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The Unconstitutionality of Justice Black

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Abstract: In *Ex Parte Levitt*, the Supreme Court denied standing to a pro se litigant making esoteric claims against the appointment of Justice Hugo Black. The Court’s short opinion is now an unremarkable mainstay of modern federal courts doctrine. But the case merits closer examination. Indeed, Levitt’s challenge was probably meritorious, and Hugo Black’s appointment unconstitutional. Moreover, the Court’s standing analysis was probably wrong – though there might have been other reasons to deny the challenge. And finally, the case’s aftermath raises intriguing questions about the Supreme Court’s role in politics and constitutional law. But don’t worry – his opinions are safe.

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1. Ex Parte Levitt

1.1 On Paper

When the light is right, a small object can cast a substantial shadow. Thus it is with *Ex Parte Levitt*, a one-paragraph per curiam opinion that is now a chestnut of modern standing doctrine.

Eighty-two years ago, the Court denied a motion attempting to challenge Justice Black's eligibility for his Supreme Court seat:

The grounds of this motion are that the appointment of Mr. Justice Black by the President and the confirmation thereof by the Senate of the United States were null and void by reason of his ineligibility under Article 1, § 6, cl. 2, of the Constitution of the United States, and because there was no vacancy for which the appointment could lawfully be made. The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public. *Tyler v. Judges*, 179 U.S. 405, 406; *Southern Railway Co. v. King*, 217 U.S. 524, 534; *Newman v. Frizzell*, 238 U.S. 537, 549, 550; *Fairchild v. Hughes*, 258 U.S. 126, 129; *Massachusetts v. Mellon*, 262 U.S. 447, 488. The motion is denied.¹

The Supreme Court has relied on that decision repeatedly in more modern cases. During the early Burger Court, it specifically “recognized the continued vitality of *Levitt*,” and invoked it to deny standing for various constitutional claims, such as a claim in *Schlesinger v. Reservists Committee to Stop the War* that members of Congress could not hold a commission in the Armed Forces Reserve,² or a claim in *United States v.*

¹ *Ex parte Levitt*, 302 U.S. 633, 633–34 (1937).

² *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974); see U.S. Const. art. I, sec. 6, cl. 2 (“[N]o person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).

Richardson that the CIA's expenditures must be published.³ In these cases the Court invoked *Levitt* "in holding that standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share,"⁴ and noting that "whatever *Levitt's* injury, it was one he shared with all members of the public."⁵

Levitt featured similarly in the Court's later reformulations of standing. In *Lujan*, Justice Scalia invoked *Levitt* to deny standing for a "generally available grievance about government."⁶ Various opinions since have said the same thing, including last year's opinion by Chief Justice Roberts in *Gill v. Whitford*.⁷ Whether because of its simplicity, its brevity, or its age, it is a mainstay of federal courts doctrine and of law school instruction.⁸

Still, there is something a little funny about the case, something that ought to clue us to dig deeper. Upon closer inspection, it turns out that *Levitt's* standing is more plausible than the Court acknowledged. Indeed, such a plaintiff would likely have standing today. Worse, on the merits his claims were correct: Hugo Black was unconstitutionally appointed to the Supreme Court. The Court's treatment of the case and the broader controversy suggests some uncomfortable facts about the role of the Supreme Court in settling constitutional questions.

1.2. In Real Life

You would not know, from the droll opinion issued by the Court, what a splash the case made at the time.

In 1937, President Franklin Roosevelt's first nomination to the Supreme Court was then-Senator Hugo Black. Justice Willis Van Devanter had retired that year at the end of the Supreme Court's term, taking advantage of the terms of a new pension made available by statute earlier in the same year. In August 1937, Black was nominated.

³ *United States v. Richardson*, 418 U.S. 166, 176 (1974). See U.S. Const. Art. I, sec. 9, cl. 7 ("[A] regular Statement and Account of the Receipts and Expenditure of all public Money shall be published from time to time.")

⁴ *Schlesinger*, 418 U.S. at 220.

⁵ *Richardson*, 418 U.S. at 176.

⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–75 (1992);

⁷ *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018). See also *Federal Election Commission v. Akins*, 524 U.S. 11, 23 (1998); *Lance v. Coffman*, 549 U.S. 437, 440 (2007); *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 633 (Scalia, J., concurring in judgment); *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1552 (2016) (Thomas, J., concurring).

⁸ *Levitt* is a principal case on standing in MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI, MICHAEL W. MCCONNELL, SAMUEL L. BRAY & WILLIAM BAUDE, *THE CONSTITUTION OF THE UNITED STATES* 418-420 (3d ed. 2016). Obviously this essay expresses my views alone.

The Black nomination engendered an unusual amount of controversy in the Senate, some of which concerned the possible unconstitutionality of his appointment. After the constitutional questions were raised, President Roosevelt told the press that he had received oral assurances from the Attorney General that the appointment was “[P]erfectly legal in every way and Constitutional.”⁹ The Senate did ultimately confirm Black, but the controversy raged on.

On October 4, the Court term opened and newly-appointed Justice Hugo Black took his seat on the bench. There was an oral objection from the gallery. A lawyer named Patrick Henry Kelley¹⁰ asked to raise “a point of personal privilege as a member of this bar,” and argued that Justice Black had not been constitutionally appointed.¹¹ Chief Justice Hughes quickly put down the interruption. As *The New York Daily News* reported:

Hughes’ tone became acid and plain clothes officers moved up from the rear of the room ready for action. “Please put the motion in writing and submit it,” Hughes said sharply. “Oral statements are not permitted on a motion of that character.”¹²

Another lawyer named Albert Levitt then rose with a written motion along these lines, and Chief Justice Hughes permitted him and then

⁹ Franklin Roosevelt, *Press Conference # 391*, p.4 (Aug. 13, 1937) available at <http://www.fdrlibrary.marist.edu/resources/images/pc/pc0052.pdf> (Q: “Has the Attorney General given you any opinion as to the eligibility of a Senator to appointment to the Supreme Court in view of the Retirement Act on emoluments?”)

THE PRESIDENT: Only informally and verbally.

Q Can you tell us what that opinion was?

THE PRESIDENT: Perfectly legal in every way and Constitutional.”). See also ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 238 (1994) (“[A]fter Cummings and Reed hurriedly conferred at the Justice Department, Roosevelt held a press conference to say that Cummings had informed him that Black’s nomination was perfectly constitutional”).

¹⁰ There is some question how to spell Kelley’s surname. In documents during the Black controversy, his surname was spelled both “Kelly” and “Kelley” but his bar admission and previous appearances before the Court were all “Kelley.”

¹¹ Doris Fleeson, *Black Takes Supreme Court Seat*, N.Y. DAILY NEWS, Oct. 5, 1937, at 1-2 (quoted in Kyle C. Kopko & Erin Krause, *Shooting From the Hip, Concealed Cameras in the United States Supreme Court*, 99 JUDICATURE 60, 65 (2015)). Another story describes Kelley as raising “a question of personal privilege” without mentioning the bar membership. *Justice Black on Bench as High Court Receives Protests on Seating Him*, N.Y. Times, Oct. 4, 1937, at 1, 20.

¹² Fleeson, *supra* note 11. The story also contained the last known published photo of the Supreme Court in session until a camera was smuggled in by protesters in 2014. Kopko & Krause, *supra* note 11, at 66.

Kelley to file written motions challenging Black's appointment.¹³ The New York Times described the Chief Justice's behavior as surprising but strategic:

To the surprise of many, the court, instead of denying these applications, took them under review, presumably to pass on them next Monday. The belief is almost universal that the petitions will be rejected without explanation It was surmised that Chief Justice Hughes, a master of tact, had taken the petitions under advisement in order to avert further discussion of them in the chamber.¹⁴

Despite this stunt, they seemed like serious people. Patrick Henry Kelley was a member of the Supreme Court bar,¹⁵ who had litigated two previous cases in the Supreme Court.¹⁶ Albert Levitt was a lawyer and trouble-maker (his obituary called him a "crusading professor") who had variously worked as a lawyer, law professor, judge, and political candidate.¹⁷ (Earlier in 1937 he had finished his third stint as a special assistant to the U.S. Attorney General.) He too was member of the Supreme Court Bar.¹⁸

A week later, the Court rejected their claims. On October 11, the Court issued the now well-known opinion in *Ex parte Levitt*, as well as a companion *per curiam* opinion in Kelley's case, stating simply "The motion is denied. *Ex parte* Albert Levitt, 302 U.S. 633, decided this day."¹⁹ But despite the Court's refusal to spend more than a page on the cases, the decision was recognized as an important one.

Standard practice at the time, then as now, would have been for such a *per curiam* opinion in a non-argued case to be quietly filed with the clerk and released on the equivalent of what is now the orders list.²⁰

¹³ See *Ex parte* Patrick Henry Kelly, 58 S.Ct. 2 (Mem.) (Oct. 4, 1937) ("Mr. Patrick Henry Kelly submitted a motion requesting a hearing on the title of Mr. Justice Black as a member of this Court."); *Ex parte* Albert Lévitte, 58 S.Ct. 2 (Mem.) (Oct. 4, 1937) ("Mr. Albert Lévitte submitted a motion for leave to file a petition for an order requiring Mr. Justice Black to show cause why he should be permitted to serve as an Associate Justice of this Court."). See also *Justice Black on Bench*, *supra* note 11, at 20.

