



THE

ANTAGONISTS

*Hugo Black,
Felix Frankfurter
and Civil Liberties in
Modern America*



JAMES F. SIMON

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Contents

<i>Introduction</i>	9
<i>Prologue</i>	13
CHAPTER I	
Felix	21
CHAPTER II	
Hugo	66
CHAPTER III	
Saving Souls	101
CHAPTER IV	
Justices at War	130
CHAPTER V	
Everyman and the Devil	157
CHAPTER VI	
Different Lenses	184
CHAPTER VII	
Fever Patients	209
CHAPTER VIII	
“Not a Razor Edge’s Difference”	235
<i>Source Notes</i>	261
<i>Index</i>	297



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BY JAMES F. SIMON

The Judge

In His Own Image: The Supreme Court
in Richard Nixon's America

Independent Journey: The Life of
William O. Douglas

For my best friends,
Sara, Lauren, David and Marcia

THE ANTAGONISTS

Introduction

THE NATION'S MOST COMPELLING political issues have often been translated into judicial questions placed on the docket of the U.S. Supreme Court. During the first fifty years of our constitutional history, the Court shaped the contours of our democracy, defining the responsibilities of the three branches of the federal government and their relationship to each other and to the states. In the last fifty years, the predominant business of the Supreme Court has been the protection of civil rights and liberties. During this period the Justices have attempted to draw the boundary between necessary governmental authority and the rights of individual citizens. No two members of the modern Supreme Court have been more important in developing the contemporary constitutional debate than Hugo Black and Felix Frankfurter.

Before their Court appointments in the late nineteen-thirties, both Black and Frankfurter had earned national reputations as political liberals, each enthusiastically supporting the social and economic reforms of President Franklin D. Roosevelt's New Deal. Frankfurter had further distinguished himself as one of the most vocal and effective defenders of individual rights of his generation. But shortly after Frankfurter joined Black on the Court in 1939, the two became embroiled in heated, often acrimonious debate over the meaning of the Bill of Rights and the role of the Court in protecting those rights. Their disagreements centered on crucial constitutional questions. Among them: Can the government de-

mand that a public school student participate in a patriotic ceremony? What is the correct constitutional standard of protection for a criminal defendant? When and how should the Court enforce the Constitution's equal protection clause on behalf of black Americans? These issues continue to have currency, as the 1987 Senate confirmation hearings on Judge Robert Bork and the vitriolic presidential campaign of 1988 attest.

Justice Black led the Court's "activist" wing, insisting that the Justices had a special obligation to protect minority rights. Justice Frankfurter became the Court's leading exponent of the philosophy of judicial restraint, arguing that the country's best hope for the protection of democratic values, including minority rights, rested primarily with the elected branches of government, not the Court. The central purpose of this book is to trace Black's and Frankfurter's backgrounds, explain their very different responses to fundamental constitutional questions and gauge the consequences of their work for the nation.

A second focus of this book is personal, not constitutional. I have presented off-the-Court portraits of Black and Frankfurter in an effort to understand them as individuals and as they interacted with each other. For most of their twenty-three judicial years together, Frankfurter and Black fought tenaciously, their arguments often tinged with anger and bitterness. Their strong wills and opposing ambitions for the Court virtually assured deep disagreements that would set them apart personally as well as professionally. But slowly, almost imperceptibly, the antagonists developed a grudging mutual respect, heightened by their recognition that they shared basic goals for the nation. And despite their many public altercations, Black and Frankfurter became genuine friends, each offering touching support for the other during times of personal need.

I have written this book for the general reader with the hope that scholars will also find it both interesting and instructive. Since Black and Frankfurter loom large in our constitutional history, much has been written in articles and books on each of them. Earlier scholarship has been extremely useful to me; I believe I have added to the literature. I have based my study on primary sources, particularly the papers of Black and Frankfurter. The book contains quotations from previously unpublished correspondence

between Black and Frankfurter as well as that between the Justices and their colleagues, friends and families. I have also introduced other sources for the first time, including FBI files on Justice Frankfurter during the McCarthy era. Finally, I have interviewed family members, law clerks and members of the U.S. Supreme Court, including Chief Justice William H. Rehnquist and Associate Justices Harry A. Blackmun, William J. Brennan, Jr., and the late Potter Stewart, who provided insights into the personalities and work of the two extraordinary men who are the subject of this book.

Many people helped make this project a finished book. The late Luis Sanjurjo, my literary agent, and Esther Newberg, who succeeded Luis in representing me, encouraged me throughout the project. Alice Mayhew, my editor at Simon and Schuster, offered candid, always insightful, advice. Three colleagues in legal education graciously agreed to read the entire manuscript and provided excellent comments for its improvement: Professor Jethro Lieberman of New York Law School, Professor Harry Wellington of the Yale Law School and Professor G. Edward White of the University of Virginia Law School. My wife, Marcia, served expertly as a general reader who asked questions about the manuscript that lawyers tend to overlook. Over the several years of this project, I have benefited from the research help of the following New York Law School students: Cornelius Courtney, Randolph Iannacone, Blanche Lark and Carol Mann. I also want to thank members of the staff at New York Law School who helped with the manuscript: Maria Del Bagno, Debbie Denhart, Susannah Halston, Dawn Ingraham, Kathleen Mahan, Marie Newman, Marylin Raisch and the faculty secretaries. Finally, I would like to express my gratitude for the assistance of the staffs in the manuscript divisions of the following libraries: Franklin D. Roosevelt Library, Hyde Park, New York; Harvard Law School Library, Cambridge, Massachusetts; Library of Congress, Washington, D.C.; Princeton University Library, Princeton, New Jersey; and the Yale University Library, New Haven, Connecticut.

Prologue

THE LARGE CAUCUS ROOM overflowed with Washington insiders, reporters, photographers, as well as plain citizens, straining to glimpse the star witness of the Senate's judiciary subcommittee. And at twelve minutes past ten o'clock on the morning of January 12, 1939, a short (five feet five), stocky, neatly dressed law professor from Harvard, the object of their attention, entered the room. He was Felix Frankfurter, who had been nominated a week earlier for the U.S. Supreme Court by President Franklin D. Roosevelt. On this dreary winter day, the third day of the hearings, the nominee appeared to be in a hurry to conclude the subcommittee's business and to take his seat on the highest court in the nation.

With the demeanor of a busy surgeon making his hospital rounds, Frankfurter briskly walked to the front of the room to shake hands with the subcommittee chairman, Senator M. M. Neely of West Virginia. Having dispensed with that formality, Frankfurter took his seat next to the distinguished Washington lawyer Dean Acheson, who was serving as his counsel. Photographers shouted to Frankfurter to strike one pose, then another. After a good-natured attempt at humor and accommodation ("I suppose that's constitutional," he told one insistent photographer), Frankfurter adjusted his pince-nez and settled down to the business of defending his honor and his nomination to the U.S. Supreme Court.

Frankfurter's slight pique at having to appear at the hearings was