

*In The
Supreme Court of Virginia*

Record No. 200195

HISTORIC ALEXANDRIA FOUNDATION,

Appellant,

v.

CITY OF ALEXANDRIA and VOWELL, LLC,

Appellees.

**BRIEF AS *AMICUS CURIAE* OF
ROGER K. NEWMAN
IN SUPPORT OF APPELLANT**

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INTEREST OF THE *AMICUS CURIAE*

I write as biographer of Justice Hugo L. Black, who resided at 619 South Lee Street in Alexandria from 1939 to 1971 in an Eighteenth-Century house that he restored to its authentic glory. My book, *Hugo Black: A Biography* (1994, reissued with a new introduction in 1997), was the product of more than a dozen years work, interviews with well over one thousand persons, archival research in thirty-

three states, and exclusive access to family papers. It won the Scribes Book Award and was a finalist for the Pulitzer Prize.

I also started the efforts to have Congress recognize his centennial in 1986, which it did with a bill designating Hugo Black Day, and to have a stamp issued in his honor at that time, which it was with a formal ceremony at the Supreme Court of the United States. My friendship with the Black family started in 1970 when I spent a day with him at the house. It continued after his death in September 1971 when I spent many pleasurable hours there with his widow Elizabeth and his family until she moved in the summer of 1973, and it endures unabated to this day.

I am shocked that the City Council disregarded the heritage of this famous American and path-breaking judge, and that the Alexandria court did not take seriously its duty to examine the record. It is dismaying to find in that record an acknowledgment that “Staff did not perform extensive research on the life and work of Justice Black.” J.A. 41. It would be a tragic and irreparable loss to history if the house and garden that this great man acted to preserve for posterity were to be destroyed, in spite of clear city and state provisions enacted to protect them.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in appellant’s brief.

ASSIGNMENTS OF ERROR

Amicus adopts the assignments of error in appellant’s brief.

STANDARD OF REVIEW

Amicus adopts the standard of review in appellant's brief.

ARGUMENT

America is a story above all of ideals moving towards realization. Over a long generation Justice Black was central to that story. His identity was intertwined with 619 South Lee. Both the house and the garden were part of his DNA. Not preserving the faithfulness of their original architecture and design risks losing the identity of the whole property.

The importance of preserving undefiled the physical settings and dwellings of those handful of truly significant figures in the American story speaks for itself. The very essence of historic preservation is more than buildings and architecture. It is also about the people, in this case a preeminent person, who inhabit those structures. The places we choose to save *as they were* do more than tell our stories and act as a window onto our shared past: they reveal the foundation and framework of our national character, our resolve and resiliency—the chambers of our common beating heart.

Alexandria has had, of course, many notable residents over the centuries. George Washington, George Mason, who provided the basis for the Bill of Rights, and Gerald R. Ford are probably the most significant. It is only stating the obvious that Justice Black belongs in this grouping. He was by any standard

one of the handful of most influential Justices in American history. His opinions were much more than ordinary legal rulings. We live by them today. American law, especially the First Amendment but also the rest of the Bill of Rights, would look very different today were it not for Justice Black. That by itself is reason to preserve his home and property as he left it and as established by law. If 619 South Lee were not the Black House, it would simply be another distinguished-looking home in Old Town, worthy of preservation for many reasons to be sure, but nothing unusually noteworthy otherwise. But as the Black House, it should be preserved as fully as are the homes of the three noted above.

To anyone who knew the Judge (as he preferred to be called) on the Supreme Court, the house and the man were interrelated. Both were formally informal, with an innate dignity. Originally, until his wife put her foot down, he wanted to buy more adjoining plots so that he would own the entire southern part of the block. He spent at least a quarter of his life reading or writing at his desk in the second-floor study, which resembled an only slightly updated version of an Enlightenment drawing room. Most of his opinions were written there, and his law clerks often went over drafts with him word by word until midnight.