¹⁴ *Justice Black on Bench*, *supra* note 11, at 1.

¹⁵ 1916 J. S. Ct. U.S. 125. A different Patrick Henry Kelley, of Lansing, Michigan, was admitted two years earlier. 1915 J. Sup. Ct. U.S. 83.

¹⁶ *State of Rhode Island v. Palmer*, 253 U.S. 350, 353 (1920); *W. Union Tel. Co. v. Foster*, 247 U.S. 105, 106 (1918).

¹⁷ *Albert Levitt, 81, crusader, is dead*, N.Y. TIMES (June 19, 1968).

¹⁸ 1926 J. Sup. Ct. U.S. 261, 286.

¹⁹ 302 U.S. 634 (1937).

²⁰ Ernest E. Clulow, Jr., Lester M. Ponder, Harry C. Nail, Garfield O. Anderson, John W. Iliff, & Elijah B. White, Jr., *Constitutional Objections to the Appointment of a Member of a Legislature to Judicial Office*, 6 GEO. WASH. L. REV. 46, 47-48 (1937) ("Normally

But instead, Chief Justice Hughes apparently “departed from established precedent by announcing” *Ex parte Levitt* from the bench.²¹

The Court was right to take the challenge quite seriously, but wrong in many other respects. The summary treatment of the challenge might give the impression that there was nothing to see here. But that is not at all true. Turning successively to the merits, the standing questions, and the aftermath of the case, I will suggest that a great deal is concealed beneath the paper surface of the opinion.

2. The Merits

Let us start by figuring out what the fuss was about.

Levitt had two complaints about Hugo Black’s appointment to the Supreme Court. The first and more prominent complaint was that Black’s appointment violated the Emoluments Clause, because of a Supreme Court pension that had been created during Black’s term in the Senate. The second complaint was that there was no proper vacancy in the first place, because Justice Van Devanter’s retirement did not create a vacancy that could be filled by Senator Black.

While neither claim was discussed in any detail by the Supreme Court,²² the Justices was not the first or last to consider the constitutional problems with Black’s appointment. They had been debated at length on the floor of the Senate.²³ After the problem was raised there, President Roosevelt announced that he had received oral assurances from the Attorney General that the appointment was “[p]erfectly legal in every way.”²⁴ The issue was then covered in contemporary law journals.²⁵ And though Roosevelt did not mention it to the press, Attorney General Cummings had commissioned several memos on the legality of

such action would have been recorded with the Clerk without oral comment or explanation by the Court.”). For the modern day equivalent, see William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 NYU J.L. & LIBERTY 1, 5 (2015).

²¹ Clulow et al, *supra* note 20, at 47.

²² A partial excerpt of Levitt’s petition is reprinted at Clulow et al, *supra* note 20, Appendix A, at 88-89.

²³ A summary of the debated issues is in John F. O’Connor, *The Emoluments Clause: An Anti-Federalist Intruder in A Federalist Constitution*, 24 HOFSTRA L. REV. 89, 111-17 (1995); my view of the specifics will follow *infra*.

²⁴ Franklin Roosevelt, Press Conference # 386, *supra* note 9.

²⁵ D.O. McGovney, *Is Hugo L. Black a Supreme Court Justice De Jure?*, 26 CAL. L. REV. 1 (1937); Note, *Legality of Justice Black’s Appointment to Supreme Court*, 37 COLUM. L. REV. 1212 (1937); Editorial, *Resolution Relative to Appointment of Hugo L. Black as a Justice of the Supreme Court of the United States*, 4 JOHN MARSHALL L. Q. 71.

Black's appointment.²⁶ These analyses were not always clear or accurate, and have been largely forgotten today, but they give us enough information to understand and evaluate Levitt's claim.

2.1. The Emoluments Claim

Let us start with Levitt's leading claim. As noted, Article I, Section 6 of the Constitution says: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States . . . the Emoluments whereof shall have been encreased during such time."²⁷

Hugo Black was a Senator from Alabama, who was elected in 1926 and reelected to serve from 1933 to 1939. During that time ("the Time for which he was elected")—on March 1, 1937—a new retirement option, including a pension, was created for Justices of the Supreme Court. The statute passed by Congress allowed Supreme Court justices to "retir[e] from active service on the bench" and continue to receive their full salary.²⁸

Justice Black was appointed later that year to a seat on the Supreme Court. That seat was a "civil Office under the Authority of the United States," covered by Article I, Section 6. We can attempt to establish this as a matter of abstract analysis: Offices "under" the United States likely include all offices "created, regularized, or defeasible by federal statute,"²⁹ and this category includes judgeships, all of which are created and regularized by statute. But even if one debates this definition of "under" or accepts the very revisionist argument that Supreme Court seats are *not* regularized by statute,³⁰ we have the best evidence from early practice: President George Washington.³¹

²⁶ **Citations to come.** Great thanks to Judge Glock for alerting me to and sharing these documents.

²⁷ U.S. Const. art. I, §6, cl. 2. There are two other clauses concerning "emoluments," one of which regulates presidential compensation, U.S. Const. art. II, sec. 1, cl. 7, and one of which regulates foreign emoluments, U.S. Const. art I, sec. 9, cl. 8. So far as I know, they have no relevance here.

²⁸ 50 Stat. 24 (1937).

²⁹ See William Baude, *Constitutional Officers: A Very Close Reading*, JOTWELL (July 28th, 2016) (synthesizing work by Seth Barrett Tillman); see also Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 NW. U. L. REV. 399, 414-415 (2012) (discussing an early list "of every person holding any civil office or employment under the United States, (except the judges)").

³⁰ James Durling & E. Garrett West, *Appointments Without Law*, Virginia Law Review (forthcoming) (draft).

³¹ On the authority of Washington, see AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 313-14 (2012); see also William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 59-62 (2019).

In 1793, President Washington attempted to nominate Senator William Paterson to the Supreme Court, but the Judiciary Act had been passed during Paterson's elected Senate term, and the term was not over. After realizing that this appointment would violate Article I, Section 6, Washington wrote to the Senate that it was his "duty to declare, that I deem the nomination to have been null by the Constitution."³² Washington then renominated Paterson the next month, after the expiration of his term.³³

The appointment was covered by the clause. The only possible defense on the merits was that the creation of the pension did not constitute an "encrease[]" to the "Emoluments" of the office.

2.1.1 Retirement vs. Resignation

It is plausible to see the pension as an increase in emoluments, but it depends on how one looks at it. Noah Webster's 1828 American dictionary defined "Emolument" as "The profit arising from office or employment. . . ." or "profit; advantage; gains in general."³⁴ Founding-era English dictionaries defined it in similar variation.³⁵ The question is whether the retirement pension was a profit that triggered the clause.

This is slightly complicated, because even before the 1937 statute, Justices already had the option to receive a pension equal to his full salary if he *resigned* from the bench. The new option to retire thus did not take retiring Justices from zero to pension. Rather, it allowed them to receive that money as a retired justice, rather than a resigned justice.

This distinction was important: A justice who resigned was no longer an Article III judge, and therefore no longer protected by Article III's rule that his "compensation . . . shall not be diminished during their

³² 1 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, PART ONE, at 90 (Maeva Marcus, et al, ed. 1985).

³³ *Id.* at 90-91.

³⁴ NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). There is a debate about which of these two definitions (office-related, or not) is used elsewhere in the Constitution. Compare Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 103 MINN. L. REV. 639, 649-666 (2017) with John Mikhail, *The Definition of "Emolument" in English Language and Legal Dictionaries, 1523-1806*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2995693. But Article I, Section 6 specifically refers to an "Office ... or the Emoluments whereof." Cf. Grewal, *supra* this note, at 658.

³⁵ JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 321 (London, Edward & Charles Dilly 1775). THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY 230 (London, Toplis & Bunney, 18th ed. 1781). WILLIAM PERRY, THE ROYAL STANDARD ENGLISH DICTIONARY 162 (Worcester, 1st am. ed. 1788). SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 307 (10th ed.; London: Rivington et al., 1792). JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY 326 (London, Henry Fisher 1822).

continuance in office.”³⁶ A retired judge, by contrast, continued to hold office under Article III and therefore to have his compensation protected, as the Supreme Court emphasized in its 1934 decision in *Booth v. United States*.³⁷ In other words, the new (retirement) pensions were protected from future diminution, while the old (resignation) pensions were not.

