

BOOKS & THE ARTS.

Doing Justice

DAVID J. GARROW

LEARNED HAND: The Man and the Judge. By Gerald Gunther. Knopf. 818 pp. \$35.

HUGO BLACK: A Biography. By Roger K. Newman. Pantheon. 741 pp. \$30.

“One advantage of a judge’s life,” the late jurist Learned Hand wrote, “is that as one gets older, provided one has been industrious and reasonably competent, an encrustation of approval builds itself up about one.” That maxim has certainly proved true in Hand’s case. Indeed, the recent flood of respectful and sometimes worshipful judicial biographies—of Hand, of retired Supreme Court Justice Lewis Powell and of the late Justice Hugo Black—raises the question of why so many judicial biographers are incapable of anything other than a fawning attitude toward their black-robed heroes.

Some might argue that judicial biography is our last culturally legitimate form of hagiography, but that contention too would be considerably overdrawn, for many recent political books offer readers far too rosy a view of their subjects. Neither Jonathan Aitken’s overly respectful *Nixon* nor Joan Hoff’s iconoclastic *Nixon Reconsidered* is exactly an attack-dog exposé, and even David McCullough’s excessively praised *Truman* hardly merits the adjective “critical.” Far more depressing, respectful reviews have greeted the publication of Stephan Leshner’s professionally dishonest *George Wallace: American Populist*, a financially compromised apologia for one of America’s worst racist demagogues. The book fails to mention that Wallace, in exchange for his cooperation, is receiving a significant portion of Leshner’s royalties.

With Nixon, Truman and Wallace, however, uncritical portraits are offset

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by other works that penetrate the radiant sheen thrown up by historical press agency. This is not so, however, in the judicial realm, where John Jeffries’s biography of Powell is the only recent exception to this rule [see Garrett Epps, “Donning the Robe,” September 26, 1994].

Many people may wonder why a \$35 book about a long-dead judge who never made it to the Supreme Court—Gerald Gunther’s biography of Learned Hand—has been so widely reviewed. But the cult of Learned Hand, who sat for more than fifty years—from 1909 until 1961—as a federal trial and appellate judge in New York, is of long standing. Its persistence is due largely though not entirely to Hand’s felicitous prose style. Richard Posner, the intellectually prolific chief judge of the U.S. Seventh Circuit Court of Appeals in Chicago, has shrewdly observed that “the literary judge wears best over time,” and Hand is the best example.

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Substantively, Hand is most notable as a representative of the philosophy of judicial restraint first championed in the late nineteenth century by James Bradley Thayer, one of Hand’s Harvard law professors, and then popularly associated with Hand’s closest Supreme Court friend, Justice Felix Frankfurter. First named a federal trial judge at the age of 37, Hand was promoted to the Second Circuit Court of Appeals, the country’s premier appellate bench, in 1924.

Gerald Gunther, who served as Hand’s clerk in the 1950s and subsequently became one of America’s most senior constitutional commentators, has devoted more than two decades to composing an impressive and engaging book, but one finishes his biography feeling that Hand’s historical significance is rather nominal and that his judicial career does not merit the attention his former clerk has lavished upon it.

Gunther sometimes minimizes Hand’s failures while also exaggerating his accomplishments. In Gunther’s mind, Hand’s greatest judicial achievement came in a 1917 district court opinion, *Masses Publishing Co. v. Patten*, in which Hand persuasively articulated a First Amendment analysis that offered far more constitutional protection to politically unpopular speech than even Oliver Wendell Holmes was calling for on the Supreme Court. Gunther terms *Masses Publishing* Hand’s “major contribution to the intellectual and legal history of free speech,” but he dramatically and embarrassingly understates the significance of Hand’s performance in a far more important subsequent case, *United States v. Dennis* (1951). In *Dennis*, the Supreme Court, directly quoting language that Hand had written for the Second Circuit, sustained the convictions of twelve leading American Communists who had been tried for the somewhat abstruse crime of conspiring to advocate the overthrow of the government. Gunther acknowledges “the puzzle of how Hand could write so speech-restrictive an opinion as *Dennis*,” and he concedes that most commentators view *Dennis* as “a debacle for the First Amendment,” but he utterly fails to give *Dennis* the weight it deserves in any evaluation of Hand’s career.

Gunther also has difficulty dealing with some of Hand’s more bizarre constitutional notions, such as his 1914 recommendation, in *The New Republic*, that the due process clauses of both the Fifth and Fourteenth Amendments should be repealed. As a fallback, Hand first suggested that a two-thirds (or 6-to-3) majority, and then an even stiffer 7-to-2 majority, rather than simply a 5-to-4, be required for any Supreme Court ruling that a governmental action was unconstitutional on due process grounds. Personally, however, Hand firmly believed that the “due process clause ought to go.”

