JUSTICE BLACK'S BATTLE

"Without support from the administration, Black and the Court must depend on the audible support of the trade unions and the people."

By VIRGINIA GARDNER

This is the second of two articles by our Washington editor on the Jackson-Black controversy.

Washington

UNTIL the advent of Hugo Black every justice of the Supreme Court who achieved a following among liberals did so through his dissents. Justice Black, too, might have gained more glamor and been the object of more adulation by the liberals if he had lost votes and become the symbol of the futility of libertarian protest which stamped every "great justice" in the history of the Court up to 1937. Instead, when he was appointed by the late President Roosevelt in August 1937, a couple of months after Roosevelt lost his battle for legislation to liberalize the Court, Black set out to win a majority for the Roosevelt concept of what the Court should be.

This Black did, not all at once, not easily, but through great effort, patience, study, skill and leadership, and, it is said by close observers of the Court, through some of the political know-how he had learned in the cloakrooms of the Senate. Instead of masterly dissents, of which there have always been some in the Supreme Court, even in the Reconstruction days when the majority was knocking out civil rights for Negroes and upholding anti-miscegenation and segregation laws of southern states, for the first time in the history of the Court there emerged progressive majority opinions.

Always sensitive to the role of the Supreme Court in the great struggles taking place in the country, organized labor at the time Black came on the bench had had its eyes glued to the Court for two years. These two years had seen the inception of the CIO, which counted so heavily on the upholding of the National Labor Relations Act, passed on July 5, 1935. But while the Court, which had thrown out the Triple A (Agricultural Adjustment Act), on April 12, 1937 in the Jones & Laughlin steel case upheld the NLRA, Chief Justice Hughes had written in a limitation which would have seriously crippled it. Not only this, but the interpretation of the Social Security Act was not settled. Employers who had insisted the Wagner Labor Relations Act was unconstitutional continued to fight it on other grounds, just as they now are trying to limit it through riders and other legislative tricks maneuvered by their stooges in Congress.

For forty years employers who wanted to break strikes had gone into federal courts and obtained injunctions against unions, and the Supreme Court had used the anti-trust laws to uphold them. But now a new day had come. Under the impact of the great mass struggles of the thirties, out of which arose a new, vigorous labor movement, the New Deal program was shaped. The same forces that produced Franklin D. Roosevelt produced Hugo Black. Adherents of capitalist democracy with all its limitations, they nevertheless recognized the threat to this democracy from big business reaction and saw the necessity of giving a larger measure of security and freedom to labor and the ordinary people of the country. Together they undertook the difficult task of bringing the Supreme Court in line with the new times, with the outlook of the overwhelming majority.

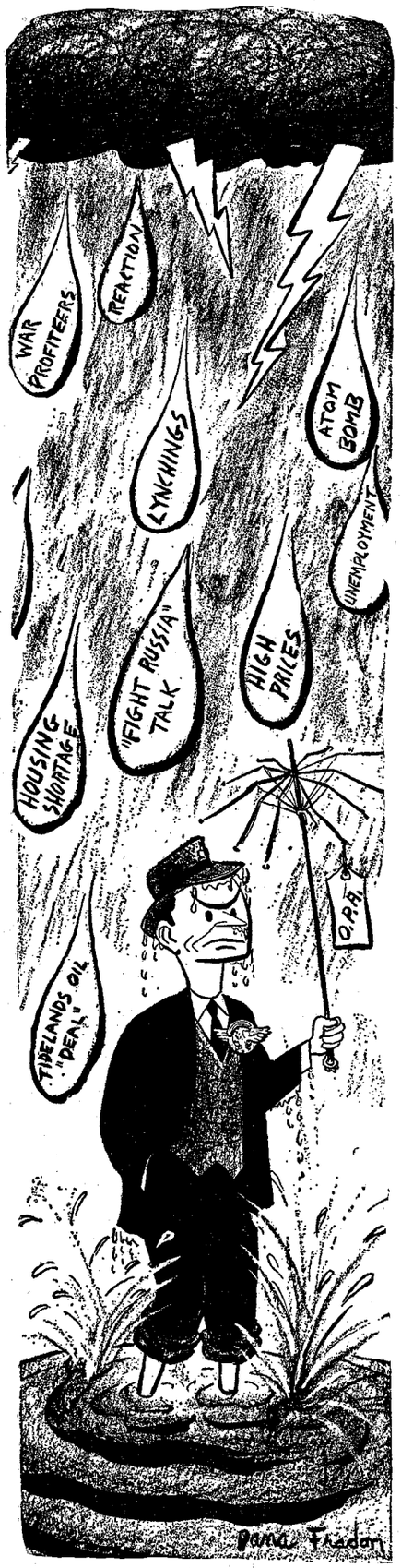
No one but Justice Black, say labor lawyers, at least no one less knowledgeable politically or less diligent in hunting out ways of persuading a diversified majority to accept his philosophy of law, could have wrested from this Court the large body of progressive decisions it boasts. Jackson does not have this quality of leadership, this ability to operate with the Court as a team, nor does Justice Felix Frankfurter, who, in the words of one lawyer, "has a high regard for the Court as an end in itself rather than an instrument for justice," but whose vote is so often on the side of reaction. One observer remarked to me: "All the rules devised by the Supreme Court in its decisional process for the protection of capitalism, the relation of the federal government to the states, the due process clause, all the legal foundations of capitalism, the Court keeps in constant repair. It sharpens here, whittles down there, adapts them to changing times, as the capitalist economy changes in form and requires new formulations of law. But whereas Justice Holmes declared that it was improper for judges to act in accordance with their 'economic predilections,' Black recognizes in a forthright fashion that men and issues are shaped by economic forces.

