▶ *Personalities and factions clash on judicial heights.*

THE ROOSEVELT SUPREME COURT

By Merlo J. Pusey

The Supreme Court itself has blown the lid off the assiduously-cultivated belief that all is harmony in its stately chambers. Since the first of the year it has handed down a series of decisions revealing sharp animosities and basic differences as to what the law is and how the court should function. The honeymoon period of the Roosevelt court has given way to a sort of free-for-all battle of judicial intellects.

Justice Hugo L. Black set the pace by administering two verbal floggings to Justice Felix Frankfurter in a single day. In one he was joined by Justice Frank Murphy. Frankfurter had lapsed into his professorial tone and lectured the court in his dissents. So his "brothers" came back with pointed personal rebukes labeled "concurring opinions." Black's most stinging barb accused the Boston jurist of indulging in the "dangerous business" of substituting morals and ethics for law.

Justice Owen J. Roberts chimed in with a crack at the Black-Douglas-Murphy trio for announcing publicly a change of heart on the flag-salute issue when it was not before the court. Then Frankfurter lashed out against "the evils of giving opinions not called for." It remained, however, for Justice Robert H. Jackson to hurl the charge that cut to the quick — because it is precisely the charge that President Roosevelt made against the old court. With stout support from Roberts, Stanley Reed and Frankfurter, he indicted the majority for legislating from the bench to bring about the undoing of a holding company. The court, he wrote, "cannot cite so much as a statutory hint" of the policy it was invoking. "The court is not enforcing a policy of Congress," he went on; "it is competing with Congress in creating new regulations in banking, a field peculiarly within legislative rather than judicial competence."

The court's opinions are now scanned eagerly every week for tidbits of controversy. The rewards are numerous. In a single day recently the justices handed down nine split opinions out of a total of thirteen, three cases being decided by five-to-four

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votes and two by six-to-three votes. The trend seems to be toward more division instead of less. Once it was feared that the eight Roosevelt-appointed justices might act as a unified bloc. Now they are castigated for making a sort of judicial hash of the law. In fact, early in February, Justices Roberts and Frankfurter expressed the belief that the Supreme Court's "tendency to disregard precedents" had become so strong as to leave future litigants and the lower courts "without any confidence that what was said yesterday will hold good tomorrow."

Beyond this widening schism is an invisible struggle for the chief justiceship when Harlan F. Stone retires. He is now more than a year beyond the retirement age. There is no indication yet that he intends to step down. But an acute yearning to have President Roosevelt appoint a young New Dealer — perhaps Justice Robert H. Jackson — Chief Justice before he leaves the White House in 1945 — or 1949 — may be detected in Washington. John Adams kept the Federalist influence alive for thirty-four years by installing John Marshall as Chief Justice shortly before Adams' term expired.

Andrew Jackson nearly duplicated that feat by his appointment of Roger B. Taney. The atmosphere around the court will probably remain tense until it is determined whether the second Roosevelt is to have a second opportunity to do likewise.

Who are the men who are writing the new chapter in our judicial history? Jackson reached the Supreme Bench by way of court-room practice and New Deal politics. When he attended Albany Law School, he was in too much of a hurry to take out a degree, but even without one he easily climbed the ladder from country lawyer to prosecutor of tax dodgers, to chief trust buster, to Solicitor General, Attorney General and Supreme Court Justice. The list of big cases he has won carries him unmistakably to the top tier of successful court lawyers, and that is no mean distinction in a tribunal of professors.

At one time Jackson's vigor, sharp tongue and crusading spirit seemed to make him heir apparent to Roosevelt. He campaigned for his chief with single-minded zeal that knew no bounds. Although he disliked the court-packing bill of 1937, he became one of its most persuasive advocates because he believed it was necessary to jar the old court out of its reactionary groove.