Given such views, it’s unsurprising that in Hand’s half-century on the bench he only twice invalidated statutes on constitutional grounds, a record of judicial restraint so pronounced as to suggest judicial abdication. Hand’s later years were highlighted by his 1958 Holmes Lectures at Harvard, which Gunther admits were “an attack both on the Warren Court’s general jurisprudence and on some of its specific rulings,” including *Brown v. Board of Education*. Later published under the incongruous title of *The Bill of*

Rights, the lectures advocated such a retrograde view of the judicial role that even Gunther laments what he calls "the bleakness, pessimism, and extremism of Hand's final major statement."

One of Hand's aphorisms from a famous speech at "I Am an American Day" in 1944—"The spirit of liberty is the spirit which is not too sure that it is right"—remains one of the most quotable lines ever uttered by an American jurist. But while Gunther acknowledges that Hand was a man "beset with extraordinary self-doubts and anxieties," it is only Lewis Powell, who wrote the foreword to the biography, who asserts that, "seen in the context of his private life, Hand's philosophy [of judicial abnegation] appears to have been a product of personal self-doubt."

Hand possessed a resolutely self-critical and sometimes unpredictable intellect. While Gunther does not mention that Hand was an extremely early supporter of a woman's legal right to choose abortion, he does detail how—thirty years before the Supreme Court upheld antigay sodomy statutes in *Bowers v. Hardwick* (1986), in a vituperatively homophobic opinion written by Byron White with Lewis Powell casting the decisive vote—Hand had publicly opined that homosexuality "is not a matter that people should be put in prison about." But many well-known federal judges have lacked Hand's integrity. Even leaving aside infamous figures like Justice Abe Fortas, who resigned from the Supreme Court in disgrace, one can still find, right at the very top of scholars' lists of ostensibly "great" Supreme Court Justices, individuals whose full life stories are marred by malice and mendacity.

No recent and well-known Justice illustrates this phenomenon better than Hugo Black. An Alabama native, Black was a local prosecutor and Birmingham police court judge prior to winning election to the U.S. Senate in 1926. There he served until Franklin Roosevelt, whom he energetically supported, named him to the Supreme Court in 1937.

Once his Court nomination was announced, many journalists turned their attention to Black's 1926 election to the Senate, which Alabama observers had seen as a victory for the worst elements in Southern politics; with no exaggeration the *Montgomery Advertiser* had labeled Black "the darling of the Ku Klux Klan."

In fact, as was publicly substantiated just a few weeks after the Senate con-

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firmed Black to the Court by a vote of sixty-three to sixteen (with an additional seventeen colleagues not voting), Black had been an active, card-carrying member of the Klan from September 1923 until he submitted an apparent letter of resignation in July 1925.

The Klan's support had been crucial to Black's 1926 race. "The Klan was his source of strength," Roger Newman writes in this new life of Black. "Without it he would have been a very minor candidate indeed, with negligible publicity." Not all Alabama politicians of that era courted Klan support; Senator Oscar Underwood was a vociferous opponent. And Newman recounts how Black as a courtroom attorney regularly used the word "nigger" and was decidedly anti-Catholic and xenophobic even for the 1920s: "The shuffling feet of myriads of immigrants fill my heart with dread."

Nor did Black change once he entered Congress; as a senator he "twice proposed that all immigration be suspended for five years," and in chairing Congressional investigating committees, Black regularly would "trample over witnesses's rights" with little concern for constitutional values.

During the public, postconfirmation firestorm over his Klan membership, Black knowingly dissembled in order to stifle the widespread demands for his resignation or removal. Not even years later would Black fully confess how extensive and ignominious his Klan associations had been. Black "never really grasped, or could admit," Newman acknowledges, "the genuine outrage that the Klan caused" among many Americans.

But Newman accords these personal prejudices and history little if any weight in his overall evaluation of Black's life. And just as Gunther soft-pedals Hand's judicial failings, Newman is unable fully and critically to consider Black's often remarkable constitutional shortcomings.

Black's most infamous early career Supreme Court debacle came in the 1944 Japanese exclusion and imprisonment case of *Korematsu v. United States*. There, in what is widely regarded—along with *Bowers*—as one of the Court's two most heinous decisions since its 1896 endorsement of segregation in *Plessy v. Ferguson*, Black's majority opinion unreservedly endorsed the government's wartime discrimination against Americans of Japanese ancestry on explicitly racial grounds.

