



# SCORPIONS

The Battles and Triumphs of FDR's  
Great Supreme Court Justices

NOAH FELDMAN



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*The Supreme Court is nine scorpions in a bottle.*

—ALEXANDER BICKEL, LAW CLERK TO  
JUSTICE FELIX FRANKFURTER,  
1952–53<sup>1</sup>

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## INTRODUCTION

A tiny, ebullient Jew who started as America's leading liberal and ended as its most famous judicial conservative. A Ku Klux Klansman who became an absolutist advocate of free speech and civil rights. A backcountry lawyer who started off trying cases about cows and went on to conduct the most important international trial ever. A self-invented, tall-tale Westerner who narrowly missed the presidency but expanded individual freedom beyond what anyone before had dreamed.

Four more different men could hardly be imagined. Yet they had certain things in common. Each was a self-made man who came from humble beginnings on the edge of poverty. Each had driving ambition and a will to succeed. Each was, in his own way, a genius.

They began as close allies and friends of Franklin Delano Roosevelt, who appointed them to the Supreme Court in order to shape a new, liberal view of the Constitution that could live up to the challenges of economic depression and war. Within months, their alliance had fragmented. Friends became enemies. In competition and sometimes outright warfare, the men struggled with one another to define the Constitution—and through it the idea of America itself.

This book tells the story of these four great justices: their relationship with Roosevelt, with each other, and with the turbulent world of the Great Depression, World War II, and the Cold War. At the same time, another story emerges from the vicissitudes of

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their battles, victories, and defeats: a history of the modern Constitution itself. These four men reinvented the Constitution; and they did so along four divergent paths. The triumph of our Constitution is a story of controversy and competition—and of the greatness that can emerge from them in the realm of ideas.

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## CHAPTER 24

### *Faith*

In the spring of 1943, with the war raging in Europe and the Pacific, Felix Frankfurter found himself delivering an impassioned lecture to his colleagues in the privacy of the Supreme Court's conference room. The topic was one very close to Frankfurter's heart. He was explaining the difference between a true immigrant patriot—someone who had become a citizen and loved his country above all else; and a fundamentally disloyal immigrant—one who subscribed fully to the beliefs of the Communist Party, and took the oath of naturalization in bad faith, in the hopes of undermining the country that had welcomed him to its shores.

The villain of the piece was one William Schneiderman, whose case was being heard by the Court for a second time. Schneiderman, a Jew by birth, had come to the United States from Russia as a boy of two, and had been raised in Chicago and later Los Angeles in circumstances of dire poverty. He had joined the Young Workers League at sixteen and the Workers Party—predecessor to the Communist Party U.S.A.—at eighteen. At twenty-one he had been naturalized as a citizen. By that time he had become a committed Communist, rising to the rank of secretary of the Party in California. Schneiderman believed U.S. citizenship was perfectly consistent with Communist belief; but the government disagreed. After a disgruntled former Communist denounced him to the House Un-American Activities Committee, the federal government tried to strip Schneiderman of his citizenship. He had been a citizen for twelve years. But the government reasoned that, as a Communist, he could not have taken the oath of naturalization

without lying, since he must logically be a “disbeliever in organized government” who was devoted to the overthrow of the U.S. government by force and violence.<sup>44</sup>

The foil to Schneiderman was Frankfurter himself. Frankfurter was the only justice who had immigrated. He was the only one to have had his citizenship impugned at his confirmation hearings. And he was the only one to have been asked at those hearings whether he was or ever had been a Communist. The superficial similarities between his experiences and Schneiderman’s impelled him to differentiate the two of them. He had known innocent fellow travelers, Frankfurter told the other justices—and Schneiderman was no innocent. He was the real thing: a dangerous traitor, whose citizenship should be revoked.<sup>45</sup>

Frankfurter had special competence on the subject, he maintained, not only because he had known many radicals in his lifetime, but because he, too was an immigrant. He spoke of his own naturalization as a conversion. Loyalty to the Constitution, he said, was his religion—and “it is well known that a convert is more zealous than one born to the faith.”<sup>46</sup>

Indeed, Frankfurter suggested, Americanism had replaced Judaism in his spiritual life: “As one who has no ties with any formal religion, perhaps the feelings that underlie religious forms for me run into intensification of my feelings about American citizenship.” Such citizenship was, he said, a “fellowship which binds people together by devotion to certain feelings and ideas and ideals.” These could be “summarized as a requirement that they be attached to the principles of the Constitution.”<sup>47</sup> Schneiderman was not attached to those principles. Therefore, he was no true citizen. The conditions of loyalty had not been met.

Ultimately, Frankfurter’s colleagues did not agree with his assessment of Schneiderman. The Soviet Union was by then allied with the United States against Hitler; and although the Court’s opinion protested that there was no connection, it was not an opportune time for the country to be stripping Communists of their citizenship. The Court held that because Schneiderman had been a law-abiding citizen for five years after taking the oath, his

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citizenship remained valid; and Frankfurter joined a dissenting opinion by Chief Justice Stone.<sup>48</sup>

But the significance of Frankfurter's protestations on the subject of loyalty were important for another reason: he was being subjected to almost unbearable pressure to admit that he had been wrong in the case of the Jehovah's Witnesses and their refusal to salute the flag. The claim was being based not simply on the principles of liberalism, but on the basis of his Jewish origin. When Frankfurter had written the opinion ruling that towns could require children to salute, it had seemed like a patriotic decision. As a Jew, he had been especially concerned that children not be treated differently in schools on the basis of religion.

Since then, the politics had shifted. The United States was now at war with Nazi Germany—a country whose policies were aimed precisely at suppressing a religious minority. To liberals, tolerance, not saluting, had become the American form of patriotism. Even the previously innocuous-seeming form of the salute, with the right arm extended straight ahead, palm up, was now perceived as too similar to the Nazis' straight armed, palm-down, "Heil Hitler."<sup>49</sup>

In the spring of 1942, in a case that involved the Jehovah's Witnesses' right to be exempt from a tax on the distribution of pamphlets, Black, Douglas, and Frank Murphy had filed a highly unusual dissent openly regretting their earlier votes in the flag-salute case.<sup>50</sup> Then, a year later, the Court overturned Frankfurter's earlier judgment—the first time the Roosevelt Court had reversed itself.

The opinion, elegantly written by Justice Jackson, became an instant classic, famous as much for its aphorisms as its holding. Jackson had not been on the Court when the first flag-salute case was decided, but he had told Frankfurter that he strongly disagreed with his opinion.<sup>51</sup> Now he embraced Stone's argument in his original dissent that the goal of judicial review was to protect minorities. "The very purpose of the Bill of Rights," he wrote, "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts...."

Fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”<sup>52</sup>

Jackson’s opinion also made it clear that he understood the political symbolism involved in protecting free speech for all—not just the religious liberty of the Witnesses. In particular, Jackson wrote, the children were being protected against having to declare a belief which they did not hold: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”<sup>53</sup>

Frankfurter took the reversal of his *Gobitis* opinion as a professional and personal calamity. It was bad enough that the Court had rejected the philosophy of judicial restraint on which he had built his reputation. But it was much worse that the Court was using the flag salute as a metaphor for the Nazis’ oppression of Jews. Frankfurter’s birthplace and childhood home were now under Nazi control. He believed that he had voted in favor of equal treatment for all, regardless of religion. Now he was being told that, as a Jew, he had made a mistake. Not only his jurisprudence but his selfhood was on the line.

Frankfurter responded with the most agonized and agonizing opinion recorded anywhere in the U.S. reports. Over weeks, Frankfurter compiled pages upon pages of disjointed arguments in his barely decipherable longhand. When circulating a draft could no longer be avoided, his law clerk, Philip Elman—who would later play a key role in the famous desegregation decision, *Brown v. Board of Education*—strung Frankfurter’s notes together over a single long night at the typewriter. In the morning, Frankfurter circulated the unedited draft to the other justices.<sup>54</sup>

To his colleagues’ horror, the opinion began with an excursus into Frankfurter’s own identity as a Jew: “One who belongs to the most vilified and persecuted minority in history,” he wrote, “is not likely to be insensible to the freedoms guaranteed by our Constitution.” He went on to refer to his career as defender of civil liberties: “Were my purely personal attitude relevant I should

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wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime."<sup>55</sup>

Several justices begged Frankfurter not to publish the opening lines of his opinion. Frank Murphy, closely identified with the Catholic Church—and the only other non-Protestant on the Court—told Frankfurter that his opinion was “too personal” and that his words “would be ‘catapulting a personal issue into the arena.’”<sup>56</sup>

Frankfurter replied to Murphy that his self-reference would be personal if he were using his identity as a basis for his decision. But in fact, Frankfurter insisted, he was doing just the opposite by asserting that the Constitution required the judge to put aside his particularity. “As judges,” he had written, “we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.”<sup>57</sup>

Owen Roberts also came to Frankfurter, telling him that on reflection he considered the words “more and more a mistake.” Frankfurter gave Roberts a lengthier explanation. He had, he said, been “flooded” with letters criticizing his original opinion in the flag-salute case on the ground that “I, as a Jew, ought particularly to protect minorities.” Since the issue had come back to the Supreme Court, he had received “a new trickle of letters” telling him that as “a Jew and an immigrant” his duty was to reverse his vote. The letters, said Frankfurter, convinced him that he needed to tell the world that background was irrelevant to the business of the Supreme Court.<sup>58</sup> Frankfurter was trying to express his own tortuous identity: the more anyone told him that he had judicial obligations “as a Jew,” the more crucial it became to insist that as a judge he was no more or less than an American.

Roberts said that he accepted the answer—what else could he say? As he brooded about it, though, Frankfurter found that he was unsatisfied with the exchange. Murphy's concerns about Frankfurter's opening lines could be explained by his desire to deflect attention away from his own Catholic identity. But Roberts was an

ordinary white, Republican Protestant who had no particular stake in such matters, and who was easily influenced by others. Why had he asked Frankfurter to change the text of his opinion?

In his diary—written with future biographers in mind—Frankfurter surmised that Roberts had been put up to it by Black.<sup>59</sup> Although Roberts and Black would later split violently, they were, at the time, good friends; Black and his wife, Josephine, regularly visited Roberts at his Pennsylvania farm.

Black's motives for trying to stop Frankfurter from drawing attention to the personal domain would have been complex. As a former Klansman, he had a reason to want the justices' personal backgrounds to be kept out of Supreme Court opinions. Frankfurter made the point obliquely if ungenerously: "What moved Black I do not know except his general philosophy about not mentioning such things—he is a great fellow for keeping things under cover." This was a reference to Black's hiding his Klan membership from Roosevelt (and everyone else) before becoming a justice. Then Frankfurter pushed it still further: "To me, on the contrary, to keep all reference to anti-Semitism and anti-Catholicism hidden is the best kind of cover under which evil can operate."<sup>60</sup> Anti-Catholicism was, alongside racism and anti-Semitism, a mainstay of the Klan's worldview. In the interests of posterity, Frankfurter was justifying his very public reference to his own Jewishness as a blow against the secret bias he was ascribing to Black.

If Frankfurter's opening was driven by the challenges of his innermost identity, the rest of his opinion sought, fatefully, to defend the principle of judicial restraint. Although he sensed it only incompletely, Frankfurter was facing the most important crossroads of his judicial career. For more than a quarter of a century, while conservatives controlled the Supreme Court, Frankfurter had argued that judges must allow democratic majorities to act as they pleased, even when their decisions were fundamentally flawed. Now liberals had a majority on the Supreme Court—and they were arguing that the Court should intervene to protect the rights of minorities. Frankfurter realized that if he remained a stalwart of judicial restraint, he would be condemned by the liberals

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whom he had hoped to lead. But having made a career arguing against judicial interference in the majority's decisions, Frankfurter chose to stick to his guns.

The beauty and also the tragedy of Frankfurter's constitutional vision were captured in this stance. Consistency was, for him, the hallmark of good judging. The error of the Court in the *Lochner* era had been to overturn legislation when it served the interests of property owners and capitalists; and Frankfurter had criticized the majority for following its economic and class interests. Now, he felt, he had to show commitment to a principle, regardless of whether he liked the consequences. If judicial restraint had been appropriate when conservatives controlled the Court, it must still be the right doctrine now that the liberals had the votes. Having articulated the theory of judicial restraint echoed by other liberals when they did not control the Supreme Court, Frankfurter found himself the sole liberal advocate of keeping to that theory when it was no longer politically expedient.<sup>61</sup>

For other liberals, judicial restraint had been simply the right idea for the right moment—a powerful way to criticize a conservative Court that stood in the way of progressive reforms. Now that the conservatives were out of power, the liberals saw good arguments for treating civil liberties as very different from property rights. They already believed the Court should not impose its economic values on the majority. But for the Court to protect religious or racial minorities was different from protecting the minority made up of property owners. These minorities, the liberals came to believe, needed the protection of the courts.

