

The American MERCURY

JUSTICE HUGO BLACK

BY FRED RODELL

A white man and a colored man were driving together over a long straight road in a piney part of Georgia at fifty-five miles an hour. "Pull over," said the cop. Then, "Turn around and follow me." Five miles back there was a small town with a courthouse. In marched the three. A sheriff in shirt sleeves grunted and said, "Strangers, aren't you? Forty's the limit here. See the signs?"

A door at the back opened and the county judge ambled in. As he glanced at the white speeder, his eyes suddenly looked puzzled. "Say," he said, "you look mighty like a man whose picture hangs back here in my office. Hugo Black from Alabama. On the United States Supreme Court. What's your name?"

"Hugo Black," said Hugo Black.

"Well," said the judge. "I'm mighty pleased to see you." Turning to the cop he winked, "I guess he wasn't speeding after all, was he?" And to Black, "Sure am sorry to put you out."

"We were going fifty-five," said Black. "What's the usual fine? Down here, you're the judge and I'm a citizen."

Citizen Black paid his ten dollars and, with his Supreme Court messenger spelling him at the wheel, drove on toward Washington.

Nothing could be more typical of the man who is today the nation's most influential legal figure than his insistence on equating himself with the humblest hill-billy who might

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rattle along Georgia's roads at more than the legal limit. For Hugo Black, acknowledged leader of the majority faction of the Supreme Court of the United States, has never forgotten in his heart that he was born in a cross-roads cabin in the small-farm cotton country of Alabama — that he was once, as he does not blink at putting it, a "Clay County hill-billy" himself.

Perhaps it is this utterly unassuming way of his — this almost-Mr.-Milquetoast mildness of manner — that has caused Black, all his life, to be underestimated by others. The fact has never hurt him. His strength, like that of the stud poker player whose ace is in the hole, has been all the more effective for being concealed and so discounted.

As a bud of a lawyer in Birmingham, the slight wiry kid from the back country used to be underestimated by the city-slick attorneys who opposed him — and underestimated to their sorrow; his batting average before juries ran close to a phenomenal .800. Even after he had built up one of the biggest personal law practices in Alabama — from a \$37.50 fee for his first case (which he won for his Negro client) to earnings of \$40,000 or \$50,000 a year — those legal lights whose bad luck it was to clash with him in court for the first time would persistently underestimate the quiet man with the slight nasal drawl — until he snapped into action.

Black was underestimated, too, by all four of his rivals when he decided to run for the Senate in 1926 against

a former governor, a former State Supreme Court justice, a well-known and well-backed businessman, and a big-shot utility lawyer who is now Senator John Bankhead — but Black made easy also-rans out of the four of them. He was underestimated by his Senate colleagues, as just another Southern senator who didn't even look like a senator, until they discovered in him their hardest worker, their most penetrating investigator, and their most devastating cross-examiner. And he was underestimated by practically the entire legal profession, and the rest of the nation as well, when Franklin Roosevelt named him to the Supreme Court in 1937.

No freshman Justice ever donned his black robes and paraded in to take the Mr. End-Man seat at the long bench under so heavy a handicap as did Black seven years ago. It had been said that, since he helped lead the futile fight for the President's plan to "pack" the Court, he could harbor no respect for that venerable institution; that his appointment amounted to a sour political plum. It had been bruited about — and rarely retracted — that his legal experience was limited to a year or so as a police court judge down in Birmingham. It had been splashed all over every front page in the country that he had once donned the white robe of the Negro-baiting, Catholic-hating, law-breaking Ku Klux Klan. Lawyers and laymen, liberals and conservatives, expected him to be a flop or a fascist or both, and thanked God and the founding fathers that his

vote would be only one of nine.

Yet less than a year later, the leftist *New Republic* ran a learned article by a liberal law professor, reviewing the record of Black's first term on the Court and praising both it and him to the skies. Before two years were out, the conservative *Atlantic Monthly* ran an article by a member of a solid Boston law firm, which stated: "There is no need of defending Black's ability. There are not many judges who could write the succinct, lawyer-like, and pointed opinions he has written for the Court. There are fewer yet capable of the clarity, power, and perspicacity of his dissents. It is nonsense for anyone who has read them to speak otherwise."

