

## Justice Hugo Black and the Ku Klux Klan

By Geoffrey Watson SC

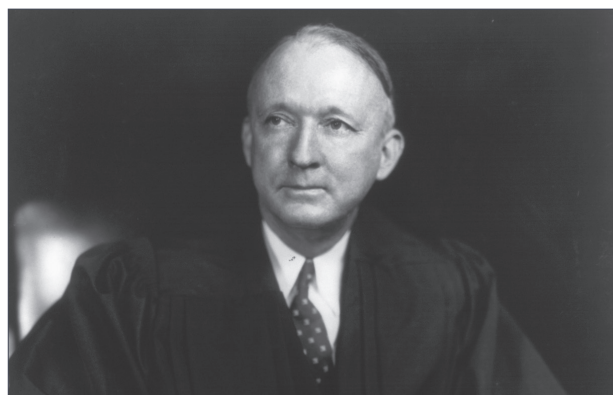
While Justice Black sat on the US Supreme Court from 1937 until 1971 he established himself as one of the most liberal judges ever to serve on that court. His judgments were politically motivated and ideologically driven with scant regard for precedent – by American standards Black was positively left wing. Yet Black had also been a member of the Ku Klux Klan. How was this so?

Hugo LaFayette Black was born on 27 February 1886 in a clapboard farmhouse in Clay County, Alabama – hillbilly country. He was one of eight children; poor, but Southern proud. Despite his background, Black had a reasonable education, and shortly after school he commenced study at the law school of the University of Alabama in Tuscaloosa. It was a two year course and the 22 students were taught all their subjects by the two faculty members.

Black determined to become a trial advocate. In 1907 he headed to the state capital, Birmingham. He only had \$10 and walked part of the way to save on the train fare. He shared a room in a boarding house with three other men – four men sharing two double beds. The few cases that Black got were small and poorly paid. He took an appointment as a ‘Municipal Court judge’ for \$125 per month where he dealt with the lowest level of crimes amongst the poorest members of the community – nearly all of the persons who came into his ‘dingy, dank, dark and dirty’ courtroom were African-Americans. He acquired a reputation for efficiency (he would decide about 80 to 100 cases per day) and there was no hint of racism in his judgments.

A committed Democrat, Black took his first step into politics in 1914, successfully nominating for election as the Jefferson County solicitor – effectively its DPP. He quickly showed that he was a genuine reformer. One of his first actions was to drop the charges against 500 petty offenders incarcerated because they were unable to muster bail. Nearly all were African-Americans. His term was marked by zealous prosecution of powerful business interests and corrupt politicians and police. He produced a report damning the police for extracting ‘confessions’ from black prisoners through force, and he indicted four police officers following a particularly brutal interrogation. He successfully prosecuted a well-connected town marshal for the murder of a black prisoner. Naturally, this was never going to last. The Alabama political establishment undermined his authority, and Black resigned in protest in 1917.

Black then joined the Army, was commissioned as a captain – but Armistice came just before he shipped out. Returning to private legal practice in Birmingham he soon became the city’s leading plaintiff’s lawyer. Birmingham was an industrial town with plenty of juicy industrial accidents and Black was



Hugo La Fayette Black. Library of Congress LC-USZ62-33516 / Photo by Harris & Ewing photography.

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soon making a fortune out of contingency fees he took out of generous jury awards. In 1926 he declared a taxable income of \$65,000 – ‘as large an income as any lawyer in Alabama’ he claimed. Accounts of his courtroom antics (‘usually feisty and aggressive’) suggest that he was a prototype for the flamboyant advocates that we see today on American TV. Known as ‘Ego Black’ by his opponents, he skirted ethical edges claiming ‘If you’re not threatened [with contempt of court] at least once during a case, you’re not doing your job’. He addressed juries with tears running down his cheeks – but only in bigger cases: he told one opponent ‘Hugo Black doesn’t cry for less than \$25,000’.

Now you cannot be an important person in Birmingham, Alabama in the 1920s and stay too far away from the Ku Klux Klan. ‘The Invisible Empire’ was at its peak, with between four and six million members across America. The Klan controlled the voting machinery in Alabama. In Birmingham there were 32,000 registered voters, 15,000 of whom were Klansmen. For Black the connection became important when, in 1921, he was selected by the Klan to conduct a case which had excited national attention.

