

BOOK REVIEW

HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM. Edited by Stephen Parks Strickland.† Indianapolis: The Bobbs-Merrill Company, Inc., 1967. Pp. xxix, 365. \$10.00.

The editor of this Symposium in his Introduction expresses the hope that "the reader will find in our aggregate endeavor a clear and comprehensive portrait of this extraordinary Judge."¹ Happily, however, we are not obliged to judge this collection of essays on Mr. Justice Black solely against Editor Strickland's ambitiously stated hope, for certainly this Symposium does not present such a portrait.

Mr. Justice Black was appointed to the Supreme Court by President Roosevelt in 1937, after an eleven-year stint as Senator Black of Alabama. Black's appointment followed immediately upon the defeat of the President's Court-packing plan and inspired shortly thereafter a series of Pulitzer Prize winning newspaper articles retelling the story of Black's former Klan connections. Thus, his career as a Justice commenced amidst much public controversy and discussion, a characteristic which continued unabated for the next thirty years.

Only eight other Justices have served on the Court as long as Mr. Justice Black,² and only one, the first Mr. Justice Harlan, has produced a greater volume than the 780-odd opinions written by Black.³ From his first term, when he spoke for the Court in *Johnson v. Zerbst*,⁴ upholding the right to raise denial of counsel questions by habeas corpus,⁵ through the most recent full term, during which

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¹ HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM xxix (S. Strickland ed. 1967) [hereinafter cited as STRICKLAND SYMPOSIUM].

² Mr. Justices Marshall, Washington, Johnson, Story, McLean, Wayne, Field, and the first Mr. Justice Harlan.

³ See Warren, Introduction to *Symposium—Mr. Justice Black: Thirty Years in Retrospect*, 14 U.C.L.A.L. REV. 397 (1967).

⁴ 304 U.S. 458 (1938). The Justice has maintained his interest in habeas corpus. In 1963 he delivered the Court's opinion in *Jones v. Cunningham*, 371 U.S. 236 (1963), upholding the right of a prisoner to test the legality of his conviction and imprisonment, even though he is "out" on parole.

⁵ Counsel for petitioner in *Johnson v. Zerbst* also became a Judge who has been notably courageous and vigilant in defense of individual liberty and equality before the law—Judge Elbert P. Tuttle of the Court of Appeals for the Fifth Circuit.

he delivered the majority opinion in *Adderley v. Florida*,⁶ upholding trespass convictions based on protest demonstrations at a jail house, Mr. Justice Black has been at or very near the center of the most important and dramatic legal developments affecting the nature and quality of life in this country. On many of these questions, including the right of an accused to the assistance of counsel⁷ and the right to equal representation,⁸ his originally rejected positions have in time and through his persistence prevailed.

Little wonder then that a modest collection of nine short essays, totalling only 273 pages of text, would be insufficient to deal with contributions of the volume, importance, and complexity of Black's in a manner which could appropriately be said to paint "a clear and comprehensive portrait." There are obvious gaps in the coverage of this Symposium, such as the absence of adequate discussions of the biographical facts about Mr. Justice Black, particularly his early career before going to the Senate,⁹ of his substantial contributions in such areas as labor law, jury trial, and maritime law,¹⁰ and of the recurrent clashes between Black's views and those of Mr. Justice Frankfurter. Finally, one can only bemoan the absence of any real dissenters or critics in this Symposium; that there have been and are critics of stature is surely a necessary and integral part of any story about Hugo Black.¹¹ It is in fact somewhat incongruous that a symposium on the country's best known and most effective champion of the right to criticize and dissent would not include representative selections from authors exercising that right.¹² In this connection, I would suggest that the word "symposium" itself implies a freer exchange of more diverse ideas, and since a sym-

⁶ 385 U.S. 39 (1966).

⁷ See *Gideon v. Wainwright*, 372 U.S. 335 (1963), *overruling* *Betts v. Brady*, 316 U.S. 455 (1942).

⁸ See *Wesberry v. Sanders*, 376 U.S. 1 (1964), *overruling* *Colegrove v. Green*, 328 U.S. 549 (1946).

⁹ An excellent summary is found in I. DILLIARD, *Mr. Justice Black: A Personal Appreciation*, in *ONE MAN'S STAND FOR FREEDOM: MR. JUSTICE BLACK AND THE BILL OF RIGHTS* 1-27 (1963).

¹⁰ Some of these particular topics are considered in the special January, 1967, symposium issue of the *U.C.L.A. Law Review*, *Symposium—Mr. Justice Black: Thirty Years in Retrospect*, 14 *U.C.L.A.L. REV.* 397 (1967).

