PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF MR. JUSTICE BLACK*

TUESDAY, APRIL 18, 1972

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

The Court is in Special Session this afternoon to receive the Resolutions of the Bar in tribute to Mr. Justice Black. Before we commence the proceedings, I am requested to remind you that all present are invited by Mrs. Black and the Black family to attend the reception in the East Conference Room at the close of this proceeding.

Mr. Solicitor General Griswold addressed the Court as follows:

Mr. Chief Justice, may it please the Court:

At the meeting of the members of the Bar† of the Supreme Court just concluded, resolutions expressing

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*Mr. Justice Black, who retired from active service on September 17, 1971, died in Bethesda, Md., September 25, 1971 (404 U. S. III, VII). Services were held at Washington National Cathedral prior to his interment at Arlington National Cemetery on September 28, 1971.

†The Committee on Arrangements for the meeting of the Bar consisted of Solicitor General Erwin N. Griswold, Chairman, Mr. Benjamin V. Cohen, Mr. William T. Coleman, Mr. Leon Jaworski, and Mr. Edward Bennett Williams.

profound sorrow at the death of Justice Hugo Lafayette Black were offered by a committee‡ of which Mr. Louis Oberdorfer was Chairman.

Addresses and resolutions were presented by Mr. Bernard G. Segal of the Philadelphia Bar, by Professor Paul A. Freund of Cambridge, Massachusetts, and by Mr. George Saunders of the Illinois Bar.

The resolutions unanimously adopted are as follows:

Resolutions

We meet to honor the memory of Justice Hugo Lafayette Black.

To each Member of your Committee that memory is a vivid one—for Justice Black was a vivid man. Some of us knew him in his public life before he came to the Court; some of us knew him across the Bar in our appearances before this Court; some of us knew him by virtue of our service as his law clerks; some of us knew him as the attentive, inspiring Circuit Justice for the Fifth Circuit.

Vignettes from our memories abound.

Senator Sparkman, Congressman Pepper, and others of us first remember Justice Black as Senator Black—feared and fearless investigator, architect of New Deal legislation, Administration leader on the Senate Floor, Chairman of the Labor and Education Committee, and an influential Member of the Finance, Foreign Affairs, Military Affairs, and Rules Committees.

Their recollections from the 1930's picture Senator Black's desk piled high with volumes of American, English and ancient history and classics. He was then still heavily engaged in the compensatory liberal education

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‡The Committee on Resolutions consisted of Mr. Louis F. Oberdorfer, Chairman, Mr. Jerome A. Cooper, Mr. Thomas G. Corcoran, Professor Archibald Cox, Mr. Clifford J. Durr, Mr. John P. Frank, Mr. George C. Freeman, Jr., Mr. Marx Leva, Mr. Robert B. McCaw, Congressman Claude Pepper, Mr. J. Lee Rankin, Judge Richard T. Rives, Senator John Sparkman, Judge Elbert P. Tuttle, Mr. Lawrence G. Wallace, and Judge J. Skelly Wright.

which he had begun in 1926, while enjoying and making the most of the relative anonymity of a freshman Senator.

The advocates among us will most vividly remember Justice Black, senior Justice for over 25 of his 34 years on the Court, as he appeared on the bench—"dwarfed" alongside the several relatively substantial gentlemen who were successively his Chief Justices. When he could be seen from the Bar, he usually appeared tanned from tennis (even in the winter), gently rocking, alternately thumbing through briefs, or with his head slightly cocked, alertly watching counsel—often, it seemed, awaiting an appropriate moment to pounce a question in his inimitable Alabama manner.

One humbler counsellor recalls from an argument concerning the power of a Judicial Conference to control the work of a Federal District Judge, "the tone of disbelief" with which Justice Black put a question:

> "Mr. Justice Black: You mean that the President of the United States, in your judgment, has the power under our Constitution to determine whether a judge is mentally able to try his cases? Is that what you are saying?
>
> "Mr. Wright: I am saying exactly that; yes, sir.
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> "Mr. Justice Black: I think I understand you now."

According to the counsellor, Justice Black "leaned far back in his chair, shaking his head but with a twinkle in his eye." [1]

In a last colloquy with counsel Justice Black evoked from the Solicitor General a concession which the Justice, with obvious relish, built into his last opinion:

> "You [Mr. Justice Black] say that no law means no law, and that should be obvious. I [the Solicitor General] can only say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean

[1] Wright, Hugo L. Black: A Great Man and a Great American, 50 Tex. L. Rev. 1, 2–3 (1971).

'no law,' and I would seek to persuade the Court that that is true. . . ." [2]

Those of us who were law clerks to Justice Black have shared a special precious privilege. We have, in our small ways, assisted and closely observed the steely disciplined working habits of a self-taught scholar as he resurrected from his own reading and experience and propagated with his own carefully penned eloquence a fresh, authentic and now widely—though not universally—accepted appreciation of the genius of our Nation's written Constitution. In the process we have pitted, or attempted to pit, ourselves in intellectual combat against what Justice Cardozo once described as one of the most brilliant legal minds he had ever known.[3]

Our privilege included a brief but intimate membership in a family presided over by a very great man, deeply in love with his wife and not ashamed to show it. We have observed firsthand how even the greatest of men can be inspired to greater heights of effort and insight by the unflagging support and admiration of a loved and loving wife.

The bonds between Justice Black and his law clerks did not end with the termination of each law clerk's service. They were renewed by frequent visits, correspondence and formal gatherings for important anniversaries and birthdays. On his 80th birthday, Justice Black spoke to his clerks and their wives about the disadvantages and advantages of growing old. The disadvantages were obvious enough and he related some. There were also surprising advantages: "As one grows old, one needs less sleep. That," said Justice Black, "gives that much more time to work."

One of Justice Black's law clerks recently wrote an extremely popular, but controversial, book.[4] It was Jus-

[2] *New York Times Co.* v. *United States,* 403 U. S. 713, 717–718 (1971) (Black, J., concurring).

[3] Hazel Black Davis, Uncle Hugo: An Intimate Portrait of Mr. Justice Black 54 (1965) (privately printed).

[4] C. Reich, The Greening of America (1970).

tice Black's habit to focus on his reading by heavy underscoring and frequent longhand penciled marginal notes. Justice Black's copy of this law clerk's book carries in its margin some trenchant annotations.

The author wrote of the glory of the original American dream of a free democratic society, observing sadly that:

> "Less than two hundred years later, almost every aspect of the dream has been lost. In this chapter we shall be concerned with the forces that destroyed the American dream . . . ." [5]

In the margin Justice Black wrote in heavy pencil:

> "I do not agree. It is not yet destroyed."

The law clerk-author, striving to identify a new set of values for our society, bluntly disparaged the old. He wrote:

> "[Our earliest generation known as] Consciousness I believes that the American dream is still possible, and that success is determined by character, morality, hard work, and self-denial. . . ." [6]

In the margin Justice Black's longhand note proclaimed: "I still do."

The judges of the Fifth Circuit have been favored for many years by the inspiring presence of Justice Black at their annual Judicial Conferences. The last 18 years have been trying ones for Fifth Circuit Judges. Justice Black shared those trials while he provided leadership and reassurance that "this, too, will pass." The Fifth Circuit Judges appreciate, perhaps more than others, the full implications of Justice Black's role in this Court's steadfast effort to eliminate unconstitutional discrimination in our land. He was the only Justice from the Deep South when the Court decided *Brown*. As on other occasions when he was personally attacked, he silently suffered with manly dignity the unpleasant reprisals inflicted upon him and his loved ones in the South. Nor

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[5] *Id.*, at 21.