As the other liberals on the Court shifted ground, Frankfurter—to his astonishment—found himself transformed into a conservative. Frankfurter's critics, then and later, have tried to explain how it could be that the country's best-known liberal became its leading judicial conservative. But the source of the change was not Frankfurter, whose constitutional philosophy remained remarkably consistent throughout his career. It was the rest of liberalism that abandoned him and moved on once judicial restraint was no longer a useful tool to advance liberal objectives.<sup>62</sup>

The question remains, of course, why Frankfurter chose consistency once the writing was on the wall. He was not an ideologue in the years before he went on the Court. If Frankfurter's liberalism was open to revision, why did he not revise the ideal of judicial restraint?

The answer lay in what Frankfurter had told his colleagues during the *Schneiderman* case: that the Constitution had replaced Judaism as his religion. The obligation of the judge was to demonstrate loyalty not to any one particular identity, but to the Constitution itself. When Frankfurter said that "as judges we are neither Jew nor Gentile, neither Catholic nor agnostic," he was using the language of religion (and a reference to St. Paul) to say that "attachment to the Constitution" was his overarching religious commitment.<sup>63</sup>

All religions put their adherents to the test and require sacrifice. Frankfurter's constitutional religion demanded that a judge reach results that contradict his political preferences. Only then could he be certain that his allegiance was to the Constitution, not the false idols of partisanship. Disinterest could be proven only by way of sacrifice—the sacrifice of voting against one's political preferences.

To Frankfurter, Holmes personified judicial disinterest. But Holmes's disinterest derived from world-weary acceptance of the inevitable victory of whatever social forces were destined to prevail. "If in the long run," he once wrote, beliefs "in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."<sup>64</sup> From this it followed that the judge's job was to stand by and allow social processes to run their course. "If the people want to go to Hell, I will help them," Holmes liked to say. "It's my job."<sup>65</sup>

By contrast, Frankfurter's judicial restraint was driven by a deeply romantic conception of the nature and tendencies of the American people living under conditions of democracy. For Frankfurter, the most astonishing fact about the United States was the liberalism of its people—a liberalism manifested not simply in the public's embrace of progressive ideals, but also in toleration and a commitment to basic rights. His deep loyalty to the country that

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01 had taken him as an immigrant led him to downplay the racism,  
02 prejudice, and other types of illiberalism that could be found in  
03 America.

04 Frankfurter worried that assigning to the Supreme Court the  
05 job of protecting liberal rights would relieve the public of the  
06 responsibility to protect basic rights on its own, through influenc-  
07 ing the legislature. If the Courts should become the institution  
08 charged with protecting rights, he feared, the public would cease to  
09 care about protecting rights itself. Legislators might pass laws that  
10 they knew to be unconstitutional, passing the buck to the courts  
11 in the expectation they would strike those laws down. What was  
12 more, the courts might eventually lose their legitimacy, since they  
13 would be seen as acting against the public, not in fulfillment of its  
14 most deeply held values. The right thing to do, therefore, under  
15 our basic constitutional structure, was to rely on democratic polity  
16 to preserve rights, not for the courts to intervene. In his dissent in  
17 the second flag-salute case, he laid out this argument for judicial  
18 restraint as explicitly as he ever would again in his career.<sup>66</sup>

19 Ultimately, Frankfurter's loyalty to the American people as he  
20 imagined them to be trumped the concern he had for the Jehovah's  
21 Witnesses whose loyalty was being impugned—just as it trumped  
22 any concern he might have had for Schneiderman. Frankfurter  
23 preferred to wait for the historical moment to pass and for the pub-  
24 lic to realize the error of its ways. To the extent he believed that  
25 loyalty to American values was itself a condition of liberalism, he  
26 may even have felt that the Witnesses' children would be better  
27 served by saluting the flag than by abstaining from that ritual. The  
28 alternative, he feared, was for the Courts to assume a new role, one  
29 that he had rejected when his political views were not those of the  
30 majority of the Court. Loyalty to the Constitution was the tran-  
31 scendent principle here—and the sacrifice was proof of that loyalty  
32 above all else.

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## CHAPTER 31

### *Things Fall Apart*

Nineteen forty-six should have been a year of triumph for the followers of Franklin Roosevelt, whose liberalism had led them to victory over the Depression and the Nazis. With the war over and the economy rebounding, the time had come to fulfill the promises of peace. Instead they found themselves beleaguered. From the left, the labor unions, tired of compromise, were aggressively demanding a greater share of the postwar bounty. In the fall, John L. Lewis, president of the United Mine Workers of America, closed every coal mine in the nation for nearly three weeks. From the right, the Republicans were rising. In a sign of the times, Robert La Follette, a Roosevelt supporter who had served Wisconsin in the Senate for twenty years, was defeated by Joe McCarthy, an unknown, thirty-eight-year-old Republican. "This thing isn't running right," Tommy Corcoran observed, as the election returns started to come in.<sup>1</sup> The Republicans took the House and the Senate back from the Democrats for the first time since 1930. A few years later, La Follette would kill himself in the shadow of one of his successor's investigations.

To the liberals who saw themselves as keepers of Roosevelt's flame, the source of the decline was Truman, a mediocrity surrounded by mediocrities. "We've got to have some brains in there," said Lyndon Baines Johnson, in the course of a thwarted effort to bring Douglas into the Truman administration as secretary of the interior. Corcoran, with the assassination of Caesar on his mind, remarked that Truman's motto seemed to be, "Let me have about me men who are not too smart."<sup>2</sup>

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01           Meanwhile the Soviets' grip over much of Europe was grow-  
02           ing stronger. Winston Churchill gave his "Iron Curtain" speech in  
03           March 1946. Not until the next year would Truman settle on the  
04           doctrine of containing the Soviet Union. Douglas, who considered  
05           Truman a "pygmy" when it came to foreign policy, summed up  
06           the contemporary view: "Truman was a very ignorant man about  
07           world affairs. He was a precinct politician.... What he knew about  
08           the world you could put into a peanut shell."<sup>3</sup>

09           The dispirited feeling extended to Roosevelt's justices. Frank-  
10           furter, who had no relationship with Truman, had lost the access  
11           to the highest level of power that he had enjoyed uninterruptedly  
12           since 1933. Jackson was trying to recover from his self-inflicted  
13           humiliation over the chief justiceship. Douglas and Black, too,  
14           were out of the loop. "I was out at Bill Douglas' with Hugo... and  
15           some others," Corcoran told a friend, "and I couldn't help saying to  
16           myself, 'Well, here's a bunch of guys... that had the world in their  
17           hands last year, and now they're just a bunch of political refugees...  
18           a helpless bunch of sheep.'"<sup>4</sup>

19           Frustration bred contempt. From allies sipping champagne  
20           to celebrate one another's joining the Court, Black, Frankfurter,  
21           Douglas, and Jackson had formed camps and become bitter ene-  
22           mies. Frankfurter despised Douglas, whom he called one of the  
23           "two completely evil men I have ever met."<sup>5</sup> Reflecting the lan-  
24           guage of wartime, Frankfurter called Douglas, Black, and Murphy  
25           "the Axis."<sup>6</sup> One-upping Frankfurter, Douglas called him "Der  
26           Fuehrer."<sup>7</sup> The hatred between Black and Jackson ran so deep that  
27           it threatened to ruin the reputations of both men. The friendship  
28           between Frankfurter and Jackson seemed to depend more on dis-  
29           dain for Douglas and Black than any closer connection. Douglas  
30           and Black voted together but were not intimate friends. For them,  
31           common ground meant revulsion for Frankfurter and Jackson.

32           As their mutual distrust grew, differences of constitutional opin-  
33           ion began to emerge among the liberals.<sup>8</sup> In most of the important  
34           wartime cases that came before the Court, these four had managed  
35S          to pull together. Now the bonds that connected them were broken.  
36N          The constitutional visions that each had begun to develop would

diverge into four distinct types, each claiming to be the true liberal position.

Alone among the justices, Black viewed the collapse of liberal consensus as an opportunity. Frankfurter's intransigence in the second flag-salute case meant that he had forfeited his natural position of leadership among the liberal justices. Jackson had been soundly defeated after his Nuremberg outburst. Douglas, his attention focused on politics, would provide a reliable vote for almost any position Black wanted to advance. So Black decided it was time to make his mark on the Constitution itself. He would set out to do what Frankfurter had done as a law professor and what Jackson and Douglas, each for different reasons, were predisposed not to do: lay out a comprehensive theory of how the Constitution should be interpreted, and get it into the law books for the ages.

Black's early efforts at originalist constitutional interpretation were the work of an inspired amateur. After nearly a decade on the Court, he had developed the intellectual discipline and rigor to expound his theory. In 1947, he found an appropriate case in which to do so. On July 24, 1944, someone had broken into the apartment of Stella Blauvelt, a sixty-four-year-old widow in Los Angeles, California. Mrs. Blauvelt was at home when the break-in occurred. The intruder beat her badly, then strangled her with a lamp cord. Her purse was stolen, as were the diamond rings she wore on her left hand. Although she was not sexually assaulted, the top of one of her stockings had disappeared. The police concluded they were looking for a burglar with a stocking fetish.

A month later, the LAPD arrested Admiral Dewey Adamson, an African-American named for the hero of the 1898 Battle of Manila Bay. Adamson, forty-three, had been overheard in a bar offering to sell a diamond ring. In the dresser drawer of his apartment, the police found women's stocking tops—though none belonging to the victim. A police expert then matched Adamson's fingerprints with several latent prints found on the door to the apartment, which had been removed from its hinges so that the burglar could enter.

Adamson protested his innocence and insisted he had an alibi

01 for the night of the murder. Yet at trial he chose not to take the  
02 stand. He had served time for two old convictions, one for bur-  
03 glary in 1920, and one for robbery in 1927. Adamson and his law-  
04 yer knew that if he testified, the jury of eleven women and one  
05 man would find out about his criminal record, which might well  
06 prejudice them against him. The stocking tops were admitted into  
07 evidence, over the objections of Adamson's lawyer.

08 In his summation to the jury, the prosecutor focused on the  
09 fact that Adamson had not testified on his own behalf. "He does  
10 not have to take the stand," the district attorney explained. "But it  
11 would take about twenty or fifty horses to keep someone off the  
12 stand if he was not afraid." The inference from Adamson's silence  
13 was clear. "If he wasn't there, where was he? Where was he? ... He  
14 could explain how his prints got on there," the prosecutor went  
15 on. Adamson could have testified, "and he did not do it. You can  
16 consider that with all the testimony in this case, and I ask you to  
17 consider it." The jury wasted no time in convicting Adamson of  
18 murder and burglary. Adamson was sentenced to death. His attor-  
19 ney appealed.<sup>9</sup>

20 In most states, a prosecutor was not allowed to tell the jury  
21 that a defendant's refusal to testify should count as evidence of his  
22 guilt. In a federal court, the inference would almost certainly have  
23 violated the right against self-incrimination that was contained in  
24 the Fifth Amendment.<sup>10</sup> In California, however, the rules were  
25 different: The prosecutor was allowed to draw the inference. The  
26 important question raised by Adamson's case was whether the Fifth  
27 Amendment applied in state court. If it did, Adamson's conviction  
28 would be reversed. If not, he would be executed.

29 The Supreme Court decided against Adamson. The Bill of  
30 Rights had been added to the Constitution as a check on the fed-  
31 eral government, not the states.<sup>11</sup> The only way one of those rights  
32 could be applied in state court would be if it were "fundamental to  
33 the concept of ordered liberty"—so basic that no system could be  
34 considered just if that right were not recognized. According to the  
35S opinion in Adamson's case, written by Justice Stanley Reed, there  
36N was nothing fundamental about the right not to have a prosecutor

tell the jury it could infer guilt from the defendant's silence. Several years later, after exhausting every avenue of appeal, Adamson was executed in California's gas chamber.