¹¹ See, e.g., Griswold, *Absolute Is In The Dark*, 8 *UTAH L. REV.* 167 (1963).

¹² Although the Justice has said that he would not want people making speeches against the Supreme Court in his house, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 *N.Y.U.L. REV.* 549, 558 (1962), certainly he would not have objected to a more representative discussion of his views.

posium was originally a drinking party,¹³ perhaps one is justified in expecting that a little more heat would be generated than is the case with Strickland's Symposium.

Nevertheless, neither absolute clarity nor absolute completeness is attainable, and there does emerge from the readable essays compiled by Mr. Strickland a reasonably fair, acceptably complete, and certainly stimulating picture of this unique individual, about whom Mr. Justice Harlan recently wrote:

There can be little doubt that few men who have assumed the responsibilities of this great office have laid them down with their place in history better assured than will be the case with Mr. Justice Black.¹⁴

And for the more sophisticated reader, at least one of the articles, which will be discussed more fully later, poses and creatively discusses the most basic questions about Justice Black's constitutional philosophy.¹⁵

Professor Swisher's opening article, "History's Panorama and Justice Black's Career," seeks to locate Black in the historical context in which he has lived and worked. He traces the changing times from the New Deal through World War II, into the post-war dilemmas of the McCarthy era and the Communist Cold War period, and then up to current times. Swisher is particularly effective in demonstrating how the expanded governmental activity of the New Deal era prepared the way for the further concentration of power in the federal government which occurred during the war years, and how the war in part produced the questions of loyalty and subversion which dominated the 1950's. Swisher also helpfully and briefly deals with the other personalities of the Court during Black's tenure and his relationship with them.

Swisher's article is followed by "The New Court and The New

¹³ WEBSTER, *THIRD NEW INTERNATIONAL DICTIONARY*, p. 2318 (1961).

¹⁴ Harlan, *Mr. Justice Black—Remarks of a Colleague*, 81 HARV. L. REV. 1, 3 (1967). One of the most warming aspects of a Supreme Court clerkship is the opportunity to observe the respect and affection which the Justices feel for each other. *See, e.g., Black, Mr. Justice Frankfurter*, 78 HARV. L. REV. 1521, 1522 (1965) ("I could not have, even if I had tried, harbored ill will toward a man I knew to be so dedicated to our country and its ideals. And so my initial respect and friendship for Felix survived all differences of opinion, in fact grew with the years, and left me with a feeling of great loss when he died.")

¹⁵ Reich, *The Living Constitution and the Court's Role*, in STRICKLAND SYMPOSIUM 133.

Deal," by John P. Frank, an early clerk to the Justice and author of *MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS* (1949). In this selection, Frank quite properly points out that the preoccupation with Black as champion of the Bill of Rights has tended to obscure the Justice's contributions as a New Dealer on the Court.

The Hugo Black on the Supreme Court today is properly thought of as the inheritor of the tradition of Thomas Jefferson and James Madison, but the Black who went to the Court was also the special inheritor of the tradition of John Peter Altgeld and of the elder Bob LaFollette, whose son was his close companion in the Senate. The Black of the appointment was George Norris's most effective Democratic ally. The Black whom F.D.R. sent to the Court in 1937 was, in sum, the hard-hitting, infinitely energetic representative of the Populist-Progressive-New Deal tradition in America.¹⁶

Thus, Black, the New Dealer, has played the leading role in the demise of "substantive due process" by which courts were substituting their social and economic views for those represented by laws passed by Congress or state legislatures.¹⁷ In addition to illuminating that side of Black which is now so often overlooked, Frank's article also contains an admirably clear and simple explanation and summary of Black's general philosophy of government, one of which the Justice, who trails no man in clarity and simplicity of writing style, would be proud. Frank points out that Black is "Congress' man." Within express constitutional limits, Black will enforce whatever Congress decides is desirable to fulfill national purposes. States have similar powers, subject, however, not only to express constitutional limitations but also to the superior power of Congress. The people can govern themselves through such governments, all powerful in their proper domains, because there is to be no restraint on their freedom to persuade each other. There must be freedom of speech, press and belief, complete equality for every citizen, and a prescribed and precise criminal procedure for the citizen who is cross-wise with his government. And, finally, there must be order. "Maintenance of an order in which the powerful government of free men can function is the first duty of any government."¹⁸

¹⁶ Frank, *The New Court and The New Deal*, in STRICKLAND SYMPOSIUM 41.

¹⁷ See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

¹⁸ Frank, *supra* note 16, at 72.