This protection was not purely hypothetical. In 1932, Oliver Wendell Holmes had resigned from the Supreme Court (the act creating the retirement option was not yet in place). And in a matter of months, Congress ended up passing The Economy Act, which cut federal salaries across the board and had the effect of cutting Holmes’s salary in half.³⁸ The treatment of Holmes had spooked Justice Van Devanter and perhaps Justice Sutherland, both of whom reportedly changed their original plans to retire because they feared the treatment of their pensions.³⁹ It is not a coincidence that those Justices retired, making room for Hugo Black and then Stanley Reed, only after the Retirement Act was passed.⁴⁰

Even more immediately, under the Court’s then-governing decision in *Evans v. Gore*, an Article III judge’s salary was immune from federal taxation.⁴¹ The 1932 Revenue Act had imposed substantial taxes on salaries as high as the Justices’, so Justice Van Devanter also had a very strong tax incentive to pick the new retirement option over the pre-existing resignation option.⁴²

To be sure, this immediate tax break turned out to be unavailable to the future Justice Black. In 1939, the Supreme Court limited *Evans*, holding that it did not apply to “United States judges appointed after the Revenue Act of 1932,” because Congress had altered the baseline of compensation at the time of their appointment.⁴³ But during future Justice Black’s lifetime, federal judges continued to have immunity under *Evans* from *new* taxes,⁴⁴ providing another pecuniary advantage for retirement over resignation.

³⁶ U.S. Const. art. III, sec. 1.

³⁷ 291 U.S. 339 (1934).

³⁸ Judge Glock, *Unpacking the Supreme Court: Judicial Retirement, Judicial Independence, and the Road to the 1937 Court Battle*, 105 J. AMER. HIST. 47, 54-55 (2019). Congress also reduced judicial salaries again two years later, producing litigation that reached the Court and emphasized the different positions of retired and resigned Justices. *Booth v. United States*, 291 U.S. 339 (1934).

³⁹ Glock, *supra* note 38, at 56-58.

⁴⁰ *Id.* at 68.

⁴¹ 253 U.S. 245 (1920).

⁴² Glock, *supra* note 38, at 56 & n.25.

⁴³ *O’Malley v. Woodrough*, 307 U.S. 277 (1939).

⁴⁴ This portion of *Evans* was overruled in *United States v. Hatter*, 532 U.S. 557 (2001). After *Hatter*, federal judges have protection only against discriminatory taxes that treat judges differently from others. *Id.* at 569-70, 572-78.

To be sure, these pecuniary benefits are somewhat hypothetical; they are triggered by future changes in judicial compensation and taxation but they were real enough even at the time. It is therefore plausible to see the new pension as an increase in the emoluments of the office.

2.1.2 Retirement vs. Active Service

However, there is an alternative comparison which makes the pension seem less like an increase in emoluments. We could instead compare the new option of retirement to the option of simply continuing in service. While retirement had pecuniary advantages over resignation, a retired judge made no more money, and had no more constitutional protection, than an active one.

If we focus on this comparison, what the pension did was rather to allow Justices to make the *same* amount of money, regardless of whether they worked. That is an increase in leisure, not an increase in monetary profit. To be sure, most employees would tell you that working less for the same money is valuable. But it is a stretch to say that the Emoluments Clause encompasses such non-pecuniary benefits as increased leisure or improved working conditions.

Consider, for example, the nineteenth century disputes about the Supreme Court Justices’ “circuit riding” obligations.⁴⁵ In 1844, Congress lessened the justices’ circuit-riding responsibilities to only one visit per year.⁴⁶ Levi Woodbury was a U.S. Senator elected for the term of 1841-47, and was appointed to the Supreme Court by President Polk in 1845, with no apparent emoluments clause problem. Similarly, during Justice Black’s nomination, Senator Minton pointed out that Congress had recently “built this nice courthouse across the way for the Supreme Court,” but even Black’s opponents did not think that had “increased the emoluments of the members of the Court.”⁴⁷ And, as Senator Connally put it, an emoluments increase did not include “a soft chair to sit in, instead of a hard one” or “air-cooling” an office building.⁴⁸

2.1.3 The Defensibility of the Appointment

It is not clear which comparison the Emoluments Clause calls for. Some contemporaneous commentary assumed it was the comparison of the decreaseable pension available by resigning to the non-decreaseable pension available by retiring, and if that is the comparison there is a

⁴⁵ See generally David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007).

⁴⁶ An Act concerning the Supreme Court of the United States, ch. 96, 5 Stat. 676 (June 17, 1844). For background, see Stras, *supra* note 45, at 1723 n.91.

⁴⁷ 81 Cong. Rec. 9076 (Aug. 17, 1937).

⁴⁸ 81 Cong. Rec. 9086 (Aug. 17, 1937).

plausible violation.⁴⁹ On the other hand, others argued that the comparison is between the non-decreasible salary available to active Justices versus the equally non-decreasible salary available to retiring Justices.⁵⁰ In that case, there is probably no violation.

Moreover, one might argue that the *purpose* of the Clause argues against applying it to the Black appointment.⁵¹ The apparent purpose of the Clause is to guard against a specific kind of conflict of interest. Members of Congress might vote for inflated salaries for a given office in the hopes that they would occupy it. They might even be convinced to inflate an office's salary *in exchange* for being the first one to occupy it.

It is not clear that this purpose of the Clause applies to the pension statute. The central purpose of the statute seems to have been to encourage Supreme Court Justices to retire so that President Roosevelt could fill the seats with younger appointees of his choosing.⁵² The retirement option was obviously designed to be attractive, but the attraction was designed to get Justices to *give up* most of the powers of their office, not to lure members of Congress onto the Court. It seems unlikely that the pension – the eventual future ability *not* to exercise the powers of a Justice – is what lured Hugo Black into his seat.⁵³ One might be worried about Congress's attempt to create vacancies that its own members could then occupy, but that worry is dealt with by a different provision of Article I, Section 6, to be discussed in a moment.

Because neither the Court nor Justice Black addressed Levitt's claims on the merits, we do not know which if any of these arguments and counterarguments they would have thought persuasive.⁵⁴ What we

⁴⁹ See, e.g., 81 Cong. Rec. 9076 (Aug. 17, 1937) (statement of Senator Burke); *id.* at 9094 (Sen. Austin).

⁵⁰ See, e.g., 81 Cong. Rec. 9083 (Aug. 17, 1937) (Sen. Connally) (“He does not get a copper cent more when he shall have retired than if he had remained on the Bench.”); *id.* (Sen. Minton) (“It does not increase his emolument. It just decreases his work.”); *id.* at 9086 (Connally again); *id.* at 9094 (Sen. Hatch).

⁵¹ Of course, there are debates about the extent to which purpose should be used in interpreting the Clause. Compare Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907, 908 (1994) with David Barron, *Validity of Statutory Rollbacks As A Means of Complying with the Ineligibility Clause*, 2009 WL 1691513, at *5-12 (O.L.C. May 20, 2009); Office of the Attorney General: Hearing on S. 2673 Before the S. Comm. on Post Office and Civil Service, 93d Cong. 11 (1973) (statement of Robert H. Bork, Acting Attorney General of the United States); AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 378-81 (2012)

⁵² See Glock, *supra* note 38, at 65-68 (discussing the potentially complementary relationship between the retirement bill and the President's own court-packing plan).

⁵³ As it happens, Black did avail himself of the option to retire, on September 17, 1971; but he was very ill and died only eight days later, on September 25. Newman, *supra* note 24, at 623.

⁵⁴ One other possible defense was that Hugo Black would not actually *receive* the emoluments until age 70, which would be long after his 1933-1939 Senate term. Todd B.

do know is that this claim is quite plausible, but there were defensible reasons for rejecting it.

2.2 The Vacancy Claim

Levitt's other claim is slightly more obscure, but turns out to have posed the more serious argument against Justice Black's appointment. As the Court put it, Levitt's complaint was that "there was no vacancy for which the appointment could lawfully be made," even though Justice Van Devanter had purported to retire under the terms of the statute. This formulation turns out to contain two alternative arguments and will eventually lead us back to Article I, Section 6.

To unpack: Before the 1937 Act, it was fairly straightforward to see how a Supreme Court seat was vacated by one Justice for another. The sitting justice resigned, lost his office, and lost his status as an Article III judge. Somebody else could therefore be appointed to that same office.

But under the retirement option, it is more complicated. Retired Justices retained some ability to exercise the judicial power. In particular, the statute authorized the retired Justices, if designated by the Chief Justice, "to perform such judicial duties, in any judicial circuit, including those of a circuit justice in such circuit, as such retired Justice may be willing to undertake."⁵⁵ That is why they remained Article III judges under *Booth*, which had just held that retired district and circuit judges continued in office for purposes of Article III and therefore could not have their compensation reduced.⁵⁶

Yet Justice Black was also appointed to be an Article III judge, an associate justice. So now there were two judges where previously there was one. For this to happen, either Justice Black or Justice Van Devanter must now hold a new office. But for either of them to hold a new office creates a serious constitutional problem, or rather two different

Tatelman, *The Emoluments Clause: History, Law, and Precedents*, Congressional Research Service at 6-7 (January 7, 2009); cf. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957* (4th ed. 1957) 72-73. But the Constitution discusses the emoluments of the *office*, not whether any given appointee will indeed collect them. See 81 Cong. Rec. 9086 (Aug. 17, 1937) (in which Senator Connally argues that Black won't get the emoluments, then quickly retreats: "That statement was really surplusage ... there is no increase of emolument.").

⁵⁵ 50 Stat. 24.

