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Daniel J. Meador

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BOOK REVIEW

Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black

Elizabeth S. Black with Paul Baier:
Random House, 354 pp. (1985).

*Daniel J. Meador**

The publication of *Mr. Justice and Mrs. Black* in February 1986 coincided with the one hundredth anniversary of Justice Hugo L. Black's birth. Two other events marked this occasion. The United States Postal Service issued a stamp in honor of the Justice, and shortly thereafter, the University of Alabama Law School, the Justice's alma mater, staged a two day commemorative program. Of the three centennial events, the publication of this book is likely to have the most enduring significance for historians. It was compiled, and much of it written, by the Justice's widow, Elizabeth S. Black, with the assistance of Professor Paul Baier of the Louisiana State University Law School.

The book provides us with a portrait of Justice Black at the beginning and the end of his long life. The beginning is depicted through "memoirs" written by the Justice himself when he was past eighty. The end—the last seven years of his life—is portrayed through selected entries from the diary of Elizabeth Black. Together they give us an unusual and intimate view of the personality of this influential and controversial Supreme Court Justice.

The memoirs, occupying only one-fifth of the book, describe the significant events in Black's life from his birth, through the First World War, to his marriage to Josephine Foster in the early

* James Monroe Professor of Law, University of Virginia.

1920s. For anyone who has read biographies of Justice Black or heard his anecdotes and stories, little will be new here. He describes the years of growing up in Clay County, Alabama, a section of the state well off the beaten track and out of the mainstream. He then recounts his short-lived medical school experience in Birmingham, his law school days at the University of Alabama in Tuscaloosa, and his eventual settling into a Birmingham law practice. What is interesting is not so much the newness of the facts recorded here, but that these facts are the ones Justice Black remembered best and thus must have been most significant to him.

Justice Black began to write this account in 1968, the year of his reemergence and reacceptance into his home state of Alabama. In that year he made what might best be described as a triumphal tour of the state: he visited the sites of his youth, attended a gathering of Birmingham lawyers, spoke before a large meeting of the University of Alabama Law School Alumni Association, and climaxed the trip with an appearance before the annual meeting of the Alabama State Bar—his first public appearance in the state in over twenty years. He was then eighty-two years old and seems to have been growing increasingly nostalgic. He apparently intended to write a memoir of his entire life, but, unfortunately for future historians, his memoirs stopped short of his entry into state-wide politics in the 1920s.

In a few pages of text Elizabeth Black then takes us across several decades, touching on Black's eleven years in the United States Senate and his first quarter century on the Supreme Court. She includes an engaging description of the events leading up to their marriage in 1957, six years after the death of Black's first wife. We pick up Justice Black's life with excerpts from Elizabeth's diary, beginning in 1964 and continuing until the Justice's death in September 1971. These diary entries complement a book published several years ago by Hugo Black, Jr., presenting the son's perspective on his father from the 1920s to the 1950s.¹ The wife's perspective presented in these diary entries is at even closer range; the reader at times feels as though he is living in the house with Justice Black.

Here, one sees the Justice in the study on the second floor of his house in Alexandria reading and writing into the small hours of the night as well as on the tennis court in his garden hitting balls and jogging around the court for additional exercise. We are with

1. H. BLACK, *MY FATHER, A REMEMBRANCE* (1975).

him when he has trouble sleeping and wakes up in the middle of the night worrying about a case pending for decision and talking with Elizabeth about an opinion on which he is working. We receive a good glimpse of social life among the Justices and their wives at the Supreme Court and at the Blacks' home. For those interested in the interplay of Supreme Court Justices' personal lives and their work on the Court, this book is a rich mine of information. It is likely to have a secure place on that growing shelf of books about Justice Black.

One aspect of the book that takes it considerably beyond the realm of light chit-chat and gossip is its numerous references to cases before the Court during these years and Justice Black's thoughts about those cases. The footnotes, prepared by Professor Baier, make the book immensely more valuable in this regard. Each time a case is referred to in the diary entries, a footnote supplies its exact name and citation, usually accompanied by a quotation from Justice Black's opinion or his questions during oral argument. These notes enable the reader, at a glance, to see the precise case, what it involved, and what Justice Black's position in it was. Through the diary entries about these cases and the accompanying footnotes, one gets a unique glimpse of Black's constitutional philosophy in his last years on the Court.

