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# WILLIAM E. LEUCHTENBURG

## THE ORIGINS OF FRANKLIN D. ROOSEVELT'S "COURT- PACKING" PLAN

No event of twentieth-century American constitutional history is better remembered than Franklin D. Roosevelt's ill-fated "Court-packing" scheme of 1937; yet the origins of the plan remain obscure and often misstated. The proposal has been variously attributed to Felix Frankfurter, who abhorred it; to Benjamin Cohen and Thomas Corcoran, who favored a different remedy and had no hand in shaping this one; and to Samuel I. Rosenman, who played only a minor role after the decision had already been made.<sup>1</sup> Among those who have been said to have helped frame the plan were James M. Landis, who had heard only rumors of it before it was announced, and Robert H. Jackson, who first learned of the President's plan when he read about it in a Philadelphia newspaper.<sup>2</sup>

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<sup>1</sup> Mallon, *Purely Confidential*, Detroit News, Feb. 8, Apr. 2, May 21, 1937; MASON, *BRANDEIS: A FREE MAN'S LIFE* 625 (1946); MOLEY, *AFTER SEVEN YEARS* 357-59 (1939) (hereinafter MOLEY); Raymond Clapper MS Diary, Feb. 8, 1937, Clapper MSS, Library of Congress (hereinafter LC); 7 Frances Perkins, Columbia Oral History Collection 128 (hereinafter COHC); Washington Post, Feb. 13, 1937. Of Frankfurter, James M. Landis recalled that he "caught hell from him" for supporting the plan. Landis, COHC 49, 302. See, too, Clapper MS Diary, Sept. 28, 1938; Frank Buxton to William Allen White, June 2, 1937, White MSS, LC, Box 189.

<sup>2</sup> Mallon, *Purely Confidential*, Detroit News, Apr. 2, 1937; Landis, COHC 44-45; MICHELSON, *THE GHOST TALKS* 169-70 (1944); GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 105 (1958).

The project has been described either as an impulsive act born of the *hubris* created by FDR's landslide victory in 1936 or as a calculated plot hatched many months before in angry resentment at the *Schechter* verdict. Roosevelt himself never did anything to clear up the confusion. Three weeks after the President launched the proposal, Senator Hiram Johnson of California wrote a friend: "He has been beaten from pillar to post upon when he conceived the brilliant idea, and how he conceived it."<sup>3</sup>

## I. PROLOGUE

The constitutional crisis of 1937 had been brewing for a long time. Franklin Roosevelt began his political career at the time that his distant cousin Theodore was assaulting the sanctity of the courts and the air was loud with cries for the recall of judges and judicial decisions. In the 1920's there was mounting progressive animus toward the Taft Court manifested in such forms as the La Follette platform of 1924, which called for empowering Congress to override the Supreme Court. In the Hoover years, progressives had waged fierce contests against the confirmations of John J. Parker and Charles Evans Hughes. Increasingly, liberal critics of the Court believed that a majority of the Justices spoke for the interests of the rich and well-born.<sup>4</sup>

Even before Roosevelt took office, he had aroused speculation over whether his presidency would result in a confrontation with the Supreme Court. In a campaign speech in Baltimore on October 5, 1932, Roosevelt blurted out: "After March 4, 1929, the Republican party was in complete control of all branches of the government—the Legislature, with the Senate and Congress; and the executive departments; and I may add, for full measure, to make it complete, the United States Supreme Court as well."<sup>5</sup> This statement had been interpolated in the original text of the address, but the next day, Roosevelt told Senator James F. Byrnes: "What I said last night about the judiciary is true, and whatever is in a man's

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<sup>3</sup> Johnson to John Francis Neylan, Feb. 26, 1937, Johnson MSS, Bancroft Library, University of California, Berkeley.

<sup>4</sup> St. Louis Star, June 23, 1930, clipping, Pierce Butler MSS, Minnesota Historical Society, St. Paul; 2 PUSEY, CHARLES EVANS HUGHES 655–62 (1951).

<sup>5</sup> 1 FRANKLIN D. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES 837 (1938) (hereinafter PUBLIC PAPERS).

heart is apt to come to his tongue—I shall not make any explanations or apology for it!”<sup>6</sup> Republicans hopped on Roosevelt’s statement as a warning that, if elected President, he might, in Herbert Hoover’s words, “reduce the tribunal to an instrument of party policy.”<sup>7</sup>

Roosevelt, who was right in thinking that the composition of the federal courts was heavily Republican,<sup>8</sup> found an even greater source of concern in the doctrines pronounced by the Court in such recent decisions as that in the *Oklahoma Ice* case.<sup>9</sup> The New Dealers recognized that much that they proposed to do would be invalidated by the Court if it followed the line of reasoning adopted by the Taft Court, but they hoped that the Court would recognize the depression to be an emergency justifying unprecedented government action. In his inaugural address on March 4, 1933, the new president stated: “Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form.”<sup>10</sup>

Yet Roosevelt was wary of relying on the tolerance of the Court for New Deal experiments. The Administration deliberately postponed tests of the constitutionality of the legislation of the Hundred Days as long as possible; the Supreme Court did not have the opportunity to rule on a New Deal statute until 1935. Meanwhile, the New Dealers were heartened by two 1934 opinions which appeared to recognize that the emergency might be the occasion for governmental restrictions on property rights.<sup>11</sup> Especially encouraging was Justice Roberts’ statement in the *Nebbia* case: “[T]his court from the early days affirmed that the power to promote the general welfare is inherent in government.”<sup>12</sup>

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<sup>6</sup> BYRNES, *ALL IN ONE LIFETIME* 65 (1958).

<sup>7</sup> N.Y. Times, Feb. 11, 1937.

<sup>8</sup> In the autumn of 1933, Roosevelt’s Attorney General sent him a memorandum noting that of the 266 judges in the federal courts, only 28 per cent were Democrats. Homer Cummings to FDR, Nov. 8, 1933, Franklin D. Roosevelt Library, Hyde Park, N.Y. (henceforth cited as FDRL) OF 41, Box 114.

<sup>9</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>10</sup> 2 PUBLIC PAPERS 14–15.

<sup>11</sup> *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934); *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>12</sup> 291 U.S. at 524.

Such pronouncements served, for the moment, to dispel the conviction that a collision between Roosevelt and the Supreme Court was inevitable and that steps should be taken to reconstitute the Court, ideas that emerged remarkably early in the Roosevelt administration. Almost two years before the Court had invalidated the first New Deal law, an Illinois man wrote the President: "Sometimes I get thinking about the many millions who are unemployed, and I wonder if we really can get them back to work, and retain our social order. . . . If the Supreme Court's membership could be increased to twelve, without too much trouble, perhaps the Constitution would be found to be quite elastic."<sup>13</sup>

As early as January, 1934, the *Literary Digest* reported: "In the intimate Presidential circle the idea of reconstituting the Supreme Court has been considered. . . . In the conversation within the Roosevelt circle, a court of fifteen, instead of the present nine, has been mentioned."<sup>14</sup> The *Digest* added that the *Blaisdell* opinion, which appeared to indicate a liberal majority on the Court, had caused such talk among the New Dealers to subside. Yet conservatives remained uneasy. The following month, Henry Prather Fletcher, soon to be chosen Republican national chairman, wrote the columnist Mark Sullivan: "You seem to rely on the Courts for relief in the last analysis. Let us hope the Supreme Court will not bend before the storm—but even if it does not, it is the weakest of the three coordinate branches of the Government and an administration as fully in control as this one is can pack it as easily as an English Government can pack the House of Lords."<sup>15</sup>

## II. GOLD CLAUSES AND RAILROAD PENSIONS

Early in 1935 the period of nervous calm was abruptly shattered. On January 7, 1935, in its first ruling on a New Deal law, the Court invalidated the "hot oil" provisions of the National Industrial Recovery Act.<sup>16</sup> The Republican New York *Herald-Tribune* commented:<sup>17</sup>

<sup>13</sup> John P. Byrne to FDR, Apr. 18, 1933, FDRL OF 41-A.

<sup>14</sup> *News and Comment from the National Capital*, 117 LITERARY DIGEST 10 (Jan. 20, 1934).

<sup>15</sup> Fletcher to Sullivan, Feb. 28, 1934, Fletcher MSS, LC, Box 16.

<sup>16</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); Charles Fahy, COHC 148.

<sup>17</sup> *New Deal Meets Tests in Supreme Court*, 119 LITERARY DIGEST 5-6 (Jan. 19, 1935).

In the skylarking days of 1933–34, the happy administrators of the New Deal brushed aside the Supreme Court as they brushed aside Congress and the Constitution. . . . The President paid perfunctory lip-service to the nation's charter of liberty. Behind the scene the whispers were loud enough to be beyond misunderstanding. Let the Supreme Court try to halt the march of the new order, according to F. D. R., an Act of Congress would be passed adding to its membership and packing it with enough Tugwellian jurists to overturn any conservative decision overnight.

Now, the *Tribune* exulted, the 8-to-1 decision had thrown "this revolutionary nonsense into the Potomac where it belongs."

In fact, the New Dealers took the "hot oil" decision in stride. Since the Court's objections had rested on procedural defects that could easily be corrected, the Administration was not greatly concerned by the judgment. Much more alarming were the series of tests of the constitutionality of gold legislation that were making their way relentlessly toward the Supreme Court. A ruling by the Court for the plaintiffs would deny Congress the right to regulate the currency at a time of national economic disaster and threatened financial chaos by increasing the country's debt by nearly \$70 billion.<sup>18</sup> Washington officials, observed Arthur Krock, were more absorbed with the question of how the Court would decide than by any subject since the bank holiday of March, 1933. In contemplation of that opinion, cold shivers "chase up and down their spines when they waken in the night."<sup>19</sup>

At a cabinet meeting on January 11, 1935, Attorney General Homer Cummings reported on the gold clause cases, which he had just finished arguing. Secretary of the Interior Harold L. Ickes noted in his diary:<sup>20</sup>

The Attorney General said that if the Court should decide against the Government in the gold certificate and Liberty Bond cases, the situation could be saved by Congress hurrying through a statute taking away from the citizens the right to sue the Government for the damages that they might claim by reason of having accepted payment in currency on bonds that, by their terms, were stated to be payable in gold. . . .

The Attorney General went so far as to say that if the Court

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<sup>18</sup> SCHLESINGER, *THE POLITICS OF UPHEAVAL* 255–56 (1960) (hereinafter SCHLESINGER).

<sup>19</sup> N.Y. Times, Jan. 15, 1935.

<sup>20</sup> 1 *SECRET DIARY OF HAROLD L. ICKES* 273–74 (1953) (hereinafter ICKES).

went against the Government, the number of justices should be increased at once so as to give a favorable majority. As a matter of fact, the President suggested this possibility to me during our interview on Thursday, and I told him that that is precisely what ought to be done. It wouldn't be the first time that the Supreme Court had been increased in size to meet a temporary emergency and it certainly would be justified in this case.

Many in the Administration had an almost apocalyptic sense of inevitable conflict. After the cabinet meeting on January 11, Ickes reported:<sup>21</sup>

I told the President yesterday that only a few years ago I had predicted that sooner or later the Supreme Court would become a political issue as the result of its continued blocking of the popular will through declaring acts of Congress unconstitutional. During the discussion today the Vice President said that he had read a pamphlet which had been written about a hundred years ago in which the author advanced the theory that sooner or later, through the aggrandizement of power by the Supreme Court, a political crisis of major magnitude would be precipitated in this country.

Close observers anticipated that the President would not permit the Court to disrupt his attempts to achieve recovery, even if this led to a constitutional crisis. In his Kings Feature Syndicate column, Arthur Brisbane created a stir when he questioned whether there was any constitutional authority for the practice of judicial review. Brisbane wrote:<sup>22</sup>

As a matter of constitutional law, as actually written by the constitutional convention, if the Supreme Court should say to the President of the United States "We find unconstitutional, and ask you to revoke, your law abolishing the gold clause," the President might reasonably reply, "I have your message and respectfully request that you show me what part of the Constitution authorizes you to nullify a law passed by the Congress of the United States and signed by the President."

If he sent that message, the Supreme Court would be puzzled, for it could show nothing in the Constitution.

Roosevelt was, in fact, ready to act much as Brisbane suggested. A month earlier, in response to an inquiry from the President, Robert Jackson, general counsel of the Bureau of Internal Revenue,

<sup>21</sup> *Id.* at 274.

<sup>22</sup> Brisbane to FDR, Feb. 11, 1935, FDRL OF 41-A, Box 116.

had suggested that the government might withdraw its consent to be sued.<sup>23</sup> Accordingly, a message to Congress was drafted recommending the withdrawal of the right to sue the United States for more than the face value of government bonds and other obligations. In the event of an adverse decision, Roosevelt was ready with a proclamation of national emergency to regulate currency transactions; for ninety days, no payment on any contract would be permitted save at the rate of \$35 for an ounce of gold, the rate fixed by the President on January 31, 1934, under authority of the Gold Reserve Act.<sup>24</sup>

If the Supreme Court ruled against the government, Roosevelt was prepared to deliver a defiant radio address in which he would declare that the decisions, if enforced, would result in "unconscionable" profit to investors, bankruptcy for almost every railroad and for many corporations, default by state and local governments, and wholesale mortgage foreclosures on farms and in cities. It would not only increase the national debt by a staggering sum but would catapult the nation "into an infinitely more serious economic plight than we have yet experienced."<sup>25</sup> He did not seek a quarrel with the Supreme Court, but he did think it appropriate to quote a sentence from Lincoln's First Inaugural Address: "At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

Neither the President nor Congress, Roosevelt planned to say, could "stand idly by and . . . permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion," because this would "imperil the economic and political security of this nation." He sought only to carry out the principle that "For value received the same value should be repaid," a doctrine "in accordance with the Golden Rule, with the precepts of the Scrip-

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<sup>23</sup> Robert Jackson, COHC.