[6] *Id.*, at 25.

did he flinch in his determination to see it through. As a single Circuit Justice he finalized the order for the admission of James Meredith to the University of Mississippi, the enforcement of which required a substantial military operation. As Circuit Justice, and with the full Court, he eliminated the "all deliberate speed" concept as a brake on school desegregation.[7]

In an informal farewell address to one of the last Judicial Conferences of his Circuit which he attended Justice Black spoke of his pride in the way the Southern federal judges had performed their difficult and often unpopular duty of applying the Constitution and enforcing the civil rights laws, particularly with respect to the *Brown* decision. He reminded them of the constancy of controversy and his belief that he and they were strengthened by it. In conclusion he told them good-by. He said:

> "I have been coming to see you for thirty years, how many more I cannot know. I, too, like many of the judges I have seen here, have passed over the crest, over the brow of the hill. I hope I have learned more tolerance, more friendship, more about the love of human kindness during those thirty years.
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> "Now I am far beyond the crest. I look over into the glowing rays that come with sunset. The years have been happy for me; the people have been good to me. I have no complaint about my life, and as I look at those rays they do not frighten me. I know that life is change, and the greatest change of all is who is to be here at any certain period. All that I can say and hope for is that my career has been such that people of integrity of thought, when they think about me, will picture a person who tried his dead level best to serve his people and his country with every ounce of energy, love and devotion that he could muster in his life,

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[7] *Alexander* v. *Holmes County Bd. of Ed.*, 396 U. S. 1218 (1969) (Black, J., in chambers).

> and that, when those rays cease to be in my vision, each of you and every member of this Conference will remember me as one who did his best."

For most of his years on the Bench Justice Black adhered to a strictly ascetic view of a judge's role and made no serious public statements. In his later years he relented to the extent of delivering the first James Madison Lecture on the First Amendment, explaining his philosophy of the Constitution in an hour-long television special entitled "Mr. Justice Black and the Bill of Rights," and delivering the Carpentier Lectures at Columbia University. In the latter he undertook to state "in simple and clear language" his "constitutional faith." He opened the Lectures with the observation that:

> "It is of paramount importance to me that our country has a written constitution. This great document is the unique American contribution to man's continuing search for a society in which individual liberty is secure against governmental oppression." H. Black, A Constitutional Faith 3 (Carpentier Lectures) (1969).

Justice Black continued with simple eloquence to express his faith in the Constitution as an ingenious instrument to be invoked by the Supreme Court to assure control of government by the people subject to restraints specifically embodied in the Constitution primarily to limit government power and to protect minorities from majorities.

Justice Black's deep faith in the Constitution expressed near the end of his long service on this Court was built upon rich experience as an active, successful trial lawyer, a fair and efficient municipal court judge, a vigorous prosecutor, candidate for public office, and as United States Senator.[8] His time on the Court began as the country struggled to design solutions for the social

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[8] For a posthumous account of Justice Black's pre-Court years, see V. Hamilton, Hugo Black, The Alabama Years (1972).

and economic problems generated and widened by the great depression. It continued through World War II, the Cold War confrontations with their corollary domestic shock waves, the conflicts which followed in the wake of the *Brown* decision and finally, in the 1960's, the violence of assassinations, street crime, increased racial tension and an unpopular war.

In his later years, he sparred with commentators and colleagues who claimed that his fundamental views had changed with these changing times. He disagreed:

> "I think that I can say categorically that I have not changed my basic constitutional philosophy—at least not in the last forty years." [9]

He convinced at least one commentator who recently concluded:

> "The remarkable thing about him was not his ability to change with the times, but the timelessness of the values of justice, freedom, and human dignity which he held so dear, and for which he fought." [10]

Justice Black came to the Court committed, as a Senator, to the view that popular control of the government was frustrated by what he deemed to be excessive judicial restraints drawn from the Due Process Clause and the Commerce Clause of the Constitution.[11] From the beginning to the end of his service he fought what he considered to be unauthorized efforts of judges to supersede the judgment of voters and their elected representatives with the judges' views of appropriate remedies for social and economic problems.[12]

Justice Black also came to the Court convinced that

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[9] H. Black, A Constitutional Faith xvi (1969).

[10] Durr, Hugo Black, A Personal Appraisal, 6 Ga. L. Rev. 1.

[11] See, *e. g.*, 76 Cong. Rec. 1443–1444 (1933).

[12] See, *e. g.*, Hugo L. Black, "Reorganization of the Federal Judiciary," a radio address reported in N. Y. Times, Mar. 30, 1937; *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945) (Black, J., concurring).

it had an affirmative responsibility to make other branches of the National Government as fully responsive to the will of the people as was consistent with orderly process and protection of minorities. His experience and reading reinforced his faith in the practical wisdom of the separation of powers effected by the Constitution between the Executive, Legislative and Judicial branches of Government and between the National Government and the States. He repeatedly urged the Court to review and strike down attempts by the Executive to legislate, adjudicate or engage in activity proscribed, or not plainly authorized; [13] by the Legislature to adjudicate or enforce through Congressional Committees or by personal legislation resembling bills of attainder; [14] and

[13] "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States. . . .'

. . . . . .

"The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 587–589 (1952). See also, *Gregory* v. *Chicago,* 394 U. S. 111, 120 (1969) (Black, J., concurring).

[14] "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. . . . When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder." *United States* v. *Lovett,* 328 U. S. 303, 317–318 (1946).

by the Judiciary to legislate or administer.[15] Any significant weakening of the careful separation contemplated by the Constitution could, he believed, lead to an inordinate accretion of power in one or another of the branches which would tempt the overreaching branch to destroy or undermine the others and then turn, unfettered, upon the people, frustrating their will and tyrannically abusing their liberties.

As Justice Black was helping to confine the power of judges to restrain the people's elected representatives from addressing themselves to solutions of pressing social and economic needs, he also sought to direct the Court's prestige and power toward what he conceived as primary roles which were fashioned for it by the plain words of the Constitution. Drawing on his experience as a prosecutor, a judge and a Senator, he used simple but eloquent language to focus and renew the attention of his Brethren and the public upon three particular elements of orderly government by the people under our Constitution: full adherence to the procedural protections of the Bill of Rights and other provisions of the Constitution designed to protect the individual from abuse of government power; free and universal access to the political process; and absolute freedom of speech, belief and thought.

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[15] Justice Black's insistence that the judiciary stay within the province of deciding specific cases presented to it by litigants is probably best demonstrated by his repeated dissents from the Court's promulgation of rules, such as the Federal Rules of Civil Procedure. See, *e. g.*, Statement of Mr. Justice Black and Mr. Justice Douglas, 374 U. S. 865–866 (1963):

"We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President. The Constitution, as we read it, provides that all laws shall be enacted by the House, the Senate and the President, not by the mere failure of Congress to reject proposals of an outside agency."

I

In his grand jury investigation of police brutality and other firsthand experience while serving as Solicitor of Jefferson County, Alabama, Hugo Black had witnessed the helplessness of the poor and the unfortunate when confronted by the power of government and the corrupting effect of official lawlessness. A 1915 Grand Jury investigating police brutality in Bessemer, Alabama, had filed a report (very likely written for it by the special prosecutor who conducted the investigation, Hugo Black) which concluded:

> "A man does not forfeit his right . . . to be treated as a human being by reason of the fact that he is charged with or an officer suspects that he is guilty of a crime. Instead of being ready and waiting to strike a prisoner in his custody, an officer should protect him. . . . Such practices are dishonorable, tyrannical and despotic and such rights must not be surrendered to any officer or set of officers, so long as human life is held sacred and human liberty and human safety of paramount importance." [16]

In his third term on the Supreme Court Justice Black was confronted by a case in which his Alabama experience and his constitutional philosophy merged to produce an early, and possibly immortal, expression of the role of the courts in providing fair trials for the helpless citizen threatened by government. In *Chambers* v. *Florida,* 309 U. S. 227, 240–241 (1940), four young Negro tenant farmers petitioned the Court to reverse their murder convictions based on confessions obtained after seven days of uninterrupted grilling. Justice Black's majority opinion in that case struck a note which he resounded again and again over the years:

> "We are not impressed by the argument that law enforcement methods such as those under re-

[16] See Birmingham Age-Herald, Sept. 18, 1915.

> view are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our Constitutional system, courts stand against any winds that blow 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. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. 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."

Justice Black also knew from his own experience as prosecutor and defense counsel that a defendant could seldom, if ever, receive a just trial without representation by an attorney. How could a defendant, even one released on bail, marshall the facts? How could he comprehend the legal questions? How could he avoid the procedural pitfalls and traps built into the criminal justice system? How could he approach the bench and address the learned judge? How could he choose the jury?

