—made more difficult for him by the anti-libertarian trend of the McCarthy era — Black married Elizabeth Seay DeMeritte, herself widowed and a still youthful grandmother. She was the daughter of a close friend of the Justice and was serving, at the

time they became engaged, as his secretary.

Black's home in Alexandria is a place of singular charm and extraordinarily suited to his personality, spacious though without pretension, Georgian in style, informal, inviting. Books are its most conspicuous feature and



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After early Senate speech in 1928.

Associated Press

On day in 1937 he became justice.

especially in the comfortable second-floor study where the Justice and his law clerks did a great deal of their work.

There is a tennis court on the ample grounds of the house—a tennis court on which Black and his wife played constantly, indefatigably and remarkably well until a cataract operation in 1967 slowed him down considerably. Any ball hit within his reach was pretty likely to come back to his opponent.

The simplicity of the Justice's private life matched the simplicity of his juridical philosophy. What he loved, he loved passionately; what he believed in, he believed in deeply. He loved America and the concept of freedom that constituted the essence of the American idea. And he believed in the utility of freedom, in the survival value of a free society.

The Source of Loyalty

No one has expressed this faith better than he expressed it himself in his James Madison lecture on the Bill of Rights: "Since the earliest days, philosophers have dreamed of a country where the mind and spirit of man would be free; where there would be no limits to inquiry; where men would be free to explore the unknown and to challenge the most deeply rooted beliefs and principles. Our First Amendment was a bold effort to adopt this principle—to establish a country with no legal restrictions of any kind upon the subjects people could investigate, discuss and deny. The Framers knew, better perhaps than we do today, the risks they were taking. They knew that free speech might be the friend of change and revolution. But they also knew that it is always the deadliest enemy of tyranny. With this knowledge they still believed that the ultimate happiness and security of a nation lies in its ability to explore, to change, to grow and ceaselessly to adapt itself to new knowledge born of inquiry free from any kind of governmental control over the mind and spirit of man. Loyalty comes from love of good government, not fear of a bad one."

Associated Press

Briefing newsmen as senator in 1933.