<sup>24</sup> 1 BLUM, FROM THE MORGENTHAU DIARIES 126-27 (1959) (hereinafter MORGENTHAU).

<sup>25</sup> Draft of message, FDRL PSF Supreme Court.



tures, and the dictates of common sense." "In order to attain this reasonable end," the President intended to announce, "I shall immediately take such steps as may be necessary, by proclamation and by message to the Congress of the United States."

On February 18, as word reached the White House that the Court had assembled, Roosevelt took his place at the cabinet table to await word. Minutes later, the tension broke, as it became clear that in each of a series of cases, the government had won.<sup>26</sup> On the following day, the President sent a saucy note to Joseph P. Kennedy, chairman of the SEC:<sup>27</sup>

With you I think Monday, February eighteenth, was an historic day. As a lawyer it seems to me that the Supreme Court has at last definitely put human values ahead of the "pound of flesh" called for by a contract.

The Chairman of the Securities Exchange Commission turns out to be far more accurate than the Associated Press in that he reported the decisions accurately. How fortunate it is that his Exchanges will never know how close they came to being closed up by a stroke of the pen of one "J.P.K."

Likewise, the Nation will never know what a great treat it missed in not hearing the marvelous radio address the "Pres" had prepared for delivery to the Nation Monday night if the cases had gone the other way.

Roosevelt could not have been pleased by the scolding he received from Chief Justice Hughes in the majority opinion, and he was aware that he had had a close call. "In spite of our rejoicing," he wrote, "I shudder at the closeness of five to four decisions in these important matters!"<sup>28</sup> Congressmen began to talk more seriously about the need to find some way to restrain the Court. Senator George Norris of Nebraska protested: "These five to four Supreme Court decisions on the constitutionality of congressional acts it seems to me are illogical and should not occur in a country like ours."<sup>29</sup> Yet, since the government had been upheld, most of the expressions of dissatisfaction came not from New Deal supporters but from the outraged conservatives, many of whom echoed

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<sup>26</sup> *Norman v. B. & O. R.R.*, 294 U.S. 240 (1935), and related cases; 1 MORGENTHAU 130.

<sup>27</sup> FDR to Kennedy, Feb. 19, 1935, 1 F.D.R.: HIS PERSONAL LETTERS 455 (1950) (hereinafter LETTERS).

<sup>28</sup> FDR to Angus MacLean, Feb. 21, 1935, FDRL OF 10-F.

<sup>29</sup> Norris to Layton Spicher, Mar. 29, 1935, Norris MSS, LC, Tray 27, Box 4.

Justice McReynolds' irate dissent: "Shame and humiliation are upon us now."<sup>80</sup>

Three months later, it was the liberals' turn to be discomforted by the Court. In another 5-to-4 decision, with Justice Roberts joining the majority, the Court invalidated the Railway Pension Act.<sup>81</sup> For the first time since Roosevelt took office, the Court had delivered an opinion that antagonized an important interest group who could demand restrictions on the Court's powers.<sup>82</sup> The president of one Railroad Brotherhood called the decision, which affected a million railroad workers, a "bitter disappointment."<sup>83</sup> From Wichita Falls, Texas, one man wrote Roosevelt: "I Had an idea they would turn Down that Railroad Pension. I told you the Rich Men always Run to the Supreme Court to Beat Our Laws. . . . The Supreme Court is a Public Nuisance."<sup>84</sup>

The implications of the rail pension decision were not limited to its effects on railroad workers. Many believed that if Justice Roberts disposed of other cases as he had this one, the pending social security legislation would also be invalidated. "Congratulations to rail carriers over pension decision yesterday," the general attorney for the Cudahy Packing Company wired a spokesman for the railroads: "That monumental decision so parallels our necessities in connection with Social Security legislation that we owe you a debt for fight now vindicating constitutional interpretation upon which all American business stands for future welfare all citizens."<sup>85</sup> The opinion, wrote *Business Week*, indicated that the

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<sup>80</sup> There is a copy of McReynolds' extemporaneous dissent, with corrections in his handwriting, in McReynolds MSS, Alderman Library, University of Virginia, Charlottesville, Va., Folder H-2. For conservative dismay, see L. E. Armstrong to Willis Van Devanter, Feb. 26, 1935, Van Devanter MSS, LC; James Beck to J. C. McReynolds, Apr. 13, 1934, Beck MSS, Princeton University Library, Carton 2; Alfred James McClure to Homer Cummings, Feb. 19, 1935, NA Dept. of Justice 105-42-11; letters in Charles Evans Hughes MSS, LC, Box 157.

<sup>81</sup> *Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935).

<sup>82</sup> The Court had, of course, angered groups like bondholders by its decisions in the gold cases, but since these elements viewed the Court as a bulwark against social change, they were unlikely to support any movement to limit the Court's powers.

<sup>83</sup> D. B. Robertson to FDR, Jan. 22, 1936, NA Dept. of Justice 235460.

<sup>84</sup> P. J. Hasey to FDR, May 6, 1935, NA Dept. of Justice 235460.

<sup>85</sup> Thomas Creigh to Paul Shoup, May 7, 1935, Shoup MSS, Stanford University Library, Stanford, California, Box 1.

Court "would smash any social security legislation that may be passed by Congress."<sup>36</sup>

Prodded by the rail pension decision, which raised the alarming likelihood that Justice Roberts had joined the conservatives to create a permanent 5-to-4 majority against the New Deal, Cummings began to explore possibilities of counter actions. Before the week was out, Cummings sent a memorandum to Assistant Attorney General Angus MacLean:<sup>37</sup>

Has any study been made in this office of the question of the right of the Congress, by legislation, to limit the terms and conditions upon which the Supreme Court can pass on constitutional questions? I have seen several memoranda from time to time spelling out a theory by which this result could be achieved without a constitutional amendment. My recollection is that our files will somewhere disclose briefs on the theory that the Supreme Court has no right to pass on constitutional questions at all. Of course, quite a learned document could be prepared dealing with the historical aspects of this matter and the way in which it has developed.

I think it would be well to have this pretty thoroughly covered, but in addition to this it would be well to cover the subject I first above mentioned; namely, the question of legislation which would not cut off the right of the Supreme Court to pass on constitutional questions, but which would limit it somewhere with a view to avoid 5 to 4 decisions.

### III. BLACK MONDAY, 1935 VERSION

On "Black Monday," May 27, 1935, in three 9-to-0 decisions, the Court invalidated the National Industrial Recovery Act and the Frazier-Lemke Act and ruled, in the *Humphrey* case, that the President could not remove members of independent regulatory commissions save as Congress provided.<sup>38</sup> Roosevelt was incensed by the overturning of the NRA, the keystone of his industrial recovery program.<sup>39</sup> The Court's language in denouncing the dele-

<sup>36</sup> *5 to 4 Against*, Business Week 7-8 (May 11, 1935).

<sup>37</sup> Cummings to MacLean, May 11, 1935, NA Dept. of Justice 235773.

<sup>38</sup> *Schechter Corp. v. United States*, 295 U.S. 495 (1935); *Louisville Bank v. Radford*, 295 U.S. 555 (1935); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

<sup>39</sup> It is often said that Roosevelt was relieved by the *Schechter* decision, because the NRA had become an intolerable burden. In fact, he believed strongly in the NRA approach, and persisted in later years in trying to revive it. On Roosevelt's

gation of powers and its narrow construction of the Commerce Clause appeared to place other New Deal laws in jeopardy and to bar the way to new legislation.<sup>40</sup> He was even more outraged by the *Humphrey* decision, which, in view of the history of the *Myers* opinion,<sup>41</sup> seemed a deliberate assault by the Court on his own prerogatives.<sup>42</sup> The unanimity of the Court in all three cases was bewildering. "Well, where was Ben Cardozo?" he asked. "And what about old Isaiah?"<sup>43</sup>

For four days, while the country speculated about what he would do, the President said nothing. On May 31, reporters were summoned to the White House. As they filed in, they saw on the President's desk a copy of the *Schechter* opinion and a sheaf of telegrams. Eleanor Roosevelt, seated next to her friend Mrs. Felix Frankfurter, busied herself knitting on a blue sock. For the next hour and a half, while reporters listened intently, Roosevelt, in an unusually somber mood, discoursed on the implications of the Court's opinion. Thumbing the copy of the *Schechter* decision as he spoke, the President argued that the Court's ruling had stripped the national government of its power to cope with critical national problems. "We are facing a very, very great national non-partisan issue," he said. "We have got to decide one way or the other . . . whether in some way we are going to . . . restore to the Federal Government the powers which exist in the national Governments of every other Nation in the world."<sup>44</sup> Of all the words the President spoke at the extraordinary conference, newspapermen singled out one sentence which headline writers emblazoned on late afternoon newspapers: "We have been relegated to the horse-and-buggy definition of interstate commerce."<sup>45</sup>

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indignation at the *Schechter* opinion, see Raymond Clapper MS Diary, Feb. 24, 1937.

<sup>40</sup> Roosevelt wrote: "It is the 'dictum' in the *Schechter* case opinion that is disturbing because . . . if the 'dictum' is followed in the future the Court would probably find only ten per cent of actual transactions to be directly in interstate commerce." FDR to Henry L. Stimson, June 10, 1935, 1 LETTERS 484.

<sup>41</sup> *Myers v. United States*, 272 U.S. 52 (1926).

<sup>42</sup> Landis, COHC 39-41; GERHART, *op. cit. supra* note 2, at 99.

<sup>43</sup> GERHART, *op. cit. supra* note 2, at 99. "Isaiah" was a familiar term for Justice Brandeis.

<sup>44</sup> 4 PUBLIC PAPERS 200-22; Washington Post, June 1, 1935.

<sup>45</sup> SCHLESINGER 284-87.

The President's "horse-and-buggy" conference created a furor. The next day, Raymond Clapper wrote in his Scripps-Howard column:<sup>46</sup>

Within an hour after President Roosevelt held his press conference yesterday, you could almost feel the electric excitement about Washington.

Gossip travels with lightning speed through the National Capital. . . . Long before the first newspapers reached the street corners . . . , the whole city knew that something of unusual importance had occurred.

Most commentators upbraided the President severely. The *Washington Post* typified much of the newspaper response with an editorial bluntly titled, "A President Leaves His Party." Henry Stimson wrote Roosevelt a long letter in which he protested that the "horse-and-buggy" observation "was a wrong statement, an unfair statement and, if it had not been so extreme as to be recognizable as hyperbole, a rather dangerous and inflammatory statement."<sup>47</sup> Senator Arthur Vandenberg, Michigan Republican, declared: "I don't think the President has any thought of emulating Mussolini, Hitler or Stalin, but his utterance as I have heard it is exactly what these men would say."<sup>48</sup>

Nor were all liberals pleased with Roosevelt's remarks. The Tennessee editor George Fort Milton wrote the President that his target should be not the Court but the Constitution. After all, Milton pointed out, men like Cardozo, Stone, Hughes, and the Brandeis of the *Oklahoma Ice* dissent had joined in the *Schechter* judgment; given our Constitution, they had had no other choice. Milton counseled:<sup>49</sup>

Take the lead in a great program of constitutional reform. That is what we need to have done. Let the Constitution be amended so that the Congress will be given power to control indirect as well as direct effects of Interstate Commerce. Let the Constitution be amended to provide for an intelligent measure of delegation. I believe that you will get a very important and effective support from progressives all over the coun-

<sup>46</sup> *Washington Post*, June 1, 1935.

<sup>47</sup> Stimson to FDR, June 10, 1935, FDRL PPF 20.

<sup>48</sup> *Washington Post*, June 1, 1935; cf. Ralph Hayes to Newton Baker, June 8, 1935, Baker MSS, LC, Box 117.

<sup>49</sup> Milton to FDR, June 4, 1935, Milton MSS, LC, Box 18.

try on a program such as this. But I do not believe that there would be nearly so much support and strength for a program bottomed on a criticism of the Court itself.

Despite his lengthy press conference, Roosevelt never stated directly what he proposed to do. When reporters asked him in what manner the question might be resolved, he replied: "We haven't got to that yet." Nor did he suggest immediate action: "I don't mean this summer or winter or next fall, but over a period, perhaps of five or ten years."<sup>50</sup>

From both within and outside the Administration, Roosevelt was urged to act immediately. In the confusion after the horse-and-buggy conference, Raymond Moley, one of the original members of the Brain Trust, called Vice President John N. Garner and Senators Byrnes and Robert M. La Follette, Jr., together and found that they, like he, favored a constitutional amendment. Encouraged by the meeting, Moley wrote an editorial for *Today* advocating this course, and Byrnes spoke in support of the idea in Charleston, South Carolina. In Congress, the demand for action produced a freshet of new proposals. Some wanted to make constitutional grants of power to Congress more explicit; others, like Senator Norris, wished to require at least a 7-to-2 vote by the Supreme Court to invalidate legislation.<sup>51</sup>

In the nation there was growing anti-Court sentiment, which those who wished to act right away might tap. To the forces arrayed against the Court by the rail pension opinion, the *Schechter* decision had added both those groups which had benefited from the NRA and people who resented any setback to Roosevelt and the New Deal. A Memphis man advised the President to balk the Court by declaring martial law,<sup>52</sup> and a Kentucky attorney wrote: "I should think that you and Congress were as tired of the Supreme Court stunts as the people are."<sup>53</sup>

But Roosevelt decided against immediate action. For a moment, Moley recalls, the President showed a "flicker of enthusiasm," but

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<sup>50</sup> 4 PUBLIC PAPERS 222.

