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A Klansman Joins the Court:
The Appointment of Hugo L. Black

William E. Leuchtenburg[†]

I. THE NOMINATION

On August 12, 1937, Franklin Delano Roosevelt, rebounding from the worst setback of his long Presidency, took the first of a series of steps toward creating what historians would one day call "the Roosevelt Court." Gallingly defeat had come less than a month before when the Senate had killed his scheme to add a Justice to the Supreme Court for every member aged seventy or over who did not resign or retire. The original plan would have allowed the President to name as many as six new Justices, but after a bitter 168-day fight, the measure was buried, amid loud rejoicing from FDR's opponents. Roosevelt was not finished yet, however, for one legacy of the protracted struggle was the creation of a vacancy on the Supreme Court, and it was the President's prerogative to nominate a successor. The choice he finally made would trigger an acrimonious controversy and would have a momentous impact on the disposition of the Court.

The vacancy resulted, at least indirectly, from Roosevelt's "Court-packing" plan. The President had advanced his bold proposal in February because he was frustrated by the performance of the Supreme Court, particularly the conservative "Four Horsemen"—Willis Van

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Devanter, Pierce Butler, James McReynolds, and George Sutherland.¹ In May, during the congressional battle, Van Devanter announced his retirement in what some thought was a well-timed move to dispose of the plan.² Roosevelt was urged to drop the Court bill, since replacing Van Devanter with a liberal would give the Administration a decisive margin in most cases. As soon as Van Devanter's communication was made known on the Senate floor, however, the senators crowded around their colleague, Joseph T. Robinson, to congratulate him on his impending nomination for Van Devanter's seat. They all but usurped the power of appointment from Roosevelt, who knew that he could not avoid honoring the Majority Leader without inciting an uprising. Unfortunately for the New Dealers, Robinson was a 65-year-old conservative who had close connections to private utility interests. So the fight went on into June and July with tempers growing short in the brutal Washington heat. In July, at a critical point in the Great Debate, Robinson died. His death doomed the President's Court-packing scheme, but it left Roosevelt with an opportunity that his opponents had hoped to deny him—naming the first Justice of his own choosing to the Supreme Court.³

The battle over the Court plan, Joseph Alsop and Turner Catledge have written, "conferred a strange, almost a lurid importance on the President's choice for the Supreme Court vacancy."⁴ As he had done in February while preparing his Court-packing message, Roosevelt moved in a covert manner that put Washington on edge. Each day it was expected that he would send a name to the Senate, but July ran its course without a decision and Congress, which had hoped to go home in June, found itself in the sultry capital in August with adjournment near and still no word from the White House.

In early August, a *New York Times* correspondent noted that "an unusually fierce attack of nervous irritability has seized the 529 legislators." "You have to see the shaking hands and the quivering facial muscles, hear the rage-quavers of the voices" of Congressmen as they spoke to appreciate "the violence of the nerve tension." They "snap at each other over trifles in floor debates" and were biting the heads off secretaries, prompting the correspondent to report "a new high in

1 Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

2 Letter from Willis Van Devanter to Franklin D. Roosevelt, May 18, 1937, on file in the Van Devanter MSS, Vol. 54, Library of Congress.

3 L. BAKER, BACK TO BACK (1967); Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, in ESSAYS ON THE NEW DEAL (H. Hollingsworth & W. Holmes eds. 1969).

4 J. ALSOP & T. CATLEDGE, THE 168 DAYS, at 295 (1938).

headless . . . secretaries." One secretary remarked, "Yesterday morning I had to phone six Senators, all of them my friends, and remind them of a subcommittee meeting. Five of them bawled me out for it, and the sixth hung up on me." Another secretary said: "The boss came back from a subcommittee row over a technicality the other day so ill that I had to nurse him and dose him for an hour and then call a doctor. It's the first time I've ever known him to be sick without a hang-over for eleven years."⁵

Roosevelt had added to this anxiety when, at a press conference on July 27, he said that he was exploring the possibility of making the appointment after the Senate had adjourned.⁶ Mutinous legislators were incensed at the prospect of not having a chance to act on Roosevelt's selection until after the nominee had donned the black robes of a Justice and taken part in the Court's decisions. The President's declaration also indicated that he might be contemplating a particularly offensive nomination, making it desirable for him to bypass the Senate. Attorney General Homer Cummings assured Roosevelt that he could fill a vacancy at any time, even when the Senate was not in session, although, of course, any designee would ultimately have to be confirmed. The historical record on this point, however, did not give the President as much comfort as he wanted, and the Senate was kicking up a storm. By early August he had resolved to settle on a nominee before the Senate adjourned.⁷

Although Roosevelt may have been needling the senators with his talk of a recess appointment, he did have a valid reason for his inquiry. On August 4 Stephen Early, the White House press secretary, reviewed the situation for a Scripps-Howard columnist, Raymond Clapper. Early explained that the President did not know how long Congress would remain in session, and he needed two to four more weeks to make up his mind. It had not been clear until the Senate killed the Court bill in late July that he would have only one seat to fill. It might be supposed, Early said, that Roosevelt could easily come up with one name since he had originally sought to choose six, but in fact it was harder to pick one, because he could not submit a balanced group and had to "make it a bull's eye." Clapper summarized the President's position in his diary: "been sixty to 75 names recommended since Robinson died. All have to be carefully investigated. Is serious matter and Rvt

⁵ N.Y. Times, Aug. 8, 1937, § 4, at 7, col. 1.

⁶ 10 COMPLETE PRESIDENTIAL PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT 70-72 (1972).

⁷ Letters from Homer Cummings to Franklin D. Roosevelt, July 29, 1937, Aug. 4, 1937, on file in the President's Secretary's File: Supreme Court, Franklin D. Roosevelt Library, Hyde Park, N.Y.; Washington Post, Aug. 4, 1937, at 1, col. 4

would be in bad spot if he sent up a name and then the opposition dug out some dumb chapter in his record. . . . Opposition which has been complaining that Rvt is slapdash would leap on him and say this is the kind of dumb[b]ell or bad actor he would have given us six of."⁸

As the tension mounted, congressmen and reporters made book on whom the President would pick, but they had little to go on. Although it was expected that Roosevelt would try to heal the breaches within his party and the Senate by making an especially judicious choice, he gave no sign of where his favor might light. Even veteran Administration senators like James F. Byrnes remained in the dark. "I haven't the slightest idea who will be appointed to the Supreme Court, nor has anybody in Washington other than the President," Byrnes wrote a South Carolina friend on August 10. "The President certainly has not consulted anybody in the Senate about it. The only information we have is that contained in the Press; namely, that Sam Bratton of New Mexico, now a Judge of the Circuit Court of Appeals and formerly a member of the Senate, is receiving serious consideration. It may be that it is because the Senators have such a high opinion of Bratton that they think he has a good chance."⁹

When Roosevelt finally made his decision, he moved in the same furtive manner he had used in preparing the Court plan. On the night of August 11 the President startled the man he had finally chosen by summoning him to the White House after dinner and, upon informing him of the honor in store for him, pledged him to silence. Not even the White House staff knew what had transpired. The next morning Stephen Early indicated that Roosevelt was still considering a list of sixty or seventy names and that a selection might not be made during the current congressional session. Two hours later the President sent a courier to Capitol Hill with a notice of appointment that Roosevelt had written in his own hand. The President kept the secret almost to the very end, but it had become too much for him. Like "a small boy waiting for his surprise to be revealed," as Virginia Hamilton has written, he had to blurt out the news to someone. Before the messenger reached the door of the Senate chamber, Roosevelt told Early the name of the nominee. "Jesus Christ!" Early exploded. FDR grinned.¹⁰

⁸ Raymond Clapper MS Diary, Aug. 4, 1937, Clapper MSS, Library of Congress. *See also* 2 H. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES* 183 (1954).

⁹ Letter from James F. Byrnes to C.C. Wyche, Aug. 10, 1937, on file in the Byrnes MSS, Clemson College, Clemson, S.C. Byrnes added that the others being discussed were Stanley F. Reed and Donald Richberg.

¹⁰ V. HAMILTON, *HUGO BLACK: THE ALABAMA YEARS* 275 (1972); N.Y. Times, Aug. 13, 1937, at 1, col. 8.

II. THE SENATE CONSENTS

The words "I nominate Hugo L. Black . . ." sent the Senate into a state of shock. Senator Black, who had not let on at any point that he knew what the message contained, now slumped in his seat, white-faced and wordless, and nervously shredded a sheaf of papers. A few liberal colleagues came over to congratulate the Alabama senator, but other legislators did not try to hide their unhappiness.¹¹ The House of Representatives responded more volubly. One reporter noted, "From the House press gallery it was quite a show to watch the reactions of the Congressmen as the news swept across the floor. A great buzzing as the name of Black was passed from lip to lip."¹²

If Roosevelt anticipated immediate acquiescence from the Senate, he was reckoning without the diehards. Henry Fountain Ashurst, the eloquent chairman of the Judiciary Committee, rose on behalf of the administration and asked the senators to confirm instantly the appointment of this "lawyer of transcendent ability, great, industrious and courteous in debate, young, vigorous, of splendid character and attainments." Ashurst contended that there was "an immemorial rule of the Senate that whenever the Executive honors this body by nominating a member thereof, that nomination by immemorial usage is confirmed without reference to a committee for the obvious reason that no amount of investigation or consideration by a committee could disclose any new light on the character or attainments and ability of the nominee, because if we do not know him after long service with the nominee no one will ever know him."¹³ When Hiram Johnson of California and Edward Burke of Nebraska objected, however, Ashurst was compelled to name a subcommittee to consider the nomination. Not since 1888, when President Grover Cleveland nominated Lucius Quintus Cincinnatus Lamar to the Supreme Court, had a proposed appointment of a senator or former senator been sent to committee.¹⁴

Roosevelt could hardly have made a choice that would have discomfited his opponents more. Black was an ardent New Dealer and had been a strong supporter of Court-packing; indeed, it was said that he

¹¹ N.Y. Times, Aug. 13, 1937, at 1, col. 6.

