CONFIRMATION DENIED:

THE SENATE REJECTS JOHN J. PARKER

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INTRODUCTION

Alexander M. Bickel, a noted authority on the Supreme Court, has written that "...the rejection of the nomination of John J. Parker as Associate Justice may have been a more telling event in 1930 than the assumption of the Chief Justiceship by Charles Evans Hughes."[1] For Hughes, with his Wall Street connections and his rock—ribbed Republicanism, symbolized the old order on the Court, and his elevation served merely to extend that order a few more years. John J. Parker also represented, or was accused of representing, many of the same interests as Hughes, but he was denied confirmation. Even more than was realized at the time, Parker's rejection was the first step on the road toward a new perception of the Supreme Court, a perception which culminated in Franklin Roosevelt's "Court Packing" Plan in 1937, but which continued with somewhat diminished intensity through the tenure of Chief Justice Earl Warren. For the first time the Court was perceived as an instrument for social change rather than for upholding the social status quo, and potential Justices might be screened for their attitude toward such social activism on the Bench. Which is not to say that no conservatives ever reached the Court after Parker's defeat, but rather that they were a decided exception to the

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[1] Alexander M. Bickel, The Supreme Court and the Idea of Progress (New York, 1970) 4.

rule. Even the two Republican Presidents in that period, Hoover and Eisenhower, appointed such liberals as Cardozo, Warren and Brennan. Parker's defeat showed that the Senate was prepared to exercise an ideological veto over Court nominees if it feared that their confirmation might alter the activist tendency of the Court's decisions. Judge Parker was accused of having no sympathy for the needs of "the masses of the people,"[2] and that alleged deficiency was also the root cause for the defeats of Clement Haynsworth and Harrold Carswell forty years later. In all three instances many Senators claimed to base their negative votes on other considerations, but, as this paper will show in the case of Parker, most of the "nays" may be traced back to ideological objections on the part of the Senators themselves or some of their most vocal constituents.

And it was not only the Senate which felt a new political potency as a result of Parker's defeat. For the first time the huge labor and Negro voting blocs were able to exert enough pressure to defeat a major Presidential appointment, and their new found power was to pervade the American political process in subsequent decades. This thesis will show how those two groups, labor and Negroes, combined in 1930 with President Hoover's innate inability to communicate with Capitol Hill to defeat a

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[2] U.S., Congress, Senate, Committee on the Judiciary, Confirmation of John J. Parker, Hearing, April 5, 1930, before a subcommittee of the Committee on the Judiciary, 71st Cong., 2nd sess., "Statement of William P. Green," p. 33.

highly qualified nominee.

Judge Parker was indeed a conservative, and if his Senatorial detractors had frankly declared their opposition to his political philosophy, his defeat would still have been an historical milestone, but its details would not have had the fascination which they now hold. In 1930 the United States Senate was still predominately conservative, and many Senators who voted against Parker had to explain what was basically a capitulation to constituents' pressure with lofty flights of rhetoric which belied their own records and philosophies. This thesis will focus on how labor and especially the Negro, through the agency of the NAACP, were able to exert such pressure and why so many Senators were vulnerable to it. Of course those two groups were not solely responsible for Parker's rejection; several Senators voted against Parker merely to embarrass President Hoover, and I hope to show how his Administration did its best to earn such a come-uppance.

The struggle over Judge Parker's confirmation is a paradigm of the American political process in action. Idealism and the instinct for self—preservation were at work on Senators on both sides, while partisanship, personalities and all varieties of political chicanery also played their parts. It is my belief that Judge Parker should have been confirmed by a conservative Senate, and this thesis will betray my bias. President Hoover labeled most of the objections to Judge Parker

"extraneous," and I share his opinion.[3] I hope to show that the case against Parker was not a fully honest one, for if it had been a straightforward question of judicial philosophy the Senate as it was then constituted would have been forced to confirm him. But 1930 was a time of shifting political alignments, and threatened politicians could not afford the luxury of candor. Judge Parker, in the final analysis, was an innocent victim of a period of transition.

[3] New York Times, April 13, 1930, p. 1.

CHAPTER I

THE NOMINATION

When the ailing Chief Justice of the United States, William Howard Taft, resigned in early February of 1930, President Hoover announced within four hours the nomination of Charles Evans Hughes to succeed him. Despite the hasty announcement, Hughes was clearly an outstanding choice. He had served as Governor of New York, Associate Justice of the Supreme Court, Presidential candidate, member of the Permanent Court of International Justice, Secretary of State and President of the American Bar Association.[1] Hoover must have felt his nominee's credentials for the nation's highest judicial post were impeccable.

Yet the choice of Hughes by no means met with unanimous Senatorial approval. The so-called "Progressive" bloc of Republican Senators, led by William E. Borah of Idaho and George W. Norris of Nebraska, launched a campaign of opposition, and they were joined by several partisan Democrats. The coalition predicted that, as Chief Justice, Hughes would join the Court majority in valuing "property rights" over "human rights."[2] Slogans aside, the basic issue in the anti-Hughes campaign was the current tendency of the Court to allow utility corporations to increase the valuation of their assets in order to justify

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[1] Time, February 10, 1930, p. 12.

[2] Ibid., Feb. 24, 1930, 14; Claudius O. Johnson, Borah of Idaho (New York 1936) 450. ***Page ???***

subsequent rate increases based upon a fixed percentage of that valuation, a trend Hughes was expected to follow.[3]

Although the choice of Hughes raised more opposition than had any other successful nominee for Chief Justice since Roger B. Taney in 1836, he was nonetheless confirmed by a vote of 52-26.[4] **President Hoover was not in the least impressed by all the commotion; he devotes one sentence to the affair in his memoirs, mentioning only the opposition of Borah and ascribing it merely to "some old grudge."**[5]

Thus when Justice Edward Terry Sanford died in a dentist's chair less than a month later and the President was obliged to select another nominee for the Court, he believed that mere legal distinction would guarantee Senate approval for whomever he might designate. In his Inaugural Address Hoover had promised that his Administration would take immediate steps to bring about the [r]eform, reorganization and strengthening of our whole judicial and enforcement system," and he was especially interested in raising the caliber of judges.[6] **But not every Supreme Court Justice could have the national reputation of Gov. Hughes, and in searching for a successor to Justice Sanford, Hoover had in mind certain prerequisites in addition to legal competence. The late**

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[3] Time, Feb. 24, 1930, p. 14.

[4] Ibid.

[5] Herbert Hoover, The Memoirs of Herbert Hoover; The Cabinet and the Presidency, 1920-1933 (New York, 1952) 268.

[6] Ibid, 267-268.

Justice Sanford had been a Tennessee Republican, appointed by President Harding upon Chief Justice Taft's recommendation, and he had fulfilled Taft's expectations by regular membership in the Court's conservative majority.[7] For several reasons Hoover was inclined to nominate another conservative southerner.

Traditionally geography had played a major role in choosing members of the Supreme Court, and after Sanford's death the only member of the Court who might conceivably have been called a southerner was Kentucky-born James C. McReynolds. When he announced his choice at his regular Friday afternoon press conference, Hoover observed that the states of the Fourth Federal Circuit (Maryland, Virginia, West Virginia, and the Carolinas) had not had a representative on the Court since 1860, whereas all the other circuits had been represented in the last twenty years. The President further stated his belief that the original setup of the Court had contemplated proper representation for all the circuits.[8]

Hoover's motives in looking south were at least partly political. In 1928, in his first bid for the Presidency, Hoover had carried five of the eleven states of the old Confederacy: Florida, North Carolina, Virginia, Tennessee and Texas, an unprecedented feat for a post-Reconstruction Republican. As is the tendency of American Presidents, Hoover was vitally

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[7] Time, March 17, 1930, p. 17.

[8] New York Times, March 22, 1930, p. 1.

interested in solidifying his base of support for his re—election bid in 1932. In 1928 his opponent had been Hew York Governor Alfred E. Smith, whose Catholicism, wetness and apparent association with the Tammany Hall machine made him anathema to many southerners, and four years hence Hoover could not depend on the Democrats to nominate so vulnerable a candidate. Unless appropriate measures were taken, Hoover's new-found friends in Dixie would probably return to their Democratic habits of half a century, the more so since his first year in office was far from an unqualified success. The stock market crash and an accelerated rate of bank failures had already forced the president to request, in the now familiar "jaw boning" fashion, that industry not retreat from its original standards of production and wages.[9] The extent of the nation's economic woes was not yet fully visible, but it was clear to Hoover in March of 1930 that he was far indeed from providing his fabled "two chickens in every pot." Disaffection with the Republican Administration was especially acute in the populous industrial states, and Hoover saw that in order to have any hope of victory in 1932 he must increase his following in the agricultural south. No one doubted that his choice of a southerner to succeed Justice Sanford was to some extent a gesture in that direction.

Hoover's nominee was a Republican Circuit Court Judge from North Carolina named John Johnston Parker. While by no means as

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[9] Oscar T. Barck and Nelson M. Blake, Since 1900; A History of the United States in Our Times,(New York, 1965) 411, 416, 417.

well known as Chief Justice Hughes, Parker nonetheless had a remarkably distinguished public career behind him for a man of only forty-four years. In 1908 he served as secretary of the Republican campaign committee in North Carolina's Fifth Congressional District which that year sent John Motley Morehead to Washington. He subsequently ran unsuccessfully for Congress in another district himself, and in 1916, although only thirty years old he was his party's candidate for State Attorney General and in 1920 he ran for Governor. In all of his campaigns Parker, as a Republican, faced almost certain defeat, but in the latter race he polled 230,000 votes, which was 60,000 more than any gubernatorial candidate of either party had ever received prior to that year. During this period Parker was also actively practicing law, and his legal distinction together with his labors in behalf of the party caused him to be named a special assistant to the U.S. Attorney General. Four years later President Coolidge appointed him to the Fourth Circuit Court.[10]

Perhaps Parker's most remarkable personal characteristic was his youth; at forty-four he was one of history's youngest Supreme Court nominees. (Coincidentally his great-great-grand-uncle was Justice James Iredell, appointed to the Court in 1791

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[10] U.S., Congress, Senate, Senator Overman speaking in favor of the nomination, April 28, 1930, Congressional Record, 72, 7808; New York Times, March 22, 1930, p. 3; Time, March 31, 1930, p. 16.

at age thirty-nine.)[11] Initial reaction in Washington to Parker's nomination was unanimous acclaim. His North Carolina practice enabled him to escape the stigma of "corporation lawyer" which had earlier plagued Chief Justice Hughes, and ideologically he was thought to be a moderate conservative who might occasion-ally join the Holmes-Brandeis-Stone progressive minority on the Court.[12] Even Senator George Norris, a Republican in name only who had opposed the Hughes nomination, told the New York Times that there was "nothing but a favorable impression of Judge Parker in the Senate."[13] Parker himself seemed to have few worries; in meeting with the press his main concern appears to have been to demonstrate his lack of pretension. "I'm not a spectacular person boys, and make mighty poor copy. Besides I'm a man of only ordinary ability," he said. "Naturally I'm quite happy at being nominated but very humble about it."[14]

President Hoover must have been very satisfied with his appointment. He had gratified the south by designating a native son; he had encouraged the budding southern Republican Party by rewarding one of its most diligent members. At the same time Hoover appeared to rise above politics by naming a man with a distinguished legal and judicial career, who had written over 130 opinions for his court none of which had been reversed on

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[11] Time, March 31, 1930, p. 16; New York Times Encyclopedic Almanac ***incomplete***

[12] Time, March 31, 1930, p. 16.

[13] New York Times, March 22, 1930, p. 1.

appeal.[15] When on March 24 the Senate Judiciary Committee referred the nomination to a three man subcommittee headed by North Carolina's Lee Overman, Parker's leading Senate sponsor, swift confirmation seemed assured.

As the days went by certain organized minorities began to scrutinize the Parker nomination more closely, and foremost among these was the American Federation of Labor. During the 'twenties the labor movement had seen its rather amateurish lobbying pay off in some significant legislation. Among labor's triumphs on Capitol Hill were its success in further restricting immigration to this country, blocking a federal sales tax and quashing the "Equal Rights" Amendment which was then a major project of the National Women's Party.[16] And with his political successes the working man was also enjoying a large measure of material comfort and prosperity. Both the frequency of strikes and the number of men involved in them decreased markedly in the late 'twenties as compared with the period 1916-1921.[17]

To be sure the fall of 1929 had demonstrated that all was not quite well with the American economy, but massive wage cuts were for the most part avoided until the fall of 1931,and the ultimate extent of the Depression was not yet widely perceived.[18]

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[14] Time, March 31, 1930, p. 16.

[15] New York Times, May 11, 1930, III, 3.

[16] Louis L. Lorwin, The American Federation of Labor - History, Policies and Prospects (Washington, 1933) 272-273.

[17] Ibid., 240.

[18] Barck and Blake, Since 1900, 410.

Organized labor thus believed it could still afford to turn its attention to matters of less than "bread and butter" importance.

One such matter was the federal judiciary and the U.S. Supreme Court in particular. Prior to 1930 the A.F. of L. had never been able to exert much influence on Executive appointments, and even the incumbent Secretary of Labor, James Davis, had no connection with the labor movement.[19] Yet it was the federal judiciary far more than any member of the Cabinet which continued even in 1930 to question effectively the social utility of organized labor. Time after time a union would prepare a strike, set up picket lines and pass out leaflets only to be met with an injunction procured by management ordering the union to desist from its conspiracy to injure the property interests of the employer. Originally federal authority arose either from diversity of citizenship or from alleged violation of the Sherman Anti-trust or Interstate Commerce Acts. The Clayton Act of 1914 limited this jurisdiction somewhat with its famous declaration that "The labor of a human being is not a commodity or article of commerce," thereby granting organized labor the right to exist free from the charge that it was inherently a "conspiracy in restraint of trade." The Act also barred injunctions prohibiting refusal to work or which restrained the peaceful advocacy of

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[19] Philip Taft, The A. F. of L. from the Death of Gompers to the Merger (New York, 1959) 25.

union membership.[20] But injunctions for other causes were still issued with regularity, restraining, for example, unions from trying to persuade workers to join in violation of the contract the worker had signed with his employer promising not to join as long as he remained on the job. The fact that federal courts continued to enforce such agreements, known derogatorily as "yellow dog" contracts, was especially galling to union leadership.

The American Federation of Labor tried to influence Hoover's judicial appointments prior to the Sanford vacancy in 1930. The previous spring the Executive Council of the A. F. of L. had met with Hoover to express the union's interest in the makeup of the bench, and A. F. of L. President William Green voiced particular approval of Hoover's nomination of Iowa's Progressive Republican Senator William Kenyon to the Court of Appeals. Green further hinted that Kenyon or Judge Learned Hand would be an acceptable successor to the ailing Taft, but for some reason Green did not join the Senate's pro-labor bloc in attacking the selection of Charles Evans Hughes. "I thought we would stand a fair chance with Hughes," he recalled "and I did not protest."[21]

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[20] Louis L. Lorwin, The American Federation of Labor - History, Policies and Prospects (Washington, 1933) 118(n.), 121, 121(n).

[21] Taft, A.F. of L., p. 21; Green quote from "Minutes of the Executive Council" May 6, 1930, quoted in Taft, A.F. of L., 21.

Judge Parker was not to be so fortunate. Three years earlier, in 1927, he had committed what was then the cardinal sin of anti-union jurisprudence: he had written an opinion which in effect sustained a "yellow dog" contract. The case grew out of a situation in Logan and Mingo Counties, West Virginia, where three hundred-sixteen mineowners obtained an order in federal district court enjoining the United Mine Workers from agitating among the miners, urging them to join even though the agitators knew they had contracted with their employers not to do so. The controversy obtained some notoriety when a thousand armed union sympathizers began a march from Mingo to Logan, only to be confronted with a mercenary force backed by the owners and also armed, even to the extent of air support. Major violence was avoided only after the military was called in to preserve the peace.[22] After the owners obtained an injunction in district court, the U.M.W. appealed to the circuit court upon which Judge Parker sat.

Three judges heard the case, International Organization United Mineworkers of America v. Red Jacket Consolidated Coal & Coke Co. (18 Fed. 2d. 839), and all concurred in the opinion which Parker wrote. The court found precedent for the injunction, which it upheld, in previous Supreme Court decisions which forbade even peaceful union interference with workers' contracts. The Supreme Court apparently agreed with Parker's reasoning for it refused to hear the union's appeal. In Congress

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[22] New York Times, March 26, 1930, p. 26.

Progressives renewed their efforts to curb the courts' injunctive powers. Senator Henrik Shipstead, Farmer-Labor of Minnesota, introduced a bill endorsed by the 1927 Convention of the A. F. of L., which would limit the jurisdiction of Federal courts of equity by redefining property subject to injunctive protection as only that which is "permanent and transferrable." But such a deliberately narrow definition would have had results far beyond the field of labor disputes, and it therefore made little headway in Congress.[23]

Green's determination to oppose Parker was in no way mitigated by such judicial and legislative acquiescence in the Red Jacket opinion. Four days after the announcement of the nomination, on March 25, Green formally requested the Senate Judiciary Committee to look into Parker's decision in the Red Jacket case. He was no doubt encouraged when Senator Borah, after Chairman Norris the senior Republican on the Committee, blithely remarked to the press that while he had "no comment" to make on Parker's opinion, he had disagreed with the finding when it was handed down.[24]

Once he had decided to go all out against Parker, President Green attempted to solidify the ranks of labor behind the campaign. A crucial ally would be John L. Lewis, the President of the United Mine Workers, and at first he and his union were not

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[23] Lorwin, A.F. of L., 275.

