Mr. Justice Black: A Foreword

William O. Douglas
Close association with a colleague disqualifies one from writing about his work. We of the Supreme Court are continuously on one side or the other of great arguments which divide the experts and even the people of the nation. Long association together takes us through many controversies—some great, some small, but most leaving vivid memories of soul-searching decisions, attempts at persuasion with arguments pro and con, and often the gradual evolution of a compromise position around which a majority can coalesce.

Over the years there are aggregates of agreement or disagreement that spell degrees of likeness and dissimilarity between any two Justices. These degrees of likeness and dissimilarity are difficult to measure, for the majority of the Court changes greatly from case to case. Moreover, in most opinions for the Court there is so great an admixture of the philosophy of each Justice that no one of us can attempt to make the separation. And when one has been in such frequent agreement with a Brother as I have with Justice Black, it is impossible to write about him without seeming to write about one’s self, or being so neutral as to appear to condemn by faint praise, or being so vague as to be stilted, or seeming to take advantage of the Brother’s anniversary to perpetuate one’s own favorite dissents.

I, therefore, do not undertake to evaluate the work of Justice Black on the Court. He is a man of deep convictions and great contrasts. Those who come to an analysis of his opinions will find a rich core to explore and assay—plenty to disprove the charge that he is an “activist” and a devotee of judicial power.

I will add only a few words concerning Justice Black, the man. There have been many great constitutional debates in this nation. On close or contentious problems feelings often run deep. Men of decided views, strong-minded men, clash. But whatever the occasion, Justice Black is always courteous and without rancor. In this he has the great advantage of having had the South as a mother.

Justice Black is, indeed, a humble person. He has traveled the world of ideas so extensively that he knows there are few absolutes. He also knows that man’s great capacity is the ability to err—to make errors because he sees only part of the facts, to make errors because he is often swept by prejudice or other emotions. Justice Black would, I am sure, subscribe to Cardozo’s wry dictum

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that "the persuasion that one's own infallibility is a myth leads by easy stages and with somewhat greater satisfaction to a refusal to ascribe infallibility to others." The knowledge that judges are not infallible is an important key to an understanding of Justice Black's judicial work.

Justice Black has an ear finely tuned to facts and quite deaf to dogma and generalities. "General propositions do not decide concrete cases," wrote Justice Holmes in *Lochner v. New York.* The problem of the application of a rule is often to make the rule accommodate the facts. Justice Black is alert to the vital issues in the case before the argument has long progressed. He quickly cuts to the heart of the record and finds the crucial facts on which the decision must turn. He thinks in terms of facts, not generalities. His kind of mind is a healthy influence in any court. For it is easy for judges to get caught up in the rules and general principles which they have fashioned and lose sight of the vital human or property issues that plead for recognition. A particular decision of Justice Black may by some standards go wide of the mark. But each one is an effort on his part to fashion a rule that will do justice in this and in the run of the cases. The vitality of the law is the policy it promotes. It is the endless search for facts that leads to an understanding of that policy. That trait, so characteristic of Justice Brandeis, is very pronounced in Justice Black.

So much for generalities. The concrete must be left to others, farther removed from the areas of conflict than I. But I dare say that when the critical account is written, none will be rated higher than Justice Black for consistency in construing the laws and the Constitution so as to protect the civil rights of citizens and aliens, whatever the form of repression may be.

2. 198 U.S. 45, 76 (1905) (dissenting opinion).