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One Step Closer to the 'Nixon Court'

By FRED P. GRAHAM
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WASHINGTON, Sept. 17—The resignation of Hugo Lafayette Black from the Supreme Court may be cited by future historians as the event that ushered in the era of the "Nixon Court." That this can be speculated, in advance of the selection of his successor, is not indicative so much of the proven propensity of President Nixon to appoint conservative, "law-and-order" Justices as it is of the impact of Justice Black's presence on the Court.

News Analysis

Without him, it is almost certain to be less zealous in its attitude toward freedom of speech and the press, more yielding in rulings on police interrogation and antisubversive investigations, less rigid in its stand against obscenity censorship and more willing to drift away from the tradition of trial by jury.

If this seems to imply that Mr. Nixon will now gain the law-and-order Court that he pledged in his 1968 campaign, the implication is only half true. For Justice Black had become increasingly critical of liberal rulings curbing searches and wiretapping by the police and protest demonstrations, and his switch had already given the conservative Burger wing of the Court a majority on these issues.

Rather, it was Justice Black's absolutist philosophy of the Constitution, and his intellectual strength and unfailing advocacy of his views that made him a bulwalk against the desires of any President, Attorney General or Congressional majority whose views did not square with the Bill of Rights—as he saw it. He was in a purist sense a "strict constructionist," and those who sought to bend well-established rights to meet new fears and accommodate new programs always had to overcome his considerable opposition.

So the trend most likely to be seen is success for certain plans of the Nixon Administration that otherwise might have failed.

The Justice Department has just asked the Supreme Court t reject the press's assertion that the First Amendment shields reporters from being subpoenaed to reveal confidential information to grand juries. Justice Black, who frequently reminded Government attorneys that the First Amendment says that "no law" shall curb press freedom, had been counted on by free-press advocates to rally the Court against press subpoenas.

The Court will also rule on a key section of Mr. Nixon's new organized crime statute, which permits witnesses to be forced to testify before grand juries if they are promised that their testimony cannot be used against them. Justice Black usually took strong positions agai any erosion of the Fifth Amendment's privilege against self-incrimination.

Last week, the Justice Department asked Congress to permit criminal convictions on less-then-unanimous votes of juries. The constitutionality of this procedure will be considered by the Supreme Court in the term that begins Oct. 4 in a case from Oregon. Justice Black refused to tamper with the traditional meaning of jury trials.

At a time when President Nixon has been calling for more stringent anti-obscenity laws, the Court's docket is hea with obscenity cases, including challenges to the United States laws against mailing and importing lewd materials. Justice Black believed that all anti-obscenity laws were unconstitutional.

However, Justice Black must be categorized as a constitutionalist — not a "liberal" — and he would probably have agreed with any law-and-order successor on a number of points.

Because he read the Bill of Rights literally, he supported strong enforcement of those constitutional protections that are written in absolute language, such as the First Amendment's guarantees, the Fifth Amendment's self-incrimination privilege and the Sixth Amendment's guarantee of the right to counsel.

But the Fourth Amendment's prohibition against unreasonable searches and seizures is not absolute, and it does not literally cover wiretapping. Justice Black thus protested excluding evidence obtained in illegal searches, and he insisted that police wiretapping was not unconstitutional.

Siding With Nixon

He would undoubtedly have sided with the Nixon Administration in the upcoming ruling on the Justice Department's use of wiretapping without court warrants against radical groups. He always agreed with the Government that the Supreme Court should take no part in protecting welfare clients' rights. And he chided the liberal Justices for overturning old convictions of convicts.

The most telling effect of Hugo Black's departure may be on the cohesion and morale of the remaining Justices who shared his views of the Bill of Rights.

William O. Douglas, now 72 years old, is now the only Justice left who adheres to the absolutist view of the First Amendment. Justice Douglas, William J. Brennan Jr., and Thurgood Marshall represent the slimremnants of the "Warren majority" that wrote so many of Justice Black's views into law over the last two decades.

On the other hand, Mr. Nixon's two nominees, Chief Justice Warren E. Burger and Harry A. Blackmun, voted together on all but four of 102 decisions last year. If Mr. Nixon's third appointee performs in this mold, the three would probably more often than not be able to win two more votes from the three conservative pre-Nixon nominees—John M. Harlan, Potter Stewart and Byron R. White.

President Nixon, in his discussions of his nominees, invariably characterizes the ideal Supreme Court nominee in terms of Justice Felix Frankfurter, who preached a doctrine of judicial self-restraint, of conserving the judiciary's influence and of accommodating the pressures of Congress and the states.

As a measure of the impact of Justice Black's retirement, it is notable that he considered Felix Frankfurter's philosophy the mirror image of his own.

A Magnificent Dissenter On the Supreme Court

By JOHN DARNTON

Justice Hugo Lafayette Black, whose retirement from the Supreme Court was announced yesterday, rose to the highest bench in the Lincolnesque tradition: he was born the son of a Confederate soldier in a tiny cabin in Clay County, Ala.

He retained the trappings of his beginnings in a slight Southern drawl and a deep respect for the simple basics, such as the United States Constitution.

He kept handy a worn copy of the nation's charter close at hand, believing that it contained absolute pronouncements put there by men who knew what they were doing. He often read aloud what appeared to be his favorite, the First Amendment, beginning: "Congress shall make no law. . . ."

Justice Black's term on the Court was 34 years, longer than that of any other Justice except Chief Justice John Marshal and Justice Stephen J. Field. And for most of these years he was a major influence in the shaping of American law.

For much of his early years he was a minority dissenter, but in his later years, beginning about 1961, his dissents were transformed into the law of the land.

Perhaps more than any Justice, his lifetime views came to prevail, piecemeal, in a strict applicaion of the Bill of Rights.

Growth of Rights

These included the right of the indigent to free counsel (the Sixth Amendment); the right to counsel and silence during police interrogation (the Fifth and Sixth Amendments); the right of protection against self-incrimination (the Fifth); the right of confrontation of witnesses (the Sixth); the Fourth Amendment's protection against illegal searches and seizures, and the Eight Amendment's proscriptions against cruel and unusual punishment.

A majority of the Court could not support his view that the First Amendment protected all speech, including libel, slander and obscenity, but his influence was such that their rulings in effect did away with most suppression.

The court also came to accept his long-held view, bitterly opposed by Justice Felix Frankfurter, of "one man, one vote."

Just as he viewed his interpretation of the Bil of Rights as cutting down on incursions on personal freedom, he also saw the Constiution as giving the greatest leeway to Government in the economic sphere.

Despite this libertarian affirmation, Justice Black was accused, in the twilght of his term, of "going conservative," because of his positions on civil rights protests, poll taxes, anti-birth-control laws and electronic eavesdropping.

Last of 8 Children

Justice Black was born Feb. 27, 1886, the last of eight children. As a boy, he would spend long hours at the local county courtroom in Alabama, while his friends played.

He studied law at the University of Alabama. After graduation, in the Populist tradition, he won a reputation as a battler for farmers, workers, and small merchants.

Public Remarks on Klan

On Sept. 11, 1923, the aspiring trial lawyer did something that came back to haunt him years later as a newly confirmed Supreme Court Justice: he joined the K Klux Klan in Birmingham.

The story of this broke on Sept. 13, 1937, one month after the Senate had approved, by a 63-to-16 vote, his nomination to the Court.

Returning from vacation in Europe, the Jsutice asked for free radio time to present his first and last public remarks on the controversy: He admitted joining the Klan, and said he dropped out before becoming a Senator in 1926.

"I have had nothing to do hit it since that time," he asserted.