Today, there are three members of the Supreme Court who fail to recognize in Black the ablest judge and the most brilliant legal mind among them. One is Owen Roberts, final hold-over from the days of the Nine Old Men (to whom Chief Justice Stone never at heart belonged); for Justice Roberts resents the fact that the views Black used to express in dissent are increasingly becoming the law of the land — with Justice Roberts dissenting. One is Felix Frankfurter, whose career on the Court is the exact antithesis of Black's inasmuch as he came in with a fanfare of trumpets from both left and right and has steadily sunk lower in the estimation of both; for his ill-concealed jealousy of Black's intellectual leadership has caused him to captain the Court's opposing — and conservative — team. One is Robert

Jackson who plays along with Frankfurter, for his White House influence, in dwindling hope of being named Chief Justice, an honor he once missed by a hair; for he is smart enough to see in Black the biggest threat to his ambition.

To the other five members of the Court, and to lawyers and judges of every hue, the mild Southerner's stature is already great and is still growing. Yet Black remains strikingly and strangely underestimated by a nation which knows next to nothing of this man who has climbed to the heights rung by rung, and has yet remembered that his ladder rests in Alabama.

II

In a cabin not even graced by logs, in a place called Harlan, not even named on the largest maps, Hugo LaFayette Black was born in 1886, the eighth and last child of his farmer father who had once enlisted in the Confederate Army at the age of fourteen. Hugo was five when his father moved to town and set up a cracker-barrel general store. The town was Ashland, population 400, and there the boy grew up and went to school. But he never so much as finished high school — or "Ashland College" as it was called. When a bullying teacher punished Black's sister by ordering her to stand in a corner on one leg, fraternal affection plus Southern chivalry led the spindly sixteen-year-old to give his instructor a public beating and walk out the door, never to return.

But from the age of nine or ten, young Hugo had been drinking in a different kind of education. Ashland was the county seat, and every fall the courthouse rang for a few weeks with lawyers' arguments and judges' rulings. This was music and excitement to the future Justice. He rarely missed a day, and even now he delights to insist that he was a better lawyer then, in his boyish imagination, than he has ever since become.

He was fascinated, too, by political speeches and rallies — no matter how minor the county office involved in the campaign. Those were the days when the Populists, and then the Populist-captured Democrats under Bryan, were sweeping farm sentiment with them, West and South, and it is not unlikely that Black's deep-imbued sympathy for the economic underdog was first ingrained in him by torchlight oratory in the town square of Ashland.

In emulation of his doctor-brother, Orlando, Black — with no high school or college degree — spent a year studying medicine, a year which his Supreme Court brethren deplore, since they claim he still tries to write medical treatises into personal injury cases. But the call of the courthouse was too strong. At eighteen he entered law school at the University of Alabama; at twenty he was graduated with honors and went home to Ashland to practice; within a few months, his loft office, eked-out law library and all, burned to the ground, and Black, with less than ten dollars in his pocket,

hit for the big city of Birmingham to hang out his shingle.

From the beginning his talents were devoted to the little fellow — to the worker, the small tradesman, the farmer, the abused Negro. He had no yen to sell his services to the power companies, the banks, the iron and steel firms, and though the disinterest was mutual at the start, there came a time when the corporations would have paid plenty for Black, if they could have bought him.

From the beginning, too, Black was recognized by bench and bar as a top-shelf trial lawyer, with cross-examination his forte. In fact, his skill at twisting witnesses around his finger actually lost him one important case. As old Judge Abernethy later explained it: "I'd about made up my mind that that key witness was lying by the clock when it suddenly came to me that Hugo was just too smart for him and the poor devil was trying his best to tell the truth."

According to Colonel Crampton Harris, Black's one-time partner in Birmingham, the man, in court and in action, had a "triple-decker mind." On one level he would be listening to the witness, on another anticipating what the witness was going to say next, and on a third setting traps to catch the witness on what he was about to say.

When a judge before whom Black had often displayed his mental agility became one of Birmingham's first city commissioners, he had the twenty-five-year-old stripling appointed a

justice of the peace. What Black himself remembers best about those eighteen months on the city bench is the old colored man who was dragged in drunk three times. The first time Black fined him two dollars, whereupon the Negro borrowed the two from Black, paid his fine, and went on his way. The second time Black doubled the fine and again found himself paying it. The third time the sentence was jail.