⁵⁶ *Booth v. United States*, 291 U.S. 339 (1934). The Supreme Court Retirement Act expressly equated the retired Justice's status with that of the other retired judges. 50 Stat. 24 ("Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court by section 260 of the Judicial Code (U.S.C., title 28, sec. 375)").

problems depending on the characterization. Let us consider both possibilities.

2.2.1 A New Office For Justice Van Devanter?

The seat that Justice Van Devanter held had been created in 1789, and previously held by a string of justices from Edward White all the way back to John Rutledge. One possibility, perhaps the seemingly straightforward one, is that Justice Black was appointed to that 1789 seat.

But then we need a seat for the retired Justice Van Devanter. The statutory powers he could exercise as a retired justice (and his continued Article III protections) made him an officer of the United States. So we could say that while Justice Black got Justice Van Devanter's old office, Justice Van Devanter got a new office, the office of retired justice.

Here is the rub. For Van Devanter to hold a new office as an officer of the United States, he must be appointed pursuant to Article II: *i.e.*, nominated by the President and confirmed by the Senate.⁵⁷ But that, of course, did not happen. Nobody appointed Justice Van Devanter to be a retired justice, he just retired.⁵⁸ So if a retired justiceship is a new office, then Justice Van Devanter's retirement was unconstitutional, because it was not conducted under the Appointments Clause.⁵⁹

As Senator Tydings put the point:

In considering the legality of what is happening, one of the difficulties that has confronted me, and to which I have not yet received an answer in my own thought, is if Justice Van Devanter can sit as a circuit court judge without being appointed and confirmed by the Senate, how he can occupy that category when the Constitution provides that nominees shall be named by the President and confirmed by the Senate. Will the Senator be so kind as to tell me what the committee has found in reference to that paradox, namely

⁵⁷ U.S. Const. art. II sec. 2. para. 2. If retired Justices were inferior officers, their appointments could instead be vested "in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

⁵⁸ Letter from Willis Van Devanter to President Franklin Roosevelt (May 18th, 1937).

⁵⁹ This argument has a parallel to the concerns raised in *Weiss v. United States*, 510 U.S. 163, 174-176 (1994), that changing the character of an officer's duties too much can sometimes require a new appointment. More particularly, a modern article about senior judges argues that switching from an active Article III judge to a senior one is a change of sufficient magnitude to require a new appointment. David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 494-506 (2007). But the argument here is a much more modest one. It is enough to note that *if* Justice Van Devanter held a new office, that would require a new appointment.

that Justice Van Devanter becomes an associate judge without being named and confirmed by the Senate?⁶⁰

The closest we could come might be to say that even though Justice Van Devanter's retirement was not formally nominated by the President nor confirmed by the Senate, perhaps it received the functional equivalent when the Senate passed the 1937 Act and the President signed it into law. But nobody knew for sure who would retire when the Act was passed, so it would require a sort of blind blanket appointment of any future retirement. This reverses the constitutional appointments process, which begins with a specific person who is then selected by the President and approved by the Senate. Such blanket approval is also contrary to the purpose of the process, in which the Senate was to provide a "check upon a spirit of favoritism in the President, and . . . to prevent the appointment of unfit characters."⁶¹ And such a scheme would be even harder to square with the many subsequent retirees under the Act, most of whom were not even on the Court, and one not even alive, in 1937.⁶²

2.2.2 A New Office for Justice Black?

So suppose that we cure the problem by taking the other tack: Justice Van Devanter keeps his old office, albeit with some big changes in the duties of that office. Indeed, this is how the Supreme Court described retirement in *Booth*: "By retiring pursuant to the statute a judge does not relinquish his office."⁶³ And it solves Justice Van Devanter's problem. If he holds the same office all along, he does not need a new appointment.

But now we need a seat for Justice Black. If he is not holding the office created in 1789, because Justice Van Devanter is keeping it, then we must create a new one for him. Under this possibility even though it may *look* like Justice Van Devanter vacated his office for Justice Black, in fact Justice Van Devanter kept his office while a new replacement office was created for Black.⁶⁴ As Senator Steiwer described this option:

⁶⁰ 81 Cong. Rec. 9078 (Aug. 17, 1937). See also *id.* at 9092 (Sen. Austin) ("[U]nder what appointment is Mr. Justice Van Devanter acting?").

⁶¹ The Federalist No. 76, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁶² For subsequent retirements through 1999, see the tables at Artemus Ward, *Deciding to Leave, The Politics of Retirement from the United States Supreme Court* 131, 159 (2003). Justice Souter, who retired from the Court in 2009, was born in 1939. <https://www.fjc.gov/history/judges/souter-david-hackett>

⁶³ 291 U.S. 339, 350.

⁶⁴ Cf. *Booth*, 291 U.S. at 350 ("Some reference is made to the fact that under the act a successor to the retiring judge is to be appointed, and it is claimed the direction is inconsistent with his retention of office. The phraseology may not be well chosen . . .").

[I]t would seem to me that the Justice in this case, having retired, still retains his judicial powers, and is still a member of the Court; that in the constitutional sense there is no vacancy, but that the act of March 1, 1937, by implication increases the size of the Court, and that a vacancy has resulted.⁶⁵

Alas, this option also has a constitutional problem – one that makes it impossible for Justice Black to be appointed.

If Justice Black’s office was not created back in 1789, then it was newly created in 1937. (We could describe the office as being created either at the time of Justice Van Devanter’s retirement, or at the time the retirement statute was passed, but these things happened in the same year, so we will not worry about which one it is.)

But if the office was newly created in 1937, Hugo Black could not be appointed to it. Why? Because of *another* provision of Article I, Section 6, Clause 2, which says: “No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States *which shall have been created . . .* during such time.”⁶⁶ As discussed above, 1937 was squarely in the middle of Hugo Black’s elected term, and so he simply could not be appointed to any office created in that year.

2.2.3. The Not So Defensible Appointment

It is debatable which is the better characterization of the replacement of Justice Van Devanter by Justice Black, but both of them have constitutional problems.⁶⁷ Under the first characterization, every Supreme Court retirement has been unconstitutional. Under the second, the retirements generally may be permissible, but Justice Black’s appointment was not.

If one were hellbent on defending Justice Black’s appointment, one *might* stick to the first characterization, and argue that even if Justice Van Devanter’s retirement was unconstitutional, that was *his* problem, not Black’s.⁶⁸ But it is not so clear that the issues can be separated,

⁶⁵ 81 Cong. Rec. 8960 (Aug. 16, 1937).

⁶⁶ U.S. Const. art. I, §6, para. 2 (emphasis added).

⁶⁷ Cf. 81 Cong. Rev. 9080 (Aug. 17, 1937) (Sen. Tydings) (complaining that “members of the Judiciary Committee who are supporting Senator Black’s nominations are arguing it from two entirely different standpoints which are in conflict with each other, and we who are not on the committee are having a great deal of difficulty in finding out just what the committee as a whole thinks.”).

⁶⁸ Indeed, that is what Senator Hatch argued at one point. 81 Cong. Rec. 9084 (Aug. 17, 1934) (“If there is any constitutional question raised, if there is any doubt as to the

for if Justice Van Devanter could not retire, then his seat was not vacant. One can vacate his seat for Justice Black only by converting Justice Van Devanter's forbidden retirement into a categorical resignation, which is contrary to what his resignation letter said and therefore seems an inapt response to the constitutional problem.⁶⁹ And again, this defense of Justice Black's appointment would come at a high cost – the invalidation of every subsequent retirement from the Court.

The other option put forward by Black's supporters in the Senate was even less plausible. The theory was that all along, Justice Van Devanter (and all Supreme Court Justices) had actually had *two* different offices simultaneously, and that his retiring abandoned only one of them. As Senator McGill put it, "appointment to the circuit court is included in the appointment to the Supreme Court."⁷⁰ Justice Van Devanter needed no new appointment to act as a retired justice on a circuit court because "Justice Van Devanter has been a member of that court all the time."⁷¹

This is too clever by half. When Justice Van Devanter was nominated to the Supreme Court, he had received only one nomination,⁷² one confirmation by the Senate,⁷³ and thus one appointment and one commission.⁷⁴ That means he held only one office, since the Constitution matches offices to commissions, nominations, confirmations, and appointments. (As it happens, Justice Van Devanter had previously been a judge on the Eighth Circuit, but he had abandoned that office to be filled by somebody else after he was elevated to the Supreme Court.)⁷⁵ Whatever was "included" in that office, there was only one. The attempt to retroactively attribute a second office to him was not consistent with the Constitution's structural requirements, or the actual facts.

validity of the new office, does not that doubt go to the position now held by Justice Van Devanter rather than the old position held by him?"); cf. id. (Sen. Connally) (praising Hatch as "a very high-class lawyer.").

⁶⁹ Indeed, this point was debated at length in the Senate, with some emphasizing that Justice Van Devanter's "retirement was exactly in compliance with the terms of the Retirement Act as passed by Congress. He was extremely careful to specify." 81 Cong. Rec. 9081 (Aug. 17, 1937) (Sen. Wheeler), while others argued that if Justice Van Devanter was not retired he was fully resigned, because "[by] abandoning the duties of an office one resigns from that office. That is the law." Id. (Sen. McGill).

⁷⁰ 81 Cong. Rec. 9078 (Aug. 17, 1937).