After this bill had been defeated Attorney General Jackson kept the feud alive by writing a book — *The Struggle for Judicial Supremacy* — in which he declared that the court had been wrong in every "major conflict with the representative branches" over social and economic policy. Soon thereafter he found himself on the big bench, as if in reward for this hint that the court ought to follow the election returns. In the austere environment of the court, however, Jackson's fire has cooled a bit.

Dynamic, scholarly and usually

liberal Felix Frankfurter is easily the most challenging personality on the court and therefore the chief fulcrum of controversy. While he was professor at Harvard Law School, Frankfurter made himself the country's foremost critic of the Supreme Court. He came to know more about the court and its work than the court itself did. His sharp, crackling intellect and his easy familiarity with the stuff that law is made of gave him first claim to the seat vacated by Justice Cardozo.

But he didn't spring full-fledged from the classroom, like Athena from the head of Zeus. Rather he hewed out his own path to the bench as a brain truster of the 1932 campaign, as a strategist of palace politics and draftsman of many a piece of New Deal legislation. Unofficially he became, and still remains, a formidable power within the Administration. What could be more natural to the President than to advance this close friend and mentor to the bench to garnish with constitutionality the measures he had helped to conceive and to write?

Frankfurter's liberalism and devotion to a political cause are restrained, however, by his ethics and a judicial quality in his temperament. He veers farthest to the left when he gets a case in his own special field of labor relations. Then he is likely to strain a "linchpin of jurisdiction" or, as in the Hutcheson case, to fashion a "mosaic of significance out of disjointed bits of a statute" in order to resolve the doubt in favor of labor. But even labor is sometimes wrong, a weakness that the jaunty little justice refuses to share with it.

Frankfurter's transition from the classroom to the bench was a trying experience for other members of the court and the bar. Sometimes he delivered little professorial lectures on the cases at bar. That was so irritating to the more seasoned judges trying to get a comprehensive view of each case in the brief time allotted for arguments that Chief Justice Hughes tactfully intervened on some occasions to cut the lectures short.

Mingled with this prima-donna complex and the vanity which crops out through purple patches in his opinions are a zest for life and a sense of humor that endear Frankfurter to an army of friends. One day he stepped into the Supreme Court barber shop just as a newspaper man was getting into the chair. The reporter volunteered to step aside. "No, keep your place," Frankfurter said. "Equal justice under law [the legend chiseled into the court's architrave] should operate here as well as in the court room."

II

"Liberal" is a lazy thinker's word, but if it is taken to mean farthest to the left, Justice Black is leader of the court's liberal wing. Black has worked prodigiously for six years to counteract the furor his appointment caused. In that he has partly succeeded. His mistake of concealing his former mem-

bership in the Ku Klux Klan until he was safely ensconced on the bench, and until the press had exposed the facts, will always trail after him. But he has certainly sloughed off the taint of klanism from his judicial thinking. He is one of the most unrelenting champions of civil rights ever to sit on the Supreme Bench.

By burning midnight oil Black has also greatly extended his legal knowledge. Once he was accused of writing such blundering opinions that they had to be rewritten by other justices. Now he is something of an expert in maritime law. But Black was never a scholar by habit, and there is no reason to suppose that his mental brushing-up will make him a great judge. His temperament and training fit him chiefly for rough and tumble politics, as his recent gratuitous rebuttals suggest. His senatorial investigation of the utility lobby rode roughshod over civil rights in order to expose the power barons more handily. He went all out for packing the court. Before that he wanted to nullify the court's opinions against New Deal measures by every device at the command of Congress.

Hard-working but colorless Stanley F. Reed owes his elevation to the Supreme Bench to his broad view of Federal powers and to the necessity of making a "safe" appointment after the Black episode. He won his legal spurs as attorney for a tobacco co-op. Hoover brought him into government service as general counsel to the old Federal Farm Board. He was plodding through legal underbrush for the RFC when the White House borrowed him as a court-room defender of New Deal legislation. He threw himself into the task with work-horse zeal and was made Solicitor General. His arguments met many rebuffs in the court, but they demonstrated to the President that Reed was the type of lawyer he wanted on the bench. For Reed expounded the Constitution as only a guide and not a curb to "necessary governmental powers." He shuttles between the Jackson-Frankfurter duo and the Black-Douglas-Murphy trio.