In 1921 a Methodist minister, Rev ‘Roscoe’ Stephenson, murdered a Catholic priest, Father James Coyle. Rev Stephenson was a member of the Birmingham Klavern and his daughter had run away to marry a Puerto Rican Catholic named Pedro Gussman. Father Stephenson officiated. The KKK was (amongst its many other prejudices) virulently anti-Catholic. Stephenson was naturally very cranky, so he sought out Father

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Coyle at his presbytery and told him 'you have acted like a low down, dirty dog ... you have ruined my home ... that man is a nigger'. Stephenson then shot the priest dead. Although these facts were not in dispute Stephenson pleaded not guilty. The KKK retained Hugo Black to appear for Stephenson. It was not a fair trial. The presiding judge was Judge Fort – a Klansman and an old friend of Black. The jury foreman was a senior Klansman. The majority of the jury were Klansmen. Black's defence was disgraceful. It involved parading the swarthy Gussman before the jury (Black arranged it so that the courtroom blinds were lowered so that Gussman would appear even darker). Meanwhile Rev Stephenson came to court each day dressed in his clerical robes. Black's cross-examination often concluded with a swingeing 'You're a Catholic aren't you?' and his address to the jury was a naked appeal to prejudice – he submitted that the Catholic witnesses were 'brothers of falsehood as well as faith'. He even recited part of the Klan's official prayer to the jury. Stephenson was acquitted – the jury made a specific finding that he had acted in self-defence – a remarkable result given that this was not the defence case and the priest was unarmed.

Now different people could react in different ways to those events. Hugo Black reacted by paying his 'klectoken' and joining the Robert E Lee Chapter of the Ku Klux Klan on 13 September 1923. It was hardly spur of the moment: He had been thinking of joining since 1920. He was admitted in a ceremony involving the traditional flaming crosses, and he wore the pointy hood and white gown while taking a Klan oath. That oath required him, inter alia, to 'shield and preserve ... white supremacy'.

In 1926 an opportunity arose for Black to run for the US Senate. To garner Klan support he spoke at klaverns and konklaves across Alabama. His typical speech was anti-Catholic. The Grand Dragon of the Realm of Alabama, James Esdale praised Black saying 'Hugo could make the best anti-Catholic speech you ever heard'. Black received endorsement from the KKK (in fact, his total vote closely approximated the Klan membership). Shortly after his election Black triumphantly addressed 3,000 hooded Klansmen at a celebratory 'klorero'. The 'exalted cyclops' introduced Black as 'chosen by the Klansmen of Alabama' and awarded Black a KKK 'passport' – the Klan equivalent of the keys to the city. In return Black pledged his allegiance to the Klan referring to it as 'the pride of Anglo-Saxon spirit' and 'the heart of Anglo-Saxon patriots'.

Upon his election to the Senate Black followed a Klan protocol – he signed a formal resignation from membership of the KKK. The protocol was designed to allow any Klansman in public

office to deny actual membership – the grand dragon later recounted how he told Black 'You give me a letter of resignation ... against the day you'll need to say you're not a Klan member'. But the resignation was not a genuine resignation – it was really just a device – once a Klansman always a Klansman. The resignation was signed off by Black with these letters 'ITSUB' – which, in Klanspeak, stands for 'In the Sacred, Unfailing Bond' – and that sacred, unfailing bond trumped any resignation.

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In the Senate Black demonstrated lingering signs of a predisposition toward Klan prejudices. Black sought leave from the Senate so he could return to Alabama to defend a Klan friend, the aromatically named Chum Smelley, who had deliberately murdered an African-American. Again self-defence succeeded although Smelley had shot the unarmed dead man in the back. Twice during 1929 Black moved in the Senate that all immigration be suspended for five years 'in defence of racial purity and national traditions'. He supported laws prohibiting marriage between blacks and whites. In 1935 Black delivered a filibuster designed to prevent the passage of an anti-lynching law.

Black strongly supported Roosevelt's infamous plan to enlarge the Supreme Court and to overwhelm conservative judicial opposition to his New Deal by packing the Supreme Court with sympathetic progressive judges. As is well known, Roosevelt's plan became unnecessary partly because one of the conservative judges, Willis Van Devanter, retired in 1937. This gave Roosevelt a legitimate opportunity to recreate the Supreme Court to his liking, and he nominated Black for the available position. Black's nomination was quickly confirmed by his colleagues in the Senate.