[24] New York Times, March 26, 1930, p. 26.

inclined to oppose the nomination. Judge George McClintic, whose injunction Parker had sustained in the Red Jacket case, wrote Parker's Washington spokesman Col. David Blair that:

> **On the matter of the Red Jacket Miners injunction cases, I have information which I deem reliable that the [U.M.W.] Executive Board is not opposed to Parker in any way. I know that the board discussed him and this decision fully and that Lewis and his board reached the conclusion that they would not oppose Parker. Personally, I know they have a good opinion of him.**[25]

When Green first contacted him, Lewis may not have expressed his "good opinion" of Judge Parker, but he did indicate his doubts as to whether the nomination could be defeated.[26] **Just as embarrassing as Lewis' lukewarm support was the attitude of organized labor in Parker's home state of North Carolina. W. M. Tye, a Democrat and the retired first president of the North Carolina Federation of Labor could not comprehend Green's hostility. Indeed Tye went so far as to write Senator Lee Overman, Parker's Senate sponsor, that he found the objections to Parker "foolish and rather far-fetched." In Tye's opinion, Parker was "... reasonably progressive, and entirely trustworthy and honest."**[27] **Parker was also endorsed by another former state President, James**

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[25] McClintic to Blair, March 26, 1930, in John J. Parker Papers, Southern Historical Collection, University of North Carolina at Chapel Hill.

[26] Taft, A. F. of L., 21-22.

[27] U.S., Congress, Senate, Committee on the Judiciary, Confirmation of John J. Parker, Hearing, before a subcommittee of the Committee on the Judiciary, 71st Cong., 2d sess, p. 7, Tye to Overman, April 5, 1930.

F. Barrett,[28] but even more distressing to the national leadership was the attitude of the incumbent President, T. A. Wilson, who also initially endorsed the nomination. But as a current officeholder, Wilson was apparently more vulnerable to pressure from above than were Tye and Barrett, and on April 2 Green released a telegram from Wilson acknowledging the error of his ways:

> **Since learning of his position in this Red Jacket case, North Carolina labor is opposed to his nomination and in full accord with the American Federation of Labor in opposing the confirmation of his nomination.[29]**

While Green was busy educating some of his recalcitrant subordinates another special interest group was evaluating the Parker nomination. Traditionally the twenty year old National Association for the Advancement of Colored People had seen itself as a catalyst, focusing attention primarily on inequities in the south, particularly lynchings and unjust convictions of Negro defendants. The organization had shied away from more ambitious efforts to manipulate lawmakers and influence legislation. But President Hoover, leader of the party of Lincoln, did not in his first two years in office accord Negro leaders the hospitality and respect which they felt their race's Republican loyalty had earned them, leading NAACP Secretary Walter White to dub him "the man in the Lily-White House."[30] Thus when Hoover nominated a

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[28] Barrett to Overman, Apr. 4, 1930, Ibid., p. 19.

[29] New York Times, April 3, 1930, p. 50.

[30] Walter White, A Man Called White (New York, 1948) p. 104.

southern judge to the nation's highest court, black leaders were from the start a bit skeptical.

White and his colleagues, upon hearing of Parker's designation, immediately wired inquiries to their friends in North Carolina concerning the judge's outlook on racial questions. Parker was certainly not a notorious bigot since the first replies indicated that those contacted knew little about him. Ultimately the organization did receive a telegram which, White recalls, "galvanized us into action."[31] In his memoirs White neither quotes the telegram nor reveals its writer or date of receipt, but he does indicate its content: in a political campaign ten years before Parker had allegedly advocated continued electoral discrimination against blacks. White demanded supporting evidence from his anonymous friend, and subsequently he received a clipping from the April 19, 1920 issue of the Greensboro, N. C., Daily News which quoted excerpts from Parker's speech accepting the GOP gubernatorial nomination:

> **The Republican party in North Carolina has accepted the amendment in the spirit in which it was passed and the negro has so accepted it. I have attended every state convention since 1908 and I have never seen a negro delegate at any convention that I attended. The negro as a class does not desire to enter politics. The Republican Party of North Carolina does not desire him to do so. We recognize the fact that he has not yet reached the stage in his development when he can share the burdens and responsibilities of government. This being true, and every intelligent man in North Carolina knows that it is true, the attempt of certain petty Democratic politicians to inject the race issue into every campaign is reprehensible.**

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[31] Ibid., p. 104.

> **I say it deliberately there is no more dangerous or contemptible enemy of the State than men who for personal or political advantage will attempt to kindle the flame of racial prejudice or hatred . . . the participation of the negro in politics is a source of evil and danger to both races and is not desired by the wise men in either race or by the Republican Party of North Carolina.[32]**

The amendment referred to was added in 1900 to the state Constitution, enacting a poll tax, literacy tests and the infamous "Grandfather Clause" which was subsequently invalidated by the U. S. Supreme Court in 1915.[33]

Convinced that such an attitude in a Supreme Court Justice constituted a "grave threat to the future of the Negro,"[34] White first decided to learn from the Judge whether he had been correctly quoted, and if so, whether he still held the same views ten years later. On March 26 White sent a telegram to Parker demanding to know if the speech "... is indicative of your attitude so far as the Negro is concerned in the enforcement of the Fourteenth and Fifteenth Amendments to the Constitution."[35] Western Union advised White that the judge had personally received and signed for the telegram, but after three days no reply was forthcoming. Deeming Parker's silence a confession of guilt, the NAACP board of directors voted to oppose the nomination.[36]

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[32] Quoted by Walter White in his testimony before the subcommittee of the Committee on the Judiciary in Confirmation Hearing, p. 74.

[33] Ibid., pp. 74-75.

[34] White, A Man Called White, p. 105.

[35] White to Parker, March 26, 1930, in Parker Papers.

[36] White, A Man Called White, p. 105.

Rather than attempt to defeat Judge Parker on the floor of the Senate, the NAACP naturally preferred that Hoover voluntarily withdraw the nomination, and White even had a precedent in mind.[37] On February 6, 1912, President William Howard Taft had announced his intention to fill a Supreme Court vacancy with one William C. Hook, a federal judge from Missouri. Hook had upheld an Oklahoma "Jim Crow" statute in a dispute before his court, and despite his endorsement by all the blacks involved in the case, Negro organizations vigorously protested. Taft withdrew Hook's name two days later, but pressure from business interests who were opposed to another Hook decision sustaining state regulation of railroad rates, was no doubt as influential as that of the Negroes.[38]

Once the NAACP had fired the first shot against Parker, other pro-Negro groups were quick to get in the act. Even the Negro arm of the Benevolent and Protective Order of Elks announced it would be represented in Washington to oppose confirmation.[39] Congress' only Negro member, Chicago Republican Oscar DePriest, was opposed to the nomination,[40] and the GOP lawmakers in the upper house were understandably distressed. Negroes in both the north and south had traditionally identified

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[37] New York Times, April 17, 1930, p. 6.

[38] New York Times,Feb. 8, 1912, p. 2; Feb. 10,1912,p. 1.

[39] Ibid., April 5, 1930, p. 3.

[40] Letter from DePriest to M.K. Tyson, no date, transcribed in letter from Tyson to Parker, May 7, 1930, Parker Papers.

with the Republican Party,[41] and in light of the declining popularity of the Hoover Administration GOP Senators up for reelection in the fall were reluctant to antagonize a voting bloc which had supported them so loyally in the past. The record of substantive Republican concern for the welfare of the Negro during this period is a slim one; psephologist V.O. Key has written that "[f]or decades the Republican Party operated on the theory that all it had to do to retain Negro support in the North was to give a few seats in the national convention to southern Negroes."[42] Even so, when faced as they were with a real threat of electoral retaliation, many Republican Senators saw themselves forced to give some concrete demonstration of good will to their newly assertive Negro constituents.

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[41] John D. Hicks, Republican Ascendancy, 1921-1933 (New York, 1960) 92.

[42] V. O. Key, Jr., Southern Politics, (New York, 1949) 288.

CHAPTER II

THE SUBCOMITTEE HEARING

Official Senate inquiry into Judge Parker's qualifications for the Supreme Court was the duty of a subcommittee of the Senate Judiciary Committee, which convened on April 5. The subcommittee consisted of Senators William Borah of Idaho and Felix Hebert of Rhode Island, Republicans, and as Chairman, Democrat Lee Overman of North Carolina. Overman led the sub-committee even though Republicans controlled the Senate because it was the habit of Senator George Norris, Chairman of the parent Judiciary Committee, to award the chair to any member of the committee whose home state was the same as the nominee to be considered.[1]

Concerning his chairmanship, Overman had written Parker on March 24 that "you will know you are in safe hands,"[2] **and from the opening of the hearing Overman left no doubt that he was in Parker's corner. Before hearing any witnesses Overman ordered read into the record numerous letters and telegrams sent to him in vigorous support of Parker's confirmation. The first, dated April 1, was from Parker himself in which he supplied, as requested by Overman, a rather detailed legal biography. Considering the necessary self-congratulation which the letter's**

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[1] U.S., Congress, Senate, Senator Overman speaking in favor of Parker's confirmation, April 28, 1930, Congressional Record, 72, 7808.

[2] Overman to Parker, March 24, 1930, John J. Parker Papers, Southern Historical Collection, (University of North Carolina at Chapel Hill).

purpose demanded, Parker managed to maintain in it the humility he had evidenced when he first learned of his nomination.[3]

The next letter was from O. Max Gardner, Democratic Governor of North Carolina, who wrote:

> **I have known Judge Parker since we were at college together at the University of North Carolina and I unhesitatingly say, and you are authorized to quote me as saying, that I have never known any man who possessed a higher or finer sense of righteousness and justice than Judge Parker . . .**
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> **There is not in my judgment. . .the slightest basis in reality, for the fear expressed by one group of our citizens that he would not, as a judge of the Supreme Court, be absolutely fair and impartial. . . I have never known any man whose concern for the upholding and protection of what we know in a democracy as human rights, as distinguished from property rights, excelled Judge Parker's.[4]**

In sum Overman introduced some thirty letters; businessmen, laborers and Negroes all attested to Parker's broadbased popularity in his home state. Many of the letters even indicate that Parker was regarded as something of a liberal. One letter declared that in his 1920 gubernatorial campaign "John Parker replied to organized labor's questionnaire in a frank manner, a reply which marked his sympathetic interest interest in the problems facing labor," and that "the bulk" of his vote total in that race came from labor votes.[5] Another writer, presumably himself black, claimed that "North Carolina Negroes . . .are

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[3] Parker to Overman in U.S. Congress, Senate, Committee on the Judiciary, Confirmation of John J. Parker, Hearing before a subcommittee of the Committee on the Judiciary, 71st Cong., 2nd sess, pp. 1-2.

[4] Gardner to Overman, April 4, 1930, Ibid., pp. 2-3.

[5] Ibid., p. 6 (editorial by James F. Barrett in the Brevard News, April 3, 1930.)

militant in their support of Judge Parker."[6] Richmond was where Parker's court sat, and a representative of that city's Bar Association wrote that at an extraordinarily well-attended meeting of 318 of the association's members, a unanimous vote was recorded in favor of confirmation.[7] A citizen of North Carolina wrote that Parker, when he ran for Governor, ". . .was a pioneer advocate of woman's suffrage, and insisted on better schools and increased pay for teachers, and improved labor conditions, including workingmen's compensation and in the important matter of taxation he strongly insisted that land was overburdened and that corporate properties were not bearing their share."[8] Parker's platform may have been mostly campaign oratory, but it was one that William Borah as well might have run on.

The first witness to appear before the subcommittee was A.F. of L. President William Green. Green had held his office a little more than five years, since the death of A.F. of L. founder Samuel Gompers, and like his predecessor, Green was considered a fairly conservative labor leader.[9] As the economy continued to decline in the last half of the Hoover Administration Green would forcefully demonstrate his conservatism by opposing many social welfarist recovery schemes. He condemned an unemployment compensation program sponsored by Governor Franklin Roosevelt of New York as "paternalistic, it is one system of the

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[6] C. M. Epps to Overman, April 7, 1930, in Confirmation Hearing, p. 8.

[7] Leon M. Nelson to Overman, Ibid., p. 14.

[8] Willis G. Briggs to Overman, Ibid., p. 17.

dole [which] demoralizes ambition, stultifies initiative and blights hope,[10] and when FDR ran for President Green insisted that the A.F. of L. remain neutral, despite his distaste for the policies of Herbert Hoover.[11] But Senators were mistaken if the expected Green to display his customary restraint when he attacked the Parker nomination.

At his first opportunity Green launched into a lengthy and detailed exposition of his organization's complaints against Judge Parker. Supreme Court Justices, he observed, "should possess a trained mind sympathetic toward the hopes and aspirations of the masses of the people."[12] Judge Parker, according to Green, did not have such a judicial disposition, and for that reason the A.F. of L. protested his nomination. Green then zeroed in on the Red Jacket case in which Parker's sustaining of the district court's injunction had the effect of making "criminals out of law abiding, honest, loyal American citizens if they requested, in the exercise of peaceful, law abiding methods, workingmen to join with them in a labor organization."[13] Green reminded the Senators that their late colleague, Robert M. LaFollette of Wisconsin, had found the district judge in the Red Jacket case, George McClintic, "to be a

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[9] Time, April 14, 1930, p. 14.

[10] Minutes of the Executive Council of the AF of L, cited in Philip Taft, The A.F. of L. from the Death of Gompers to the Merger (new York, 1959) 31-32.

[11] Ibid., 24-25.

[12] Confirmation Hearing, 24.

[13] Ibid., 24-25.

petty tyrant and an arrogant despot."[14] McClintic seems to have been a fairly notorious anti-union judge, and Green must have been trying to pass along some of McClintic's bad reputation to Parker.

A major obstacle to the success of Green's argument was the prevailing impression that Parker had been bound by precedent to uphold McClintic's injunction. In his Red Jacket opinion Parker cited several Supreme Court decisions which he felt supported the injunction. Primarily he relied upon Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229, which was handed down by the Court in 1917. Green knew that his own case would be immeasurably strengthened if he could show that the Hitchman and Red Jacket cases were in some respect different and that Parker was not in fact bound by precedent to decide as he did. Green began by emphasizing that the Hitchman decision was rendered thirteen years ago and that "[s]ince that time many economic, industrial, and social changes have taken place."[15] Green then claimed that even the late, and conservative, Chief Justice Taft was of the opinion that "yellow dog" contracts were made under duress and thus unenforceable.[16]

This was too much even for William Borah, one of the Senate's foremost champions of the workingman. He stated that the very Taft opinion to which Green was referring showed that in fact Taft was even opposed to mere union picketing. Since Borah

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[14] Ibid., 25.
[15] Ibid.
[16] Ibid., 25-26.

did not appear convinced that Taft's outlook differed significantly from Parker's, Green next offered in evidence a column the late Chief Justice had written for a Philadelphia newspaper discouraging the use of injunctions in labor disputes. But Borah dismissed it as having been written when Taft was in private life, and Green, forced to abandon that tack, turned once more to rhetoric. If Parker were to be confirmed, Green predicted that:

> **. . . the power of reaction will be strengthened, and the broad-minded, humane, progressive influence so courageously and patriotically exercised by the minority members of the highest judicial tribunal in the land correspondingly weakened.**[17]

President Green continued with a rather lengthy and emotional denunciation of the institution of the "yellow dog" contract, leading Senator Overman to inquire whether the A.F. of L. was opposed to Parker as a judge or merely to the "yellow dog" contract and the Hitchman doctrine Parker was forced to observe.

"No," Green replied, "we don't want to be placed in that light. The Hitchman decision- I will try to make it plain- was the Dred Scott decision to labor. . . . What I stated in the preceding paragraph was not so much that Judge Parker followed the Hitchman decision as laid down by the Supreme Court, but that he shows himself as in entire sympathy with that decision, and that is our objection to Judge Parker."[18] **Therein Green was stating the kernel of truth in labor's argument against the Judge. Of all Parker's opponents in the Senate who based their**

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[17] Ibid., p. 28.

[18] Ibid., p. 28.

stand on the labor issue only Borah ever developed a credible argument that Parker could have ruled other than he did in the Red Jacket case, and the finer points of his reasoning were appreciated by few of his allies. Most of the pro-labor and anti-Parker Senators were simply disturbed that Judge Parker, even if he were bound by precedent when he wrote the Red Jacket decision, failed to make clear that his opinion was dictated by the law and that "yellow dog" contracts violated his personal code of abstract justice. Though he would have ample opportunities to do so during the six weeks that his name was before the Senate, Parker never publicly declared his personal opinion of the hated contract, and indeed it is safe to presume that the "yellow dog" probably did not offend him terribly. President Green and several Senators perceived Parker as a conservative, and they opposed him on purely ideological grounds, though few of them were candid enough to admit it, preferring to rely on Borah's legal obfuscations to legitimize their stand.[19]

Green certainly did not believe that a strictly ideological argument would carry the day against Parker, and although he was not himself a lawyer he did make some half-hearted attempts to assail Parker's jurisprudence as distinguished from his political philosophy. He observed that "yellow dog" contracts generally provided no minimum wage guarantee to the employee and thus lacked the mutuality necessary in any enforceable contract, a

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[19] Borah's interpretation, which I found intricate but unconvincing, is treated in greater detail in Appendix B to this paper.

hypothesis with which Senator Borah heartily agreed.[20] Finally Green undertook to explain in what respect Parker had not properly followed precedent in Red Jacket. He contended that Hitchman and another previous decision by Parker's own court, Bittner et al. v. West Virginia-Pittsburgh Coal Co., 15 Fed. (2d) 652, had not used the injunction to forbid all forms of persuasion by the U.M.W. to convince the "yellow dog" miners ultimately to join the union. Green felt that the Red Jacket injunction precluded even peaceful advocacy of union membership in general so long as the mineworkers remained under a non-union contract.[21]

In point of fact, Judge Waddill of Parker's court had modified an injunction in Bittner with the following provision:

> **"Provided that nothing herein contained shall be construed to forbid the advocacy of union membership, in public speeches or by the publication or circulation of arguments, when such speeches or arguments are free from threats and other devices to intimidate, and from attempts to persuade the complainant's employees or any of them to violate their contracts with it."[22]**

Clearly the Bittner modification still restrained interference with a contract, and whatever additional latitude it may have granted to the union was expressly incorporated in Red Jacket. The unions had petitioned Parker's court for a modification of McClintic's injunction, which they felt was delivered in far too sweeping terms. Parker answered their complaint in his opinion:

> **They say that the effect of the decree, therefore, is that, because complainant's employees have agreed to work on the**

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[20] Confirmation Hearing, pp. 30-31.