¹² Tufty, *Michigan in Washington*, Pontiac News, Aug. 17, 1937, clipping on file in the Prentiss Brown Scrapbooks. Senator Brown kindly made these materials available to me at his home in St. Ignace, Michigan. They have subsequently been deposited with the Michigan Historical Collections, The University of Michigan.

¹³ THE DIGEST, Aug. 28, 1937, at 6. Doubts were raised about Ashurst's argument in Cole, *Mr. Justice Black and "Senatorial Courtesy,"* 31 AM. POL. SCI. REV. 1113-15 (1937).

¹⁴ N.Y. Times, Aug. 13, 1937, at 1, col. 8.

was one of the few senators who actually believed in the plan.¹⁵ Most people had expected that Roosevelt would take pains to name someone like a federal judge, but Black's only judicial experience consisted of eighteen months as a police court judge in Birmingham.¹⁶ Little about him suggested the judicial temperament, and he had especially incensed conservatives by his performance as an exceptionally vigorous prosecutor on Senate committees. As one biographer described it, "The paths of his investigations had been lurid with charges and countercharges, *subpoenas duces tecum*, searches and seizures, and contempt proceedings,"¹⁷ and the political scientist Earl Latham has noted that "Senator Black in 1936 was the kind of legislator Justice Black had no use for twenty years later."¹⁸

A year before the nomination Newton D. Baker, a onetime progressive leader who had become a prominent corporation attorney, had written a friend: "I heard last week that the incredible Senator Black with his eavesdropping, peeping-Tom committee had secured from the Western Union Telegraph Company all the telegrams sent out of my office in a year. As I run a law office and not a criminal conspiracy, I am entirely indifferent as to what he discovered from the telegrams, but the oftener I permit myself to reflect on this outrage, the more violent I become. Man of peace as I am, I am quite sure I could not

¹⁵ In April a former Republican senator, renowned as the man who had called Western progressives "Sons of the Wild Jackass," wrote, "Senator Walsh of Massachusetts told me at a luncheon party the other day, that there are only three members of the Senate who are really in favor of the President's plan—they being La Follette of Wisconsin, Black of Alabama, and Minton of Indiana. The first two of these are extreme radicals, and the third is very much of a nitwit." Letter from George H. Moses to Edward Tuck, Apr. 15, 1937, on file in the Moses MSS, Box 4, Concord Historical Society, Concord, N.H.

¹⁶ In June, Justice Stone had written Felix Frankfurter sardonically, "I shall not be getting much news after I leave here and if anything new or exciting occurs, like the appointment to the Supreme Court of a man who has legal background and knowledge, do let me know about it." Letter from Harlan F. Stone to Frankfurter, June 5, 1937, on file in the Frankfurter MSS, Box 105, Library of Congress.

¹⁷ C. WILLIAMS, HUGO L. BLACK 15 (1950).

¹⁸ E. LATHAM, THE COMMUNIST CONTROVERSY IN WASHINGTON 386 (1966). See also James Williams, Columbia Oral History Collection, Columbia University, at 770-72; Eugene Wilson, Columbia Oral History Collection, Columbia University, at 557-58; Washington Star, Aug. 18, 1937, clipping on file in the H. Styles Bridges MSS, Scrapbook 58, New England College, Henniker, N.H. For a defense of Black, see the letter from Felix Frankfurter to Grenville Clark, Dec. 16, 1937, on file in the Clark MSS, Series XXV, Box 1, Dartmouth College. John G. Clifford was particularly helpful in facilitating access to the Clark papers. I am also grateful to Elizabeth Mason for arranging for the photocopying of the materials in the Columbia Oral History Collection and to Esta Sobery for assistance with regard to these and other sources in the Columbia libraries.

keep my hand off the rope if I accidentally happened to stumble upon a party bent on hanging him."¹⁹

Conservatives outdid themselves in expressions of indignation. "If the President had searched the country for the worst man to appoint, he couldn't possibly have found anyone to fill the bill so well," grumbled one senator.²⁰ "Mr. Roosevelt could not have made a worse appointment if he had named John L. Lewis,"²¹ wrote the columnist David Lawrence, and Herbert Hoover protested that the court was now "one-ninth packed."²² The most devastating critique appeared on the editorial page of the *Washington Post*:

Men deficient in the necessary professional qualifications have occasionally been named for the Supreme Court. And qualified men have sometimes been put forward primarily because they were also politically agreeable to a President. But until yesterday students of American history would have found it difficult to refer to any Supreme Court nomination which combined lack of training on the one hand and extreme partisanship. In this one respect the choice of Senator Black must be called outstanding.

. . . .

If Senator Black has given any study or thought to any aspect of constitutional law in a way which would entitle him to this preferment, his labors in that direction have been skillfully concealed. If he has ever shown himself exceptionally qualified in either the knowledge or the temperament essential for exercise of the highest judicial function, the occasion escapes recollection.²³

Although Black came from Alabama, no group was unhappier about his nomination than the Southern congressmen. A sharp-tongued, unrelenting partisan who kept too much to himself, Black had never been a member of "the club."²⁴ More important, he was a Southern liberal, and his selection signaled Roosevelt's determination to back those who were attempting to transform the conservative structure of Southern politics, an inclination that was later manifested in the 1938 purge. A Georgia congressman called the nomination of Black "the worst insult that has yet been given to the nation;" a Texas congress-

¹⁹ Letter from Newton D. Baker to Ralph Hayes, June 10, 1936, Baker MSS, Box 117, Library of Congress.

²⁰ Detroit News, Aug. 13, 1937, clipping on file in the Blair Moody Scrapbooks, Michigan Historical Collections, The University of Michigan.

²¹ THE DIGEST, Aug. 28, 1937, at 6.

²² N.Y. Times, Aug. 18, 1937, at 6, col. 5.

²³ Washington Post, Aug. 13, 1937, at 8, col. 2.

²⁴ J. ALSOP & T. CATLEDGE, *supra* note 4, at 301.

man said, "I wouldn't appeal a case with him there."²⁵ Black had particularly antagonized Southern conservatives by sponsoring the wages and hours bill, which they claimed was denying their constituencies a competitive advantage granted by God. When reporters asked the veteran Virginia Senator Carter Glass for a comment on Black, he replied, "Don't start me off again."²⁶

Yet Roosevelt knew very well that there was not a thing they could, or would, do about it. Black was a senator, and the sense of collegiality was so strong that it was inconceivable that the Senate would fail to confirm one of its members. As the President told Democratic Chairman James A. Farley, "They'll have to take him."²⁷

The Senate proved unwilling to entertain the real objections many felt to Black's nomination. It would not consider the assertion that Black was too liberal, because ideological differences were not regarded as proper grounds for refusing to confirm a fellow senator; nor was Black's lack of judicial background explored, since it could not be conceded that any member of the Senate might be unqualified to sit on the Supreme Court. The little consideration given the appointment therefore focused on technical matters. Senator William E. Borah of Idaho claimed that since Van Devanter had taken advantage of legislation passed earlier in the session allowing retirement rather than resignation, he was still a member of the Court, and there was no vacancy for Black to fill.²⁸ Ashurst retorted that if all nine Justices retired or went mad, according to Borah's reasoning, there would be no Court; even Van Devanter thought the argument was nonsense, since he had no intention of ever returning to the bench.²⁹ Others speculated that Black was ineligible for another reason: since the retirement legislation also guaranteed the pensions of retiring Justices, Congress had increased their emoluments, and the Constitution forbade any member of Congress to accept a post under such circumstances. Few people thought much of that argument either.³⁰

²⁵ N.Y. Times, Aug. 13, 1937, at 1, col. 6.

²⁶ THE DIGEST, Aug. 28, 1937, at 6.

²⁷ J. FARLEY, JIM FARLEY'S STORY 98 (1948).

²⁸ Washington Post, Aug. 4, 1937, at 1, col. 4. See also N.Y. Times, Aug. 4, 1937, at 1, col. 1; *id.*, Sept. 18, 1937, at 17, col. 4; letter from John Spargo to the editor, Boston Herald, Aug. 7, 1937, clipping on file in the Spargo MSS, University of Vermont.

²⁹ Raymond Clapper MS Diary, Clapper MSS, *supra* note 8, Aug. 3, 1937.

³⁰ It had, however, been troubling the administration for several months. Letters from Edward S. Corwin to Homer Cummings, Mar. 2, 1937, and Cummings to Corwin, Mar. 3, 1937, on file in the Corwin MSS, Princeton University. Some people contended alternatively that Black had been a member of a Congress that had unwittingly created a new office, from which the Constitution barred him. These issues are carefully dissected in McGovney, *Is Hugo L. Black a Supreme Court Justice De Jure?*, 26 CALIF. L. REV. 1 (1937).