<sup>51</sup> MOLEY 307; SCHLESINGER 288; H.R. No. 7997, Robert Ramsay MSS, University of West Virginia, Morgantown, W.Va.; Washington Post, May 29-June 1, 1935.

<sup>52</sup> Edward J. Brown to FDR, June 7, 1935, FDRL OF 41-A, Box 116.

<sup>53</sup> H. M. Stanley to FDR, July 2, 1935, FDRL OF 41-A, Box 116.

this soon dwindled.<sup>54</sup> Roosevelt sensed that the time was not yet ripe. The NRA had its supporters, but its detractors were more numerous; he could not go to the country with that kind of an appeal. The clamor raised by the horse-and-buggy conference indicated that the Court would have to antagonize a much larger portion of the nation before it would be politically safe to challenge it.<sup>55</sup> The difficulties in the way of winning approval for a constitutional amendment were inhibiting. Norris conceded: "It looks now as though it would be an absolute impossibility to pass it through the Senate or the House by the necessary two-thirds majority in order to submit it to the states."<sup>56</sup> Nor had the explorations in the Department of Justice proceeded far enough so that Roosevelt was ready with a specific proposal.

For the next year Roosevelt bided his time. He made no public reference to the Supreme Court even when additional adverse decisions appeared to require some sort of response. He left the impression that he was accepting the Court's verdicts without complaint and that, after having had his knuckles rapped for his horse-and-buggy remarks, he proposed neither to say nor to do anything further. In fact, as Tugwell has written, "If open battle was not at once joined, a kind of twilight war did begin."<sup>57</sup>

In June, 1935, the American ambassador to Italy, Breckinridge Long, returned for a brief visit to the United States; he found "one thing . . . uppermost on the minds of political America": the *Schechter* decision. At lunch alone with Long on the White House porch, Roosevelt spoke freely about the course he planned to pursue. He would move other cases up to the Supreme Court to give it an opportunity to modify its interpretation of the Commerce Clause. If the Court did not do so, then it might be necessary to

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<sup>54</sup> MOLEY 307.

<sup>55</sup> TUGWELL, *THE DEMOCRATIC ROOSEVELT* 385 (1957).

<sup>56</sup> George W. Norris to William A. Ahern, July 10, 1935, Norris MSS, Tray 27, Box 4.

<sup>57</sup> TUGWELL, *op. cit. supra* note 55, at 385. For Roosevelt's continued concern, see FDR to Armstead Brown, July 6, 1935, FDRL PPF 2669. In a letter marked "Personal," he told the judge of the Supreme Court of Florida: "I am not worrying in any way about 1936, but I am, of course, concerned about future Supreme Court decisions. After all, we do not want to take away State's rights but, at the same time, there are a good many problems which, under modern conditions, can be solved only by Federal action."



propose an amendment. Long noted in his diary: "The amendments are not yet in specific or concrete form but might be broached under three headings: first, to define Inter-State Commerce with authority to Congress to legislate on the subject; second, to define certain phases of Inter-State Commerce; and third, taking a page from Lloyd George, to give authority to the Congress to pass over the veto of the Supreme Court legislation which the Court held unconstitutional."<sup>58</sup>

If and when the time came to act, the amendment route seemed the most promising path, although not everyone agreed about this. Some thought that the problem lay not in the Constitution but the Court; hence, they reasoned either that the composition of the Court must be altered or that the Court must, and perhaps could, be persuaded to change its views. The Felix Frankfurter cadre, which had always disliked the NRA anyway, opposed the amendment approach. From a different standpoint, Homer Cummings, angered by the *Schechter* decision, fumed: "I tell you, Mr. President, they mean to destroy us. . . . We will have to find a way to get rid of the present membership of the Supreme Court."<sup>59</sup> Yet the unanimity of the Court made it seem unlikely that the New Deal could win a majority, and it argued against solving the problem by appointing a few additional judges. After the *Schechter* opinion was handed down, Raymond Clapper wrote: "Talk of blackjacking the court by enlarging its membership collapsed when all nine justices joined in the decision. That subterfuge of packing the court, a weak and uncertain one at best, becomes ridiculous to think of now."<sup>60</sup>

Both Roosevelt and Cummings agreed that the Justice Department should continue to seek out solutions for the impasse. A week after the horse-and-buggy conference, Alexander Holtzoff, who was to be a central figure in the search for a plan, sent Cummings a memorandum responding to the suggestion that the Court might be stripped of most or all of its appellate jurisdiction. When Holtzoff explained that such a proposal would encounter too much

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<sup>58</sup> Breckinridge Long MS Diary, LC, June 12, June 17, 1935. That same month, the President's son James Roosevelt, in a speech in Missouri, called for "an earlier determination of the constitutionality of the acts of the Legislature." Carlisle Barger, *Along the Potomac*, Washington Post, June 13, 1935, clipping in John Taber MSS, Cornell University Collection of Regional History, Ithaca, N.Y., Box 62.

<sup>59</sup> SCHLESINGER, 282, 288-89.

<sup>60</sup> Washington Post, May 29, 1935.



opposition and still would not eliminate all the problems confronting the Administration, Cummings was unsatisfied and told him to develop his point "a little more fully." On June 22 Holtzoff sent another five-page memorandum on the question, but the matter did not end there. On August 15, W. W. Gardner prepared a fourteen-page study for the Solicitor General in which he, too, looked into whether "the power of the Supreme Court to pass upon the constitutional validity of congressional legislation might be abolished or restricted by an Act of Congress." But he also found objections to the proposal, and the search for a satisfactory plan continued.<sup>61</sup>

The President displayed a lively interest in these inquiries. In July, for example, he sent Cummings a memorandum calling to his attention "two extremely interesting articles by Harold Laski" in the Manchester *Guardian*.<sup>62</sup> Roosevelt also corresponded with critics of the Court outside the government. In August, 1935, Charlton Ogburn, counsel for the American Federation of Labor, informed the President that he had submitted a proposed constitutional amendment to the executive council of the Federation for approval.<sup>63</sup> That same month, Roosevelt told Charles E. Wyzanski, Jr., solicitor of the Department of Labor: "Of course, if the Supreme Court should knock out the AAA, then the constitutional amendment would be the real issue. It probably will be anyway, and there will be less difficulty in phrasing it than many people think."<sup>64</sup>

Finding a satisfactory plan was only one part of Roosevelt's strategy; another part was building popular support for such a move. The horse-and-buggy conference had been one move toward that end. In August the President took another step when he met at the White House with George Creel. In collaboration with Creel, a veteran of reform wars, Roosevelt sometimes used the pages of *Collier's* to launch trial balloons. For an article entitled "Looking Ahead with Roosevelt," the President now dictated to Creel:<sup>65</sup>

<sup>61</sup> Holtzoff, Memorandum for the Attorney General, June 6, 1935; Cummings, Memorandum for Mr. Holtzoff, June 13, 1935; Holtzoff, Memorandum for the Attorney General, June 22, 1935; W. W. Gardner, Memorandum for the Solicitor General, Aug. 15, 1935, NA Dept. of Justice 235773.

<sup>62</sup> FDR to Cummings, July 5, 1935, FDRL OF 142.

<sup>63</sup> Charlton Ogburn to FDR, Aug. 7, 20, 1935, FDRL OF 142.

<sup>64</sup> 3 SCHLESINGER 453. See, too, Rev. Francis Haas to FDR, Oct. 25, 1935, Haas MSS, Catholic University of America, Washington, D.C.

<sup>65</sup> CREEL, REBEL AT LARGE 291-92 (1935).

In the next few months, the Supreme Court will hand down fresh pronouncements with respect to New Deal laws, and it is possible the President will get another "licking." If so, much will depend on the language of the licking. In event that unconstitutionality is found, perhaps the decisions will point the way to statutory amendments. If, however, the Constitution is construed technically; if it is held that one hundred and fifty years have no bearing on the case, and that the present generation is powerless to meet social and economic problems that were not within the knowledge of the founding fathers, and therefore not made the subject of their specific consideration, then the President will have no other alternative than to go to the country with a Constitutional amendment that will lift the Dead Hand, giving the people of today the right to deal with today's vital issues.

He told Creel grimly: "Fire that as an opening gun."<sup>66</sup>

Contrary to Roosevelt's expectation, the trial balloon attracted almost no notice. Most of the nation in 1935 was still either indifferent to the Court question or outrightly opposed to tethering the Court. To the query: "As a general principle, would you favor limiting the power of the Supreme Court to declare acts of Congress unconstitutional?" the Gallup Poll in the autumn of 1935 received the following replies: yes, 31 per cent; no, 53 per cent; no opinion, 16 per cent. The most articulate anti-Court feeling came from those who felt they had been hurt by specific decisions. A Virginian objected: "The Supreme Court turned down my railroad pension." But many more thought the Justices wise, the system of checks and balances sacred, and Congress mercurial, even if their conception of these institutions was sometimes primitive. Asked his view of the Court, an Illinois man replied: "It's permanent. Congress is just the whims and fancies of the people." An Ohio reliefer said: "If they didn't know more than the other courts, they wouldn't be called the Supreme Court."<sup>67</sup>

Despite this discouraging response, the President pushed ahead quietly with his plans. At a long lunch at the White House on November 12, 1935, Ickes and Roosevelt fell to talking about the Court. The President remarked that he did not think that any Justices would retire and permit him to make new appointments. "Then," Ickes noted, "he said that while the matter could not be talked about now, he believed that the way to mend the situation was to adopt a constitutional amendment which would give

<sup>66</sup> *Id.* at 292.

<sup>67</sup> N.Y. Herald-Tribune, Nov. 3, 1935.

the Attorney General the right, if he has any doubt of the constitutionality of a legislative act, to apply to the Supreme Court for a ruling, that ruling to state specifically in which respects the act is unconstitutional. Then, if the next succeeding Congress, with this opinion of the Supreme Court before it, should re-enact that statute, it would, by that fact, be purged of its unconstitutionality and become the law of the land."<sup>68</sup>

During their conversation, the President made use of an analogy that was to crop up frequently in succeeding months in discussions of the judiciary crisis. Ickes wrote in his diary:<sup>69</sup>

The President's mind went back to the difficulty in England, where the House of Lords repeatedly refused to adopt legislation sent up from the House of Commons. He recalled that when Lloyd George came into power some years ago under Edward VII, he went to the King and asked his consent to announce that if the Lords refused again to accept the bill for Irish autonomy, which had been pressed upon them several times since the days of Gladstone, he would create several hundred new peers, enough to outvote the existing House of Lords. With this threat confronting them, the bill passed the Lords.

Roosevelt's recollection was faulty—the episode actually concerned Asquith and the attempt to reform the House of Lords—but the British analogy was clearly important for him, because he re-occurred to it once more on December 27 at a cabinet meeting at which the Supreme Court question was again reviewed at length.<sup>70</sup> This time he referred not only to the Irish Home Rule Bill, but to Lloyd George's success in pushing through a social security act by the threat to create three hundred new peers.<sup>71</sup>

After the cabinet meeting, Ickes made a new entry in his diary:<sup>72</sup>

Clearly, it is running in the President's mind that substantially all of the New Deal bills will be declared unconstitutional by the Supreme Court. This will mean that everything that this Administration has done of any moment will be nullified. The President pointed out that there were three ways of meeting such a situation: (1) by packing the Supreme Court, which

<sup>68</sup> 1 ICKES 467–68.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Id.* at 494–95. The Asquith precedent was to be mentioned often during the Court fight. See, for example, Martin J. Lide to Kenneth McKellar, Feb. 16, 1937, McKellar MSS, Memphis Public Library, Memphis, Tenn., Box 229.

<sup>71</sup> 1 ICKES 495.

<sup>72</sup> *Ibid.*

was a distasteful idea; (2) by trying to put through a number of amendments to the Constitution to meet the various situations; and (3) by a method that he asked us to consider very carefully.

The third method is, in substance, this: an amendment to the Constitution conferring explicit power on the Supreme Court to declare acts of Congress unconstitutional, a power which is not given anywhere in the Constitution as it stands. The amendment would also give the Supreme Court original jurisdiction on constitutional questions affecting statutes. If the Supreme Court should declare an act of Congress to be unconstitutional, then—a congressional election having intervened—if Congress should repass the law so declared to be unconstitutional, the taint of unconstitutionality would be removed and the law would be a valid one. By this method there would be in effect a referendum to the country, although an indirect one. At the intervening congressional election the question of the constitutionality or unconstitutionality of the law would undoubtedly be an issue.