According to an article written by Black after Roosevelt was dead, he had informed Roosevelt of his former Klan membership – but the sequence of events seem to suggest that this claim was untrue. In any event, a few weeks after his confirmation, newspapers revealed Black's connection with the Klan. In an interview with a leading newspaper Grand Dragon Esdale produced documents proving Black's membership. The public response was angry. There were calls for Black's resignation or for his impeachment. Black responded by making an eleven

minute public statement on the radio. There was a nationwide audience. That speech by Black was a masterful piece of rhetoric. Only one minute of the speech was devoted to the real issue – he mentioned his former Klan membership, emphasising his resignation. The next ten minutes of the speech were devoted to an attack on religious and racial bigotry in the United States. It even included the good old, time-worn 'among my friends [are] many members of the coloured race' and 'some of my best and most intimate friends are Catholics and Jews'. Then the controversy quickly subsided. It is probably fair to say that in 1937 there were still a substantial proportion of Americans who would not have been terribly antagonistic toward the principles of the Ku Klux Klan.

Excuses have been offered to explain how or why Black came to join the KKK. Black himself generally avoided answering questions on the subject. Over his lifetime he did say some things, but some were quite inconsistent with others. For example, Black explained to his law clerks that membership of the KKK was only a little different from joining any other civic association. That is rubbish: during the 1920s the Alabama Klan was routinely organising whippings, murders, and lynchings – and even the odd tarring and feathering. Not really like Rotary. One apologist has made the suggestion that Black joined the Klan because he was drawn to its 'idealistic side', including the Klan's 'strict moral code' and its protection 'of the common labourer, too often victimised by manipulative corporate powers'. Yeah, sure. Another writer is closer to the mark: 'Black joined the Klan because it would get him into the Senate, because his views at the time were close enough to those of the Klan's membership that he was not deeply troubled by joining, and because he thought he could get away with it'. In early 1958 a daring young law clerk asked the question: 'Mr Justice, why did you join the Klan?' Apparently Black went silent, laughed – then offered 'Why son, if you wanted to be elected to the Senate in Alabama in the 1920s, you'd join the Klan too'.

All of this leaves two questions: the first – did Black's judicial work manifest prejudices consistent with those of the Klan? The answer must be no, it was almost exactly the opposite. Black ruled consistently in favour of minorities, and took an avidly pro-civil liberties stance. In fact the quite striking and political position adopted by Black might cynically be interpreted as an attempt to erase any question mark over his earlier Klan membership. Black continually went out of his way to establish his liberal credentials. Sometimes his actions in this respect were a little obvious: when the public furore over his Klan membership blew up, Black appointed a Jewish law clerk,

a Catholic secretary, and a Black Catholic messenger to his staff.

And that leads quickly to the second question: what sort of a judge was Black? This question is more difficult to answer. By the end of his term there is no doubt that Black was entitled to be described, in American terms, as liberal, progressive, activist and creative. Yet overall I would suggest that his legal work would be dismissed in Australia as politically-motivated and results driven. There was only a loose connection between precedent and his results; his judgments were short and his reasoning very thin. Viewed through the prism of strict legalism he was a failure. But the Americans do not view things that way, and there is no doubt that Black's career was, in American terms, highly successful: he regularly figures on the lists of the most influential of the Supreme Court justices. When he was joined later by Bill Douglas, Earl Warren and Bill Brennan, they formed the core of a judicially active Supreme Court which drove (rather than merely applied) the civil rights agenda in the 1950s and 1960s.

In his personal life Black was modest, unfailingly polite and oozed Southern charm. He was an adoring husband, but his first wife Josephine was very badly afflicted with depression and died in mysterious circumstances in 1951. Many thought it suicide, and Black could not forgive himself. He had three children and one of his sons, Hugo Jnr, became an eminent lawyer. He was religious, describing religion as 'a vital part of the warp and woof of our national existence'. He was energetic and skilful at tennis, competing right into his 80s. He was genuinely likeable. He was popular even amongst his ideological opponents in the Senate and on the court – he was especially close to that classical conservative John M Harlan.

Black remained on the US Supreme Court until his health began to fail. He then initiated what he called 'Operation Frustrate the Historians' by ordering the destruction of all of his personal papers. He resigned on 17 September 1971 and was dead within a week. In accordance with his will, he was buried in the cheapest available plain pine box, with a copy of the US Constitution in his pocket.

#### Further reading

Roger K Newman, *Hugo Black: A Biography*, 1994

James F Simon, *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America*, 1980

Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*, 2010