It is striking that in most of the cases mentioned here Justice Black was either dissenting or separately concurring. Similarly, when Black first joined the Court in 1937, he served for several years before he began to be comfortably and regularly in the majority. Thus, we have here the curious phenomenon that Justice Black ended his career on the Supreme Court as he began it—at odds with the majority on significant issues. Many of his early views about the meaning of the Constitution, expressed initially in the minority, gradually came to be accepted by the Court majority. A question raised by the pattern of decisions shown in this book is whether the views expressed in the minority in these closing years will likewise come to be accepted by a Court majority. It is too early to answer this question, but there are reasons to believe that Justice Black may yet prevail in death as he did in life.

Consider two examples from the cases that Elizabeth Black mentioned. In *Kaufman v. United States*² Justice Black stated in dissent that the Court should not set aside a criminal conviction on collateral attack because illegally seized evidence had been used, at

2. 394 U.S. 217, 231 (1969) (Black, J., dissenting).

least not in the absence of a claim that the defendant was not guilty. Seven years later, after Justice Black's death, in *Stone v. Powell*³ the majority agreed with Black's restrictive view about the availability of collateral attack on fourth amendment grounds. In *Food Employees Union v. Logan Valley Plaza*⁴ Black's dissent stated that the first amendment has no part to play in cases of employees picketing on the private property located in shopping centers. Eight years later, in *Hudgens v. NLRB*⁵ the majority, quoting at length from Black's dissent in *Logan Valley*, agreed.

In addition to foreshadowing Supreme Court decisions that followed his death, some of Justice Black's dissents noted in this book, though not yet adopted by a Supreme Court majority, have played a role in lower court decisions. His dissent in *Tinker v. Des Moines Community School District*⁶ expressed the idea that the disruptive activities of high school students are not protected by the first amendment. This view subsequently was reflected in a Ninth Circuit decision,⁷ and his *Tinker* opinion has been favorably cited in other lower court opinions.⁸ Justice Black's comments during oral argument in *Swann v. Board of Education*⁹ reflect his support of neighborhood schools. He stated that the Court is constitutionally bound to prevent racial discrimination in the schools, not to "challenge the whole arrangement of the living practices and the way of life of the people all over this nation."¹⁰ That idea seems to have been influential with the Fourth Circuit, which in a recent challenge to Norfolk's neighborhood school plan, stated that absent discriminatory intent, there is nothing "constitutionally suspect" in the school board's preference for neighborhood schools.¹¹

Some observers have commented that Justice Black's positions in these and other cases during his last few years on the Court represent a change on his part, that his constitutional views had shifted from those of his earlier years on the Court. This is a question that will bemuse students of the Court and of the law for

3. 428 U.S. 465, 490 (1976).

4. 391 U.S. 308, 327 (1968) (Black, J., dissenting).

5. 424 U.S. 507, 516 (1976).

6. 393 U.S. 503, 515 (1969) (Black J., dissenting).

7. *Nicholson v. Board of Educ.*, 682 F.2d 858 (9th Cir. 1982).

8. *See, e.g., Quarterman v. Byrd*, 453 F.2d 54, 58 n.6 (4th Cir. 1971).

9. 402 U.S. 1 (1971).

10. MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK 305 (1985).

11. *Riddick v. School Board of Norfolk*, 784 F.2d 521 (4th Cir.), *cert. denied*, 55 U.S.L.W. 3316 (Nov. 3, 1986).

years to come, as will other questions about Hugo Black's career. He was an unusually complicated public man in some respects. In other respects, however, he was at bottom a man easily understood in relation to his time and place. His memoirs of his early life in this book provide a key. From them one senses the indelible fixing of the values of study and work, ordered and civil behavior, and respect for authority and for one's elders. These values, I suspect, were embedded in him in the very special ways of small town life in the South. Elizabeth Black's diary entries show that the same values influenced Justice Black at the end of his life. Thus, the case can fairly be made that his views at the end were essentially what they were from the beginning. By making available such intimate and informative remembrances of his life, Hugo and Elizabeth Black have aided oncoming generations in understanding a major public figure and Supreme Court Justice.