In a 1942 case, involving a poor unemployed farm hand who was tried without the aid of counsel and convicted, Justice Black stated his strongly held view, which he believed he shared with the men who wrote the Sixth Amendment, that a lawyer is indispensable

to a defendant on trial for his liberty. *Betts* v. *Brady,* 316 U. S. 455, 476–477 (1942) (Black, J., dissenting). While Justice Black's dissent argued that the Fourteenth Amendment made the Sixth Amendment applicable to the States, he also maintained that:

> "A practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented. . . .
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> . . . . . .
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> "[N]o man [should] be deprived of counsel merely because of his poverty. Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law."

As Justice Black wrote his *Chambers, Betts* and related opinions and studied the history of the Constitution and its Amendments, he began, in the 1940's, to question the validity of the process by which his predecessors and colleagues selected concepts or provisions from the Bill of Rights to apply to the States while rejecting others. His study convinced him that the draftsmen of the Bill of Rights had designed a nearly perfect device for use by courts in protecting individual liberty and the democratic process from the natural tyranny of government by men with power, and that the genius of the Bill of Rights had been fully appreciated by the framers of the Fourteenth Amendment when they were selecting a mechanism to protect the citizens of the States, particularly Negro citizens, from the tyranny of state government power. The Fourteenth Amendment framers had quite understandably and naturally turned to the honored and tested Bill of

Rights as the means of extending specific Federal constitutional protections to all levels of government, instead of trying to fashion some vague new formula, such as rights "implicit in the concept of ordered liberty," as the means of carrying out their purpose. His diligent study and persistent search for basic principles bore fruit in *Adamson* v. *California,* 332 U. S. 46 (1947), where his dissent laid the cornerstone for much of the rest of his life's work. He wrote there:

> "I cannot consider the Bill of Rights to be an outworn Eighteenth Century 'strait jacket' as the *Twining* opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights. To hold that this Court can determine what, if any, provisions of the Bill of Rights

will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution." *Id.*, at 89.

Upon this foundation he rested his many forceful opinions insisting not only that the Bill of Rights restrained the power of state governments but also that each Amendment applied with exactly the same meaning, force and effect to the States as it applied to the Federal Government.

Although in Justice Black's lifetime the full Court did not adopt his view that the Fourteenth Amendment had incorporated the Bill of Rights, and it has been the subject of considerable controversy,[17] there is little doubt about the impact of the *Adamson* dissent. By the time Justice Black left the bench almost all the elements of the Bill of Rights had been applied to the States.

A charming by-product of Justice Black's effort to make the Bill of Rights applicable to the States through the Fourteenth Amendment was one of the most intense intellectual contests and one of the closest friendships of Justice Black's life, both with Justice John Marshall Harlan. Justice Black often said that his fear of the power of judges, undoubtedly strengthened by the Court's substantive due process opinions in the 1920's and 1930's, would have little foundation if judges were all like Justice Harlan. It is a happy vignette of judicial history and a tribute to both men that their friendship grew and flourished in the midst of their vigorous debate. The story of that friendship had its final chapter in adjacent rooms at Bethesda Naval Hospital; the friendly struggle will probably be carried on by the disciples of each Justice.

The "incorporation" theory of the Fourteenth Amendment and Justice Black's fight for counsel in all crim-

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[17] Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949).

inal cases came together in the Court's 1963 decision that the Sixth Amendment, made applicable to the States by the Fourteenth, requires that every defendant charged with a crime must be offered counsel by the State if he is without means to hire his own. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). In vindication of his dissent in *Betts* v. *Brady,* Justice Black recorded the Court's recognition that:

> "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. . . ." *Id.,* at 344.

Justice Black's belief in the vital role of counsel in criminal cases was reflected in his efforts to limit the contempt power of judges, particularly as related to lawyers' vigorous in-court efforts to defend their clients. He viewed the authority vested in a single life-tenured jurist to punish a lawyer for contempt after a trial on account of the lawyer's conduct of that trial as an anathema to the very concept of the Bill of Rights. In *Sacher* v. *United States,* 343 U. S. 1 (1952), for example,

Justice Black dissented from the affirmance of a summary criminal contempt sentence imposed by a United States District Judge upon attorneys who had energetically defended their Communist clients. He wrote:

> "Unless we are to depart from high traditions of the bar, evil purposes of their clients could not be imputed to these lawyers whose duty it was to represent them with fidelity and zeal. Yet from the very parts of the record which [the trial judge] specified, it is difficult to escape the impression that his inferences against the lawyers were colored, however unconsciously, by his natural abhorrence for the unpatriotic and treasonable designs attributed to their Communist leader clients. It appears to me that if there have ever been, or can ever be, cases in which lawyers are entitled to a full hearing before their liberty is forfeited and their professional hopes are blighted, these are such cases." *Id.*, at 19.
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> "Are defendants accused by judges of being offensive to them to be conclusively presumed guilty on the theory that judges' observations and inferences must be accepted as infallible? There is always a possibility that a judge may be honestly mistaken. Unfortunately history and the existence of our Bill of Rights indicate that judicial errors may be from worse causes." *Id.*, at 22.

The Bar's fond memories and high admiration for Justice Black may reflect his manifest faith in adversary proceedings in court as the best means to do justice. His opinion for the Court in *Gideon* v. *Wainwright* displayed his commitment to the vital role of lawyers in the adversary process. In *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964), Justice Black's opinion for the Court upholding the right of unionized workers on the railroad

to associate and seek legal advice in implementing their rights under federal laws enacted for their benefit said:

> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries . . . and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics. The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped." *Id.*, at 7.

Securing access to counsel for the injured and the aggrieved was for Justice Black the easier part of the issue. He worked harder and longer against efforts of government officials, judges and bar association committees to stifle change and peaceful dissent from the *status quo* by disciplining and thereby intimidating or excluding lawyers who failed to conform to current notions of "loyalty" or who refused to submit to a searching examination of their personal beliefs and ties. His years on the Bench through World War II, the Joseph McCarthy Era and the desegregation struggle confronted Justice Black and the Court with repeated instances in which courts and the Organized Bar sanctioned or attempted to sanction courageous lawyers who stood up for their clients' beliefs and constitutional privileges and who vigorously defended unpopular causes. Over Justice Black's classic dissents, a divided Court in 1961 affirmed decisions banning Raphael Konigsberg and George Anastaplo from the legal profession.

In *Konigsberg* v. *State Bar of California,* 366 U. S. 36 (1961), and *In re Anastaplo,* 366 U. S. 82 (1961), Justice Black eloquently documented his unshakable belief in the honorable role of courageous, unorthodox lawyers. In *Anastaplo* he said:

> "This case illustrates to me the serious consequences to the Bar itself of not affording the full protections of the First Amendment to its applicants for admission. For this record shows that Anastaplo has many of the qualities that are needed in the American Bar. It shows, not only that Anastaplo has followed a high moral, ethical and patriotic course in all of the activities of his life, but also that he combines these more common virtues with the uncommon virtue of courage to stand by his principles at any cost. It is such men as these who have most greatly honored the profession of the law—men like Malsherbes, who, at the cost of his own life and the lives of his family, sprang unafraid to the defense of Louis XVI against the fanatical leaders of the Revolutionary government of France—men like Charles Evans Hughes, Sr., later Mr. Chief Justice Hughes, who stood up for the constitutional rights of socialists to be socialists and public officials despite the threats and clamorous protests of self-proclaimed super patriots—men like Charles Evans Hughes, Jr., and John W. Davis, who, while against everything for which the Communists stood, strongly advised the Congress in 1948 that it would be unconstitutional to pass the law then proposed to outlaw the Communist Party—men like Lord Erskine, James Otis, Clarence Darrow, and the multitude of others who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thor-

> oughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it." *Id.*, at 114–116.

His stirring dissent in *Anastaplo,* quoted above, led to a long exchange of letters with the unsuccessful petitioner and, more importantly, to an ultimate change of the Court's position. *Baird* v. *State Bar of Arizona,* 401 U. S. 1 (1971); *In re Stolar,* 401 U. S. 23 (1971).

