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## A Passion for Justice

Charles A. Reich

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## A Passion for Justice

Cover Page Footnote

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## A PASSION FOR JUSTICE

*Charles A. Reich\**



*Justice Hugo L. Black and Charles Reich  
February 27, 1966*

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\* Copyright © 2010 by Charles A Reich. A.B. Oberlin 1949, LL.B. Yale 1952. This Article began with a letter from Professor Todd Peppers of Roanoke College, who was preparing a book of experiences by Supreme Court law clerks. He asked me if I would contribute a description of my year with Justice Black, and I agreed. Later it was Professor Peppers who suggested the Post-Clerkship section. I started with what I expected to be a short piece in the spring of 2009. Greg Marriner worked with me on every draft from the earliest effort to the final page proof. More than anyone else Greg is the person who kept me going. Michael Varet read a draft early in the summer of 2009 and strongly urged me to expand my discussion of the functioning of the Warren Court. Michael continued to read draft after draft with just the right amount of approval. Professor Rodger D. Citron is responsible for bringing a draft to the attention of the *Touro Law Review*. Rodger has also contributed many suggestions of his own. James Lucarello, editor-in-chief of the *Touro Law Review*, added an imaginative touch as well as a truly professional job of editing. My longtime friend, Ernest Rubenstein, added crucial final insights. Lee Reich deserves a special note of appreciation for insisting that I drop my original far less descriptive title. And it was my brother Peter who last summer recalled the Douglas-Frankfurter scene in the hallway. At some point this Article took on a life of its own. All of those mentioned above contributed questions, which prodded me to further efforts. My heartfelt thanks to all.

## I. A MOMENTOUS YEAR

What makes a good judge or justice? The public has a need to know. But simplistic labels, such as “activist,” “liberal” and “conservative,” are both meaningless and misleading. Perhaps a former law clerk can offer a different perspective.

I served with David J. Vann as law clerk to Justice Hugo L. Black during the momentous 1953 Term of the Supreme Court. This was the year when *Brown v. Board of Education*<sup>1</sup> was decided. It was also the year when Chief Justice Vinson died and was replaced by the Governor of California, Earl Warren. And it was also a year in which the members of the Court divided in a series of cases with profound implications for the future, involving unlawful police surveillance, political restrictions on the right to work, and the use of psychiatry for “enhanced interrogation” of a suspect.

David and I lived with Justice Black in his Alexandria, Virginia home and spent the entire day with him seven days a week, starting with breakfast cooked by the Judge and served at the kitchen table, continuing with the drive to Washington and a day at the Court, and ending with dinner and an evening of discussion in the Judge’s study upstairs. Justice Black had recently lost his wife and his children were grown and had left home, so David and I were “family” as well as law clerks.

I was a third-year student at Yale Law School when I applied for a position with Justice Black. He was already an influential figure in Supreme Court history, having been appointed in 1937 by President Franklin D. Roosevelt, and having become the senior Justice by the time that I applied. As a student I had been tremendously impressed by Justice Black’s defense of civil liberties at a time when fear of communism had caused most judges, including many “liberals,” to uphold the persecution and punishment of individuals who expressed dissenting views.

In the opinions I read while in law school, Justice Black made clear that he believed prior decisions had wrongfully diminished, diluted, and in some cases totally betrayed the Constitution’s protections of individual rights and liberties. The most conspicuous example of such a betrayal was the Court’s rewriting of the

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<sup>1</sup> 347 U.S. 483 (1954).

Fourteenth Amendment's guarantee of the "equal protection" of the laws, a guarantee adopted after the Civil War and specifically intended to grant equal status to former slaves. Instead of enforcing this provision as written, the Justices had rewritten it to uphold "separate but equal" treatment—a formula for inequality that still remained the law in 1953.<sup>2</sup>

Similarly, in Justice Black's view, the Constitution's mandate of "no law" abridging freedom of speech had been wrongfully rewritten by the Justices to allow any law punishing speech that was considered necessary to prevent perceived threats to the government.<sup>3</sup> And in yet another example of judicial rewriting of the Constitution, to which Justice Black strongly objected, corporations had been given all the rights intended exclusively for natural persons.<sup>4</sup> Such were the highly independent views of the Justice with whom I had eagerly sought a clerkship.

The year previous to my clerkship had been an unhappy one for Justice Black. He was still grieving from the death of his wife, Josephine, he had suffered a physically painful case of shingles, and he was an increasingly isolated dissenter on the Vinson Court. Just before my clerkship began, the Court had suffered the trauma of the *Rosenberg v. United States*<sup>5</sup> case, in which a hastily convened "special session" of the Court had allowed the execution of Julius and Ethel Rosenberg to proceed.<sup>6</sup> Justice Black repeatedly objected that the session itself was not authorized by the rules of the Court.<sup>7</sup> Moreover, he contended that the Court had failed to consider substantial issues concerning the legality of the death sentences.<sup>8</sup> When David and I started work, Justice Black was still angry that the Court had failed to follow its own procedures. He refused to have lunch with "them" and instead the three of us had lunch downstairs in the Court's public cafeteria.

Recently Linda Greenhouse described the activities of the current Supreme Court Justices as follows: "[I]n this media-saturated

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<sup>2</sup> *Plessy v. Ferguson*, 163 U.S. 537, 544-45 (1896).

<sup>3</sup> *Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring).

<sup>4</sup> *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting).

<sup>5</sup> 346 U.S. 273 (1953).

<sup>6</sup> *Id.* at 288, 289.

<sup>7</sup> *Id.* at 297-301 (Black, J., dissenting).

<sup>8</sup> *Id.* at 298-99.

age, the Justices are everywhere. If they are not on book tours, they are opining on the authorship of Shakespeare's plays, or mingling with their peers in Europe, or on C-SPAN addressing high school students, or at least delivering named lectures at law schools."<sup>9</sup>

Justice Black did none of these things. David and I sat in his office and watched him open his mail, heavy with invitations to official functions, embassy receptions, and offers of honorary degrees from universities. On each he wrote one word: "regret." He was home seven nights a week and he insisted on doing all of his own work: he wrote his own opinions, he did his own legal research, he made his own decisions on petitions for certiorari, he read the lengthy printed record of cases when necessary, and he made his own preparations for hearing cases on the bench and for the Justices' weekly conferences. Thus, David and I did none of the work usually assigned to law clerks. For example, incredible as it may seem, we never did any legal research. Only where the Judge's work ended did ours begin. We read certiorari petitions and discussed his choices for cases that the Court should review. We discussed his opinions line by line as well as the opinions of other Justices when they were circulated. We even listened to the angry letters he received from people in Alabama who thought he was a Communist. In fact, we were busy all day long, but never did we do *his* work.

Occasionally David and I wandered next door to the chambers of Justice Felix Frankfurter, where Justice Frankfurter's clerks, Frank Sander and Jim Vorenberg, offered the hospitality of the large room with a fireplace intended for the Justice himself, while Justice Frankfurter preferred the smaller office intended for his clerks. Often our gossip sessions were interrupted by the sudden appearance of the excitable Justice Frankfurter himself, who treated everyone as one of his students, and sometimes backed me into a corner with demands that I "explain" something to "your Judge" who was, in Justice Frankfurter's view, a bit slow to catch on to certain matters, such as the proper criteria for granting or denying petitions for certiorari. Justice Frankfurter seemed to think that my Yale Law School education might enable me to correct some of the flaws in my Judge's education. Needless to say, I never undertook to "correct" Justice Black.

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<sup>9</sup> Linda Greenhouse, *Justice Unbound*, N.Y. TIMES, May 3, 2009, at WK1.

The area of the Court building that included the chambers of the nine Justices, their secretaries, their messengers, and their law clerks made up a small self-contained village where the clerks wandered freely, carts loaded with certiorari petitions were rolled along, and a relaxed atmosphere prevailed. Everyone was on friendly terms, and the clerks had their own dining room where David and I would go when our Judge finally decided it was time to have lunch with “them.” There were no female law clerks in our year; the Court convened at noon; and government lawyers still wore formal dress. On one memorable occasion we all dressed in rented white tie outfits for a formal reception at the White House. We all were in the courtroom to hear two of the greatest lawyers of the day, Thurgood Marshall and John W. Davis, argue *Brown v. Board of Education*. But thereafter, none of the law clerks except Chief Justice Warren’s worked on these cases.

I have previously written about Justice Black, but always with a sense of constraint imposed by the confidentiality of a law clerk’s position.<sup>10</sup> But now that more than fifty years have passed, and now that the Court is a constant subject of political debate that is frequently based on misconceptions, I feel that the claims of history and the study of law have become paramount. For historians, the story of how the new Chief Justice began as a “law and order” judge but by the end of the 1953 Term had been transformed, with the crucial intervention of Justice Black, into the “liberal” judge of the “Warren Court,” needs to be recorded while there is still a witness able to do so. For aspiring legal academics, a close-up of one Justice’s thought processes and tactics should prove valuable. For law students I would like to provide a picture of one individual who truly loved the law. For all of the above and for the public as well, there is the ultimate test of what makes a good judge: a passion for justice.

