Joseph Kraft

A Balanced High Court

THE NEARLY simultaneous resignations of Justices Hugo Black and John Marshall Harlan assert the basic standard for measuring their replacements on the Supreme Court. That is the standard of a balanced court.

For Justices Black and Harlan represent two different strains of American judicial thought that came together in opposition to the mainstream of the Supreme Court's development. And no matter what may be said about regional, racial or sexual balance, the most important balance of all is upset if the court is now deprived of both kinds of dissent.

The mainstream for the Supreme Court is along the way beaten by the brawling dynamic force, the irresistible lunge toward profit and development that is American life. Since the days of John Marshall, the court has always yielded to the national drift. It has been a court of assenters and yea-sayers — the "least dangerous branch," as Prof. Alexander Bickel put it. It has at all times been apt, in the favorite phrase of Mr. Dooley, to follow the election returns.

A FINE EXAMPLE of this judicial mainstream was Roger Brooke Taney, Chief Justice from 1836 through 1863. As Dean Acheson says in a forthcoming book: "He applied no touchstone of doctrine to settle questions as they *should* be settled . . . His method of approach was to leave this making of policy, so far as possible, to the trial of experience and legislative judgment . . . Every opportunity, he thought, should be given to solving these problems elsewhere than in the courtroom."

But from the beginning there have been unrepresentative justices, dissenters disposed to check the driving force of American life. Most of these dissenters have been willing to arrest acts of legislation only on narrow grounds. They have insisted that while there was no absolute check, that while the Constitution was flexible and must be adjusted to changing times, there was an obligation to move in certain ways. Government had, in Prof. Paul Freund's phrase, to "turn square corners." It had to follow due process.

These proceduralists have been very well represented on the court through this century. Holmes, Brandeis and Cardoza all fit that definition. So did Felix Frankfurter. And Justice Harlan was in their tradition.

But Justice Black interposed against the mainstream a very different kind of obstacle. He was, by his own accounting, a fundamentalist. He believed in the exact letter of the Constitution and the Bill of Rights, and he made no concessions to changing times and customs. As he wrote in the decision he liked best, the dissent in Adamson v. California:

"I cannot consider the Bill of Rights to be an outworn 18th century 'straitjacket' . . . . Its provisions may be thought outdated abstractions by some. And it is true they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century whenever excessive power is sought."

In thinking about new Supreme Court justices, the critical distinction to bear in mind is the distinction between assenters and dissenters. For in matters of criminal justice, freedom of speech, and race, the national majority is now impatient with the restraints of the Constitution. Basic liberties can be threatened if the court is unwilling to assert unpopular opinions.

President Nixon, like President Johnson, has shown a disposition to favor assenters, those who would go along, who would not rock the boat. Like President Johnson before him, too, he has sought to camouflage the bent for conformity by affecting to right some other kind of balance.

But the true measure of a balanced court is not whether he names a black or a Northerner or a woman. It is whether he is prepared to go against the grain of the national prejudice — whether he is prepared to appoint a dissenter true to the tradition of Black and Harlan.