Black filed a dissent in Adamson's favor. He maintained that the Fifth Amendment should be applied in state court as well. Adamson should get a new trial, one in which the prosecutor would not be allowed to tell the jury that the defendant's silence was proof of his guilt. It was not that Black thought the self-incrimination right was more fundamental than the majority did. The Constitution, Black argued, demanded that all the guarantees in the Bill of Rights be applied against the states. Black was doing much more than calling for a reversal of Adamson's conviction. He was proposing to transform the whole face of constitutional law. If the Bill of Rights applied to the states, then every action by a state government, including every conviction in a state court, would have to be reviewed to see if it complied with the Constitution.

Black's position flew in the face of precedent dating back to 1873. To back it up, he needed what every good constitutional theory demands if it is to gain followers: he needed a story. Drawing on months of historical research undertaken completely on his own, Black provided one.

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## CHAPTER 32

### *Originalism*

Black's story began in a postwar era not so different from the one in which he was living. The war that had just ended was the Civil War. The defeated enemy was not the Axis powers, but the American South, Black's native soil. As the United States was doing in Germany and Japan, the victorious Union had imposed a military occupation on its defeated foes. As part of the occupation, it aimed to rid the occupied people of their practices of racial discrimination. And just as the United States in Black's own day would impose new constitutions on Japan and Germany, part of the project of Reconstruction was to create a new Constitution that would maintain racial equality in the Southern states—and give the federal government the authority to enforce it in perpetuity.

Black's story had a protagonist: Congressman John Bingham, who represented northern Ohio from 1865 until 1872. For a Southerner like Black, Bingham was an unlikely hero. He had made his reputation as a prosecutor in the military tribunal that convicted eight Confederate sympathizers for conspiracy in the assassination of Abraham Lincoln and hanged four of them, including a woman. Elected to Congress, Bingham became a member of the Republican majority. Although not a radical Republican who believed that the Union should reconstruct the South's entire political, economic, and social system from the ground up, Bingham supported Reconstruction in its essentials.<sup>12</sup> To most white Southerners, from the nineteenth century to the middle of the twentieth, Reconstruction was itself a conspiratorial plot, and the Republicans were

the would-be dictators who had tried unsuccessfully to force it down their throats.

To Black, Bingham and his fellow Republicans were not villains. They were a second set of Founding Fathers. The amendments that they proposed in Congress—and that they insisted the Southern states ratify if they were to be readmitted to the Union—were, in effect, a new Constitution layered on top of the old one. The so-called Reconstruction amendments—numbers Thirteen, Fourteen, and Fifteen—had two purposes, according to Black. One was to “make colored people citizens entitled to full equal rights as citizens.” The other was to turn the Constitution into a truly national document by making the Bill of Rights apply to the states.<sup>13</sup>

John Bingham had been the principal draftsman of the Fourteenth Amendment. As Black told the story, Bingham had introduced language into Congress that was very similar to the language finally adopted and ratified. It prohibited the states from depriving any person of life, liberty, or property without due process of law, or from abridging the privileges or immunities of citizens. Bingham had explained that his proposal was intended to extend the freedoms of the Bill of Rights so that they applied against state governments. When the amendments were ratified, Black insisted, contemporaries understood that this was the system they were putting into place.

Then Black’s story took a dramatic turn. In 1868, the Fourteenth Amendment was ratified. But just four years later, the Supreme Court took up the first in a series of cases that would strip the amendment of its original meaning. Instead of acknowledging that the words “privileges or immunities” and the concept of “due process” were intended to incorporate the Bill of Rights by reference, the Court began to develop a new, deviant approach. It refused to apply the specific guarantees of the Bill of Rights to the state courts. Instead it began, slowly but surely, to invent different rights—rights protecting property—that appeared nowhere in the Bill of Rights but were attributed to the vague words “due process of law.” This trend, Black hinted, led directly to *Lochner v. New York*, and the hated doctrine of the liberty of contract.

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01 Black never said exactly why the Supreme Court had sup-  
02 pressed the original meaning of the Fourteenth Amendment.  
03 But his implication was clear enough. During the presidency of  
04 Andrew Johnson, the process of Reconstruction had been aban-  
05 doned. Segregation had replaced integration. At the same time, in  
06 the industrialized Northern states, big business had started to dom-  
07 inate the institutions of government. The Supreme Court had gone  
08 along with Congress's abandonment of Southern blacks. And it had  
09 happily become an instrument of capitalism, using the Fourteenth  
10 Amendment to protect the property rights of corporations.

11 Black's story included one man who had seen it happening at  
12 the time—Justice Joseph Bradley, who in 1873 had written a dis-  
13 sent arguing that the “privileges or immunities” guaranteed in the  
14 Fourteenth Amendment must include those found in the Bill of  
15 Rights. For Black, Bradley was his frustrated forerunner. His 1873  
16 opinion proved that Black was right about the outrage that had  
17 happened several generations before.

18 Having laid out his tale, Black had to explain why the Court  
19 had never told it before. The reason, he said, was ignorance. The  
20 Fourteenth Amendment's true “historical purpose,” he said, “has  
21 never received full consideration or exposition in any opinion of  
22 this Court.”<sup>14</sup> Before Black, no one had carefully studied the his-  
23 tory of how the Fourteenth Amendment was drafted. “The Court  
24 had never had that kind of original research before,” he proudly  
25 told his clerks later.<sup>15</sup>

26 In support of his claims, Black provided a thirty-page histori-  
27 cal appendix. Prepared over the summer of 1946 in anticipation of  
28 a case like *Adamson's*, it cited numerous original sources, speeches  
29 taken from the Congressional record and given context by Black's  
30 explanation.<sup>16</sup> For a self-taught justice whose first Supreme Court  
31 opinions had been subject to derision, the appendix was a powerful  
32 vindication. With it, Hugo Black established himself as both a jus-  
33 tice in command of a major theory of constitutional interpretation  
34 and also as a constitutional historian of the first importance.

35S It was paradoxical that Black, who believed that any ordinary  
36N person should be able to understand the words of the Constitution,

was now relying on unknown history to find out what the words originally meant. In Black's mind, however, his theory elevated the text of the Constitution over judicial speculation and invention. By showing that the Fourteenth Amendment's references to "due process" and "privileges or immunities" were really pointing to the words of the Bill of Rights, Black believed he could avoid *Lochner's* error of inventing new rights that were not actually contained in the Constitution. At the same time, Black's approach would expand constitutional rights for defendants like Adamson—a result that liberals badly wanted to reach. By discovering the original meaning of the Fourteenth Amendment, Black thought, he had solved the conundrum of liberal constitutional interpretation.

Frankfurter understood Black's historical foray in the *Adamson* case for what it was: a bid for intellectual leadership of the Court. Frankfurter would never stop thinking that Douglas was entirely unprincipled, pursuing his presidential ambitions from the bench and deciding cases solely on the basis of how they would play politically. He had once considered Black as little more than Douglas's henchman. Now Frankfurter saw that Black was actually a serious intellectual adversary—the only one he recognized on the Court.

Since the second flag-salute case, Frankfurter had understood that his intellectual leadership of the Court was in doubt. His diaries from 1946 to 1947 reflect the doldrums in which he found himself. He wrote regularly about long conversations with his old friend Dean Acheson, who was back in government as deputy secretary of state under Jimmy Byrnes. Looking for a judicial father figure, Frankfurter went regularly to visit the retired chief justice Charles Evans Hughes, with whom he discussed the rising threat from Russia as well as a mutual favorite topic: the great justices of the Supreme Court, their personalities, work, and reputations.

Frankfurter wrote an opinion of his own in the *Adamson* case, devoted specifically to refuting Black's claims. He pointed out that the Fourteenth Amendment never actually said it was incorporating the Bill of Rights by reference.<sup>17</sup> And he argued that the framers of the Fourteenth Amendment could not have meant to incorporate by reference the minor guarantees of the Bill of Rights, like

the twelve-man jury, or the availability of a jury trial whenever the amount in controversy exceeded twenty dollars.<sup>18</sup>

But his separate, anti-Black concurrence, Frankfurter knew, was not enough of a counterpunch. According to Black's law clerk at the time, Yale Law School graduate and later judge Louis Oberdorfer, upon reading Black's *Adamson* opinion, "Frankfurter threw the dissent across the desk to Oberdorfer, scattering the pages on the floor and dismissing Oberdorfer with the words, 'At Yale they call this scholarship?'"<sup>19</sup>

The reference to Yale was no more an accident than Frankfurter's outburst itself. For Frankfurter, the former academic, the law schools were the real audience for Supreme Court opinions—and the primary venue for the making and breaking of judicial reputations. Black had neither attended a famous law school nor taught at one. But with Douglas as his conduit, Black was beginning to develop ties to Yale Law School that would eventually become his answer to Frankfurter's power base at Harvard.

Frankfurter's outburst at Black's historical work reflected the reality that Black had now done more important historical research on the Fourteenth Amendment than he had. Frankfurter liked to present himself as a great expert on the Fourteenth Amendment. In 1943, as Black was beginning to develop the theory of incorporation-by-reference that would emerge full-blown in *Adamson*, Frankfurter wrote to him a bit condescendingly:

Dear Hugo:

For nearly twenty years I was at work on what was to be as comprehensive and as scholarly a book on the Fourteenth Amendment as I could make it. That book was aborted when I came down here, and now there is nothing to show for those twenty years except the poor things in my head and the mass of largely illegible notes.<sup>20</sup>

Whether Frankfurter's book in progress ever really existed outside his mind is doubtful. If it had, he would have been better acquainted with the historical materials connected to the drafting

and ratification of the Fourteenth Amendment than he actually was. To his chagrin, despite his scholarly credentials, Frankfurter was not in a position to disprove Black's story on his own.

What Frankfurter needed was a surrogate who could provide a scholarly refutation of Black's historical claims. Frankfurter turned to Professor Charles Fairman, then of Stanford Law School and later of Harvard. Fairman had been Frankfurter's doctoral student at Harvard. He had written a book on Supreme Court justice Samuel Miller, author of the key 1873 decision rejecting the idea that the Fourteenth Amendment incorporated the Bill of Rights.<sup>21</sup> That expertise made Fairman the right man for the job.

Fairman understood that Frankfurter wanted him not only to refute Black's views, but also to deal a blow to an increasingly serious rival for intellectual dominance. He told Frankfurter a story about the nineteenth-century justice Miller, one that Frankfurter liked so much he repeated it to the retired chief justice Hughes. Miller had been complaining about one of his most distinguished colleagues—Justice Joseph Bradley, the man whom Black, in his story, had depicted as his own precursor. "The trouble with Bradley," Miller had said, "is that he does not recognize my intellectual preeminence."<sup>22</sup> The parallel to Frankfurter and Black was not lost on anyone.

Working for nearly two years, Fairman produced a lengthy article intended to show that Black's story was wrong.<sup>23</sup> He demonstrated that John Bingham, Black's hero, had wavered considerably over the precise effect he intended the Fourteenth Amendment to have. Then, collecting a much wider range of sources than Black had used, Fairman showed that supporters of the amendment said virtually nothing about incorporating of the Bill of Rights by reference. In one particularly critical passage, Fairman maintained that Black had drawn unwarranted conclusions from an obscure 1908 book he had used as part his research.<sup>24</sup> Black's reliance on the book was perfectly natural, but the blow was effectively placed. To academic readers already inclined to doubt Black's unconventional conclusions, Fairman made Black seem once again like an amateur, corrected by a professional.

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01           Black was frustrated and outflanked. Unlike Frankfurter, who  
02           had an army of professors he had been training for a quarter of a  
03           century, he did not yet have a large group of professional academ-  
04           ics to defend him. He wrote to the one law professor with whom  
05           he was close, former clerk John Frank (then at Indiana Law School  
06           but soon to be at Yale): "I would thoroughly enjoy engaging in this  
07           debate with Mr. Fairman and his associates were I free to do so. I  
08           must say that Mr. Fairman's article reminds me of those advocates  
09           who come into court believing that strained inferences conclusively  
10           settle a matter. . . . By my agreeing with the conclusions of [Horace  
11           Edgar Flack, author of a 1908 text on the Fourteenth Amendment]  
12           in his nearly 300 page argument, it appears that I have committed  
13           an unpardonable sin."<sup>25</sup>

14           Frankfurter's recourse to a professional academic historian had  
15           worked—for the moment. He did not anticipate that just five years  
16           later, when the question of desegregation would come before the  
17           Court, that kind of history would become a much greater problem  
18           for him than it would ever be for Black.