[21] Ibid., pp. 42-43.

[22] 15 Fed. (2d) 652 at 659.

> **nonunion basis, defendants are forbidden, for an indefinite time in the future, to lay before them any lawful and proper argument in favor of union membership.**
>
> **If it were so understood in the decree, we would not hesitate to modify it. As we said in the Bittner case, there can be no doubt of the right of defendants to use all lawful propaganda to increase their membership.[23] (my emphasis)**

As for the Hitchman case, President Green claimed that in that controversy the union had signed up workers covertly, thus deceitfully encouraging them to violate their contracts. Since no such "deceit" was charged against the union in Red Jacket, Green felt that the Hitchman doctrine did not apply.[24] Green's interpretation is a little like saying that the Court could restrain a burglary but not a holdup, a clear misreading of the Hitchman opinion. Justice Mahlon Pitney declared for the Court in Hitchman that an employer could presume a mutually favorable relationship with his employees, and that the law forbade one even to induce an employee to resign without good cause, much less to join a union in violation of his contract.[25]

After introducing a long series of typical "yellow dog" contracts into the record, Green was asked whether the Supreme Court had granted certiorari on appeal from Parker's decision. He replied with disarmingly circular reasoning that "the Supreme Court refused to grant the application for a writ. That is another reason we should like to see the Supreme Court

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[23] 18 Fed. (2d) 839 at 849.

[24] Confirmation Hearing, p. 43.

[25] 245 U. S. 229 at 252.

liberalized."[26] In this instance Green's candor must have gotten the best of him, for his response does seem rather illogical when compared with his effort of only a few minutes before to depict Parker's Red Jacket opinion as departing from Supreme Court precedent.

After some more emotion-charged rhetoric about the Hitchman decision delivering "thousands and thousands of miners in isolated mining sections to a condition of industrial servitude,"[27] Green retired to the sidelines. He was succeeded on the stand by E. C. Townsend, an attorney who had represented the U.M.W. in the Red Jacket litigation. Surprisingly, Townsend had appeared to testify in favor of Judge Parker's confirmation. He asserted that he did not stress the issue of the "yellow dog" contract in his argument before the circuit court because "I did feel it was, to a large extent, settled in the Hitchman case, and I feel that way now."[28] Townsend stated that in his brief he had emphasized instead the issue of jurisdiction: whether the actions of the union constituted an interference with interstate commerce, which, if it were so, would allow federal courts to pass on the matter.[29]

Senator Borah assumed the great part of the burden of questioning Townsend himself, and increasingly the Senator from Idaho used his forum less to extract information than to demon-

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[26] Confirmation Hearing, p. 52.
[27] Ibid., p. 56.
[28] Ibid., p. 66.
[29] Ibid., pp. 62-63.

strate, somewhat redundantly, his unswerving affection for American labor. When Townsend declared that he did not feel that Parker's Red Jacket decision was sufficient grounds for disqualifying him from the Court, Borah returned with President Green's complaint: would he feel the same if Parker in fact sympathized with the doctrine of the case, regardless of precedent? Townsend responded that if Parker had originated the doctrine himself, he would oppose him for possessing faulty economic views.[30] Townsend continued, however, that even on the Supreme Court Parker might legitimately feel that judicially the issue of "yellow dog" contracts was settled, and that he, Townsend, felt that the only remedy now lay with legislation. Borah, aware of the fate of the Shipstead anti-injunction bill, knew that Congress was not yet prepared to supply that remedy, and he could only grumble:

> **Well, assuming that the majority of the Supreme Court of the United States has passed on it to that effect, and we continue to put other members on the court holding to the same opinion, it would be a pretty well-settled proposition, wouldn't it?[31]**

Before Borah stepped down President Green, who was still in the hearing room, interjected:

> **Mr. Townsend does not speak for anyone connected with the American Federation of Labor. He does not speak for the American Federation of Labor. He is not with us. He comes here as an attorney, as I understand it, and as tax commissioner for West Virginia.[32]**

Townsend had freely admitted his official position at the beginning of his testimony, and Green's reminder was perhaps an

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[30] Ibid., pp. 67-68.

[31] Ibid., pp. 68.

attempt to suggest that Townsend's appearance was the result of political pressure. The governor of West Virginia who presumably appointed Townsend to his state job was indeed a Republican,[33] and he may have encouraged Townsend to endorse Judge Parker, but the sincerity of Townsend's statement is difficult to question since the Red Jacket opinion bears out his claim that he did not emphasize the validity of the contract in his argument.[34] Furthermore Green was hardly the one to put forth innuendoes of

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[33] World Almanac and Book of Facts for 1931, p. 237.

[34] Parker discusses the contract for approximately one page out of an eight page opinion.

undue pressure. When North Carolina Federation President T. A. Wilson had initially endorsed Parker, the Charlotte News reported that Green "held over [Wilson's] head a club in the form of a threat to compel his resignation" in order to persuade him to retract his endorsement.[35] Senator Overman asked Green if he had used a "threat" to influence Wilson but Green, who was not under oath and who may have thought that Overman was referring to some sort of violent intimidation replied, "That is not true, Senator. I am not made that way."[36]

After a brief appearance by an individual who had nothing to say about Parker but who had a personal grudge against William Green,[37] Walter White took the stand. Though it would be his complaints even more than those of the A.F. of L. which would be decisive in Parker's defeat, White's appearance before the subcommittee must have given little encouragement to the acting secretary of the NAACP. In 1930 the cause of "colored people" had little of the glamor which would accrue to it in subsequent years, and even otherwise progressive individuals often shunned open association with civil rights agitators. White records in his memoirs that the hearing was for him "a strange and uncomfortable situation." Most grating was William Green's determination not to be connected with White's movement; White

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[35] Charlotte (N.C.) News, April 3, 1930, cited in Confirmation Hearing, pp. 3-4.

[36] Confirmation Hearing, p. 57.

[37] "Statement of H. E. Fish," Ibid., p. 70.

recalls that while they had met previously on several occasions, Green nonetheless refused to speak to him, even as they entered the hearing room together.[38] As for the members of the sub-committee, Senator Hebert never once verbally addressed himself to White's testimony, and his two colleagues were hardly known as friends of the Negro. Senator Overman was a conservative southerner, and Borah was a consistent opponent of federal anti-lynching statutes whose Presidential ambitions White would take great pleasure in helping to thwart six years later.[39]

White began by reading the Greensboro Daily News' decade old report of Parker's campaign speech and continued with the observation that since Parker had never answered his telegram requesting repudiation of those opinions, "... we feel that it is safe to assume that he was correctly quoted. . . and that his views have not changed within the past decade."[40] In that infamous speech, Parker had indicated acceptance of the spirit of the so-called "Grandfather Clause" amendment to his state's constitution, but the Supreme Court had declared such clauses unconstitutional in 1915.[41] White feared that Parker, had he been on the court when that case was decided, would have ruled against the Negroes and was likely to do so in future cases, despite the 1915 precedent. To infer that Parker would wilfully ignore precedent merely because he once said he accepted "the spirit" of

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[38] Walter White, A Man Called White (New York, 1948) 106.
[39] White, A Man Called White, 171-173.
[40] Confirmation Hearing, p. 74.
[41] Guinn & Beal v. United States (238 U.S. 347)

a defunct amendment may have been stretching a point, but Parker's refusal to answer White's telegram necessitated a strong response from the NAACP. To summarize his case, White said:

> **Twelve million American negroes and all white Americans who have a regard for law and order can not help condemning an attitude which a willingness to support some laws and to disregard others when politically expedient dictates.**[42]

As was the case with William Green, Senator Borah apparently did not wish labor's opposition to be tainted with a pro-Negro element, and in questioning he did his best to dilute the impact of White's charges:

> **Senator BORAH: Do you know anything in the career of Judge Parker to indicate that he is unfriendly to the negro?**
> **Mr. WHITE: Nothing except this statement here.**
> **Senator BORAH: Except that statement you have there?**
> **Mr. WHITE: This one statement.**
> **Senator BORAH: Do you know of anything in his career that you have heard of, where he has been in any way unjust?**
> **Mr. WHITE: Frankly, we never heard of him until he was nominated by President Hoover.**
> **Senator BORAH: Has it been your business to look up his record since then?**
> **Mr. WHITE: Yes, since then.**
> **Senator BORAH: In looking it up, have you ascertained anything along that line?**
> **Mr. WHITE: Nothing, except the statement upon which we base our objection.**[43]

Senator Overman, a North Carolinian himself, next attempted to challenge White's implication that literate Negroes were still

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[42] Confirmation Hearing, p. 75.

[43] Ibid., pp. 77-78.

barred from voting in North Carolina. He succeeded in having White leave the stand with the admission that:

> **I might say this: I don't want, even in the slightest degree, to be accused of being unfair, and I want to say that North Carolina has made more rapid progress toward fair treatment of the negro than any other Southern state. That is not flattery, Senator Overman.**[44]

The final witness was Mercer G. Johnson, director of the People's Legislative Service, an ultra-liberal lobby inspired by the late Senator Robert LaFollette and similar in purpose to the modern Americans for Democratic Action.[45] **In the manner of William Green, Johnson totally ignored the racial issue. His sole complaint was the Red Jacket decision, and he submitted a long written statement for inclusion in the record, reiterating the substance of Green's previous testimony. Nearly half of Johnson's statement was devoted to condemning District Judge George McClintic, even criticizing Parker for observing the legal courtesy of calling McClintic "the learned district judge" as he sustained McClintic's injunction.**[46] **Like Green, Johnson was a rhetorical virtuoso, viewing with alarm Judge Parker's "blind-ness" and "Egyptian darkness of the mind," and in his written declaration contending that, "According to Parker, the American worker has no rights which the American employer is bound to respect."**[47]

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[44] Ibid., p. 78.
[45] Ibid., p.83.
[46] "Judge Parker Not the Right Man" in Ibid., 79-80.
[47] Ibid., 81-82; 79.

During its nearly three hour session the subcommittee heard the major portion of the evidence against Parker. Except for the statement of Walter White, the focus had been on the grievances of organized labor, especially upon the inhumanity of the "yellow dog" contract. William Green's strategy of deemphasizing legal issues and appealing instead to emotional considerations was as effective as he could have hoped. Of the three members of the subcommittee, the labor leader knew that only Borah could possibly be moved to oppose Parker. Yet when he first questioned Green, the Senator from Idaho appeared decidedly unimpressed with the unions' case. Indeed, before the hearing, Borah had agreed with Senator Overman that Parker's Red Jacket opinion merely sustained an injunction according to the law without passing directly on the validity of the contract.[48] It was Green's repeated tales of misery in the minefields which caused William Borah, one of labor's staunchest allies, to resume his customary role, thus awarding the anti-Parker forces their first major victory.

But as President Hoover's difficulties with the Hughes nomination had indicated, Borah and his insurgent brethren had of late been fairly "regular" in their harassment of the Administration, and their opposition alone was not fatal. What remained to seal Parker's fate was a consistent display of political ineptitude by the Administration, and, to a lesser extent, the nominee himself on one hand and some remarkably adroit maneuvering by the Judge's opponents on the other.

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[48] Overman to Parker, March 28, 1930, in Parker Papers.

CHAPTER III

POLITICS AND PRESSURE

To no one's surprise the subcommittee reported the nomination favorably by a vote of two to one. Nonetheless shortly thereafter Republican Senators Guy Goff and Henry Hatfield of West Virginia, Roscoe McCulloch of Ohio and John Marshall Robison of Kentucky were rumored to be reconsidering their initial endorsements of Parker as a result of pressure from their Negro constituents. In its wire to McCulloch, the Cleveland NAACP made perfectly clear to the Senator how much a vote for confirmation would cost him in November when he must stand for election: "Parker is seriously objectionable to 90,000 Cleveland Negro citizens."[1]

On April 12 the NAACP announced that letters and telegrams were pouring into its offices across the country to denounce Parker. The organization also asserted that it had secured fifty-one affidavits denying Senator Overman's claim that all literate Negroes were freely permitted to vote in North Carolina.[2] Negro pressure groups endeavored to uncover additional evidence to reinforce their case against the Judge, and a report originating in the Baltimore Sun and the Raleigh News and Observer and widely circulated in other media charged that in his Greensboro speech Parker had promised that "If I should be

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[1] New York Times, April 12, 1930, p. 3.

[2] Ibid., April 13, 1930, p. 4.

elected Governor of North Carolina and found it was due to one Negro vote, I would resign."[3] If that report were true, which later it proved not to have been, it was an even more provocative insult than those Parker was already accused of casting at the Negro race. Although White and the NAACP never officially complained of this remark, its wide circulation served to stoke the fires of anti-Parker sentiment among Negroes and their sympathizers.

By the time this charge was made Judge Parker himself was beginning to feel some concern for the campaign being waged against him by the Negro lobbies. His apprehension was understandable, for his supporters had been able to answer the charges made by the A.F. of L. with the simple and reasonable explanation that he had been bound by precedent when he decided the Red Jacket case, but the racial question was a far more delicate matter. It was very difficult to explain Parker's remarks to a non-southerner, and by early April Senators were receiving more letters and telegrams opposing confirmation due to the racial issue than due to the Red Jacket decision.[4]

Sensing this shift in the political winds, Parker elected to confront the racial issue. Since a personal discussion in the press might appear undignified coming from a man aspiring to the Supreme Court, Parker agreed to have a fellow North Carolinian

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[3] New York Herald Tribune, April 19, 1930, p. 8.

[4] Ibid., April 13, p. 4.

and former Internal Revenue Commissioner, David H. Blair, act as his spokesman in Washington, and his first duty was to try and allay Negroes' fears that Parker would not treat their race fairly from the bench. The task required great political sensitivity; any effective reply to the Negroes' charges might well serve to alienate the Senate's southern Democrats such as Ellison D. "Cotton Ed" Smith and Cole Blease of South Carolina, some of whom were ironically concerned over a recent Parker decision striking down a Richmond ordinance requiring residential segregation of blacks and whites.[5]

Parker himself honestly believed that he was not a bigot. After receiving an unsolicited letter of support from Dr. James E. Shepard, black President of the North Carolina College for Negroes, Parker mentioned it to one of his colleagues, writing "I think this shows conclusively that the colored people of North Carolina have confidence in my fairness, and should be given greater weight than a protest by a society in New York which knows nothing about it."[6] **He wrote David Blair that what he said in the Greensboro speech ". . . was not attacking the colored people, but was decrying the practice of certain politicians whose custom it was to stir up racial prejudice for partisan advantage."**[7]

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[5] City of Richmond v. Deans (37 Fed. 2d. 712)

[6] Shepard to Parker, March 25, 1930; Parker to Judge Eliott Northcott, March 31, 1930, John J. Parker Papers, Southern Historical Collection (Univ. of North Carolina: Chapel Hill)

[7] Parker to Blair, March 26, 1930, Ibid.

Like the lawyer that he was, Judge Parker set about preparing a brief in defense of his racial fairness, and explaining his Greensboro speech. On April 3 he sent a copy to Blair, calling the document ". . . a complete answer to the charge that I was advocating a denial of rights to the colored people." While it may not have been that, the memorandum at least demonstrated that Parker was interested in dispelling his image as a bigot, a step a hard core racist, like some in the Senate, would be loath to take. Unfortunately, Parker instructed Blair to circulate the memorandum without disclosing its author. (In writing the statement, Parker referred to himself in the third person.) Parker had an exceptionally high regard for the bench, and he thought its dignity would suffer if he engaged in public debate on issues of constitutional law. Since Negro groups were beginning to be quite active in litigation at that time, Parker considered the race question such an issue and he refused to discuss it.[8] This attitude may partially explain the Judge's refusal to answer Walter White's telegram, a snub which may have been Parker's most serious mistake. If he had promptly and personally clarified his Greensboro speech in a wire back to White, the NAACP might not have found him sufficiently objectionable to oppose. But once they began their campaign it

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[8] Parker to Blair, April 3, 1930, Parker Papers. Judge Parker reemphasized his determination not to discuss publicly the race issue in a letter to his friend Cong. Charles Jonas, also April 3, 1930, in Parker Papers.

was regarded as a test of strength from which they could not back down.

As for the memorandum, Blair made some minor alterations and submitted it to the Senate under his own name. The gist of it was that Parker had made his speech at Greensboro to counter a Democratic charge that the Republicans had made a secret alliance with the Negro population to take over the state after election day. The purpose of such a charge was to inflame the bigotry of white voters, and the Republican Party, Parker wrote, ". . . deplored the attempt to stir up racial prejudice and hatred against them [Negroes]."[9]

While this explanation, especially in the context of white southern society, may have been eminently reasonable, it did little to ease the effect of Negro political pressure north of the Mason-Dixon Line. Not only did the split in Republican Senatorial ranks continue to widen, but Northern Democrats as well began to voice dissatisfaction with the nominee. On April 15 Montana's Democratic Senator Burton Wheeler, whose concern may have been genuine since his state had few Negroes, notified the NAACP of his intention to oppose Parker.[10]

But the main sources of discontent were still within the Grand Old Party; some of the Republican Senatorial stalwarts were so nervous about the Parker controversy that on April 11 a

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[9] Parker to Blair, April 3, 1930, from Parker Papers.

[10] New York Times, April 17, 1930, p. 6.

delegation led by Vice President Charles Curtis and Majority Leader James Eli Watson called upon President Hoover to confront him personally with the situation. At this juncture withdrawal of the nomination was not a categorical demand, but Hoover's visitors did urge that he reexamine Parker's racial outlook and issue a convincing clarification.[11] Whether the group had yet read the Parker-Blair memorandum is uncertain, but it was probably convincing only to those whose natural instincts were to support Parker in the first place. The extent of Parker's own contribution to the memo was then a secret, and David Blair had little reputation of his own with which to attract much attention. An indication of Presidential support, considering the White House's presumably broad national perspective, would have been far more reassuring to wavering GOP Senators than a memo from another North Carolina Republican like Blair.