⁷¹ Id. The view was also defended by Senator Barkley. 81 Cong. Rec. 9079 (Aug. 17, 1937).

⁷² 46 Cong. Rec. 204 (Dec. 12, 1910).

⁷³ 46 Cong. Rec. 335 (Dec. 15, 1910).

⁷⁴ See 81 Cong. Rec. 9092 (Aug. 17, 1937) (Sen. Austin).

⁷⁵ See 61 Cong. Rec. 1058 (Jan. 18, 1911) ("Walter I. Smith, of Iowa, to be United States circuit judge, eighth circuit, vice Willis Van Devanter, appointed Associate Justice of the Supreme Court."). See also 61 Cong. Rec. 1734 (Jan. 31, 1911) (recording Judge Smith's confirmation).

A somewhat similar workaround might be to argue that Justice Van Devanter's nomination and confirmation to his seat as a retired Justice was implicit in the nomination and confirmation of Justice Black. This would allow Black supporters to avail themselves of the "New Office for Justice Van Devanter" theory, while finding something like an appointment for Van Devanter to that seat. As with the above theory, however, this requires us to find an implicit second appointment hidden inside another explicit one; and as with the above theory, this bundling of two appointments in one vote and one commission seems inconsistent with the structural requirements of the Constitution. Indeed, reading a single commission as if it were a commission to two separate people (Black and Van Devanter) is even more awkward than reading it as if it were two commissions to the same person (two offices for Van Devanter). Who would get to hang it on his wall?

3. Jurisdiction

3.1 Standing

Of course, none of these legal issues were ever resolved by Supreme Court litigation, because the Court concluded that Levitt did not have standing. In rejecting Levitt's standing to challenge Justice Black's appointment, the Court wrote that he had "disclose[d] no interest ... other than that of a citizen and a member of the bar of this Court."⁷⁶ The Court concluded that these were insufficient because Levitt needed to show "a direct injury" and not "merely a general interest common to all members of the public."⁷⁷

While that conclusion is now cited as black-letter law, it is not clear that it is consistent with subsequent case law, and if it is it is not exactly for standing reasons.

3.1.1 as a Citizen

The Court's rejection of Levitt's interest as "a citizen" seems correct and hard to quarrel with. As a matter of longstanding doctrine, both before and after *Levitt*, the fact that one is a citizen does not alone make one the proper party to litigate general noncompliance with the law, or even noncompliance with the Constitution. The Court had said as much in cases before *Levitt*, such as *Fairchild v. Hughes*,⁷⁸ and continued to

⁷⁶ 302 U.S. 633, 636 (1937).

⁷⁷ *Id.*

⁷⁸ 258 U.S. 126, 129–30 (1922) ("Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid").

say so afterwards.⁷⁹ There are more difficult questions about whether one can sue if one is both a citizen and the personal beneficiary of a statutory cause of action,⁸⁰ but Levitt did not seem to have one.

3.1.2 as a Supreme Court bar member

But Levitt's more interesting claim to standing, to which the Court gave undeservedly short shrift, was his interest as a member of the Supreme Court bar. That fact alone set Levitt off from the vast majority of American citizens. The number of Supreme Court bar members in 1937 was only in the thousands (or perhaps the low tens of thousands),⁸¹ as against more than one hundred *million* citizens in alive in that year.⁸²

And more particularly, as a member of the Supreme Court bar, he was subject to the regulation of the Court. By 1937, the Court had already promulgated rules requiring of bar members "that their private and professional characters shall appear to be good,"⁸³ and providing for their suspension if they were "guilty of conduct unbecoming a member

⁷⁹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992) ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").

⁸⁰ See generally William Baude, *Standing in the Shadow of Congress*, 2016 SUPREME COURT REVIEW 197 (2017).

⁸¹ An exact count is probably impossible, because "the rolls of the Court give no clue as to how many Bar members have died, retired, resigned," etc., STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 982 (10th ed. 2013), but we do have a decent estimate of the number of lawyers who had *ever* been admitted to the Supreme Court Bar by 1937, which obviously overstates the number of living active bar members in that year: around 4,700.

For the math, see *id.* at 982 n.2 ("Prior to 1925, lawyers were admitted only on oral motions by other members; their names were subscribed in the rolls without being numbered. The rolls for the 1845–52 period were destroyed by fire, making a precise total count impossible. But one of the former Clerks, John F. Davis, made a careful study of all the rolls in 1966 and reached an educated estimate that 28,080 attorneys were admitted between 1790 and 1925." (citing E. May, *One Hundred Thousand Lawyers*, THE DOCKET SHEET, Vol. 12, No. 2, p. 3 (Mar.—Apr. 1975).) Furthermore "about 285,000 have been admitted since 1925, when written applications were first required. The annual growth rate of the Bar, since the institution of the 'admission-by-mail' option in 1970, has been in the neighborhood of 5,000 admissions." *Id.* at 982. By my back-of-the-envelope calculations, that works out to be approximately 1556 admissions/year from 1925 to 1970 ($45x + 43 \cdot 5000 = 285,000$), for an estimate of 46,747 total admissions from 1790 to 1937.

⁸² Halbert L. Dunn, *Vital Statistics of the United States 1937*, U.S. Department of Commerce Bureau of the Census (1939), at 16, available at http://www.nber.org/vital-stats-books/VSUS_1937_1.CV.pdf.

⁸³ Rule 2.1 (1931), at 286 U.S. 594

of the bar of this court.”⁸⁴ It also reserved the right to regulate their practice and behavior further.⁸⁵ So Justice Black’s appointment was not just a question of principle to Albert Levitt, but a question of who would be empowered to regulate Levitt’s professional behavior.

This kind of regulated-party status is exactly the kind of interest that the Court has found sufficient for standing in subsequent separation of powers cases. Consider:

In *Buckley v. Valeo*, the Court found that a group of political parties and candidates had standing to challenge the appointment of members of the Federal Election Commission.⁸⁶ It held that “Party litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.”⁸⁷ The *Buckley* plaintiffs had such interests by dint “of impending future rulings and determinations by the Commission.”⁸⁸

In *Free Enterprise Fund v. PCAOB*, the Court heard a challenge by a regulated accounting firm to the appointment of members of a federal oversight board.⁸⁹ The government had argued that the firm lacked standing “because no member of the Board has been appointed over the Chairman’s objection.”⁹⁰ But the Court rejected this argument, concluding that “petitioners’ standing does not require precise proof of what the Board’s policies might have been in that counterfactual world.”⁹¹

In other cases like *Morrison v. Olson*⁹² and *NLRB v. Noel Canning*,⁹³ the Court similarly adjudicated appointments challenges brought by the subjects of regulatory authority, without even discussing standing. But presumably it relied on the same principle – that those subject to the authority of a government actor have standing to challenge that actor’s claim to lawful power.⁹⁴

That same principle, however, should have supported standing for Albert Levitt. As a member of the Supreme Court bar, he too was

⁸⁴ Rule 2.5 (1931), at 286 U.S. 595

⁸⁵ Rule 5 (1931), at 286 U.S. 596.

⁸⁶ 424 U.S. 1, 117-118 (1976).

⁸⁷ *Id.* at 117.

⁸⁸ *Id.*

⁸⁹ 561 U.S. 477 (2010).

⁹⁰ *Id.* at 512 n.12.

⁹¹ *Id.*

⁹² 487 U.S. 654 (1988).

⁹³ 134 S.Ct. 2550 (2014).

⁹⁴ There is some dispute about whether the plaintiff must be “directly subject to the authority of the agency,” as the D.C. Circuit has held, *Comm. for Monetary Reform v. Bd. of Governors*, 766 F.2d 538, 543 (D.C. Cir. 1985), or whether non-regulated entities who suffer an injury may also sue, William Marks, *Bond, Buckley, and the Boundaries of Separation of Powers Standing*, 67 VAND. L. REV. 505 (2014) (taking this position). But at a minimum, those directly subject to the authority of the agency may sue.

subject to the Court's authority to discipline lawyers who practiced before it. That status as a regulated party would seem to give him the same sort of standing as *Buckley*, *Free Enterprise Fund*, *Olson*, and *Noel Canning* had.

To the extent there was a problem with Levitt's standing as a member of the Supreme Court bar it would better be described as one of ripeness. So far as we know, in 1937 Levitt was a man of good "private and professional character" and no "unbecoming conduct," so he had no immediate reason to fear disbarment or other Supreme Court discipline.⁹⁵ So perhaps when the Court said that Levitt must have "sustained" or be "immediately in danger of sustaining, a direct injury, as the result of that action"⁹⁶ it really invoked principles that we would now call ripeness rather than standing.

Even that ripeness justification is not totally consistent with subsequent cases. After all, in *Buckley* the Federal Election Commission had only exercised a small portion of its rulemaking power, and "many of its other functions remain as yet unexercised."⁹⁷ For that reason, the D.C. Circuit had considered most of the challenges unripe, but the Supreme Court disagreed, concluding that the importance of the question and the inevitability that the Commission would indeed exercise its powers against somebody, justified hearing all of the challenges in full.⁹⁸

Similarly, in *Free Enterprise Fund* the plaintiffs had been allowed to challenge the appointment structure of the board – the vesting of appointment authority in the whole SEC rather than the Chairman – even though "no member of the Board has been appointed over the Chairman's objection."⁹⁹ That could have been an invitation to declare the claim unripe, but the Court gave the benefit of any uncertainty about the "counterfactual world" to the plaintiffs.¹⁰⁰ Had Albert Levitt been given the same generous treatment, the Court should have found his claims as a Supreme Court bar member ripe.