Two days after the nomination, a more explosive consideration arose—it was said that Black, at the outset of his career, had been associated with the Ku Klux Klan. The National Association for the Advancement of Colored People and the Socialist Party each urged the Senate to explore Black's racial attitudes.³¹ The Socialist leader Norman Thomas also asked the Judiciary Committee to investigate Black's opposition during the Hoover administration to proposals to equalize relief between Whites and Negroes, his hostility to antilynching legislation, and his silence about the "Scottsboro boys," a group of Negroes convicted in Alabama in what appeared to be an outrageous miscarriage of justice. "We fully appreciate Senator Black's championship of labor legislation," Thomas said, but "no other excellence can fit a man for the Supreme Court whose record is marred by race prejudice."³²

Despite these reservations the nomination moved quickly through committee, but not without occasioning some animosity. Matthew Neely of West Virginia, an Administration stalwart, allotted the matter only two hours in a meeting of his subcommittee on Friday, August 13, the day after the nomination; the subcommittee then reported the recommendation by a vote of 5-1, with only Warren Austin of Vermont dissenting on constitutional grounds. On the following Monday, as the Judiciary Committee convened behind closed doors, William Dieterich of Illinois accused certain committee members of trying to "besmirch" their colleague by linking him to the Ku Klux Klan. Dieterich's tirade nearly resulted in a fist fight with a fellow Democrat when Senator Burke charged at him. Although "tempers flared to white heat," the committee approved the nomination 13-4.³³

When the full Senate took up the Black appointment on August 17, Senator Royal S. Copeland of New York opened the debate by asserting that his Alabama colleague's first election to the Senate in 1926 had been supported by the Klan. Before crowded public galleries, Copeland read a *New York Times* report on Black's exploitation of anti-Catholic sentiment in attacking the Presidential ambitions of Alfred E. Smith.³⁴ Copeland asserted, "We are free because we are

³¹ N.Y. Times, Aug. 17, 1937, at 9, col. 6.

³² Letter from Norman Thomas to the Committee on the Judiciary, Aug. 16, 1937, in the National Office files, Socialist Party MSS, Duke University. See also D. CARTER, SCOTTSBORO (1969).

³³ Manchester Union, Aug. 17, 1937, clipping on file in the H. Styles Bridges MSS, *supra* note 18, Scrapbook 58. See also V. HAMILTON, *supra* note 10, at 277-78.

³⁴ N.Y. Times, Aug. 13, 1937, at 4, col. 1; *id.*, Aug. 14, 1937, at 1, col. 3; *id.*, Aug. 15, 1937, § 1, at 2, col. 1; *id.*, Aug. 16, 1937, at 2, col. 2; *id.*, Aug. 17, 1937, at 1, col. 4; *id.*, Aug. 18, 1937, at 1, col. 1. For the claim that the *Baltimore Catholic Review* supplied

guarded by the Supreme Court. Catholics, Protestants, Negroes, Jews, Gentiles, all of us, are guarded by the Supreme Court. But what will happen if a half dozen men of the mental bias of the nominee should be seated on the bench? . . . Does the leopard change his spots? Will Mr. Justice Black be any different from Candidate Black? . . . Naturally we wonder what Mr. Justice Black would do were another Scottsboro case appealed to the Supreme Court."³⁵

Copeland made no headway with his charges, because they were regarded as blatantly political and because the Senate received reassurances. Many believed that Copeland, an anti-New Deal Democrat who was running for Mayor of New York City, was exploiting the Klan issue to curry ethnic voters. Although Black left the question unresolved when cornered by some of his supporters during the debate, the unpredictable Borah came to his aid. The Idaho maverick, who eventually voted against confirmation on the technical ground of ineligibility, conceded that senators had received thousands of telegrams about Black and the Klan, but insisted, "There has never been at any time one iota of evidence that Senator Black was a member of the Klan We know that Senator Black has said in private conversation, not since this matter came up but at other times, that he was not a member of the Klan." When Copeland asked Borah how he would vote if he knew that Black was or had been a Klansman, the Idaho senator replied, "If I knew that a man was a member of a secret association organized to spread racial antipathies and religious intolerance through the country, I should certainly vote against him for any position."³⁶

Late in the afternoon of August 17, just five days after the Black nomination was made and after only six hours of debate, the Senate confirmed the appointment by the lopsided margin of sixty-three to sixteen.³⁷ Of the Republicans present all but three voted "nay," as did six Democrats, including Burke and Copeland. However, some of the most reactionary Southern Democrats, who had bitterly fought the Court plan, ended up supporting the administration. Ickes recorded,

opposition senators with evidence against Black, see *THE TABLET*, Sept. 18, 1937, clipping on file in the Prentiss Brown Scrapbooks, *supra* note 12. On Black's role in the 1928 campaign, see letters from Alfred E. Smith to Jouett Shouse, Oct. 2, 1937, and Shouse to Smith, Oct. 4, 1937, on file in the Shouse MSS, University of Kentucky.

³⁵ *N.Y. Times*, Aug. 18, 1937, at 1, col. 1.

³⁶ *Id.*, Sept. 13, 1937, at 3, col. 5. Borah wrote a constituent, "Hawley, I do not know of a single iota of evidence to the effect that Black was a Ku Kluxer. He has denied positively that he was and denied it long before this appointment came up." Letter from William E. Borah to Jess Hawley, Aug. 16, 1937, on file in the Borah MSS, Box 412, Library of Congress.

³⁷ 81 CONG. REC. 9102-03 (1937).

"Even 'Cotton Ed' Smith, of South Carolina, who 'God-damned' the nomination all over the place when it was first announced, didn't have the courage to stand up and vote against a fellow Senator from the Deep South."³⁸ The Klan issue had fizzled, but it left some uneasiness. In Washington, a one-liner went from mouth to mouth: "Hugo won't have to buy a robe; he can dye his white one black."³⁹ Despite the rumbling about the KKK, Roosevelt and the New Dealers had apparently won a stunning victory, less than a month after the opposition thought FDR was on the ropes. Ickes concluded: "So Hugo Black becomes a member of the Supreme Court of the United States, while the economic royalists fume and squirm, and the President rolls his tongue around in his cheek."⁴⁰

The outcome left conservatives disconsolate. When Carter Glass heard the nomination called a triumph for the common man, he snapped, "They must be Goddam common!"⁴¹ Senator Peter Gerry of Rhode Island explained to Canada's prime minister, "His legal experience was not considered sufficient and he hasn't a judicial attitude of mind. He is a prosecutor and not a judge."⁴² An Oregon editor went even further: "His appointment of Black was the grossest insult to the Supreme Court and the American people that we have ever been called upon to accept."⁴³ Roosevelt's former adviser Raymond Moley commented, "There have been worse appointments to high judicial offices; but . . . I can't remember where or when."⁴⁴

After Congress adjourned, Hiram Johnson wrote a confidant in California: "This was a most unsatisfactory session. We wound up by confirming Black, who is unfit to be a Supreme Court Justice. . . . Had it not been for me, Black's nomination would have gone through with a 'Hurrah!' . . . Borah and other distinguished patriots wished it so, but I had 'guts' enough to stop it. I accomplished nothing—save that sixteen men in the Senate showed their feeling of his unfitness. I understand he was a member of the Ku Klux Klan when first elected to the Senate. He never dared say anything about it subsequently, and

³⁸ 2 H. ICKES, *supra* note 8, at 196.

³⁹ TIME, Aug. 23, 1937, at 13.

⁴⁰ 2 H. ICKES, *supra* note 8, at 196.

⁴¹ NEWSWEEK, Aug. 21, 1937, at 7.

⁴² Letter from Peter Gerry to W.L. Mackenzie King, Aug. 24, 1937. I am indebted to Erik Olssen of Otago College, Dunedin, New Zealand, for this letter from the King papers in Canada.

⁴³ Letter from C.E. Ingalls to William Allen White, Aug. 19, 1937, on file in the White MSS, Box 191, Library of Congress. See also letter from Edward Burke to James Truslow Adams, Aug. 19, 1937, on file in the Adams MSS, Columbia University.

⁴⁴ Moley, *An Inquisitor Comes to Glory*, NEWSWEEK, Aug. 21, 1937, at 40.

Borah and his other friends, saw to it that he was not called as a witness."⁴⁵

Once Black was confirmed, the hubbub died down. Congressmen left the capital, and Black sailed with his wife to Europe for a vacation. His name soon disappeared from the newspapers, and the controversy appeared to be at an end.

III. THE REVELATION

On September 13 the Pittsburgh *Post-Gazette* detonated a bomb-shell. It published the first of six articles by Ray Sprigle, an enterprising reporter who had dug up original materials, including the transcript of a Klan meeting, conclusively connecting Hugo Black to the Ku Klux Klan.⁴⁶ The series grabbed front page headlines in newspapers throughout the country.

Sprigle began, "Hugo Lafayette Black, Associate Justice of the United States Supreme Court, is a member of the hooded brotherhood that for ten long blood-drenched years ruled the Southland with lash and noose and torch, the Invisible Empire, Knights of the Ku Klux Klan."⁴⁷ Since it was generally suspected that Black had once had a KKK relationship, that allegation hardly constituted news. Sprigle developed three points in his series, however, that were very damaging. First, he demonstrated that Black had not merely run with Klan backing, but had actually been a member of the organization. He gave an account of the night of September 11, 1923, when Black pledged that he would never divulge, even under threat of death, the secrets of the Klan; surrounded by white-robed members of the Robert E. Lee Klan No. 1 in Birmingham, Black had vowed, "I swear that I will most zealously and valiantly shield and preserve by any and all justifiable means and methods . . . white supremacy."⁴⁸

Second, Sprigle recounted vivid examples of the views held by the Klansmen with whom Black had associated. In a meeting on September 2, 1926, the Imperial Wizard Hiram Wesley Evans said, "We find that America up to now has done all that has been worth while under the leadership of native-born, white, gentile, Protestant men. . . . There isn't a Negro in Alabama that dares open his mouth and says he believes in social equality of the black man. . . . I mean to tell you any

⁴⁵ Letter from Hiram Johnson to Frank P. Doherty, Aug. 23, 1937, on file in the Johnson MSS, Bancroft Library, University of California, Berkeley, California.

⁴⁶ Sprigle was later awarded the Pulitzer Prize for his work.

⁴⁷ Pittsburgh *Post-Gazette*, Sept. 13, 1937. Phyllis Wallach kindly photocopied this series of articles for me at the Carnegie Library, Pittsburgh, Pennsylvania.