The following day Hoover did reply publicly, but with Hoover's customary political obtuseness, his only concrete response to the anti-Parker campaign dealt with the Red Jacket case rather than the allegedly racist campaign speech. He instructed Attorney General William Mitchell to prepare a written defense, and what emerged was a memorandum illustrating what was already widely conceded: that Parker was bound by precedent in the case and should not be penalized for having done his duty. Mitchell's paper was largely superfluous since those Senators who

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[11] New York Times, April 12, 1930, p. 3; Time, April 21, 1930, p. 11.

still used the A.F. of L.'s complaints to justify their opposition were clearly no longer amenable to persuasion. As for Hoover's own comments on the matter, he merely stated that he appointed Parker because of his "outstanding legal attainments" and that he felt opposition to Parker's confirmation "does not militate against his ability and is based chiefly upon extraneous matters."[12] Not surprisingly, the skeptical Republicans in the Senate were not convinced, and they were to call at the White House again.

The warning from Vice President Curtis ought especially to have alerted Hoover to the tenuous status of his nomination. Curtis first came to Congress in 1893, two years before Hoover graduated from Stanford, and as a former Senate Majority Leader he knew how to judge the mood of that body. Furthermore in 1912 then-Senator Curtis had been a leading backer of Judge Hook (see above, page 22), and President Taft's withdrawal of that nomination impressed upon him some of the potential effectiveness of Negro agitation within Republican ranks.[13] But Curtis did not enjoy a close association with the President; he had not been Hoover's first choice for Vice President in 1928, and rumors were rife that Postmaster General Walter F. Brown would replace him on the Republican ticket in 1932.[14] Thus Curtis' well-intentioned

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[12] New York Times, April 13, 1930, p. 1.

[13] Ibid., February 10, 1912, p. 1.

[14] Robert S. Allen and Drew Pearson, Washington Merry Go-Round (New York, 1931) 84-85; Time, April 31, 1930, p. 12.

admonitions fell on largely deaf ears, and even if that were not the case, Herbert Hoover had no stomach for spirited confrontations with Congress. "I felt deeply that the independence of the legislative arm must be strengthened, he wrote in his memoirs. "I had little taste for forcing Congressional action or engaging in battles of criticism."[15] While Hoover's choice of words here may be somewhat self-serving, his inability to communicate with politicians was one of his most serious problems.

The political maneuvering on Parker's behalf was not totally without effect. Walter White relates in his autobiography how the Judge's friends attempted to dilute the impact of the notorious Greensboro speech by exposing the fact that the NAACP had procured the incriminating clipping illegally. "This charge," recalls White, "because it was true threatened disaster." Apparently the man whom White had entrusted to copy the speech had delegated the task to a younger acquaintance who cut the clipping out of the paper rather than take the time to transcribe it.[16] Of course, that was theft, a fact which if properly exploited, might seriously have undermined the NAACP's pose of moral rectitude. Whether Hoover's staff felt the clipping's nefarious history was too trivial to pursue or they

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[15] Herbert Hoover, The Memoirs of Herbert Hoover; The Cabinet and the Presidency, 1920-1933 (New York, 1952) 217.

[16] Walter White, A Man Called White (New York, 1948) pp. 107-108.

were simply lax in their prosecution remains unclear, but for once, at least, they were pointed in the right direction.

The momentum of the Negroes' case, if not the specific charges voiced by Mr. White, received another setback on April 18 when Senator Overman read into the Congressional Record a telegram from the editor of the Greensboro Daily News in which the sender declared that upon examining his paper's report of Parker's famous speech, "Nowhere do we find that we printed that Judge Parker, if elected governor, would resign if election due to one Negro vote."[17] Walter White himself had never charged Parker with making that improbable commitment, but the story had been widely circulated and the editor's refutation did Parker's cause no harm

But whatever favorable news which emerged in Parker's behalf probably served more to reinforce Hoover's determination to stand by his nominee than to convert any Senators previously inclined to oppose him. For it was not the GOP Senators themselves who needed convincing; most of them could have had no serious objection to Parker's elevation, a fact which their conservative records make plain. The Republican Senators whom Parker so desperately needed were listening to their constituents, and they heard almost no one back home who really desired Parker's confirmation. The overwhelming majority of Americans, to be sure, was indifferent and uninformed, but the

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[17] U.S., Congress, Senate, April 18, 1930, Congressional Record, 72, 7272.

tiny minority which was involved was by and large hostile to Judge Parker. Clearly the political cost of voting against Parker in the Senate was nil; in many cases, however, voting for him seemed to carry with it a definite risk. President Hoover, of course, might have made a strong appeal to the Senators' party loyalty, but he was temperamentally incapable of doing so effectively. Thus Republican Senators were feeling all the pressure from only one side.

As it was with the American public in general, so also within the United States Senate itself militancy and commitment seemed only to exist on the side of Parker's enemies. Senator Overman was doing most of the work of defending Hoover's choice, but as a Democrat he thought his role somewhat unseemly and was anxious for a Republican to take over some of the burden. Ordinarily of course the job would have fallen to Majority Leader James Watson of Indiana, but while was committed to vote for confirmation, he was not inclined to an aggressive promotion of a nominee whose name he probably wished he had never heard.

It is axiomatic in commenting on the American political system that the Senate as a body is exceedingly jealous of its own prerogatives. To approve a President's nominee to the federal judiciary, the Constitution of course requires the Senate's Advice and Consent, and many Senators have felt the former is too often neglected in a slavish pursuit of the latter. In the midst of the Parker controversy, columnist Mark Sullivan wrote that many Senators favored expanding the role of

"Senatorial courtesy" in approving judicial nominees. Where formerly Presidents had allowed Senators from a nominee's home state, if they were members of the President's political party, an informal veto over prospective judges, Sullivan reported some sentiment in the upper house for the Senate virtually to dictate nominations by refusing to confirm anyone not drawn from lists prepared by every Senator of acceptable nominees from his home state.[18] While such a scheme was not adopted, Senatorial disdain for the Parker nomination gave it additional impetus. Even Senator Carter Glass, an aristocratic Virginian who supported Parker, read into the record an editorial citing the "complete abdication of the Senate" from the process of judicial selection.[19] Apparently even Judge Parker's friends bridled a bit at having to settle for a man they might not themselves have chosen.

Republican Senators must have felt a jolt when, on April 8, Senator Charles Deneen, a staunch party man, was defeated for renomination by the widow of the man he himself defeated six years earlier. Foreign affairs rather than the Parker nomination was the main issue in the campaign, but Deneen's surprising defeat made painfully clear the vulnerability of Senators closely associated with the Republican Administration.[20] Senators who had to face the voters in 1930 doubtless perceived the threadbare

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[18] New York Herald Tribune, April 16, 1930, p. 16.

[19] Ibid.

[20] New York Times, April 9, 1930, p. 1.

nature of Herbert Hoover's coattails, and many concluded that political independence was a safer virtue than party loyalty.

This spirit among GOP lawmakers was one likely cause for a second pilgrimage to the White House by Majority Leader Watson to discuss the Parker affair. This time, however, Watson was after more than mere clarification. The Senator from Indiana informed the President that most of their party's Senators who were up for re-election in the fall were opposed to the nomination and would in all likelihood vote to reject. Hoover of course maintained that the Senators were unduly alarmed, and he spurned Watson's suggestion that Parker's name be quietly withdrawn. No new information had turned up to discredit the Judge; on the contrary, the latest news was if anything in Parker's favor and Hoover could not bring himself to a tactical retreat based merely on political expediency. Watson apparently assured the President that he personally would vote for Parker (he was not up for election until 1932), but he reiterated that opposition within Republican ranks was a serious threat.[21]

Following his session with the President, Watson held a luncheon in his office suite for sixteen of his colleagues who were skittish about the nomination. Of the sixteen, none except occasionally Michigan's James Couzens was a member of the GOP's "Progressive" bloc, and their reservations were of greater significance than the almost automatic opposition of a Borah, a

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[21] New York Times, April 18, 1930, p. 1.

Norris or a Hiram Johnson of California. Present at the luncheon were such arch-conservatives as Simeon Fess of Ohio, Guy Goff of West Virginia and John Townsend of Delaware. That such as these could oppose a Presidential nominee on grounds that he was too conservative ought to have given the White House pause, but Watson could only report to them that Hoover gave no sign of relenting. "Now it is up to you to act individually as you think best in presenting your views to the President on the subject," he told them. There was briefly some sentiment at the gathering to send Senators Goff and Hatfield of West Virginia, both of whom had originally endorsed Parker, to see the President to convince him of the regulars' dissatisfaction.[22] That the plan was abandoned is probably because Goff and Hatfield were not militant enough for the job: they both eventually voted or were paired in Parker's favor.

When the luncheon meeting had dissolved, Senator Watson told reporters he would request the full Judiciary Committee to summon Judge Parker before it "to subject himself to examination," an idea his colleague Senator Overman had had in mind for some time. Watson also denied the existence of a scheme which possibly was the only one which might have saved Parker: rumors were circulating that Parker's friends would allow the nomination to be reported from committee but would delay final Senate action until the lame-duck session after the elections

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[22] Ibid.

when the most obvious pressures would have dissipated.[23] Naturally Parker's opponents would try to force an earlier vote, and Watson denied that such a plot was brewing.

Despite the favorable report of the subcommittee, Parker's prospects in the full Judiciary Committee were note encouraging. Ergo the Judge's backers had succeeded in postponing consideration several days after the original date of April 14. In the interim they hoped to provide an opportunity for Parker to appear personally to clarify his position. Today this practice occurs quite frequently, but in 1930 it was considered rather unusual, though not totally unprecedented. When President Wilson nominated Louis Brandeis in 1916 that controversial nominee made a personal appearance before the Committee in an effort to dispell vigorous Senatorial opposition.[24] On April 18 Overman wired Parker to ask him whether he wished to come to Washington, but Col. Blair also wired the same day "Don't answer Overman telegram until you talk with me tonight."[25] Blair and another of Parker's Washington proxies, Congressman Charles Jonas of North Carolina, agreed heartily with Parker's own low profile strategy,[26] and Blair's telephone conversation with the Judge that night must have continued in the same vein. For Parker

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[23] New York Herald Tribune, April 18, 1930, p. 10.

[24] New York Times, April 13, 930, p. 4.

[25] Blair to Parker, April 18, 1930, Parker Papers.

[26] Typical Jonas instruction to Parker: "As I see it the thing to do is NOTHING, and say nothing unless called on." or "Quit writing or worrying." March 28, 29, 1930, Parker Papers.

wired back to Overman: "If the Judiciary Committee of the United States Senate desires my presence and requests it, I shall of course be glad to come."[27] While perhaps not at first apparent, the wording of this telegram was exceedingly unfortunate. If Parker had specifically requested an opportunity to present his case to the Senate, in the name of free speech that body could scarcely have refused him. But the Judiciary Committee was not about to go out of its way to ask Parker for the favor of his presence when most of its members felt they had made up their minds about him already. The burden of supplication was clearly on Parker's shoulders, and he foolishly claimed as much dignity as a U.S. Senator. Parker's poor judgment seems especially clear in retrospect, but at the time perhaps his strategy seemed to have some worth. Though the White House finally gave its consent,[28] it too was probably not eager for Parker to testify unless he was summoned. Hoover, and probably the Judge himself as well, no doubt believed that if Parker seemed overly anxious to appear that would be interpreted as an acknowledgement that he had something to explain.

When Senator Overman read Parker's telegram to reporters, he stated, in an effort to compensate for the Judge's "After you, Alphonse" attitude, that the wire had been sent without any suggestion from him,[29] which of course was not true. The Senator

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[27] Parker to Overman, April 19, 1930, Parker Papers.

[28] Time, April 28, 1930, p. 12.

[29] New York Times, April 20, 1930, p. 11.

also announced that he would move in Committee that Judge Parker be invited to appear nine days hence, on April 28.

Upon hearing of Overman's intention, Senators Borah and Norris, true to form, announced that they would have none of it. They could see "no value" in an appearance by Parker; the New York Times said Borah told its reporter "that Judge Parker might send any data to the committee that he desires, but that his appearance is unnecessary…"[30]

The Committee was to meet on April 21, and in the days preceding special interests were continuing to exert what pressure they could on either side. To no one's surprise, on April 17 the Republican Party of North Carolina in convention unanimously endorsed the nomination of one of its most distinguished members.[31] Walter White was also busy, endeavoring to discredit Dr. J. E. Shepard, perhaps the most distinguished Negro to endorse Parker (see above p. ??). In a telegram to Senator Simeon Fess, White stressed that "Dr. Shepard is President of s school supported wholly by State funds," and he revealed that the NAACP had nearly two hundred affidavits from prominent North Carolina blacks attesting to the fact that the leaders of the state GOP "do not invite, permit or receive Negro delegates, representatives or visitors." White disclosed that eight of those affidavits were being forwarded to Senator Norris.[32]

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[30] Ibid.

[31] Ibid., April 18, 1930.

[32] New York Times, April 20, 1930, p. 11.

Norris was probably selected as the recipient of the documents because of his position as Chairman of the Judiciary Committee, for as far as his attitude toward the Negro was concerned he was not an ideal choice. Neither in his memoirs nor in any contemporary account which this writer has seen is there mention of the Negro question to explain Norris' opposition to Parker. Norris himself cites only the labor decision in his modestly entitled reminiscences, Fighting Liberal,[33] and while personal antipathy for President Hoover may have helped him along, certainly a concern for Parker's racial attitude played no part. Like his fellow "Progressive," William Borah, Norris somehow convinced himself that federal anti-lynching statutes encroached unduly on state prerogatives, even though he never doubted that his Muscle Shoals federal power scheme easily squared with the Constitution. Eight years later in a speech on the Senate floor, Norris would oppose a lynch statute thus:

> **The people of the South have made a record of which they have a right to be proud. . . . I do not want the federal government to take up this burden which the people of the south have carried so well.[34]**

Norris' present reputation as a valiant crusading liberal is probably due more to the ideological biases of most historians than to any greatness of character on his part. To be sure, he was independent, but during the years prior to the New Deal especially, he behaved more like a crank than a crusader.

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[33] (New York, 1945) p. 374.

[34] Ibid., 360.

Although a nominal Republican, he was the only major figure in the party to "bolt" in 1928 and back Alfred E. Smith for President. Even William Borah, who strongly backed Hoover at the time, confided to the President that the Senator from Nebraska was "a devoted socialist."[35] As for the issue of Supreme Court nominations, Norris was a congenital naysayer; he opposed successively Pierce Butler, Harlan F. Stone, Charles Evan Hughes and Parker.[36] He was to take a more free-wheeling approach to the Court during FDR's Democratic Administration, however, for his vaunted integrity did not prevent him from going along with Roosevelt's notorious "Court Packing" plot.[37]

As Senator Norris was preparing to sink the parker nomination in his Committee, William Green was busy cranking up an anti-Parker bandwagon. On the eve of Committee consideration, Green announced that a canvass of the Senate showed that the nomination was headed for defeat, and he attempted to answer the Justice Department's memo defending the Red Jacket decision by observing that ". . . mere dogmatic adherence to judicial precedent established in a case during the World War period cannot be offered as convincing evidence of the qualifications of a man to serve on the highest judicial tribunal in the land."[38]

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[35] Hoover, Memoirs 1920-1933, 197-198.

[36] David Danelski, A Supreme Court Justice Is Appointed (New York, 1964) 194.

[37] William E. Leuchtenberg, Franklin D. Roosevelt and the New Deal (New York, 1963) 235.

[38] New York Times, April 21, 1930, p. 16.

(Here again, Green was tacitly conceding the validity of the precedent which Parker followed.) Green also finally succeeded in bringing John L. Lewis over to the cause. The President of the United Mine Workers had previously been silent on the nomination and in some quarters was thought actually to support it (see above p. ???) But union leaders like Senators must answer to their constituents, and Lewis decided to fall into line. On April 20 Senators received a letter from him in which Lewis showed that he, even more than Green, preferred emotional catharsis to legal reasoning:

> **[w]hy is it necessary for the Senate to confirm the elevation to the Supreme Court of Parker, the judge who in the Red Jacket injunction suit, delivered 50,000 free Americans into indentured servitude?[39]**

The following day a lengthy debate ensued when Sen. Overman moved that Parker be invited to appear before the Committee. Overman read to his colleagues Parker's "unsolicited" telegram and reported that Senator Watson had informed him that the President and Attorney General Mitchell were desirous that their nominee have a chance personally to explain his views. But Senator Frederick Steiwer of Oregon took much of the force out of Overman's statement by relating that Walter Newton, Hoover's chief political aide, had called him to say that neither Hoover nor Mitchell specifically wanted a Parker appearance, although they did not oppose one.[40] If Steiwer's report was true, and

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[39] Ibid.

[40] New York Times, April 22, 1930, p. 1.

there is no reason to doubt it, White House political ineptitude had once again outdone itself. Republican Senators were looking for any excuse to dump Parker, and as long as the White House did not stress party loyalty they could rationalize defection with relative ease. If the President did not care whether Parker was called, GOP Senators must have reasoned, why not dispose of the whole matter as soon as possible? After all, they thought, matters had reached the point where nothing Judge Parker might say could placate the interests opposed to him; they had all committed themselves too firmly.

But if Parker had appeared it is unlikely that several of the Republican regulars on the Committee would have been able to maintain their opposition to him. After all, Parker was one of their own, and as past testimony from his home state and his future record would indicate, Parker was a decent man and no hidebound reactionary. A personal interchange between the Senators and the Judge would likely have proved more sympathetic and convincing than any written evidence could have been.

Why Walter Newton went out of his way to emphasize his Chief's indifference to Parker's appearance is inexplicable, except perhaps as a gesture to reaffirm Hoover's confidence in his appointee's record as it already stood. But perhaps basic incompetence on Newton's part is nearer the mark. Harris Warren, perhaps the foremost historian of the Hoover years, characterized Newton as "slow, clumsy and dull," and the authors of <u>Washington Merry Go-Round</u>, while of course not predisposed toward men of

Newton's conservative stripe, found him "a slow and unimaginative thinker" who was also "loud and trite."[41] The same Walter Newton was to figure in an even more unfortunate political blunder before the Parker affair reached its denouement.