For Justice Black the constitutional guarantees of a jury trial in all criminal and most civil cases embodied in the Sixth and Seventh Amendments provided essential flexibility in the administration of justice and an ultimate restraint on possible abuse of power by judges. The jury, consisting of men drawn from the community to hear a particular dispute, was an institution with which Hugo Black had shared great experiences. Perhaps these experiences and his diligent study of English history led him to agree with Alexander Hamilton that the citizens who ratified the Constitution could be divided "between those who thought that jury trial was a 'valuable safeguard to liberty' and those who thought it was 'the very palladium of free government.'" *Galloway* v. *United States,* 319 U. S. 372, 397–398 (1943) (Black, J., dissenting). His efforts to emphasize and strengthen the jury's role as a counterbalance to the power of judges are typified by his opinions that a jury trial should be afforded in contempt proceedings in which the judge might otherwise be the unrestrained accuser, prosecutor and arbitrator of the sentence. See, *e. g., United States* v. *United Mine Workers,* 330 U. S. 258, 328 (1947) (Black and DOUGLAS, JJ., concurring in part and dissenting in part). His view was perhaps best expressed in *United States* v. *Barnett,* 376 U. S. 681 (1964). He wrote in dissent:

> "No provisions of the Constitution and the Bill of Rights were more widely approved throughout the new nation than those guaranteeing a right to trial by jury in all criminal prosecutions. . . . They

> were adopted in part, I think, because many people knew about and disapproved of the type of colonial happenings . . . in which . . . people had been sentenced to be fined, thrown in jail, humiliated in stocks, whipped, and even nailed by the ear to a pillory, all punishments imposed by judges without jury trials. Unfortunately, as the Court's opinion points out, judges in the past despite these constitutional safeguards have claimed for themselves 'inherent' power, acting without a jury and without other Bill of Rights safeguards, to punish for criminal contempt of court people whose conduct they find offensive. This means that one person has concentrated in himself the power to charge a man with a crime, prosecute him for it, conduct his trial, and then find him guilty. I do not agree that any such 'inherent' power exists. Certainly no language in the Constitution permits it; in fact, it is expressly forbidden by the two constitutional commands for trial by jury." *Id.*, at 725–726.

Justice Black was not deflected from his insistence upon the strict application of the Bill of Rights to individual cases, including the right to trial by jury, by the prospect that some defendants who had, in fact, committed crimes would, on occasion, escape the consequences of these crimes. In a rare public interview on a national television special, he stated:

> "Why did they write the Bill of Rights? [The first ten Amendments] practically all relate to the way cases shall be tried, and practically all of them make it more difficult to convict people of crime. What about guaranteeing a man a right to a lawyer? Of course, that makes it more difficult to convict him. What about saying that he shall not be compelled to be a witness against himself? That makes it more difficult to convict him. . . . They were every one intended to make it more difficult before the doors of a prison closed on a man. . . ." CBS

News Special: Mr. Justice Black and the Bill of Rights, Library of Congress Motion Picture Collection, FBA 6334, Reel 2, 600–650 feet.

However, his concern for law enforcement never faded. In cases where he felt that a majority of the Court unreasonably expanded the scope of the Fourth Amendment proscription against "unreasonable" searches and seizures, he chided them:

> "It is difficult for me to believe the Framers of the Bill of Rights intended that the police be required to prove a defendant's guilt in a 'little trial' before the issuance of a search warrant. . . . [E]avesdroppers were deemed to be competent witnesses in both English and American courts up until this Court in its Fourth Amendment 'rule-making' capacity undertook to lay down rules for electronic surveillance. . . . The reasonableness of a search incident to an arrest, extending to areas under the control of the defendant and areas where evidence may be found, was an established tenet of English common law, and American constitutional law after adoption of the Fourth Amendment—that is, until *Chimel* v. *California,* 395 U. S. 752 (1969). The broad, abstract, and ambiguous concept of 'privacy' is now unjustifiably urged as a comprehensive substitute for the Fourth Amendment's guarantee against 'unreasonable searches and seizures.' *Griswold* v. *Connecticut,* 381 U. S. 479 (1965).
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> "Our Government is founded upon a written Constitution. The draftsmen expressed themselves in careful and measured terms corresponding with the immense importance of the powers delegated to them. The Framers of the Constitution, and the people who adopted it, must be understood to have used words in their natural meaning, and to have intended what they said. The Constitution itself

contains the standards by which the seizure of evidence challenged in the present case and the admissibility of that evidence at trial is to be measured in the absence of congressional legislation." *Coolidge* v. *New Hampshire,* 403 U. S. 443, 499–500 (1971) (Black, J., concurring and dissenting).

In Justice Black's view an orderly courtroom was also a necessary ingredient for the conduct of a fair trial. This view was forcefully expressed in his opinion outlining the sanctions available to a judge faced with an obstreperous defendant in the courtroom. His opinion for the Court in *Illinois* v. *Allen,* 397 U. S. 337, 346–347 (1970), states:

"It is not pleasant to hold that the respondent Allen was properly banished from the court for a part of his own trial. But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor, the good and the bad, the native and foreign born of every race, nationality, and religion. Being manned by humans, the courts are not perfect and are bound to make some errors. But, if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case. . . ."

II

Justice Black's work reflects his concept that a second major role of the Court under the Constitution was to open the channels of the political process. During his service on the Court controversies about popular control of government appeared in diverse forms. When Justice Black came to the bench, electoral equality generally was far from a reality. The Court regarded reapportionment as a "political thicket" to be avoided.[18] Justice Black, however, saw the threat to our constitutional form of government in self-perpetuating "rotten boroughs" as a responsibility of the Court as interpreter and enforcer of the Constitution. For him the right to an undiluted vote was "too important in our free society to be stripped of judicial protection." [19] In his dissenting opinion in *Colegrove* v. *Green,* 328 U. S. 549, 566 (1946), he forecast not only penetration of the reapportionment thicket but also the ultimate "one-man, one-vote" standard adopted by the Court in *Reynolds* v. *Sims,* 377 U. S. 533 (1964).

In the South, the controversies about access to the political process focused on racial discrimination. At a time when the South was considered by many an eccentric pocket of racial discrimination, in contrast with the rest of the Nation, Justice Black spoke of the people of the South as decent and compassionate human beings, who, he believed, could, with leadership, live down the tragedies of slavery, the Civil War, Reconstruction, and segregation. His opinions stressed that equal education and equal suffrage were the principal means to total equality under law. Perhaps his Senate campaign days, stumping the State of Alabama, led him to believe that no right could create the respect for a man or recognition of his views by elected officials like his right to

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[18] *E. g., Colegrove* v. *Green,* 328 U. S. 549, 556 (1946).

[19] *Wesberry* v. *Sanders,* 376 U. S. 1, 7 (1964).

vote for local, county, state, and federal officers.[20] But he dissented from the Court's decisions upholding regional sanctions against voting discrimination which he viewed as penalties against the Southern States reminiscent of Reconstruction.[21]

By the time Justice Black died, the face of the South had changed dramatically. School desegregation spurred by *Alexander* v. *Holmes County Bd. of Ed.*, 396 U. S. 19 (1969), had produced more school integration in the South than in the North. Negro officials sat in state legislatures for the first time since Reconstruction and various cities and towns had black mayors or aldermen. A new spirit of warmth and moderation pervaded Southern politics replacing the bluster of massive resistance.

When specific groups were disenfranchised or forced to forfeit full political participation, Justice Black defended them. For example, he dissented from the Court's opinion sustaining the constitutionality of the Hatch Act, which barred public employees from engaging in political activity.

> "The section of the Act here held valid reduces the constitutionally protected liberty of several million citizens to less than a shadow of its substance. It relegates millions of federal, state, and municipal employees to the role of mere spectators of events upon which hinge the safety and welfare of all the people, including public employees. It removes a sizable proportion of our electorate from full participation in affairs destined to mold the fortunes of the nation. It makes honest participation in essential political activities an offense punishable by proscription from public employment. It endows a

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[20] Voter registration, facilitated by court decisions and new federal legislation, had established the Southern Negroes as a potent political force, particularly in local affairs.

[21] *South Carolina* v. *Katzenbach*, 383 U. S. 301, 355 (1966) (Black, J., concurring and dissenting); *Perkins* v. *Matthews*, 400 U. S. 379, 401 (1971).