3.1.3 as a Litigant?

⁹⁵ That said, Levitt's colorful personal and professional life put that question less far beyond doubt than many other bar members. Cf. Paul R. Baier, *Holmes and Honors Law at LSU—From the Great Hall to La Maison Francaise*, 63 LA. L. REV. 53, 64 n.48 (2003) ("Levitt was likely the most unusual, colorful, and, some would contend, eccentric law teaching in the history of Washington and Lee."); *Miss Elsie Hill, Suffrage Picketeer, Weds Prof. Levitt, but Will Keep Her Own Name*, NEW YORK TIMES (Jan. 19, 1922) (describing Levitt's wife as "a 'militant' who had 'served time in the District of Columbia jail as one of the picketers at the White House.'").

⁹⁶ 302 U.S. 633, 636 (1937).

⁹⁷ *Buckley*, 424 U.S. 1, 113-118 (1976).

⁹⁸ *Id.* at 115-117.

⁹⁹ 561 U.S. 477, 512 n.12.

¹⁰⁰ *Id.*

Moving beyond the facts of *Levitt* itself, we discover another recurring puzzle of standing doctrine: if Levitt did lack standing to challenge Black’s appointment, does that mean that nobody would have standing? The Court has occasionally suggested that this is possible: “The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”¹⁰¹ But it seems a troubling possibility, and it has been argued that in “actual judicial practice” there are few or no such cases.¹⁰²

Fortunately, it seems as if it should have been easy to find other parties with standing to challenge Justice Black’s appointment. Even if Supreme Court Bar members had no cognizable interest, surely *litigants* of merits cases before the Supreme Court would have one. A principle established long before *Levitt* held that a serious defect in a judge’s claimed authority could invalidate decisions they participated in. As the Supreme Court put it in an 1893 appeal: “If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error, or certiorari.”¹⁰³ Versions of that rule have been repeated by various cases up to the modern day.¹⁰⁴

By this logic, any litigant before the Supreme Court would have had standing to challenge Justice Black’s appointment to the Court. To be sure, the challenge might not find a disinterested tribunal – it would likely be resolved either by Justice Black himself, or by the whole Court.¹⁰⁵ But either way, it would have been confronted on the merits, and as we have seen, they are not free from difficulty – indeed, they are

¹⁰¹ *Clapper v. Amnesty International*, 133 S.Ct. 1138, 1154 (2013) (quoting various cases); see also *United States v. Richardson*, 418 U.S. 166, 179 (1974) (“It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process”).

¹⁰² Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1250 (2014) (“In practice, each plaintiff’s standing critically depends, not on a constant benchmark, but on how she compares with other would-be claimants. Standing is relative.”).

¹⁰³ *Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 387 (1893).

¹⁰⁴ *Nguyen v. United States*, 539 U.S. 69, 77-82 (2003) (citing many cases).

¹⁰⁵ In a contentious recusal controversy a few years later – also featuring Justice Black – Justice Jackson maintained that “There is no authority known to me under which a majority of this Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting in any case.” *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 897, 897 (1945) (Jackson, J., concurring in the denial of rehearing). But that logic doesn’t extend to a challenge to the constitutional validity of the appointment—i.e., a claim that the Justice was not “duly commissioned” after all. For background on the *Jewell Ridge* controversy, see Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203, 204-229.

quite strong. So *Ex Parte Levitt* did not render Hugo Black's seat safe; it left thousands of possible challenges coming down the pike.

3.2 Remedy and Appellate Jurisdiction

Even if the Court's conclusion about Levitt's standing was not entirely correct, that did not mean that the Court would have had to reach the merits. Another fundamental procedural question remained: what cause of action or remedy was Levitt seeking, and under what authority?

In later cases like *Morrison* and *Noel Canning*, the challenger would raise their separation of powers claim as a defense in an enforcement proceeding.¹⁰⁶ In others like *Buckley* and *Free Enterprise Fund*, the challenger would bring an anticipatory claim within the federal question jurisdiction of a federal district court.¹⁰⁷ Levitt's claim was neither of these. Levitt had characterized his motion as a "Petition for an Order to Show Cause,"¹⁰⁸ and contemporary coverage suggested that "it is conceivable that this method of direct petition to the Court . . . is the proper procedure to bring the question before the court."¹⁰⁹ (One might also analogize the claim to a writ of mandamus or a writ of quo warranto, but the former was the traditional remedy for somebody who was kept *out* of office and the latter was vested exclusively in the DC courts.)¹¹⁰

Still, even if we assume the availability of some kind of cause of action, the Supreme Court might have been powerless to hear Levitt's case for a more fundamental reason. Levitt was asking the Supreme Court to hear a controversy that had not been litigated in any other court, and therefore one that fell within the Court's "original jurisdiction" as a constitutional matter.¹¹¹ But Article III of the Constitution stated only that the Court's original jurisdiction extended to "cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party," and no less an authority than *Marbury v. Madison* stated that nothing could be added to this.¹¹²

¹⁰⁶ *Morrison v. Olson*, 487 U.S. 654, 668 (1988) (motion to quash); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014) (motion to set aside).

¹⁰⁷ *Buckley v. Valeo*, 424 U.S. 1, 8 (1976); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 487 (2010). In *Buckley*, there was a special statutory cause of action created by the Federal Elections Campaign Act. 424 U.S. at 8 & n.4 (citing 2 U.S.C. 437h(a) (1970)). In *Free Enterprise Fund*, the cause of action was a non-statutory one analogized to *Ex Parte Young*. 561 U.S. at 491 n.2.

¹⁰⁸ Clulow et al, *supra* note 20, Appendix A, at 88.

¹⁰⁹ Clulow et al, *supra* note 20, at 52.

¹¹⁰ *Id.* at 52-54.

¹¹¹ See *Ex Parte Levitt*, 302 U.S. 633 (1937) ("No. ___, original.").

¹¹² *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 174 (1803) ("Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all").

So if there was a jurisdictional problem in *Levitt*, perhaps it was not the one described in *Fairchild v. Hughes* but rather in *Marbury v. Madison*. But this problem, too, would be equally inapplicable to a challenge raised by an ordinary litigant before the Court; and it might even be solved by Levitt himself refile his claim in a district court.

4. The Aftermath

4.1. The Lack of a Square Challenge

The Court never did end up adjudicating the constitutionality of Hugo Black. That brings us to perhaps the biggest puzzle of *Ex Parte Levitt* – why not? It is a cardinal rule of standing doctrine that the denial of standing does not necessarily prejudice the lawfulness of the challenged conduct. So how did the Court’s standing decision end up becoming a de facto settlement of Black’s right to sit?

It’s not as if Black’s appointment was unassailably legal. As we’ve seen, the challenges to his appointment were quite plausibly meritorious, and shared by a number of Senators during debate over Black’s confirmation. Even a decision rejecting these challenges could have made important precedent about the definition of “emolument” or the status of Supreme Court retirements. But somehow, over time, the controversy faded, even if it is not entirely clear when or how.

It did not fade immediately. In the aftermath of *Levitt*, at least two litigants did try to challenge Black’s appointment. The petitioners in *Ryan v. Newfield*, an equitable challenge to a securities subpoena, had a petition for certiorari denied on October 18, 1937.¹¹³ They then filed a petition for rehearing, arguing that Justice Black should not have been allowed to participate in the cert. denial. In terms that echoed *Levitt*’s they argued “That the determination of the petition and the order denying same is invalid, ineffectual, null and void in that the court was illegally and unconstitutional constituted for the reasons that said Honorable Hugo L. Black was not and is not eligible under the Constitution of the United States to be an Associate Justice of this Court”¹¹⁴

The Court denied the petition for rehearing without comment, as is usual.¹¹⁵ A 1937 article suggested that because of this denial, the pos-

¹¹³ *Ryan v. Newfield*, 302 U.S. 729, 58 S.Ct. 54 (Mem) (denying certiorari in *Newfield v. Ryan*, 91 F.2d 700 (5th Cir. 1937)).

¹¹⁴ See Petition for Rehearing of Order Denying Petition for Writs of Certiorari, *Ryan v. Newfield*, reprinted in part in Clulow et al, *supra* note 20, Appendix B, at 89-91.

¹¹⁵ The reports show two successive petitions for rehearing denied. See 302 U.S. 777, 58 S.Ct. 137 (Nov. 8, 1937); 302 U.S. 650, 58 S.Ct. 262 (Nov. 15, 1937). I am not yet sure which one is the one reproduced at Appendix B of Clulow et al, *supra* note 20.

sibility of a litigant challenging Black's seat "probably has been definitely excluded."¹¹⁶ In addition to being confusing ("probably ... definitely"?), this assessment of the denial of rehearing is questionable. For the 1930s Supreme Court had been noted for its "almost conclusive practice against rehearings"¹¹⁷ which had also been praised for helping to "achieve a civilized judicial administration."¹¹⁸ A denial of rehearing was not a merits holding.