Black's only other public office before he went to the Senate was as "solicitor," or prosecuting attorney of Jefferson County (which includes Birmingham) to which post he was elected at twenty-nine. And those who were later scared for civil liberties when an ex-Klansman was named to the Supreme Court might profitably have looked back to the young solicitor, who, single-handed, put a stop to the use of third-degree methods on Negroes in Bessemer, Alabama, twenty-odd years before.

After an artillery captaincy in the first world war, Black went back to the private practice of law. He married gracious young Josephine Foster who, as a Navy "yeomanette," had been a forerunner of the WAVE of today. And in 1925, when Alabama's perennial Oscar Underwood decided to vacate his Senate seat at the end of his term, Black began to aim his hat for the open ring.

Two things clinched his election. First, he could call almost everybody in Alabama "Brother." An inveterate joiner, he followed up his initiation

into the youth-luring "Coming Men of America" with membership in the Masons, the Moose, the Oddfellows, the Praetorians, the Knights of Pythias, and a score of others.

Black says that by joining all these societies and orders he kept himself politically free. For their number was so great that he never felt the slightest political debt to any one. And, more significantly, they added up to a backlog of support sufficient to save him from having to tie himself to any political machine or to any moneyed backers, who might later demand favors in return.

Black also says that, of all the organizations he ever joined, he only really regrets his ex-membership in one. Not the Klan, which was to cause him so much trouble, but the eminently proper, stolid, and stuffy American Bar Association.

The second and more telling factor in Black's 1926 election victory was the manner of his campaign. For almost a year he drove around the back districts of the state, covering every county, literally wearing out one Ford and half a Chevrolet, talking simple down-to-earth stuff to simple down-to-earth people. His most formidable opponent, John Bankhead, tried a little of the same technique but gave it up after he discovered, and later admitted, that "every single place I went, Hugo Black had been there before me. And he had them."

So the country boy went up to Washington. Always a voracious reader, he undertook extra-curricular

self-study of economics, history, government, philosophy — the better to serve his constituents.

All Washington knew him for a worker. A Baptist who had once taught Sunday School, a teetotaler, parties did not appeal to him. He would make appointments as late as 10 P.M. at his office, and, night after night, his visitors would grope through the darkened corridors of the Senate Office Building to the only light still glowing.

Soon, Washington knew him, too, for that knife-like mind that had confounded opposing counsel in Alabama courtrooms. Even before Senator Tom Walsh died, Black was rated his peer at the tough job of investigation; afterward, Black had no peer, and Senate committees to which he did not belong used to borrow him to handle cross-examination of witnesses.

The two biggest investigations which Black himself headed were that of the shipping companies — where his uncovering of skulduggery at government expense led to the Merchant Marine Act and the setting up of the Maritime Commission — and his lobbying investigation, which got him into hot water.

In order to prove — as he did — that Congress had been pelted with thousands of fake wires, signed with dead names and names copied from telephone books, in order to influence legislation, Black subpoenaed mountains of telegrams from Western Union. Western Union requested Black's investigators to come down and look

through their files to save the bother of shipment. William Randolph Hearst, whose editorial activities were involved, began to shout about "unconstitutional search and seizure" in his newspapers. The American Civil Liberties Union and others took up the cry. But a Federal court, while lecturing Black for his over-enthusiasm, fully upheld the legality of what he had done — a practice which, incidentally, had been indulged in by the Senate for decades without protest until Black happened to step on the toes of the vociferous.

This episode plus, particularly, his one-time membership in the Klan long soured many liberals on Black, despite his 99.44 per cent pure liberal record. The business of the Klan is best told bluntly:

Black joined the Klan as a young Alabama politician, perhaps unthinkingly — as he joined almost every other organization in the state; certainly unadmirably. He would still be a practising attorney in Birmingham if he had not joined it, for in Alabama in the Twenties, membership was a *sine qua non* for election to public office. He was never active, he soon resigned.