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## CHAPTER 33

### *Crisis and Rebirth*

Black had made great progress consolidating his position as an intellectual force on the Court. Yet he still harbored the fantasy of a return to political life. Truman was weak—extraordinarily so. By the end of 1947, talk of a rebellion from within the Democratic Party was rampant.

The source of the frustration was the liberals. New Dealers, Black among them, believed Truman had failed them. Roosevelt's legacy was on the line. Both Eleanor Roosevelt and Franklin Jr. were active in Americans for Democratic Action, a small but significant group aimed at rejuvenating the liberal cause within the Democratic Party. At their convention in February 1948, the ADA members made their insurgency public. They called for open primaries and a chance to unseat Truman.

In this environment, Black traveled back to Birmingham—where he had not lived full-time in fifteen years—to gauge whether he would have any sort of support were he to run for president. The reaction from his confidants was negative.<sup>26</sup> As Black should have realized, he no longer had a base in Alabama. Indeed, it is more a reflection on Black's ego than his political judgment that he even bothered to ask. The reason it was on Black's mind was that one of his colleagues had an altogether better chance at the job. As 1948 dawned, Douglas was gathering his forces for what would turn out to be his last crack at the one office he really wanted.

Douglas's political ambition had not dimmed since he fell just short of the vice presidency in 1944. Now the prospect of either the vice presidency or, if Truman continued to falter, perhaps

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01 the presidency itself seemed entirely realistic. His friend Eliot  
02 Janeway wrote to him that "an army of people...has welded  
03 itself to you as a leader... The momentum of this army will accel-  
04 erate at an increasing rate the next few years. Nothing you do can  
05 stop it."<sup>27</sup>

06 The ADA's plan for a revolt against Truman was tailor-made for  
07 Douglas. The liberals might have preferred Dwight D. Eisenhower,  
08 a national hero of unparalleled stature whose political affiliations  
09 were still unknown. But when Eisenhower officially dropped out,  
10 Douglas appeared to be the liberals' natural choice. He had, after  
11 all, been Roosevelt's own preference four years before; and since  
12 then, no other liberal with comparable New Deal credentials had  
13 emerged at the national level.

14 Frankfurter and Jackson had believed for years that every judi-  
15 cial decision that came from Douglas's pen was calculated solely to  
16 advance his political career.<sup>28</sup> If this was so, Douglas's strategy had  
17 apparently worked. When the ADA issued a pamphlet promoting  
18 Douglas, it featured copious citations from his judicial opinions as  
19 evidence of his liberalism.<sup>29</sup> From the Supreme Court, Douglas had  
20 succeeded in keeping his political prospects alive.

21 But challenging Truman was exceedingly difficult. Whether a  
22 failure or not, he was still president, with a strong influence over  
23 his party. In the days before open primaries, the chances of displac-  
24 ing an incumbent as closely connected to the political machine as  
25 Truman were slim. Either Truman would have to step aside, or a  
26 miracle would have to happen at the convention. And as Douglas  
27 should have known from his experience in 1944, the convention  
28 was the worst possible place for a man with no substantial regional  
29 constituency to mount a challenge.

30 To a rational observer—which Truman certainly was—it must  
31 have seemed that in flirting with the ADA, Douglas was not run-  
32 ning against him but was trying to become vice president, the spot  
33 he had narrowly missed the last time. If this was his goal, it made  
34 perfect sense for Douglas to welcome the sponsorship of the insur-  
35S gent ADA. Truman badly needed support from the liberal wing  
36N of his party, for which the ADA could plausibly claim to speak. If

the ADA wanted Douglas, then Truman could bring the liberals onboard by offering Douglas the vice presidency.

That is precisely what Truman did. In July 1948, with the Democratic convention approaching, Truman sent a series of messengers to offer Douglas the number two spot on the ticket. Douglas rebuffed Robert Hannegan, Clark Clifford, and even Eleanor Roosevelt. Hat in hand, Truman called Douglas himself. Douglas equivocated, taking several days to make up his mind. But finally he declined. Truman settled on Senator Alben Barkley of Kentucky, a staunch supporter of Roosevelt as Senate majority leader and the closest thing Truman could find to a New Deal liberal.

It is puzzling that Douglas turned down the chance of becoming vice president of the United States when the overarching goal of his life had been the presidency. One possible reason is that he was relying too heavily on the advice of Tommy Corcoran, who was still trying to get back into power and still saw Douglas as the man who would bring him there. Corcoran wanted Douglas to defeat Truman, not join the Truman administration. Truman hated Corcoran, and he knew it. Even if Douglas became vice president, Corcoran would not have real influence in the White House.

Corcoran therefore had reason to convince Douglas that it was worth taking a shot at the presidency, but not worth signing on with Truman. His method was to appeal to Douglas's ego. "Bill," he told Douglas in a phone conversation, "you don't want to play second fiddle to a second fiddle." Douglas, who had repeatedly resisted efforts to co-opt him into the Truman administration, could see Corcoran's point. Pretty soon Corcoran's line, often attributed to Douglas himself, was making its way around Washington.<sup>30</sup>

Truman knew all about it. Hating Corcoran even more intensely than Corcoran suspected, Truman had personally ordered a "national security" wiretap on Corcoran's phone. Three times a week, J. Edgar Hoover would send a special messenger to the White House with transcripts of Corcoran's phone calls.<sup>31</sup> The fact that Truman went on to offer Douglas the vice presidency despite knowing about the "second fiddle" crack was a mark of the president's humility—and his desperation.

Beyond Douglas's desire not to be subordinated to a man he considered inferior, there was also the question of whether Truman had a chance of winning. Some of Douglas's comments at the time suggest that he wanted Truman to lose so that he would be left as the party's standard-bearer in 1952. If so, the reason Douglas did not want to accept the nomination for vice president was that he feared Truman might win. Then he would be stuck with an association to Truman instead of being well-positioned to run the next time as his own man.<sup>32</sup>

At the same time, Douglas also seems to have feared that if he resigned from the bench to run and Truman then lost, he would find himself jobless. Joe Kennedy, his old mentor, reinforced this fear by asking him, "If you ran for vice president, and got licked, as you will, who will provide for your wife and children?"<sup>33</sup> Kennedy, of course, had the means at his disposal to promise Douglas the soft landing he needed. A lucrative corporate job would not have been hard to arrange. But by 1948, Joe Kennedy had other reasons for discouraging a vice presidential run by his former protégé. John F. Kennedy was serving in the House of Representatives and would try for a Senate seat in 1952. Counting ahead, Joe could see that putting the charismatic Douglas at the front of the Democratic Party might not serve his son's interests.

But for whatever reason—ego, fear, or the foolish expectation that the convention would dump Truman and draft him—Douglas turned down Truman's offer. After Truman's surprise victory, Douglas realized he had miscalculated. Although in theory he could have run again in 1952, Douglas probably sensed that having been so close to the vice presidency twice, he would not get another chance. Almost immediately, his life began to implode—and through actions of his own devising.

The first intimation of crisis had to do with romance, or what passed for it in Douglas's inner world. In common with Joe Kennedy and his sons, Douglas had for years been an inveterate womanizer. Now for the first time—though, as it would turn out, far from the last—he sought to turn one of his affairs into something more. In the summer of 1949, he proposed marriage to his mistress,

promising to divorce his wife, Mildred.<sup>34</sup> Married herself, the mistress turned him down. But the mere fact that he had spoken seriously about getting a divorce signaled the beginnings of a personal transformation and the disintegration of his political ambitions. At midcentury the idea of a divorced president was still essentially unthinkable. No Supreme Court justice had ever been divorced. For a man who had for so long cherished hopes of the presidency, the willingness to accept a national scandal was remarkable, to say the least.

Spurned by his mistress and deeply unhappy in his marriage, Douglas traveled to rural Washington State. The trip itself was an opportunity for escape. Douglas often went to the Wallowa Mountains for personal retreat; he had been there the previous summer when he had rebuffed Truman's advances. In October 1949, just days before he was scheduled to return to the other Washington for the new Supreme Court term, Douglas went horseback riding alone on a dangerous mountain trail.

Douglas loved the solitude of the mountains and the challenges of nature. But he was not a skilled rider, and this time he overextended himself. While climbing uphill, the horse reared, and both beast and rider began to fall down the steep incline. The horse landed on its feet, but Douglas's injuries were severe. He broke twenty-three ribs and had to be carried off the mountain semiconscious and in shock.<sup>35</sup> At the Court, where Douglas was not much loved, the life-threatening accident was treated as the setup to a punch line. "Douglas fell off a cliff!" one law clerk told another. "Where was Frankfurter?" went the reply.<sup>36</sup>

Months passed before Douglas could return to work. When he did he was a changed man, at least with respect to his personal life. By 1954 he would leave his wife and file for divorce. He married his second wife in 1954, a blonde eighteen years his junior. In 1963, after divorcing her, he married his third wife, this one twenty-three years old to Douglas's sixty-five. The marriage—this time to a brunette—lasted only two years. In 1966, now nearly sixty-eight years of age, Douglas married a twenty-three-year-old college student who was, unsurprisingly, blond as well. He never divorced

01 this fourth wife but he was consistently unfaithful to her. He spent  
 02 most of his time with the one who got away, an artist and recent  
 03 college graduate whom he met around the same time he married  
 04 wife number four. With this last woman he maintained a long rela-  
 05 tionship despite (or maybe because of) her refusal to marry him.<sup>37</sup>

06 This pattern of behavior was erratic, to say the least. And  
 07 Douglas's unusual personal decisions affected his professional activ-  
 08 ities. Burdened with multiple alimonies, he was chronically short  
 09 of cash. His problems were made worse by an unusual clause in his  
 10 divorce from Mildred, his first wife, according to which the more  
 11 money Douglas made, the higher the percentage of his income he  
 12 had to pay in support. The clause had been negotiated on Mil-  
 13 dred's behalf by none other than Douglas's friend Tommy Corc-  
 14 oran, who called it "a hell of a deal."<sup>38</sup> At the time Corcoran had  
 15 begged, cajoled, and finally ordered Douglas not to get a divorce  
 16 that would end his political career. "You don't have to marry 'em,  
 17 just sleep with 'em," he told Douglas.<sup>39</sup> When Douglas refused to  
 18 listen, Corcoran decided to represent Mildred in the divorce, either  
 19 out of legitimate concern for her plight, as Douglas's daughter  
 20 believed, or sheer vindictiveness at Douglas for having wasted the  
 21 political capital Corcoran had invested in him—the view of Eliot  
 22 Janeway.<sup>40</sup>

23 As a fluid and fast writer with some political celebrity and  
 24 increasing name recognition, Douglas found that the best way to  
 25 make money was by writing books. Given his wide-ranging intel-  
 26 lectual curiosity and impatience, Douglas would have written  
 27 prolifically in any case. But financial pressure dictated the tempo.  
 28 Working with astonishing speed, Douglas authored more than a  
 29 dozen books on topics from the pursuit of liberty to exploring the  
 30 Himalayas and the Soviet Union. Increasingly his favorite topics  
 31 related to the protection of the environment—a cause for which he  
 32 would later become a pioneer.

33 Yet even as his life spiraled increasingly out of control, Doug-  
 34 las's philosophy of the Constitution grew and developed. Realizing  
 35S that he was going to spend his life on the Supreme Court con-  
 36N centrated his mind: and whatever else he may have been, Douglas

was brilliant. If fate had put him on the Court for the long haul, he would do what he could to make his mark on its work. Once a presidential future was no longer a realistic possibility, Douglas was freed to become a great justice.

According to the realist theory of the law in which Douglas had been trained and which he still espoused, judges inevitably make the law in their own image. Douglas needed a sense of who he was in order to know what the law should be. Until 1948, his self-image had been bound up in the aspiration to high office, and Douglas lacked a focused constitutional objective. If his opinions had a theme, it was trying to match popular opinion, as he had done in the Japanese-American internment cases. A constitutional realism based on the reality of judicial preference could get him nowhere so long as what he wanted as a judge was not to be a judge anymore.