Sandy-haired, yarn-spinning "Bill" Douglas is the most colorful personality on the court. He has never held an elective office and his judicial knitting has kept him pretty busy for the last four years. Yet Douglas remains a sort of pin-up boy of politics. Some of his friends are convinced that he will not endure the dignity of a black robe the rest of his life. But his lack of interest in several big war jobs which he might have had suggests that he likes the bench better than some of his friends have supposed.

Part of the political glamour that clings to Douglas arises from the Horatio Alger pattern of his career. He reached the highest court in the land by way of hawking papers in Yakima, by washing windows, teaching school and chaperoning a car-load of sheep across the continent as well as by lecturing at Yale and working sixteen hours a day as chairman of the SEC. Some of these assets may be wasted on the bench, but his "brothers" have a

healthy respect for his knowledge of corporation law and the intricacies of high finance.

The real misfit on the court is Justice Murphy. His dislike for the assignment came to the surface in 1942 when he took a leave of absence and went into the Army as a lieutenant colonel. Having long ago jilted the law for politics, and having been jilted in turn by the voters of Michigan, he lacks the persistence of Justice Black in rewooing his first love. So he has not found a comfortable niche on the bench. His transfer from the Cabinet to the court can be explained only by the President's habit of making judges out of Attorneys General and the fact that a Catholic was needed to replace Justice Pierce Butler.

Latest of the recruits to the liberal wing is Justice Wiley B. Rutledge — the court's only graduate from a lower bench. But the President didn't just go rummaging around the courts of the land to find a great jurist when Justice James F. Byrnes resigned. First he offered the post to Attorney General Biddle. Now the court already had three Attorneys General and one Solicitor General among its members. It had found itself stymied in an important case (another like it came later) because it couldn't get a quorum of judges who had not had some connection with the case as Government lawyers. Another Attorney General might have turned the court's dilemma into a nightmare. For this reason Mr. Biddle must have induced the President to seek a justice outside the circle of his own legal aides. Anyway, the President turned to Rutledge whom he had placed on the United States Court of Appeals for the District of Columbia three years earlier.

Rutledge is an able professor of law without much experience before the bar. He was dean of the University of Iowa Law School when President Roosevelt discovered his adroitness in reading new meaning into old law. On the Court of Appeals he proved his unwillingness to wait for legislatures to change the law. He took a hand in streamlining it from the bench.

Chief Justice Stone fits rather uncomfortably into this sort of tribunal. In the "horse-and-buggy" days he was the most outspoken voice of the liberal minority. Now his frequent dissents are called conservative. That is because this rugged, homespun jurist has clung to his habit of independent thinking while the court around him has experienced something of a revolution. Perhaps the roots of this habit go back to Stone's youth on a New Hampshire farm and his football days at Amherst. Certainly the habit was strengthened by his deanship at Columbia University Law School, and it survived his practice of law in New York and his eleven months as Coolidge's Attorney General. When he was named to the court, ignorant critics labeled him "Wall Street lawyer." Stone quietly confounded them by giving "hospitable scope" to the law and the Constitution. Many years later ignorant admirers classified him as a "New Deal

judge." They, too, were sharply disillusioned. The Chief Justice remains first and last a professional jurist of the Holmes-Brandeis school, a jurist who cuts fearlessly through sentiment, sophistry, and politics to find the law, and lets the chips fall where they may.