⁴⁸ *Id.*

time they propose to produce equality between me and a certain said Negro they are simply going to have to hold a funeral for the Negro." The Imperial Wizard added that Northern Negroes "will be murdered by the Yankees that have gotten all the sass from the Negroes that they want."⁴⁹ On that same occasion the KKK's Imperial Legal Adviser in Washington observed, "To come down here now and find that you have given us a man named Black who wears 'white'—do you get that boys—to occupy a seat in the Senate of the United States is like getting an inspiration before baptism." Turning to Bibb Graves, who had just won the Democratic nomination for Governor, tantamount to election, he added, "I am so glad that you have a man all but elected Governor who comes from a town that, prior to his advent as Exalted Cyclops of the local Klan, I am told was owned by the Jews, controlled by the Catholics and loved by Negroes. [Laughter and applause]. Now he tells me that the Jews have a foreclosure sale at bankruptcy, selling out, the Catholics are on the run, and the Negroes are in hiding [Applause]."⁵⁰

Most of Black's own remarks that afternoon were unexceptionable. In fact he spoke of the "principles of liberty which were written in the Constitution of this country" and the ideal of loving one's enemies. But he also assured the assembled Klansmen, "I realize that I was elected by men who believe in the principles that I have sought to advocate and which are the principles of this organization," and said to them and to the Grand Dragon, "I thank you from the bottom of a heart that is yours."⁵¹

Finally, Sprigle made a third and critical contribution—he established that, on the same afternoon in 1926, Black, who had resigned from the Klan in the summer of 1925 for reasons of political expediency, had been awarded a special life membership, a gold "grand passport." Black had thanked the Klan for this honor, which only a half dozen men in the United States had received. Most important, the card was presumably still valid because there was no evidence in the Klan archives that it had been returned. In short, Sprigle was saying not merely that Black had been elected with Klan backing, not merely that Black had once been a bona fide member of the Klan, not merely that Black had thanked the Klan leaders for their aid, but that Black was *still* a member of the Ku Klux Klan.

— Sprigle's articles prompted denunciations of Black and Roosevelt

⁴⁹ *Id.*, Sept. 16, 1937.

⁵⁰ *Id.*, Sept. 18, 1937.

⁵¹ *Id.*, Sept. 15, 1937.

that far exceeded, in both volume and vehemence, the protests that had greeted the nomination. Cartoonists had a field day depicting the members of the Supreme Court assembled in their silk, eight in black and the ninth in the white robe and hood of the KKK. In the pages of the *American Mercury* the mordant critic Albert Jay Nock called Black "a vulgar dog" and wrote that Roosevelt's appointment "was the act of a man who conceives himself challenged to do his very filthiest."⁵²

Several senators who had voted to confirm Black hastened to declare that if they had known of his Klan connection they would have opposed his elevation to the Court. Some thought they had been duped, since Black had temporized when the KKK rumors surfaced in August, and others had given assurances that there was no foundation to the allegations. Democratic senators from New Jersey and South Dakota charged that John Bankhead of Alabama had deliberately misled them by stating that Black had not been a member of the Klan.⁵³ "I feel that not only I but the rest of the Senators were deceived and imposed upon," complained Clyde Herring, and his Iowa colleague, Guy Gillette, added, "I hope something is done to keep Black from the high court bench."⁵⁴

The issue hit directly at the core of Roosevelt's urban coalition since the main targets of the KKK had been Catholics and Negroes. The revelations also embarrassed Northern Democratic senators with large ethnic constituencies who had voted for Black. Groups like the Ancient Order of Hibernians demanded that Black resign or be removed;⁵⁵ the Catholic Club of the City of New York deemed the appointment "a direct affront to the more than 20,000,000 Catholic citizens of the United States as well as to countless numbers of other citizens."⁵⁶ In New Hampshire the Knights of Columbus adopted resolutions castigating Senator Fred Brown for supporting confirmation,⁵⁷ and a member of the staff of Senator Theodore Green of Rhode Island noted, "At a very large meeting of the Hibernian County Convention last night a

⁵² Nock, *The Packing of Hugo Black*, 42 AM. MERCURY 231-32 (1937). See also letter from Frank Gannett to C. Greene, Sept. 22, 1937, on file in the Gannett MSS, Box 16, Cornell University.

⁵³ N.Y. Times, Sept. 15, 1937, at 1, col. 1; *id.*, Sept. 16, 1937, at 14, col. 2; letter from J.H. Bankhead to Grenville Clark, Sept. 21, 1937, on file in the Clark MSS, *supra* note 18, Series XXV, Box 1.

⁵⁴ N.Y. Journal and American, Sept. 14, 1937, clipping on file in the Royal S. Copeland Scrapbooks, Michigan Historical Collections, The University of Michigan.

⁵⁵ N.Y. Times, Sept. 27, 1937, at 5, col. 6.

⁵⁶ *Id.*, Sept. 23, 1937, at 6, col. 2.

⁵⁷ *Id.*, Sept. 17, 1937, at 1, col. 2.

great many Democrats were denouncing Roosevelt. Very severe criticism among the Democrats."⁵⁸

Irish Catholic politicians played a numerically disproportionate role in the campaign to get rid of Black. Representative John J. O'Connor, chairman of the House Rules Committee, reported he had been canvassing congressmen about instituting impeachment proceedings and had found no one opposed to such a move.⁵⁹ "If Mr. Justice Black was a member of the Klan when nominated and confirmed, his silence constituted a moral fraud upon the American people," said Representative Edward L. O'Neill, a New Jersey Democrat.⁶⁰ Lieutenant Governor Francis E. Kelly of Massachusetts drafted a resolution asking the President to insist upon Black's resignation,⁶¹ and Senator David I. Walsh, who favored the same course, declared, "There are two counts against him, one that Black, for political advantage joined the Klan and took the oath of a Klansman and subscribed to its creeds; two, that Black obtained his nomination and confirmation by concealment and thereby deceived the President and his fellow-Senators, especially the latter."⁶²

Sprigle's articles appeared just as the campaign for the mayoralty in New York City was reaching a climax, and Senator Copeland took full advantage of the opportunity. He told a Carnegie Hall audience: "I never expected to see the day when a member of that organization, sworn to bigotry and intolerance, should become a member of the court. Shame upon him that he did not have the courage and decency to tell his colleagues in the Senate that the suspicion of his affiliation was a reality." Copeland accused his rival, Jeremiah T. Mahoney, of approving Roosevelt's action in the "placing upon the court of a Klansman who wears a black robe of court by day and a white robe of the Klan by night."⁶³ "Imagine a man named Mahoney being mixed up with the Klan," his opponent spluttered. "Show me a Ku Klux Klanner and I promise he won't be alive a minute after I see him!"⁶⁴

Negro spokesmen joined in the hue and cry. The National Association for the Advancement of Colored People urged the President to call upon Black "to resign his post in the absence of repudiation

⁵⁸ *Id.* See also *id.*, Sept. 21, 1937, at 3, col. 5.

⁵⁹ *Id.*, Sept. 27, 1937, at 5, col. 3.

⁶⁰ *Id.*, Sept. 23, 1937, at 6, col. 1.

⁶¹ Letter from Joseph Witherow to Theodore Green, Sept. 13, 1937, on file in the Green MSS, Box 32, Library of Congress.

⁶² Memorandum, Sept. 16, 1937, on file in the Green MSS, *supra* note 61.

⁶³ N.Y. Times, Sept. 14, 1937, at 1, col. 3.

⁶⁴ N.Y. Post, Sept. 16, 1937, clipping on file in the Royal S. Copeland Scrapbooks, *supra* note 54.

and disproof of charges" that he held life membership in the KKK.⁶⁵ Robert L. Vann, who was the Negro editor of the *Pittsburgh Courier*, a special assistant United States attorney general, and also credited with playing the largest role in swinging Pennsylvania Negroes to the Democratic Party, wired Roosevelt to remove Black. "Your friends are on the spot," Vann said. "You must save your friends or you must release them."⁶⁶

Despite this widespread feeling, even Roosevelt's conservative critics in the Senate conceded that nothing could be done if Black decided to stick it out. The President could not oust a Justice, and since he had been lambasted month after month for trying to tamper with the Court, Roosevelt and his supporters surmised that any attempt to coerce Black into resigning would not be well received. People would be led to conclude "that, if the President should request Justice Black's resignation, he might also attempt to drive Justices McReynolds, Sutherland and Butler from the bench."⁶⁷ Nor did there appear to be grounds for impeachment. The civil liberties attorney Osmond K. Fraenkel observed, "I don't believe a judge can be impeached for something that happened before his appointment, but even if that were so, I do not see how he could be impeached for membership in an organization. Membership in the Klan, however politically inadvisable, is not a crime."⁶⁸

The electrifying disclosures exasperated the President. Washington, which so recently had been the self-confident capital of the New Deal, was now jeered at as "Klu-Kluxville-on-the-Potomac."⁶⁹ The situation was especially embarrassing to the New Dealers because Roosevelt had taken a firm stand for religious liberty in 1928 while campaigning for Al Smith, a Catholic, and had been severely criticized for having too many Jews in his administration and for giving too many benefits to Negroes. Despite this record the President now bore the onus of having brought the main battle of his second term to a climax by naming a Klansman to the Supreme Court.⁷⁰

⁶⁵ N.Y. Times, Sept. 19, 1937, § 1, at 39, col. 2.

⁶⁶ *Id.*, Sept. 22, 1937, at 2, col. 6.

⁶⁷ *Id.*, Sept. 26, 1937, § 4, at 3, col. 1. See also 2 H. ICKES, *supra* note 8, at 216-17. For contrary views, see Philadelphia Record, Sept. 15, 1937, clipping on file in the Frank Murphy Collection, The University of Michigan Law School; Paul Block editorial, clipping on file in the H. Styles Bridges MSS, *supra* note 18, Scrapbook 60.