In essence, the President's strategy was to leave the power of decision to the Supreme Court. If the Court upheld New Deal legislation, the issue would fade away. But if all the legislation were thrown out, Roosevelt warned, there would be "marching farmers and marching miners and marching workingmen throughout the land." For almost half a year, while the Court was recessed, the conflict between the President and the Court had simmered on a low flame. But during those months, as Roosevelt was keenly aware, such significant questions as the AAA processing tax had been making their way through the lower courts; the Supreme Court could be expected to render decisions on such matters early in 1936. "If the Court does send the AAA flying like the NRA," the President had told Wyzanski, "there might even be a revolution."<sup>73</sup>

#### IV. THE COURT NULLIFIES THE NEW DEAL

On January 6, 1936, the Supreme Court handed down its long-awaited decision on the AAA processing tax.<sup>74</sup> Divided 6 to 3, the Court ruled the tax unconstitutional, thus overturning the second of the two most important New Deal recovery programs. In an opinion that earned him scorching comments from the law journals, Justice Roberts held the levy to be an illegitimate use of the

<sup>73</sup> 3 SCHLESINGER 453.

<sup>74</sup> *United States v. Butler*, 297 U.S. 1 (1936).

taxing power, "the expropriation of money from one group for the benefit of another."<sup>75</sup>

The *Butler* decision aroused acrimonious criticism of the Court. Coming on top of the 1935 opinions, the *Butler* verdict appeared to indicate a determination by the Court to wipe out all of the New Deal. "Is Poe's Raven who croaked 'Never More' their model?" asked one man. An Oklahoman penciled a letter to the Attorney General stating that he wanted to impeach every judge who had declared the AAA invalid, and another man wrote the President: "I'm in favor of doing away with the Constitution if it's going to interfere with the general welfare of the people." The head of a Chicago advertising agency asked: "Are you aware that the people at large are getting damned tired of the United States Supreme Court, and that, if left to a popular vote, it would be kicked out?"<sup>76</sup>

A nation of tinkerers, the country flooded Washington with home-made inventions to improve the government machinery. Many of the contrivances stressed either the age of the Justices or the device of packing the Court, or both. A South Carolina attorney wrote: "We are hoping and believing that you and the Congress of the United States will not allow six old men to destroy this Country." A Minnesota lawyer urged compulsory retirement at 65 or 70, "whichever would retire the majority of the present members of the Court." A Los Angeles man questioned the fitness of "that body of nine old hasbeens, half-deaf, half-blind, full-of-palsy men. . . . That they are behind the times is very plain—all you have to do is to look at Charles Hughes' whiskers."<sup>77</sup>

<sup>75</sup> *Id.* at 61.

<sup>76</sup> Maurice Daley to Homer Cummings, Jan. 13, 1936, NA Dept. of Justice 5-36-346; George Thomason to Cummings, NA Dept. of Justice 235773; John W. White to FDR, Jan. 7, 1936, NA Dept. of Justice 5-36-346; W. K. Cochrane to Stephen Early, Jan. 25, 1936, FDRL OF 41-A, Box 120. Governor George Earle of Pennsylvania denounced the Court as "a political body" with "six members committed to the politics of the Liberty League." Address of George H. Earle, Jan. 18, 1935, Earle MSS, Bryn Mawr, Pa., privately held, Speech and News File No. 73. Some of the indignation was aroused by the "windfall" millers anticipated as a consequence of the decision. Clifford Hope to Chester Stevens, Apr. 21, 1936, Hope MSS, Kansas State Historical Society, Topeka, Kans., Tax (Legis.) folder, Legislative Correspondence, 1935-36.

<sup>77</sup> Joe P. Lane to FDR, Jan. 7, 1936, FDRL OF 274, Box 3; S. C. Odenborg to FDR, Feb. 3, 1936, NA Dept. of Justice 235241; John B. Muller to FDR, Jan. 9, 1936, FDRL OF 1-K, Misc. 1936.

From different parts of the nation came calls for additional Justices "with younger minds." Some wanted four more Justices, like the Memphis businessman who pointed out: "Business does not accept an applicant with twelve gray hairs on his head." Others thought six new Justices would have to be added to "reverse this infamy." An Arizona attorney recommended: "In order to avoid the impending seizure of this government by the special interests it is incumbent on you to increase the membership of the Supreme Court to fifteen; and appoint the new membership from the Frankfurters, Olsons, and other men who place human rights above the rights of predatory wealth." From Richmond, Virginia, came a demand for a Court of "at least twenty or more members. Nine OLD MEN, whose total age amounts to about 650 years, should have additional help." A member of the Kansas House of Representatives had an even more radical suggestion: add sixteen new members, "the new members to be not over thirty-five years of age, and retired at forty. This would put men on the court that are in step with TO-DAY."<sup>78</sup>

A number of correspondents seemed to believe that Roosevelt was unaware of the Court's infamy or that he needed to be stiffened to oppose the Court. A Seattle woman wrote:<sup>79</sup>

I have just this minute heard the decision of the U.S. Supreme Court on the A.A.A.

Mr. Roosevelt, are you going to sit back and let these few men, controlled by the selfish elements of our country, control the destinies of intelligent, thinking and country-loving people, who really make this great country of ours?

A Kansan asserted: "One who is really a man will resist to the end being governed by men who lived one hundred and fifty years ago." A Miami attorney assured the President: "If you, as the Executive, and Congress will make the Supreme Court an issue in this country it will not fail. Jackson did not fail, Grant did not fail, and the Dred-Scott decision was treated with contempt."<sup>80</sup>

<sup>78</sup> W. J. Young to FDR, Jan. 7, 1936, NA Dept. of Justice 5-36-346; W. B. Mills to FDR, Jan. 13, 1936; Thomas Duncan to FDR, Jan. 7, 1936; Elmer Graham to FDR, Jan. 7, 1936, NA Dept. of Justice 235773; W. F. Betts to FDR, Jan. 6, 1936, FDRL OF 1-K Misc. 1936; W. H. (Bill) Reed to FDR, Jan. 21, 1936, NA Dept. of Justice 235868.

<sup>79</sup> Auzias de Turenne to FDR, Jan. 6, 1936, FDRL OF 1-K Misc. 1936.

<sup>80</sup> R. W. Sholders to FDR, Jan. 6, 1936, NA Dept. of Justice 5-36-246; Rudolph Isom to FDR, Jan. 13, 1936, FDRL OF 41-A, Box 120.

A Mississippi editor wired Roosevelt:<sup>81</sup>

On behalf of farmers and workers urge that you set aside Supreme Court decision and destroy their assumed right to declare laws of Congress unconstitutional. . . . President Andrew Jackson, our greatest Democrat, defied Supreme Court on this very point. Hope you will do the same. Sincerely believe that future of Democratic government hinges on whether you will take the bull by the horns. Drastic action is imperative. America is depending on you. Perhaps civilization and its perpetuity is involved in your acts. God grant that you have the courage to do right.

Roosevelt's strategy of "watchful waiting" seemed to be paying off. The Court, which had antagonized groups like railway employees in 1935, had now angered farmers who would be denied more than two billion dollars in AAA benefit checks in the next year. Edward A. O'Neal, president of the American Farm Bureau Federation, warned: "Those who believe the American farmer will stand idly by and watch his program for economic justice fall without a fight are badly mistaken. The fight is on—and this time it will be with the gloves off."<sup>82</sup> O'Neal planned to meet with the A. F. of L.'s general counsel, Charlton Ogburn, to lay plans for a farmer-labor alliance to achieve common objectives.

Yet none of this agitation moved Roosevelt to act. Despite constant prodding, he refused even to comment on the *Butler* decision. He believed that the time had not yet come. An election year was not the propitious moment to give the opposition, which was bereft of issues, an opportunity to stand by the flag. Nor had the coalition against the Court yet reached full strength. If O'Neal denounced the *Butler* opinion, other farm leaders approved it, and a Gallup Poll, which appeared the day before the decision was rendered, showed a majority of the country opposed to the AAA.<sup>83</sup> Nor had opponents of the Court yet reached agreement on a proposal. Ogburn, for one, thought that nothing should be done at present save to make the amending process easier.<sup>84</sup>

Moreover, the Administration was not yet ready for a fight on the Court issue, because it had not yet come up with a satisfactory

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<sup>81</sup> H. B. Sanders to FDR, Jan. 7, 1936, NA Dept. of Justice 5-36-346.

<sup>82</sup> Washington Post, Jan. 7, 1936.

<sup>83</sup> Washington Post, Jan. 8, 1936.

<sup>84</sup> Charlton Ogburn to FDR, Jan. 9, 1936, FDRL OF 274.



plan. Shortly after the *Butler* verdict was rendered, Assistant Attorney General John Dickinson wrote:<sup>85</sup>

The way in which the high command has apparently decided to treat the AAA decision has been to smother its effect as much as possible. I am not at all sure that this is a wise strategy, but apparently the feeling is that there is a widespread readiness, throughout the country, to blaze up against the Supreme Court and that this state of mind must be wet-blanketed, for fear that otherwise it would drive the Administration into the position of either attacking the Court, or calling for an amendment, which they are not yet prepared to do.

While maintaining public silence, Roosevelt indicated privately that he was preparing for a showdown with the Court. At the cabinet meeting on January 24, 1936, Ickes recorded:<sup>86</sup>

The President said that word is coming to him from widely separated parts of the country that people are beginning to show a great deal of interest in the constitutional questions that have been raised by recent Supreme Court decisions. . . . The President made the point, based upon some statement by Harold J. Laski, that the Supreme Court, in its decisions on New Deal legislation, was dictating what it believed should be the social philosophy of the nation, without reference to the law or the Constitution. . . . It is plain to see, from what the President said today and has said on other occasions, that he is not at all averse to the Supreme Court declaring one New Deal statute after another unconstitutional. I think he believes that the Court will find itself pretty far out on a limb before it is through with it and that a real issue will be joined on which we can go to the country.

For my part, I hope so. Here is an issue that must be faced by the country sooner or later, unless we are prepared to submit to the arbitrary and final dictates of a group of men who are not elected by the people and who are not responsible to the people: in short, a judicial tyranny imposed by men appointed for life and who cannot be reached except by the slow and cumbersome process of impeachment.

That same day, Roosevelt prepared a memorandum for the files, with a copy to Moley, stating:<sup>87</sup>

It has been well said by a prominent historian that fifty years from now the Supreme Court's AAA decision will, in all probability, be described somewhat as follows:

<sup>85</sup> Dickinson to George Fort Milton, Jan. 13, 1936, Milton MSS, Box 19.

<sup>86</sup> 1 ICKES 524.

<sup>87</sup> Memorandum, Jan. 24, 1936, FDRL OF 1-K.



(1) The decision virtually prohibits the President and Congress from the right, under modern conditions, to intervene reasonably in the regulation of nation-wide commerce and nation-wide agriculture.

(2) The Supreme Court arrived at this result by selecting from several possible techniques of constitutional interpretation a special technique. The objective of the Court's purpose was to make reasonableness in passing legislation a matter to be settled not by the views of the elected Senate and House of Representatives and not by the views of an elected President but rather by the private, social philosophy of a majority of nine appointed members of the Supreme Court itself.

Roosevelt continued to move ahead on the study of plans to curb the Court. A week after the *Butler* decision, he wrote Cummings: "What was the *McArdle* case . . . ? I am told that the Congress withdrew some act from the jurisdiction of the Supreme Court."<sup>88</sup> The Attorney General replied: "The case of *ex parte McArdle* . . . to which you refer . . . is one of the classic cases to which we refer when considering the possibility of limiting the jurisdiction of Federal Courts. This whole matter has been the subject of considerable study in this Department, and, in view of recent developments, is apt to be increasingly important."

The exchange between the President and the Attorney General suggests the crucial development in the early weeks of 1936: loss of faith in the amendment solution and rising belief that the Court could be curbed by an act of Congress. Perhaps the most important influence on this change of plans was the division of the Court in the *Butler* case and Justice Harlan Stone's ringing dissent, less because the minority voted to sustain the processing tax than because of Stone's vigorous assault on judicial usurpation. Cummings wrote Stone:<sup>89</sup>

Your dissenting opinion is on a high plane—sound, constructive and human.

It may not be the law *now*—but it will be the law later, un-

<sup>88</sup> FDR to Cummings, Jan. 14, 1936; Cummings to FDR, Jan. 16, 1936, FDRL PSF Supreme Court.

<sup>89</sup> Cummings to Stone, Jan. 8, 1936, FDRL PSF Justice. Stone responded: "Thank you for your generous note. When one finds himself outvoted two to one he should be humble and perhaps skeptical of his own judgment. But I have a sincere faith that history and long time perspective will see the function of our court in a different light from that in which it is viewed at the moment." For Stone's views, see MASON, HARLAN FISKE STONE 417 (1956).

less governmental functions are to be permanently frozen in an unescapable mold.

You spoke at a great moment and in a great way. Congratulations.