But Stone is not a Marshall who carries his court with him regardless of politics and predilections. His leadership is undercut by the fact that every justice, except himself and Owen J. Roberts, has been named from the President's official family or a little inner circle of his followers. Time gave the President what Congress had so emphatically denied him — the opportunity of making over the Supreme Court. He has used that opportunity to appoint men who would cut loose from the legal concepts of the past. In this general attitude toward the Constitution and the law, and in their adherence to certain Administration policies, the new justices seem to be in agreement. Beyond these realms of common understanding, however, their differences are wide and deep. That is why the court is often criticized as a tribunal of "yes men" one week and as a Babel the next.

III

There is a persistent effort to explain the epidemic of dissents in recent months by saying that the liberal *vs.* conservative fight has been won and that the liberals are now merely settling minor differences on a narrower plane. I fear that the cause runs deeper than that. The net effect of the Roosevelt appointments has been to cut the court loose from previous legal and philosophical moorings, not to give it a new set of rational guide lines. The new judges agree with the President that the Constitution and laws shall not be rigidly interpreted but sharply disagree on what shall take the place of rigid interpretation. So decisions are more frequently based on vague legal concepts or on ethics, morals, mere expediency or personal predilections. That inevitably produces conflict and, as Justices Roberts and Frankfurter complain, public misunderstanding of what the law is.

Some results of the court's new sense of freedom are unquestionably good. The rejuvenated court has stripped the Constitution of various obsolete incrustations of judicial dogma. Note what has happened to the long-standing but unnecessary judge-made tax immunities. State employés now pay Federal income taxes along with all other citizens, and the States may tax Federal salaries so long as each avoids discrimination and use of its taxing powers to interfere with governmental functions beyond its control. This sensible arrangement appears to satisfy both the Constitution and modern demands for revenue.

"Due process of law" has also been shrunk to something approaching its historic meaning. That vague phrase had been used to break down minimum-wage laws and thwart an untold number of social experiments on the

part of both the State and Federal Governments. Now the "due process" clauses of the Fifth and Fourteenth Amendments are regaining their rightful places as guarantees of fair play between government and citizen.

Civil rights lie close to the heart of the present court, so close that it sometimes turns loose confessed criminals because of technical slips in the judicial process. The chief exception to this generalization was the reactionary decision that children attending public schools may be constitutionally forced to salute the flag. Justices Douglas, Black and Murphy allowed their first misgivings over this decision to be overcome by the tornado of legal learning that had recently swept into the Court from Boston. But after mulling over the issue for several months, they concluded that Frankfurter was wrong and Stone right. They made a public confession of error, and when a similar case reached the court, the Chief Justice's dissent became law. Replacement of Justice Byrnes by Rutledge led to reversal of another careless decision upholding the arrest of a woman for selling a Bible without having paid a license fee.

It is in mushrooming the commerce clause that the court has most seriously lost the sense of constitutional restraint. The power "to regulate commerce . . . among the several States" has been pushed outward, upward and downward until it covers even local business, farming and labor relations. Having been stampeded into acceptance of the view that employment in big manufacturing plants could be regulated from Washington as part of the economic system which keeps interstate commerce flowing, the court can now find no logical point at which to draw a line between Federal and local powers of economic control. So it has simply opened the floodgates of Federal power.

Here is an example from Texas: an independent contractor was drilling holes in oil lands. As is customary, he never drilled all the way down to the oil-bearing strata and never brought in a well. But the contractor was held to be producing goods for interstate commerce, and thus subject to the Federal wage-and-hour law, because some of the holes would later be converted into wells by other contractors and some of the oil which they might produce might be shipped over State lines. Justice Roberts, dissenting, accused the court of ignoring "all practical distinction between what is parochial and what is national."

There are many similar cases. Janitors and other employés of a New York building were brought within the Federal wage-hour regulations simply because their work contributes to the comfort of seamstresses employed in the building to make clothes that may enter interstate commerce. In *Wickard vs. Filburn* the court forced an Ohio farmer to pay a penalty of $117 for growing wheat to feed to his own chickens — all in the name of regulating interstate com-

merce. The farmer had planted a few acres more than his AAA allotment. The court blandly waved aside the fact that he wanted to use the wheat on his own farm. "Home-grown wheat," said Justice Jackson's opinion, ". . . competes with wheat in commerce."