Now, after 1948, Douglas's instinct to compromise principle for political gain began to fade. He was unmoored and adrift in his own life—and that freed him to make new constitutional law. Searching painfully for fulfillment and struggling with the norms of conventional society, Douglas settled on a picture of himself as a lone figure, riding toward the Western horizon, making his own fate without the interference of others. From childhood a loner, Douglas cast himself as independent.<sup>41</sup> Always struggling with authority, Douglas now self-defined as someone who made his own rules, governed by the philosophy of "Darest Thou."<sup>42</sup>

This self-image gave Douglas a unifying constitutional goal: the pursuit of individual freedom. In his emerging vision, the Constitution should be interpreted to give each person the greatest room possible to shape his or her life autonomously, without the intervention of the government. The Constitution, properly understood, was a blueprint for personal liberty. In essentially every constitutional opinion he wrote from then on, Douglas sought to give individuals the maximum degree of personal freedom relative to the government. From 1948 until 1975, when he finally stepped down from the Court as the longest-serving justice ever, Douglas steadily expanded the boundaries of constitutional rights in the

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01 crucial areas of free speech, privacy, and reproductive and sexual  
02 freedom.

03 For Douglas, then, breaking the bonds of personal obliga-  
04 tion provided the ideal of rights expansion that made him a great  
05 constitutional figure instead of an also-ran. Although he never  
06 found happiness in his own life, his personal chaos gave mean-  
07 ing and direction to his liberal constitutional values. Douglas even-  
08 tually lost the credit for his revolutionary constitutional thought  
09 because of the unconventional character of his life. But it was his  
10 revolutionary, even unhinged life that allowed him to develop that  
11 thought in the first place.

12 Douglas's robust conception of civil liberties could be seen  
13 emerging in a decision he wrote shortly before his fateful ride into  
14 the mountains. The case had begun on a chilly evening in Febru-  
15 ary 1946, in the tranquil neighborhood of Albany Park in north-  
16 west Chicago. The area was mostly Jewish (it now houses Chicago's  
17 Koreatown), but that night an event was planned in a local audito-  
18 rium that would have few Jewish attendees. Members of an organi-  
19 zation known as the Christian Veterans of America, affiliated with  
20 Gerald L. K. Smith, the founder and onetime presidential candi-  
21 date of the racist, anti-Semitic America First Party, had received  
22 mailed invitations to a special rally. The featured speaker was to be  
23 Father Arthur Terminiello.

24 Terminiello was a Boston-born Catholic priest who had spent  
25 his pastoral career as a missionary to poor Alabama farmers. Termi-  
26 niello blamed Southern poverty on a Communist-Jewish conspir-  
27 acy. Like Father Charles Coughlin, the popular, anti-Semitic radio  
28 priest of the 1930s, Terminiello spoke and published widely on the  
29 subject of saving America from Reds and Jews. Like Coughlin and  
30 Smith, Terminiello sympathized with fascism and had opposed  
31 U.S. involvement in World War II. Spokesman for an organiza-  
32 tion that claimed some forty thousand members, he was sometimes  
33 called the Father Coughlin of the South.

34 Father Terminiello's speech for the evening was titled "Christ or  
35S Chaos—Christian Nationalism or World Communism—Which?"  
36N When he arrived at the auditorium in Albany Park, a crowd of

somewhere between two hundred and five hundred protesters—some reports said it was fifteen hundred—had gathered to express its disapproval. Its composition would have confirmed Terminiello's worst suspicions: It was made up of labor union members, members of the Communist Party, and some of the membership of the usually staid American Jewish Congress. Armed with banners, the protesters tried to block access to the auditorium. Police escorted attendees as they tried to enter, and some of them had their clothing torn on the way in.<sup>43</sup>

As Terminiello began to speak, the protest outside turned violent. The crowd threw rocks, bricks, and ice picks, breaking twenty-eight windows in the auditorium. A phalanx of forty boys rushed at the police, knocking some of them down. The door to the auditorium was forced opened. Many people were injured in the *mélée*, and nineteen protesters were arrested.<sup>44</sup>

Inside the auditorium, Terminiello soldiered on, connecting his remarks to the riot that was taking place outside. "I am going to whisper my greetings to you, Fellow Christians," he began. "I said, 'Fellow Christians,' and I suppose there are some of the scum got in by mistake... nothing I could say tonight could begin to express the contempt I have for the slimy scum that got in by mistake."<sup>45</sup> Terminiello then moved on to his subject: "the attempt that is going on right outside this hall tonight, the attempt that is going on to destroy America by revolution." That revolution, he said, was imminent. "My friends, it is no longer true that it can't happen here. It is happening here, and it only depends upon you, good people, who are here tonight.... The tide is changing, and if you and I turn and run from that tide, we will all be drowned in this tidal wave of Communism which is going over the world." The crowd inside the auditorium was cheering. According to some reports, shouts of "Kill the Jews" could be heard.<sup>46</sup>

After the speech was over and protest had wound down, Ira Latimer, the head of the Chicago Civil Liberties Committee, took the action that would lead to a Supreme Court case. Latimer walked to the nearest police station and, with the help of a judge whom he had met at the protest, rounded up a judge, a bailiff, and

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a court clerk. At 11:30 p.m., Latimer swore out warrants for the arrest of Terminiello and two of the meeting's organizers on the charge of breach of the peace. It was an unusual choice for a civil libertarian to seek the arrest of an unpopular speaker. The Chicago Civil Liberties Committee, however, was not a regular affiliate of the ACLU. The previous year it had withdrawn from the national organization after being threatened with expulsion for Communist tendencies.<sup>47</sup> Latimer wanted to deflect attention away from the violence of the protest and focus on Terminiello as the person who had provoked it.

The Chicago police arrested Terminiello. A local judge told the jury that a conviction for breach of the peace could occur when the accused "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."<sup>48</sup> The priest was convicted and sentenced to pay a one-hundred-dollar civil fine. He appealed on the ground that his right to free speech had been abridged.

To Douglas, the case turned on the purpose of the First Amendment. The judge had told the jury that in Chicago, it was unlawful to invite dispute. It followed that the conviction should be overturned. After all, he wrote, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging."<sup>49</sup>

Douglas's analysis amounted to an aggressive expansion of the circumstances in which free speech could be used as a principle to limit government action. The Court had held several years before that a speaker's right to provoke his audience was not absolute. A speaker who used what the Court had called "fighting words" could be prosecuted for his speech.<sup>50</sup> All the lawyers in the Terminiello case had focused on whether or not the priest's speech should be counted as fighting words. All assumed that the Supreme Court's decision would depend on whether the Court thought that listeners would have been driven to use their fists when confronted by Terminiello's invective.

Douglas, however, sidestepped the issue completely. In his opinion, all that mattered was what the judge had said to the jury; that, he insisted, was where the constitutional analysis should be focused. The legal realists had long believed that court was where the law got done. The definition of law, according to Holmes, was "what the courts will do in fact." If a court could convict you for inviting dispute, then you lacked the right to invite dispute. Such a reality was not compatible with the Constitution, Douglas thought, and there was the end of it. It did not matter whether the lawyers had made this argument. What mattered was that the First Amendment should protect debate. Black joined Douglas's opinion, as did three other justices, giving Douglas a bare 5-4 majority.

Frankfurter saw the opinion as an abdication of judicial restraint. In his dissent, he criticized Douglas for ignoring what every lawyer and judge who had been involved in the case from the outset had thought the case was about. Ordinarily, appellate courts rule only on arguments that the parties make in court. Never before in the 150-year history of the Supreme Court, Frankfurter claimed, had the Court completely ignored the parties' arguments to overturn a state-court judgment on grounds it had invented out of whole cloth. Whether Douglas's decision was entirely unprecedented or not, Frankfurter was on to something. Douglas had a constitutional objective to promote. He could not care less what the rest of the world thought about it—and that certainly included the lawyers and the judges in the state courts who had dealt with *Terminiello's* conviction.

Meanwhile, from the pragmatic standpoint of enabling the police to control potential riots, the *Terminiello* decision seemed little short of crazy. Jackson fired off a frustrated dissent. To him, the events in Albany Park were the American version of the struggle between fascists (*Terminiello*) and Communists (the protesters). "This was not an isolated, spontaneous and unintended collision of political, racial or ideological adversaries. It was a local manifestation of a worldwide and standing conflict between two organized groups of revolutionary fanatics, each of which has imported to this country the strong-arm technique developed in the struggle by which their kind has devastated Europe."<sup>51</sup>

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01 Jackson's railing about revolutionary fanatics may have sounded  
02 alarmist, but he had a reason for his concerns. At the Nuremberg  
03 trials, he had made a deep study of the rise of Nazism during the  
04 Weimar Republic. The Nazis had struggled with the Socialist and  
05 Communists for control of the streets. Jackson understood that  
06 whoever controlled the streets was halfway to controlling the state.  
07 Hitler had said as much in *Mein Kampf*, which Jackson quoted, the  
08 only time that work appears in the Supreme Court's reports. "It  
09 is not by dagger and poison or pistol that the road can be cleared  
10 for the movement," Hitler had advised, "but by the conquest of  
11 the streets. We must teach the Marxists that the future master of  
12 the streets is National Socialism, just as it will some day be the  
13 master of the state." They laughed at Hitler, Jackson noted, but  
14 "the battle for the streets became a tragic reality when an organized  
15 Sturmabteilung [i.e., Stormtroopers] began to give practical effect  
16 to its slogan that 'possession of the streets is the key to power in  
17 the state.'"<sup>52</sup> In Weimar Germany, Hitler's tactics had undeniably  
18 worked. The liberal state there had been, Jackson believed, too lib-  
19 eral for its own good, too fragile in the face of a fundamental chal-  
20 lenge to its authority.

21 Of course postwar Chicago was not prewar Europe. Jackson  
22 was seeing an America threatened by forces whose consequences  
23 he had seen firsthand. Fascism was a spent force. As for Commu-  
24 nism, the question of how serious the internal threat really was  
25 would preoccupy the justices in the years to come.  
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## CHAPTER 37

### *Clear and Present Danger*

By the time the case reached the Supreme Court under the name *Dennis v. United States*, the composition of the Roosevelt Court had changed substantially. Although five justices were Roosevelt appointees, Truman had by 1950 named four justices of his own. One of them, Tom Clark, could not participate in the case, because he had himself initiated the prosecution while he was attorney general. The others—Chief Justice Fred Vinson, Justice Harold Burton, and Justice Sherman Minton—all voted to affirm the convictions that were a product of Truman administration policy.

One Roosevelt holdover, Stanley Reed, joined these three Truman men. Since only eight justices were sitting on the case, these four votes guaranteed that Learned Hand's opinion would be upheld and that the Communist leaders would stay in prison. Chief Justice Vinson's opinion applied the "clear and present danger" test just as it had been glossed by Hand. The four very average judges who signed the opinion deemed it the best course to rely on the famous judge.

Roosevelt's four leading justices, however, could not accept the Court's opinion—and for four different reasons. Frankfurter and Jackson each produced concurring opinions that accepted the convictions, though not for the reasons expressed by Learned Hand and adopted by the Court. Black and Douglas each wrote important and memorable dissents. Each of the men was eager to express his distinctive constitutional philosophy—and to distance himself from Truman's unpopular policies.

Black's opinion was the simplest. In a ringing and concise

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dissent—two pages to Frankfurter’s forty-two—Black came as close as he ever would to announcing that the right to free speech was absolute. He based his argument on the text of the First Amendment: “Congress shall make no law...abridging the freedom of speech.” Black would walk around his office reciting a catechism to himself: “What does the Constitution say?” went the question. “It says ‘no law,’” went the answer. “That means no law. It doesn’t make for any exceptions.”<sup>28</sup> For Black, the key to the case was simply that the Smith Act flatly prohibited speech.

Once again, Black was defying precedent. Applying Holmes’s “clear and present danger” test, the Supreme Court had never taken the command of the First Amendment literally. As usual, he was willing to jettison precedent, even when it came from the pen of the great Holmes.<sup>29</sup> If the doctrine did not match the text, then the doctrine must be wrong.