After both sides had been heard from, a vote was taken and the Committee, by a vote of ten to four, declined to summon Parker to testify. Newton's phone call to Senator Steiwer had persuaded him and three of his Republican colleagues (Hastings of Delaware, Gillett of Massachusetts and Robinson of Indiana) to vote against Overman's motion. Of the Committee's six Democrats, only Overman and Mississippi's Hubert Stephens voted with the minority.

In the immediate aftermath of this result Chairman Norris without ceremony asked his Committee whether they would report the nomination favorably or unfavorably. Again the outcome was a stunning defeat for the Administration: Parker was reported unfavorably by a vote of ten to six. Parker regained the support of regulars Gillett and Hastings and another Senator who did not vote on the Overman notion, but he lost the vote of Deneen of Illinois, who, though he had recently been made a lame-duck, was thought to be mending his fences with Illinois' large Negro bloc in preparation for a comeback.[42]

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[41] Harris Gaylord Warren, Herbert Hoover and the Great Depression, (New York, 1959) 57; Allen and Pearson, Washington Merry Go-Round, 314.

[42] New York Times, April 27, 1930, III, 1; Ibid., Apr 22, 1.

As a result of Norris' peculiar phrasing of the question the Parker nomination still moved on to resolution by full the Senate; the only doubtful point had been whether the nomination would carry the Judiciary Committee's endorsement, and it did not. The votes of Deneen, Robinson and Steiwer against the nomination were serious blows to the Administration, by Steiwer announced his vote had been cast with reservations and he indicated he would vote on the Senate floor to confirm, a commitment he ultimately did not see fit to honor, perhaps due to the strength of organized labor in his home state of Oregon.[43]

At the White House the reaction was nil. The President would not budge an inch, still believing that Senators had found no valid basis for rejection. Rumors were circulating that Judge Parker himself would have his name withdrawn, but Parker's own papers give no sign of his having seriously considered such a move. His allies in the Senate were hopeful that they could delay the final vote until the return of several absent Senators who were expected to vote for confirmation, such as President Pro Tem George Moses and Pennsylvania's David Reed, who was at the London Naval Conference.

Senators from below the Mason-Dixon Line were especially perturbed by the position of the nomination. They were generally all partisan Democrats, the New Deal and the Civil Rights Movement not having occurred to force their disaffection from the national party. The obvious vulnerability of the Hoover

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[43] Ibid., April 22, 1930, p. 1.

Administration made them eager to criticize and oppose Republican policies in hopes of taking over the Senate in the November elections, but the association of the Negro question with Parker's nomination made opposition by southerners highly untenable. Parker's defeat might be interpreted to mean that no man who possessed the prevailing southern racial prejudices was qualified for the Court. Senator Overman expressed the sentiments of many of his Dixie neighbors when he blithely remarked: "If Judge Parker is rejected Southern Negroes will accept as due to their protests and may become unruly."[44] Under the present circumstances racial solidarity was a more vital concern to most southerners than partisanship, and on April 22 it appeared that an almost unanimous southern vote for Parker would be sufficient to offset Republican defections and win the day for the harassed jurist.[45] Later, however, when Hoover's alleged design for cultivating Republicanism in the south was exposed and tied to the Parker nomination many southern Senators refused to tolerate such a threat to one party hegemony and they deserted Parker's cause.

After the devastating resolution of the Judiciary Committee, Senator Watson made another of his painful journeys to the White House to suggest that the nomination be withdrawn. Again he was unsuccessful and he emerged from his futile

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[44] New York Times, April 22, 1930.

[45] Ibid., April 23, 1930, p. 2.

discussion with his usual display of optimism for the waiting reporters. Parker would be confirmed by a safe majority, he declared; already forty Senators were firmly committed to him and before Monday the 28th, when Senate consideration was scheduled to begin, the Administration was hopeful it could win over enough to assure confirmation.[46] Watson's sanguine stance contrasts sharply with a letter about Parker he wrote to a friend two days after his visit with Hoover: "Confidentially the way matters stand right now he is whipped in this fight."[47]

All through the period during which Parker's name was before the Senate the prevailing public attitude was one of indifference. Considering Hoover's diminished popularity, one could hardly expect the public to be aroused in favor of his choice, but one reason there was no massive protest against it was that at the time the major pubic information media were predominantly conservative. Such papers as the Indianapolis Star, Chicago Daily News, Philadelphia Inquirer, and the New York Times and Herald Tribune were generally pro-Republican, but characteristically Hoover was unable to use editorial predisposition toward his policies to full advantage. With the single exception of Hoover's closest aide, Lawrence Richey, the White House press secretariat was an undistinguished lot, and

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[46] New York Herald Tribune, April 23, 1930, p. 10; New York Times, April 23, 1930, p. 2.

[47] Watson to Marion Butler, April 24, 1930, copy sent by Butler to Parker, Parker Papers, April 25, 1930.

they were not sufficiently generous with leaks and other tidbits upon which White House reporters thrive. Consequently the press corps developed an antipathy for the Administration which often prevailed in spite of the conservatism of their editors and publishers. While distinguished columnists such as Mark Sullivan of the New York Herald Tribune and Richard V. Oulahan of the Times pontificated on Parker's high qualifications and obvious fitness, the average reporter was little disposed to do anything to help the Administration make its case. In fact, Robert Allen and Drew Pearson would have liked the crusading fourth estate to have taken some of the credit for Parker's ultimate defeat. The two columnists cite "a small band … of honest and conscientious reporters," presumably including themselves, as having "energized the successful fight in the Senate" against Parker, whose nomination they called "one of the shabbiest" in the history of the Court. Pearson and Allen's attitude, while not typical in degree, was at least indicative of the generally cool relations between the press and the President during Hoover's tenure. Harris Warren, no Hoover apologist, has written that

> When Hoover made a mistake reporters pounced on it gleefully with no charity in their souls. No President needed a good press more than did Hoover; no President in modern times had worse relations with the fourth estate.[48]

If President Hoover did not know how to use the forum of the press to his best advantage, he might have profited from the

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[48] Warren, Herbert Hoover, p. 58; also Pearson and Allen, Washington Merry Go-Round, pp. 324-326; New York Times, April 27, 1930, III, 1; New York Herald Tribune, April 23, 1930, 10.

example of Walter White. On April 24 White publicly called upon Governor O. Max Gardner of North Carolina "to protect the lives and property" of his Negro constituents in Greensboro and Winston-Salem, many of whom he contended were under severe pressure to add their names to endorsements of Judge Parker.[49] White was careful to phrase his complaint in such a way as not to polarize southern Democrats against his cause due to the racial question. He attributed the coercion strictly to "Lily White Republicans" in the state where Democrats felt a stronger sense of party loyalty than anywhere else in the south.[50] Even so, after the Democratic Governor made an investigation he announced that the charges were "totally without foundation" and the issue was not pursued.[51] Nonetheless White had subtly exposed some of the desperation of Parker's supporters and helped create the impression that justice resided with the friends of the helpless Negro, who was being victimized by racist elements for partisan political ends.

Pressure noticeably increased on both sides as the date for Senate confirmation drew near. In major northern cities with significant Negro populations, black leaders scheduled mass assemblies of their followers to drum up anti-Parker sentiment for an intensive telegram campaign. Western Union blanks were often provided at such meetings, and on the Sunday before the

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[49] New York Times, April 25, 1930, p. 16.
[50] V. O. Key, Southern Politics (New York, 1949) 283-284.
[51] New York Times, April 27, 1930.

vote the two Senators from Illinois received over two thousand wires from Chicago alone.[52] Senators were now feeling far more pressure from the NAACP and its allies than they had yet experienced from organized labor, even though most discussion of the nomination on both sides tended to ignore the racial issue.

Judge Parker's active supporters among the public did not represent as many votes and hence were less a threat to Senators' survival than organized labor or the Negroes, but at least the Judge did have one quasi-lobby agitating in his behalf. The leaders of the American legal profession that consideration of a potential Supreme Court Justice should be subject to such extraneous influences as were evident with the Parker nomination. They felt that appointment to the Court should be determined only by outstanding legal competence, a quality which few claimed Parker lacked. Henry Upson Sims, then President of the American Bar Association, wired that "It would be regrettable for Judge Parker to fail of confirmation because of dissatisfaction on the part of certain groups with his decisions following ruling of the Supreme Court."[53] In another letter to Sen. Overman, five of Sims' predecessors as President of the ABA and twelve other officials of that organization all endorsed the nomination.[54] An attorney whom Parker had opposed while serving as a government

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[52] Walter White, "The Negro and the Supreme Court" Harper's Monthly Magazine, 162, 241-242.

[53] Sims to William P. MacCracken in U.S., Congress, Senate, Congressional Record, April 28, 1930, 72, 7795.

[54] MacCracken to Overman, Ibid., pp. 7794-7795.

prosecutor wrote the Senator that "I have at no time encountered a more dangerous and formidable trial lawyer than he."[56]

But testimony on Parker's legal abilities could have, at this late date, little impact on wavering Senators. No matter how much evidence was presented to show that Parker had always observed the highest standards of professional competence, the fact remained that, among laymen, he did not have a reputation as an outstanding jurist, for indeed he had no reputation at all. The nomination of Charles Evans Hughes had upset many liberals, but Hughes had been a distinguished public figure for many years, and his service had made him something of an institution whom it was politically difficult to malign. Thus while such dependable liberals as New York's Robert F. Wagner, Sr., were forced to support Hughes' elevation, no comparable record of distinction barred them from opposing the hitherto unknown Judge Parker. Throughout the six weeks of controversy Parker's legal abilities were never seriously questioned; even so his lack of a glamorous past allowed insubstantial objections to be used by some Senators as rationalizations for a vote against him. And the Republican Senators who were opposed to Judge Parker for his alleged racial views did indeed take that stand with more of a concern for their own self-interest than for the welfare of the American Negro. With the possible exception of Kansas' Arthur Capper, who was a

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[56] Charles A. Douglas to Overman, April 24, 1930, Ibid., 7690.

Director of the NAACP,[57] Republican Senators had taken their Negro voters for granted and had done little to earn their support. Hard times were beginning to shake Negro faith in the party of Lincoln, and Republican Senators from states with large black populations, especially those up for reelection in 1930, suddenly felt called upon to heed a voice which had been silently compliant for generations. The New York Times, in a widely quoted editorial, inquired of the newly aroused Republicans:

> **Do these Senators really care anything about the Negro except as a political danger? Are they willing to do and dare on behalf of the black man's political rights?… No principle is at stake. Only a political self interest is driving on these Republican Senators. Full in the eye of the public they write themselves down as what they are - men afraid of doing anything to hurt their own chances at the polls, even if they know it the right thing to do. Compared with them the Negro agitators, hot on their trail, are straightforward and honorable.[58]**

Even as the fear of Negro retaliation at the ballot box pushed more Republican Senators toward opposing Parker, the labor question continued to rank foremost in public arguments against confirmation. Those Senators whose opposition was based on the racial issue generally kept silent, while the friends of labor constantly harped on the injustice of the "yellow dog" contract* A bill proposed by Senator Shipstead of Minnesota, which would

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[57] U.S., Congress, Senate, Committee on the Judiciary, Confirmation of John J. Parker, Hearing before a subcommittee of the Committee on the Judiciary, 71st Cong., 2nd sess., "Statement of Walter White," p. 79.

[58] New York Times, editorial, April 21, 1930, p. 22.

have limited the injunctive powers of Federal Courts in labor disputes, had been before the Judiciary Committee since 1928. Conveniently for organized labor, the subcommittee which was to study and revise the bill consisted of Senators Norris, Blaine of Wisconsin and Walsh of Montana, all members of the Senate's liberal wing. The subcommittee had reported a modified version in 1928, but the A.F. of L. had refused to endorse it that sam6 year. After a panel of experts had approved the subcommittee version with minor amendments, the A.F. of L. went along in 1929,[59] but little action was taken by the subcommittee since the first rebuff. Then suddenly, on April 26, 1930, two days before the Senate was to take up the Parker nomination, Norris' subcommittee approved an anti-injunction bill. The timing, according to the New York Times, "caused widespread comment." Under the proposed law, Federal Judges could issue injunctions only after a hearing in open court, with an opportunity for cross-examination of witnesses, and when "substantial and irreparable injury" threatened a plaintiff who was unable to obtain regular police protection. Clearly such stringent prerequisites for injunctive relief would make judicial enforcement of "yellow dog" contracts extremely difficult.[60] Norris' selection of that particular date to approve an anti-

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[59] Louis L. Lorwin, The American Federation of Labor - History, Policies and Prospects (Washington, 1933) 276.

[60] New York Times, April 27, 1930, p. 1.

injunction bill was obviously designed to embarrass Judge Parker's supporters and foster a pro-labor psychology within the Senate for the showdown on the nomination.

After the Senate Judiciary Committee's decisive repudiation of Judge Parker, one might have expected that it would warmly have endorsed Norris' bill, but in fact on June 18, shortly after Parker's final defeat, the committee rejected the bill as unconstitutional.[61] Senator Steiwer, who had played a major role in the committee's unfavorable treatment of Parker, was a leading opponent of Norris' proposal.[62] It is only logical to conclude, therefore, that he and several of the other Senators who voted against Parker in committee, were not terribly upset by the Red Jacket decision and were motivated by other considerations, chief among them political pressure. For after the tremendous effort it devoted to the defeat of Parker, the labor movement was unable to generate the same enthusiasm for another project following the first so closely.

Another indication of Parker's declining fortunes came from his agent David H. Blair. Blair, it will be recalled, had been acting as a one man lobby for Parker, one of his duties having been to take credit for the memorandum which Parker himself had written about the Greens-

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[61] Philip Taft, The A.F. of L. from the Death of Gompers to the Merger (New York, 1959) 24-25.

[62] Norris, Fighting Liberal, 314. It should here be noted that two years later Congress did pass by overwhelming margins the Norris-LaGuardia Act which accomplished much the same ends.

boro speech. As the battle over the nomination entered its final stages Blair was expected to return to North Carolina to make a bid for the Republican nomination for the U.S. Senate seat of incumbent Furnifold Simmons. Simmons was considered highly vulnerable in the Democratic primary, and should he lose to a liberal, the Republican nomination was expected to have more than its usual value. Even so, on April 24 Blair announced that the Parker nomination was requiring his full attention and that consequently he was unable to run for the Senate.[63] Blair's sacrifice underscored the gravity of Parker's situation. Another proxy for the Judge at work in the nation's capital was his brother, Sam Parker, who contented himself with observing Senate debate from the galleries and reporting whatever relevant gossip he might overhear.[64] Judge Parker did not want his brother's presence in Washington publicized, no doubt lest he appear unduly anxious about his prospects, and Sam's activities are revealed only through an examination of Judge Parker's correspondence.

On the morning before formal debate was to begin, Senator Overman read into the record a letter Parker had written attempting to rebut the arguments against him. The letter

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[63] Charleston (S.C.) News & Courier, April 28, 1930, clipping in Parker Papers.

[64] A sample report from Sam Parker: "I am quite sure [Senator] Brock of Tennessee is all right. Mrs. Brock came in the Galleries this morning and got so disgusted with Norris she got up and left." S. Parker to J. Parker, May 2, 1930 in Parker Papers. (Senator Brock voted against Parker.)

contained the Judge's first public and personal answer to the charges levelled against him by the NAACP:

> **In conclusion let me say that I have no prejudice whatever against the colored people and no disposition to deny them any of their rights or privileges under the Constitution or under the laws. I think that my record as a judge of the United States Circuit Court of Appeals, in a circuit where many of them reside, shows that I have no such prejudice or disposition.**[65]

A more categorical denial of racial bias can scarcely be imagined, but it came too late. If at one point White and his allied had been willing to settle for such an affirmation, they were, by the end of April, locked into opposition. For the first time they were seeing a significant portion of the United States Senate take serious, if rather embarrassed, notice of them and their followers, and they could hardly fail to exploit such an opportunity to the maximum. Furthermore, while Parker emphatically denied possessing any racial prejudices, in his letter he attempted to explain rather than simply repudiate his decade-old Greensboro speech, and that deficiency was probably sufficient to rationalize the NAACP's refusal to forgive him.

Senator Henry Allen of Kansas, a relative newcomer to the Senate who had been appointed to the seat of Vice President Curtis was up for election in the fall, was a vigorous advocate of Judge Parker, even though it must have been clear to him that independence from the Administration would be far more profitable in November than close association with it. On the night prior

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[65] Parker to Overman, April 24, 1930, Congressional Record, 72, 7793-7794.

to formal consideration of the nomination Allen issued a statement which was widely regarded as expressing the unofficial views of the White House. In the staement Allen made a point of emphasizing Parker's recent decision of City of Richmond v. Deans in which Parker had overturned a racial segregation ordinance. The Kansas Senator cited the decision as proof of Parker's "unswerving fidelity to the Constitution when passing upon a fundamental right of every citizen, irrespective of race or color," and indeed, the NAACP had no complaints against Parker's five year judicial record. The following day the NAACP wired an answer to Allen's defense, contemptuously dismissing the Richmond decision as no proof that Parker was racially unbiased because "with two unanimous Supreme Court decisions as precedent in this case Judge Parker had no choice." Thus, ironically, the Negro opposition to Parker's confirmation had taken the position that judges of inferior courts must automatically follow Supreme Court precedent, a point of view which Parker's labor opposition was simultaneously doing its best to discourage.[66]

The Senate's manner of considering Judge Parker was to be a significant factor in determining his fate. In the past the Senate had often conducted much of its business in closed executive session, where the votes of individual members were not disclosed, thus affording lawmakers an opportunity to vote their

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[66] New York Times, April 28, 1930, p. 3; Ibid., April 29, 1930, p. 1ff, esp. 13.

consciences rather than as their constituents might demand of them. While voting one's conscience seems in the abstract a fine idea, closed session minimized popular control over legislators and made it difficult for voters to appraise an incumbent's record. The closed session system finally became something of a scandal in 1929 when President Hoover nominated former Senator Irvine Lenroot of Wisconsin to the U.S. Court of Custom Appeals. The Progressives opposed the nomination for two days in closed session even as Norris and others vigorously demanded that the debate be made public.[67] Lenroot was finally approved, but an enterprising reporter somehow found out and published the roll call, which proved so embarrassing to some Senators that confirmations were thereafter debated and voted upon in public. As Time Magazine quaintly phrased it, consideration of Judge Parker in open session "gave Senators no chance to weasel on their votes."[68]

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[67] Alfred Lief, Democracy's Norris - the Biography of a Lonely Crusader (New York 1939) 330-331.