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<sup>10</sup> See, e.g., Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963) [hereinafter *The Living Constitution*]; see also CHARLES A. REICH, *THE SORCERER OF BOLINAS REEF 22-24* (Bantam Books 1977); Charles A. Reich, *Deciding the Fate of Brown, The Populist Voices of Earl Warren and Hugo Black*, 7 Green Bag 137 (2004) [hereinafter *Deciding the Fate of Brown*].

## II. IN THE JUDGE'S STUDY



*Backyard view of 619 South Lee Street in October of 1956. (Center) clerk apartment & grape arbor. (Left) The bench where Justice Black discussed Brown v. Board of Education. (Right) The main house.  
Photograph taken by Charles Reich*

David and I occupied our own quarters on the ground floor of Justice Black's beautiful old home at 619 South Lee Street in Alexandria, Virginia. Our windows looked out on a grape arbor and tennis court. Our day began when the Judge, in his bathrobe, knocked on our door to tell us that breakfast, which he prepared, was almost ready. At breakfast, in the kitchen, he liked to read aloud from the *Washington Post*, with many humorous asides. He especially enjoyed the Herblock cartoons. We each had a car, and we rotated cars and drivers for the daily trip to Washington and to the Court. Together we arrived at the Court at 10:00 a.m. Usually we had lunch together in the Court's public cafeteria. Between 12:00 p.m. and 12:10 p.m. the line was open to Court employees only, and the Judge liked to time our trip downstairs so that we just made the tail end of the employees' line. At precisely 3:50 p.m., just ahead of the afternoon rush hour, we departed for Alexandria. Dinner was served at about 6:00 p.m. by Lizzie Mae Campbell, the Judge's longtime cook and housekeeper. Then the three of us would climb the stairs to the Judge's second floor study for a session that would last until bedtime. For me, this was the most remarkable and inspiring part of our day together.



The study was filled with books, including a full set of *U.S. Reports* containing all previous Supreme Court decisions and opinions. There was space on the walls for many framed photographs, usually autographed, of individuals the Judge had known in his long public career as a senator and Justice. My favorite, in a place of honor, was a photograph of Senator George Norris of Nebraska, inscribed "To my friend Justice Black with admiration and love." The books revealed a great deal about the Judge's concept of what it meant to be a Supreme Court Justice. To him, it was a position that went far beyond merely voting on cases. To begin with, the job required a scholar, one who had studied history all the way back to the Greeks and the Romans, with particular emphasis on the history of liberty and tyranny, and the rise of the rule of law. The Framers of the Constitution were well represented, as was the history of English law going back to the Magna Carta.

The spirit that pervaded this remarkable room was best expressed in Edith Hamilton's *The Greek Way*,<sup>11</sup> a book beloved by Justice Black and frequently referred to in our conversations. The Greeks, writes Hamilton, were the first to practice "the supremacy of mind in the affairs of men . . . , the first intellectualists. In a world where the irrational had played the chief role, they came forward as protagonists of the mind. . . . The Greeks said, 'All things are to be examined and called into question. There are no limits set to thought.'"<sup>12</sup>

In this spirit, there were no limits set to what David or I could say or ask as the Judge sat behind his desk, rocking gently back and forth, and David and I occupied two easy chairs facing him. Most frequently the subject was a case we were working on, with the printed record on the desk, and perhaps the first draft of an opinion or dissent in our hands.

But before we reached the subject of any specific case, the Judge gave us some insight into how he viewed the job of being a Supreme Court Justice and how he prepared for that job. A Justice must have a judicial philosophy. He saw his role as a defender of the Constitution, and as a protector of the individual, to whom the Constitution belonged. Essential to this role was knowledge of

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<sup>11</sup> EDITH HAMILTON, *THE GREEK WAY* (W.W. Norton & Co., Inc. 1993) (1930).

<sup>12</sup> *Id.* at 16, 25 (citing generally to Greek philosophic sayings).

history, in particular the intentions of the Framers of the Constitution, and the fears of power that concerned them. This led back to English history, to the injustices that the Framers knew about and sought to prevent, and further back to the long struggle between tyranny and the rule of law.<sup>13</sup> Much as he loved his country, Justice Black believed that the rise of tyranny was always a possibility, that exaggerated fears, such as the fear of Communism, pose an ever-present threat to liberty, and that freedom remains, in the words of Stephen Vincent Benet, “a hard bought thing.”<sup>14</sup>

Crucial to the Judge’s judicial philosophy was his invariable practice of looking directly at the words of the Constitution itself, rather than at previous Supreme Court interpretations of those words. Most judges are inclined to follow precedents; he was never satisfied with precedents if he thought the words of the Constitution did not support them.

Justice Black opposed any interpretation of the Constitution that allowed broad leeway to judges. He repeatedly objected to any view of the First Amendment that allowed judges to engage in “balancing” the interests of government against the interests of the individual.<sup>15</sup> To him, “balancing” was judge-made law, never intended by the Framers. Likewise, he rejected vague and shifting interpretations of the phrase “due process of law,” seeking to give the phrase a definite meaning limiting the discretion of judges.<sup>16</sup>

For the same reason, the Judge was also determined to restore to their full vigor sections of the Constitution that had been allowed to fall into disuse, notably the prohibition against bills of attainder and the prohibition against ex post facto laws.<sup>17</sup> He was keen to find

<sup>13</sup> See *Deciding the Fate of Brown*, *supra* note 10, at 139.

<sup>14</sup> See *id.*; see also STEPHEN VINCENT BENÉT, *Freedom’s a Hard-Bought Thing*, in *SELECTED WORKS OF STEPHEN VINCENT BENÉT VOLUME 2: PROSE* 46 (Farrar & Rinehart 1942).

<sup>15</sup> See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 718-19 (1971) (Black, J., concurring); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 60-62 (1961) (Black, J., dissenting).

<sup>16</sup> See *In re Winship*, 397 U.S. 358, 381-82 (1970) (Black, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 511-13 (1965) (Black, J., dissenting).

<sup>17</sup> See *Wisconsin v. Constantineau*, 400 U.S. 433, 444 (1971) (Black, J., dissenting) (referring to bill of attainder); *City of El Paso v. Simmons*, 379 U.S. 497, 522 (1965) (Black, J., dissenting) (referring to both bill of attainder and ex post facto laws); *Scales v. United States*, 367 U.S. 203, 260-62 (1961) (Black, J., dissenting) (referring to ex post facto laws); *Barsky v. Board of Regents*, 347 U.S. 442, 460 (1954) (Black, J., dissenting) (referring to bill of attainder).

present-day examples of both these abuses, while other Justices treated them as archaic remnants of a bygone era.

Finally, Justice Black was acutely sensitive to the injury done to any individual and the harm done to society in any given case. While other Justices stated the facts of a case in abstract and legalistic terms, in opinions and particularly in dissents he made sure to present the facts as a vivid narrative.<sup>18</sup>

During our sessions there were no interruptions. When David and the Judge were having an exchange, I liked to sit back and watch the Judge's expressive face register his feelings. When we discussed a case where power had been abused and an individual had suffered harm, the Judge's face showed pain and anger. Too often in law school my teachers, many of them "legal realists," made law seem like a game or even a joke, and any answer was just as acceptable as the opposite answer. This often made for good, lively classroom teaching, but ultimately it left students cynical and disillusioned about the law as a profession. Later, when I became a teacher, I often wished that my students could have shared my experience in the Judge's study. It profoundly renewed my idealism and belief that justice is the foundation of society. Yet I have never heard a senator ask a Supreme Court nominee, "Do you have a passion for justice?"

### III. *IRVINE V. CALIFORNIA*

"I thought a man was going to get *hit* back there in the Conference Room!" It was Saturday afternoon and we were driving back to Alexandria after the Justices' weekly private conference. Of course David and I were eager to hear the Judge's story. The case under discussion was *Irvine v. California*,<sup>19</sup> which eventually produced five opinions, and no "opinion of the Court." Justice Frankfurter had written an elaborate dissent,<sup>20</sup> to which Justice Clark, concurring with the majority, offered a tart rebuttal in a separate opinion of his own.<sup>21</sup> When it was his turn to speak, Justice Frankfurter had taken a copy of Clark's opinion and torn it to bits in front of the other Justices, throwing the pieces on the Conference

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<sup>18</sup> See, e.g., *Leyra v. Denno*, 347 U.S. 556, 556-62 (1954).

<sup>19</sup> 347 U.S. 128 (1954).

<sup>20</sup> *Id.* at 142-49 (Frankfurter, J., dissenting).

<sup>21</sup> *Id.* at 138-39 (Clark, J., concurring).

Room's carpeted floor. Justice Clark, a tall Texan who wore a cowboy hat, did not take kindly to being humiliated in front of his colleagues. Apparently, the new Chief had intervened to prevent violence. Justice Black was amused. Obviously he had seen "Felix" in action many times before.