To abandon the clear and present danger test in favor of absolute free speech was an act of constitutional bravery—and like most such acts, it left the hero unguarded and alone. Even Douglas, usually friendly to Black, could not agree with him: “The freedom to speak,” he wrote in his own dissent, “is not absolute.”<sup>30</sup> As Holmes had explained in formulating the “clear and present danger” test, the First Amendment could not possibly protect someone who falsely shouted *fire* in a crowded theater. Frankfurter charged Black with the sin of formalism: “Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment,”<sup>31</sup> or as “barren words found in a dictionary.”<sup>32</sup>

Frankfurter considered *Dennis* “a great case”—the kind that posed a fundamental conflict “of the utmost concern to the well-being of the country.”<sup>33</sup> On the one hand was the inherent right of the state “to maintain its existence” against a serious threat.<sup>34</sup> On the other hand was the right to free speech, which Frankfurter had supported during his long association with the ACLU. Indeed, one of the Communist leaders who had been convicted, William Z. Foster, had served with Frankfurter on the ACLU national committee—and Frankfurter had been questioned about him in his confirmation hearings.<sup>35</sup>

Grasping for a solution to the conflict between self-preservation and freedom, Frankfurter turned to his master theory: judicial restraint. In the presence of a conflict of values, Frankfurter reasoned, it was not up to the Court to "balance the relevant factors and ascertain which interest is in the circumstances to prevail."<sup>36</sup> Courts, after all, are not "representative bodies. They are not designed to be a good reflex of a democratic society."<sup>37</sup> Responsibility for balancing the competing interests of self-preservation and free speech lay with Congress. Of course the Court could overturn the law if it so chose, but Frankfurter advised against it: "We must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us."<sup>38</sup>

Frankfurter understood perfectly well that the CPUSA posed little threat domestically. He quoted George Kennan, the country's most prescient student of the Soviet Union and the author of Truman's doctrine of containment. "The American Communist party is today, by and large, an external danger," Kennan had written in the *New York Times Magazine*. "It represents a tiny minority in our country; it has no real contact with the feelings of the mass of our people; and its position as the agency of a hostile foreign power is clearly recognized by the overwhelming mass of our citizens."<sup>39</sup>

Acknowledging that the Communist leaders were basically harmless, Frankfurter wanted to duck the question of whether they belonged in jail. He could, he thought, uphold the Smith Act and the convictions without endorsing this sort of crude anti-Communism. He wanted to believe he was following Holmes, who had patented the trick of saying that a given law was a bad one while simultaneously upholding it as constitutional.

But there was a catch. In all his writing on the freedom of speech, Holmes had never said that the courts should defer to the legislature. Neither had Brandeis, Frankfurter's other judicial hero. Frankfurter had always claimed that judicial restraint was the invention of these two great justices and of Professor James Bradley Thayer. But now he was forced to confront the one area where Holmes and Brandeis had both been activist. Both men believed that the courts should carefully review restraints on free speech,

01 permitting them to remain in place only when there was, in fact, a  
02 clear and present danger.

03 Frankfurter could not admit that he was deviating from the  
04 legacy of Holmes. As Douglas once cruelly joked, "Know why  
05 Frankfurter never had any children? Because Holmes didn't."<sup>40</sup> So  
06 Frankfurter tried to claim that he was actually applying the "clear  
07 and present danger" test flexibly, as Holmes would have: "It does  
08 an ill-service" to Holmes, Frankfurter wrote, "to make him the  
09 victim of a tendency which he fought all his life, whereby phrases  
10 are made to do service for critical analysis by being turned into  
11 dogma."<sup>41</sup>

12 This was a striking piece of overreaching, especially for some-  
13 one who had devoted his life to emulating Holmes. The "clear  
14 and present danger" test was designed to protect free speech from  
15 encroachment by government authorities armed with broad leg-  
16 islative authority. Holmes could not credibly be made into an  
17 advocate of deference to the legislature with respect to the First  
18 Amendment.

19 Frankfurter had allowed the theory of judicial restraint to take  
20 him outside of Holmes's legacy. In so doing, he found himself mis-  
21 representing Holmes and Brandeis in the bargain. When forced to  
22 choose between his mentors and the theory he had invented to  
23 explain them, he went with the theory. Instead of looking prin-  
24 cipled, Frankfurter ended up looking benighted. His theory of  
25 judicial restraint itself came to seem like a cover for his tolerating  
26 violation of the most basic civil liberties. Frankfurter would pay  
27 dearly for this deviation. Black pointed out the problem in his opin-  
28 ion: If the Court defers to a "reasonable" judgment by Congress to  
29 abridge free speech, then the First Amendment is no longer a law,  
30 but "little more than an admonition to Congress."<sup>42</sup> Although he  
31 did not know it, Frankfurter's decision in the *Dennis* case marked  
32 the moment that he could no longer be fairly described as a liberal.

33 If Frankfurter in the *Dennis* case was misled by his own consti-  
34 tutional theory, for Jackson the case was a test of whether a coun-  
35S try lawyer turned international statesman could apply his own  
36N pragmatism correctly. His early experience with domestic anti-

Communism had left him skeptical of its efficacy. As a young man in Jamestown, he had been a member of the American Protective League, formed originally in 1917 as an auxiliary to the Department of Justice in order to ferret out pro-German sentiment across the country.<sup>43</sup> Jackson considered the League's activities amateur and absurd; after the war, the League became anti-Communist and antilabor, which Jackson later called "a complete perversion of its original purpose."<sup>44</sup>

During his year at Nuremberg, however, Jackson had seen Communism from a different angle. The Soviet lawyers and judges with whom he worked were, he knew, taking their orders from Moscow. In occupied Germany, with its different zones controlled by different states, it had been obvious how the world was becoming divided between the Soviets and the Western powers. More than his colleagues, Jackson had been exposed to the ground zero of the Cold War—and he felt he understood the operation of Communism firsthand.

Jackson began his opinion by acknowledging that under the "clear and present danger" test as it had been formulated some thirty years before, the Communist leaders could not be found guilty. The test, he explained belonged to the age of "anarchist terrorism"—of Sacco and Vanzetti. Anarchists, Jackson explained, lacked coordinated plans, and so it made sense to deal with them by prohibiting their speech only when it was in danger of causing imminent harm.

Communism, on the other hand, was something entirely different. The "antithesis of anarchism," it relied on a highly disciplined cadre of leaders to coordinate the long-term takeover of the government it sought to subvert. "The Communists," Jackson wrote, "have no scruples against sabotage, terrorism, assassination, or mob disorder; but violence is not with them, as with the anarchists, an end in itself. The Communist Party advocates force only when prudent and profitable. . . . Force or violence . . . may never be necessary, because infiltration and deception may be enough."<sup>45</sup>

With his single year of formal legal education in Albany, Jackson had not been a protégé of Holmes and had no instinct to treat

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him as a legal god. Holmes was for him simply a judge of a previous generation, whose "clear and present danger" test was obsolete. If it were used, it would mean "that the Communist plotting is protected during its period of incubation," and that "its preliminary stages of organization and preparation are immune from the law."<sup>46</sup> The government would be allowed to make arrests "only after imminent action is manifest, when it would, of course, be too late."<sup>47</sup>

Like his opinion in the case of the anti-Semitic priest Terminiello, Jackson's argument drew from what he had learned about the rise of Nazism. "Totalitarian groups," he wrote, "perfected the technique of creating private paramilitary organizations to coerce both the public government and its citizens."<sup>48</sup> Jackson, led astray by his own experiences, concluded that what had happened in Europe could happen at home. "The Communist Party realistically is a state within a state, an authoritarian dictatorship within a republic," he wrote.<sup>49</sup> The CPUSA and its Soviet handlers might have aspired to such discipline and power, but they were very far from achieving it.

His assessment of the Communist threat was not the only part of the *Dennis* opinion in which Jackson was influenced by Nuremberg. He also drew on the trial for what he considered the cure. The right tool to combat the Communists' long-term strategy, Jackson argued, was to put them on trial for conspiracy.

"The basic rationale of the law of conspiracy," he explained, "is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish."<sup>50</sup> Conspiracy law made sense because Communism was itself a conspiracy—an ongoing, collective enterprise designed to accomplish the takeover of government by any expedient means. The essence of the conspiracy charge was to impose responsibility on different people within complex organizations for the actions of all. At Nuremberg, Jackson had argued that Nazism itself amounted to the greatest criminal conspiracy the world had ever known.

Douglas put no stock in Jackson's use of conspiracy at Nuremberg. Earlier in the year, in a case involving investigation of

subversive groups, Douglas had lashed out at what he called "guilt by association." It was, he said, "one of the most odious institutions of history"—un-American and unconstitutional. "The fact that the technique of guilt by association was used in the prosecutions at Nuremberg does not make it congenial to our constitutional scheme. Guilt under our system of government is personal. When we make guilt vicarious you borrow from systems alien to ours and ape our enemies."<sup>51</sup> Douglas had a point. At Nuremberg, Jackson had been participating in a trial that included the Soviets, who considered law strictly as a tool for political ends.

Now, in his *Dennis* dissent, Douglas went after Jackson once more. "Invoking the law of conspiracy," he charged, "makes speech do service for deeds which are dangerous to society."<sup>52</sup> It turned mere words into acts of sedition: "Never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct. Yet that is precisely what is suggested."<sup>53</sup>

As Douglas took pains to demonstrate, the CPUSA defendants had been accused of nothing more than speaking. The men had taught the doctrines of four Communist texts. These books were perfectly lawful in the United States. If they could be on the shelves, Douglas asked, how could it be a crime to teach what was in them?<sup>54</sup> Douglas admitted that the Communist leaders believed the teachings of the books in question, but to rely on that charge to convict them was "to make freedom of speech turn not on what is said, but on the intent with which it is said."<sup>55</sup> This, in essence, was mind control.

Douglas had always claimed to be the true heir to Brandeis.<sup>56</sup> Now he invoked that legacy with pride, quoting Brandeis's most trenchant free speech passage: "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."<sup>57</sup> While Jackson was pontificating about world communism and Frankfurter was flailing in a maelstrom of theory, Douglas embodied the values of Brandeis. The mantle of liberalism had passed to his shoulders.

01           The essence of Douglas's liberal free-speech theory was that  
02           advocating ideas was different from conduct. The state has the  
03           power to prohibit "teaching the techniques of sabotage, the assassi-  
04           nation of the President...the planting of bombs...and the like."<sup>58</sup>  
05           It did not have the authority to prohibit abstract ideas. "I repeat  
06           that we deal here with speech alone, not with speech plus acts of  
07           sabotage or unlawful conduct. Not a single seditious act is charged  
08           in the indictment."<sup>59</sup> The absence of action made all the difference.  
09           In violation of liberal principle, the leaders of the CPUSA were  
10           being convicted only for their ideas.

11           Douglas did more than insist on the all-important difference  
12           between ideas and action. He provided an original explanation for  
13           why the liberal state must protect ideas, even those that might seem  
14           dangerous: "The airing of ideas releases pressures which other-  
15           wise might become destructive.... Full and free discussion keeps  
16           a society from becoming stagnant and unprepared for the stresses  
17           and strains that work to tear all civilizations apart."<sup>60</sup> Threatening  
18           ideas could not be suppressed without creating potentially destruc-  
19           tive pressures on the whole system. Allowing the unspeakable to  
20           be spoken would, Douglas suggested, safeguard the civilization  
21           against destruction from within. The argument reflected Douglas's  
22           familiarity with the version of Freudian psychology that he had  
23           experienced himself when George Draper cured him of his fear of  
24           peritonitis.

25           Not content with abstract arguments for free speech, Douglas  
26           also gave a practical one. Jackson had emphasized the tremendous  
27           threat of Communism worldwide. But Douglas insisted that Com-  
28           munism was not a threat domestically, because it lacked popular  
29           support. "Communists in this country have never made a respect-  
30           able or serious showing in any election. I would doubt that there is  
31           a village, let alone a city or county or state, which the Communists  
32           could carry."<sup>61</sup> And why was Communism so unpopular in United  
33           States? "Communism has been so thoroughly exposed in this  
34           country that it has been crippled as a political force. Free speech has  
35S          destroyed it as an effective political party."<sup>62</sup> Douglas was arguing  
36N          that liberal democracy could only be subverted through a broad-

based popular movement. To believe that Communists “are placed in such critical positions as to endanger the Nation is to believe the incredible,” Douglas wrote.<sup>63</sup> In the event of war with Russia, “they will be picked up overnight as were all prospective saboteurs at the commencement of World War II.”<sup>64</sup> In fact, the CPUSA was “the best known, the most beset, and the least thriving of any fifth column in history.”<sup>65</sup>

The upshot of Douglas’s profession was that liberalism must rest itself on the will of the people. “Our faith should be that our people will never give support to these advocates of revolution, so long as we remain loyal to the purposes for which our Nation was founded.”<sup>66</sup> Seen in these terms, it would actually be unpatriotic to interpret the Communist threat as dire. True patriotism relied upon the enduring power of popular support for liberal values and ideals.