When his name was sent to the Senate, as the first Roosevelt appointee to the Supreme Court, the question of his being — or having been — a Klansman was raised by those who disliked FDR's choice — not at all because they feared Black would be illiberal, but because they knew he would be far too liberal for their tastes. Out of Senatorial courtesy, and because Sen-

ator Borah assured the Senate, accurately, that Black was not then a member of the Klan, Black was confirmed.

Later that summer, the Pittsburgh *Post-Gazette* created a national sensation with a series of articles about Black's old membership in the Klan. That Ray Sprigle, the reporter who "dug up" the facts, was awarded a Pulitzer Prize for his efforts must have amused Alabamans who had seen the exact-same facts spread all over the Montgomery *Advertiser* when Black was running for reelection to the Senate in 1932, five years before. Nevertheless, the new Justice felt forced to explain and justify himself over a coast-to-coast radio hook-up.

III

But anyone who cared to look at the record, instead of being taken in by one blown-up boner, need have had no misgivings about Black's complete freedom from racial or religious prejudice. The man who had outraged the Klan by supporting Al Smith for the Presidency in 1928, the man whose secretary was — and still is — a Catholic girl (and whose law clerks have been Jewish boys), the man whose whole life had been devoted to fighting for the fellow at the bottom, from which he had climbed, was not likely to turn tyrant on the Supreme Court bench. Nor has he. The Court has never known a more militant humanitarian than Hugo Black.

"An evangelical progressive" was

Senator Bankhead's phrase for Black in the warm telegram that first put the appointive bee in FDR's bonnet. But Justice Black has since said it better for himself. In a decision reversing the murder conviction of four young Florida Negroes, on the ground that confessions had been tortured from them, Black concluded:

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. . . . 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.

Here, in two sentences, is the crux of Black's legal credo. To him, deeply learned as he is in the law, a case is never a jigsaw puzzle of cold and abstract and supposedly permanent legal principles. It is rather a vital and temporal problem concerning the rights, the dignities, the lives, of flesh-and-blood people. He sees the law always as a means to an end — the achievement of social justice, especially for the otherwise unprotected — instead of as an end in itself.

Hence his doughty defense of civil liberties; for his mind is on the beaten-down Negro, the harassed picket, the unorthodox worshipper of God. Hence his unusual interest in personal injury cases; for his heart is with the widow,

or the worker who lost a leg, and not with the niceties of legal logic. Hence his disgust and frequent dissent when the Supreme Court, standing on its dignity, sets out to censure or disbar some little lawyer who has made a formal misstep. Hence, too, his passionate belief in the jury system, stemming from his faith in the decency and common sense of the average man.

By contrast, Black has little sympathy with the business concerns which hire high-priced lawyers to plead them out of government regulations or taxes. A dissent of his, written in his freshman year on the Court, would have taken from corporations the convenient protection of that phrase of the Fourteenth Amendment which says that no State shall "deprive any person of life, liberty, or property without due process of law." Black stated simply — and with an array of historical facts behind him — that a corporation was not a "person," had never been intended as such when the Amendment was adopted, and should no longer be taken under the Amendment's wing despite more than half a century of judicial error in thus saving corporations from many a bothersome bit of legislation. If Black's view should be adopted by the Court majority — as it yet may, through his persuasion of his fellow Justices — it would be the most important change in constitutional law in the Court's entire history.

Here, too, is displayed Black's tremendous respect for legislatures, his belief that appointed judges should

interfere only in rare and extreme instances with the decisions of those elected by the people. This respect is partly due to the fact that he, alone on the present Court, was once a legislator himself. His constant battle cry is — Let Congress decide this; it's none of our judicial business. The respect is also due in part to his unflinching faith in democracy with a small "d."

Thus Black, mild and amiable as he remains in person, has no intellectual patience with his brethren when they mistake their rôle for that of God-in-government. This is the core of his chief quarrel with Justice Frankfurter, a quarrel which has recently flared into their formal opinions.

And it is significant that when they differ, Black is almost always with the majority and Frankfurter dissenting. For Black who, during his first term on the Court, dissented from 10 per cent of the Court's decisions — and in case after case dissented alone — now regularly wins most of his colleagues to his side by the sheer unanswerableness of his reasoning, grounded in the bedrock of facts and yet hitched to the highest principles of jurisprudence. Whereas the former Harvard law professor, though adept at the manipulation of legal language and fine-spun theory, suffers increasing difficulty in keeping his feet on solid earth.