[68] Time, May 19, 1930, p. 14.

CHAPTER IV

DEBATE AND DEFEAT

At the appointed hour of three o'clock on the afternoon of April 28, Senator Lee Overman opened the debate on the Parker nomination. He declared that his remarks would be a statement about "Judge Parker the man and Judge Parker the lawyer," but before he began his encomium he cited some of the distinguished citizens of both races who had endorsed the nominee. That done, he proceeded to pull out all the stops:

> **Mr. President, Judge Parker was born in a little town in my state, grew up there, and got his early education at the high school. He was a member of a plain family, but of distinguished ancestry. He worked his way up and finally went to the University of North Carolina. He worked his way through the University. He was a leader among the boys of that institution... He is a man of courage, a man of character, a man of supreme ability.**
> **...He was raised among the plain people, lived among the plain people.**
> **...How could the trend of this man's mind be in favor of the corporations and against humanity? The whole life and environment of the man has been among the plain people.**[1]

During the course of his address Overman scarcely alluded to the complaints made by the A.F. of L. against Judge Parker. Unlike some of his northern, and presumably more liberal colleagues, Overman publicly recognized that the Greensboro speech was the real issue, and he did his best to deal with it.

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[1] U.S. Congress, Senate, Senator Overman speaking in favor of the nomination, April 28, 1930, Congressional Record, 72, 7808-7809.

He cited Walter White's admission at the subcommittee hearing that North Carolina was the most racially enlightened southern state, embellishing it, however, by claiming that White had put North Carolina "ahead of every other state in the union" instead of merely the south.[2] Overman also tried to dissociate Parker from the notorious "grandfather clause" which he had been charged with defending by noting it had expired in 1908 and that any "man who can read and write the constitution, be he black or white, can vote without any trouble" in North Carolina.[3] Continuing in that vein, Overman declared his belief that, despite the Greensboro speech, Negro voters had strongly supported Parker's bid for Governor in 1920, even submitting as an example a notarized affadavit showing that Parker had carried two Negro precincts in one county, even though those precincts usually voted Democratic.[4] Finally Overman took a step which Parker had been unwilling to take publicly himself; he tacitly repudiated the Greensboro speech.

> A man ought not to be held responsible for what he said in a political speech ... [M]en frequently say things in their political speeches that they would not say if they sat down to write them and think about them.

Toward the end of his remarks, Overman yielded to Senator (now Supreme Court Justice) Hugo Black of Alabama. Black read from an editorial appearing in the Scripps- Howard papers, which

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[2] Ibid., 72, 7810.
[3] Ibid., 72, 7814.
[4] Ibid., 72, 7810-7811.

had been active in the anti-Parker campaign,[5] charging that while an Assistant U.S. Attorney General Parker had prosecuted a case when he possessed documentary proof of the defendants' innocence. Black, although he gave no evidence of even knowing the name of the case involved, showed his great respect for the American tradition of presumption of innocence by announcing he would vote against Parker if this charge were not disproved.[6]

Overman had not anticipated Black's charge and was not immediately prepared to rebut it, but the following day he came to the Senate fully armed. The particular case was United States v. Byron, known as the "Harness Case," and Overman had with him a telegram of categorical denial from Parker as well as a letter praising Parker's conduct of the case from the presiding Judge and from several attorneys intimately associated with proceedings.[7] On the following day a wire from the judge in whose court the case originated also appeared in the record stating that Parker had "acquitted himself in a most commendable manner."[8]

Regardless of one's attitude toward Judge Parker's confirmation, it is difficult to avoid the conclusion that the Scripps-Howard editorial cited by Sen. Black was an example of

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[5] Walter White, A Man Called White (New York, 1948) 109.
[6] Congressional Record, 72, 7811.
[7] Ibid., 72, 7939-7940.
[8] Ibid., 72, 8047.

yellow journalism at its worst. The editorial claimed in part that in the case,

> **the Judge charged that Parker and his fellow counsel had in their possession – and were suppressing – documents tending to prove the innocence of the defendants. He expressed his "decided amazement" at such conduct.[9]**

An examination of the full transcript of Judge Groner's charge to the jury in the Harness Case reveals how clearly the Scripps-Howard editor had taken out of context and twisted the intent of the Judge's words in an obviously deliberate effort falsely to impugn Parker's integrity. The Harness Case did indeed result in a directed verdict of acquittal, but Groner's "amazement" arose not because the Government had deliberately suppressed any evidence but because the defendants had been able to produce certain government papers the import of which Parker and the other Government attorneys had not been able to contradict by presenting relevant official documents to buttress their own argument. Lest that distinction seem purely semantical, a direct quotation from Judge Groner's charge to the Jury will establish beyond any doubt his opinion of the performance of the government attorneys who appeared before him:

> **My friends who represent the Government earnestly contend for a verdict. Their conduct has been characterized by fairness; I think by great ability.[10]**

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[9] Editorial read into the record by Sen. Black; Congressional Record, 72, 7811.

[10] "Charge to the Jury" inserted in the record by Sen. Walsh of Montana, Ibid., 72, 8025.

The Scripps-Howard editorial did not quote that observation, and the incident marked the first attempt by Parker's opponents to attack his personal character as well as his political beliefs.

Overman's remarks were followed by a two day discourse from the unofficial leader of Parker's opposition, Senator William Borah of Idaho. Two weeks earlier Borah had told the press that in resolving to oppose Judge Parker, "I gave no consideration whatever to the other objections that have been raised against Judge Parker because the 'yellow dog' contract decision was sufficient unto itself."[11] Throughout the long period that he held the floor Borah pursued this narrowly focused method of attacking the nomination, disclaiming any influence from the other interests which were opposing confirmation.

Borah was considered to be the most eloquent member of the Senate's "Progressive" bloc (dubbed by President Pro Tempore George H. Moses of New Hampshire "the sons of the Wild Jackass") and even his admirers considered him the most vain.[12] He was not an irreconcilable non-conformist as were his colleagues George Norris and Hiram Johnson. Unlike either of them Borah had vigorously supported Hoover's election in 1928, and could occasionally be found in sympathetic agreement with the GOP establishment. Since his stand on a given issue was somewhat less predictable than was the case with most of the Republican insurgents, his

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[11] New York Herald Tribune, April 15, 1930, p. 12.

support was vigorously courted by both sides. Ray T. Tucker, a fervent admirer of all the Progressives, relates in an article how, after Borah's infatuation with President Hoover had begun to wear thin, Senators Norris and "Young Bob" LaFollette would hold meetings of the Progressive bloc in Borah's office where they:

> **held out the promise of headlines and "honorification" and the Idahoan succumbed as ever to those temptations.[13]**

It was more than simply Borah's vote which Norris and LaFollette were after on such occasions; rather it was his eloquence and his reputation as something of a scholar which had a public relations value far greater than the vote of a single Senator.

Thus Borah's speech would receive more than ordinary attention, and he rose to the occasion with an extraordinary argument. The gist of it was Borah's contention that rather than being bound by Supreme Court precedent to sustain the "yellow dog" injunction, Parker was in fact obligated to allow the union "peaceful persuasion" in its attempt to recruit members, as a result of a more recent Supreme Court decison modifying the one Parker had cited. Borah's argument was carefully, if rather selectively, researched, but suffice it to say that his opinion, whatever its merits, was not widely shared in the Senate.[14] Senators Norris and Thomas Walsh of Montana expressed admiration

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[12] Ray T. Tucker, "Those Sons of Wild Jackasses" North American Review, 229, 227; Robert Sharon Allen and Drew Pearson, Washington Merry Go-Round, (New York, 1931) 212.

[13] Tucker, "Those Sons of Wild Jackasses" 227.

for Borah's argument, but they evidenced no familiarity with its detail and would concentrate their own attacks on more emotional considerations. And, of course, the fact that the Supreme Court refused even to grant certiorari on appeal from Parker's Red Jacket decision was rather embarrassing to Borah's argument that after the original Hitchman decision the Court had modified its position so that Parker was bound to decide in favor of the union. Senator Daniel Hastings of Delaware quoted from the union's brief on its appeal to the Supreme Court for certiorari, showing that the union had presented the Court with Borah's very argument. Hastings drew the logical conclusion that since the Court refused to hear the case, it was rejecting Borah's interpretation of its own rulings. Borah could do little in response but grumble that

> **It is possible that the Supreme Court might have come to that conclusion, it might have taken the view of the Hitchman case again and returned to it; I do not know but it does not seem to me reasonable.**[15]

After Senator Overman's speech leadership of the pro-Parker forces in the Senate passed from him to his Republican colleague Simeon D. Pess of Ohio. Overman had long felt it unseemly that he, a Democrat, act as the leading spokesman for the nominee of a Republican President, and the prospect of numerous GOP defections made it imperative

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[14] Senator Borah's argument is treated in greater detail in Appendix B to this paper.

[15] Senator Borah speaking against the nomination, Congressional Record, 72, 7938.

that a leading Republican actively take up Parker's defense. Fess, soon to be appointed Republican National Chairman, was a logical choice to lead the fight, for his devotion to Republicanism was unexcelled. A former history professor at Antioch College,[16] Fess devoted the greater part of his speech to examples from the nation's past which he felt lent support to his argument. He responded to the complaints of some Senators that Parker was unknown and lacked a distinguished record by pointing out that many of the Supreme Court's most outstanding members, such as Marshall, Story, Field and the elder Harlan, were appointed to the Court as comparatively young men who had not yet had a chance to distinguish themselves in legal circles. Fess then called attention to the examples of, among others, John Rutledge and Roger Taney, both of whom were once denied confirmation by the Senate, even though both at one time served on the Court with great distinction, the former prior to rejection for Chief Justice and the latter subsequent to rejection as Secretary of the Treasury.[17]

The Senate was awaiting the return on April 30 of Senator Joseph T. Robinson of Arkansas, the Democratic Floor Leader, who had been attending the London Naval Conference. As the Senate's leading Democrat, Robinson's attitude toward Parker would be of crucial importance, but as a southerner who by

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[16] Robert S. Allen and Drew Pearson, More Merry Go-Round (New York, 1932) 344-351.

"temperament, instinct and economic conviction ... belongs in the ranks of Bourbon Republicanism rather than in those of Jeffersonian Democracy," Robinson was expected to support the Judge.[18] Thus when Robinson returned and announced he was not yet prepared to say how he would vote, his indecision was a sign that southern Democrats would not be automatic or monolithic in their support for the nominee.[19]

On the day of Robinson's return Senator Robert F. Wagner of New York took the floor to assail Judge Parker's record. Wagner devoted about ninety percent of his time to inveighing against Parker's decision in the Red Jacket case, but at the close of his remarks he piously declared that:

> In my State, I am happy to say, men and women participate fully and freely in every phase of democratic government and in every branch of the arts and sciences, without regard to race, creed or color.

Having thus to his personal satisfaction cast the beam from his own eye, he went after Parker's mote by condemning the Judge's Greensboro speech as "an insufferable and unjustified affront to millions of Americans." Despite Wagner's smugness about conditions in New York, he was to be the only opposition Senator who put himself squarely on public record as opposed to

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[17] Senator Fess speaking in favor of confirmation, April 29, 1930, Congressional Record, 72, 7945-7954.

[18] quote from Allen and Pearson, More Merry Go-round, 340; New York Times, April 28, 1930, p. 3.

[19] New York Times, May 1,1930, p. 2.

Parker's alleged racial attitudes.[20] Although forty-one Senators were eventually to vote against Judge Parker, no one of them from either party joined Senator Wagner in publicly condemning Parker's supposed bias. Ironically, the only other Senator to express some distaste for the Greensboro speech was Massachusett's Frederick Gillett,[21] and he did not think it sufficiently damning to prevent him from voting for Judge Parker. The GOP regulars who voted against Judge Parker, however, chose to remain silent. For ideological reasons they could not pretend to be basing their decision on Parker's Red Jacket opinion, but they did not dare get up and claim to be concerned about the Negro they had ignored for so long. A number of the Republican regulars were cold-bloodedly about to do in one of their own, and obviously they were more than a little embarrassed.

In his defense of Judge Parker, Senator Fess had intimated that some Democrats were opposing confirmation merely to frustrate a Republican administration. While this charge was to some extent true, coming as it did from the leading GOP spokesman for the Judge it forced the Democrats to return in kind with equally valid charges that the Republicans were not averse to playing politics with such matters. Senator Walsh of Montana, one of the Senate's most prestigious Democrats, pointed out that of the twenty-two votes cast against the confirmation of Louis

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[20] April 30, 1930, Congressional Record, 72, 8037.

[21] Ibid., April 29, 1930, 7943.

Brandeis in 1916, twenty-one were from Republican ranks.[22] Yet Walsh's rebuttal paled into insignificance when compared to the bombshell dropped by Tennessee's Kenneth McKellar on the afternoon of April 30.

McKellar expressed his regret that his "esteemed friend, the Senior Senator from Ohio on yesterday undertook to inject politics into this matter."[23] McKellar of course believed that politics had no place in so weighty a concern as the selection of a Supreme Court Justice, but to his great dismay he had reason to believe that politics had indeed intruded upon the Senate's deliberations. McKellar then read aloud a letter addressed to Walter Newton, Hoover's political secretary, which he had taken from Parker's file with the Judiciary Committee. The writer of the letter was Joseph M. Dixon, an unsuccessful Senate candidate from his adopted state of Montana and currently serving as First Assistant Secretary of the Interior. The letter, dated March 13, 1930, read:

> My Dear Mr. Newton: I speak, as a native born North Carolina Republican.
>
> North Carolina gave Hoover a 65,000 vote majority. In my judgment it carries more hope of future permanent alignment with the Republican Party than any other of the Southern States that broke from their political moorings last year.
>
> If the exigencies of the situation permit, I believe the naming of Judge Parker to the Supreme Court would be a major political stroke.
>
> North Carolina has had no outstanding recognition by the administration. The naming of Judge Parker at this time would appeal mightily to state pride. It

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[22] Congressional Record, April 29, 1930, 72, 7976.

[23] Ibid., April 30, 1930, 72, 8040.

> would be the first distinctive major appointment made from the South. It would go a long way toward satis- fying the unquestioned feeling that the administration has not yet recognized the political revolution of 1928.
>
> Everyone tells me that Judge Parker is a man of fine personality, who has made a most enviable record, both in private practice and as a member of the Federal circuit court. By education and legal training he should measure up to the position. There would be no apology necessary. He is a Phi Beta Kappa graduate of the University of North Carolina. The fact that he is 45 years old, and has not yet reached the senile stage, would give a distinct flavor in the matter of a Supreme Court appointment.
>
> I may be prejudiced on account of my knowledge and sympathy for the North Carolina Republicans who have borne the banner, in season and out, under tremendous discouragement. I believe Judge Parker's appointment would be a master political stroke at this time.
>
> If in the midst of overwhelming demands upon your time and his these considerations could be presented to President Hoover, I believe they are worthy of serious thought.
>
> Your very sincerely,
>
> Jos. M. Dixon[24]

The letter had been written five days after Justice Sanford's death, and its unabashed emphasis on the political profits to be reaped from nominating Parker was indeed an embarrassment to the Republicans. Senator Overman was present in the chamber at the time McKellar made his revelation, and he was utterly bewildered. The letter had come from the file of Parker endorsements sent to the Judiciary Committee by Attorney General Mitchell, but Senator Norris, who received the file, had not turned it over to Overman as evidence for the subcommittee hearing.[25] Naturally the import of the letter was embarrassing

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[24] Inserted in the record by Senator McKellar, April 30, 1930, Congressional Record, 72, 8040.

[25] Ibid., 8041.

to Overman; although he was surely not so naive as to have been unaware of the Parker appointment's political ramifications, the issue had previously remained sub rosa and Overman could afford to support Parker as a native son without appearing to be undermining his own party's supremacy. For North Carolina was in fact a hot bed of nascent Republicanism, and Overman himself had lost his first bid for the Senate to a Republican-Populist coalition in 1895.[26] Overman knew that Democrats in his home state were seriously upset by the Republican success of 1928; in a few short weeks Tarheel voters would deny renomination to Senator Furnifold Simmons, due largely to his prominent backing of Hoover two years before. With the tremendous publicity the Dixon letter was bound to get, Overman could not have helped but feel uncomfortable.

He must have been especially annoyed that Senator McKellar, not even a member of the Judiciary Committee, had been shown the file of endorsements while he, Overman, had not. The incident seems to have been an example of Senator Norris' noted "Machiavellian" tendencies,[27] for the letter was discovered by Norris' secretary, who also served as clerk to the Judiciary Committee. Norris and his clerk recognized the potential impact of the letter if properly exploited, but the Nebraska Senator, as a nominal Republican, was probably hesitant to do the job

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[26] Congressional Directory, 71st Cong., 2nd sess. (Washington, 1930) 81.

[27] Tucker, "Those Sons of Wild Jackasses" 227.

himself.[28] Instead of passing the document around to the other members of his Committee, it doubtless occurred to Norris that the letter would be most effective if read aloud on the Senate floor by a southern Democrat. He likely turned to Senator McKellar because of the latter's strong pro-labor record,[29] and his probable desire to oppose Parker on that basis alone, if he could only justify it back home in Tennessee.