Douglas’s argument effectively repudiated the paranoia that gripped even liberal anti-Communism in the early 1950s. In the face of speculation—much of it in retrospect well justified—that international Communism sought to take advantage of liberalism in order to subvert it, Douglas insisted that liberalism was more than strong enough to resist the challenge. As Jackson and Frankfurter doubted the strength of liberalism, they began to stray from the values they had once striven to protect. Douglas kept his eye on the ball, never believing that Communism could make serious inroads into American society. History vindicated his opinion. The major reason Douglas emerges as a hero of liberalism in the anti-Communist moment is simply that he was right.

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## NOTES

1. The quotation is often attributed to Oliver Wendell Holmes Jr. See, for example, Max Lerner, *Nine Scorpions in a Bottle: Great Judges and Cases of the Supreme Court* (New York: Arcade, 1994). But there is no evidence Holmes ever said it or anything like it. For the attribution to Bickel, see Dennis J. Hutchinson, "The Black-Jackson Feud," *Supreme Court Review* 1988: 203, 238. Kent Olson of the University of Virginia Law School Library points out that in the July 1953 issue of *Foreign Affairs*, J. Robert Oppenheimer compared the US-USSR arms race to "two scorpions in a bottle, each capable of killing the other, but only at the risk of his own life." Oppenheimer, "Atomic Weapons and American Policy," *Foreign Affairs* 31 (1953): 525, 529. Olson writes: "This metaphor received some coverage in the newspapers at the time, and the application to the Supreme Court may well have started out as a play on Oppenheimer's phrase." Bickel was a law clerk from 1952 to 1953, and so would have been finishing his clerkship when Oppenheimer used the phrase. Kent Olson, personal communication to the author, July 22, 2009.

### Book One CONTACTS

1. "Frankfurter v. Pupils," *Time*, June 12, 1933 (Frankfurter "still had an accent" in 1906).
2. Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* (Boston: Houghton Mifflin, 2005), 16–17.
3. See, for example, a cover story on Theodore Jr.'s Porcellian induction: "Initiate Young Roosevelt; Porcellian Club at Harvard Compels Him to Adore Pigs' Feet," *New York Times*, February 19, 1907, 1. Archibald, Theodore's third son, was not a member. See Patricia O'Toole, *When Trumpets Call: Theodore Roosevelt after the White House* (New York: Simon & Schuster, 2005), 336.
4. President William McKinley was shot on September 5, 1901, and died on September 14, 1901.
5. A comparison of the membership of the Institute of 1770 and the *Crimson* editorial board for 1903, 1904, and 1905, shows that between one-third and one-half of the *Crimson* board members had been chosen for the Institute. For FDR's experiences see Karabel, *The Chosen*, 14–15.

41. White, "Felix Frankfurter's 'Soliloquy,'" 432; see also Michael Belknap, "Frankfurter and the Nazi Saboteurs," *Supreme Court Historical Society, 1982 Yearbook*, 67; Jack Goldsmith, "Justice Jackson's Unpublished Opinion in *Ex Parte Quirin*," *Green Bag* 9 (2006): 223. 01
42. White, "Felix Frankfurter's 'Soliloquy,'" 434. 02
43. *Ibid.* Here was an express statement of one component of the doctrine of judicial restraint. Constitutional questions, according to Frankfurter, should be avoided because the Court would inevitably impinge on the other branches of government in deciding them. Justice Brandeis had in fact given formal expression to this notion in a case where he suggested that the Supreme Court should not reach constitutional questions unless obligated to do so. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345–56 (1936). More than sixty years later, John Roberts, as a judge on the D.C. Circuit before his elevation to chief justice, would express essentially the same idea in the pithy formulation that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Laboratories Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment). 03
44. See *Schneiderman v. United States*, 320 U.S. 118 (1943); for the facts concerning his age and background I have relied on William Schneiderman, *Dissent on Trial: The Story of a Political Life* (Minneapolis: MEP Publications, 1983), 11–18; 84. 04
45. Felix Frankfurter, *From the Diaries of Felix Frankfurter*, ed. Joseph P. Lash (New York: Norton, 1975), 214. 05
46. *Id.*, 211. 06
47. *Id.*, 211–12. 07
48. *Schneiderman*, 320 U.S. 118. 08
49. In Jackson's opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 627–28 (1943), the Court noted objections to the salute on these grounds—objections unmentioned in *Gobitis*. 09
50. *Jones v. City of Opelika*, 316 U.S. 584, 623–24 (1942) (Black, J., dissenting). 10
51. *The Secret Diary of Harold L. Ickes* vol. iii, 199 (entry for June 5, 1940) ("Apparently there was a good deal of feeling between Bob Jackson and Felix" over the opinion at a dinner hosted by Archibald MacLeish.") 11
52. *Barnette*, 319 U.S. at 638. 12
53. *Id.* at 642. 13
54. Norman I. Silber, *With All Deliberate Speed: The Life of Philip Elman, an Oral History Memoir* (Ann Arbor: University of Michigan Press, 2004), 112. 14
55. *Barnette*, 319 U.S. at 646–47. 15
56. Frankfurter, *Diaries*, 254. 16
57. *Ibid.* 17
58. *Id.*, 254–55. 18
59. *Ibid.* 19
60. *Ibid.* 20
61. For an alternative view, see Norman Dorsen, Book Review, *Harvard Law Review* 95, no. 1 (1981): 367 (reviewing Hirsch, *The Enigma of Felix Frankfurter*). 21

- 01 62. Cf. Dorsen, Book Review, *Harvard Law Review* 95.
- 02 63. *Barnette*, 319 U.S. at 646–47.
- 03 64. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).
- 04 65. Holmes to Harold Laski, May 13, 1919, in Mark DeWolfe Howe, ed.,  
05 *The Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J.*  
06 *Laski, 1916–1935* (Cambridge: Harvard University Press, 1953).
- 07 66. Sanford Levinson, “The Democratic Faith of Felix Frankfurter,” *Stan-*  
08 *ford Law Review* 25 (1973): 430.
- 09 67. The most up-to-date scholarly work on the Japanese internment is Greg  
10 Robinson, *A Tragedy of Democracy: Japanese Confinement in North America* (New  
11 York: Columbia University Press, 2009). See also Greg Robinson, *By Order of*  
12 *the President: FDR and the Internment of Japanese Americans* (Cambridge: Harvard  
13 University Press, 2001); and Wendy L. Ng, *Japanese American Internment During*  
14 *World War II: A History and Reference Guide* (Westport, CT: Greenwood Press,  
15 2002); Eric L. Muller, *American Inquisition: The Hunt for Japanese-American Dis-*  
16 *loyalty in World War II* (Chapel Hill: University of North Carolina Press, 2007).  
17 On the legal aspects of the case, the definitive source remains Peter Irons, *Justice*  
18 *at War* (New York: Oxford University Press, 1983). For an overview of the  
19 Japanese-Americans who brought the test cases, see Robinson, *A Tragedy of*  
20 *Democracy*, 218–19; Irons, *Justice at War*, 81–103; Neil Gotanda, “The Story of  
21 *Korematsu: The Japanese-American Cases,” in Constitutional Law Stories* (see  
22 book 2, note 74), 231, 247–251. On Yasui, see the oral history of Yasui in John  
23 Tateishi, *And Justice for All: An Oral History of the Japanese-American Detention*  
24 *Camps* (New York: Random House, 1979), 62–93; on Yasui’s family, see Lau-  
25 ren Kessler, *A Stubborn Twig: Three Generations in the Life of a Japanese Family*  
26 (New York: Random House, 1993).
- 27 68. Robinson, *A Tragedy of Democracy*, 128.
- 28 69. See the oral history of Endo in Tateishi, *And Justice for All*, 60–61; see  
29 also Robinson, *A Tragedy of Democracy*, 219.
- 30 70. Steven A. Chin, *When Justice Failed: The Fred Korematsu Story* (Austin,  
31 TX: Raintree, 1992), 70.
- 32 71. See, for example, “Nips Work Prisoners to Death in Jungles,” Septem-  
33 ber 1, 1945; “Nip Ship Sunk Off Solomons,” March 2, 1943; “Jap Girl Awarded  
34 Vacation Wages,” December 28, 1943 (all from the *Los Angeles Times*).
- 35 72. Attack on Pearl Harbor by Japanese Armed Forces, S. Doc. No. 77-2, at  
36 12 (1942), available at <http://www.ibiblio.org/pha/pha/roberts/roberts.html>.
- 37 73. Irons, *Justice at War*, 45.
- 38 74. Biddle, *In Brief Authority*, 218–19.
- 39 75. Robinson, *A Tragedy of Democracy*, 84–85. See Walter Lippmann, “Facts  
40 Demanded on Coast Danger,” *New York Times*, Feb. 15, 1942; “Pacific Coast  
41 Aliens,” *New York Times*, Feb. 15, 1942.
- 42 76. Robinson, *A Tragedy of Democracy*, 220–21.
- 43 77. *Hirabayashi v. United States*, 320 U.S. 81 (1943).
- 44 78. *Hirabayashi*, 320 U.S. at 93 (quoting Charles Evans Hughes, War Powers  
45 under the Constitution, 42 A.B.A. Rep. 232, 238).

resign, leading Biddle to comment in a letter to his wife that "this is not new."  
Taylor, *Anatomy of the Nuremberg Trials*, 359.

87. Id., March 20, 1946, <http://avalon.law.yale.edu/imt/03-20-46.asp#Goering7>.

88. Ibid.

89. Janet Flanner, Letter from Paris, *New Yorker*, March 30, 1946, 76.

90. Id., 78.

91. Jackson was as well-dressed as ever in Nuremberg. In most images he wears a suit in lieu of the tailcoat and striped flannel trousers affected by Fyfe; but in at least one image he is sitting at the prosecution table wearing the formal striped trousers and dark coat.

92. Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (New York: Palgrave Macmillan 2007), 81; Biddle, *In Brief Authority*, 385.

93. Biddle, *In Brief Authority*, 384–86.

94. Jackson, *Reminiscences*, 1591.

95. Cf. Dennis J. Hutchinson, "The Black-Jackson Feud," *Supreme Court Review* 1988: 213–14.

96. Id., 215. Hutchinson says that there was a column, but research reveals this is inaccurate; no such column appeared on that day—it therefore must have been a radio broadcast.

97. Newman, *Hugo Black*, 341–42, 430.

98. Id., 341 and 680 n.7.

99. Ernest Lindley, "Chief Justiceship: Many Factors Temper Selection," *Washington Post*, April 26, 1946, 7.

100. Newman, *Hugo Black*, 343.

101. Jackson, *Reminiscences*, 1207–08. Eagleton was the father of Thomas Eagleton, who would serve as Democratic senator from Missouri and briefly be George McGovern's running mate, only to lose the spot on the ticket when revelations of his treatment for mental illness became public.

102. Doris Fleeson, *Evening Star*, May 16, 1945.

103. Frank Sher to RHJ, May 17, 1946, cited in Hutchinson, "The Black-Jackson Feud," 216.

104. Hutchinson, "The Black-Jackson Feud," 220.

105. Lewis Wood, "Split of Jackson and Black Long Widening in Capital," *New York Times*, June 11, 1946, 2.

106. *Yale Law Journal* 56 (1946–1947): 636.

107. "The Supreme Court: 1947," *Fortune*, January 1947, 73, 78.

108. Biddle, *In Brief Authority*, 163.

109. Id., 411.

110. Ibid.

### Book Seven FRACTURE

1. Janeway, *The Fall of the House of Roosevelt*, 80–81 (quoting transcripts of Corcoran's wiretapped phone conversations).