The split in the Court confirmed those who had been arguing that the problem lay not in the Constitution but in the composition of this particular Court, and Justice Stone's dissent made it easier to argue that Congress must act to regain powers which the Court had usurped. The amendment route was not abandoned, but the search for a suitable amendment now concentrated for the first time on compelling the retirement of Justices at 70, thus altering the makeup of the Court. In addition, increasing attention was given to finding a way to meet the difficulty by statute.<sup>90</sup>

On January 29, 1936, after talking over the Court issue at lunch with Senator Norris, the President continued the same discussion with Ickes. He told Ickes that he had reached the conclusion that he could achieve Court reform without resort to an amendment; he had also confided this to Norris. Roosevelt favored an act of Congress which would strip the lower courts of the power to pass upon the constitutionality of statutes and would confer this power on the Supreme Court as a matter of original jurisdiction. The Supreme Court would be required to give an advisory opinion on the constitutionality of a bill before it was enacted. Congress could then alter the bill to conform with the advice of the Court or it could pass it once more in its original form, and it would then become the law of the land. Ickes noted:<sup>91</sup>

I made the obvious remark that the Supreme Court would declare unconstitutional such an act as the President had in mind and he said that of course it would. To meet that situation his plan would be somewhat as follows: Congress would pass a law, the Supreme Court would declare it unconstitutional, the President would then go to Congress and ask it to instruct him whether he was to follow the mandate of Congress or the mandate of the Court. If the Congress should declare

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<sup>90</sup> 3 SCHLESINGER 493-94; FDR Memorandum to Homer Cummings, Feb. 24, 1936; FDR Memorandum for Chairman Hatton Sumners, FDRL OF 41, Box 114. During the 1936 campaign, one correspondent wrote the President: "Why not make a campaign on the opinions of Justice Stone? By taking the words of a member of the court itself there can be no justifiable charge of usurpation." Paul Webb to FDR, June 4, 1936, FDRL OF 41-A, Box 116.

<sup>91</sup> 1 ICKES 529-30.

that its own mandate was to be followed, the President would carry out the will of Congress through the offices of the United States Marshals and ignore the Court.

After their talk, Ickes reflected:<sup>92</sup>

There isn't any doubt at all that the President is really hoping that the Supreme Court will continue to make a clean sweep of all New Deal legislation, throwing out the TVA Act, the Securities Act, the Railroad Retirement Act, the Social Security Act, the Guffey Coal Act, and others. He thinks the country is beginning to sense this issue but that enough people have not yet been affected by adverse decisions so as to make a sufficient feeling on a Supreme Court issue.

I told the President that I hoped this would be the issue in the next campaign. I believe it will have to be fought out sooner or later, and I remarked to him that the President who faced this issue and drastically curbed the usurped power of the Supreme Court would go down through all the ages of history as one of the great Presidents.

Two days later, at a cabinet meeting, Cummings raised the question whether the government should appeal a lower court decision denying the federal government the right to condemn property for a low-cost housing project. Tom Corcoran and Ben Cohen were but two of the President's advisers who thought the government should drop the case, in part because they feared an adverse opinion from the Supreme Court that might wipe out the Public Works Administration. Ickes noted:<sup>93</sup>

The President was firmly of the opinion that we ought to go ahead with the case. He scouted the idea that anyone could draw an act which would pass the scrutiny of the Supreme Court in its present outlook on New Deal legislation. He thought that if all PWA projects should be suspended as the result of an adverse decision by the Supreme Court, it would be all to the good. . . . There doesn't seem to me to be any doubt that he is entirely willing to have the Supreme Court knock out every New Deal law. It is clear that he is willing to go to the country on this issue but he wants the issue to be as strong and clear as possible, which means that he hopes the

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<sup>92</sup> *Id.* at 530.

<sup>93</sup> *Id.* at 531–32. Ickes added: "It happens that I am fully in accord with the President's view on this matter. I believe that this issue will have to be fought out sooner or later and no more important issue has arisen since the Civil War. Naturally, I would like to be in this fight and be a member of the Administration that is carrying it on."

Supreme Court will declare unconstitutional every New Deal case that comes before it.

Yet, while blithely accepting this prospect of a constitutional Armageddon, the President continued to say nothing publicly. Early in February, George Fort Milton confided:<sup>94</sup>

I thought a month ago that the Court and the Constitution were very definitely going to be in this year's presidential debate. But everything in Washington is of the hush, hush attitude. . . . What I am feeling is that maybe he is depending too much on his resourcefulness and that he could do some thinking on what would be the usefulness of being re-elected if he was going to have to go into a second term denied the essential powers of nationality. Wouldn't he be all dressed up and have nowhere to go?

Roosevelt's silence, which some interpreted as acquiescence in the Court's decisions, left the initiative for public action to Congress. In the 1936 session, congressmen introduced more than a hundred proposals to restrict the federal courts. Some measures, such as the "Human Rights Amendment," aimed to expand the powers of Congress to enact social legislation. Others, like the Cross bill, sought to strip the courts of the prerogative of judicial review. Still others resorted to enlarging the bench. In January, 1936, Representative Ernest Lundeen of Minnesota filed a bill to increase the Supreme Court by two Justices so that the Court could handle more work and because "new blood will mean a more liberal outlook on constitutional questions." Lundeen pointed out that when his bill had been adopted, and when Justice Willis Van Devanter carried out his purported plan to retire, the President would be able to name three new Justices and thus assure a liberal majority. A week earlier, Representative James L. Quinn had gone even further; he had introduced a measure to expand the Court to fifteen Justices.<sup>95</sup>

On February 12, 1936, George Norris delivered a major address on the floor of the Senate. He denounced the Supreme Court as a "continuous constitutional convention." To the contention that the processing tax was invalid because agricultural production was not mentioned in the Constitution, Norris retorted: "Nowhere in

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<sup>94</sup> Milton to George Foster Peabody, Feb. 10, 1936, Milton MSS, Box 19.

<sup>95</sup> Thomas R. Amlie to W. Jett Lauck, Mar. 6, 1937, Amlie MSS, State Historical Society of Wisconsin, Madison, Wisc., Box 6; O. H. Cross to Stanley Reed, Jan. 17, 1936, NA Dept. of Justice 235868.

that great document is there a syllable, a word, or a sentence giving to any court the right to declare an act of Congress unconstitutional." Norris expostulated: "The members of the Supreme Court are not elected by anybody. They are responsible to nobody. Yet they hold dominion over everybody."<sup>96</sup> Rejecting the amendment procedure he had once favored as "impracticable," Norris asked Congress to have the "courage" to enact legislation requiring a unanimous decision to invalidate an act of Congress.

The columnist Robert S. Allen wrote Norris:<sup>97</sup>

I have been wondering for weeks what the hell this session was for. Your matchless speech on the Supreme Court this afternoon cleared up the mystery. The session was solely so you could deliver this superb exposition—so it could go into the Record for all history to read—so you could say what everybody was thinking, but no other leader had the guts to say out loud.

It was a grand and unequalled job, Senator. And what was no less significant was the tremendous response it is being accorded. It is really amazing the extraordinary press coverage it has received. Even the filthy Hearst jackals carried almost a column of your remarks. It was also amazing to me how deeply moved the press gallery was. Reactionary old bastards who haven't had an intelligent idea in decades spoke respectfully of your views.

Norris' concern over the Court question was long-standing, but it was heightened during these weeks by anxiety over the fate of the Tennessee Valley Authority, of which he was acknowledged to be the "father." In January, Norris had written: "Up to the time this decision was rendered in the AAA case, I had no doubt whatsoever that the Supreme Court would sustain the TVA Act. . . . Since the AAA decision, however, I would not be surprised if the Court would hold the TVA Act unconstitutional."<sup>98</sup> On February 17, the Court, by a surprising 8-to-1 vote, diminished these

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<sup>96</sup> "Legislation by the Judiciary," Copy in the George Norris MSS. See, too, Norris to Francis Heney, Apr. 25, 1936, Heney MSS, Bancroft Library, University of California, Berkeley, Calif. The Norris idea was a familiar one. In January, a Tacoma assessor had written the President: "The extreme penalty is not exacted from the vilest culprit, save on a unanimous verdict. Why should the will of the people be crucified for less?" Fred A. Smith to FDR, Jan. 9, 1936, NA Dept. of Justice 235773.

<sup>97</sup> Allen to George W. Norris, Feb. 12, 1936, Norris MSS, Tray 27, Box 4.

<sup>98</sup> George W. Norris to Irving Brant, Jan. 11, 1936, Norris MSS, Tray 27, Box 5.

anxieties by upholding the power of the TVA to dispose of power generated at Wilson Dam.<sup>99</sup>

Although some critics pointed out that the Court still had not rendered a decisive judgment on the constitutionality of the TVA, friends of public power were delighted by the opinion. "I had completely resigned myself to a bad decision, only holding out hope that we would have some crumb of comfort in that unlike AAA and NRA we would not be swept completely out to sea, bag and baggage," wrote David Lilienthal.<sup>100</sup> "The decision, clearing away so many of the clouds hanging over us, makes me feel very humble. We are given an almost incredible grant of power."<sup>101</sup> The opinion served, for the moment, to quiet demands for reform of the judiciary.<sup>102</sup> By showing the fairness of the Court, the decision, observed the *Washington Post*, "should do more than anything else to end the campaign for limitation of the Court's authority."<sup>103</sup> From Chattanooga, George Fort Milton wrote gleefully:<sup>104</sup>

Well, after TVA, I think we ought to start talking about "one old man and the eight young men." . . .

I suspect that some of the members of the Court set themselves forward deliberately to show that they could render other than a Tory decision. Would you call this modernizing Mr. Dooley, so that the Supreme Court precedes the election returns?

The respite provided by the TVA decision proved short-lived. Six weeks later, the Court rebuked the Securities and Exchange Commission,<sup>105</sup> and on May 18, 1936, it went out of its way in the *Carter* case<sup>106</sup> to strike down the Guffey Coal Act in an opinion that appeared to doom not only the Wagner Labor Relations Act

<sup>99</sup> *Ashwander v. T.V.A.*, 297 U.S. 288 (1936).

<sup>100</sup> 1 JOURNALS OF DAVID E. LILIENTHAL 59 (1964).

<sup>101</sup> Lilienthal to Felix Frankfurter, Feb. 17, 1936, Lilienthal MSS, Princeton University Library.

<sup>102</sup> Knoxville News-Sentinel, Feb. 18-20, 1936, clippings, David Lilienthal Scrapbooks, Lilienthal MSS, Princeton University Library.

<sup>103</sup> Knoxville News-Sentinel, Feb. 18, 1936.

<sup>104</sup> George Fort Milton to Francis Coker, Feb. 18, 1936, Milton MSS, Box 19. Cf. Newton Baker to James M. Beck, Mar. 19, 1936, Beck MSS.

<sup>105</sup> *Jones v. S.E.C.*, 298 U.S. 1 (1936).

<sup>106</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

but any attempt by act of Congress to control wages and hours. The *Carter* decision started a new wave of condemnations of the Court and demands for restrictions. Once more, the age of the Justices and the possibilities offered by "packing" were pointed out. "We permit old men 90, probably as childish as boys of 9, to sit on the Supreme Court bench and in case of a 5 to 4 vote one old man controls the affairs of the nation," one critic wrote the President. "In reviewing the Constitution of the United States," noted a Pennsylvania man, "it comes to my attention the fact that there is no limit to the Personell of the Supreme Court." A Los Angeles man urged the President to name four more Justices. He added helpfully: "For these four positions I nominate Senator Hiram Johnson of California and Senator Geo. W. Norris of Nebraska. Now you name two." Yet Roosevelt not only would not heed such advice but when newsmen pressed him for a statement on the *Carter* decision he brusquely closed off that line of questioning.<sup>107</sup>

The *Carter* decision turned out to be only the first in a series of rapid-fire blows the Court delivered at the New Deal. On successive Mondays in the spring of 1936, the Court handed down the *Carter* opinion, overturned the Municipal Bankruptcy Act,<sup>108</sup> and, in the most momentous ruling of all, invalidated the New York state minimum-wage law in the *Tipaldo* case.<sup>109</sup> Each decision came from a divided court.

For critics of the Court, the *Tipaldo* opinion was the last straw. Before that decision, even some New Dealers hoped to avoid a direct confrontation with the Court. After it, Tugwell has written, liberals agreed that "something must be done."<sup>110</sup> Not since the *Dred Scott* disaster had the Court inflicted on itself so deep a wound. As Alpheus T. Mason has observed: "At any time up to June 1, 1936, the Court might have retreated and thus avoided a showdown. The New York Minimum Wage opinion, handed down

<sup>107</sup> Wendell Berge to E. L. Woodcos, May 20, 1936, Berge MSS, LC, Box 10; L. C. Weiss to FDR, May 20, 1936; H. C. Holland to FDR, May 23, 1936; Jan Byrd to FDR, May 20, 1936, NA Dept. of Justice 235773; Washington Post, May 20, 1936; John D. Miller to the New York Times, May 19, 1936, Miller MSS, Cornell University Collection of Regional History.

<sup>108</sup> *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38 (1936).

<sup>109</sup> *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

<sup>110</sup> TUGWELL, *op. cit. supra* note 55, at 391.



that day, convinced even the most reverent that five stubborn old men had planted themselves squarely in the path of progress.<sup>111</sup>

The *Tipaldo* decision produced a national outcry against the Court. Ickes noted angrily: "The sacred right of liberty of contract again—the right of an immature child or a helpless woman to drive a bargain with a great corporation. If this decision does not outrage the moral sense of the country, then nothing will."<sup>112</sup> But it was not only New Dealers who objected to the opinion. The Court had embarrassed Administration critics who had argued that protection of the rights of labor should be left to state action. "Hereafter," wrote Franklyn Waltman in the *Washington Post*, "whenever New Dealers are taunted with trying to break down the rights of the States to manage their own affairs, the taunters will have this decision tossed in their faces."<sup>113</sup> The *Post* labeled the opinion "An Unfortunate Decision," and Herbert Hoover called for an amendment to restore to the states "the power they thought they already had."<sup>114</sup>

Once more, Roosevelt was pressed to act. From California, the head of the Stockton Democratic Club wrote the President: "By another 4 to 5 decision on the part of JUDOCRACY, *one man* has been able . . . to nullify the progress of half a century along humanitarian lines, exposing the Motherhood of America to further exploitation on the part of unscrupulous employers. If this be Democracy—may God save the mark!" A telegram from Brooklyn urged: "Increase number of justices in Supreme Court with men in their fifties." The head of a New York printing firm warned the President that it would be "useless" for him to pursue his program unless he pushed through an amendment. "You can't side-step the issue," he scolded. "The people who will re-elect you will expect you to have something to say about this matter."<sup>115</sup>

At a press conference on June 2, 1936, Roosevelt broke his silence. For the first time since the "horse-and-buggy" meeting,

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<sup>111</sup> MASON, *op. cit. supra* note 89, at 438.