Just as with his Klan membership, Black was unable or unwilling to admit what a great moral stain *Korematsu* repre-

sented—even years later, when other participants, including future Justices Earl Warren and Tom Clark, readily confessed their error. "He did not like to talk about it," Newman concedes, but "he stood by the opinion until his death." Indeed, in 1967 Black defiantly told a questioner that "I would do precisely the same thing today."

But *Korematsu* is not the only part of Black's judicial record that Newman is unwilling to consider fully. Much of Black's judicial fame rests upon his simple and literal-minded reading of the Bill of Rights, particularly the First Amendment; as Richard Posner has noted, judges "who take extreme positions tend to get disproportionate attention," and Hugo Black has been a primary beneficiary of that truth for many years.

The modern-day judicial figure who is Black's closest counterpart is Justice Antonin Scalia.

Newman acknowledges Black's "ability to pigeonhole any issue instantly," without recognizing that such an approach to constitutional decision-making is inadequate. Newman admits that from Black's perspective, a "detailed analytical framework . . . was not required," and he concedes that after the mid-1960s, as Black's jurisprudence became increasingly rudimentary, "becoming a prisoner of his philosophy . . . didn't bother" Black.

Today, most serious constitutional scholars hold Black's opinions in low regard. Warren Court historian G. Edward White terms Black "idiosyncratic to the point of eccentricity," with a "theory of constitutional interpretation that was both bizarrely rigid . . . and mysteriously flexible." While Newman and many others would like to imagine Black as a distinctive liberal, University of Virginia law Professor Michael Klarman not only highlights "the many glaring inconsistencies in Justice Black's constitutional jurisprudence" but also argues that Black's voting record during his final six years on the Court "can only be described as reactionary."

Nowhere was that quality more visible than in civil rights protest appeals. New-

man, seeking to evade the full import of Black's stance, writes that "the aftermath of *Brown* saw a rampant lawlessness . . . sweeping the South" and that "in the direct action cases Black was responding to the imperative of the return to legal processes." This justification is transparently faulty, for the "rampant lawlessness" that was sweeping the South was being committed almost exclusively by segregationist whites, while Black's judicial antipathy was focused largely upon nonviolent blacks. Newman does report Black's undeniable comments: how "these street parades should be stopped"; that it was "time to clamp down on the Negroes"; and that it was "high-time the Court handed down a decision against the Negroes." Newman does not underscore that these comments were made by the same man who forty years earlier had talked about "niggers" and enlisted in the Ku Klux Klan. And while Robert Bork would later be rightfully criticized for his 1963 article in *The New Republic* opposing the public accommodations provisions of the then-pending Civil Rights Act of 1964, in private the supposedly liberal Hugo Black was making much the same argument to his Supreme Court colleagues: "I think it is an indicia of slavery to make me associate with people I do not want to associate with."

But the modern-day judicial figure who is Black's closest counterpart is not the now-harmless Bork but rather the relatively young Justice Antonin Scalia. As constitutional scholar Michael Gerhardt has recently explained, "the striking similarities between Justices Black and Scalia" include not only "their comparably intense and persistent proclamations of fidelity to the constitutional text" but also "similar substantive positions, especially with respect to the Commerce Clause, the Equal Protection Clause, substantive due process, and separation of powers." Gerhardt notes "the frequency with which Justice Black laid the particular doctrinal foundations that Justice Scalia would later develop," and highlights the antiliberal thrust of some Black tenets. Perhaps the most memorable of these was Black's simple-minded insistence that no form of electronic surveillance could offend the Fourth Amendment's constitutional protection against unreasonable search and seizure, since "a conversation overheard by eavesdropping . . . can neither be searched nor seized."

To declare, as Newman does, that Black was "one of the handful of truly great Supreme Court justices" in Ameri-

can history may be par for the course in the worshipful field of judicial biography, but to further proclaim that Black's "accomplishments ranked him with Franklin D. Roosevelt and Martin Luther King, Jr., among contemporaries" is not only demonstrably false but also morally repugnant. Unfortunately, Newman is far from alone in attributing judicial "greatness" to Black; in one recently published collection of academic papers, revealingly titled *Great Justices of the U.S. Supreme Court*, virtually every cumulation not only ranks Black as a "great" but also features a long list of other contemporaries—from Felix Frankfurter to Earl Warren to William O. Douglas to William Brennan to Lewis Powell—whom one or another commentator is eager to label the same way.

Most of these candidacies are no more plausible than Hugo Black's. Frankfurter's most recent biographer, Melvin Urofsky, labeled his subject a "tragic" failure, and the historian Michael Parrish reports that "there is now almost a universal consensus that Frankfurter the Justice was a failure." Earl Warren hardly fares better; despite all the credit and calumny that commentators have accorded the Supreme Court of the 1950s and 1960s, even Warren's own biographer—and former clerk—G. Edward White readily acknowledges Warren's "subordination of reasoning to results."