⁶⁸ N.Y. World-Telegram, Sept. 14, 1937, clipping on file in the Royal S. Copeland Scrapbooks, *supra* note 54.

⁶⁹ Letter from Samuel G. Blythe to Urey Woodson, Sept. 24, 1937, on file in the Woodson MSS, University of Kentucky.

⁷⁰ Letter from Fred Crawford to D. Kinahan, Sept. 23, 1937, on file in the Crawford MSS, Michigan Historical Collections, The University of Michigan; Chase S. Osborn,

In an editorial in the *Emporia Gazette* William Allen White wrote:

When Franklin Roosevelt is dead and buried and all his bones are rotted, the fact that he played around with Black and appointed to the highest honorable office in American life a man who was a member of the Ku Klux Klan, as Black was charged when Roosevelt named him, well, as we started to say, when Roosevelt is dead and gone he will be remembered in the history of this day and time by the fact that he was not above dishonoring the Supreme Court by putting a Klansman there.

Why could not a man as smart as Franklin Roosevelt, as brave and as benevolent, also be wise in a day of crisis?⁷¹

IV. "I DID JOIN THE KLAN"

While Roosevelt's prospects were imperiled by the unexpected turn of events, Black's life had become all but unendurable. The clamor followed the new Justice to Europe, where he was still vacationing when the Sprigle series broke. Journalists hounded him, first in Paris, then in London. "A dreadfully worried United States judge hid himself away in a palatial hotel suite in London yesterday while all his fellow countrymen were asking for a straight answer to a straight question," reported the British *Daily Herald*.⁷² One newspaperman jumped out of a darkened corridor scaring Black's wife, and another seized his arm as he emerged from a London theater. "I don't see you; I don't know you; I don't answer you," Black told him.⁷³ The columnist Dorothy Thompson wrote, "In London tonight a Justice of the United States Supreme Court is barricaded behind locked doors. His telephone rings but he does not answer it. Reporters try to interview him but in vain. This man . . . sees only the waiters who bring him food, the maids who tidy his rooms and the traffic of London moving in the streets below He is front page news in England, where the British are taking revenge for the Simpson case."⁷⁴ After letting it be

Editorial Evidence Piles Up, on file in the Osborn MSS, Michigan Historical Collections, The University of Michigan; Roy O. Woodruff, *Notes and Comments from Washington*, attached to letter from Woodruff to Daniel Reed, Sept. 21, 1937, on file in the Reed MSS, Box 14, Cornell University.

⁷¹ N.Y. Times, Sept. 15, 1937, at 3, col. 5.

⁷² [London] Daily Herald, Sept. 16, 1937. I am indebted to Betsy Wade Boylan of the *New York Times* and to Joseph Frayman of the London bureau of the *New York Times* for material on the British press response.

⁷³ Toledo Blade, Sept. 18, 1937, clipping on file in the Clark MSS, *supra* note 18, Series XXV, Box 1. See also J. FRANK, MR. JUSTICE BLACK 105 (1949); [London] Daily Herald, Sept. 16, 1937; [London] Daily Mail, Sept. 16, 1937.

⁷⁴ PALL MALL, Sept. 17, 1937, on file in the Green MSS, *supra* note 61, Box 32. The American press had made headline news of the relationship between the King and the

known that he would sail back to America on a large transatlantic liner, on which one of his fellow passengers would have been Mr. Justice McReynolds, Black escaped from his hotel by a service entrance and drove to Southampton where he boarded a small mail steamer, *The City of Norfolk*. He left England, said the *Sun*, "Klandestinely."⁷⁵

No longer would Black be permitted to remain silent. Senator Walsh said that he had to speak out to be fair to the Catholic senators, and to those with Catholic and Jewish constituents, who had voted for his confirmation and who might suffer the consequences in the next election.⁷⁶ Democratic Senator Bennett Champ Clark of Missouri commented, "I do not wish to be in the position of concluding as to the authenticity of the charges contained in the newspapers against Justice Black, but it does seem to me that he has had ample opportunity to answer a simple statement of fact."⁷⁷ As Black's vessel headed westward across the Atlantic toward Norfolk, a Gallup Poll revealed that 59 percent of those interviewed believed that he should resign if he were proven to have been a member of the Klan. At Felix Frankfurter's suggestion, the young *Nation* editor Max Lerner flew to Norfolk, made his way through throngs of newspapermen, and at breakfast with Black aboard ship argued that he should issue an explanation. That night, Lerner spent four more hours with Black in Alexandria.⁷⁸ Under all of this pressure, Black finally decided to accept an invitation to speak over the radio on October 1, but he now had less than two days to draft his speech.

The address, carried over three national networks with three hundred stations, attracted the largest American audience of the decade, except for that tuned in to the abdication of Edward VIII. (The huge audience, however, did lack one prominent listener—Franklin Roosevelt contrived to be in the Pacific Northwest in an automobile without a radio as Black spoke.) The fact of Black's speech was a sensation because of the cardinal rule that Justices do not make statements on public matters, and the dramatic nature of the occasion was enhanced when fiery crosses lit the hillsides in different parts of the country.

In his talk, Black admitted having belonged to the Klan—he could hardly do anything else—but said that he had resigned before entering the Senate and never rejoined. He minimized the grand passport

American Mrs. Simpson, to whom he was subsequently married, at a time when the British press could not breathe a word about it.

⁷⁵ N.Y. Times, Sept. 24, 1937, at 20, col. 5.

⁷⁶ *Id.*, Sept. 16, 1937, at 14, col. 2.

⁷⁷ *Id.*, Sept. 17, 1937, at 14, col. 3.

⁷⁸ Letter from Max Lerner to Felix Frankfurter, Oct. 6, 1937, on file in the Lerner MSS, Yale University; Lerner, *Hugo Black—A Personal History*, NATION, Oct. 9, 1937, at 20.

as an "unsolicited card" which he did not view as membership in the Klan, had never used, and had not kept. He also voiced his disdain, without naming the KKK, for "any organization or group which, anywhere or at any time, arrogates to itself the un-American power to interfere in the slightest degree with complete religious freedom."⁷⁹

Black's speech is remembered today as a courageous denunciation of the Klan that foreshadowed his future character as a Justice, but in truth it was not. Black neither explained his past Klan membership nor offered any apology for signing up with the KKK; nor did he account for why he had sat through the Senate discussion of his alleged Klan connections without a word to anyone either in the Senate or, apparently, in the administration. He repudiated none of the atrocities perpetrated by the Klan in Alabama while he was in the secret order. In all, he used only eleven of the thirty minutes allotted to him. The most unfortunate aspect of his talk, however, was not what he failed to say but what he did say. He spent the first third of his remarks cautioning against the possibility of a revival of racial and religious hatred, but he warned that this might be brought about not by groups like the Klan but by those who questioned his right to be on the Supreme Court. He went on to affirm that some of his best friends were Jews and Catholics, told the national audience about his longtime Jewish chum in Birmingham, and mentioned that he numbered among his friends "many members of the colored race."⁸⁰

Rarely in the twentieth century has any statement by an American public figure brought down such abuse on him in the press as Black's brief address called forth. The *New York Herald Tribune* branded him a humbug and a coward: "The effort of Senator Black to suggest that he is the real protagonist of tolerance and that his enemies are intolerant is perhaps the greatest item of effrontery in a uniquely brazen utterance. Only a man heedless of the truth and a man afraid of his official skin could fall so low."⁸¹ The *Boston Post* called on him to resign, for "one who associates with bigots, bids for their support, takes the bigots' oath and then is so craven that he allows his friends in a crisis to deny it all, can't clear himself by asserting it was all contrary to his real character."⁸² About Black's references to Catholic, Jewish, and Negro friends, the *New York Post* said, "We might reply in kind that one of our best liberal friends was a Klansman but we still don't

⁷⁹ Black, *I Did Join the Klan*, VITAL SPEECHES, Oct. 15, 1937, at 20.

⁸⁰ *Id.*

⁸¹ N.Y. Herald Tribune, Oct. 2, 1937, at 14, col. 2.

⁸² Boston Post, Oct. 2, 1937, clipping attached to letter from Lawrence F. Quigley to George W. Norris, Oct. 2, 1937, on file in the Norris MSS, Tray 27, Box 3, Library of Congress.

think he ought to be on the Supreme Court.”⁸³ The *Newark Ledger* added that Black had, “resigned from the Klan to maintain an appearance of decency. He should resign from the Supreme Court to attain the substance of decency.”⁸⁴ Catholic outrage ranged across the political spectrum from the liberal *Commonweal* to periodicals and spokesmen on the right.⁸⁵ “Since there was no sign of his being ashamed for himself,” wrote the editor of *The Catholic World*, “I was ashamed for him; ashamed too for the Supreme Court, ashamed for the President of the United States.”⁸⁶

Roosevelt, however, had no doubt that Black’s performance had carried the day. When Jim Farley telephoned him a few days later the President asked, “What d’you think of Hugo’s speech of the other night?” “He did the best he could under the circumstances, but I think he should have hit the Klan,” Farley answered. “It was a grand job,” Roosevelt returned. “It did the trick; you just wait and see.”⁸⁷

The President was absolutely right. The address was inevitably applauded, if not altogether convincingly, by Black’s supporters in the New Deal. “If you listened to Mr. Justice Black’s radio talk,” said Senator Green of Rhode Island, “I am sure that you must have felt as I did that he admirably expressed the principles on which Roger Williams founded this State.”⁸⁸ Elements of Roosevelt’s urban coalition also remained loyal. Labor leaders praised Black’s speech, and Rabbi Herbert S. Goldstein of Yeshiva College spoke for others in saying, “As a citizen, I do not seek ‘the pound of flesh’ and as a Jew, I do not seek retaliation.”⁸⁹ Most important, Black’s discourse won the majority of his listeners, albeit not a substantial majority. After the broadcast 56 percent of the people polled by Gallup responded that Black should stay on the bench, which was precisely what he had intended to do all along.