At least one other rehearing petition came in early 1939, when the Jacobs estate lost a tax case in the Supreme Court. The opinion in *United States v. Jacobs*, for a 4-3 majority, was written by Justice Black.¹¹⁹ A few weeks later, Jacobs's counsel filed a rehearing petition raising both the emoluments and office-creation arguments against Black's seat.¹²⁰ The theory of injury was particularly pointed, because Justice Black had provided the crucial vote to overturn the ruling below, where the estate had prevailed:

Respondent has sustained or is immediately in danger of sustaining direct and material injury . . . [in] that had the Honorable Hugo L. Black not been sitting in the consideration and decision of this case, this Court would have been evenly divided as to the determination of the issues in this case, in which event the judgment of this Court would have been to sustain the judgment of the Circuit Court of Appeals for the Seventh Circuit which was in favor of the Respondent and that unless this motion be granted she will be deprived of property without due process of law in violation of the Fifth Amendment to the Constitution.¹²¹

Nonetheless, the motion was denied with no comment.¹²²

Meanwhile, Black's appointment remained controversial for a few years in some public circles. In 1938, the year after *Levitt*, University of Chicago Law Professor Kenneth Sears observed in the ABA Journal that

¹¹⁶ Clulow et al, *supra* note 20, at 56 n.52.

¹¹⁷ Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 579 (1938).

¹¹⁸ Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1930*, 45 HARV. L. REV. 271, 275 (1931); see also FELIX FRANKFURTER & JAMES M. LANDIS, PREFACE, *THE BUSINESS OF THE SUPREME COURT* at xxxvii-xxxviii (MacMillan 1928) (Transaction Publishers 2008).

¹¹⁹ 306 U.S. 363 (Feb. 27 1939). Justice Brandeis had retired two weeks earlier and Justice Douglas was not confirmed to replace him until April 4; Justice Stone was recused.

¹²⁰ Motion to Set Aside Judgment, *United States v. Jacobs* (Mar. 22, 1939).

¹²¹ *Id.* at 7.

¹²² 306 U.S. 620, 59 S.Ct. 640 (mem.) (March 27, 1939).

“The status of Mr. Justice Black is exciting much legal curiosity.”¹²³ Sears pointed to articles about the lawfulness of Black’s appointment in the California Law Review,¹²⁴ as well as student notes in the George Washington Law Review¹²⁵ (dismissed as “too academic”)¹²⁶ and in the Columbia Law Review.¹²⁷

The issue even surfaced in the American Bar Association. Edward Lee, the dean and cofounder of John Marshall Law School, presented a resolution asking the American Bar Association to appoint a committee of five lawyers who would in turn try once more to get the Supreme Court to consider the lawfulness of Black’s appointment. The ABA Resolutions Committee decided not to adopt the resolution on the force of *Ex Parte Levitt*.¹²⁸ Lee thought that *Levitt* could be distinguished either because the ABA had an unusually strong interest in the question, or because the Court had “on more than one occasion during the past year broken away from an ancient precedent and a technicality of the law.”¹²⁹

But nothing ever came of it. The resolution was not adopted,¹³⁰ and the controversy faded over time. For instance, by 1944, Patrick Henry Kelley was filing pro se again, this time a petition for certiorari in *Kelley v. American Sugar Refining Co.*,¹³¹ but he did not make any challenge to Justice Black’s consideration of the petition.¹³²

4.2. Some Speculation

Somehow, the serious constitutional questions about Justice’s Black’s appointment just went away. The Supreme Court never resolved them, and thousands of litigants with ability to raise them did not, leaving *Ex Parte Levitt* as an odd footprint in the sand. But why not? What gives?

I do not know the answer. Perhaps somebody will unearth something in a Justice’s papers that will shed some light, or perhaps there is

¹²³ Kenneth C. Sears, *Summaries of Articles in Current Legal Periodicals*, 24 ABA J. 154 (1938).

¹²⁴ McGovney, *supra* note 25.

¹²⁵ Clulow et al, *supra* note 20.

¹²⁶ Sears, *supra* note 123, at 154.

¹²⁷ Editorial, *Resolution Relative to Appointment of Hugo L. Black as a Justice of the Supreme Court of the United States*, 4 JOHN MARSHALL L. Q. 71.

¹²⁸ *Id.* at 73.

¹²⁹ *Id.* at 76-77.

¹³⁰ *Id.* at 76-77.

¹³¹ 321 U.S. 791 (1944).

¹³² See Petition for Certiorari, *Kelley v. American Sugar Refining Co.*, No. 712 (1944); Brief in Support of Petition for a Writ of Certiorari, *Kelley v. American Sugar Refining Co.*

nothing to unearth.¹³³ But a couple of odd fragments of the historical record are suggestive.

4.2.1 Not “for a million dollars”

One possibility is that litigants stopped raising the question, even without a ruling, because they feared offending Justice Black, or even the Court as a whole. Consider the Associated Press story reporting the decision in *Ex Parte Levitt*:

Clear Title for Present

Dismissal of the challenges gave Black a clear title to his seat in so far as present legal actions are concerned.

Levitt, however, has indicated that they may be others.

“This fight will not be over if my petition is denied,” he had said before the ruling.

...

When Levitt emerged from the court room, he said: “I am not surprised at the court’s action because it was one of the possibilities for which I was prepared. My only official comment is contained in the Bible, Job 13:15.”

Will Take Another Step

“I don’t know which of possibly four or six steps will be taken but I am certain that another step will be taken. It will depend on my further consideration of the opinion.”

The biblical reference to which Levitt referred was:

“Though he slay me, yet will I trust in him; but I will maintain mine own ways before him.”

...

Solicitor General Stanley Reed said he would not comment on the court’s action “for a million dollars.”¹³⁴

¹³³ Unfortunately the two most relevant Justices, Hugo Black and Charles Evans Hughes, both destroyed their conference notes and many other potentially useful documents. ALEXANDRA K. WIGDOR, *THE PERSONAL PAPERS OF SUPREME COURT JUSTICES: A DESCRIPTIVE GUIDE* 48, 121 (1986)

¹³⁴ *Black’s Right to His Seat Upheld*, LAWRENCE JOURNAL-WORLD, at A1 (Oct. 11, 1937) available at: <https://news.google.com/newspapers?nid=2199&dat=19371011&id=cmFeAAAAIBAJ&sjid=EWENAAAAIBAJ&pg=2936.1530638&hl=en>. And for Levitt’s biblical reference, see Job 13:15 (King James) (“Though he slay me, yet will I trust in him: but I will maintain mine one ways before him.”); Job 13:15 (NIV) (“Though he slay me, yet will I hope in him; I will surely defend my ways to his face.”).

Notice that it would have been easy enough for Reed to say that the United States was pleased with the outcome if he thought that it was obviously correct. Recall that Solicitor General Reed had “hurriedly conferred”¹³⁵ with Attorney General Cummings right before Roosevelt announced that Cummings said that the nomination was “[p]erfectly legal in every way and Constitutional.”¹³⁶ Reed’s reticence to comment at all suggests something else – a recognition that the case raised a sensitive topic, and one that continued to be sensitive, even after the Court’s decision in *Levitt*.

Perhaps future litigants and lawyers figured that if even the Solicitor General of the United States dared not to comment on Black’s eligibility, they would be fools to rush in.

4.2.3 A Taboo?

Here is one other oddity. While *Ex Parte Levitt* is now a mainstay of federal courts doctrine and has been cited in more than a dozen Supreme Court opinions,¹³⁷ its first citation came surprisingly late. That citation was in *Laird v. Tatum*,¹³⁸ decided June 26, 1972. That is nine months after Hugo Black’s death. After that, *Levitt* picked up another citation the following year,¹³⁹ two more in 1974,¹⁴⁰ another in 1975,¹⁴¹ and more in each subsequent decade. But for the first 34 years of *Levitt*’s life, while Hugo Black sat, it was never cited by the Justices.

Now maybe it is just a coincidence. But by comparison, there were plenty of citations in the lower courts during this period.¹⁴² There were citations in Supreme Court briefs.¹⁴³ There were Supreme Court opinions that *could* well have cited *Levitt*, but did not.¹⁴⁴ It is enough to raise the possibility – only the possibility, mind you – that the Justices had a quiet norm against citing the case while Justice Black sat.

¹³⁵ Newman, *supra* note 9, at 238.

¹³⁶ Franklin Roosevelt, Press Conference # 386, *supra* note 9.

¹³⁷ Not counting the reference in the companion case, *Ex parte Kelley*, 302 U.S. 634 (1937).

¹³⁸ 408 U.S. 1, 13 (1972).

¹³⁹ *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973).

¹⁴⁰ *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 219-221 (1974); *United States v. Richardson*, 418 U.S. 166, 177 (1974).

¹⁴¹ *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

¹⁴² A Westlaw search reveals 27 lower court citations in this period, beginning with *State ex rel. Dahl v. Fredrickson*, 277 N.W. 407, 409 (1938) and ending with *Schaefer v. Sharp*, 328 F. Supp. 762, 765 (S.D. Miss.) (July 2, 1971).