Another goodly slice of time Justice Black spent on the tennis court in his garden—which would be destroyed under the current proposal. That court often seemed as important as the other, palatial one on Capitol Hill on which for decades

he served. Bad days on the one behind the house were called “tennis the menace” days. He personally rolled its surface before he played, which was most days spring, summer and fall. And daily he watered the garden which he always felt was the centerpiece of the property. He was proud of its rhododendrons and scuppernong grapes (from his native Clay County, Alabama), several varieties of trees, and turnip greens, vegetables and berries which he also planted. Indeed, the garden, with its brick walks and circles with elaborate plantings timed to keep something in bloom most of the season (but would be obliterated under the proposal at issue), was featured on Alexandria garden tours for years.

He did everything possible to preserve the home and property, to keep them in their original condition, updated only if and when necessary, always making sure to keep their historical essence intact. This included granting a pioneering easement under Virginia’s Open-Space Land Act, Va. Code § 10.1-1700 *et seq.*, which guaranteed that it would not be “converted or diverted from open-space land use.” Va. Code § 10.1-1704.

The house was the focus of much history. In 1940, before introducing the Lend-Lease bill to aid the allies, Senator Claude Pepper went to the house to show the text to Black. They talked about it in the study, and Pepper incorporated some of Black’s suggestions.

In 1941 then-Senator Harry Truman came over to discuss with former Senator Black—a past master of chairing congressional investigations—how to organize the new Truman Committee, charged to find and correct waste and mismanagement in military spending.

In 1953 Black returned home from the Court in a windowless laundry van after the Rosenberg case was considered for the last time. He knew that the Rosenberg lawyers would try to approach him for a stay of the death sentence. Within an hour they knocked on the door while he was playing tennis with his daughter. She answered it and went back to the (tennis) court to tell him who it was. Before she could utter a word, he said, while crying and with racket in hand, “I can’t do it. Josephine, tell them I can’t do it.”

The next year, Chief Justice Earl Warren sent his law clerk to hand-deliver to the Justice a draft for the Court’s opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954), a decision in which Black played a key role. Black stopped playing tennis, went over to a chair, read it, and told the clerk that its result was fine but that “Note 11,” which listed social science literature, “will get you in trouble.” The clerk thanked Black and left. As it turned out, Warren nevertheless retained the note, and it indeed became the focus of segregationist criticism.

Presidents, Justices and other dignitaries came to the Lee Street house repeatedly.

—The Blacks entertained Lyndon Johnson as he filled successive offices, as senator, Vice President and President. On each visit Johnson would ask Elizabeth Black his stock question: “Did he beat you yesterday? . . . At tennis, I mean.”

—President Truman came over when the Justice, knowing Truman would be upset after the Court ruled against him in the *Steel Seizure* case in 1952, threw a stag dinner for him and the other Justices. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). “Hugo, your decisions stink but your bourbon is mighty good,” Truman said. Vice president Henry Wallace, carrying both his racket and V8 juice, frequently played tennis with Black throughout the 1940s. John Frank, one of the Judge’s early law clerks, wrote that “The Blacks live in one of the oldest and handsomest houses in Alexandria, where . . . he plays tennis with everyone he can find, from his messenger to a recent vice-president of the United States.” John P. Frank, *Mr. Justice Black: The Man and His Opinions* 133-34 (1949).

—All the Justices, ranging from Felix Frankfurter, William O. Douglas and William J. Brennan, Jr., to Chief Justices Earl Warren and Warren Burger, were at the house regularly. They discussed cases and more. Each summer, Black invited the whole Court over for a garden party. The Justices and their spouses sat outside and sang songs (off-key). Justice Brennan liked to say that the Court’s opinions were better than its singing. In 1951 Justice Black also had a stag dinner for the

Justices while daughter Josephine invited her classmates over to celebrate their high school graduation. After the meal, he called for her to bring them downstairs. “President Truman wants to play the piano for them.” “Call your numbers, anything at all,” the President said. He played a current tune. The Justices and the President grinned and joined in the singing. The girls were astonished.