V. MR. JUSTICE BLACK

On the morning of October 4, three days after Black’s radio talk, the Supreme Court opened its fall term, and huge crowds gathered to

⁸³ V. HAMILTON, *supra* note 10, at 296.

⁸⁴ N.Y. Times, Oct. 2, 1937, at 2, col. 6. For a review of editorials on the affair, with bitter attacks on Black, see Chicago Tribune, Oct. 3, 1937, § 1, at 9, col. 1.

⁸⁵ See, e.g., COMMONWEAL, Oct. 15, 1937, at 559-60; letter from Reverend Edward Lodge Curran to Louis Brandeis, Oct. 6, 1937, on file in the Brandeis MSS, University of Louisville Law School, S.C. 20, Folder 2.

⁸⁶ CATHOLIC WORLD, Nov., 1937, at 132.

⁸⁷ J. FARLEY, *supra* note 27, at 100.

⁸⁸ Letter from Theodore Green to Frank J. Keough, Oct. 11, 1937, on file in the Green MSS, *supra* note 61, Box 32.

⁸⁹ N.Y. Times, Oct. 3, 1937, § 1, at 3, col. 2.

see the former Klansman take his seat. Long lines extended for hundreds of feet in the corridor, and much of the throng was unable to enter the courtroom. When the Justices filed in, it was noted pointedly that Black sat to the "extreme left" of the Chief Justice.⁹⁰ For the first time in public, Black wore the silk robes of a Justice, but the occasion was not the hour of triumph the man from Clay County, Alabama might have hoped for. To the dismay of his supporters, two petitions were filed to challenge his right to be a Justice. For all Black's efforts and those of Roosevelt, the controversy continued to simmer.

The President quickly remedied the situation. The next day in Chicago, he delivered his historic "quarantine" address, and by nightfall the country had turned its attention from Black to foreign affairs and the prospect of a second world war.⁹¹ A distinguished authority on international law, John Bassett Moore, wrote, "The President never was more adroit than in his Chicago speech. All the talk about Black, balancing the budget, the C.I.O., the 'dictatorial drift,' etc. etc., . . . suddenly ceased when the war cry was raised."⁹² Critics charged that FDR had deliberately seized the headlines in order to distract attention from the Black furor. "The speech would never have been made if there had been no Black case," Hiram Johnson protested.⁹³ Actually, the situation was more complex than such conspiracy notions suggested. From Washington, His Majesty's Charge D'Affaires sent the British Foreign Secretary Anthony Eden a more balanced report:

I have every reason to believe that the speech had long been contemplated, but the President was prepared to await the psychological moment for its delivery. He had returned from his Western tour fully convinced that, however lukewarm the feeling regarding the Supreme Court might be in those parts, the electors as a whole had not lost confidence in his personal leadership. On the other hand the regrettable "Black and Klan" incident was still front page news and required something more important to

⁹⁰ *Id.*, Oct. 2, 1937, at 3, col. 3.

⁹¹ Leuchtenburg, *Franklin D. Roosevelt, "Quarantine" Address, 1937*, in *AN AMERICAN PRIMER* 846-56 (D. Boorstin ed. 1966).

⁹² Letter from John Bassett Moore to Otho Nowland, Oct. 12, 1937, on file in the Moore MSS, Box 73, Library of Congress.

⁹³ Letter from Hiram Johnson to Raymond Moley, Oct. 11, 1937, on file in the Johnson MSS, *supra* note 45. Newton D. Baker scouted these stories. "The President has too simple a mind to work out such a solution for the Black problem," he wrote. Letter from Baker to Ralph Hayes, Oct. 12, 1937, on file in the Baker MSS, *supra* note 19, Box 117. The President also took advantage of his trip to Chicago to call on Cardinal Mundelein, an episode that was interpreted as showing the continued good relations of the Roosevelt administration with the Catholic hierarchy despite the Black affair. J.F.T. O'Connor MS Diary, Oct. 6, 1937, Bancroft Library, University of California, Berkeley, California.

remove it to the back page. In fact unkind Wall Street wits are talking of "a red herring drawn across the Black trail." The President's arrival at Chicago coincided with the decision at Geneva to refer the Far Eastern crisis to the signatories of the Nine-Power Treaty. Here was a good opportunity for Mr. Roosevelt to make his appeal to the nation to abandon a policy of complete isolation.⁹⁴

Although the quarantine address was followed by reduced attention to Black in the press, lawyers and Washington correspondents continued to scrutinize him closely. Even after the Court summarily dismissed the petitions to deny Black a seat,⁹⁵ every eye seemed to be inspecting the new Justice. "I went to the Court last week and had the opportunity to see Mr. Justice Black on the bench," Newton D. Baker wrote to the former Supreme Court Justice John H. Clarke. "He is young enough to make a good judge but he has a wavering expression of the eyes which he will have great trouble in straightening out if he wants to be like the judges on that Court usually are—impervious to all considerations except their view of the public good."⁹⁶ The veteran *New York Times* columnist Arthur Krock had a different perspective; he observed:

Mr. Justice Black's court-room demeanor provided material for interesting study. His face had gained color. His manner had acquired content. He looked benign instead of harried. But now and then, as the Chief Justice read the orders and Mr. Justice Black looked out upon the lawyers and spectators from his impregnable fortress of life tenure, an expression touched his face which is common to certain types of martyrs. It was a mixture of forgiveness and satisfaction, of pity for unreconstructed dissenters and sympathy for himself who had borne so much in comparative silence. Charles Dickens, who gave many passages to the description of Mr. Christopher Catesby, would have recognized it at once.⁹⁷

Black might well have nourished such sentiments in his first year on the bench, for he was permitted to forget neither his Klan past nor his limited judicial background. In his first month, Black drew scathing criticism when the conviction of one of the Scottsboro boys came up on appeal and Black disqualified himself.⁹⁸ The treatment accorded

⁹⁴ Letter from V.A.L. Mallet to Anthony Eden, Oct. 12, 1937, F.O. 371, 20668, No. 924E (A 7543/542/45), on file in the Public Record Office, London, England.

⁹⁵ U.S. Supreme Court Journal, Oct. 11, 1937, at 4-5.

⁹⁶ Letter from Newton D. Baker to John H. Clarke, Oct. 20, 1937, on file in the Baker MSS, *supra* note 19, Box 60.

⁹⁷ N.Y. Times, Oct. 12, 1937, at 4, col. 5.

⁹⁸ *Id.*, Oct. 27, 1937, at 30, col. 1.

him by liberal Justices Louis Brandeis and, more particularly, Harlan Fiske Stone caused greater distress. In strolls through Washington with the newspaperman Marquis Childs, Stone abandoned discretion and vented his distress over Black's inexperience. Childs later said that Stone was "like an old New England wood-carver, and here they suddenly brought someone in the shop who doesn't know a knife from a hoe. This really upset him very greatly."⁹⁹ In an article inspired by his chats with Stone, Childs created a hullabaloo by stating that Black's opinions frequently had to be rewritten by his colleagues in order to bring them up to the standards of the Court and that Black's incompetence had caused the other Justices "acute discomfort and embarrassment."¹⁰⁰

Yet even in these early days Black won admirers for his courage and skill. Rather than meekly accommodating himself as might be expected of a newcomer tarred by scandal, he boldly advanced iconoclastic notions. "Mr. Justice Black, dissenting" became a familiar phrase; indeed, he was said to have set a record for lone dissents.¹⁰¹ Walton Hamilton expressed his esteem for Black's cleanly written opinions and the independence of a man who "regards the sacred cows as ordinary heifers."¹⁰² By 1939 Erwin D. Canham was observing that "Mr. Justice Black . . . has climbed out of the pit into which the circumstances of his appointment had hurled him, and is on the way to being regarded as another Brandeis."¹⁰³

The allusion to Brandeis suggested both a craftsmanship that demeaning references to the police court judgeship had not prepared critics for and a solicitude for civil liberties that many people had not expected of an ex-Klansman. In 1940 Black was spokesman for the Court in two notable decisions. In *Chambers v. Florida*,¹⁰⁴ generally

⁹⁹ Marquis Childs, Columbia Oral History Collection, Columbia University, at 89-90. Two days before Black took his seat on the Court, Stone wrote John Bassett Moore, "I experienced a kind of melancholy amusement in reading your two notes with reference to the Ku Klux Klan." Letter from Harlan Fiske Stone to John Bassett Moore, Oct. 2, 1937, on file in the Moore MSS, *supra* note 92, Box 73.

¹⁰⁰ Childs, *The Supreme Court To-day*, HARPERS, May, 1938, at 581-83; cf. A. MASON, HARLAN FISKE STONE 451-55, 472-75 (1956); Raymond Clapper MS Diary, Clapper MSS, *supra* note 8, May 11, 1938; letter from Clapper to Hugo Black, May 12, 1938, on file in the Clapper MSS, *supra* note 8, Box 8. Learned Hand told an interviewer years later, Black "isn't my idea of what a judge is at all." Learned Hand, Columbia Oral History Collection, Columbia University, at 88.

¹⁰¹ Curtis, *How About Hugo Black?*, ATLANTIC MONTHLY, May, 1939, at 667-68.

¹⁰² Hamilton, *Mr. Justice Black's First Year*, NEW REPUBLIC, June 8, 1938, at 121.

¹⁰³ Canham, *The New Supreme Court*, Christian Science Monitor, Weekly Magazine Section, April 8, 1937, at 7. See also I. DILLARD, ONE MAN'S STAND FOR FREEDOM 21-24 (1963); Green, *Mr. Justice Black Versus the Supreme Court*, 4 U. NEWARK L. REV. 113 (1939).