After an interesting though not particularly significant discussion of the race issue and its relationship to Black's career,¹⁹ the Symposium moves to the more familiar story, told now by Irving Dilliard, a long-time Black friend and admirer, in "The Individual and the Bill of Absolute Rights."²⁰ Here is catalogued the great bulk of Black's familiar contributions in the realm of human liberty—his position that the Bill of Rights means what it says and is to be enforced absolutely and literally, his conclusion that the fourteenth amendment made the first eight amendments applicable to the states, the high preferred place he would give to the first amendment, his concern for the fundamental rights of an accused, and his fight for reapportionment. Even the familiarity of the story does not dilute the excitement with which it can be reviewed. As Mr. Dilliard has previously said:

Beginning with the very foundations of the Republic, no one else has stood up so resolutely over so long a period in times so trying for the sacred freedoms of the individual American under the Bill of Rights.²¹

The Symposium also contains articles discussing Black's participation in non-constitutional areas, such as federal taxation, antitrust, and the Federal Rules of Civil Procedure, where, as might be expected, he has held strong, straightforward, and usually influential views.²² These articles help to round out the picture and certainly are properly included in this work, although one may question whether some of them, in particular "The Federal Civil Rules and the Pursuit of Justice," are not somewhat more extensive than would be desirable for this Symposium. There is also an article by the editor discussing primarily the question of whether Black *really* believes in the absolutes in the Bill of Rights.

Although the Justice is popularly conceived to be a "liberal," his constitutional philosophy is essentially conservative. As earlier indicated, he allows federal and state governments the greatest of latitude in making decisions concerning the welfare of our society.

¹⁹ Berman, *The Persistent Race Issue*, in STRICKLAND SYMPOSIUM 75.

²⁰ STRICKLAND SYMPOSIUM 97.

²¹ I. DILLIARD, *Mr. Justice Black: A Personal Appreciation*, in ONE MAN'S STAND FOR FREEDOM: MR. JUSTICE BLACK AND THE BILL OF RIGHTS 27 (1963).

²² Black's view, shared with Mr. Justice Douglas, that the Federal Rules exceed the authority of the Court has met with virtually no success, however. See Kaufman, *The Federal Civil Rules and the Pursuit of Justice*, in STRICKLAND SYMPOSIUM 223.

He assumes power to subject those governments only to the explicit restrictions and commands of the Constitution. While he would not "balance" away those explicit protections of freedom and liberty, neither would he void distasteful laws unless he can find justification in the Constitution for doing so.²³ He invariably looks to the history of any constitutional provision to justify the reading he gives it,²⁴ and he vehemently denies the right or duty of the Court "to keep the Constitution in tune with the times"²⁵—as situations from time to time appear, in the view of the majority of the Court, to demand. How, then, did this judicial conservative come by his reputation as liberal, civil libertarian, protector of the oppressed, the poor, and the defenseless, and defender of individual liberty?

The easy, and indisputably correct, answer is that Black's reputation has been earned by his votes, for surely the result and not the reasoning of a decided case accounts for its label of "liberal" or "conservative." But such an answer of course does not satisfy. Can "liberal" votes be produced by a "conservative" judicial philosophy? Obviously much of the trouble lies with the labels; they say too much or too little; and they are political labels not judicial ones.

Harvard's Professor Louis Jaffe has answered by concluding that Mr. Justice Black's concept of judicial power is either illusory or not in fact observed—by which he seems to say that the standards by which the Justice purports to test legislation are either incapable of affecting the outcome or are not permitted by the Justice to do so. It is well to note, however, that Professor Jaffe has also reached the same conclusion about the tests of "ordered liberty," "fundamental," and the reasonable beliefs of "right-minded men" adopted by Mr. Justices Cardozo and Frankfurter,²⁶ whose judicial philosophies were often at odds with Justice Black's.²⁷

In 1963 Professor Charles Reich, of the Yale faculty, explored the operation of Justice Black's philosophy in an article that offered

²³ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (dissenting opinion).

²⁴ The best known illustration of this is probably *Adamson v. California*, 332 U.S. 46, 68 (1947) (dissenting opinion).

²⁵ *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (dissenting opinion).

²⁶ Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 995-97 (1967).

²⁷ In a similar vein, it has been questioned whether the exchange between Black and Frankfurter has been meaningful or fruitful. See Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A.L. REV. 428, 441-42 (1967).

answers to this question.²⁸ Wisely, Mr. Strickland has seen fit to include the major portion of that article in this Symposium, with the title, "The Living Constitution and the Court's Role."²⁹ Not only was Professor Reich's article unquestionably the most provocative at the time it appeared, it also is, in my opinion, the outstanding selection of this Symposium.