A full treatment of what a huge disappointment William O. Douglas's judicial career represented will await Bruce Allen Murphy's comprehensive biography, but even today no knowledgeable observer would challenge Melvin Urofsky's observation that Douglas "exercised far less influence than his abilities and ideas deserved." And any attempt to claim Lewis Powell for greatness would founder fatally on his support for Byron White's homophobic opinion in *Bowers*.

The one other name that some "greatness" aficionados regularly suggest—William Brennan—represents the strongest, and really the only plausible, twentieth-century contender for comprehensive judicial greatness. Even one of Brennan's most frequent adversaries, the often-understated Byron White, has said Brennan "will surely be remembered as among the greatest Justices who have ever sat on the Supreme Court." Georgetown University Law Center Professor Mark Tushnet, a former Thurgood Marshall clerk who has become one of the nation's most insightful Court historians,

suggests that "the best way to understand the recent history of the Supreme Court is to discuss not 'the Warren Court' but 'the Brennan Court,'" a concept that covers not just the 1960s but the 1970s and 1980s as well.

But even Tushnet's advocacy of "the Brennan Court" as the best label for the 1956–1990 period is qualified by his concession that, especially up through 1969, "Brennan was primarily a tactician, devising ways to implement a vision clearly and properly associated with Warren." In the post-Warren era, Justice Brennan almost always found himself on the jurisprudential defensive, eking out victories, or at least avoiding defeats, by the smallest of margins and on the narrowest of grounds. But even in Brennan's heyday, Tushnet notes, "the Warren Court's mem-

bers were not concerned with constitutional theory to any significant degree." Hence any argument for Brennan's judicial "greatness" necessarily falters.

That even the best Justice of the century—which William Brennan arguably was—does not on examination merit the label of "judicial greatness" signals that in fact we are dealing with an empty category. Judicial biography in far too many cases still suffers from a deep-seated need to exalt and ennoble, a regrettable urge rooted in the culture that develops among each judge or Justice's network of clerks. Just as the valet's-eye view of political history usually proves unsatisfying, so too—in the opposite way—does an uncritical and overly respectful clerk's-eye view of "great" Justices result in incomplete and disappointing judicial history. □

Travels With Charlie

MICHAEL UHL

DUES: A Novel of War and After. By Michael H. Cooper. *Curbstone*. 248 pp. Paper \$11.95.

PLAYING BASKETBALL WITH THE VIET CONG. By Kevin Bowen. *Curbstone*. 63 pp. Paper \$10.95.

It is often said, and justifiably so, that the premier war novel of the twentieth century is *All Quiet on the Western Front*, Erich Maria Remarque's searing and compassionate account of life and death in the German trenches of the First World War. It is a standard—along with less frequently read works by Remarque's fellow combatants Siegfried Sassoon, Edmund Blunden, Wilfred Owen, Frederic Manning and a few others—against which subsequent novels, memoirs and poetry of war are measured.

It may still be too soon for final judgment, but most of the writing about the Vietnam War by its veterans seems to fall short of what Remarque and his contemporaries achieved as they plotted, with a rare objectivity, both the scope of their mad war and the profound transformations affecting those who fought it. Having read the war stories of many Vietnam vets, I am still waiting for Remarque.

Broadly speaking, from the American side there are two categories of Vietnam

War literature written by its veterans. First, the popular branch of the genre, which fails so miserably to embrace the experience that it functions, de facto, as postwar apologia, an extension of hostilities by other means. Typically, such works crown their protagonists with exaggerated honors as "warrior kings" and "rogue warriors," or they are blatantly revisionist, like the so-called "oral histories" regularly churned out by Al Santoli. By implication, if not intent, the vets who author these works seek to dull the national memory of our military defeat by glorifying the role of the individual American soldier, marking survivors simultaneously as valiant heroes of an unpopular foreign war and victims of political betrayal at home.

Perhaps it is only slightly grandiose to suggest that another social consequence of such high-test pulp is to abet the recruitment of adventure-prone elements among minority and working-class youths, who are most apt to face the nation's combat chores in the endless chain of mini-invasions our government now finds so appealing.

A second, smaller category of Vietnam veteran war literature contains those memoirs and works of fiction for which someone in the world of high culture claims literary merit. My own short list of works that "get the war right" would certainly include Ron Kovic's *Born on the Fourth of July* and Ronald J. Glasser's *365 Days*, plus a sampling of the poetry, some of it quite exceptional. I consider it a possibility that even into the next millennium, *Born on the Fourth of July* will be read

Michael Uhl served with the Army in Vietnam. He returned there last summer to do research for a book.

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