*Irvine* was a case involving an extraordinary intrusion by police into an individual's home. The police suspected petitioner, Irvine, of illegal bookmaking.<sup>22</sup> While Irvine and his wife were absent from their home, and without any warrant, an officer arranged with a locksmith to make a door key, and a concealed microphone was installed in the hall.<sup>23</sup> A hole was bored in the roof of the house and wires were strung to a nearby garage where officers could listen to any conversations picked up by the microphone.<sup>24</sup> After a week of listening, officers again made illegal entry into the house and moved the microphone into the bedroom.<sup>25</sup> After listening to bedroom conversations for twenty more days, officers again made illegal entry and moved the microphone to a closet, continuing their round-the-clock eavesdropping until it had lasted more than a month.<sup>26</sup> Eventually they heard incriminating statements that were used to convict Irvine of gambling.<sup>27</sup>

This was a classic case of a wrong without an adequate remedy. The normal remedy for illegally obtained evidence is to exclude the evidence from a defendant's trial.<sup>28</sup> But because of an earlier decision by the Supreme Court, in an opinion written by Justice Frankfurter, the exclusionary rule applied only to trials in federal courts and not to a trial in the state courts.<sup>29</sup>

The Justices could agree on only one thing: they all denounced the illegal conduct by the police. Justice Jackson wrote, "[t]hat officers of the law would break and enter a home, secrete such

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<sup>22</sup> *Id.* at 129 (plurality opinion).

<sup>23</sup> *Id.* at 130-31.

<sup>24</sup> *Irvine*, 347 U.S. at 131.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 135-36.

<sup>29</sup> *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (Frankfurter), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961) (Clark). Justice Clark had the satisfaction of writing the opinion in *Mapp* overruling Frankfurter's opinion in *Wolf*, which had restricted the applicability of the Fourth Amendment to the states. The overruling of *Wolf* was a great victory for Justice Black's philosophy of incorporation of the Bill of Rights into the Fourteenth Amendment.

a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted.”<sup>30</sup> Justice Frankfurter said that the criminal actions by the officers lead “down the road to totalitarianism.”<sup>31</sup> Justice Douglas wrote, “The search and seizure conducted in this case smack of the police state, not the free America the Bill of Rights envisaged.”<sup>32</sup> But the members of the Court could not agree on any remedy. Five voted to affirm the conviction. Among them was Chief Justice Warren, who had once served as Attorney General of California. He joined an opinion by Justice Jackson, with Justices Reed and Minton concurring. After saying that the conviction of Irvine must be upheld, Jackson added the following totally unprecedented statement:

It appears to the writer, in which view he is supported by THE CHIEF JUSTICE, that there is no lack of remedy if an unconstitutional wrong has been done . . . . [The conduct of the police] may constitute a federal crime . . . . We believe the Clerk of this Court should be directed to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States. However, Mr. Justice REED and Mr. Justice MINTON do not join in this paragraph. Judgment Affirmed.<sup>33</sup>

The proposal by Justice Jackson and Chief Justice Warren, which sought to initiate a criminal investigation of the police officers by the Department of Justice, produced a surprisingly angry response by Justice Black. He wrote: “I would strongly object to any such action by this Court. It is inconsistent with my own view of the judicial function in our government. Prosecution, or anything approaching it, should, I think, be left to government officers whose duty that is.”<sup>34</sup>

*Irvine* presented the Judge with a dilemma, and led to much discussion in the study. He did not want to affirm a conviction based

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<sup>30</sup> *Irvine*, 347 U.S. at 132.

<sup>31</sup> *Id.* at 149 (Frankfurter, J., dissenting) (citation omitted).

<sup>32</sup> *Id.* (Douglas, J., dissenting).

<sup>33</sup> *Id.* 137-38 (plurality opinion).

<sup>34</sup> *Id.* at 142 (Black, J., dissenting).

on illegal police conduct. He did not want to base a dissent on the “vague” due process grounds utilized by Justice Frankfurter with Justice Burton concurring,<sup>35</sup> nor could he agree with a vigorous dissent by Justice Douglas arguing for the exclusion of the evidence.<sup>36</sup> Instead, he amazed David and me by finding in the record of the case an entirely different ground for dissent, which allowed him to discuss another provision of the Constitution that he considered under-utilized—the self-incrimination clause.

Federal law imposed a special tax on wagering, which Irvine had duly paid, receiving in return a “federal wagering tax stamp,” which was found in his possession and introduced in evidence in his state trial for gambling, along with the surveillance evidence obtained by state police officers.<sup>37</sup> Alone among the Justices, Justice Black called this “evidence” a violation of the Fifth Amendment provision that no person shall be compelled to be a witness against himself.<sup>38</sup> He wrote: “I cannot agree that the Amendment’s guarantee against self-incrimination testimony can be spirited away by the ingenious contrivance of using federally extorted confessions to convict of state crimes . . . .”<sup>39</sup> And the Judge added his view that the Fourteenth Amendment *incorporates* the Fifth Amendment, an idea that would eventually succeed in influencing the Warren Court.<sup>40</sup> And finally he made it clear that the Court’s decision in *Irvine* was one more example of how judges have wrongly narrowed the protections of the Bill of Rights.<sup>41</sup> In his words, the Court’s interpretation “frustrates a basic purpose of the Fifth Amendment—to free Americans from fear that federal power could be used to compel them to confess conduct or beliefs in order to take away their life, liberty or property.”<sup>42</sup>

Here was the Judge eloquently going beyond anything taught in the law schools or written in the law reviews. Here was the Judge

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<sup>35</sup> *Irvine*, 347 U.S. at 147 (Frankfurter, J., dissenting).

<sup>36</sup> *Id.* at 151 (Douglas, J., dissenting).

<sup>37</sup> *Id.* at 130 (plurality opinion).

<sup>38</sup> *Id.* at 139-41 (Black, J., dissenting).

<sup>39</sup> *Id.* at 140.

<sup>40</sup> *Irvine*, 347 U.S. at 141-42. *See also* *Benton v. Maryland*, 395 U.S. 784 (1969) (holding that the Double Jeopardy Clause of the Fifth Amendment applies to the states); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that such warnings are a prophylactic device, required by the Fifth Amendment); *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating the right against self-incrimination).

<sup>41</sup> *Irvine*, 347 U.S. at 142 (Black, J., dissenting).

<sup>42</sup> *Id.*

saying that the true intentions of the Framers had been undone by “interpretation” that diminished the liberties of all Americans, just as “equal” had been turned into its opposite—“separate but equal.”

*Irvine* had an unsatisfactory outcome, not only because of the Justices’ disagreements, but also because of the underlying reality that the words of an eighteenth century constitution proved inadequate to the twentieth century realities of surveillance. But neither Justice Black, nor any other member of the Court appeared ready to address this dilemma directly.

#### IV. EXERCISING THE MIND

The Judge was a great believer in exercise—both physical and mental. If he could not find a tennis partner, he would go to the tennis court with a large basket of balls that he would hit from one side to the other, pick them all up, and repeat the process by hitting them all back. He was unlucky to find that neither David nor I played tennis, but we at least partly made up for that deficiency by enthusiastically participating in mental exercise. David was the first to recognize that the Judge enjoyed a good argument. Apparently David had taken a course in Admiralty Law at the University of Alabama, because he came out swinging as the Judge prepared a lengthy dissent in *Maryland Casualty Co. v. Cushing*,<sup>43</sup> a case where a towboat named *Jane Smith* hit a railroad bridge and sank in the Atchafalaya River, causing five crew members to lose their lives.<sup>44</sup> For many evenings the Judge’s study was filled with arguments concerning maritime law. I had never taken a course in this subject; in fact, I did not even know where to find the Atchafalaya River on a map, but I saw that the Judge would allow a law clerk to make a full-blown argument just like a lawyer in court, and when the time came I too made a full-blown argument in a later case that interested me deeply. David showed me how far the Judge would go in granting equality to his law clerks so they could challenge the Judge with full vigor. Of course the Judge made clear that he would not readily change his own long-held views. But he was a great believer in hearing the other side, and he clearly considered that kind of openness to be an essential part of being a judge.

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<sup>43</sup> 347 U.S. 409 (1954).

<sup>44</sup> *Id.* at 427 (Black, J., dissenting).

During our serious sessions in the study, David was thoughtful, congenial, and more than able to hold his own when the discussion grew serious. It was David, not me, who asked the Judge about his early membership in the Klan, whether the Klan as he knew it was actively racist, and why the Judge had quit the Klan when he did. I would never have dared to ask these questions. David also asked about some of the Judge's more questionable early decisions such as the first flag salute case<sup>45</sup> and the Japanese internment case,<sup>46</sup> both of which might be seen in hindsight as mistakes.

Many people have asked me what the Judge had to say about the Klan. He told us that it was just a social and fraternal organization, like many others he belonged to. David and I found this answer frustrating, but the Judge would go no further, and we were left to wonder.

After an evening in the study, when the Judge had retired for the night, David and I sometimes talked about the events of the day, the interplay among the Justices, and the Judge's own stubborn streaks. David had both tact and humor, but he was fully prepared to argue his views strenuously when he thought the Judge was wrong. Spending seven days and nights together week after week could have been a disaster instead of an extraordinary experience. David's personal gifts made a huge difference.