Professor Reich suggests that Black's demand for "faithful adherence" to the Bill of Rights means "faithful adherence" to its spirit and objectives. Black wants the Bill of Rights to accomplish the same purposes in our contemporary setting as it was originally designed to accomplish in an earlier setting. To do so, he interprets the Bill of Rights in the light of changed conditions and growing governmental power. In a dynamic society the Bill of Rights must keep changing in its application or lose even its original meaning. Reich recognizes the difficulty of reconciling this explanation with Black's doctrine of "absolutes," but he maintains that the two are not inconsistent. He regards Black's absolutism as more than just a rejection of the "balancing test" by which one might normally expect the Constitution to be changed or to grow; absolutism asks judges to apply the balance originally struck in the Bill of Rights. Thus, by beginning with the literal language of the Constitution, a judge can maintain the fundamental structure and purposes of the Constitution—the rule of law. And by emphasizing the underlying purposes of the framers one can nevertheless make its provisions meaningful in modern and changing times.

In a very real sense, Reich's article is a classical apology for the views of Mr. Justice Black; it seeks to explain and justify "much that he has not articulated."³⁰ It may be doubted that the Justice would fully accept Professor Reich's explanation of his views, a possibility which Reich himself recognized.³¹ And others also appear, at least on the surface, to disagree with Reich.

Professor Howard, of the Virginia Law School, has recently dealt with one of the most mooted questions of the day, namely, whether Justice Black's votes and opinions of recent years, particularly in the sit-in and other direct action cases and in the Georgia Governor's

²⁸ Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963).

²⁹ STRICKLAND SYMPOSIUM 133.

³⁰ *Id.*

³¹ *Id.* at 134.

case, are consistent with his judicial philosophy and his earlier positions.³² Professor Howard states a convincing case that Black's views have not changed—that his recent opinions are completely consistent with his prior judicial philosophy. He finds the rule of law to be the pervading principle—the rule of law which requires judges to decide cases by reference to the precise wording of the Constitution, rather than their preferences, the rule of law which requires grievances to be channeled into lawful processes, and the rule of law which requires an open, free society in which one man can persuade another.³³

Although Howard's article emphasizes and accepts as a basic premise Black's protestations that he will have no part in rewriting or changing the Constitution, that view is not, in my opinion, inconsistent with Professor Reich's explanation of Black's willingness to adapt the Bill of Rights to current times. Basically, Black's adaptations actually represent the continued adherence to a consistent reading of the Bill of Rights applied to various situations by a Justice who has an exceptional ability to perceive those evils against which the Bill of Rights originally sought to protect, regardless of what new forms those evils might take. Further, as Reich says, the Justice's dedication to the rule of law, expressed in large part through his doctrine of "absolutes," gives structure and purpose (and perhaps legitimacy) to the Justice's philosophy, and operates to prevent erosion of cherished freedoms, particularly in difficult times. Such "changes," then, are consistent with the rule of law and are not only accomplished within its framework but are in fact assisted by it.

Reich's article shows primarily how the Justice's attitudes and philosophy have supported "liberal causes." Howard has shown how, particularly in recent years, they have supported "conservative" positions. It certainly would be strange if any mature and principled constitutional philosophy did not sometimes produce a "liberal" result, and sometimes a "conservative" result. And certainly it is to Black's everlasting credit that he has accepted the "conservative" result when it appears to him to be required by his own constitutional philosophy.³⁴

³² Howard, *Mr. Justice Black: The Negro Protest Movement and the Rule of Law*, 53 VA. L. REV. 1030 (1967).

³³ *Id.* at 1085-86.

³⁴ See Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A.L. REV. 467, 474 (1967).

Since, as I view it, there has been no change in the Justice's philosophy and no absence of fidelity to that philosophy, the only question that remains is whether there may have been some change in attitude that has produced different results. For example, would in earlier years the Justice have found some way, consistent with his judicial views, to offer more refuge to those who sit in or demonstrate in other ways? I doubt it, for the Justice's dedication to the maintenance of order and the avoidance of violence is too deeply felt.³⁵ The Georgia Governor's case³⁶ for me is more difficult. I have no quarrel with the Court's conclusion that nothing in the Constitution prohibits the legislature from participating in the elective process. But in the Georgia case the apparent will of the people was frustrated by a malapportioned legislature. Even though the malapportioned legislature had been permitted to function until May, 1968, one wonders why Black rejected the argument that the election of a Governor is beyond the scope of the ordinary duties which a malapportioned legislature can, consistent with the Constitution, be permitted to perform.³⁷ Mr. Justice Black did not explain why this distinction did not persuade him. Perhaps some day he will.

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³⁵ Howard, *supra* note 32, at 1033-47.

³⁶ Fortson v. Morris, 385 U.S. 231 (1966).

³⁷ See *The Supreme Court—1966 Term*, 81 HARV. L. REV. 110, 146-48 (1967).

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