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# Correspondence

Tinsley E. Yarbrough

James Magee

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## CORRESPONDENCE

*To the editor:*

A friend favored me with an offprint of Jim Magee's review of my *Mr. Justice Black and His Critics*, which appeared in the Winter, 1990, issue. Given Professor Magee's own work on the Justice, the review's tone was naturally not surprising. I was a bit disappointed to learn, however, that neither Magee nor the *Commentary* staff had seen fit to point out to readers that he was the Black critic who received most of my book's attention and thus was hardly a disinterested reviewer. The wisdom of having one of a book's subjects review it is debatable at best. But at the very least your readers should be apprised of such a decision.

Sincerely,

Tinsley E. Yarbrough  
Professor of Political Science  
East Carolina University

*James Magee replies:*

I write to address Professor Yarbrough's central concern, which deserves a more elaborate reply than limited space here permits.

In the first paragraph of part III of the unedited version of my review, I had written this:

The most prominent single section of Yarbrough's book concentrates on Black's first amendment views, particularly his absolutist interpretation of that amendment where criticism has perhaps been the most voluminous. Yarbrough's response is equally comprehensive, directed primarily, though not exclusively at arguments that I made on Black's first amendment jurisprudence. . . . [Footnote to my book]

Black's allegiance to the "No . . . Law" prohibition [of the first amendment] . . . came late in his career on the Court, and I argued in my book on Black that a commitment to an absolutist construction of the first amendment did not emerge in his jurisprudence until 1951 or 1952. Yarbrough rejects this, arguing that Black was always an absolutist, from the beginning of his tenure on the Court.

These passages were editorially pared down and published as this:

Yarbrough naturally devotes considerable attention to Black's first amendment views, particularly his absolutist interpretation. I argued in my book on Black that

a commitment to an absolutist construction of the first amendment did not emerge in his jurisprudence until 1951 or 1952. Yarbrough rejects this, claiming that Black was an absolutist throughout his tenure on the Court.

Stated either way, it is clear to the reader that Yarbrough and I disagree regarding Black's rendition of the first amendment. Any attentive reader would undoubtedly recognize that part of Yarbrough's book is a rejection of my understanding of Black's first amendment posture.

Professor Yarbrough finds "at best debatable" the wisdom of my writing any review of his book, as he says that my book on Black received most of his book's attention. Though I am the principal target of his lengthy chapter on the first amendment, Yarbrough also addresses other critics and other parts of Black's constitutional jurisprudence.

A devotee of the absolutist Hugo Black, Professor Yarbrough surely must welcome a robust and uninhibited exchange of ideas. I confess that I am, indeed, an "interested" reviewer of his provocative book. I cannot readily discern, however, what is unwise in publishing review essays written by interested reviewers. A more detached—uninterested—reviewer may be unfamiliar with the subject and can often unintentionally overlook important nuances or subtleties common in academic exchange. I agree with Professor Yarbrough, of course, that a reviewer ought not to pretend disinterest and thus mislead the reader. That was clearly not done by either me or the editor of this journal.

Tinsley Yarbrough's book and my review highlight the discord seen in two appraisals of the contributions of a major 20th century jurist; unfortunately, the spacious ground we share tends to be obscured. Yarbrough frankly dismisses most critics of Black as political opponents of the results Black reached in deciding cases. This generalization is both incorrect and unfortunate. One can suppose under the same tenuous surmise that Yarbrough himself politically endorses all Black's conclusions, for he finds little to criticize in Black's 34 years on the Court. I agree with most of the results that Black reached, though I am not persuaded, as apparently Yarbrough is convinced, that Justice Black came to his conclusions primarily through careful analysis of the Constitution's text.