Of course the Dixon letter did not represent any official Administration opinion; Dixon had written strictly as a private individual, and neither Walter Newton nor any other Administration source had gone on record as sharing Newton's sentiments. The very fact that the Attorney General included the letter in a file of other endorsements of Parker seems to indicate that the Administration did not consider the political aspects of the appointment were sufficient to be worth concealing. Yet the letter's exposure did afford an opportunity for partisan Democrats from southern states to oppose confirmation without incurring charges of sectional disloyalty. The Republican Party, north and south, had lost much of its lustre as the economy began to go sour, and politicians of both parties were eager to dissociate themselves from the Administration. Prior to McKellar's contribution, most observers agreed that southern Democratic support for the Judge would be fairly solid,

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[28] Albert Lief, Democracy's Norris - the Biography of a Lonely Crusader (New York, 1939) 346.

[29] V.O. Key Southern Politics (New York, 1949) 73.

due of course, to the racial issue. With the Dixon letter in the picture, however, Southern Senators could, with great displays of alarm, point to it as proof that the White House, rather than paying the south tribute with the nomination, was in fact exploiting the region for partisan political purposes. Certainly the eleventh hour desertion of Judge Parker by many southern Senators cannot be attributed to their possessing a more enlightened racial attitude than those who supported the nomination. None of them ever publicly assailed Parker's Greensboro speech and Walter White went out of his way to cite four of them, Heflin of Alabama, Connally of Texas, Robinson of Arkansas and McKellar himself as "notoriously opposed to equal rights for Negroes" in spite of their refusal to vote for Parker.[30]

The ultimate blame for the scandal of the Dixon letter (and scandal it was, making front-page news across the country) must lie with the Administration. Walter Newton was the recipient, and as the President's top political aide he ought to have known that files of endorsements were often kept on behalf of Executive nominations,[31] and that Dixon's letter would be very unseemly in such a file. Whether he so advised Attorney General Mitchell, to whom it was ultimately referred, is uncertain, but in light of the record we have of Newton's abilities, (see above p. ???) it Is doubtful that he foresaw the danger or took steps to prevent it. As for Attorney General William D. Mitchell, he too must

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[30] White, A Man Called White, 108.

share in the onus since he sent the letter along in the file to Senator Norris, but Mitchell, a nominal Democrat, was never a politician. His role in the Justice Department was technical and administrative, with special emphasis on Prohibition enforcement, and he could hardly have been expected to be fully mindful of partisan considerations.[32] The Hoover Administration is well known for its political awkwardness, and the Dixon fiasco seems only a particularly blatant example of how men like Newton, paid expressly to watch out for the President's political interests, could bungle the job so badly.

McKellar's speech marked the culmination of the case against Judge Parker. Over the past month, labor and civil rights lobbies had assembled a body of evidence sufficient to convince a large minority of the Senate to oppose confirmation, but the Dixon letter introduced a third and decisive element Into the fray, namely political partisanship. Which is not to say that political considerations had played no role at all up to that point, but merely that McKellar was able, with one isolated letter, to legitimize the political antipathy long felt toward the nomination by many Democratic Senators. Thus Southern Democrats like Brock of Tennessee, (grand-father of the present GOP Senator), George of Georgia and Robinson of Arkansas, were able to oppose the nomination on partisan grounds even though

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[31] Congressional Record, April 30, 1930, 72, 8042.

[32] Time, January 27, 1930, pp. 11-12.

they had little sympathy for the arguments of men like William Green or Walter White. In fairness it must be noted also that several Republican Senators, Watson of Indiana and McCulloch of Ohio for example, swallowed hard and supported Judge Parker for equally partisan reasons of loyalty to a Republican President.

Of course McKellar's implication that the choice of Parker was a political ploy had to be answered. On May 3 Attorney General Mitchell wrote to Mississippi's Hubert Stephens who, aside from Overman, was the south's most ardent supporter of the nomination in the Senate, and Stephens promptly read Mitchell's reply on the floor of the Senate. Concerning the Dixon letter, Mitchell assured the Senators that Hoover never saw it and knew nothing of it. The Attorney General related that after Justice Sanford died he had examined the records of many judges, particularly those residing in circuits not then represented on the Court, and that Parker had made "an impressive showing." After a lengthy paragraph praising Parker's personal and intellectual qualities Mitchell observed that since the late Justice Sanford had been a Republican and the Supreme Court already had three Democratic members, "...it was. considered entirely appropriate and in accordance with tradition and historical practice for the President to nominate a member of his own party who possessed the necessary qualifications."[33]

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[33] Mitchell's letter read into the record by Senator Stephens, May 5, 1930, Congressional Record, 72, 8341-8342.

But the damage had been done and nothing the Administration might say in defense could undo it. Whether Parker was an outstanding jurist and merely coincidentally a southern Republican or vice versa could never be proved, and Senators were free to take their choice. While the Attorney General might promise that Hoover had never seen the Dixon letter, no one in his right mind would believe that the President was unaware of the sentiments it expressed. Little in the week of debate that followed McKellar's exposure was likely to influence the vote of any Senator, The tail end of the debate was taken up, for the most part, with oratorical restatements of the same arguments, pro and con, which had been heard ever since Hoover first presented Parker's name. Senator Henry Ashurst of Arizona did create some drama and headlines when he charged on the Senate floor that "...men with Judge Parker's consent are being offered Federal judgeships and other appointments to office if they will vote for this nominee."[34] When Ashurst saw the transcript of his remarks in the record he had the words "with Judge Parker's consent" stricken out, admitting that he had no evidence to implicate the Judge personally.[35] Even so, Ashurst's accusation in its original form made national headlines. Parker, of course, immediately issued an emphatic denial which, along with Ashurst's revision, easily exonerated him. And Ashurst's whole bribery

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[34] New York Times, May 6, 1930, p. 1.

[35] Congressional Record, May 6, 1930, 72, 8426.

charge came to naught after it was learned that it was based upon a conversation he had overheard in the office of Washington Democrat Clarence C. Dill, in which a friend of Dill's had merely theorized that Dill might receive an appointment should he change his mind and vote for Parker and then retire from the Senate. Dill revealed that his friend did not represent the Administration and had absolutely no authority to offer judgeships. Furthermore Dill was one of the Senate's most liberal members,[36] and even Walter Newton would surely not have been so foolish as to have offered him a bribe to support a nomination so ideologically distasteful to him. Ashurst was reluctantly forced to abandon his witch-hunt.[37]

Once the excitement of the Ashurst-Dill affair had died down Senators felt ready to put the question to a vote. Thus on the afternoon of May 6 the Senate recessed until noon of the following day, when an hour and a half of last minute debate would precede a vote at one thirty. Among the final remarks were a reminder from Senator Allen of Kansas that the Senate had unanimously confirmed Parker in 1925 as a Circuit Court judge, only five years after the Greensboro speech but "before we made a field day of judicial confirmations."[38] California's insurgent Republican Hiram Johnson, who had been Teddy Roosevelt's "Bull Moose" running mate in 1912, was a bitter personal enemy of

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[36] Time, January 6, 1930, p. 6.
[37] Congressional Record, May 6, 1930, 72, 8423-8431.
[38] Ibid., May 6, 1930, 8433.

President Hoover for the past decade and was the only Republican to condemn the Parker nomination's political overtones.[39] He honored the last day of debate with an appropriate rhetorical flourish, calling upon Senators to defeat the nomination as an opportunity to go on record as opposed to:

> **...this inhuman, this cruel, and this wicked contract that rests upon the necessity of human beings and the hunger of innocent and helpless children.[40]**

The vote was clearly going to be very close, and up to the last moment neither side was absolutely sure of victory, although informal surveys tended to give the edge to the opposition.[41] Pressure had built up so heavily on both sides that no Senator was able to escape going on record one way or the other.

The result was forty-one Senators opposed to confirmation and thirty-nine in favor, with the remaining sixteen Senators paired evenly on either side. If one Senator had changed his vote from opposition to support of the Judge, Vice President Curtis would have been able to break the tie to confirm him. The Administration lost the support of ten GOP regulars, in addition to a dozen members of the Republican insurgent bloc. The only GOP "Progressive" to support Parker was South Dakota's Peter Norbeck. Thirteen Democrats supported the nomination, but only two were from outside the south: Utah's William King and Iowa's

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[39] Warren, Herbert Hoover, p. 25.
[40] Congressional Record, 72, 8478.
[41] New York Times, May 7, 1930, p. 5.

Daniel Steck. Steck's was the only vote the Administration forces had been able to wrest at the last minute from those Senators committed to opposition, and he probably switched to antagonize his GOP colleague, Smith Wildman Brookhart, an insurgent whom he had defeated in 1924 and who had vowed Steck would not be reelected Senator, even if he had "to turn Iowa upside down."[42]

Judge Parker was sitting at the regular session of his court until minutes before the vote was taken. When advised of the outcome he had no comment to make other than to express his disappointment and to thank "the friends who stood by me so loyally."[43] No doubt Parker was prepared for an unfavorable result and had steeled himself against the possibility, for his public conduct following such a great disappointment was unimpeachable. Almost immediately upon his defeat a movement sprang up in North Carolina GOP circles to draft him as as candidate for the United States Senate in the event that conservative Democrat Furnifold Simmons were defeated in the primary (which he was). Parker's close friend, Congressman Charles Jonas, even wrote the Judge on May 27 that "This matter was discussed fully in the presence of the President. I have reason to believe he is heartily in sympathy with the idea."[44]

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[42] Time, May 19, 1930, p. 12; for roll call, see Appendix A.

[43] New York Times, May 8, 1930, p. 2.

[44] Jonas to Parker, May 27, 1930, John J. Parker Papers, Southern Historical Collection, University of North Carolina at Chapel Hill.

But Parker's ordeal had not made him bitter, and he did not feel the need for public vindication. He wrote back to Jonas that he had no interest in electoral politics and that he much preferred the bench to the Senate.[45]

Another letter, which Parker wrote to a professor at the University of North Carolina a short time after the Senate vote, gives a better impression of Parker's personal reaction to the defeat than anything else he said publicly or wrote at the time. The recipient, Prof. Horace H. Williams, had publicly endorsed Parker's nomination, as had many of his colleagues at the University.

> Dear Professor Williams (Parker wrote):
>
> I greatly appreciate your kind letter of the 24th instant. I am disappointed, of course, that my nomination should not have been confirmed by the Senate, by it is an inspiration to me to know that friends like you stood by me so loyally.
>
> It is hard to understand the forces that brought about my defeat. In the final analysis, however, these forces resolved themselves into a radical attack on the Administration and the Supreme Court. The labor people, as I understand, were put up to their protest by certain radical Senators, and I imagine the same thing is true of the National Association for the Advancement of Colored People. The latter association is a quasi socialistic organization, the directorate of which contains some of the most prominent socialists and communists of the country.
>
> The methods employed were something new in the history of the United States. What was done was to agitate the labor unions and Negro organizations from Washington and New York by means of false propaganda, and to have them bring influence to bear on their Senators. It is almost impossible for a nominee for the Supreme Court to meet this kind of propaganda; for if he descends to entering into a publicity fight of this sort, he is straightway con-

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[45] Parker to Jonas, May 29, 1930, Parker Papers.

demned for engaging in tactics unbecoming to a nominee to the highest Bench. Of course, Senators should not be influenced by such propaganda, but should pass upon the fitness of the nominee from the standpoint of his merits without reference to the outcry of uninformed minoritites having special interests to serve; but Senators are human and naturally lend ear to the wishes of their constituents.

Notwithstanding the assault of the labor unions and the Negro organizations, I would have been confirmed by the Senate if certain Southern Senators had not been led off by a desire to play small politics. It seemed to some of them that it would be desirable to defeat the Administration's appointment, and they voted against me for that reason. When it is remembered that a change of one vote would have meant my confirmation, you can readily understand how serious this was.

In the face of a disappointment so great, it is hard to maintain one's equanimity; but I console myself with the thought that I have not yet reached the end of my efforts nor, I believe, the zenith of my capacity. While I cannot take my seat upon the Supreme Bench, I can at least demonstrate to the country that I am worthy of that position. My appointment by the President, even though not confirmed, will probably give me an outstanding position as a Circuit Judge and will cause my opinions to be more carefully scrutinized than they would otherwise be. It is my hope, therefore, that I may develop as a Judge and that my opinions may aid in the development of the law and in the solution of the problems with which the country is faced.

There has come the temptation to retire from the Bench and engage in the practice of law again. I believe that I could enter the practice with every assurance of success in a big way; but I doubt whether I should even consider this. I am inclined to think that my position on the Circuit Bench affords greater opportunities both for worth-while achievement and for worth-while service,

I hope to see you before long and talk things over with you.

With every good wish, I am

Affectionately yours,

John J. Parker[46]

Parker's belief that certain Senators mobilized the

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[46] Parker to Williams, May 26, 1930, Parker Papers.

opposition of the labor unions is surely an exaggeration, but there can be no doubt that the A.F. of L. was encouraged to oppose him with greater militancy by easy receptivity to their arguments evidenced by the likes of Borah and Norris from the very start. Furthermore the brouhaha over the Hughes confirmation may have signaled to labor officials that judicial confirmations would no longer be handled in the Senate as a matter of form. The relationship of labor and the Progressive Senators seems to have been that they each simultaneously fed upon the fervor of the other, and that neither was "put up" to the job in any devious sense.

After the McCarthy experience of the 1950's, Parker's looseness in the letter with the terms "socialists" and "communists" may disturb modern readers. But W. E. B. DuBois, the most famous member of the NAACP at the time, did indeed have political views far to the left of the American mainstream, as did other less distinguished members.[47] And America in 1930 was considerably less tolerant of left wing opinion than it is today; far more heated examples of rhetoric like Parker's may be found in many a speech in the Congressional Record of that period.

But on the whole, Parker's attitude toward his defeat seems to have been impressively philosophical. He did indeed prove to the nation that he was qualified for the appointment he so

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[47] Eric F. Goldman, Rendezvous With Destiny (New York, 1952) 276; Letter from Paula Lucas to Sen. Simeon Fess, printed in Congressional Record, May 6, 1930, 72, 8436-8437.

narrowly missed, for he was prominently mentioned for just about every vacancy on the Court from the 'thirties to his death in 1958. In 1941 President Roosevelt requested Justice Felix Frankfurter to research Parker's opinions prior to the President's filling an empty Court seat. Although Frankfurter had been associated with the NAACP in 1930, the wrote the President that "the opinions cannot fail to give an impression of a high degree of competence."[48] While FDR ultimately did not submit Parker's name, his successor, Harry Truman appointed the North Carolinian alternate member of the International Military Tribunals at Nuremberg. In 1953 it was believed that the only thing which prevented President Eisenhower from naming Parker Chief Justice was his age, then sixty-eight.[49] When he died on March 17, 1958, John Johnston Parker was the Senior Circuit Court Judge of the United States.

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[48] Max Freedman, ed., Roosevelt and Frankfurter, Their Correspondence, 1928-1945, (Boston, 1967) ???

[49] Unpublished summary, John J. Parker Papers; Newsweek March 4, 1957, pp. 22-23.

CHAPTER V

AFTERMATH

John J. Parker was the first Supreme Court nominee to be rejected In the twentieth century and the ninth in American history.[1] During the forty-one years since Justice Sanford died no southern conservative has sat on the Court, save James F. Byrnes for the brief period of a single year. Two more in addition to Judge Parker have been rejected by the Senate.

President Hoover must have been infuriated at the Senate's rebuff. While he made no public comment at the time, his brief account in his memoirs indicates the formation of a mental block; in little over a page one finds six errors of fact in addition to the highly dubious interpretation that "No senator who supported me lost his election on this account."[2]

Two days after Parker's defeat President Hoover submitted the name of Owen J. Roberts to the Senate. Like Parker, Roberts was a conservative Republican, but unlike the North Carolinian, he was not from the south nor had he ever been a judge, having made his reputation as a

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[1] Time, May 19, 1930, p. 14.

[2] Herbert Hoover, The Memoirs of Herbert Hoover, The Cabinet and the Presidency, 1920-1933 (New York, 1952) pp. 268-269. Among Hoover's errors are the date he made the nomination, Parker's political and judicial background, and the make up of the Court.

prosecutor in the Teapot Dome scandals. In another era Roberts might have been a target for liberal assault more bitter than was directed against for he held some rather remarkable opinions on how to improve American law enforcement. He advocated an end to the presumption of innocence and reasonable doubt doctrines and urged that juries might convict defendants on merely a 9-3 vote.[3] In fairness it must be noted that these "reforms" were directed especially toward mobsters and bootleggers, and no Senator wanted to go on record as unduly concerned with the constitutional rights of the likes of Al Capone. The fight had temporarily gone out of the Senate's Progressives, and on May 21, 1930, without any debate the Senate unanimously confirmed Roberts' nomination.[4]

The Senate's easy acceptance of Roberts did not mean that the groups and interests which had opposed Parker were content to rest on their laurels. All made attempts to exploit their new-found power, and though none was spectacularly successful in the short run, the advent of the New Deal brought them closer to the substance of power than even their success against Parker had led them to anticipate. In the remaining three years of Hoover's term, however, their victories were marginal and sporadic. The

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[3] Time, May 19, 1930, p. 14.

[4] George H. Haynes, The United States Senate, (New York, 1960) Vol. II, p. 759.

A.F. of L. was the first group to try to capitalize on its part in defeating Parker. Labor Secretary James Davis announced his intention of running for the Senate from Pennsylvania and late In the spring he defeated Republican incumbent Joseph Grundy In the primary. When Davis left the cabinet the A.F. of L, wanted one of its own men to succeed him. Among Green's preferences were A.F. of L. Vice President Matthew Woll and John L. Lewis, and Green wrote the President expressing his desires in that area. The papers somehow reported that Green had demanded an A.F of L. member get the nod, and Hoover felt obliged to name a non-member to prove that appointments in his Administration were open to all. Green strongly objected to Hoover's choice of William Doak, a non-A.F. of L. member, but Doak was nonetheless confirmed. Even though Green had opposed him, Doak was at least a union member (Brotherhood of Railway Trainmen), which was more than his predecessor had been.[5]

The Progressive Senators who had been so helpful to labor in the fight against Parker emerged from the struggle with less to be ashamed of than their "regular" Republican brethren. While most of them gave no sign that they were well versed in the rigors of jurisprudence, at least they arrived at their opposition to Parker relatively honestly.