> governmental board with the awesome power to censor the thoughts, expressions, and activities of law-abiding citizens in the field of free expression from which no person should be barred by a government which boasts that it is a government of, for, and by the people—all the people. Laudable as its purpose may be, it seems to me to *hack at the roots of a Government by the people themselves;* and consequently I cannot agree to sustain its validity." *United Public Workers* v. *Mitchell,* 330 U. S. 75, 115 (1947). (Emphasis added.)

In *Williams* v. *Rhodes,* 393 U. S. 23 (1968), Justice Black led the Court to take another step toward equal access for all to the ballot box by coming to the aid of a political candidate, whose views and actions Justice Black may well have abhorred. The American Independent Party candidate for President had been denied a place on the ballot because he had failed to secure sufficient petition signatures by the appropriate date. In striking down the complex rules which infringed on George Wallace's right to become a candidate, Justice Black wrote:

> "In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly we have said with reference to the right to vote: 'No right is more precious in a free country than

that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'" *Id.*, at 30–31.

III

The third area in which Justice Black sought to fulfill the goals of the Founding Fathers, as he perceived them, and the area in which his constitutional faith attracted the greatest public attention involved what Oliver Wendell Holmes called the "free trade of ideas." In a real sense, Justice Black viewed the First Amendment as the foundation of the American democratic process—the foundation that permitted a man to conceive an idea, to express it, and to associate with other men of like persuasion to further their common interests. It would be difficult to find better words to express this belief in the First Amendment than those chosen by Justice Black himself early in his Court career. In February 1941, less than four years after he was appointed to the Court, he wrote:

> "I view the guaranties of the First Amendment as the foundation upon which our governmental structure rests and without which it could not continue to endure as conceived and planned. *Freedom to speak and write about public questions 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." *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287 (1941) (dissenting opinion). (Emphasis added.)

Like the human heart, the liberty which is the core of a democratic government requires the greatest protection in times of severe stress, such as war or social upheaval. In each such time of crisis, Justice Black

stood beside the First Amendment against a tide of popular opinion so aroused in opposition to a common "enemy" that it often failed to recognize the self-destructive consequences of its own actions. Justice Black saw the threat which he communicated with eloquent simplicity in his dissents:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. . . ." *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 137 (1961).

After World War II, sentiment was strong against persons of German descent. When the Court upheld the deportation of a German alien who was alleged to be "dangerous to the public peace and safety" under the Alien Enemy Act, Justice Black dissented, drawing an analogy to the 1798 Alien and Sedition Acts. He wrote:

> "[T]he First Amendment represents this nation's belief that the spread of political ideas must not be suppressed. And the avowed purpose of the Alien Enemy Act was not to stifle the spread of ideas after hostilities had ended. Others in the series of Alien and Sedition Acts did provide for prison punishment of people who had or at least who dared to express political ideas. I cannot now agree to an interpretation of the Alien Enemy Act which gives a new life to the long repudiated anti-free speech and anti-free press philosophy of the 1798 Alien and Sedition Acts. I would not disinter that philosophy which the people have long hoped Thomas Jefferson had permanently buried when he pardoned the last person convicted for violation of the Alien and Sedition Acts." *Ludecke* v. *Watkins,* 335 U. S. 160, 181–183 (1948).

The Korean conflict brought on another cycle of public harassment of allegedly or potentially disloyal citizens, Communists and their sympathizers. Justice Black's resistance to the extraordinary measures taken by a fearful government and its frightened citizens brought him much personal abuse. The personal attacks only strengthened his faith and heightened the insight and courage that he embodied in his written memorials to free speech. His dissent on behalf of eleven American Communist Party leaders at the height of the Korean War in *Dennis* v. *United States,* 341 U. S. 494 (1951), is one such memorial:

> "The opinions for affirmance indicate that the chief reason for jettisoning the rule is the expressed fear that advocacy of Communist doctrine endangers the safety of the Republic. Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. . . ." *Id.,* at 580.
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> "Public opinion being what it now is, few will protest the conviction of these Communist petitioners. 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." *Id.,* at 581.

Even before Cold War tensions had relaxed, the Nation and the Court were confronted by the inevitable tensions generated by the American Negro's increasingly successful struggle for equality. The marches, demonstrations, sit-ins, and confrontations of the 1960's presented new challenges, both to free speech and to an orderly society. In *Cox* v. *Louisiana,* 379 U. S. 559 (1965), Justice Black emphasized the careful distinction between speech and conduct which he believed necessary

simultaneously to provide protection to the rights of individuals to associate for the advancement of their beliefs and to protect the public against incipient and actual violence and intimidation of the orderly functioning of government and the courts. He wrote:

> "The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes.* This does not mean, however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property. Were the law otherwise, people on the streets, in their homes and anywhere else could be compelled to listen against their will to speakers they did not want to hear. Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment." *Id.,* at 578 (concurring and dissenting).

As the social unrest concentrated in the South in the early 1960's turned to urban riots elsewhere in America in the late 1960's, many who feared anarchy were ready to weaken the rights of free speech and free assembly to re-establish more rigid order. Disorderly conduct and trespassing convictions appeared frequently on the Court's docket. Many Supreme Court decisions were misconstrued by large segments of the public who viewed them either as too restrictive or too permissive, depending upon their individual persuasions. In *Gregory* v. *Chicago,* 394 U. S. 111 (1969), Justice Black again attempted to find the safe channel between speech and conduct, between rights protected by the First Amendment and actions subject to legislative regulation. Comedian Dick Gregory had conducted an orderly march through Chicago in the face of hecklers. The Illinois

courts had found that he had been completely law-abiding until policemen, concerned that the hecklers would provoke a breach of the peace, had ordered Gregory and his demonstrators to disperse. When they failed to leave, they were arrested and charged with disorderly conduct. Concurring in the Court's opinion reversing the conviction, Justice Black said:

> "[U]nder our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat. Laws, that is valid laws, are to be made by representatives chosen to make laws for the future, not by police officers whose duty is to enforce laws already enacted and to make arrests only for conduct already made criminal. . . . To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws." *Id.*, at 120.

However, Justice Black offset his concurrence in the reversal of Gregory's conviction with a clear warning that in his view conduct can be and should be regulated to protect other people, their families, their homes and their serenity. In the same opinion he wrote:

> "Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men. I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Id.*, at 125–126.

Justice Black believed that the First Amendment was designed to protect individual men. He was unwilling to "balance" away the rights of any individual person

for some higher governmental purpose. In *Barenblatt* v. *United States,* 360 U. S. 109 (1959), Justice Black expressed his belief that the protection provided by the First Amendment enabling individual men and women to voice their beliefs and ensuring that other persons could hear the speaker was itself one of the highest purposes of the Founding Fathers of the Republic. He said:

> "[E]ven assuming what I cannot assume, that some balancing is proper in this case, I feel that the Court after stating the test ignores it completely. At most it balances the right of the Government to preserve itself, against Barenblatt's right to refrain from revealing Communist affiliations. Such a balance, however, mistakes the factors to be weighed. In the first place, it completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political 'mistakes' without later being subjected to governmental penalties for having dared to think for themselves. It is this right, the right to err politically, which keeps us strong as a Nation. . . ." *Id.,* at 144 (dissenting opinion).

Justice Black's appreciation of the value to society as a whole from enforcement of the First Amendment to protect the speech and writings of one individual is also reflected in his opinions interpreting the freedom of religion elements in the First Amendment. He gave to the Free Exercise and No Establishment of Religion Clauses of the First Amendment the same sympathetic consideration that he devoted to the speech and free press guarantees. He treated these provisions as interrelated devices to protect the American heritage of freedom. In fact, the decision in *Reynolds* v. *United States,* 98 U. S. 145 (1879), in which the Court upheld the prohibition against polygamy, even as applied to Mormons who had more than one wife as a profession of

their religious beliefs, apparently led him to the speech-conduct differentiation which for him marked the limits of the First Amendment's protections.

Justice Black sat on the bench during times when religious freedom was subjected to intense pressures from competing social forces. Parochial schools and their sponsors sought public aid to meet the ever-rising costs of education, while minority religious groups attacked flag salutes, school prayer services and Sunday closing laws. These questions were not easy for Justice Black to decide and upon reflection he was unable to reconcile his first judgment as a Justice with the First Amendment. *Minersville School District* v. *Gobitis,* 310 U. S. 586 (1940). In *Jones* v. *Opelika,* 316 U. S. 584 (1942), and *West Virginia Bd. of Ed.* v. *Barnette,* 319 U. S. 624 (1943), he admitted his error. In his concurring opinion in *Barnette,* he expressed his profound respect for freedom of belief and thought:

> "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction

is a form of test oath, and the test oath has always been abhorrent in the United States.

"Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

"Neither our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. . . ." *Id.*, at 643–644.

After his initial uncertainty over the meaning of the First Amendment prohibition on government interference in religion, Justice Black wrote three landmark decisions on the relationship between church and state. His *Everson* opinion for the Court, holding that New Jersey could constitutionally pay a school transportation subsidy to parents of school children, including parents who used the subsidy to send their children to religious schools, is usually cited as precedent for the limited nature of governmental power in the area of religious education.

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining

> or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Everson* v. *Board of Education,* 330 U. S. 1, 15–16 (1947).

Building upon *Everson* Justice Black wrote the Court's opinion invalidating the practice of some schools to release time in the school day so that students could participate voluntarily in religious activities within the school building. *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203 (1948).

> "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. . . ." *Id.,* at 211–212.

Finally, in 1962 Justice Black wrote one of the most controversial opinions rendered by the Court during the quarter-century he had by then been an Associate Justice. In *Engel* v. *Vitale,* 370 U. S. 421 (1962), the Court held

that the Constitution outlawed voluntary repetition of the New York Regents' Prayer in the public schools of that State. The opinion reflects Justice Black's deep respect for Thomas Jefferson's "wall of separation" between church and state and the Justice's own strong religious upbringing.

> "It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that '[m]ore things are wrought by prayer than this world dreams of.' It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that

> government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Id.*, at 433–435.

We believe that it would be fitting to end this remembrance of Justice Black as he ended thirty-four Terms in pursuit of his constitutional faith—with attention to his deep concern for freedom of the press. His opinion supporting the right of several newspapers to publish the *Pentagon Papers* critical of the Viet Nam War was the culmination of his effort over his entire long tenure to keep the press free from government interference.

In *Bridges* v. *California*, 314 U. S. 252 (1941), Justice Black's opinion for the Court upheld the right of an individual citizen vigorously to speak his mind to government officials and the right of a newspaper to editorialize about pending lawsuits. He wrote:

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act

> at the peril that judges might find in the utterance a 'reasonable tendency' to obstruct justice in a pending case." *Id.*, at 269.

And in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 293 (1964), his concurring opinion expressed his opposition to onerous libel judgments that might curb the unfettered flow of news to the great detriment of our free society. His dramatic grand finale, in *New York Times Co.* v. *United States*, 403 U. S. 713 (1971), re-expressed much of the faith he always had in that well worn, dog-eared little paperback booklet entitled "The Constitution of the United States of America" which was seldom out of his reach:

> "The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: 'Congress shall make no law . . . abridging the freedom . . . of the press . . . .' Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.
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> "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free

> to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. . . ." [22] *Id.*, at 716–717 (concurring opinion).

Now the work of Justice Black is done. His constitutional faith is recorded in over 100 volumes of the United States Reports, the 3,000 Court decisions on which he voted and the nearly 1,000 opinions which he wrote, 53 of them in his last Term.

We must, of course, await the judgment of history for a valid appraisal of his work. We need not wait to acknowledge with gratitude that he was, indeed, one "who tried his dead level best to serve." And there are many already prepared to join in an admiring judgment rendered over ten years ago that:

> "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 the quiet courage and gentle strength—cannot, as will his opinions, live forever." [23]

Wherefore, *it is resolved* that we, the Bar of the Supreme Court of the United States, express our sorrow

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[22] Those who would doubt that Hugo Black remained a Southerner throughout his life should compare the last sentence quoted above with the ballad, "I Am a Dirty Rebel."

[23] Professor Fred Rodell, quoted in I. Dilliard, One Man's Stand for Freedom 26 (1963).

and deep sense of loss that Justice Black is no longer with us; we are comforted by the knowledge that he lived (and knew that he had lived) a full and useful life in which he served his people and his country with every ounce of the considerable energy, love and devotion which he could muster; we are strengthened by his example of courage, discipline, steadfastness and wisdom; and we are inspired by his enduring faith that our written Constitution, our Bill of Rights and the rule of law are the best instruments yet designed for the preservation and peaceful development of the Nation he knew and loved.

And it is further resolved that the Chairman of our Committee on Resolutions be directed to present these resolutions to the Court with the prayer that they be embodied in its permanent records.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General, your motion will be granted. We will now hear from the Acting Attorney General of the United States.

Mr. Acting Attorney General Kleindienst addressed the Court as follows:

Mr. Chief Justice, may it please the Court:

The Bar of this Court met today to honor the memory of Hugo L. Black, Associate Justice of the Supreme Court for 34 years, from 1937 to 1971. Without doubt, he was and will remain one of the most revered Justices this country has ever known and we can say with assurance that when the history of the twentieth century is written three decades hence, Hugo Black will take his place among the towering judicial figures of these eventful times. In recalling Justice Black we are reminded of the words of Judge Learned Hand in his tribute to Cardozo: "He is gone, and while the west is still lighted with his

radiance, it is well for us to pause and take count of our own coarser selves."

The hills of Alabama caught the first gleam of the morning in 1886 and even three-quarters of a century later Justice Black would still describe himself, with characteristic modesty, as a "rather backward country fellow." The story of his journey from Clay County to the Supreme Court of the United States has been often told; it is a journey that cannot be measured in time or distance but in accumulated wisdom and experience. On this occasion we can do no more than note some of the markers along the way: his modest formal education and the start of his legal career at the age of 18 when he entered the University of Alabama Law School; his brief tenure as a judge of a Birmingham criminal court with petty jurisdiction and his later term spent as a prosecuting attorney—experience that provided lasting lessons in the operation of criminal procedures and vivid memories of the plight of the poor and disadvantaged; his general practice of law after service in the Army during World War I and his effectiveness in pleading his clients' cases before the jury; his ten-year career in the Senate, where he played an important role in the passage of such New Deal measures as the TVA, the Public Utility Holding Company Act of 1935 and the Fair Labor Standards Act of 1938; and his diligent self-education resulting in a knowledge both wide and deep.

All this and much more would have to be taken into account before any portrayal of the background of the man would even approach completeness. This we must leave to those who can speak more intimately. But no matter how brief and inadequate our mention of his early years, we cannot leave out one essential ingredient that is infused in everything he did. For in William James' phrase, Hugo Black "energized at his maximum"—constantly. Once set in motion, he would not rest until he finished the job at hand. And whatever the task, whether clearing the docket of the Birmingham criminal court,

or playing tennis on a Sunday afternoon, or struggling with an important and difficult case before the Supreme Court, he devoted all the strength and zeal he could summon—and that was considerable.

Add to this his great courage—the most important of all virtues because, as Dr. Johnson reminded, without it a man "has no security for preserving any other"—add to this his great courage to hold true to his beliefs and it is not at all unusual to find Mr. Justice Black reversing, in his first opinion for the Court, no less an eminence than Judge Learned Hand and, what is more, doing so less than three weeks after oral argument in a case that can hardly be described as simple. *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112.

During his first Term, in his opinion for the Court in *Johnson* v. *Zerbst,* 304 U. S. 458, we can also see the beginning of his relentless effort to secure the right to counsel for all defendants in criminal cases, which successfully culminated 25 years later in his famous opinion in *Gideon* v. *Wainwright,* 372 U. S. 335. *Johnson* v. *Zerbst* is noteworthy too for his exhaustive, but succinct definition of waiver as an "intentional relinquishment or abandonment of a known right or privilege," 304 U. S. 464—a pronouncement that to this day has exerted substantial influence.

There are many themes that recur in Justice Black's opinions. His insistence on focusing on what the decision would mean to the individuals affected by it is well known. See, *e. g., Fleming* v. *Nestor,* 363 U. S. 603, 621, 624 (dissenting opinion). He was concerned with setting down firm and concise rules so that people could govern their actions accordingly and, just as important, so that judges would not be set adrift in a sea of uncertainty where, in his words, the "fundamental rights of the people [would] be dependent upon the different emphasis different judges put upon different values at different times." *Konigsberg* v. *State Bar,* 366 U. S. 56, 75 (dissenting opinion). To Justice Black, flexibility was not a desirable attribute

but a positive evil to be avoided in dealing with people's constitutional rights. He wrote, for example, in his dissenting opinion in *Braden* v. *United States,* 365 U. S. 438, 445, that: "The majority's approach makes the First Amendment, not the rigid protection of liberty its language imports, but a poor flexible imitation."