In my first interview with Justice Black he told me that he habitually chose most of his law clerks from the South. He hoped they would return home to fight for the ideals he believed in. David was a native of Alabama and a graduate of the University of Alabama School of Law. He would go on to become a leader in the Birmingham desegregation struggle and the mayor of that city as well. In David's case the Judge's hopes were fully realized.

Of course every one of Justice Black's law clerks must have played the role of mental exercise partner, and some were tennis partners as well. I never got to observe them in action. But during the 1953 Term the Judge had occasional guests, and it was interesting to see that they too provided the Judge with mental exercise, although Court business was never discussed. Each guest was invited to come

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<sup>45</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

<sup>46</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

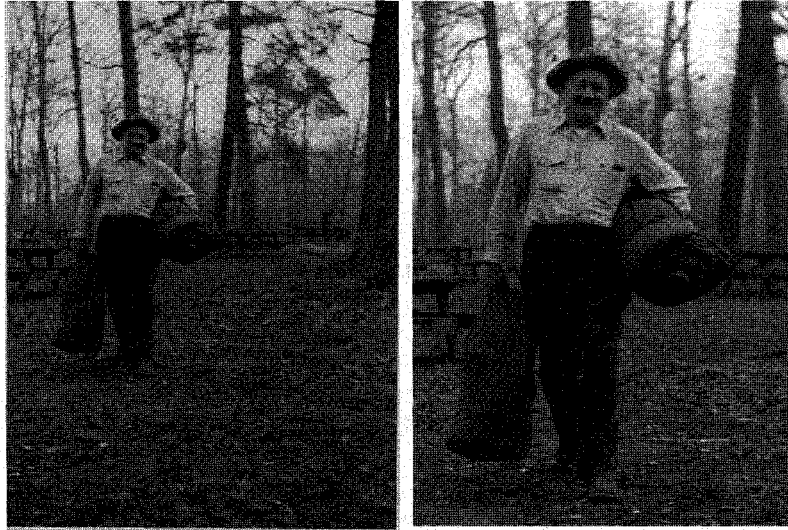


alone. The dinner table was set for four instead of three, the guest got the tenderloin part of the steak, and upstairs David and I were quieter than usual, although we were always welcome to talk. Otherwise, the routine in the study was much the same for four as it was for three.



*Justice Black at the dinner table next to his chair  
February 27, 1966*

Among the guests, I remember Senator Lister Hill of Alabama, Benjamin V. Cohen, Justice Douglas, Professor Edmund Cahn of New York University Law School, Tom Corcoran, who brought his accordion and sang for us, and Chief Justice Warren.

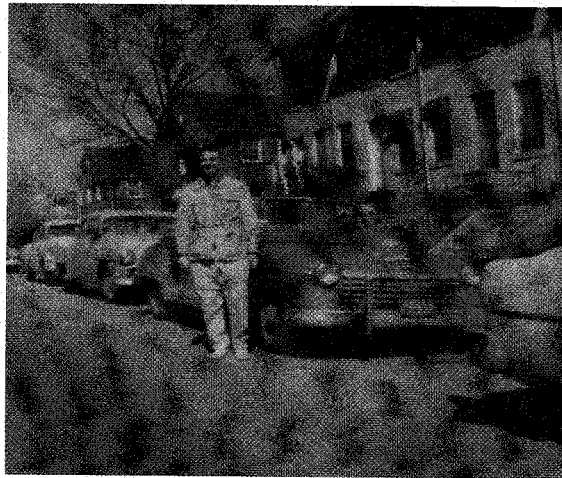


*Justice Douglas after an overnight trip on the C&O Towpath in May 1956—one of the few photos of the Justice smiling. Photograph taken by Charles Reich*

I found Justice Douglas fascinating from the moment he walked in the door, with his ruddy outdoorsman face, battered western hat, and intense energy. Justice Black had more than once said to David and me, “Bill is a genius.” Now I could see and hear for myself. Justice Douglas was encyclopedic in his knowledge. He had traveled all over the world, and would gather facts about a country, its government, and its people that few other travelers would learn. He was one of the earliest environmentalists, not only knowledgeable about plants, fish, and animals, but concerned about climate, pollution and land use before most people had heard anything at all about these subjects. There was none of Justice Black’s benevolence, however. One day at the Court, my brother Peter was visiting, and we noticed a small crowd of law clerks surrounding Justice Frankfurter in the hallway. At that moment, Justice Douglas happened to walk by, and we heard him call out, “Spinning your web, Felix?”

Justice Douglas told us his personal story of the *Rosenberg* case events that preceded the Court’s decision. He had been ready to leave for the summer, after the Court ended its Term in June, when he was approached by lawyers with a last-minute plea in the

*Rosenberg* case. He reluctantly agreed to listen. Even more reluctantly, he concluded that their argument—that the Rosenbergs had been convicted and sentenced under the wrong statute—required a full hearing.<sup>47</sup> Accordingly he issued a stay of execution until the Court's fall session,<sup>48</sup> jumped into his car, and started the long drive to his summer cabin at Goose Prairie, Washington. When he stopped for the night at a motel on the Pennsylvania Turnpike, he turned on the television news and was stunned to learn that Chief Justice Vinson had called a special session of the Court to overturn the stay.<sup>49</sup> The next morning he headed back to the hearing, which both he and Justice Black believed was improperly called.



*Charles Reich next to his blue Dodge*

When Chief Justice Warren came for dinner, I was dispatched in my used blue Dodge to call for him at his temporary residence in the Wardman Park Hotel in northwest D.C. This forty-five-minute drive with the famous ex-governor of California, ex-presidential candidate, and new Chief Justice, plus the return trip, was just about as exciting as things can get for a twenty-five-year-old newly out of law school, and today at the age of eighty-two I can still feel the thrill.

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<sup>47</sup> *Rosenberg v. United States*, 73 S. Ct. 1173, 1177 (1953), *vacated*, 346 U.S. 273.

<sup>48</sup> *Id.*

<sup>49</sup> *Rosenberg*, 346 U.S. at 288-89.

With each guest the Judge was his usual self, rocking back and forth behind his desk, perhaps taking a volume of *Tacitus* down from the shelves, asking questions and making sure that there was serious talk. I marveled at the calming effect that the Judge had on Justice Douglas, who could be restless, brusque and impatient, but when asked about his travels became eloquent and even flashed his winning smile at David and me. The Chief and the Judge found common ground in running for office and winning elections, and with Senator Hill the talk was about politics in Alabama. Otherwise, these evenings resembled our regular sessions to a remarkable degree.

#### V. *BARSKY V. BOARD OF REGENTS* AND THE RIGHT TO WORK

After I graduated from law school, I took what was called a cram course in preparation for the much-feared New York State bar examination. A crowd of applicants filled a sweaty classroom in downtown New York for several weeks as our instructor shouted information I had never learned at Yale, such as the three ways to serve a complaint at the start of a lawsuit. I did manage to pass the exam, only to learn that there was another hurdle: a grilling by the Committee on Character and Fitness. And, I was warned, the Committee would reject applicants if they revealed the slightest trace of left-wing sympathies or “communistic” associations. In those days of anti-left hysteria the danger of rejection on political grounds was very real. One of my professors at Yale Law School, Clyde Summers, was refused admission to the bar in Illinois solely because of his pacifist beliefs, and the denial of his right to practice his profession had been upheld by the United States Supreme Court.<sup>50</sup> Worse, two outstanding young professors at Yale Law School, Vern Countryman, who had been a law clerk for Justice Douglas, and David Haber, who had clerked for Justice Black, were denied tenure and dismissed from the faculty at Yale for their supposed left-wing views.<sup>51</sup> I had taken classes with both Countryman and Haber, who I found to be brilliant thinkers. Such were the 1950s in America.

<sup>50</sup> *In re Summers*, 325 U.S. 561, 573 (1945).

<sup>51</sup> LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS*, 236, 237 (University of North Carolina Press 2005); John Henry Schlegel, *The Ten Thousand Dollar Question Legal Realism at Yale: 1927-1960*, 41 *STAN. L. REV.* 435, 440-41 (1989).

I had nothing of a political nature on my record and managed to pass the scrutiny of the character committee and get admitted to the New York bar. (Fortunately they were not mind readers.) But when a case came before the Supreme Court in the 1953 Term in which a physician had been suspended from practicing medicine in New York State for what were blatantly political reasons, opposition to the Franco dictatorship in Spain,<sup>52</sup> his case took on a highly personal meaning for me.

*Barsky v. Board of Regents* had a distressing outcome. The Court upheld Dr. Barsky's suspension by a vote of six to three; we lost the vote of the new Chief Justice; and the dissenters, Justice Black, Justice Frankfurter and Justice Douglas, split three ways. The old dispute over due process divided the dissenters.<sup>53</sup> But I got an opportunity to argue my views before a Supreme Court Justice—with vastly more time than would have been allowed any lawyer arguing before the Court. And eventually I put my views into a law journal article.<sup>54</sup> So, I remain grateful for the *Barsky* case and for the Judge's generosity in hearing me out—even if he accepted none of my arguments!