How can we avoid the conclusion that the court has sat as a constitutional convention? The fact is that it has given Federal agencies, without consent of the people, more power than has ever been granted by constitutional amendment.

This does not mean, however, that Congress now has a free hand in regulating the economic affairs of the nation. The court has held no act of Congress unconstitutional since 1936, but it has found other means of emasculating laws that do not meet with its approval. Its most potent weapon nowadays is a sort of strip-tease interpretation. Consider the Teamsters case. There was no dispute as to the facts. Union racketeers were extorting fees from truck drivers entering New York and beating up those who failed to comply. They were convicted under the Anti-racketeering Act of 1934. But the Supreme Court exonerated them under the pretense that Congress had intended to exempt such militant labor activity when it forbade application of the law to "the payment of wages by a bona fide employer to a bona fide employé."

Could Congress have meant "blackmail" when it said "wages"? I decided to find out. The issue turned entirely upon the revision of the anti-racketeering bill in 1934 by the House Judiciary Committee. So I went to members of that committee and asked what their intent had been. Here are a few typical replies: "It [the court's opinion] is a ridiculous misconstruction of the law." "Chief Justice Stone's dissent is 100 per cent right." "Of course, we intended the act to apply to all racketeering that interferes with interstate commerce." Every member of the 1934 Judiciary Committee who is still in Congress — Democrats, New Dealers and Republicans alike — believes that the court misconstrued the law.

Judicial strip-tease was used again in the Schneiderman case. Schneiderman had been naturalized under the pretense that he was loyally attached to the principles of the Constitution when actually he was a teacher and worker in the Communist Party advocating overthrow of the government by force and violence. The court detoured around the law and its own previous decisions to let him keep his citizenship. Chief Justice Stone, in another withering dissent, showed how the majority had made hash of the law and defied the will of Congress.

The Roosevelt court has shaken itself free from the reactionism of its predecessor, but it is a long way from being a truly liberal court after the Stone pattern or the Holmes tradition. It has yet to develop a sense of teamwork or a set of principles that will safely orient big government at Washington in our Federal system.

HOW A GREAT ARMY COLLAPSES

By Major Erwin Lessner

The day is not far off when Hitler's armies will disintegrate and collapse, as the Kaiser's did in 1918. Armies will turn into mobs. What is the process like? An officer who lived through the agonizing death of the once great Austro-Hungarian Army here answers the question.

Our summer offensive in 1918 had failed utterly. Few of the spearheading divisions had actually succeeded in crossing the River Piave, and these only to be repelled in the foothills of the Montello and thrown back to the initial positions. Our losses were frightful and we were bewildered. True, the odds had been against us. The Piave had been unexpectedly swollen by heavy rains and the floods destroyed more bridges than enemy action; and the generals had blundered, as generals always do — at least in the opinion of the subalterns. But something else must have gone wrong, something we did not fully understand. Only eight months earlier we had chased the Italians like rabbits at Caporetto. Now they were chasing us. . . .

My oldest staff sergeant, a professional soldier who had been in the army before I was born, looked thoughtful. I wanted to comfort him. "Never mind, Pelosa," I said, "next time we'll surely break through."

"I report most obediently, sir," the gray-haired non-com replied. "I just feel that we were lucky *not* to break through."

I could not believe my ears.

"Yes, sir," he went on, "that's what I mean — most obediently. Look at our horses, sir. They are underfed. They could hardly draw our heavy howitzers out of their emplacements. They certainly couldn't go on for many miles of pursuit. We'd have to stop, and our infantrymen would have no support if they should advance. In the trenches they have their ammunition cases right on hand. But marching they would have to carry the stuff. Look at our men, sir. . . . How far do you think this pitiful lot could

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