All who knew him or who have read his opinions are aware of his penetrating intelligence and of his ability to reason logically and with force. But Justice Black believed, as he stated only a few years after he began his career on the bench, that "Constitutional interpretation should involve more than dialectics. The great principles of liberty written in the Bill of Rights cannot safely be treated as imprisoned in the walls of formal logic . . . ." *Feldman* v. *United States,* 322 U. S. 487, 499 (dissenting opinion). He knew well Dean Pound's admonition that "logic does not give starting points" and, whether the Bill of Rights or federal legislation was involved, Justice Black adhered to the view that starting points were not to be devised by judges. Instead they were to be gleaned from the Founders or the legislature, in light of the language used and its historical background. As he wrote in describing his constitutional faith, "it is language and history that are the crucial factors which influence me in interpreting the Constitution—not reasonableness or desirability as determined by Justices of the Supreme Court."

When he had decided what the Framers meant he maintained that position with consistency and integrity. Throughout his succeeding years on the Court, for example, he never departed from the view, first expounded in *Adamson* v. *California,* 332 U. S. 46, 68 (dissenting opinion), that the Fourteenth Amendment made the Bill of Rights fully applicable to the states—a view he arrived at through the study of history and one buttressed by the fact that other theories such as "selective incorporation" left judges free to determine what rights were "fundamental."

This is not to say, however, that for him the great constitutional guarantees were confined within static bounds. Repeatedly, his opinions marked a path for applying the substance of those guarantees to new factual circumstances that could not have been known to their Framers. An example is his opinion for the Court in *United States* v. *Lovett,* 328 U. S. 303, which breathed new vitality into the prohibition of bills of attainder.

Perhaps he is best known for his position that the First Amendment is an "absolute"—that when the Framers said: "Congress shall make no law . . . abridging the freedom of speech" they meant "no law." It was in cases involving freedom of speech that he made his most impassioned arguments, for he was unashamed of human emotions and unhesitant about revealing his own in defense of liberty. Often in dissent he would chide the majority for employing what he described as the "so-called balancing test." To Justice Black, the Framers had done all the balancing when they wrote the First Amendment. And even when his pleas failed to persuade, particularly during the turbulent period of the early fifties, one can still feel in his dissents the breezes of humanity blowing in to purify the atmosphere and set the tone for decision in calmer times. Compare *Dennis* v. *United States,* 341 U. S. 579, 581 (dissenting opinion), with *Yates* v. *United States,* 354 U. S. 298.

There were qualities about Justice Black that invited further inquiry by those who did not know him but knew only of him, apparent paradoxes that vanished as the image of the man sharpened. He had great warmth and kindliness, but his opinions and his memorable oral announcements of them in the courtroom resounded with eloquent indignation whenever a wrong needed righting. He would rigorously attack the ideas of those with whom he disagreed, but he bore no personal malice and never spoke ill of anyone. The structure of his writings is studied simplicity, but for those astute enough to delve beyond, the vast foundation of the views he expressed is

revealed. To him the law was serious business, yet his sparkle and mirth often defused the charged atmosphere of oral argument. While he strove for firm and fixed legal rules, he would overrule precedent and uproot established practice without hesitation in order to fulfill his primary duty to the Constitution. He was both talkative and a good listener; intense, but relaxed; and, most of all, gentle in manner but firm in holding to his beliefs during the ebbs and flows of public opinion that marked his 34 years on the bench.

It is perhaps inevitable that the future will see comparisons made and similarities noted between Justice Black and John Marshall or Holmes or Brandeis or Cardozo. The attempt is worthy and intellectually fascinating, but in the end it must fail. For Hugo Black was, above all else, his own man. There have been few judges whose writing had so many ideas brooding in the background. He has left his legacy in more than one hundred volumes of United States Reports and so long as men seek to be true to themselves his light will remain to guide the way.

May it please this Honorable Court: In the name of the lawyers of this Nation, and particularly of the Bar of this Court, I respectfully request that the resolution presented to you in memory of the late Justice Hugo L. Black be accepted by you, and that it, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Thank you, Mr. Acting Attorney General, for the tribute of the Bar of the Supreme Court to our late Brother, Hugo Black. Your motion will be granted.

If it is possible to add anything to the splendid tributes to Hugo Black, in making the traditional response to your presentation, it seems to me I can do this best by some observations, not primarily on his stature as a judge, but

rather to touch briefly on dimensions of the man as seen by us and in terms of his personal qualities of a human being.

We, who knew Hugo Black well, even though in varying degrees as to the length of our association, can and do agree heartily with all that you and the others have said. The intimacy of the daily association of Justices of the Court is such that, within the Court, each of us acquires an insight and appreciation concerning a colleague that may not be paralleled in any other kind of association.

Even in the intimacy of a law firm each partner does much of his work alone. In this Court we can only act together, even when we do not agree. To do our task, we must consult on each step and stage, and almost daily, as the decisions evolve.

You gentlemen of the Bar have depicted Hugo Black as he appeared to you, chiefly as advocates see a Justice on the bench, through his opinions, and perhaps through an occasional speech. A law clerk has perhaps a more intimate view but, at best, that is only a glimpse.

The tributes you have presented, along with countless other tributes to Hugo Black over the past 20 years—and with more to come—will become part of the fabric of the large record of this uncommon man and part of the literature of the law to which his life was devoted as an advocate, as a legislator and as a judge.

There is always a risk of having our admiration for uncommon men and women create an image that becomes, in time, more legend than flesh and blood. Hugo Black would not like that. He was surely an unusual man, but he was very human. He valued respect, he cherished friendship, but he would not care for sentimental adulation.

He would not mind a dash of legend but he was so vital in his humanity, so firm in his basic views, that he would also want to be seen and remembered as his intimates saw him; what we saw was a warm, responsive, responsible

person and a passionate advocate of his own deepfelt convictions.

He made no apologies for having been a politician, which he had been in the high sense of that word. Nor did he make apologies for being an advocate and he surely was that. Indeed we who shared the intimacy of the Conference with him well know his powers of advocacy, for even when they did not persuade, they shook the positions of others.

But even at his most ardent and passionate, he was always ready to listen and on occasion to change his mind. His was a reasoning mind. Perhaps one of his favorite words was "reasonable." I believe he ranked "reasonable" with "fair" and "just." The combination of those concepts—reasonable, fair, just—made him a tolerant man who would always listen to others. I can see him now when someone sought to make a point with him: leaning back in his chair at the bench or in Conference, or in his chambers—head cocked, fingertips touching, his attention focused. Even with his passionate belief in the First Amendment that earned him, with some, the term "absolutist," he was careful to distinguish conduct from speech, occasionally to the dismay of the true absolutists.

Justice Douglas served with Hugo Black for more than 30 years and he recalls the toughness and vigor and alertness of Hugo Black's mind that was matched by his physical alertness. This made him love the game of tennis that he played until very recent times. Justice Douglas describes Hugo Black as a fierce competitor, whether in his days in the courtrooms in Alabama, or on the Senate floor, or in the Conferences of the Court; he saw no diminution of the depth of his convictions and the skill and vigor of his advocacy over the years they sat on the Court together. He describes Hugo Black as "a tartar" and a man whose fervor led him to contend for supporters of his point of view. This fierceness and fervor as an advocate who could declaim, and even thunder,

for his position had another side that could be seen by his colleagues almost as well in one year as in many years of association.

This was the man of the warm smile, the soft Southern voice, the gentle manner. Over their long years together, Justice Douglas saw him as a man whose friends could do almost no wrong, or if they did, he would defend them or explain them in an effort of mitigation. In short, he describes Hugo Black as a man who was no "fair weather friend" but a friend for all seasons. This quality made him a friend to cherish, to consult, to spend happy hours of comradeship with, with talk of campaigns fought long ago, cases tried a half century past in Alabama, anecdotes of the great figures of the stirring years he spent in the Senate and of his early years on the Court.