Dr. Edward A. Barsky was a physician who practiced medicine in New York since 1919.<sup>55</sup> In 1946 he was summoned before the House Un-American Activities Committee.<sup>56</sup> He was at that time the chairman of the Joint Anti-Fascist Refugee Committee, an organization founded in 1942 to help with the problem of Spanish refugees from the Franco dictatorship.<sup>57</sup> Barsky appeared before the Committee but refused to produce records and papers demanded by the Committee.<sup>58</sup> For this offense against Congress he was sentenced to serve six months in jail.<sup>59</sup> His conviction was upheld and the Supreme Court denied certiorari, with Justices Black and Douglas

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<sup>52</sup> *Barsky*, 347 U.S. at 456-59 (Black, J., dissenting).

<sup>53</sup> Compare *id.* at 469-70 (Frankfurter, J., dissenting) (utilizing the Due Process Clause), with *id.* at 456-67 (Black, J., dissenting).

<sup>54</sup> See Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) [hereinafter *The New Property*].

<sup>55</sup> *Barsky*, 347 U.S. at 445.

<sup>56</sup> *Id.* at 444.

<sup>57</sup> *Id.* at 457 (Black, J., dissenting).

<sup>58</sup> *Id.* at 444-45 (majority opinion).

<sup>59</sup> *Id.* at 445.

noting their dissents.<sup>60</sup> Thereafter, charges were filed against him by the New York State Medical Committee on Grievances.<sup>61</sup> Ten doctors constituting the Committee found Barsky guilty of charges under the state law governing medical practice, and voted to suspend him from practice for six months.<sup>62</sup> The suspension was upheld by the New York State Court of Appeals, that court declaring itself “wholly without jurisdiction” to consider whether the Committee and the Board of Regents based the suspension on “matters not proper for consideration.”<sup>63</sup> Under procedures then in effect, Barsky was entitled to a mandatory appeal to the Supreme Court, and the Court, however reluctant, was compelled to hear the case.<sup>64</sup>

As we sat in the study, it was clear that Justice Black was deeply outraged by the suspension of Barsky on grounds that had nothing to do with Barsky’s competence to practice medicine. And the Judge, as a former senator, had no patience with a congressional committee investigating “un-American activities.” But what constitutional grounds were available to overturn the suspension? A denial of due process seemed the only possible ground and, as in *Irvine*, Justice Black was most unwilling to employ this concept. But he did allow me to argue strenuously for its use in this case.

I said that more and more professions and occupations were subject to licensing by the state, not merely physicians and lawyers, but taxi drivers, school teachers, even amateur fishermen in the Adirondacks. If the ability to work and earn a living was no longer part of the liberty of every citizen, then the only people who were genuinely free would be the very young, the retired, and those so wealthy that they did not need to earn a living. Could all of the freedoms of Americans be taken away by the simple device of controlling their right to work? Moreover, John Locke, in his writings on property, describes the individual’s liberty to work and earn a living as the most basic form of “property.”<sup>65</sup> Due process is

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<sup>60</sup> *Barsky*, 347 U.S. at 445 (citing *Barsky v. United States*, 167 F.2d 241 (D.C. Cir. 1948), *cert. denied*, 334 U.S. 843 (1948)).

<sup>61</sup> *Id.* at 445-46.

<sup>62</sup> *Id.* at 446.

<sup>63</sup> *Barsky v. Board of Regents*, 111 N.E.2d 222, 226 (N.Y. 1953).

<sup>64</sup> *Barsky*, 347 U.S. at 448 (noting that the court found probable jurisdiction) (citation omitted).

<sup>65</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 19 (C.B. Macpherson ed., Hackett Publishing Company 1980) (1690).

said to protect “life,” “liberty,” and “property.” Surely, I argued, the Framers intended to protect the ability to work from arbitrary deprivation by government.

Justice Black was still not prepared to use due process in the manner I suggested. For a moment David and I caught a glimpse of a side of his character that usually remained well hidden: the long-range strategist, who was determined to bring about a revolution in the Court’s *entire* interpretation of due process, expanding it to include the Bill of Rights. He proved willing to pursue this goal patiently through many years, until the Court finally accepted most of it. He had begun his campaign in 1946, and would continue his efforts for many years after the 1953 Term, until a much later Court—by then the “Warren Court”—accepted almost all of his “incorporation theory,” an accomplishment by a single Justice possibly unique in the Court’s history.<sup>66</sup>

But for the present, for the *Barsky* case, the Judge found two other powerful grounds for his dissent, both of which derived from his habit of studying the record of a case himself, and both of which made pioneering contributions to constitutional law. He discovered that, as part of the license suspension proceedings, evidence had been introduced that Barsky’s Refugee Committee had been listed by the Attorney General of the United States as a “subversive” organization.<sup>67</sup> This published list, Justice Black boldly declared, was the modern equivalent of the ancient “bill of attainder” specifically prohibited by the Constitution.<sup>68</sup>

For those who are interested in debates concerning the “originalist” approach to interpreting the Constitution, there could be no more striking example of Justice Black’s “originalist” approach than his opinion in *Barsky*. Historically, a bill of attainder was a legislative condemnation of an individual without a judicial trial.<sup>69</sup> To call the Attorney General’s list a bill of attainder might be considered either a far-fetched stretching of a historic term or the modern equivalent of an evil that the Framers intended to prohibit. Both of these approaches lay claim to the label “originalist.”

The medical grievance committee had allowed Dr. Barsky to

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<sup>66</sup> See *Mapp*, 367 U.S. at 664-65 (Black, J., concurring).

<sup>67</sup> *Barsky*, 347 U.S. at 460 (Black, J., dissenting).

<sup>68</sup> *Id.*

<sup>69</sup> *The Living Constitution*, *supra* note 10, at 710-11.

be questioned about whether his organization was “subversive,” “un-American,” and “communistic.”<sup>70</sup> In the Judge’s view, these questions were wholly improper in a proceeding to suspend a medical license, suggesting that Barsky had been guilty of the “crime” of “un-American activities” without any conviction or proof.<sup>71</sup>

Moreover, the Judge found that the ultimate licensing authority in New York State, the Board of Regents, possessed unlimited discretion to suspend any physician’s license without giving any reason:

[S]o far as we know the suspension may rest on the Board’s unproven suspicions that Dr. Barsky had associated with Communists. This latter ground, if the basis of the Regents’ action, would indicate that in New York a doctor’s right to practice rests on no more than the will of the Regents.<sup>72</sup>

Finally, the Judge quoted from a much older Supreme Court opinion: “For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails . . . .”<sup>73</sup> And to his dissent the Judge added, in his statement of the case, seven words in which I could take pride. Referring to the right of a physician to practice his or her profession and, by implication, the right to work itself, he wrote: “It may mean more than any property.”<sup>74</sup>

I remember that Justice Douglas wrote a separate dissent in *Barsky*, and I was sent down the hall to get his newly printed opinion and give him a copy of the Judge’s dissent. He was very cordial, and although the two dissents were based upon very different theories of the law, the Judge and Justice Douglas signed each others’ opinions in a doctrinally inconsistent but friendly gesture.

When I was re-reading *Barsky* in 2010, with unemployment in the news every day, I came across this remarkable paragraph from

<sup>70</sup> *Barsky*, 347 U.S. at 464-65, 467 (Black, J., dissenting).

<sup>71</sup> *Id.* at 459, 464-65.

<sup>72</sup> *Id.* at 463.

<sup>73</sup> *Id.* at 463-64 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)) (internal quotation marks omitted).

<sup>74</sup> *Id.* at 459.



Justice Douglas' dissenting opinion. Surely his prophetic words deserve repeating today:

The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.<sup>75</sup>

## VI. COURTING THE CHIEF

In case after case during the 1953 Term, the Judge found himself on the opposite side from the new Chief Justice. On this painful subject, the Judge said nothing at all. Meanwhile, Justice Frankfurter was making an obvious and very public attempt to instruct his newest "student" in the duties of a Supreme Court Justice. The odd couple was frequently seen in the hall, with Justice Frankfurter holding the Chief's arm with one hand while gesticulating with the other hand in a professorial manner. David and I often saw the Chief as he came through our door on his way to discuss some matter with Justice Black. The Chief was hearty and outgoing. But David and I each suspected that Justice Frankfurter's teacher-student relationship would not last. We often talked about this late at night after our session with the Judge in the study, and especially after the evening when the Chief came out to dinner. The Chief was a proud man. But, we both suspected, he might be thin-skinned. The Judge certainly did not treat him like a student. The Judge called him "Chief" and made no attempt to "teach" him anything.

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<sup>75</sup> *Barsky*, 347 U.S. at 472 (Douglas, J., dissenting) (emphasis added).

Other Justices also made a play for the Chief. Justice Jackson evidently had the Chief's ear in *Irvine v. California*, but Justice Jackson was soon taken ill and vanished from the scene. Justice Douglas invited the Chief to go walking on the C&O Canal towpath, but this effort proved disastrous. We all heard that the Chief had returned with sore feet and blisters, and that Mrs. Warren had said never again.