619 South Lee Street, in short, with its unique garden, was a venue of history. Just as the house was an Eighteenth-century haven in the Twentieth-century world, its garden served, as few locations in the Washington, D.C. area could, as a refuge from the pressures of public life, a retreat from the daily grind of policy, politics and law. Guests left remembering “the feeling of the pleasantness of the company and the charm of the place,” as Jonathan Daniels, assistant to Franklin D. Roosevelt and press secretary to Harry S Truman, wrote—too discreet to mention the discussions begun or consummated there. Daniels, *White House Witness, 1942-1945* 28 (1945). It certainly served that purpose for Justice Black, giving him the peace of mind to craft opinions that more than those of anyone else in his time guided the (re)direction of American law toward a meaningful Bill of Rights and guarantees of due process and equal protection for all Americans. For its national audience, the *New York Times* in 1970 published a feature article titled

“Justice Black and the Venerable House That He Presides Over,” that included a walking tour by the Justice himself. N.Y. TIMES, Jan. 24, 1970.

The massive alterations being proposed in this case are far more than simply adding a microwave to the kitchen. The changes involved go to the heart of the property and, more importantly, how he lived there. Our heritage is more than the physical: it equally includes the setting and context. The irrevocable impact on history and future generations if those are lost, in this case by deliberate demolition and adding incongruous modern buildings, is incalculable. This case serves as a beacon to guide future preservation efforts. As a site where lasting history in every sense was made, the house and garden should be preserved in the manner Justice Black wished.

* * *

Justice Black and his indelible impact on the law have been written about extensively. Besides my book, there are, for only a few examples, the John Frank work previously cited, and Gerald T. Dunne, *Hugo Black and the Judicial Revolution* (1977). The Judge’s son Hugo Black, Jr., now deceased, wrote from a singular vantage in *My Father* (1975), as did niece Hazel Black Davis in *Uncle Hugo* (1965), which includes a chapter on the house. The unique study by former law clerk and University of Virginia law professor Daniel J. Meador, *Mr. Justice Black and His Books* (1974), devotes much attention to the house and garden. So

do the diary entries in *Mr. Justice and Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black* (1986).

A sampling of the vast collection of works on Black includes also Virginia Van der Veer Hamilton, ed., *Hugo Black and the Bill of Rights* (1978); Steve Suitts, *Hugo Black of Alabama* (2005); Stephen P. Strickland, ed., *Hugo Black and the Supreme Court* (1967); Tinsley E. Yarbrough, *Mr. Justice Black and His Critics* (1988); and Howard Ball, *The Vision and the Dream of Justice Hugo L. Black* (1975), and *Hugo Black: Cold Steel Warrior* (1995).

There also are several studies of how Justice Black interacted with his colleagues. For example, James F. Simon, *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America* (1989); Mark Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (1984); and Howard Ball and Philip J. Cooper, *Of Power and Right: Hugo Black, William O. Douglas, and America's Constitutional Revolution* (1992).

Edmond Cahn, *The Firstness of the First Amendment*, 65 YALE L.J. 464 (1956), best captures Black's intellectual essence. And some of his most famous opinions are collected and commented upon in Irving Dilliard, ed., *One Man's Stand for Freedom: Mr. Justice Black and the Bill of Rights* (1963). The dozens or hundreds of commentaries in law journals are far too numerous to list. A

symposium celebrating the centenary of his birth is at 36 ALA. L. REV. 789-926 (1985) and 38 ALA. L. REV. 214-499 (1987). A colorful account of one of his favorite cases, *Gideon v. Wainwright*, 372 U.S. 335 (1963)—that held that indigent criminal defendants must be provided counsel, turning into law an earlier Black dissent, *Betts v. Brady*, 316 U.S. 455, 474 (1942)—is Anthony Lewis’s best-seller *Gideon’s Trumpet* (1964). For appreciations in the Congress, see *Hugo Lafayette Black: Memorial Addresses and Tributes in the Congress of the United States*, H.R. Doc. No. 92-236, 92d Cong., 1st Sess. (1972). In the words of Chief Justice Earl Warren when Black died, “A Titan has passed.” *A Tribute to Hugo L. Black*, 85 HARV. L. REV. 1, 2 (1971). Warren’s successor, Warren E. Burger, agreed that Black’s career “will rank with those of the great justices.” *Justice Black’s Imprint*, WASHINGTON STAR, Sept. 19, 1971.