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[5] Philip Taft, The A. F. of L. From the Death of Gompers to the Merger (New York, 1959) p. 25.

The Progressives perceived Parker as a reactionary, and they felt that even if the Red Jacket opinion were legally valid, Parker had "smacked his lips when he did it," as one Progressive phrased his desciption of what he felt was Parker's enthusiasm for the injunction.[6] And Parker's refusal, even in private correspondence, to condemn the "yellow dog" contract indicates that their impression, if a bit exaggerated, was not totally inaccurate. The Progressives felt that the Supreme Court was even then out of touch with the mainstream of American political thought, and they were determined not to perpetuate the Court's isolation by confirming another conservative member. The fact that they swallowed Owen Roberts without complaint was largely due to the timing of his nomination so soon after the trmendous battle over Parker; the next time a vacancy occurred on the Court Senator Borah was instrumental in persuading President Hoover to nominate liberal Democrat Benjamin Cardozo of New York.[7]

Throughout the Hoover Administration, the Republican Progressives had found themselves in a peculiar position. They were the darlings of the press for their supposed reformist zeal, but most of them, with the exception of

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[6] Senator Norris speaking against the nomination. May 1 1930, U.S., Congress, Senate, Congressional Record, 72, 8103.

[7] Claudius O. Johnson, Borah of Idaho, (New York, 1936) pp. 452-453.

George Norris, had supported Hoover in his campaign against Al Smith, who was generally perceived as the more liberal candidate. In April of 1929, just as the Hoover Administration was getting under way, H. L. Mencken's The American Mercury came out with a piece by an anonymous Washington correpondent lambasting the Progressives as "a sorry bunch of weaklings and time servers." This was not a standard right wing attack, but rather a complaint in a prominent liberal organ that the Progressives were insincere in their commitment to liberalism and were especially unwilling to work hard to achieve the lofty projects they espoused.[8] The wide currency which this "exposé" attained naturally embarrassed the Progressives and may have played a large part in their constant sniping at the Administration most of them helped put in office by making them feel that they would prove their liberal virility with more frequent refusals to cooperate with the President. William Borah, for instance, though he had enthusiastically supported Hoover's campaign, deserted his President in the first year of his term successively on farm relief, the tariff, prohibition enforcement personnel and the Hughes and Parker nominations.[9] Parker's defeat was the first major success of the

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[8] A Washington Correspondent, "The Progressives of the Senate" The American Mercury, XVI, 385.

[9] Time, February 24, 1930.

insurgent bloc during Hoover's term, but even that was eclipsed with the Norris-LaGuardia Anti-Injunction Act which they forced Hoover reluctantly to sign in 1932. The election of Franklin Roosevelt and the end of the Republican era that same year greatly diminished the Progressives' importance and influence, and today the states which elected them are among the most conservative in the Union.

Even more than its allies in the labor movement, the NAACP was determined to maintain the political consciousness it had developed in the Parker dispute. Some promi- nent Negroes like Dean Kelly Miller of Howard University argued that the black population should be satisfied with. Judge Parker's defeat and should not attempt to inflict retribution upon those Senators who refused to go along with them. Walter White in his memoirs indicates that he personally agreed with the majority of the NAACP's directors that Negro voters had to make good their threats against recalcitrant Senators or else they "... would be laughed at the next time they appealed to their elected representatives."[10]

White's own recollections of the Negro's success in this political venture are rather exaggerated and inaccurate. In several cases he claims credit when the seat of a pro— Parker Republican went Democratic apparently without

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[10] Walter White, A Man Called White (New York, 1948) p. 112.

realizing that the Senator to whom the Negroes were ostensibly opposed was not a candidate for reelection. There were six Senators up for election in 1930 who decided to retire voluntarily, and significantly all six, Baird of New Jersey, Gillett of Massachusetts, Goff of West Virginia, Gould of Maine, Phipps of Colorado and Sullivan of Wyoming, were recorded in favor of Parker's confirmation, another indication that pressure rather than sincere conviction motivated many Senators' votes against Judge Parker.

It is fair to say that only Senators up for reelection in 1930 would have had to deal with the Parker issue in their campaigns, since two or four years later the controversy would have been supplanted In the voters' minds with more immediate issues, especially the economy. In 1930 the only two Republicans who voted for Parker to be defeated in November were Henry Allen of Kansas and Roscoe McCulloch of Ohio, both of whom were Senators by appointment and, having never faced the voters before, had not had an opportunity to build a personal following. Both Allen and McCulloch were indeed deserted by large numbers of Negro voters, and their votes for Parker surely gave added impetus to the Democrats' quest for the black voter. The fact, however, that Republican regulars John M. Robison of Kentucky and W. B. Pine of Oklahoma, both of whom came from states with significant numbers of Negro citizens, voted against Parker and were still defeated in 1930 makes the

relevance of that particular issue to the campaign less clear.

The fact that in subsequent elections many members of the Republican Old Guard went down to defeat can only indirectly be attributed to their support of Parker. During this period the Negro was moving north to the urban areas of the border and midwestern states in great numbers, but rather than enjoying the fruits of urban prosperity he found himself instead among the first victims of an economic depression which far more than the Parker nomination caused many Negroes to sever their traditional Republican moorings.[11] But while the Parker controversy may not have been directly responsible for the defeats of more than a couple of Senators, it unquestionably encouraged the Negro electorate to be more selective at the ballot box. Walter White even went so far as to contend, a quarter of a century later, that the "confidence gained in the Parker case" was a factor in the heavy Negro support won by Harry Truman in 1948, a support which may have been decisive in the outcome."[12]

W. E. B. DuBois wrote that the struggle against Judge Parker "was a campaign conducted with a snap, determination and intelligence never surpassed in colored America and very seldom in white. It turned the languid, half-hearted

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[11] For an analysis of the Negro's growing impact on urban areas in the north see Charles E. Hall, "The Negro Is Coming to Town," North American Review, January, 1930, p. 40.

[12] Walter White, How Far the Promised Land? (New York, 1955) pp. 79-80.

protest of the American Federation of Labor into a formidable and triumphant protest.... It was ready to beat back the enemy at every turn."[13] Allowing for a little rhetorical excess, DuBois' analysis is reasonably valid, for the Negro lobbyists did have the most difficult task of any of the anti-Parker forces. The labor unions had merely to appeal to the Progressive bloc which so often befriended them, and the partisanship of the Democrats who wished to scuttle the nomination would have come to the fore as soon as Parker could be shown to possess any visible flaw. But the Negroes had to persuade normally conservative Republicans to desert their party and their President to reject a nominee who was unquestionably qualified as far as legal distinction and training were concerned. The American Negro had never developed any real rapport with Republican officials; Walter White was surely justified in claiming that the reverberations of their unaccustomed vehemence and its success "may be heard for years to come."[14]

We have seen that partisan Democrats were the third crucial interest opposed to Judge Parker's nomination. As with labor and the Negro, their success in that effort foretold the substantially greater role they were soon

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[13] Quoted in Walter White, "The Negro and the Supreme Court," Harper's Magazine, January, 1931, 162, 238, p. 242.

[14] White, "The Negro and the Supreme Court," p. 246.

to play in American politics. Especially the Southern Democrats who were so upset with the Dixon letter had little to fear, for the states of the Old Confederacy did not elect a Republican to the Senate until 1961.[15] Of course there was no trace of a cause and effect relationship between the Democrats' desertion of Parker and their subsequently greater influence in American politics, as ther may have been with labor and the Negro. Nonetheless, in all three cases, the success against Parker was an early warning of an end of an era.

Parker's rejection was President Hoover's first major defeat, and it may have been the first sign that the center of American politics had moved sharply to the left. A second important result was that the victory against Parker made Supreme Court nominations fair game for political attack. Where previously mere legal eminence had been sufficient qualification for a potential Justice, Parker's defeat added a new dimension. No longer, as was the case with Butler, Stone and Hughes, could opposition be dismissed as the work of mere cranks and radicals. Now Presidents have become obliged to consider the ideological temper of the Senate if they wish their nominees to achieve easy confirmation.

Finally the Parker episode was a stunning demonstration of the power of the organized and militant minority.

Lobbies have had few victories on Capitol Hill which provoked as much publicity crediting their own contributions as their triumph against Judge Parker. The year 1930 reinforced the growing power of the American Federation of Labor and it introduced the National Association for the Advancement of Colored People to a meaningful role in national affairs. More than that, Judge Parker's ordeal served to illustrate to Americans the technique of politics in their pluralistic society. Organized minorities can and often have attained victory by using the indifference of the majority to exaggerate their own influence and following. At least with the Parker nomination this phenomenon occurred openly, with the public as a silent witness.

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[15] Texas' John G. Tower.

APPENDIX A

SENATE ROLL CALL ON THE PARKER NOMINATION

FOR CONFIRMATION- 39

REPUBLICANS- 29
**Henry J. Allen, Kansas
David Baird, Jr., New Jersey
Hiram Bingham, Connecticut
Porter H. Dale, Vermont
Simeon Fess, Ohio
Frederick W. Gillett, Massachusetts
Phillips Goldsborough, Maryland
Arthur R. Gould, Maine
Frank L. Greene, Vermont
Frederick Hale, Maine
*Daniel 0. Hastings, Delaware
Henry Hatfield, West Virginia
Felix Hebert, Rhode Island
Wesley L. Jones, Washington
Hamilton Kean, New Jersey
*Henry W. Keyes, New Hampshire
**Roscoe McCulloch, Ohio
*Jesse H. Metcalf, Rhode Island
Tasker L. Oddie, Nevada
Roscoe Patterson, Missouri
David Reed, Pennsylvania
Samuel M. Shortridge, California
*Reed Smoot, Utah
Patrick J, Sullivan, Wyoming
John Thomas, Idaho
John G. Townsend, Delaware
Frederick Walcott, Connecticut
Charles W. Waterman, Colorado
James Eli Watson, Indiana**

DEMOCRATS- 10
**Cole L. Blease, South Carolina
Edwin S. Broussard, Louisiana
* Carter Glass, Virginia
*Pat Harrison, Mississippi
Lee Slater Overman, North Carolina
*Joseph E. Ransdell, Louisiana
**Furnifold McL. Simmons, North Carolina
** Daniel Steck, Iowa
Hubert Stephens, Mississippi
Claude A. Swanson, Virginia**

OPPOSED TO CONFIRMATION- 41

REPUBLICANS- 17
John J. Blaine, Wisconsin
***William E. Borah, Idaho**
***Arthur Capper, Kansas**
***James Couzens, Michigan**
Bronson M. Cutting, New Mexico
****Charles Deneen, Illinois**
Lynn J. Frazier, North Dakota
Robert B. Howell, Nebraska
Hiram Johnson, California
Robert M. LaFollette, Jr., Wisconsin
***George W. Norris, Nebraska**
Gerald P. Nye, North Dakota
****W. B. Pine, Oklahoma**
Arthur R. Robinson, Indiana
***Thomas Schall, Minnesota**
Frederick Steiwer, Oregon
Arthur H. Vandenburg, Michigan
DEMOCRATS- 23
Henry J. Ashurst, Arizona
Alben Barkley, Kentucky
Hugo L. Black, Alabama
***Sam G. Bratton, New Mexico**
***William E. Brock, Tennessee**
Thaddeus H. Caraway, Arkansas
Tom Connally, Texas
Royal S. Copeland, New York
Clarence C. Dill, Washington
***William J. Harris, Georgia**
Harry B. Hawes, Missouri
Carl Hayden, Arizona
John B. Kendrick, Wyoming
Kenneth D. McKellar, Tennessee
Key Pittman, Nevada
***Joseph T. Robinson, Arkansas**
***Morris Sheppard, Texas**
Park Trammell, Florida
Millard Tydings, Maryland
Robert F. Wagner, New York
David I. Walsh, Massachusetts
***Thomas J. Walsh, Montana**
Burton K, Wheeler, Montana

FARMER-LABOR- 1
Henrik Shipstead, Minnesota

PAIRED FOR CONFIRMATION- 8
REPUBLICANS- 5
Guy D. Goff, West Virginia
Peter Norbeck, South Dakota
George H. Moses, New Hampshire
Lawrence C. Phipps, Colorado

****Joseph R. Grundy, Pennsylvania**
DEMOCRATS- 3
Duncan U. Fletcher, Florida
William H. King, Utah
Ellison D. Smith. South Carolina

PAIRED AGAINST CONFIRMATION- 8

REPUBLICANS- 5
Smith Wildman Brookhart, Iowa
Otis F. Glenn, Illinois
****W. H. McMaster, South Dakota**
***Charles McNary, Oregon**
****John Marshall Robison, Kentucky**

DEMOCRATS- 3
****J. Thomas Heflin, Alabama**
Walter F. George, Georgia
Elmer Thomas, Oklahoma

***Senator was a successful candidate for reelection in 1930**
****Senator was an unsuccessful candidate for reelection in 1930**

(No asterisk was given to a Senator whose seat was up for election in 1930 but who decided not to run as a candidate himself. All six Senators in that category: Goff, Baird, Gillett, Gould, Phipps and Sullivan, voted or were paired for Parker.)

APPENDIX B

SENATOR BORAH'S BRIEF AGAINST JUDGE PARKER

Throughout the six weeks of controversy Judge Parker and his supporters argued that his decision in the Red Jacket case was mandated by precedent. Even some of the Judge's opponents who based their opposition on that very case conceded that the weight of earlier decisions may have left Parker no other choice, and they complained merely that he had failed to register his personal distaste for the "yellow dog" contract in his opinion. But Senator William Borah argued that Parker had in fact erred in sustaining the Red Jacket injunction since he ignored a recent Supreme Court decision allegedly modifying the ruling in the Hitchman case, which Parker had followed in Red Jacket.

If one accepts the historian's axiom that in examining attitudes held in the past, perception is more important than reality, then a study of the legal issues involved in the Red Jacket Case is irrelevant, since almost no one of importance shared Borah's interpretation and it had little influence on the final result. Nonetheless it is the present writer's belief that the arguments of an individual of Senator Borah's historical stature ought not to be ignored simply because they were not widely accepted, or even because they were clearly mistaken.

Borah began his analysis by describing the partic-

ulars of the Hitchman decision, handed down by the Supreme Court in 1917 and cited by Parker as precedent for his own Red Jacket decision.[1] In Hitchman the Court issued an injunction restraining agents of the United Mine Workers of America from, among other things, persuading miners who had signed a contract promising not to join a union while remaining in their employer's hire to join the union secretly for the purpose of striking for union recognition when a sufficient number had so joined. The unions argued that their agent was merely trying to persuade the miners to "agree" to join and that when a sufficient number had so "agreed," all would leave their jobs and then join the union, as the contract allowed. "But," declared Justice Mahlon Pitney, speaking for the Court majority, "in a court of equity, which looks to the essence and substance of things and disregards matters of form and technical nicety, it is sufficient to say that to induce men to agree to join is but a mode of inducing them to join."[2] Borah interpreted this to mean that only persuasion accompanied by "deceit and misrepresentation" was enjoined in Hitchman, especially in light of a subsequent Supreme Court ruling, American

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[1] Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229, 1917.

[2] Senator Borah speaking against the nomination, April

Steel Foundries v. Tri-City Central Trades Council et al. 287 U.S. 184, 1921, in which "interference of [an outside] labor organization by persuasion and appeal to induce a strike against low wages" was held lawful.[3] On first reading that rule does seem to modify Hitchman's injunction against persuasion, but such an interpretation ignores the fact that no "yellow dog" contract was involved in the Tri-City case. In the absence of such a contract it is not surprising that the Court permitted unions to urge non-union members to go out on strike. The doctrine of Hitchman was clearly that any persuasion to break the letter or spirit of a contract was inherently unlawful and could be enjoined, but that persuasion in the absence of illegality was permissible.

In his Red Jacket opinion, Judge Parker referred to Judge McClintic's injunction only briefly, devoting most of his attention rather to the question of jurisdiction. When he finally did examine McClintic's injunction he upheld it against charges that it was too sweeping by observing that the order "is certainly not so broad as that of of the decree approved by the Supreme Court in Hitchman Coal & Coke Co. v, Mitchell... which also enjoined interference with the contract by means of peaceful persuasion."[4] Hitchman, as we have seen above, (p. ???)

28, 1930,in U.S. Congress, Senate, Congressional Record, 72, 7933.

forbade persuasion of workers to resign, even in the absence of a contract, without good cause,[5] and it was chiefly this prohibition which the Tri-City case modified. In Red Jacket, Parker clearly indicated that his view of McClintic's injunction, while it enjoined illegal interference with contracts, even by peaceful means, nonetheless left considerable room for the advocacy of union membership in general.[6]

Thus in my view the Red Jacket decision, if it deviated at all from precedent, was somewhat more liberal than the Hitchman ruling upon which it chiefly relied. Certainly it did not grant the unions as much latitude as the Supreme Court had allowed in the Tri-City case, but in that dispute the employees had not bound themselves by contract to refrain from union membership, and of course the unions were in consequence more at liberty to proselytize them. If, because no contract was involved, one eliminates the Tri-City rule as precedent for modifying the injunction in Red Jacket, Parker had no choice but to sustain, since the previous federal cases which touched upon the "yellow dog" contract protected it in the most sweeping language. Borah's argument that Parker could have ruled other than he did is the case of an ad-

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[3] 287 U.S. 184, at 208.

[4] 18 Fed (2d) 839, at 849.

[5] 245 U.S. 229, at 252.

vocate rather than of a scholar, and it won little following among his colleagues in the Senate. Ironically, a reading of the debate indicates that Senators opposed to Parker's confirmation were far less informed about the legal issues involved in the Red Jacket case than were the leading spokesmen in Parker's behalf, such as Senators Allen, Overman, Hastings and Hebert.

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[6] 18 Fed (2d) 839 at 849; 15 Fed (2d) 652 at 659.

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