The Judge finally found a case with which he could win over the Chief. I have already mentioned that the Judge read and decided petitions for certiorari himself, contrary to the practice of most Justices. One day the Judge picked a case that no law clerk would have ever chosen. In an earlier form, it had already been denied review by the Supreme Court.<sup>76</sup> The case seemed to meet none of the criteria of "public importance" required for review by the Court. It was a sordid murder case, in which a middle-aged man had beaten his elderly parents to death with a hammer, a crime to which he had confessed and for which he had been sentenced to death in New York.<sup>77</sup>

But the Judge had studied the record in the case, and he was deeply troubled by the confessions introduced into evidence, because they had been obtained by the use of a police-employed psychiatrist pretending to "help" the defendant.<sup>78</sup> The Judge called us into his office, where he was seated with the printed record on his desk. He said that he had discovered that a tape recording had been made of the psychiatrist talking to the defendant. "Don't you think we ought to hear that recording for ourselves?" he asked. David and I nodded. "Why don't we ask the Clerk's office to send for it?" We nodded again. And in due time a tape recording arrived from New York, the Clerk's office supplied a machine to play it, and the three of us sat down to listen.

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<sup>76</sup> *People v. Leyra (Leyra II)*, 108 N.E.2d 673 (N.Y. 1952), *cert. denied*, 345 U.S. 918 (1953).

<sup>77</sup> *Leyra*, 347 U.S. at 556-57. In Leyra's first trial the New York Court of Appeals held that the primary confessions used by the prosecution were extorted by coercion. *People v. Leyra (Leyra I)*, 98 N.E.2d 553 (N.Y. 1951). After a jury determination that subsequent confessions made by Layra were voluntary, Leyra was again convicted and the New York Court of Appeals affirmed. *Leyra II*, 108 N.E.2d 673, *cert. denied*, 345 U.S. 918. After an unsuccessful habeas corpus petition, Layra again sought review by the Supreme Court, which was granted. *Leyra v. Denno* 208 F.2d 605 (2d Cir. 1953), *cert. granted*, 347 U.S. 926 (1954).

<sup>78</sup> *Leyra*, 347 U.S. at 559-60.

Prior to what we heard on the tape recording, the defendant, Camilio Leyra, Jr., had already undergone lengthy questioning by the police, but had admitted nothing. On the day that his parents' bodies were found, a Tuesday, Leyra was questioned by the police until 11:00 p.m.<sup>79</sup> On Wednesday he was questioned from 10:00 a.m. to midnight.<sup>80</sup> On Thursday he was questioned from 9:00 a.m. through the day and the night until 8:30 a.m. the following morning, when he was taken to his parents' funeral.<sup>81</sup> After the funeral he was allowed to sleep for an hour and a half after which questioning resumed.<sup>82</sup> During his absence a concealed microphone had been installed, enabling the police to listen to and record any further conversation.<sup>83</sup> At no time was a lawyer present and Leyra made no admissions.<sup>84</sup>

Leyra had been suffering from acute sinus pains, and after the concealed microphone had been installed the police promised to get a physician to help him.<sup>85</sup> He was introduced to Dr. Helfand, supposedly a doctor who would help with the sinus pain.<sup>86</sup> In fact, Dr. Helfand was a psychiatrist who had considerable experience with hypnosis.<sup>87</sup> The dialogue went in part as follows:

'Q.-(continued)- [I am] going to make you remember and recollect back and bring back thoughts—thoughts which you think you might have forgotten. . . . It's entirely to your benefit to recollect them because, you see, you're a nervous boy. You got irritable and you might have got in a fit of temper. Tell me, I am here to help you. A. I wish you could, Doctor.'

'Q. I am going to put my hand on your forehead, and as I put my hand on your forehead, you are going to bring back all these thoughts that are coming to your mind. . . .

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<sup>79</sup> *Id.* at 558.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 558-59.

<sup>82</sup> *Id.* at 559.

<sup>83</sup> *Leyra*, 347 U.S. at 559.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

‘Q. . . . What did you do when you sat down. Come on, speak up. Don’t be afraid now. We’re with you. We’re going to help you. You’re going to feel lots better after you talk to me. A. Gee, I hope so.’

. . . .

‘Q. . . . Look at me. Open your eyes. Now you know what happened. Look at me. I know you know what happened. A. I can’t think.’

‘Q. Sure you can. Come on now. Don’t be afraid. Your conscience will be clear. God will be with you, and everybody will help you if you tell the truth. Everybody will help you, but nobody likes a liar, not even God. Come on now. Tell the truth. A. I can’t think.’

‘Q. Your father went for the paper; then you hit your Mother, didn’t you? With what did you hit—with a hammer? Your thoughts are coming back to you. What did you use to hit your mother with? A. I loved my mother.

‘Q. I know you did. You lost your temper. Don’t be afraid. A lot of people do things that they are not responsible for while in a fit of temper. You see?

. . . .

‘Q. So what did you do. Speak up. I’ll positively help you if I can. I’m with you one hundred per cent. I’m going to help you. You’re going to feel fine. Your conscience will be clear and everything will be fine. Don’t hide anything. You did it in a fit of temper. Your mother went to the sink to give you some water. So you did what? You went up to her? A. I was standing there waiting for him to come back. I picked up the hammer.’

. . . .

‘Q. You got a much better chance to play ball . . . than if you say you don’t remember.’<sup>88</sup>

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<sup>88</sup> *Leyra*, 347 U.S. at 565, 567, 569-70, 575, 583.

As the session continued and Dr. Helfand repeated his suggestions over and over again, Leyra's voice sounded so slow and dazed that he seemed drugged, hypnotized, or just plain exhausted, like a person barely awake, barely able to answer.<sup>89</sup> The doctor kept saying, "I have my hand on your forehead and your thoughts are coming back to you."<sup>90</sup>

The Judge was able to get three votes in addition to his own for a grant of certiorari. But the outcome was still in doubt. Justice Jackson was ill and unable to take part in the case. Three other Justices were determined to uphold the verdict. A four to four split would affirm the death sentence. The Judge stayed home for several days to prepare an opinion.

Meanwhile, I imagined that this would be a famous case, a "case of first impression," the first case on mental coercion by the use of psychiatry and hypnosis, a landmark. It would be noted in every law review, included in every casebook, taught in every class in both criminal and constitutional law, and in medical school as well, cited in every future decision on interrogation . . . but only if we could get five votes, and that would require the vote of the Chief, who up to that time had yet to vote in favor of a criminal defendant.

When the Judge showed us the draft opinion he had prepared, my daydreams about a landmark case were suddenly dissolved. The *Leyra* case would not be famous. It would never be taught in law school or noted in the law reviews. The Judge had written the simplest possible opinion. It was almost entirely factual. It appeared to make no new law. Instead, the opinion made the case seem like long established law. The Judge's special ideas about due process were relegated to the inconspicuous last sentence of a footnote.<sup>91</sup> For those who might be interested, an appendix was included, running twenty-two pages in *U.S. Reports*, containing excerpts from the tape recording, without further comment.<sup>92</sup> The opinion itself took up only five-and-one-half pages. Not a word in the opinion was the least bit novel or controversial.

The Chief signed on! The Judge's strategy worked! He had read the Chief's character perfectly. The Chief was not prepared to

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<sup>89</sup> *Id.* at 560.

<sup>90</sup> *Id.* at 571.

<sup>91</sup> *Id.* at 558 n.3.

<sup>92</sup> *Id.* at 562-84.

make new law, but he would not tolerate the duplicity of a Dr. Helfand. The Warren Court had begun.

On June 1, David and I went down to the courtroom. The Chief presided over the usual admissions to the bar. Then he nodded to Justice Black on his right. The Judge leaned forward. "I am authorized to announce the Opinion and Judgment of the Court in *Camilio Leyra v. Wilfred Denno, Warden of Sing Sing prison*, on writ of certiorari to the Second Circuit of Appeals." Anyone who ever heard Justice Black deliver an opinion from the Bench will never forget the effect his soft but perfectly clear and distinct voice had on the packed courtroom. It was still the custom to read opinions in full. The Judge related the facts at length, while the legal conclusion was condensed into a single sentence that made no mention of psychiatry: "We hold that the use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution."<sup>93</sup> Finally, the Judge read the judgment, overturning a death sentence and the holdings of four courts below: "It was error for the court below to affirm the District Court's denial of petitioner's application for habeas corpus. Reversed."<sup>94</sup>

Two weeks before *Leyra*, *Brown v. Board of Education* had been decided. David and I were in Court for the announcement, but we had not worked on the case. After the dramatic events at the Court that day, we returned to Alexandria and the Judge sat down with us under the grape arbor for at least two hours. His first words were, "Earl Warren has made his place in history." The Judge apologized to David and me for the extraordinary secrecy with which the case had been handled, but he also said that if there had been a leak, we would have thanked him for keeping us uninformed. Now, however, the Judge seemed eager to speak out. He had agreed to make the opinion unanimous, but in fact he disagreed with the enforcement part of the decision, under which implementation was delayed for further arguments. The Judge said that the South would resist no matter how cautiously the Court proceeded, so he would have preferred to dispose of the cases like any other ordinary lawsuits by ordering the plaintiffs to be admitted to the schools they applied to

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<sup>93</sup> *Leyra*, 347 U.S. at 561.