<sup>112</sup> 1 ICKES 614.

<sup>113</sup> *Washington Post*, June 2, 1936.

<sup>114</sup> *N.Y. Times*, June 7, 1936.

<sup>115</sup> James A. Metcalf to FDR, June 3, 1936, NA Dept. of Justice 224196; E. Larkin to FDR, June 4, 1936, FDRL OF 41-A, Box 116; Earl Salley to FDR, June 5, 1936, FDRL OF 274, Box 3.



he commented on a decision of the Court. Of the *Tipaldo* opinion, he said:<sup>116</sup>

It seems to be fairly clear, as a result of this decision and former decisions, using this question of minimum wage as an example, that the "no-man's-land" where no Government—State or Federal—can function is being more clearly defined. A State cannot do it, and the Federal Government cannot do it.

But when a reporter asked, "How can you meet that situation?" the President replied, "I think that is about all there is to say on it."

Roosevelt was no less circumspect about drafting the 1936 Democratic platform. Both the President and Senator Robert Wagner of New York, chairman of the Resolutions Committee, were urged to incorporate in the platform commitments to specific proposals, such as requiring a 7-to-2 majority to invalidate a law, or amending the Constitution to empower Congress and the states to enact minimum-wage laws.<sup>117</sup> But the Administration was determined to keep the platform ambiguous, not only because it wanted to remove the Court issue from the campaign, but because it had not yet decided on any particular plan.

In drafting their platform, the Democrats had to cope with the fact that the Republicans had already committed themselves to an amendment to overcome the *Tipaldo* decision. As Cummings warned the President, if the Democrats sought to outbid the Republicans they ran the risk of going so far as to shift the whole emphasis of the campaign to the constitutional question. Cummings hoped to avoid any specific plank, but if one were necessary he favored one so vaguely worded that it should leave the door open "to the thought that perhaps, after all, an amendment may not be necessary." Four days earlier, Donald Richberg, who had been a prominent labor attorney and chairman of the National Industrial Recovery Board, had also submitted a draft which was adroitly phrased to escape any definite commitment.<sup>118</sup>

On the Sunday before the 1936 Democratic convention, Roosevelt, Wagner, and several others met after dinner in the White

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<sup>116</sup> 5 PUBLIC PAPERS 191-92.

<sup>117</sup> Louis Boehm to Robert Wagner, June 6, 1936; Clarence V. Tiers to Stephen Early, June 24, 1936, FDRL OF 1871-A.

<sup>118</sup> Detroit News, June 25, 1936, clipping, Blair Moody Scrapbooks, Moody MSS, Michigan Historical Collections of the University of Michigan, Ann Arbor, Mich.; Cummings to FDR, June 20, 1936, FDRL PSF Justice; Richberg to FDR, June 16, 1936, FDRL PSF Supreme Court.

House to draft the platform. When they encountered difficulties, it was decided to ask two of the participants, Samuel I. Rosenman, another member of the original Brain Trust, and Stanley High, a skillful phrase-maker, to try their hands after the meeting broke up. They worked all night at a typewriter, and by morning the President had their draft on his breakfast tray. Certain parts, including a Supreme Court plank, were still missing. After breakfast, Rosenman and High went into the President's bedroom, where they found Donald Richberg.

Recognizing that more aid might be required, the President had summoned Richberg to the White House. Richberg, who guessed why he had been called, turned up shortly after breakfast with a carbon of his proposed plank in his pocket. When Roosevelt told him that Wagner needed help, Richberg handed him the draft to read. After going over it, the President whistled softly and said, "I think this is it." The others gathered in the President's bedroom agreed, and, with minor changes, Richberg's plank was incorporated in the platform. Purposely vague, it proposed an attempt to achieve a "clarifying amendment" only "if these problems cannot be effectively solved by legislation."<sup>119</sup>

In the 1936 campaign, Roosevelt maintained a studied silence on the Court question despite counsel from different sides that he urge action to alter the Court or that he assure the country that he would not pack the Court. The President wanted the campaign to center not on the Constitution but on the concrete achievements of the New Deal and the past iniquities of Herbert Hoover. Within the Roosevelt circle, Felix Frankfurter and Frances Perkins opposed making an issue of the Court's rulings, and even Ickes conceded that the groundwork for it had not been laid.<sup>120</sup> One correspondent urged the President to leave the Court matter "till after the campaign, so as not to supply ammunition to the 'constitution cryers.' When the campaign is over, Congress could proceed in a calm mood and adopt certain changes. . . . Congress could suggest to the President to add to the present Tribunal two, four or six justices to make the number 11, 13, or 15."<sup>121</sup>

Nonetheless, the constitutional issue surfaced in different parts

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<sup>119</sup> RICHBERG, *MY HERO* 204-05 (1954); ROSENMAN, *WORKING WITH ROOSEVELT* 100-03 (1953); MOLEY 346-47.

<sup>120</sup> 1 ICKES 524, 531, 602.

<sup>121</sup> Jacob Hayman to FDR, Feb. 24, 1936, FDRL OF 41-A, Box 116.

of the country where conservatives warned that a Roosevelt victory would menace the Court. They were unpersuaded by New Deal avowals of reverence for the Constitution. Rexford Tugwell's theology was acceptable, noted one writer, but his actions were unorthodox, "like a Renaissance cardinal with children." Conceivably, a few votes may have been swung by the Court question. One man wrote: "In my opinion any man who sneered at the United States Supreme Court like he did in May 1935, when they ruled against N.R.A., is not worthy of my vote though I have been voting the Democratic Ticket since 1884." Yet Roosevelt's studied silence made it possible for Stephen Duggan, director of the Institute of International Education, to write a long letter, which the *New York Times* published, urging support of the President, who "has given no evidence that he wants to 'pack' the court," and for a conservative senator like Josiah Bailey of North Carolina to defend Roosevelt on the Court question. Enlarging the Supreme Court, wrote Frederick Lewis Allen shortly before the election, "need hardly be regarded as a serious possibility in the immediate future: it would be too obviously a cowardly move."<sup>122</sup>

## V. ELECTION LANDSLIDE

In November, 1936, Franklin Roosevelt rolled up the greatest landslide victory in the history of two-party competition by capturing the electoral votes of all but two of the forty-eight states. His political opponents routed, his policies vindicated, he could now give full attention to the challenge posed by the Supreme Court. Time was short. In just two more months the Court would reconvene; awaiting it were tests of the validity of the Social Security Act, the Wagner Labor Relations Act, the Railway Labor

<sup>122</sup> STERNESHER, REXFORD TUGWELL AND THE NEW DEAL 349 (1964); Raymond Clapper MS Diary, Aug. 24, 1937; S. H. Boddinhouse to Daniel Roper, Nov. 6, 1936, FDRL OF 41-A, Box 116; Henry Teigan to C. Schoening, Feb. 16, 1937, Teigan MSS, Minnesota Historical Society, Box 14; Chicago Tribune, July 24, 1936, clipping, Frank Murphy Collection, University of Michigan Law School; Frank Gannett to Alexander Falck, Mar. 7, 1936, Gannett MSS, Cornell University Collection of Regional History, Box 16; James H. Winston to FDR, Aug. 1, 1936, FDRL PPF 1786; J. A. Mulhern to Newton Baker, Oct. 22, 1936, Baker MSS, Box 52; Stephen Duggan to FDR, Nov. 13, 1936, FDRL OF 274; John Robert Moore, "Josiah William Bailey: A Political Biography," unpublished Ph.D. dissertation, Duke University, 1965; James Hamilton Lewis to Arthur Vandenberg, Sept. 18, 1936, Lewis MSS, LC; Allen, *Behind the Campaign*, 173 HARPER'S 476 (Oct., 1936).

Act, the Commodity Exchange Act, state minimum-wage and unemployment compensation laws, and of the powers of the PWA, the SEC, and the Federal Communications Commission. Even the gold clause resolution faced another contest.

In view of this prospect, what was Roosevelt to do? He might just wait for vacancies to develop. The laws of nature were on his side, for never in our history had a Court been composed of so elderly a group. Moreover, Justices Van Devanter and Sutherland had talked of retiring. Yet Roosevelt had seen nearly four years go by without one opportunity to make an appointment, an experience that had occurred in no other full presidential term save for the special instance of Andrew Johnson's tenure. Anyone familiar with the conversation of Justices knew enough to place a high discount on talk of retiring, and these particular Justices seemed determined to stay on the bench so long as Roosevelt was in the White House. At the first cabinet meeting after the election, the President, in a spirit of gallows humor, said that Justice McReynolds would still be on the tribunal when he was 105.<sup>123</sup>

Still, Roosevelt might wait to see whether the Court would follow the election returns. The switch of even one Justice could be decisive. It might be anticipated that the emphatic outcome of the election would surprise some Justices who had believed that they were speaking for a nation outraged by the New Deal. (It is clear from Van Devanter's correspondence that he thought the election would be close.)<sup>124</sup> Nor, it has been argued, was Justice Roberts as set against the New Deal as he appeared to be.

Yet there were risks in waiting. The Court had behaved so arrogantly in the spring of 1936 that the prospects for a change of views seemed slim. Not only did the Court's line of reasoning in its last Term leave little reason to suppose that the Court would

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<sup>123</sup> John H. Clarke to Newton Baker, Apr. 6, 1934, Jan. 3, 1936, Baker MSS, Box 60; Detroit News, June 2, 1937; Willis Van Devanter to Mrs. John Lacey, Jan. 11, 1933, Van Devanter MSS, Vol. 46; 1 *ICKES* 705.

It is not clear why the Administration did not move more forcefully to expedite the Sumners bill to make retirement more attractive. On the early history of this bill, see James M. Landis to Donald R. Richberg, Richberg MSS, LC, Box 1; Alexander Holtzoff to the Attorney General, Mar. 5, 1935, NA Dept. of Justice 235241. For post-election response, see Cummings to FDR, Dec. 29, 1936, FDRL PSF Supreme Court.

<sup>124</sup> Van Devanter to Dennis Flynn, Oct. 19, 1936; Van Devanter to Mrs. John W. Lacey, Nov. 2, 1936, Van Devanter MSS, Vol. 52.

not strike down such landmarks as the Wagner Act and the Social Security law, but it barred the way to new legislation. Returned to office with a tremendous grant of power, Roosevelt might be denied by the Court the opportunity to use that power. If he waited to see what the Court did, he might find himself with his past achievements obliterated and the momentum for future change lost.

Roosevelt had a strong sense of his own place in history. He would not countenance being written off in the history books as a man who had been frustrated in his attempts to lead the country out of the depression and to create a more humane social order. "When I retire to private life on January 20, 1941," he remarked, "I do not want to leave the country in the condition Buchanan left it to Lincoln."<sup>125</sup> Nor did he wish to be known as a President who had permitted judicial usurpers to impair the office of the Executive. Finally, it should be noted, the Court, by such decisions as that in the *Humphrey* case, had wounded his self-esteem, and, by other acts, had convinced Roosevelt that it was personally hostile to him.<sup>126</sup> He now sought a way not merely to liberalize the Court but to chastise the Justices for their past behavior.

Six days after the election, Roosevelt returned to Washington from Hyde Park; on his very first night in the capital, he summoned Cummings to the White House to report to him on what progress had been made at the Justice Department. Cummings told him that, over the summer, work had intensified as men like Edward S. Corwin, professor of jurisprudence at Princeton University, and William Draper Lewis of the American Law Institute had been asked for advice. Within the department, under the direction of Cummings and Solicitor General Stanley Reed, arguments were being assembled for and against specific proposals.

Both Roosevelt and Cummings had a tacit understanding that at some point action would have to be taken, and they now agreed that the Court was unlikely to be changed in its ways by the election returns. Yet the President still did not indicate that the time to act had come. He treated the meeting as yet another occasion on which the Attorney General had been asked for a progress

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<sup>125</sup> 29 TIME 13 (Mar. 8, 1937).