¹⁴³ See, e.g., Brief and Argument for Appellees, *Baker v. Carr*, 1961 WL 64807 (Mar. 17, 1961); Brief for the National Labor Relations Board, *NLRB v. Highland Park Manufacturing Company*, 1951 WL 81851 (April, 1951).

¹⁴⁴ See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 & n.11 (1940); *In re Summers*, 325 U.S. 561, 567 (1945); *Poe v. Ullman*, 367 U.S. 497 (1961).

Why would that be? The justifications are even more speculative. Perhaps a citation to *Levitt* from a court containing Justice Black made it too awkward to insist that standing decisions are separate from the merits, when the merits really did seem to be pre-decided. Perhaps Black's colleagues didn't want to offend him by reminding him of an awkward time. Or perhaps the justices were relieved that the challenges had stopped and didn't want to give anybody ideas. Perhaps it is only a coincidence. But as it happens, *Levitt* reentered modern doctrine only over Hugo Black's dead body.

5. The Bigger Picture

5.1 Political Realities

In discussing the legal issues, we might also want to attend to the broader political context. Hugo Black's appointment in 1937 was a hot moment, and it is more than possible, that the Emoluments Clause is not what everybody was really so worked up about.

For one thing, there was the Klan. Even during the Senate debates, there was speculation about Hugo Black's association with the Ku Klux Klan earlier during his Alabama legal career.¹⁴⁵ On September 13, less than a month after Black's confirmation and less than a month before the Court resumed session, the news broke: "Justice Black Revealed as Ku Klux Klansman," opened a Pulitzer-Prize-winning series of articles in the *Pittsburg Post Gazette*.¹⁴⁶ The public and politicians were outraged.¹⁴⁷

By October 1, Black was driven to an unusual public radio address addressing the charges.¹⁴⁸ It is possible that the dry legal challenges a few days later had something to do with this controversy. But maybe not. Levitt had apparently been planning the challenge since at least August 18, before the press scandal, when he wrote a letter to Black himself warning him and enclosing a copy of the motion.¹⁴⁹ And in that letter and in subsequent press interviews, Levitt insisted that his "action [was] taken without any personal unfriendliness or bias"¹⁵⁰ and that he had "no personal feelings whatever against Mr. Black."¹⁵¹

¹⁴⁵ William E. Leuchtenburg, *A Klansman Joins the Court: The Appointment of Hugo L. Black*, 41 U. CHI. L. REV. 1, 9-11 (1973).

¹⁴⁶ Ray Sprigle, *Justice Black Revealed as Ku Klux Klansman*, PITTSBURGH POST-GAZETTE (Sep. 13, 1937) at A1.

¹⁴⁷ Leuchtenburg, *supra* note 145, at 13-16.

¹⁴⁸ Hugo Black, Radio Address (Oct. 1, 1937) available at <https://www.youtube.com/watch?v=p7BaRRPh428>

¹⁴⁹ HOWARD BALL, HUGO L. BLACK: COLD STEEL WARRIOR 99 (2003).

¹⁵⁰ *Id.*

¹⁵¹ But see Baier, *supra* note 95, at 65 n. 49 (quoting an interview with Levitt).

So perhaps the real motivations may have lay still elsewhere. Black himself believed that the Klan controversy was motivated by business interests. And while Black's beliefs may have been self-serving, he was right about the broader political context. The constitutionality of progressive economic legislation was one of the big recurring controversies in the Court, and the cause of the court-packing fight that had started to wind down just before Black's appointment. By summer 1937, President Roosevelt had prevailed on many important agenda items, but the voting coalitions that favored him remained unreliable.¹⁵² He "had secured 'the liberalization of the interpretation of the Constitution,' but had not yet attained 'insurance of the continuity of that liberalism.'"¹⁵³

Thus, the next few appointments still mattered a great deal, and those who opposed the New Deal agenda had a strong incentive to keep fighting for more moderate appointments.¹⁵⁴ Similarly, the Court still had reason to fear the resurgence of the court-packing proposals if it ruled the "wrong" way. Grenville Clark analyzed the coming term in a memo that August, two weeks after Black's confirmation:

As I understand it, there are likely to be several crucial cases next winter, including the Public Utility Holding Act case, possibly another TVA case, possibly a Wages and Hours Bill case if it passes, and possibly a new Agricultural Law case. It does seem very possible that the S.C. will be unable to uphold all these laws, and if even in one case, the law was held void, I think it might mean that the President would return to the attack—especially so since if any law was held void, it would probably be by a divided Court.¹⁵⁵

So it is possible that the Court's cold treatment of the challenges, reflected the desire to circle the wagons against the continuing threat to the Court's independence. On this logic, the opinion's terseness and its technical legal merits are beside the point. The goal was to send the message that later litigants apparently received: *Leave this issue alone.*

Still, if this is what the Court was up to, its opinion was a funny way to do it. A denial for lack of standing is curiously inconclusive. It

¹⁵² Barry Cushman, *Court-Packing and Compromise*, 29 CONST. COMM. 1, 10-14 (2013)

¹⁵³ *Id.* at 14. Accord JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 519-520 (2010).

¹⁵⁴ Cf. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 467 (1956) (describing these as "politically inspired attacks upon [Black's] right to sit.")

¹⁵⁵ Grenville Clark, Memorandum for Messrs. Burlingham, Arant and Marbury, 31 August 1937, Clark Papers, Series VIII (National Committee for Independent Courts), Box 1, Folder Burlingham, Charles C. (Box 70, Folder 11). Special thanks to Laura Weinrib both for this source and for suggesting these general points.

seems to invite another vehicle, a subsequent challenge. If the goal is to settle the lawfulness of Black's seat why not do so in an opinion on the merits? Or perhaps the Court might wish to avoid publicly dealing with an embarrassing constitutional question. But if the goal is to send as little of a message as possible, why issue an opinion at all? And why issue the opinion in open court, outside of the regular press of orders?¹⁵⁶ Even if the political realities were inescapable, they do not fully explain the Court's treatment of *Ex Parte Levitt*.

5.2 Constitutional Realities

Whatever the motivation, the results of *Levitt* also provide an interesting lesson in how constitutional law really gets settled.

It is black letter law that the denial of standing is not supposed to bless the underlying conduct as lawful, and that the underlying legal question can be litigated once a proper party is found. The "threshold inquiry into standing 'in no way depends on the merits of the ... contention that particular conduct is illegal.'"¹⁵⁷ Thus, when a Supreme Court decision concludes that there is no standing to sue, it "intimate[s] no view on the merits of the complaint."¹⁵⁸ The lack of standing leaves the issue free to be resolved another day.

But that didn't happen in *Levitt*. The standing holding was never followed by a straightforward merits claim brought by a proper party. It is as if *Levitt*, and the discretionary denial of a couple of rehearing petitions, effectively legalized Justice Black's claim to office, just what standing decisions are not supposed to do.

Levitt also inverts our modern understanding of the judiciary's supremacy in settling constitutional questions. Nowadays, we assume that major constitutional questions will be settled by the judicial opinions of the federal courts, especially the Supreme Court.¹⁵⁹

But, again, that didn't happen in *Levitt*. Even though the constitutional challenges were serious – meritorious, I have argued – the Supreme Court never adjudicated the matter. Instead, the lawfulness of Hugo Black's appointment was settled in more practical terms. The President appointed him, with the legal advice of his Attorney General.

¹⁵⁶ See *supra* notes 20-21 and accompanying text.

¹⁵⁷ *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

¹⁵⁸ *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972)

¹⁵⁹ See, e.g. Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 6-7 (2001); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); but see Mark A. Graber, *Judicial Supremacy Revisited: Independent Constitutional Authority in American Constitutional Law and Practice*, 58 WM. & MARY L. REV. 1549 (2017).

The Senate debated the legality of that appointment, ultimately concluding that Black was eligible. And despite the absence of a Supreme Court *case*, the Justices certainly treated him as if he were eligible to the office, letting him put on a robe and assume his equal place on the bench. Indeed, Black himself surely could not have taken his constitutional oath in good faith if he had not satisfied himself that his appointment was lawful. And over time, none of these branches had much incentive to reopen the question until it was too long settled.

That process is not foolproof. Sometimes it is wrong. But sometimes it is how constitutional law really gets settled.

6. Conclusion

Ex Parte Levitt has become a paradigmatic standing case, but it may turn out to be a poor vehicle for its own lessons. It is true enough that our constitutional tradition rejects generalized citizen standing, but Albert Levitt had a good case for standing nonetheless. He was a member of the Supreme Court bar, whose conduct was subject to regulation by Justice Black. *Ex parte Levitt's* rejection of that standing is in tension with modern doctrine.

What is more, *Ex Parte Levitt* conceals the real constitutional and political issues raised by the cases. The constitutional challenges to Justice Black's seat were meritorious. Even rejecting them would have required making important precedent about the meaning of "emoluments or the law of Supreme Court retirements. But that never happened. And the fact that that never happened is a reminder that the real source of constitutional settlement in our system is not always judicial decision, but sheer practice.