

**Martin Fried's synopsis of his presentation on
*Scorpions: The Battles and Triumphs of FDR's Great
Supreme Court Justices*, by Noah Feldman.**

A comparison of the four Roosevelt Justices (Black, Douglas, Frankfurter, and Jackson) with the current Justices.

Economics. FDR: All four Justices were from economically disadvantaged backgrounds. TODAY: Only Sotomayor and Thomas come from poor families.

Rural v. Urban. Three (Black, Douglas, and Jackson) came from rural areas; Frankfurter was the only one raised in a big city. TODAY: Thomas was born in a small, all-African-American town in Georgia, but moved to Savannah when he was young. The rest come from urban or suburban areas.

Education. The four went to different law schools. Black attended the University of Alabama (40 students, 2 professors). Douglas went to Columbia. Frankfurter studied at Harvard. Jackson attended Albany Law School for one year, receiving a certificate of attendance. He was the last Justice not to have graduated from law school. TODAY: The educational background is quite different. Ginsburg attended Harvard for one year, but transferred to Columbia for her last two years. Sotomayor and Thomas attended Yale. All the others went to Harvard.

Judicial Experience Prior To Joining the Court. None had prior judicial experience. TODAY: only Kagan never served as a federal appellate judge; she was nominated, but the nomination

expired before she could be confirmed.

Religious Affiliation. Black, Douglas, and Jackson were Protestants; Frankfurter was Jewish. (The only Catholic on the Court was Justice Murphy.) TODAY: There are six Catholics, three Jews, and no Protestants.

Getting to the Court — the Backgrounds of the Four Justices. Black was a Southerner, one of few who have served on the Court. FDR traded a generally reliable vote in the Senate for an equally reliable spot on the Court. Black had not practiced law for more than ten years. Black's prior membership in the Ku Klux Klan did not stand in the way of his confirmation. (He apparently resigned his membership after having been elected to the Senate.) Black was confirmed by the Senate (63 in favor, 16 opposed, 17 abstentions) five days after being nominated.

Douglas (the longest serving) had been a professor at Columbia Law School, then Yale Law School, where he was named a Sterling Professor at age 34. He served on the Securities Exchange Commission, campaigning for the chairmanship by claiming to have an "offer" to be the Dean of Yale Law School. The seat that he was to occupy became available when Justice Brandeis resigned for health reasons in February 1939. FDR wanted to appoint a Westerner, and Douglas was one, even though he had not been West for 16 years. He was confirmed in April.

Frankfurter, FDR's "Jewish advisor," courted FDR

assiduously. He was offered the post of Solicitor General, but turned it down because he thought he could do more good (have more influence?) from Cambridge and Harvard Law School. He replaced Justice Cardozo, who died in the summer of 1938. FDR did not appoint Frankfurter until six months later. The appointment may have come as a reward for Frankfurter's backing of FDR's Court-packing plan. The Senate held hearings on the nomination, a rare occurrence at that time. The only prior instance of such a hearing involved Justice Brandeis. Frankfurter appeared before the Senate, something that is commonplace now, but not then. He was confirmed unanimously.

Jackson was a country lawyer who became a successful lawyer in a small western New York State city. He became counsel to the Bureau of Internal Revenue, where he successfully brought suit against Andrew Mellon for tax avoidance. He then became an Assistant Attorney General, where he wrote to FDR supporting the Court-packing plan. He later was appointed Attorney General.

Chief Justice Charles Evans Hughes resigned from the Court in June 1941. Jackson was the natural frontrunner for the post, but FDR appointed Harlan Fiske Stone. Jackson was appointed to fill Stone's seat and was sworn in a month later.

Similarities at the Start — the Common Bond. All four were liberal and committed to the New Deal. They were opposed to the *Lochner* doctrine and the Court's property-protection stance, namely, that liberty of contract was included in the liberty of

individuals protected by the 14th Amendment. They all had a reverence for Justice Brandeis.

Judicial Philosophies — Constitutional Theories. Black was an originalist — the text of the Constitution means what it was originally intended to mean. For Black, the Constitution did not protect corporations, only people. This principle guided him for his 34 four years on the Court (5th longest), a period during which he saw originalism become a conservative doctrine. Douglas's philosophy was legal realism — the law is not what judges say in formal rulings, but what legal actors do in the real world. Social, psychological, and, especially, economic factors determine results. Frankfurter's hallmark was judicial restraint, the "unofficial" constitutional philosophy of American idealism. The doctrine eventually led Frankfurter to become conservative; he abandoned his liberal views out of fidelity to his constitutional philosophy. Jackson espoused constitutional pragmatism. This was designed to balance competing forces and achieve the ends of civilization. This is best seen in Jackson's opinion in the steel-seizure case.

Disagreements and Animosities. The visions of the four diverged, their personalities clashed, each had his own theory of how to understand the Constitution. By choosing Stone as Chief Justice, FDR set in motion the disagreements that were to follow. Frankfurter despised Douglas, calling him "one of the two completely evil men I have ever met." Douglas considered Frankfurter a pedant, stating that Frankfurter would hold forth for

50 minutes in conference, 50 minutes being the length of a Harvard class. The animosity between Black and Jackson stemmed from Jackson blasting Black for not recusing himself in a case in which Black's former law partner was involved. This led Black to oppose Jackson's appointment as chief Justice.

Extracurricular Activities and Aspirations. Frankfurter took the unusual step of advising Henry Stimson not to serve on military commissions. He also actively went to work to block Tommy Corcoran's nomination to be Solicitor General. Jackson served as Prosecutor at the Nuremburg war-crimes trials. Douglas harbored the desire to be Vice President or even President. Another Justice, Byrnes, served on the War Mobilization Board and later became Governor of South Carolina.

Some Important Cases. *Gobitis* — the Jehovah's Witnesses Cases: the first case of the FDR court to be overturned. Frankfurter treated the reversal as a professional and personal calamity. It marked the rejection of the philosophy of judicial restraint. *Korematsu* — Japanese-American Detention Case: one of the two or three worst decisions of the Court. *Dennis* — Communist Party Member Case: Frankfurter's decision in the case marked the moment he could no longer be described as a liberal. *Griswold*: Douglas finds that the guarantees in the Bill of Rights have a penumbra formed by emanations from the guarantees that help give them life and substance. *Brown v. Board of Education*: the last significant decision of the Roosevelt Court.