<sup>126</sup> For Roosevelt's belief that he had been snubbed by the Justices in 1936, see the penciled memorandum, "Court story," Harry Hopkins MSS, FDRL, Box 325. The account in SHERWOOD, ROOSEVELT AND HOPKINS 94 (1948) is slightly inaccurate.

report, and told him to come back as soon as he had something new to recommend. Meanwhile he was to maintain the closest secrecy on his research.<sup>127</sup>

Cummings, who may have sensed that Roosevelt was more disposed to act than he indicated, sped back to the Justice Department to order his research aides to devote full time, and overtime, to preparing reports and digests of reports for the President. Speed was important, because Roosevelt was to leave on a South American cruise on November 18. For the next nine days, messengers carried memorandums from the Justice Department to the White House and the President's comments back in the other direction. Almost every day, the Attorney General, arriving secretly through a private entrance, conferred at the White House with the President.<sup>128</sup>

Day after day they went over the great variety of recommendations that had come to them in the past two years. The uninited counsel the President had received in the aftermath of the election indicated that opinion was still unsettled and that no one solution had emerged as the inevitable answer. Some urged pressing for an amendment. A Philadelphia attorney wrote, "We hope . . . you will recommend an amendment clearly adequate in scope, not only for today but for tomorrow also, when even broader needs will arise but may be met by stronger reactionary barriers." Similarly, a group of five Utah labor organizations wanted their legislature to memorialize Congress for an amendment to give Congress the power to regulate the hours of labor.<sup>129</sup> But other letters recommended packing the Court and emphasized the old-age theme. A Baltimore lawyer wanted "a law to be enacted at once that the personnel of the Supreme Court be increased to not less than two more judges," and a Memphis man wrote: "I think you the grandest President we have ever had, and I think God will give you a hand. . . . Mr. President, the labor people want you and Congress

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<sup>127</sup> ALSOP & CATLEDGE, *THE 168 DAYS* 20, 23–24 (1938) (hereinafter *ALSOP*); N.Y. Times, Feb. 12, 1937; Raymond Clapper MS Diary, Feb. 8, 1937.

<sup>128</sup> *ALSOP* 27.

<sup>129</sup> L. Stauffer Oliver to FDR, Nov. 12, 1936; George C. Christiansen *et al.* to C. W. Spence, Dec. 12, 1936, FDRL OF 274, Box 4. See, too, Virgil V. Johnson to FDR, Nov. 13, 1936, FDRL PPF 200, Reelect Cong–J.

to curb the Supreme Court. You all know just 9 old men should not rule this grand country.”<sup>130</sup>

Roosevelt dismissed the amendment route as unacceptable for a number of reasons. In the first place, he thought an amendment would be difficult to frame. Two years of study in the Justice Department had not yet yielded a satisfactory draft, and liberals outside the government were far from a consensus. When the National Consumers’ League, which had spearheaded the drive for minimum-wage legislation, polled national legal experts after the *Tipaldo* decision on whether a campaign for an amendment should be launched, the results were discouraging. Half of those polled—including Felix Frankfurter—opposed agitation for an amendment, and the other half were so far apart on what kind of an amendment should be sought that the League decided against any action at all.<sup>131</sup>

Even if an amendment could be framed, and approved by two-thirds of each house of Congress, it would have to run the gantlet of ratification by three-fourths of the states. If ratification was by state legislatures, as seemed most likely, it would require an adverse vote by only one house in thirteen legislatures to defeat an amendment, and the state legislatures were known to overrepresent conservative interests. Nor did Roosevelt have much faith in the probity of these assemblies. As he wrote a prominent New York lawyer three months later: “If you were not as scrupulous and ethical as you happen to be, you could make five million dollars as easy as rolling off a log by undertaking a campaign to prevent the ratification by one house of the Legislature, or even the summoning of a constitutional convention in thirteen states for the next four years. Easy money.”<sup>132</sup> In a conversation with Ickes, Tom Corcoran had no trouble in ticking off the thirteen states “that would naturally be against a broadening amendment or in which money could be used to defeat it.”<sup>133</sup>

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<sup>130</sup> John B. McGraw to Stephen Early, Dec. 8, 1936, FDRL OF 274, Box 4; L. L. Wilson to FDR, Dec. 3, 1936, NA Dept. of Justice 235773. See, too, B. F. Welty to FDR, Dec. 29, 1936, FDRL OF 41, Box 114.

<sup>131</sup> Report of the Committee of Inquiry to the Board, Nov. 5, 1936, Mary Dewson MSS, FDRL, Box 6. The Dewson Papers also contain the original replies.

<sup>132</sup> FDR to Charles C. Burlingham, Feb. 23, 1937, 1 LETTERS 662.

<sup>133</sup> 2 ICKES 33–34.



At best, ratification would take a long time, and time was invaluable. Conscious of the brief span allotted to reform movements, Roosevelt wanted to exploit his landslide victory to drive through legislation such as a wages and hours bill while Congress still felt the full force of his popular indorsement. To be sure, the Norris lame-duck amendment had been adopted quickly, but that, he thought, was because it had not been opposed by any strongly entrenched interest. A constitutional amendment affecting the courts would not only be rejected by business interests but would encounter state legislatures largely composed of lawyers, who would be likely to be more disapproving of tinkering with the courts than would other groups.<sup>134</sup>

Roosevelt was especially influenced by the long, unsuccessful experience with attempting to win ratification for the child-labor amendment, a struggle then in its thirteenth year. As LaRue Brown, formerly Assistant Attorney General under Wilson, told the National Consumers' League:<sup>135</sup>

My personal experience with the Child Labor Amendment leads me to view with great dubiety the prospect of ratification of an amendment increasing federal power. Our side is at so tremendous a disadvantage as to resources and so many truly liberal folk are so questioning as to the ultimate intendments of increasing the federal authority that I fear we should simply wear our hearts out in another hopeless fight.

Subsequently, Stephen Early, Roosevelt's press secretary, summed up the objections for Raymond Clapper. Clapper set down in his diary:<sup>136</sup>

Steve said that the president had given him sidelight this morning on court proposal that he thought he would pass on to me to use or not as I saw fit. It was this—that people who talked about an amendment either didn't realize difficulties in that method or else did realize them and for that reason advocated this course. Steve said that to seek an amendment meant

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<sup>134</sup> Mallon, *Purely Confidential*, Detroit News, Feb. 13, 1937; N.Y. Times, Feb. 12, 1937.

<sup>135</sup> Brown to Lucy R. Mason, Sept. 9, 1936, Mary Dewson MSS, Box 6. See, too, Donald Richberg to Raymond Clapper, Feb. 26, 1937, Richberg MSS, Box 2. Advocates of amendments pointed out that the child-labor amendment had been improperly drafted, and that the ratification process could involve conventions rather than legislatures.

<sup>136</sup> Raymond Clapper MS Diary, Feb. 8, 1937.



getting two-thirds of both houses and then submitting it to states where  $\frac{3}{4}$  needed. He said suppose 13 governors refused to submit amendment. It dead then. He said all of us who ever been around legislatures know how easy be for moneyed interests to buy up enough legislatures to prevent action. Said this not like prohibition—here are vast and powerful groups determined to prevent action. Said another reason would be that to follow amendment course would make this an issue in 1938 campaign and might lose a number of “our congressmen.” Might cost them their seats.

Even if all these objections were overcome and an amendment went through, any legislation enacted under authorization of such an amendment would still be subject to review in the courts, unless such an amendment was purely procedural. “In view of what Mr. Justice Roberts did to a clause as broad and sweeping as ‘the general welfare,’” wrote Charles A. Beard, “I can see other justices of his mental outlook macerating almost any clarifying amendment less generous in its terms. If there is any phrase wider than providing for the general welfare, I am unable to conjure it up in my mind.”<sup>137</sup> Besides, if the President should sponsor an amendment enlarging federal powers, it might seem tantamount to conceding that he had been wrong and the Supreme Court right in their dispute over the constitutionality of New Deal measures, and this Roosevelt, especially after his bracing election triumph, was less willing than ever to do.<sup>138</sup>

After eliminating amendment proposals, Roosevelt and Cummings next looked into various suggestions that would require only an act of Congress. First, they considered a bill stipulating more than a majority of Justices to invalidate a law; they dismissed this, because they feared that the Court would void such a statute. As Richberg later explained: “A mere statute to this effect would either be disregarded by the court, or have the result that Justices anxious to preserve the prestige of the court would join unwillingly with the majority so as to make a decision of the court effective.” Moreover, such a law would limit the Court’s role as a protector of civil liberties. They then examined a bill to withdraw appellate

<sup>137</sup> Beard, *Rendezvous with the Supreme Court*, 88 NEW REPUBLIC 93 (Sept. 2, 1936); Beard to Nicholas Kelley, Aug. 8, 1936, Mary Dewson MSS, Box 6.

<sup>138</sup> Washington Herald, Mar. 14, 1937, clipping, Frank Murphy Collection, University of Michigan Law School.

jurisdiction, but they were troubled by the recognition that the Court would still have original jurisdiction, especially in cases involving conflicts among states, and that the lower courts would retain their powers. By the end of the nine days, both men were leaning toward court-packing as the only feasible solution, but they were not yet committed to it, nor had they decided on the form it should take.<sup>139</sup>

Just before departing for South America, Roosevelt met once more with Cummings in the President's office. This time the President told an elated Cummings that he had made his decision; he would present a Court bill to Congress as soon as one was ready. Cummings gave him two stout volumes of proposed amendments and bills to take aboard ship to study, and they agreed that if any new ideas were developed they would be dispatched to the President at his ports of call. Roosevelt also took with him two lengthy memorandums from Donald Richberg, which stated that he "should not simply *defend* reasonable exercises of legislative power, but should aggressively *attack* the unconstitutional exercise of judicial power." On November 18, the President set sail for southern waters, after charging Cummings to have a plan ready for him on his return.<sup>140</sup>

## VI. McREYNOLDS' PETARD

During the four weeks the President was touring South America, Cummings and his aides worked prodigiously at canvassing the possibilities for judicial reform. But when Roosevelt returned on December 15, they still had not found a solution. The main result of their labors was an exhaustive 65-page report which W. W. Gardner submitted to Reed, and the Solicitor General forwarded to Cummings. ("This matter has been handled confidentially," Reed assured him, "and I have my copy of the memorandum under lock.") Scholarly, shrewd, carefully written, the report was more valuable for warning of the pitfalls in various proposals than in pointing out what should be done.<sup>141</sup>

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<sup>139</sup> ALSOP 28-30; N.Y. Times, Feb. 12, 1937; Washington Post, Feb. 13, 1937; Richberg to Clapper, Feb. 26, 1937, Richberg MSS, Box 2.

<sup>140</sup> ALSOP 30-31; Richberg to FDR, Nov. 16, 1936, FDRL PPF 2418.

<sup>141</sup> Raymond Clapper MS Diary, Feb. 8, 1937; Reed, Memorandum for the Attorney General from the Solicitor General, Dec. 19, 1936, NA Dept. of Justice 235773.

Meanwhile, a much more fruitful exchange was being carried on between Cummings and Professor Corwin. The author of numerous articles and books excoriating the infringement by the Court on the prerogatives of other branches of government, Corwin had developed a close relationship with the Justice Department. Like other constitutional authorities, he had oscillated between different answers to the conflict between the President and the Court—from believing the Court should correct its own errors to favoring amendments, especially one to require more than a simple majority to invalidate laws.<sup>142</sup> His thinking may have been turned in a new direction by a letter he received early in September from Charles E. Clark, dean of the Yale Law School: “I do think that the possibility of increasing the size of the Court ought to be more considered in Congress than apparently it has.”<sup>143</sup>

After the election, Corwin wrote a series of newspaper articles on the Court question. On December 3, Cummings wrote the President, who was still in South America:<sup>144</sup>

Professor Corwin, of Princeton, has prepared a series of articles dealing with some of our Constitutional difficulties. These articles will shortly be published in the Philadelphia Record. They are especially pertinent to the last discussion I had with you on this subject. I have just received from Doctor Corwin the proof sheets of the articles, which I enclose herewith. I am very sure that you will find them well worth reading.

Corwin's series was a curious performance. With corrosive wit, he derided the record of the Court during the New Deal. In exposing the inadequacies of the panaceas that had been offered, he wrote brilliantly. But his own remedies were murky and even contradictory. After showing with devastating clarity why the Administration should not resort to amendments, he stated that some amendments might be needed. He called for the Court to reform itself, yet conceded that this particular Court could not be expected to do so. But one sentence in the final article emerged boldly: “No reform could be better adopted than the requirement, to be laid

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<sup>142</sup> Corwin had helped prepare the Government's brief in the *Carter* case. CORWIN, *THE COMMERCE POWER VS. STATES RIGHTS* 263–67 (1936); Corwin to Lucy R. Mason, Sept. 24, 1936, Mary Dewson MSS, Box 6; John Dickinson to Corwin, June 15, 1936.

<sup>143</sup> Clark to Corwin, Sept. 3, 1936, Corwin MSS, Princeton University Library.

<sup>144</sup> Cummings to FDR, Dec. 3, 1936, FDRL OF 41-A, Box 116; Cummings to Corwin, Dec. 3, 1936, Corwin MSS.

down by an act of Congress, or, if necessary, by constitutional amendment, that no Judge may hold office under the United States beyond his seventieth birthday."<sup>145</sup>

In the series, Corwin appeared to be trimming some of his beliefs in order to avoid exciting unnecessary quarrels. In particular, his deference to the amendment approach seemed less than heartfelt. On December 16, he wrote Cummings:<sup>146</sup>

It is probably utopian to hope that the Court will supply the needed remedy for a situation which it has itself created. Hence we must turn either to constitutional amendment or Congressional action.

As to the latter, I did not care to go on record as favoring a *tour de force*; yet it is essential to face the fact that Congressional action may be necessary.

Nor, he added, had his articles exhausted the possibilities of action. Corwin continued:

A friend of mine has made this ingenious suggestion: that the President be authorized, whenever a majority of the Justices, or half of the Justices, are seventy or more years old, to nominate enough new Justices of less than that age to make a majority. This, too, would require only an act of Congress, and something of a legislative precedent for such a measure is furnished by § 375 of title 28, of the U.S. Code.