<sup>94</sup> *Id.* at 562.

“forthwith,” with no further delay and no general hearing on the broad issue of implementation. “I would have simply ordered them in,” he told us. But he had nothing but praise for the Chief’s skill in bringing the Court together. From the depths of the *Rosenberg* case, the year had seen the Court rise to one of its greatest challenges.

In the early 1970s, after Justice Black had died, I was walking near Huntington Park, at the top of Nob Hill in San Francisco, when I came face to face with Chief Justice Warren, now retired. He said that his doctor required him to circle the park ten times, and invited me to join him. I repeated Justice Black’s remark about the Chief’s place in history. He smiled with warm appreciation. “I’m off to Baja tomorrow morning for some fishing,” he said.

## VII. POST-CLERKSHIP YEARS



*Max Isenbergh, Elizabeth Black, Justice Black, Charles Reich  
February 27, 1966*

After my clerkship was finished I remained in Washington, D.C., for the next five years, working at the law firm of Arnold, Fortas & Porter and living in an apartment house on Connecticut Avenue. The firm was a small one near DuPont Circle, in a private mansion formerly occupied by the late Justice Pierce Butler. The three founding partners were all prominent ex-New Dealers—insiders. Justice Black remarried, his new wife Elizabeth was warm and outgoing, and a huge bonus for me was the fact that the wonderful evenings at South Lee Street continued.

I would be working at my desk in the mid-afternoon when the phone would ring and the familiar voice of Justice Black would say, “Charlie! Can you come out to dinner at six? Elizabeth has a steak that looks perfect for three.” Occasionally there would be another guest, but most of these evenings were just the three of us. We never talked Court business and we never mentioned current cases. And sometimes a neighbor from across the street came over after dinner to make a fourth for bridge.

In 1960, I joined the faculty at Yale Law School and moved to New Haven. Only rarely did I travel to Washington, D.C. As a professor, I wrote a number of law review articles. Justice Black



read them, and I received comments in the mail, but we saw each other only a few times a year, and this was a great loss for me. But there were much greater losses to come.



*Charles Reich and others protesting the Vietnam War and Dow Chemical Inc. in New Haven, Ct. Originally published in the Yale Daily News on December 13, 1967*

A photograph in the *Yale Daily News* shows a group of shivering protestors on a sidewalk in downtown New Haven on a typical wet, cold, snowy winter day. I am bareheaded in the first row of protestors, carrying a self painted sign reading “No More Napalm.” According to the caption, the protest was directed at the presence of a Dow Chemical Co. recruiter on campus. This was hardly the role I imagined for myself when I became a law professor. But the discomfort I felt was overridden by the inhumanity of dropping flaming chemicals from the air on human beings in Vietnam—the newest escalation in the depravity of war. A law professor does, after all, have a legitimate concern with what is being done in the name of constitutional government.

Meanwhile, the Supreme Court decided a case that also involved a protest against the war in Vietnam. In December, 1965, two high school students and one junior high school student in the Des Moines public schools wore black armbands to school to publicize their objections to the Vietnam War.<sup>95</sup> They were asked to

<sup>95</sup> *Tinker v. Des Moines*, 393 U.S. 503, 504 (1969).

remove the armbands and were suspended when they refused.<sup>96</sup> The case reached the Supreme Court and was decided in 1969. The opinion of the Court, upholding the students' First Amendment right to express their views by wearing the armbands, was written by Justice Abe Fortas, my former employer.<sup>97</sup> It was a landmark opinion on the subject that had always been of the highest importance to Justice Black.

Instead, the Judge dissented. The tone of his dissent was shocking. He said that "groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins."<sup>98</sup> Justice Black's biographer, Roger K. Newman, reports that the Judge told the other Justices in the conference that "[t]he schools are in great trouble. Children need discipline—the country is going to ruin because of it."<sup>99</sup> His published dissent in *Tinker* denounces "a new revolutionary era of permissiveness."<sup>100</sup> And he wrote to me that "I find it difficult to believe that students from the kindergarten on through college have a constitutional right to use the schools for advertising their political views."

In the 1960s, people who shared the same values and goals for America began to find themselves divided and angry at each other in ways that seemed inexplicable at the time, as if we were being driven by forces that were not yet visible. For me, this process had started earlier, when I published a law review article in 1964 that proved to be far more controversial than I ever intended or imagined and thus bore some resemblance to a "protest."<sup>101</sup> What did an article called *The New Property* have in common with picketing Dow Chemical Co. or wearing a black armband to school? What did all of them have in common with Justice Black denouncing the very free speech he had championed for so long? It was not easy to see the true picture at the time. And it was all acutely painful.

Today we can see that on one side of the dividing line was a perception and fear of unchecked governmental power, and the urgent need for those without power to express themselves. On the other side were those who saw governmental power as necessary and

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 514.

<sup>98</sup> *Id.* at 525 (Black, J., dissenting).

<sup>99</sup> ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 591 (Pantheon Books 1994).

<sup>100</sup> *Tinker*, 393 U.S. at 518 (Black, J., dissenting).

<sup>101</sup> *The New Property*, *supra* note 54.

legitimate, and the protests as hysterical and dangerous. This dispute might, of course, have been carried on calmly with mutual respect. Instead, there was an intensity of feeling that swept people away. I can only say that the Judge and I were evidently seized by opposite sides of this society-wide impulse. I was out in the snow protesting when I should have been doing the work of a legal scholar, and the Court's greatest defender of free speech was upholding repression.

In 1967 President Johnson gave a reception at the White House to honor Justice Black, and I did not attend because of my opposition to the Vietnam War. In retrospect, this was a mistake. Justice Black was hurt by my absence, and no one else was helped in the slightest. I had met and listened to President Johnson at private dinner parties on two previous occasions when he was still in the Senate, and admired him greatly; as such, my objections had only to do with Vietnam. My compass was swinging wildly.

In 1970 the Court decided a case in which I was deeply interested, *Goldberg v. Kelly*.<sup>102</sup> As it happened, one of Justice Black's law clerks had been recommended by me and was a former student: James Gustave Speth, now a distinguished figure in environmental law. Many years later, Gus told me about the arguments he had with Justice Black concerning *Goldberg*. At the time, in 1970, I had a professional interest in the outcome of *Goldberg*. The argument was one I had made six years earlier in *The New Property*: welfare recipients should be accorded certain rights—rights based on the status of welfare benefits as “new property.”<sup>103</sup> This status was required in an economy where government played an ever increasing role in providing for needs such as education, housing, and child health.<sup>104</sup> Otherwise, the “welfare state” would lead to arbitrary and tyrannical power exercised as a means of control over those in need.<sup>105</sup> Need must not be allowed to curtail liberty, I argued.<sup>106</sup>

The Court upheld the rights of welfare recipients in *Goldberg*, but Justice Black wrote a long and impassioned dissent, which did

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<sup>102</sup> 397 U.S. 254 (1970).

<sup>103</sup> *Id.* at 262 n.8 (citing Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965); *The New Property*, *supra* note 54).

<sup>104</sup> *See The New Property*, *supra* note 54, at 737-38.

<sup>105</sup> *Id.* at 787.

<sup>106</sup> *Id.*

not make easy reading for me.<sup>107</sup> Reflecting on the rise of the welfare state, with all its attendant problems, he preferred to allow Congress to write the rules, rather than have the courts make the rules into constitutional mandates.<sup>108</sup> His trust in the fairness of government was far greater than mine.

Roger Newman writes that as Justice Black aged, his constitutional views became rigid and “almost calcified”—“Black’s Constitution had become all anchor and no sail.”<sup>109</sup> It is possible that this is true; it may have been old age or it may have been that in some cases the protests had gone too far, and the protestors themselves were the problem, rather than the conditions that gave rise to protest.

In the same year that *Goldberg* was decided, I published *The Greening of America*. Justice Black read his copy carefully and filled it with his usual comments and underlining. Meanwhile my colleagues at Yale maintained a silence that, if it had been translated, might have been expressed as “What’s a law professor doing writing a book like this?”

And this is how matters stood when the news of Justice Black’s death, on September 25, 1971, reached me in New Haven. Together with Guido Calabresi I traveled to Washington for the funeral at the National Cathedral. Guido and I had been friends since his own clerkship days with Justice Black and thereafter as Guido became a distinguished legal scholar, Dean of Yale Law School, judge of the United States Court of Appeals, and a much-loved mentor to many. For me, his presence at the service turned out to be crucial. We sat together in a row of seats near the front reserved for former law clerks.

The service was a formal one, with readings from sources familiar to all of us in the Justice Black community. Then, as the service almost ended, one of the former law clerks at the podium began reading from the Judge’s personal copy of *The Greening of America*—not what I had written but critical comments that the Judge had written in the margin and that I had never seen. I remember sitting in the Cathedral feeling shocked and hurt. This seemed totally out of place at a formal state funeral. It was personal and private, something the Judge might have shown to me in his study with a

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<sup>107</sup> See *Goldberg*, 397 U.S. at 271-79 (Black, J., dissenting).

<sup>108</sup> See *id.* at 275.