"He recognizes that behind the particular phrase is a particular oppression, and it takes color and shape to him because as the son of a poor dirt farmer who didn't even know a good log cabin, he could smell an oppression, and within the narrow limitations of the Court he has tried to prevent the Court from acting as the ultimate sanction of reaction."

IN TAKING the fairly rigid formulae of constitutional law and shaping them to apply to workers and Negroes in the South who had known terrorism protected by state political machines and corrupt courts, Black employed not only his profound legal knowledge, which, despite the early calumny heaped on him, won him the plaudits of law professors and authorities. He employed his own knowledge of trial courtrooms and politics as politics is practiced in his native state of Alabama. He understood what lay behind the formal phrases of men like Florida's Atty-Gen. Tom Watson.

Like Sen. Claude Pepper, perhaps the only other figure in public life who so nearly embodies the Roosevelt traditions, Black's schooling was an intimate knowledge of the deep South, where reaction is so naked that a boy from the wrong side of the tracks soon figures that this is a society where you play for keeps. Coming from sections where class divisions and the divisions

between black and white are more clearly polarized than anywhere else in America, both men seem to recognize that what's involved in the current



"Into each life some rain must fall."

legislative and judicial struggles is an attempt on the part of reaction to enslave the worker and whittle down democratic rights.

Black's record spells out his awareness that the Supreme Court is a part of the whole play of power in our society. Faced with procedures grown hoary and rigid, he proceeded to strip the Court of the mumbo-jumbo with which it was surrounded, and, at first in dissents and later in majority opinions, he tried to make law a living reality for the protection of civil rights.

One of the jobs of the justices in the summer months when the Court is not in session is to go over a mass of cases to see which ones they should review. Black soon showed a genuis for picking cases involving penniless Negroes without funds to hire lawyers, especially Negroes who had been beaten and tortured by state or local authorities into giving "confessions." Heretofore the Court had been extremely chary of reviewing these cases.

Jackson, for instance, has been reluctant to interfere in state criminal cases, on the ground that the state is sovereign. Black, on the other hand, by dint of hard work on these cases and by his persuasiveness, gradually made the Court amenable to looking into the facts which had been so negligently treated in the lower courts of the South. One of these was the Chambers case, involving four Negro youths whose lives hung in the balance before the Court decided that the confessions tortured from them in Florida were in violation of the federal civil rights statute. In this case Black wrote in the majority opinion:

"Under our constitutional system courts stand against any winds that blow, as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. . . . No higher duty, no more solemn responsibility, rests upon this Court than that of translating into living law and maintaining this constitutional shield . . . for the benefit of every human being subject to our Constitution—of whatever race, creed, or persuasion."

While Black has insisted that on the question of civil liberties it was the Court's function to protect the individual, he has often adopted a states'-rights position in economic matters, because progressive laws on regulation of industry for many years originated largely in the states. One of his strongest opponents in decisions on civil liberties cases originating in the states has been Frankfurter.

In the free speech case of Bridges versus Cafifornia, Black delivered the majority opinion, reversing the lower court's judgement that a published telegram Harry Bridges sent to the Secretary of Labor regarding a case being tried, was in contempt of court. Frankfurter wrote the dissent, joined by Stone, Roberts and Byrnes. Black wrote that Bridges' threat that a strike would result was not a threat "to follow an illegal course of action," but was within the right to petition the government guaranteed in the First Amendment. And, he added, the timeliness and importance of the utterance by "a prominent labor leader" should be interpreted as "emphasizing rather than diminishing the value of constitutional protection."