2. Id., 61 (LBJ), 77 (Corcoran).

3. Douglas Oral History Interview with Walter Murphy, Cassette no. 16, June 5, 1963. 01
4. Janeway, *The Fall of the House of Roosevelt*, 77 (quoting transcripts of Corcoran's wiretapped phone conversations). 02
5. Simon, *Independent Journey*, 217, quoting Elizabeth Peer, "The Mind of a Maverick," *Newsweek*, November 24, 1976. I have not been able to identify the other person to whom Frankfurter may have been referring. 03
6. Simon, *Independent Journey*, 216, citing Frankfurter, *Diaries*, 76. 04
7. Fine, *Frank Murphy*, 254, citing Douglas to Frank Murphy, May 11, 12, 16, 1943. 05
8. Harrison, "The Breakup of the Roosevelt Supreme Court" (see book 4, note 50), 165, deserves credit for noticing the way these allies fractured. For Harrison, the cause lay in several "lessons" the justices had learned from their experiences as liberals during the 1920s and 1930s. 06
9. The details may all be found in Richard Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties* (Madison: University of Wisconsin Press, 1981), 139-43. 07
10. See *Adamson v. People of State of California*, 332 U.S. 46, 55 (1947) ("Generally, comment on the failure of an accused to testify is forbidden in American jurisdictions."); *id.* at 50 (assuming without deciding that the inference would violate the Fifth Amendment if the trial were held in federal court). 08
11. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). In *Twining v. New Jersey*, 211 U.S. 78 (1908), the Supreme Court had specifically held that the right against self-incrimination did not extend to the states. 09
12. See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper and Row, 1988), 241 (describing Bingham as a moderate rather than a radical Republican). 10
13. *Adamson*, 332 U.S. at 71-72 and n.5 11
14. *Adamson*, 332 U.S. at 72. 12
15. Newman, *Hugo Black*, 359. 13
16. Black had been able to rely for some material on an obscure historical book, Horace Edgar Flack, *The Adoption of the Fourteenth Amendment* (Baltimore: Johns Hopkins Press, 1908). Otherwise the research was original. 14
17. *Adamson*, 332 U.S. at 63 (Frankfurter, J., concurring). 15
18. *Id.* at 65. 16
19. See Richard J. Aynes, "Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment," *Chicago-Kent Law Review* 70 (1995): 1223. 17
20. Frankfurter to Black, November 13, 1943, Felix Frankfurter papers, Harvard Law School, Folder 2 in Box 169. 18
21. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862-1890* (Cambridge: Harvard University Press, 1939). 19
22. Frankfurter, *Diaries*, 312. In Frankfurter's diary for April 25, 1947, when the justices were still working on their *Adamson* opinions, Frankfurter recorded his conversation with Hughes. Not only did the two men discuss Fairman, 20

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but Frankfurter reported Justice Samuel Miller's remark about Justice Stephen Bradley, his great nineteenth-century rival. Fairman had also studied Bradley; see Aynes, "Charles Fairman," 1213.

23. Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," *Stanford Law Review* 2 (1949-1950): 5. The piece appeared as the lead article in the second-ever volume of the *Stanford Law Review*. In one respect, Fairman's research actually strengthened Black's case. He pointed out that one senator supporting the Fourteenth Amendment had actually said outright that it would incorporate the first eight amendments of the Constitution by reference. Black had mentioned this passage in his original appendix without fully emphasizing its significance. *Id.*, 57-58.

24. Flack, *The Adoption of the Fourteenth Amendment*.

25. Hugo Black to John P. Frank, January 10, 1950, cited in Newman, *Hugo Black*, 355-56.

26. Newman, *Hugo Black*, 383. Newman emphasizes Black's personal fondness for Truman (*id.* at 380, 385); but this is at odds with his apparent interest in supplanting him and with his at least partial alliance to Douglas and Corcoran, who disdained Truman.

27. Janeway, *The Fall of the House of Roosevelt*, 60.

28. In his diaries, Frankfurter related an exchange with Justice Reed about the role of politics on the Supreme Court. Reed insisted that politicians like Hugo Black could not ignore their political instincts just because they joined the Court. Frankfurter's reaction was, "But what about Bill Douglas? You can have no such excuse for him. He's never been a politician, he was a professor." Reed, in Frankfurter's telling, replied, "But he is a politician now.... I had assumed he had put all thoughts of the Presidential nomination in '44 out of his head, but plainly not." See Frankfurter, *Diaries*, 184.

29. See Murphy, *Wild Bill*, 254.

30. *Id.*, 255.

31. *Id.*, 240-41.

32. *Id.*, 258, comments to Eliot Janeway.

33. *Id.*, 263.

34. *Id.*, 271.

35. *Id.*, 274.

36. *Id.*, 276-77, citing interview with a law clerk.

37. On these peregrinations see *id.*, chapters 24, 30, and 32.

38. Janeway, *The Fall of the House of Roosevelt*, 65 n.

39. Murphy, *Wild Bill*, 291.

40. Murphy, *Wild Bill*, 293. Janeway's son notes that Murphy overstates the permanence of the break between Douglas and Corcoran, who reconciled at least once, in 1957. Janeway, *The Fall of the House of Roosevelt*, 65 n.

41. Douglas, *Go East, Young Man*, 39; see White, *The American Judicial Tradition* (see book 2, note 118), 371, identifying the themes of "loneliness, fear, and the strengthening and calming effects of the wilderness."

42. William O. Douglas, *The Court Years* (New York: Random House, 1980), 394; White, *The American Judicial Tradition* (see book 2, note 118), 369. 01
  43. Patrick Schmidt, "The Dilemma to a Free People: Justice Robert Jackson, Walter Bagehot, and the Creation of a Conservative Jurisprudence," *Law and History Review* 20 (2002): 519. 02
  44. *Ibid.* 03
  45. *Terminiello v. Chicago*, 337 U.S. 1, 16–17 (1949). 04
  46. Schmidt, "The Dilemma to a Free People," 520. 05
  47. See "American Civil Liberties Union," in *Encyclopedia of Chicago History*, available at <http://www.encyclopedia.chicagohistory.org/pages/20.html>. 06
  48. *Terminiello*, 337 U.S. at 3. 07
  49. *Terminiello*, 337 U.S. at 4. 08
  50. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); the rule has never been directly followed by the Court afterward. 09
  51. *Terminiello*, 337 U.S. at 23 (Jackson, J., dissenting). 10
  52. *Terminiello*, 337 U.S. 1, 24–25, internal citations omitted. 11
  53. *Hirota v. MacArthur*, 388 U.S. 197 (1949); *In re Yamashita*, 327 U.S. 1 (1946). 12
  54. Charles Lane, "Habeas Schmabeas: The 60-Year-Old Case That Will Decide Guantanamo," *Slate*, April 14, 2004, available at <http://www.slate.com/id/2098817/>. 13
  55. *Johnson v. Eisentrager*, 339 U.S. 763, 793 (1950) (Black, J., dissenting). 14
  56. *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949). 15
  57. *Johnson*, 339 U.S. at 779. 16
  58. *Id.* at 791. 17
  59. West Pediment Information Sheet, Office of the Curator, Supreme Court of the United States. Available at <http://www.supremecourtus.gov/about/westpediment.pdf>. 18
  60. *Johnson*, 339 U.S. at 796. 19
  61. *Id.* at 797. 20
  62. *Id.* at 798. 21
  63. *Id.* 22
  64. In a telling footnote, Black explained that his vision of a people who "choose to maintain their greatness by justice rather than violence" came from Rome. *Id.* 23
- Book Eight COMMUNISM** 24
1. "Harvard Law School Celebrates Its Black Alumni," *The Journal of Blacks in Higher Education* no. 31 (Spring 2001): 85–87. 25
  2. Gerald Horne, *Black Liberation/Red Scare: Benjamin Davis, Jr. and the Communist Party* (Cranbury, NJ: Associated University Presses, 1994). 26
  3. *Id.*, 31. 27
  4. *Id.*, 27–31. 28
  5. Benjamin Jefferson Davis, *Communist Councilman from Harlem: Autobiographi-* 29
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- cal Notes Written in a Federal Penitentiary (New York: International Publishers, 1991), 222; Horne, *Black Liberation/Red Scare*, 36.
6. Horne, *Black Liberation/Red Scare*, 38.
  7. Davis, *Communist Councilman from Harlem*, 222.
  8. Horne, *Black Liberation/Red Scare*, 38.
  9. Davis, *Communist Councilman from Harlem*, 222.
  10. Horne, *Black Liberation/Red Scare*, 38.
  11. Harvey Klehr & John Earl Haynes, *The American Communist Movement: Storming Heaven Itself* (New York: Twayne Publishers, 1992), 99.
  12. Horne, *Black Liberation/Red Scare*, 143.
  13. Michal R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, CT: Greenwood Press, 1977), 45–53.
  14. Irving Howe & Lewis Coser, *The American Communist Party: A Critical History* (New York: Praeger, 1962), 339.
  15. Harvey Klehr, John Earl Haynes, and Fridrikh Igorevich Firsov, *The Secret World of American Communism* (New Haven: Yale University Press, 1995), 259–63.
  16. Id., 233–38.
  17. Id., 323.
  18. Michael Gold, *Jews Without Money* (New York: Carroll and Graf, 1996), 309 (originally published 1930).
  19. John Earl Haynes & Harvey Klehr, *Venona: Decoding Soviet Espionage in America* (New Haven: Yale University Press, 2000), 15. Eugene Dennis was mentioned just twice in the intercepts, without enough context to show him guilty of anything. Id. at 222. Browder, the former CPUSA general secretary who was not tried, was mentioned in twenty-six messages and implicated in espionage. Id. at 210.
  20. William M. Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953* (New York: Cambridge University Press, 2006), 555.
  21. Horne, *Black Liberation/Red Scare*, 210.
  22. On Hand see Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Alfred A. Knopf, 1994). See 151–70 for the *Masses*; and 598–612 for the *Dennis* case.
  23. Gunther, *Learned Hand*, 554–62.
  24. Douglas, *Go East, Young Man*, 332. Francis Biddle, attorney general at the time, would also write that he “heard later that [FDR] resented what he called the ‘organized pressure’ in Hand’s behalf.” Biddle, *In Brief Authority*, 194.
  25. *Schenck v. United States*, 249 U.S. 47 (1919).
  26. *United States v. Carroll Towing Co.*, 159 F.2d 159 (2d Cir. 1947).
  27. *United States v. Dennis*, 183 F.2d 201, 213 (2d Cir. 1950).
  28. Newman, *Hugo Black*, 404.
  29. *Dennis*, 341 U.S. at 580 (Black, J., dissenting), quoting *Bridges v. California*, 314 U.S. 252, 263 (1941).
  30. Id. at 581 (Douglas, J., dissenting).

31. *Id.* at 521. 01
32. *Id.* at 523. 02
33. *Id.* at 519. 03
34. *Id.* 04
35. Powers, 34–5. 05
36. *Dennis*, 341 U.S. at 525 (Frankfurter, J., concurring). 06
37. *Id.* 07
38. *Id.* at 526. 08
39. *Id.* at 554 (quoting George F. Kennan, “Where Do You Stand on Communism?” *New York Times Magazine*, May 27, 1951, 53). 09
40. Janeway, *The Fall of the House of Roosevelt*, 82. 10
41. *Ibid.* 11
42. *Dennis*, 341 U.S. 494, 580 (Black, J., dissenting). 12
43. Jackson, *Reminiscences*, 116. 13
44. *Id.*, 121. 14
45. *Dennis*, 341 U.S. at 564–65 (Jackson, J., concurring). 15
46. *Id.* at 570. 16
47. *Id.* 17
48. *Id.* at 577. 18
49. *Id.* 19
50. *Id.* at 573. 20
51. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 178–79 (1951); see Murphy, *Wild Bill*, 304, noting reference to Jackson here. 21
52. *Dennis*, 341 U.S. at 584 (Douglas, J., dissenting). 22
53. *Id.* 23
54. *Id.* at 583. 24
55. *Id.* at 583. 25
56. *Cf.*, privacy cases, *On Lee v. US* and streetcar case, discussed in Murphy, *Wild Bill*, 312. 26
57. *Dennis*, 341 U.S. at 586 (Douglas, J., dissenting), quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). 27
58. *Dennis*, 341 U.S. at 581. 28
59. *Id.* at 584. 29
60. *Id.* 30
61. *Id.* at 588. 31
62. *Id.* 32
63. *Id.* at 589. 33
64. *Id.* 34
65. *Id.* 35
66. *Id.* at 591. 36
67. See Frank Newport, “Bush’s 69% Job Disapproval Rating Highest in Gallup History,” Gallup, April 22, 2008, available at <http://www.gallup.com/poll/106741/bushs-69-job-disapproval-rating-highest-gallup-history.aspx>. George W. Bush’s lowest approval rating was 25 percent, in October 2008. See Lydia Saad, “Bush Presidency Closes With 34% Approval, 61% Disapproval,”