



SCORPIONS

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

NOAH FELDMAN

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Great Supreme Court Justices

N O A H



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SCORPIONS

Also by Noah Feldman

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To Daniel Aaron

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.

This book tells the story of these four great justices through their relationships 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 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.

The Supreme Court is nine scorpions in a bottle.

—ALEXANDER BICKEL, LAW CLERK TO
JUSTICE FELIX FRANKFURTER,

1952–53¹

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Book One

CONTACTS

CHAPTER I

In the Club

The mingled smells of oiled mahogany paneling, polished brass, and good tobacco were familiar ones to Franklin Delano Roosevelt. Folding his slim frame into a leather-upholstered chair in the new, three-story clubroom of the Harvard Club of New York, the recent graduate was exactly where he belonged. He had a job working in an elite Wall Street law firm, intended as a brief interlude before he sought political office. His starting position was enviable. The previous year he had married his cousin Eleanor, the favorite niece of the president of the United States.

Joining Roosevelt for lunch at the club on that spring day in 1906 was another twenty-four-year-old New Yorker, also a newly minted lawyer eager to become involved in politics. There the similarities came abruptly to an end. Rich and impeccably bred, Roosevelt was a favored child of the Hudson Valley aristocracy, educated at Groton, Harvard College, and Columbia Law School. His ancestors had come to what was then New Amsterdam before 1650. Felix Frankfurter had arrived in the United States from Austria at age twelve—in steerage, without a word of English. A dozen years later, after City College and Harvard Law School, he still spoke his acquired language with a noticeable Austrian accent.¹

But speak he did—and with a passionate intensity that exempted no one. Frankfurter would grab his listener by the upper arm, squeezing hard on the bicep while pressing a point. Argument was his favored, almost constant mode of expression. He argued so well, in fact, that he had finished first in his law school class. That was his entrée into the corridors of power. It was the only way a recent

immigrant could have been lunching on terms of equality with a Roosevelt.

The paths that Roosevelt and Frankfurter had followed to New York legal practice were as divergent as their backgrounds. Roosevelt had experienced a childhood of ease and privilege, spending time in Europe with his family before returning to the United States for his secondary schooling. His college peers liked him. If there was a hint of the spectacular class betrayal that Roosevelt's future held, it was only that he was perceived as trying a bit too hard. Socially prominent freshmen were publicly ranked by a series of elections to something called the Institute of 1770, which chose one hundred men in groups of ten, the most clubbable coming first. The lone setback Roosevelt suffered as an undergraduate was not being elected until the sixth group.² That signaled he would not be asked to join the Porcellian Club—the pinnacle of college social life, to which Theodore Roosevelt had belonged and which his sons Theodore Jr. and Kermit would join a few years later.³

Roosevelt, who acknowledged the slight as “the greatest disappointment in my life,” looked for a different venue to distinguish himself. Unable to make the football team—at six feet one and 146 pounds he was far from solid—he made a run for the presidency of the *Harvard Crimson*. The membership of the student newspaper was more inclusive than that of the clubs, and it did not hurt that in the fall of his sophomore year, his cousin Theodore became president of the United States.⁴ This time Roosevelt was successful. Choosing electoral politics over pure social status had paid off. He returned from summer vacation in 1903 not to go to class but to lead the *Crimson*.⁵

By coincidence, Frankfurter arrived at law school that same autumn, although the two never met in the year they overlapped in Cambridge. To Roosevelt's Anglo-Saxon contemporaries, prepared by their boarding schools to be leaders of an emerging great power, Harvard was simply the next training ground. Frankfurter, by contrast, found Harvard overwhelming—a land of giants: “The first day I went to my classrooms I had one of the most intense frights of my life. I looked about me. Everybody was taller.”⁶

Frankfurter stood just five feet five inches tall, but his worry about stature was as much social as literal. He had been born in the Vienna of the late Austro-Hungarian Empire, the magical city that produced Freud, Wittgenstein, and Mahler. Yet Frankfurter's small-bourgeois family had little connection to the great world of Viennese arts and letters, which might be why Vienna almost never figured in Frankfurter's later reminiscences of his boyhood. Frankfurter's most accomplished relative was his uncle Solomon, a scholar who eventually became director of the State Library in Vienna. There were rabbis in the family's history, though nearly every European Jew could say as much.

On arrival, the Frankfurters had settled in the Lower East Side of New York, in a German and Yiddish-speaking part of the neighborhood that real estate agents would later rename the East Village. Frankfurter's pleasant and rather ineffectual father sold linens, silks, and furs, sometimes out of their apartment, sometimes door-to-door, and never to much profit.⁷ Money was scarce. Frankfurter attended P.S. 25, and when he was offered only a half scholarship to the Horace Mann School—one hundred of the two-hundred-dollar tuition—he went instead to the College of the City of New York, which offered a combined high school and college degree.⁸

City College was already a hotbed of ambitious and brilliant young Jewish students. Frankfurter enjoyed his classes, and was an active and successful debater. The fervid atmosphere of intellectualism and leftism engaged him without overwhelming him. "I'd sit hours and hours in East Side tea shops," Frankfurter later recalled. Together he and his friends would "drink highball glasses of tea with some rum in it, or lemon, and a piece of cake, and jaw into the morning about everything under the sun."⁹ Frankfurter read widely, browsing across a broad range of subjects and educating himself through the resources of the college and New York City's extraordinary public libraries.¹⁰ While Roosevelt was averaging a gentleman's C at Harvard, Frankfurter finished third in his class at City College and left college (like Roosevelt) with the vague plan of becoming a lawyer.

An obsessive newspaper reader interested in politics and public