To contrast the two Justices is inevitable, for the Court's much-publicized inner dissension revolves chiefly around them. It is typical of Frankfurter that he will quote the late

Justices Holmes or Brandeis on issues that came before them twenty years ago — and consider the matter closed and his duty done. But it is Black who has kept the Holmes-Brandeis liberal approach to the law a living thing, by applying their skeptical and inquiring spirit to the fresh issues of today.

Moreover, Black, when he gets his teeth in a case, can make Frankfurter sound glib, shallow, and uninformed — even to the legally uninitiated — simply because he is by far the harder worker of the two. Although his quick mind would allow him to coast and still do a good judicial job, his actual working hours while the Court is in session add up to almost eighty a week, a figure no other member of the Court can touch.

He slaves over his opinions, writing and re-writing to compress them to the shortest possible number of short words and yet get his points across equally effectively to the top scholars of the profession and to the back-country lawyers for whom he still feels a nostalgic glow of kinship. His tremendous working stamina, his utter inability to relax when there is a job to be done, regularly wear out every young law clerk of his who tries to keep pace with his schedule.

Every summer, he plays just as strenuously as he works in the winter, and in a full day of tennis he can tire

two men half his age. “Hard as a litard knot” is his own Clay County phrase for his physical condition.

But every summer he also sets himself a tough reading course of a hundred books or so on some subject he has never thoroughly explored. Last summer he dug into the farthest reaches of legal philosophy. The summer before was devoted to formal grammar and English composition, in a perfectionist desire to improve his opinion-writing style.

Already lawyers have begun to compare Hugo Black to that almost legendary legal lion, Justice Holmes. Many believe that his stature will have surpassed Holmes’ before he retires.

For Holmes was always great in dissent, where the irresponsibility of not talking for the Court makes it easier to be great. And most of the legal battles Holmes fought were won by others after his death.

But Black, in seven short years, has achieved the heavy responsibility and the far harder task of usually speaking for the Court majority, as he wins his battles in person, now. He has the sure touch of greatness in him. And history may yet record that the quiet country boy from Alabama gave more to the growth of American law than any man since Chief Justice Marshall more than a century ago.



WE LEARN FROM OUR ENEMIES

By THOMAS M. JOHNSON

OUR troops splashed ashore in France on D-day from special landing craft which grew out of an idea we grabbed from the Germans. They swooped behind the enemy lines in gliders which embodied many features copied from German gliders captured in Africa. For three days before they landed, midget submarines, undetected, planted markers along the French coast to guide them in; and we got that idea the hard way too, from the Japs at Pearl Harbor.

We are using in France many new secret weapons, jealously hoarded as an invasion surprise. It was reasonable to expect the enemy also had surprises. So with the first troops ashore were specially trained teams of officers and men whose sole assignment was to snatch enemy weapons and equipment for study.

In Africa, in Italy, and on a score of Pacific islands, our battlefield detectives are right out in front. To take apart an unexploded shell or a new type of bomb is all in the day's work. Other enemy weapons are rushed from the battlefield onto planes that fly them to laboratories here for rigorous

analysis and testing. The rocks, mud, sand and dust of the proving ground at Aberdeen, Maryland, are admirably suited in all weather to try out anything from a land mine to a Tiger tank. Aberdeen's present collection consists of over 600,000 items of Axis ordnance.

We have found most Italian weapons to be ill-assorted curiosas, their ammunition so dangerous that we blew it up rather than risk using it, as we use German. But we copied the Alpini mountain boot, with hard rubber cleats that strike no revealing sparks from rocks at night. Japanese material is sometimes good. It was from a Japanese plane that we got an improvement on that most complicated of technical devices, the automatic pilot. In general, Japanese copyable ideas are mostly oddments. They exploded firecrackers to simulate machine-gun fire and confuse our troops; we made missiles that do it better and take less space. They used phosphorescent vines to mark jungle paths at night; we made a fluorescent paint that was better.

In the Aleutians, our troops wear

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