* * *

I am aware that the lawmakers of Virginia and of Alexandria have enacted substantial laws designed to guarantee preservation of rare historic sites like the Hugo L. Black house and garden. Justice Black welcomed and relied on them. These include:

—Virginia’s Constitution, art. 11, which makes inviolable “the policy of the Commonwealth to conserve . . . its historical sites and buildings.”

—Virginia Code § 10.1-2204, by which with certification approved by Virginia Governor Mills E. Godwin, Jr., the Black property was officially designated a Virginia Historic Landmark, finding that it embodied both “architectural distinction” and “ample historical quality.”

—Conclusively, Virginia Code § 10.1-1704, the Open-Space Land Act, which guarantees that the Lee Street garden, having been approved in 1969 as “open-space land,” will not be “converted or diverted from open-space land use.”

—Also, many provisions of the Alexandria Code that were adopted under the General Assembly’s grant in the City Charter “to promote . . . preservation and protection of historic places and any other buildings or structures within the city having an important historic, architectural or cultural interest . . .” Charter § 9.09(i). For example:

—In the Old and Historic District “to educate residents about the city’s cultural and historic heritage” and “to promote local historic preservation efforts” and “protection of historic resources” and to encourage the nomination of historic properties to . . . the Virginia Landmarks Register. Alexandria Code § 10-101.

—Specific standards that restrict permits for demolition and construction, including whether a proposal would “preserve or protect historic places and areas of historic interest” as well as “attracting historians . . . encouraging study and

interest in American history” and “educating citizens in American culture and heritage.” Alexandria Code § 10-105(g), (i), (j).

I am disappointed that the staff report which the City Council adopted in its ruling ignored all of this, and admitted: “Staff did not perform extensive research on the life and work of Justice Black because this already exists elsewhere and, as previously stated, nothing in the proposed application would preclude interpretation of the legal work of the Justice in the future.” It cited as its sole reference, Wikipedia. J.A. 41. The report also imagined that “all of the proposed work could . . . be reversed in the future” if some day someone decided to tear down the three huge additions, and to recreate, with ancient bricks and materials no longer available, the demolished wall. It suggested photographing everything before the wreckers and builders came, so as to “help future historians identify any remaining portions of the private garden created by the Blacks.” J.A. 38, 108. I cannot conceive that photographing before destruction is what the preservation law had in mind as “protecting the unique resource that is the historic district, including familiar landmarks and other treasured elements of the area” or “protection of historic resources throughout the city.” Alexandria Code § 10-101(A), (E). Certainly no capable historian would call that an adequate way to “preserve or protect historic places.” Alexandria Code § 10-105(g).

None of these legal requirements appears to have received serious attention from the City Council, and unfortunately no meaningful review was provided by the court below. I hope that this Court will at last require that they obey these statutory directions and enforce the law.

CONCLUSION

I urge this Court to honor the claims of history, as recognized and enacted in Virginia's laws, and reverse the judgment that would allow the irrevocable destruction of the historic Hugo L. Black house and garden.

Respectfully submitted,



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CERTIFICATE OF SERVICE AND COMPLIANCE

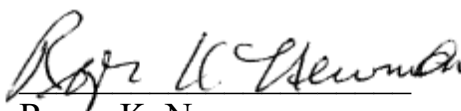
I certify that this 16th day of November 2020 I caused copies of the foregoing brief to be served electronically on each of the following:

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I further certify that I have caused an electronic copy of the foregoing brief to be filed with the Clerk of this Court via VACES. I also certify that the foregoing brief does not exceed fifty pages in length and that it complies with Rules 5:6, 5:26 and 5:30 of the Rules of this Court.


Roger K. Newman