Whatever the battles of the past, or struggles over issues within the Court, Hugo Black carried no bitterness or scars. If any tension arose, as it could in the heat of debate with a passionate advocate, it washed away quickly. As with all of us, he preferred to have others agree with him, but he did more than tolerate disagreement, he welcomed and respected it and listened to it.

On one occasion, Hugo Black and I talked for several hours on a point that could move him to great eloquence. He could see that I was not fully persuaded, and, as we separated, that wonderful, warm smile flooded his countenance, his eyes sparkled and he said something like this:

> "Do you know something? You might be right about that, so stick to your guns. I don't think you are right, but it might turn out that you are."

This was not a pose, or a gesture. It came directly from the well-springs of his nature. It was an Alabama populist's 20th century version of Voltaire's famous dictum. He was a confident man, sure of his own powers and convictions, but there was a quality of humility that could be seen in a very short time after coming under his spell. He would listen as attentively to the newest Justice as to the most senior.

I found it interesting that Justice Brennan in 16 years independently identified the same qualities that Justice Douglas observed in Hugo Black in his association of more than three decades, and they were the same qualities that others of us could observe in the short span of a few years.

Justice Brennan recalls one occasion when Hugo Black was quietly but firmly insistent on having certain changes made in one of Justice Brennan's opinions, during the difficult May and June period when tension and pressure are great and patience is in short supply. Justice Brennan recalled that finally he spoke rather sharply and pointedly over the phone to Justice Black generally about the matter of finality at some point in the process of writing an opinion. Soon after what Justice Brennan described to me as his vigorous outburst, Justice Black walked into his office and told him to leave the building—to stay away, saying: "This place can become like a pressure cooker and it can beat the strongest of men. You should get out of here and forget it for a few days." Justice Brennan said he accepted the advice.

On another occasion, Hugo Black and Justice Brennan were in disagreement in a First Amendment case and a vigorous exchange occurred over many weeks. When it was over, Justice Black wrote, saying:

> "Much as I disagree with you, I admire the way you fought for your position."

Of the present court, Justice Blackmun is the most recent member to serve with Hugo Black, serving one year with him. He recalls Justice Black coming to his chambers one day to discuss a dissent in which he was joining Justice Blackmun. His comment was:

> "That's the way to do it, Harry—strike for the jugular, strike for the jugular."

Striking the jugular, as we know, does not necessarily cause much pain, but it can be fatal. This was Hugo Black, the advocate, speaking; for a dissenter is, by defini-

tion, an advocate. His dissents were always powerful, they always struck the jugular, and they were often prophetic.

I hope I can be indulged some observations on the intimate relationship I had with Hugo Black from the time I came here three years ago.

I had known him slightly after I came to Washington in 1953 and from arguing cases before the Court. When I went on the Court of Appeals in 1956, one of his former law clerks with whom I had worked in the Department of Justice arranged for the three of us to have lunch together. After that I saw him intermittently and a cordial but not close relationship developed.

Sometimes when I would see him at Washington parties, he would say, naming a particular case,

> "I read your dissent. You may be right about that, but even if you're not, stand by it. Dissents keep the boys on their toes."

But when I came to this Court 3 years ago, he was at once both warmly cordial and helpful in his welcome. During that first summer I remained in Washington, as he did, and saw him almost daily. As the senior Justice, he was the logical member of the Court for me to consult as I tried to adapt my experience on the Court of Appeals to the work of this Court. We lunched together often and I found myself not only consulting him on the steady stream of chambers motions, but on a wide range of internal matters of the Court's work.

As time went on during the 1969 Term, he occasionally dropped in to see me, sometimes as he was leaving for the day. He would vary between cautioning and scolding me about taking on too much of the administrative burdens of the federal judiciary while carrying on a full load of Court work. Once he said:

> "Chief, you've got to let up. Make them get someone else to do that. Congress has no right to give nonjudicial duties to a Justice of this Court."

Yet on many sensitive and difficult problems of the federal systems, his counsel was most valuable to me. He would remind me that Chief Justice Hughes had said: "This job can kill a man if he is not careful."

As a Senator when Hughes was named to be Chief Justice, Hugo Black opposed the nomination, spoke against him, and voted against him in a bitter and long-drawn-out confirmation battle. A few years later, he was himself named to the Court in an atmosphere that engendered controversy at the time. When he came to the Court, Chief Justice Hughes greeted Black cordially and was helpful in every way and never alluded to Black's opposition and vote against him.

It was characteristic of Hugo Black to say, as he did on several occasions:

> "When Hughes was nominated I thought of him as a big business Wall Street lawyer, not much interested in the people. I was a Senator from a rural state and it was the poor people and small farmers who sent me here and he didn't seem like our kind of man.
>
> "But I was wrong. Hughes was a fine human being and a fine justice, and a great Chief Justice, and we became warm friends."

We know how Hugo Black loved good stories, a happy evening with lawyers and judges. His table, which he and Elizabeth presided over in my time, was a gourmet's delight. I often teased him about his lack of interest in wine, since the only wine he cared for was made from scuppernong grapes that abound in the South. When I discovered this I kept a supply of it on hand for him. He, in turn, would both tease and caution some of the rest of us, quoting Chief Justice Hughes' dictum that judicial work on the Supreme Court never killed any Justime, but overeating did. When we changed the lunch hour from 30 to 60 minutes, he said he would "go along" but he feared we would all eat too much.

One fairly recent incident discloses a side of Hugo Black that the public could not see.

When we contemplated changing the shape of this bench to make it easier for lawyers to hear the Justices, and especially for Justices on the two end seats to hear each other, we arranged to have a full-scale model of the proposed bench made up in plywood on the same elevation as we now sit. This model was placed in the East Conference Room with a lectern in front and our chairs in place. Then one day we all gathered to make the final decision. As we sat at our places and discussed the change, Justice Harlan, with the professional advocate's point of view, said he wanted to see how the bench would look to the lawyer. He went to the lectern and engaged in a colloquy with those of us on the bench. Finally, he said he believed it would be an improvement, but then he added:

"There is just one thing I don't like about this."

We all waited, but we could begin to see a twinkle in the Harlan eyes. Someone said, "What is it, John?" "The trouble I see," said Justice Harlan, "is that the change in shape gives an inordinate prominence and position to the three Justices in the center section."

Hugo Black responded immediately, and the smile on his face carried out the byplay:

"John, you're wrong—very wrong—it just *seems* that way to *you* because of the *distinction* and quality of the three men who sit here."

One of the most pleasant memories I have of our informal hours were those last spring when, on occasion, the Justices had lunch beside the fountain in one of the courtyards. Since he loved his garden at home, he seemed to respond to the courtyard setting, and more than the usual number of stories came forth.

I never heard him speak ill of any man in any mean-spirited sense. Occasionally, when the news media would

have stories about Justices or the opinions of the Court that would bring annoyed comments from Justices, he would say:

> "Don't let it bother you. This has been going on a long time. Those fellows must have something to write about and when there isn't anything, they have to think something up. Just forget about it."

At the risk of repetition, I would like to close by drawing on what I stated on the opening day of the 1971 Term when we had the sad duty of announcing that the Court opened without Hugo Black for the first time in 34 years—a tenure that spanned that of one-third of all the Chief Justices who presided here since the first session on February 1, 1790.

In time, I believe, one thing will stand out above all else in Hugo Black's work and his thinking. Throughout his entire career, he never wavered in his unbounded faith in the people and in the democratic political processes of a free people under the American Constitution. He loved this Court as an institution, he revered the Constitution, he had enormous respect for the Presidency and high regard for the Congress, but above all else, he believed in the people. He had no doubt whatever as to the ability of an informed and free people to determine their own destinies.

We will miss his wisdom, his comradeship, and the radiant warmth of his rare spirit, but to use his own words, "the Court will go on."

Mr. Attorney General, Mr. Solicitor General, on behalf of the Court, I thank you for your presentation in memory of our late Brother Hugo L. Black. We accept the resolutions of the bar and we ask that you convey to Mr. Louis Oberdorfer, chairman of the bar committee, and all its members, our appreciation for their statements, which will be made part of the records of this Court in perpetuity.