ONE of his early dissents in 1938 left little doubt as to how Black stood on matters of property where the public interest was involved, and this trend was to show itself consistently in his votes on patent cases and state regulation of utilities. The Constitution declares that no person should be deprived of life, liberty or the pursuit of happiness without due process of law. In 1886 the Court held that the term "person" included corporations. In the next fifty years the due process clause was used in order to protect the property of corporations, and scarcely at all in protecting liberties of the unpropertied. Black therefore caused a stir when in the New York Life Insurance Co. versus Garner case, his dissent boldly stated that the due process clause didn't apply to corporations.

Likewise in 1938 Black was the sole dissenter in an Indianapolis Water Co. case where the Court held certain water rates violated the due process clause because the state commission levying them didn't assure the company a six per cent return on the "reproduction cost" of its system, which cost should include "the rising trend of prices." So blistering was Black's dissent, and so sound legally that the company failed to take advantage of the new hearing it was awarded, and operated with apparent comfort thereafter under the rates the majority of the Court had found to be confiscatory and unconstitutional.

Later in the Federal Power Commission versus Hope Natural Gas Co. case Black won a majority to his viewpoint, holding valid a reduction of rates. Douglas wrote the opinion and Black and Murphy agreed, but wrote a concurring opinion in order, they said, to add nothing but a protest against "what is patently a wholly gratuitous assertion as to Constitutional law in the dissent of Mr. Justice Frankfurter." Frankfurter had claimed that it was "decided more than fifty years ago that the final say under the Constitution lies with the judiciary and not the legislature." Black and Murphy insisted that Congress hadn't abdicated all authority over "regulation of economic affairs," despite Frankfurter.

It is in the thirty-two page dissent of Justice Jackson in this case that you get the real flavor of a Jackson dissent. Speaking loftily of the state commission's failure to add a seventeen million dollar well-drilling cost, Jackson wanted the Court to return the case to the commission in order to be "clearly quit of what now may appear to be some responsibility for perpetrating a short-sighted pattern of natural gas regulation."

Lawyers point out that Black's opinions, while lucid and in language that cannot be misunderstood in any court, are not studded with the prose gems of Jackson's, or the clever profundities of Frankfurter's. It is not that he works less hard on them, for he writes and rewrites them, it is said. But he writes with the layman as well as lawyers in mind—something which is practically unprecedented on the Supreme Court. Futhermore, his opinions must represent the common level of the thoughts of a number of men when they are majority opinions, which they usually are. To get that majority he has to trim here and add there, to curb his own expression, often to compromise. He cannot permit himself the luxury of precise expression of his own philosophy of law, as did in an earlier period the great dissenters, Brandeis and Holmes, Cordozo and Stone.

Not that Black, particularly in his early years before his leadership won over more and more frequently these so different-thinking men in the wavering and fluctuating majority he formed, ever hesitated to make a bold dissent if he found he could not win. If the majority ruled against labor's basic rights as he saw them, he dissented, no matter how politically unpopular that dissent was with Congress. Notable was the dissent in the historic Fansteel Metallurgical Corp. sitdown case, a dissent in part which was written by Justice Stanley Reed and concurred in by Black. "The point is made," it said, "that an employer should not be compelled to reemploy an employe guilty, perhaps, of sabotage. This depends upon circumstances." It was the function of the NLRB, they said, to weigh these, and not the courts' function to "interfere with the normal action of administrative bodies." Pointing out that evidence of espionage had been introduced by the union, they said, "It cannot be said to be unreasonable to restore both (management and labor) to their former status," including sitdown strikers.

The NLRB lost Black's vote only once, in the Virginia Electric case, when it was remanded back for re-trial in such a way that the NLRB knew, thanks to Black, what to do to get it upheld by the Court, and did. Lawyers before the Court frequently explain one of the numerous ways in which Black has managed to get majorities upholding, at first, the constitutionality of New Deal legislation, and latterly, a workable statutory construction of the laws. If he wants to bring out the weakness of an argument he opposes, he innocently asks questions, never forgetting an old theory of trial practice that in cross-examination you never ask a question without knowing what the answer will be. Or if he wants the side he favors to emphasize a point—and he usually has studied a case in advance of oral argument—he lets the lawyers know by his questions. He never wastes questions and lawyers knowing this study them carefully, unlike Frankfurter's questions, which roam here and there for his own delight. "Actually, Black works as hard as we do in oral orgument," one lawyer said. He works in the same way he did as Senator when almost single-handedly he conducted an investigation into the lobby opposing the Public Utility Holding Act, and turned the tide of Congress in favor of the act."