<sup>109</sup> NEWMAN, *supra* note 99, at 594.

smile. In the Cathedral, no other person had been singled out for mention, and I felt attacked at a time and place when response was impossible. Fortunately, Guido reached out, grabbed my hand and held it. A hymn began. Guido and I stood and wept as the coffin with its honor guard passed us on its way out of the Cathedral.

### VIII. JUSTICE BLACK'S VIEWS AND THE COURT TODAY

Today's Supreme Court may look the same as the Court in the 1953 Term, but in fact it is a greatly changed institution. The new Court accepts far fewer cases for review than the old Court—less than half as many, perhaps only one-third as many.<sup>110</sup> This is not just a procedural change. It tilts the Constitution in the direction of more unchallenged governmental and corporate power. Power grows unless it is actively checked. Individual rights, in contrast, are lost unless acted upon. The Supreme Court's passivity inevitably helps power and reduces the enforcement of rights.

What is particularly strange about the present Court's diminished caseload is the fact that the legal system over which the Court presides has grown enormously in every possible way. There are far more judges on the federal bench, many new areas of constitutional controversy, such as the rights of public school students or issues arising in the health care system, a vastly expanded criminal justice system, and all of the nation's new activities around the globe. How can there be *fewer* issues of importance, or *fewer* injustices in need of remedy, than fifty years ago?

Justice Black was a strong advocate of taking more, not fewer cases for review. When the Court denied review in what he considered a deserving case, he often noted his dissent from this denial. He believed that the Court had oversight responsibilities, that it must seek out cases where justice demanded review. By his standards, the Court today should be reviewing 400 cases per annum, not a paltry seventy. After all, each Justice now has four brilliant law clerks with time on their hands!

What is profoundly troubling is the cases we never hear about—the cases denied review. What injustices, abuses of power and unresolved conflicts never come to light because the Court

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<sup>110</sup> See Erwin Chemerinsky, *An Overview of the October 2007 Supreme Court Term*, 25 *TOURO L. REV.* 541, 541-42 (2009).

refuses to listen? The new Supreme Court appears far more aloof, unreachable, unmoved.

Perhaps this remoteness is in part due to another significant change in the Court since the 1953 Term: how new Justices are chosen. The Court back then was comprised of three former United States Senators (Justices Black, Burton, and Minton), several former high administration officials (Justices Clark, Douglas, Jackson, and Reed), and three former law professors (Justices Frankfurter, Douglas, and Burton). Now the composition of the Court has shifted almost exclusively to individuals who have already served on the lower federal courts. This means the new appointees have a track record. Their judicial views are known. They have been vetted, and vetted again. A candidate with no known judicial views, such as Hugo Black, would have little chance of being appointed today. The Court has been “professionalized.” Indeed, most of the members seem to come from just a few Ivy League law schools. This has made the Court a less democratic and less representative institution.

But it is not only the Justices who have been professionalized. The Constitution itself has been professionalized, and that development is a threat to the very nature of a democratic constitution. When today’s Justices appear on C-SPAN, they give the impression that the Constitution is an obscure and esoteric document that only an expert or scholar can understand. In contrast, Justice Black insisted that the Constitution was written in plain words that could be understood by ordinary people.<sup>111</sup>

The Court today is famous for its doctrinal disputes over how to interpret the Constitution. Should the original intent of the Framers be followed? Should the exact meaning of the text be observed? Should the Court be “activist” or should it demonstrate “judicial restraint”?

However, it is seldom made clear that all of this disputation seems to apply only to the interpretation of individual rights and not to the interpretation of the powers of the presidency and Congress. When it comes to these powers, the present Court has not shown any deference to the intent of the Framers. The national security state, with its secrecy, its domestic surveillance, and its global reach, cannot possibly be reconciled with the intent of the Framers. As is

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<sup>111</sup> *Coleman v. Alabama*, 399 U.S. 1, 13 (1970) (Black, J., concurring).

well known, they feared every form of unchecked power and believed in strictly limited government.

The Court has upheld the national security state and many other expansions of government power on the basis of “need”: the government must have the powers necessary for survival.<sup>112</sup> Justice Black, however, took a decidedly more narrow view of government powers. In the famous *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>113</sup> Justice Black denied that the president had any power to take possession of the steel industry without congressional authority.<sup>114</sup> He said that the president’s powers were limited “in both good and bad times,” and that the Framers had chosen to limit all delegated powers rather than trust to “need.”<sup>115</sup> In a memorable sentence rejecting President Truman’s national emergency claim Black wrote: “It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice.”<sup>116</sup>

Justice Black’s decision in the *Youngstown* case cost him the friendship of President Truman, as he ruefully recalled to David and me. The Blacks and the Trumans had been friendly since Senate days and had much in common. But after the *Youngstown* decision, Truman never again visited South Lee Street.<sup>117</sup>

Justice Black’s voice was sorely needed when the Court recently decided that corporations have the free speech rights of individuals.<sup>118</sup> The constitutional status of corporations was an issue of the greatest importance to him, and although we had no case on this subject during our Term, David and I heard the Judge’s views frequently and fully.

In 1938, in a case involving the Fourteenth Amendment, Justice Black dissented from the view that a corporation is included within the constitutional meaning of “person.”<sup>119</sup> He said then that “the judicial inclusion of the word ‘corporation’ in the Fourteenth

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<sup>112</sup> See, e.g., *Gitlow v. People*, 268 U.S. 652, 668 (1925).

<sup>113</sup> 343 U.S. 579 (1952).

<sup>114</sup> *Id.* at 588-89.

<sup>115</sup> *Id.* at 589.

<sup>116</sup> *Id.*

<sup>117</sup> Two of President Truman’s own appointees, Justices Clark and Burton, also voted to overturn the seizure, and Truman reportedly made disparaging comments about both.

<sup>118</sup> *Citizens United v. Fed. Election Comm’n*, No. 08-205, 2010 WL 183856, at \*36 (U.S. Sup. Ct. Jan. 21, 2010).

<sup>119</sup> *Conn. Gen. Life Ins. Co.*, 303 U.S. at 85 (1938) (Black, J., dissenting).

Amendment has had a revolutionary effect on our form of government.”<sup>120</sup> No doubt he would have felt exactly the same about extending the constitutional free speech rights of the individual to corporations.

The debate since the recent decision was announced has focused on the practical issue of corporate influence over elections and the judicial issue of the Court’s unseemly eagerness to overturn established precedent. But Justice Black’s concern went to a deeper issue that today’s commentators seem to have missed entirely. Can a democracy admit to membership artificial “persons” who can be replicated in unlimited numbers, are subject to control by others, have no limits in lifespan or size, and are endowed with no morality, no loyalty, no faith? Are corporations a legitimate part of “We the People”?

In suggesting that corporations are merely an instrument through which “the people” act, today’s Court ignores what every first year law student is taught—that corporations are a separate legal entity with an existence of their own. Moreover, corporations often engage in governmental functions, from operating prisons to waging war. Corporations, unlike human beings, have no natural limits to their power. Thus the recent Supreme Court decision does not only raise the issue of money in politics, it raises the more profound issue of entities as persons who are “of the people”—entities with constitutional rights, interlopers to the human political community that joined together to adopt the Constitution.

A constitution that grants sweeping powers both to government and to corporations is an unbalanced constitution—unbalanced against the individual. The individual today has lost the economic independence that was taken for granted by the Framers of the Constitution, who could not foresee a time when employment would become necessary for economic survival. There is a way to restore that balance that is available within our present constitutional framework. A future Supreme Court can recognize explicitly what is now implicit—that individuals must be guaranteed access to the means of economic survival. A “right to work” would be an appropriate response to newly granted corporate rights.

In August 1953, when David Vann and I began work, we did

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<sup>120</sup> *Id.* at 89.



not realize that the Court was about to embark upon a sustained period of advances in individual rights, a pent-up agenda that would occupy the entire period called “the Warren Court.” Beginning with *Brown v. Board of Education* what took place has been called a “rights revolution.”<sup>121</sup> I prefer to see it as a time of catching up—rights catching up to a host of newly created powers.

Today’s Court may well face a pent-up demand for economic rights. If unemployment continues at a high rate, there will surely be a presidential candidate astute enough to promise the appointment of new Supreme Court Justices who will support a “right to work,” as Justice Douglas eloquently described it. And why not? That is the way the interpretation of the Constitution has been changed many times before.

Just as in 1953 there was a powerful demand for personal and civil rights, so the need for economic survival serves as a basis for individual economic protection. The need-based jurisprudence of powers can be fully justified as applied to the position of the individual as well.

Under the Due Process Clause no person shall be unlawfully denied life, liberty or property. The legal challenge is to protect the *means* of life, liberty and property. The Court has protected the means to governmental survival. It will be under growing pressure to protect the means to individual survival.

Justice Black relished the opportunity to re-think the meaning of the Constitution by going back to the original sources and seeking to be faithful to the kind of republic the Framers envisioned. Today’s judges, legal scholars, and law students can relish a similar creative opportunity to protect individual independence and autonomy in an age when the individual needs protection as never before.

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<sup>121</sup> See *Brown*, 347 U.S. at 495.