¹⁰⁴ 309 U.S. 227 (1940). Chief Justice Hughes's biographer has written that Black voted

thought to be his ablest opinion, he spoke for a unanimous Court in holding that the convictions of four Negroes for murder, obtained by using coerced confessions, violated the due process clause of the fourteenth amendment. In *Smith v. Texas*,¹⁰⁵ he again spoke for all nine Justices in setting aside the rape conviction of a Negro based on an indictment handed down by a grand jury from which Negroes were excluded. Black became best known, however, not as the eloquent voice of a unanimous Court, but as a dissenter urging the Court to break new ground on civil liberties, particularly as an advocate of uninhibited application of the first amendment. Justice William O. Douglas observed in 1956, "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."¹⁰⁶ A decade later Alexander Bickel wrote of "a Hugo Black majority" on the Court, "for in this second half of Justice Black's third decade of service, the Court was overturning many a precedent that had entered the books over his dissent."¹⁰⁷ When he finally left the bench in 1971, Justice Black, who had once been jeered at for his alleged lack of expertise, was praised for his "extraordinary capacity to clarify and make vivid the issues in a case" through "seemingly impregnable logic,"¹⁰⁸ and as one of "the court's intellectual pillars" with a reputation for "judicial integrity, dignity and tight reasoning."¹⁰⁹

Black's subsequent career made the widespread alarm expressed at his appointment seem badly misdirected and gave Roosevelt a sense of vindication. The President had remained rather touchy about the Black affair. In February, 1938, Raymond Clapper related in his diary an episode that took place in the Gridiron Club, the organization of Washington correspondents: "President Geo Holmes told about visit he and Gould Lincoln made to Rvt on Monday after dinner. Rvt said like dinner except thought one skit in bad taste. Said that was Klan skit

against taking this case when it reached the Court on petition for certiorari. M. PUSEY, CHARLES EVANS HUGHES 774 (1963). See also McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 18 (1949).

¹⁰⁵ 311 U.S. 128 (1940).

¹⁰⁶ Douglas, *Mr. Justice Black: A Foreword*, 65 YALE L.J. 449, 450 (1956). See also Frederick Coudert, Columbia Oral History Collection, Columbia University, at 44; Allen Wardwell, Columbia Oral History Collection, Columbia University, at 111.

¹⁰⁷ A. BICKEL, *POLITICS AND THE WARREN COURT* 168 (1965). Anthony Lewis wrote, "If any member of the Court saw his philosophy become doctrine in fact, it was not the Chief Justice but Justice Black." Lewis, *Earl Warren*, in *THE WARREN COURT* 1, 2 (R. Saylor ed. 1968).

¹⁰⁸ Ferrer, *On Choosing Justices*, TIME, Oct. 18, 1971, at 70.

¹⁰⁹ TIME, Oct. 4, 1971, at 15. These words were jointly applied to Justice John Harlan.

on Black. . . . Said Harding had an illegitimate child but Gridiron club never use anything on that. . . . Said matter was dying out skit by being printed in newspapers tended to reopen whole thing keep it agitated. Holmes told us he couldn't see analogy of Rvt's unless he meant that Black was like Nan Britton."¹¹⁰ When the *Chambers* decision was handed down, Roosevelt seized the opportunity at his press conference the next day to tell reporters, "I would put in a general dig that some of the Press should not only give a little praise but also a modicum of apology for things they have said in the last two years. Is that fair?"¹¹¹

VI. "A WONDERFULLY GOOD APPOINTMENT"

Black's emergence as a champion of civil liberties has been offered as proof that Roosevelt knew what he was doing all along, that he perceived potential in Black that others did not. Perhaps he did; it is hard to determine, particularly this long after the fact, what one man sensed in another. It is highly improbable, though, that FDR foresaw Black's ultimate accomplishments, even if he may have supposed that Black, like other men, might show new qualities when given the independence of life tenure.

Other commentators have said that Black's post-1937 conduct accorded with his pre-1937 career, for he had come out of a populist tradition in Alabama and had long been an exponent of civil liberties and individualism and a friend of labor and the Negro.¹¹² This view acknowledges that he had been a Klansman, but contends that the KKK was a populist, prolabor movement that sponsored liberal, humanitarian measures, such as aid for underprivileged children. Some have also claimed that he joined at the urging of a Jewish friend in order to exercise his benign influence within the Klan.¹¹³

The evidence for these familiar arguments is, at best, ambiguous. It is true that Black appears never to have been associated with Klan violence,¹¹⁴ that he was an attorney for unions, and that he was respon-

¹¹⁰ Raymond Clapper MS Diary, Clapper MSS, *supra* note 8, Feb. 13, 1938.

¹¹¹ V. HAMILTON, *supra* note 10, at 302.

¹¹² See, e.g., J. FRANK, *supra* note 73, at 12.

¹¹³ Berman, *Hugo Black, Southerner: II. The Negro*, 10 AM. U.L. REV. 40 (1961); letter from I.E. Boyette to Charles Evans Hughes, on file in the Brandeis MSS, *supra* note 85, S.C. 20, Folder 2; N.Y. Times, Sept. 15, 1937, at 2, col. 6.

¹¹⁴ For allegations with respect to the violence of the KKK in Alabama, see "Personal and Confidential" memorandum from Douglas Arant to Grenville Clark, Sept. 22, 1937, on file in the Clark MSS, *supra* note 18, Series XXV, Box 1; Cochran, *One Man's Opinion*, Sept. 20, 1937, mimeographed, contained in letter from Naomi Lowensohn to Raymond Moley, Oct. 2, 1937, on file in the Moley MSS. Mr. Moley graciously made his papers available to me at his *Newsweek* offices.

sible for reforms in court procedure in Alabama. Nevertheless, the link of Black to populism has been too easily assumed, quite apart from the difficulty of showing the connection between populism and modern civil libertarianism. Black did have Negro clients, but he was also reproached for making a blatant appeal to race prejudice while defending the accused murderer of a priest.¹¹⁵ The strongest statement that Daniel M. Berman could make in his informative article in the *Catholic University Law Review* was that "there is no evidence that Judge Black treated Negroes any more harshly than whites."¹¹⁶ As late as 1932, Black had opposed a government relief bill because it would, in code language, interfere with "social habits and social customs."¹¹⁷ Correspondent Paul Y. Anderson reported that Black "became hysterical over the prospect of a federal relief plan which might feed Negroes as well as whites, and gave an exhibition which brought a blush to the face of Tom Heflin, lurking in the rear of the chamber."¹¹⁸ The one thing known for certain about Black's attitude toward the Negro was that, in the very month Roosevelt appointed him to the Supreme Court, Black was planning to speak in the Senate against the antilynching bill.

At a press conference in September Roosevelt responded "No" to the question: "Prior to the appointment of former Senator Black, had you received any information from any source as to his Klan membership?"¹¹⁹ The President may not have known about "membership," but it is inconceivable that he had no awareness of a Klan connection. It was widely recognized, at the very least, that the Alabama senator had Klan backing when he was first elected to the U.S. Senate.¹²⁰ In fact, as a writer in the *Washington Post* noted, "It is difficult to find a sketch of Senator Black which does not contain some reference to the Ku Klux Klan."¹²¹ In addition, because of his association with the polio center at Warm Springs, Roosevelt regarded himself as much a son of Georgia as of New York, and in his many sojourns in Georgia he would have been likely to have acquired good intelligence about the politics of neighboring Alabama.

It is more likely that civil liberties considerations did not loom

115 V. HAMILTON, *supra* note 10, at 84-95.

116 D. Berman, *Hugo L. Black: The Early Years*, 8 CATHOLIC U.L. REV. 103, 108 (1959).

117 H. WARREN, HERBERT HOOVER AND THE GREAT DEPRESSION 203 (1959).

118 Anderson, *Democracy at Work*, NATION, Mar. 2, 1932, at 252. Heflin, formerly Black's senior colleague from Alabama in the Senate, was a notorious racist.

119 10 COMPLETE PRESIDENTIAL PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT 210-11 (1972).

120 G. TINDALL, THE EMERGENCE OF THE NEW SOUTH, 1913-1945, at 623 (1967).

121 Washington Post, Aug. 14, 1937, at 2, col. 2.

large in Roosevelt's mind in choosing a nominee. The central issue in the Court crisis had been the fate of New Deal economic legislation, and the President was looking for someone to legitimate the growth of the State. Concentration on such matters, rather than civil liberties and civil rights, reflected the basic attitudes of 1930's liberalism. It is true that interest in civil liberties and civil rights grew during the Depression, fostered by New Deal activities, particularly in the Justice Department, the inclinations of New Deal administrators like Harold Ickes, the example set by Eleanor Roosevelt, and the spirit of concern that the New Deal conveyed. Not until the 1940's, however, did civil liberties and civil rights come to have a truly prominent place on the agenda of American liberalism.¹²²

For many New Deal supporters, Black's Klan affiliation was distressing, but it was not thought to be central, as it would be today. Klan membership was regarded as the entry fee Black had to pay for political advancement in Alabama, nothing more. Senator George Norris, the most respected of all the progressives and father of the TVA, who had fought the Klan and been fought by it, called the naming of Black "a wonderfully good appointment." He added, "Even if he was a member of the Klan, there's no legal objection to that. I've an idea many members of the House and the Senate belong to the Klan also but that is their privilege."¹²³

Progressives characterized the outcry against Black as a conservative scheme to discredit the Roosevelt administration and thereby scuttle the New Deal and prospects for reform. They did not attack what was said about Black, but rather who said it; when Sprigle's series appeared, Black's supporters concentrated their fire on his publisher, Paul Block, and other hostile newspaper titans like William Randolph Hearst. They offered the defense, in Heywood Broun's words, that "few justices of the Supreme Court swim up to the high bench as immaculate as Little Eva on the way to Heaven"¹²⁴ and contended that the elements opposed to Black would not have shown the same intense concern about the past of a reactionary nominee. The liberal columnist Jay Franklin wrote, "One point only should be made in relation to these charges: If Hugo L. Black had been a labor-baiter, a trust cor-

¹²² For analyses of the impact of the Great Depression and the New Deal on civil liberties and civil rights, see J. AUERBACH, *LABOR AND LIBERTY* (1966); P. MURPHY, *THE CONSTITUTION IN CRISIS TIMES* (1972); H. Sitkoff, draft of a Ph.D. dissertation at Columbia University.