Hand.

THE attack on the progressive character of the Court, symbolized by Justice Jackson's scathing personal attack on Black, comes at a moment when labor is facing new threats. Whether Black, who will not quit, can hold a majority remains to be seen. At stake are labor's painfully won gains, and the partial rights of citizenship and civil liberties won by Negroes and signified in such Court decisions as the Texas white primary case and the outlawing of segregation on interstate bus travel.

Doubtless Black's development on the Court was hastened by Frankfurter's turn toward reaction, and Jackson's opportunism. With Roosevelt gone, supplanted by a President capable of calling out the troops to break a railway strike and surrounded by profits-first men like Sec. of the Treasury Snyder, the Supreme Court with its progressive majority is noticeably out of step with the rest of the government. Without any show of support from the administration, Black and the Court must depend on the audible support of labor and the people when the Congressional attack begins again in earnest, as it will. Labor is fully aware of how Black, within the rigid scope allowed by the juridical process, has contributed toward checking reaction. Jackson's attack on Black is undoubtedly only the forerunner of a determined effort to change the character of the Court. Congressmen and Senators should be committed wherever possible in the coming campaigns to resist this assault.

CORRECTION

An unfortunate typographical error was printed in the classified ads in our last issue. In the ad listed under "Child Care" the line "white: Box 46 NM" should have read "write: etc." NM, of course, never accepts or publishes advertisements which cater to racial prejudice.

UPON SEEING A SKETCH AT AN EXHIBIT

By ARTHUR GREGOR

These were the initial points of visual perception:
She is dead
and holds their dead child in her arms.
Now weeps the willow tree in branches
brittle are the weeping leaves . . .
The sun slimy within pits of mud
talks of universe concentric
in typhoid trenches,
of hills without shadow
of air too lean for hungry breath
and of their death;
mirrors in yellow filth
the mood of this white-framed oblong,
portrays the frozen hearts
that left bodies and came to nip
the quartz of weeping trees . . .

All upside down within this scene:
The paralysed mouth,
the stares that scream
and balance the drastic two-tone
of bloodshot iris wild within the skeleton.
We see him standing there
and from his look and color differential
derive that he has come home,
has wandered across lands of living bones
to find that his are not alive.
What once was farm
is now an open grave,
deprived of moves to touch
he cannot without arm
dig sorrow in the earth,
cannot even feel how cold the mass
that he had hoped would heal
as breath the empty pits
where arms should be,
would sooth the pains
knifed with flame into his flesh,
numbers that strike us like
veins gone mad upon his back;
cannot scream of suppressed embraces,
can only blur their faces
with flood-like reflections
of his barren eyes.
While our eyes are screen
for twisted, painful pulses of the heart,
we know we cannot ever part this scene
from our mind,
where now you take on forms that live,
and tell of grief, your utter disappointment
and hopes now ultimately lost.
Now part of us, you grope queerly—without arms—
in strokes of hate
in our hearts and minds for answers
to questions hard to formulate,
with words you cannot shape—paralysed mouth.
But as you have been carved within our flesh,
have been swerved within our heart,
we understand your pulses
as we know our own.
You meant no harm, wrought into your farm
young sweat and hope and love,
cheered the sun when cooling your body
in her reflections in the water pits nearby,
restricted tears in your lover's eye
when the smiling moon threw white
between the lovers' shady moods of night,
helped the peasants build their homes
as they had helped you build your own,
never a frown, gay costumes, dancing with her
at the country fair,
her hand, she said, felt like silken gloves
hiding her passion in your hair,
while your hands would build and build and build
for her and child. . . .
And then the years which you could never understand . . .
Why . . . why away from wife and child,
why why this beating, this laughing in slave-depth,
ploughing their insanity within my flesh
and whips in sweating earth . . .
and then they screamed with laughter
rolling in low depth,
ripped out your arms with flames
and insane dreams of blooming farms
and insane screams that exploded orbits torn from space,
paralysed your face, made lame brain movement.
You ask us WHY?
Impossible, utterly impossible
to equate in logic such bestial festivity,
Impossible to answer in direct emotional terms
and give reasons.
We can only tell you
that they have lashed upon you
the morbid tortures of a treason
that they have committed,
that they have admitted upon us,
Can only tell you that they tried to whirl
the globe balanced by a finger,
tried to sip the heat from the equator
with insulated straw, but
could not.
And so we have paid for all the vileness of their action,
because they know we understand
and shrink from their sanctimonious protection,
which they know we do not need.

Let freely bleed the thoughts upon this sight
beneath the blue-white fluoroscope.