¹²³ Statement, n.d., on file in the Norris MSS, *supra* note 82, Tray 27, Box 3; N.Y. Times, Sept. 23, 1937, at 6, cols. 2-3.

¹²⁴ *THE DIGEST*, Oct. 16, 1937, at 7.

poration attorney, a man who had amassed a fortune and achieved political prominence as a result of helping the banks, utilities and corporations to loot the State of Alabama and stifle competition by strong-arm monopolies, he could have engaged in devil-worship, he could have practiced polygamy, he could have hunted down run-away sharecroppers with blood-hounds, and eaten babies for breakfast, for all that his conservative Northern critics would care."¹²⁵

The New Dealers insisted that Black should be measured by the yardstick of twentieth century social reform and by the imperatives of the Great Depression. *The Progressive*, the organ of the La Follette dynasty in Wisconsin, noting Black's "excellent and long standing record of liberalism," pointed out that Black had fought the big-navy lobby and the power trust.¹²⁶ Congressman David Lewis, a Maryland Democrat who had cosponsored the social security bill, asserted, "The real issue is not Black's qualifications, but whether the court is going to keep out of the 'nullification business'—that is quit vetoing acts of Congress."¹²⁷ A Providence newspaper observed, "We don't like the idea of a Supreme Court Judge having been at any time or for whatever purpose associated with the Ku Klux Klan, but the issue is not religion, it is not race or creed; the issue is economics."¹²⁸

In its "Topics of The Times" column, the *New York Times* satirized this sentiment in *Alice in Wonderland* style:

After a while the White Rabbit summed up the debate, nobody dissenting.

"You see, Alice," he said, "it's all because we have recently discovered that all life is functional. Once upon a time people thought there were definite things like truth, justice, honor, mercy, courage, and so forth. But now we know these things are only functions of the economic system. . . . That is why Liberals in the United States feel it does not matter if a member of the Supreme Court used to belong to the KKK. The only important thing is how does he stand on the question of 11½ cents per kilowatt hour f.o.b. Norris Dam."¹²⁹

This preoccupation with economic and social policy had led the President to choose Black, but it was not the only consideration. Roosevelt certainly sought an enthusiastic New Dealer, but he also

¹²⁵ Washington Evening Star, Sept. 21, 1937, clipping on file in the Green MSS, *supra* note 61, Box 32.

¹²⁶ *THE PROGRESSIVE*, Aug. 21, 1937, clipping in the Royal S. Copeland Scrapbooks, *supra* note 50.

¹²⁷ N.Y. Times, Oct. 3, 1937, § 1, at 3, col. 4.

¹²⁸ *Id.*, § 1, at 2, col. 3.

¹²⁹ *Id.*, Oct. 10, 1937, § 4, at 10, col. 4.

wanted someone who was young, came from a section that did not have a Supreme Court Justice, and could readily be confirmed. He and Cummings had reduced a list of sixty names to seven, four of whom were federal judges. None of the judges, however, including the highly touted Bratton, had sufficient liberal ardor to suit the President. "Bratton belongs to a judicial school of thought that ought not to be represented on the bench," he later told Farley.¹³⁰ So the candidates were reduced to three: Solicitor General Stanley Reed, Black, and Senator Sherman Minton of Indiana.

Reed was crossed off as "middle-of-the-road . . . a good man but without much force or color,"¹³¹ and attention focused on the choice of a senator. Roosevelt found that solution particularly beguiling, especially after the Robinson episode in May, in which the Senate in effect made its own nomination of a Justice. If he named a senator, even one regarded as a radical, the Senate would be trapped into going along, a circumstance that appealed to FDR's love of surprise and of turning the tables on his opponents with a clever move. He was initially inclined toward the fiery Shay Minton, but the Hoosier senator recognized that during the recent struggle over the Court bill he had made too many harsh comments about the Justices who would be his colleagues. Moreover, he was needed in the Senate. The President therefore settled on Black, who was young enough at 51, from a large unrepresented circuit in the Deep South, and, most important, a true believer in expanding governmental power.

Far from seeking to placate Congress by picking a moderate like Bratton, Roosevelt wanted to make clear that he was as committed to the New Deal as ever, and his selection of Black was a symbolic and defiant act.¹³² FDR's original plan seems to have been motivated by a desire not only to reform the Court, but also to punish the Justices for wronging him in the past.¹³³ The appointment afforded Roosevelt

¹³⁰ J. FARLEY, *supra* note 26, at 162. See also Detroit News, Aug. 12, 1937, at 1, col. 1. On the allegation that Bratton was unacceptable because of his hostility to women, see letter from Emma Guffey Miller to Marvin McIntyre, Aug. 6, 1937, on file in the Miller MSS, Folder 14, Radcliffe College, Schlesinger Library on the History of Women in America.

¹³¹ 2 H. ICKES, *supra* note 8, at 83.

¹³² J. ALSOP & T. CATLEDGE, *supra* note 4, at 296-307; A. Bernstein, Blacklash: The Making of a Supreme Court Justice, 1937, graduate colloquium paper, Columbia University, 1969; A.A. Berle, Jr., MS Diary, Sept. 14, 1937. Mr. Berle kindly granted me access to his diaries in his New York office.

¹³³ Roosevelt was particularly upset by the decision in *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935). See Leuchtenburg, *The Case of the Contentious Commissioner: Humphrey's Executor v. U.S.*, in *FREEDOM AND REFORM: ESSAYS IN HONOR OF HENRY STEELE COMMAGER* 276 (H. Hyman & L. Levy eds. 1967).

another opportunity to express his contempt for the illusion that the Court was a body that lived on Mt. Olympus and his conviction that it was essentially a political agency. The Senate was even more of a target for revenge, for it had just humiliated him in the Court-packing battle. Donald Richberg, a prominent New Dealer, confided, as Clapper noted, that "Roosevelt was mad and was determined to give Senate the name which would be most disagreeable to it yet which it could not reject."¹³⁴

The President's faith in Black's liberal proclivities proved well founded. "Although Black's appointment did not mark the precise chronological point from which the Court's philosophy began its deviation from its previous path," Charlotte Williams has written, "it was this event which made it plain beyond all doubt that the Court was about to be reconstituted in the image of the New Deal."¹³⁵ Black immediately gave the Administration a 6-3 majority on the Court, and his lone dissents indicated that he favored even more advanced stands than Justices like Brandeis, Cardozo, and Stone.¹³⁶ Wallace Mendelson has calculated that in sixty cases involving the Federal Employer's Liability Act from 1938 through 1958, Black sustained workingmen's claims in every case but one, and that in the decade beginning 1949, in nineteen Sherman Act conflicts between business and consumer interests, "only Mr. Justice Black found a violation of the law in every instance."¹³⁷

In nominating Black, the President set the pattern that most of the other selections for "the Roosevelt Court" would follow. To the Supreme Court would go progressives, like Frank Murphy and William O. Douglas, who shared Black's zeal for the New Deal. The typical appointee would, like Black, be several years younger than William Howard Taft's representative choice. Only once would FDR pick a man with prior experience in the federal judiciary; indeed, Black was exceptional in that, except for Wiley Rutledge, the former police court magistrate was the only Roosevelt appointee who had ever served as a judge prior to joining the Court.¹³⁸

¹³⁴ Raymond Clapper MS Diary, Clapper MSS, *supra* note 8, Aug. 14, 1937.

¹³⁵ C. WILLIAMS, *supra* note 17, at v. See also Frank, *Justice Black and the New Deal*, 9 ARIZ. L. REV. 26 (1967).

¹³⁶ C. PRITCHETT, *THE ROOSEVELT COURT* 35 (1948). The "conversion" of Owen Roberts had provided a 5-4 majority even before Van Devanter's departure. Chambers, *The Big Switch: Justice Roberts and the Minimum Wage Cases*, 10 LABOR HISTORY 44 (1969).

¹³⁷ W. MENDELSON, *JUSTICES BLACK AND FRANKFURTER* 24, 29 (1961); see Leuchtenburg, *The Constitutional Revolution of 1937*, in *THE GREAT DEPRESSION: ESSAYS & MEMOIRS FROM CANADA & THE UNITED STATES* (V. Hoar ed. 1969).

¹³⁸ C. PRITCHETT, *supra* note 136, at 12-14.

Black's appointment turned out to be only the first of many for the President. Roosevelt, who was unable to designate anyone for the Supreme Court in his first term, named eight Justices, including the Chief Justice, in the six years from 1937 to 1943. So rapidly did the composition of the Court change under Roosevelt and Truman that by the late 1940's Black, whose tenure seemed so precarious in 1937, was the senior member. Black remained on the bench through the thirties, forties, fifties, sixties, and into the seventies and would fall only months short of establishing a new record for length of service as a Justice.

The Black controversy is rich in paradox and irony—a former Klansman becoming one of the century's leading exponents of civil liberties, a Justice chosen for one set of reasons winning fame for accomplishments that had hardly been anticipated, an Alabaman who created alarm among Negro groups when he was nominated but who lived to be denounced as a foe of the white South—but not least of the many ironies is the fact that the President's bitterly fought campaign to rejuvenate the Court by terminating tenure at the age of seventy would end in his naming, as his first appointment, a man who would still be on the bench on his eighty-fifth birthday and whose lengthy and brilliant career would be seen as a testament to Roosevelt's perspicacity.