Mr. Reed appears to think that I put too much emphasis on my age-limit proposal, but I'm not so sure. A 70-year age-limit would secure more rapid replacement of justices. Furthermore, it might serve to draw the attention of the appointing power more frequently to the faculties of our great Law-schools where superior talent emerges at an earlier age than in practice at the Bar.

<sup>145</sup> The proofs are in FDRL OF 41-A, Box 116. Clark argued that Corwin had underestimated the possibilities of the amendment process. Clark to Corwin, Dec. 11, 1936, and Corwin's reply, Dec. 16, 1936. See, too, Clark to Corwin, Aug. 18, 1936, Corwin MSS.

<sup>146</sup> The penciled draft of this letter in the Corwin Papers is undated. The letter could have been sent at any time between December 4 and 16, but December 16 seems highly probable. That same day, Corwin wrote Reed: "I was glad to get your comments on those articles—I believe that my age limit proposal, if adopted, may have considerable effect. It might not get more liberal judges, but it would assure a more rapid replacement of the Bench. Today Jefferson's complaint is well justified: 'Few die and none resign.'—indeed the statement might be made stronger. . . . I believe it could be validly accomplished by an act of Congress." Corwin to Reed, Dec. 16, 1936, NA Dept. of Justice 235868. Reed appears to have been unenthusiastic about the plan both at this point and when it finally emerged.

Since Corwin had pointed out in his series the folly of enlarging the Court, this suggestion marked an important new departure. For the first time, compulsory retirement at 70 was linked to the appointment of new Justices. On the very next day, Cummings replied to Corwin:<sup>147</sup>

Of course, I realize that there is a good deal of prejudice against "packing the Court." I have been wondering to what extent we have been frightened by the phrase.

Quite apart from immediate consideration, and as a mere matter of general policy, I have often thought that much was to be said for a constitutional amendment requiring retirements when the age of 70 is reached. I am wondering if there would be much opposition to such an amendment if it were so framed as not to affect the present judiciary by making it apply to future appointments only.

Corwin's contribution reached Cummings at a propitious moment. Both the Attorney General and the President had been attracted to "court-packing" for some weeks, but they recognized that the proposition violated taboos and that some principle would have to be found to justify it. Corwin offered such a formula by relating new appointments to the ages of Justices. If Corwin's suggestion (or that of Corwin's "friend") was adopted, Cummings could exploit growing popular resentment at the age of the bench.

By now, it had become commonplace to refer to the Justices as the "nine old men." A. A. Berle had used the term in *passing* in 1933,<sup>148</sup> and a column in a Kentucky newspaper reflected a popular notion when it referred to the Court as "nine old back-number owls (appointed by by-gone Presidents) who sit on the leafless, fruitless limb of an old dead tree." But it was the publication on October 26, 1936 of *The Nine Old Men* by Drew Pearson and Robert S. Allen which made the phrase a household word. The book quickly climbed onto the best-seller lists, and it was serialized in newspapers across the country. Even critics of the Justices were disturbed by the book's tone and by its inaccuracies, but this exposé helped concentrate popular attention on both the age and the viewpoint of the Court as a more sober account might not have done. Representative Thomas Amlie of Wisconsin, while regretting the book's innuendos, thought "that Pearson and Allen have done a particu-

<sup>147</sup> Cummings to Corwin, Dec. 17, 1936, Corwin MSS.

<sup>148</sup> Berle, *Law and the Social Revolution*, 22 SURVEY GRAPHIC 594 (Dec., 1933).

larly good job on the Constitutional law angle," and Senator Joseph Guffey of Pennsylvania called for a Senate investigation of the allegations made in the book. Guffey called the volume "the most disturbing—I would say shocking book on public officials I have ever read. Its purported disclosures are sensational."<sup>149</sup>

After receiving Corwin's letter, Cummings was close to the end of the trail. Yet Corwin still had not shown him the precise route the Attorney General was seeking, and Cummings' reply suggests that he was still thinking that an amendment might be required, and that the present Justices might be exempted. However, once Corwin had blazed the path this far, it did not take Cummings long to discover the rest of the way.

At some point in the next five days, Cummings found his answer. While carrying on his other duties, the Attorney General had also been writing a history of his department, in collaboration with his aide, Carl McFarland. One passage in *Federal Justice*, which was about to be published, now stood out from the pages as it had not before, a recommendation that Justice McReynolds, when serving as Wilson's Attorney General, had made in 1913.

McReynolds' recommendation stated:<sup>150</sup>

Judges of the United States Courts, at the age of 70, after having served 10 years, may retire upon full pay. In the past, many judges have availed themselves of this privilege. Some, however, have remained upon the bench long beyond the time that they are able to adequately discharge their duties, and in consequence the administration of justice has suffered. . . . I suggest an act providing that when any judge of a Federal court below the Supreme Court fails to avail himself of the privilege of retiring now granted by law, that the President be required, with the advice and consent of the Senate, to appoint another judge, who would preside over the affairs of the court and have precedence over the older one. This will insure at all times the presence of a judge sufficiently active to discharge promptly and adequately the duties of the court.

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<sup>149</sup> Charles N. Crewdson to Louis Howe, Jan. 7, 1936, FDRL OF 41-A, Box 116; Thomas Reed Powell to William O. Douglas, n.d., Douglas MSS, LC, Box 20; Herbert Hoover to Charles Evans Hughes, Feb. 19, 1937, Hughes MSS, Box 6; James A. Stone to William T. Evjue, Mar. 17, 1937, Stone MSS, Minnesota Historical Society, Box 28; Thomas R. Amlie to Donald A. Butchart, Mar. 6, 1937, Amlie MSS, Box 36; N.Y. Times, Jan. 27, 1937.

<sup>150</sup> REPORT OF THE ATTORNEY GENERAL FOR THE FISCAL YEAR ENDING JUNE 30, 1913 5, CUMMINGS & MCFARLAND, *FEDERAL JUSTICE* (1937).

Cummings now reasoned that McReynolds' prescription, which had been limited to the lower courts, might also be applied to the Supreme Court. Once the principle of retirement was adopted, any age might be stipulated, but 70 seemed especially compelling. It had been the age that, on different occasions, McReynolds, Cummings, and Corwin had all hit upon, and it had the not inconsiderable advantage of having biblical sanction. That summer, an Oklahoma newspaper had proposed to retire Supreme Court Justices at seventy, "as set out in Holy Writ as the reasonable span of human life."<sup>151</sup> With the retirement age fixed at 70, Roosevelt would be able to name six new Justices, thus practically assuring a bench that would approve New Deal legislation.

Before presenting the plan to Roosevelt, Cummings directed his assistants in the Justice Department to prepare a series of reports. He deliberately parceled out work so that the scheme would be kept a secret even from his own aides. Except for Cummings and Reed, no one in the department save for Holtzoff and McFarland appears to have known the full scope of the proposal until it was announced. When his assistants reported back to Cummings, each gave a favorable reply. One report approved the plan's constitutionality. Another turned up historical precedent in an 1869 bill that had passed the House of Representatives. A third pulled together statistics to show that the formula would also supply enough new judges for the lower courts.<sup>152</sup>

Cummings' search had ended. On December 22, he sent a penciled note to the President: "I am 'bursting' with ideas anent our constitutional problems; and have a plan (of substance & approach) I would like to talk over with you when you have the time."<sup>153</sup> By this point, Roosevelt was already determined to "pack" the Court, but he did not yet know how, and he still thought of the idea as a birch rod to be taken out of the closet only if the Court did not mend its ways in the new Term.

He now summoned George Creel to the White House once more to prepare an article, this one to be called "Roosevelt's Plans and Purposes." During the afternoon and evening they worked to-

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<sup>151</sup> *The Federal Constitution*, Shawnee (Okla.) County Democrat, Aug. 7, 1936, clipping, FDRL OF 274, Box 4.

<sup>152</sup> *ALSO* 34; Raymond Clapper MS Diary, June 12, 1938.

<sup>153</sup> Cummings to FDR, Dec. 22, 1936, FDRL PSF Supreme Court.



gether, Creel was struck by the fact that the President, understandably, viewed the election as a purely personal victory. He told Creel that the social objectives he cherished would all have to run the gantlet of the Supreme Court. But his face brightened as he said: "I've thought of a better way than a constitutional amendment stripping the Court of its power to nullify acts of Congress. The time element makes that method useless. Granted that Congress could agree on such an amendment for submission to the several states, it would be two, three, or four years before the legislatures could or would act. What do you think of this?"<sup>154</sup> From a drawer in his desk, he extracted a heavily marked copy of the Constitution and riffled the pages as he read off passages and commented on the powers of Congress to act for the general welfare.

After reading Article III, § 1, he asked: "Where is there anything in that which gives the Supreme Court the right to override the legislative branch?" As the President talked, Creel wrote afterward, "I was amazed by his reading on the subject and by the grip of his mind on what he conceived to be essential facts. For example, he quoted at length from Madison's *Journal* and Elliot's *Debates*, citing them as his authority for the statement that the framers of the Constitution had voted on four separate occasions against giving judges the power to pass upon the constitutionality of acts of Congress."<sup>155</sup>

If Congress was to reclaim the powers that had been usurped from it, Roosevelt reasoned, it should add a rider to each bill at the next session charging the Supreme Court to remember that the Constitution vested all legislative power in Congress and authorized it to provide for the general welfare. Suppose this proved ineffective? Creel related: "'Then,' said the President, his face like a fist, 'Congress can *enlarge* the Supreme Court, increasing the number of justices so as to permit the appointment of men in tune with the spirit of the age.'" When *Collier's* published this article on December 26, with three columns discussing the Supreme Court, Creel expected an explosion in Congress and the press. Yet, once again, the President's explicit words were ignored.<sup>156</sup>

On the same day that Creel's article appeared, Cummings went

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<sup>154</sup> CREEL, *op. cit. supra* note 65, at 292-94; Richberg to FDR, Nov. 16, 1936, FDRL PPF 2418.

<sup>155</sup> CREEL, *op. cit. supra* note 65, at 293-94.

<sup>156</sup> *Ibid.*

to the White House to report to Roosevelt. According to one account, not altogether probable, the Attorney General handed the President a packet of plans with the new scheme on the bottom. He then watched agitatedly while Roosevelt turned over each in turn until he came to Cummings' favorite; to the Attorney General's immense pleasure, Roosevelt was delighted. However it happened, it is clear that the President gave his approval that day. He was gratified that the proposal was unquestionably constitutional, and he took a mischievous pleasure in the fact that it could be attributed to McReynolds.<sup>157</sup>

Buoyed by the President's approval, Cummings now turned his hand to sketching the remaining details of the plan. He wanted not only to liberalize the Court but to reform the entire judiciary. By presenting "court-packing" in the guise of judicial reform, he would make the plan more palatable. Yet Cummings' interest in reform was not just expedient. He had long cherished the aim of overhauling the structure of the courts, and Roosevelt shared some of his ardor. Once they launched what they knew would be a historic fight, they wanted it to be remembered for improving the judicial system as well as for overcoming the intransigence of the Supreme Court.

For two years, William Denman, Judge of the Ninth Circuit Court of Appeals, had been bombarding Roosevelt with pleas for more lower-court judges in order to relieve congestion in the courts and prevent miscarriages of justice. Denman also argued that the lower-court system was illogically organized, and, he proposed, among other suggestions, the appointment of a proctor of the Supreme Court to supervise lower courts and the creation of "roving judges" to clear up congestion. The Judicial Conference had also, more than once, pointed out the need for additional district judges. Cummings now decided to tie all these ideas together into a single package, but to relate the call for more lower-court judges to the principle of age.<sup>158</sup>

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<sup>157</sup> ALSOP 34-35; Raymond Clapper MS Diary, June 12, 1938. Rexford Tugwell has written: "Of all the ways open to him Franklin does seem to have chosen the one most upsetting to judicial dignity." TUGWELL, *op. cit. supra* note 55, at 392.

<sup>158</sup> Raymond Clapper MS Diary, Feb. 8, 1937; Denman to Cummings, Mar. 19, 1936; Denman to FDR, Mar. 20, 1936, FDRL OF 209-I; Memorandum for the Attorney General, Apr. 29, 1936; Denman to M. H. McIntyre, Mar. 17, 1936, FDRL PPF 336; Denman to FDR, Sept. 5, 1936, FDRL OF 41, Box 114; Charles Evans Hughes

By the end of the year, the Justice Department had prepared the first draft of the bill. In all, it went through twelve full drafts and numerous minor revisions. The measure embraced four proposals: (1) that when a judge of a federal court who had served ten years did not resign or retire within six months after his seventieth birthday, the President might name another judge as co-adjutor; (2) that the Supreme Court should not have more than six added Justices, nor any lower-court bench more than two, nor the total federal judiciary more than fifty; (3) that lower-court judges might be assigned to exceptionally busy courts; and (4) that the lower courts should be supervised by the Supreme Court through a proctor.<sup>159</sup>

Roosevelt and Cummings decided it would be helpful to accompany the bill with both a message from the President and a letter from the Attorney General. Instead of concentrating on the desirability of a more liberal court, both documents would stress the incapacity of aged judges and the need for additional appointments to get the Court abreast of its work. By emphasizing the theme of greater efficiency, they hoped the whole plan would be accepted as a project for judicial reform rather than a stratagem to pack the Court. Once again, Cummings parceled out assignments within the department so that men were called on to supply statistics on denial of certiorari or the ages of judges without ever being told why this information was wanted or being given enough to do to be able to piece together what was happening.

When all three documents were taken to the White House, the President offered little comment on the bill, but he gave the letter, to which Holtzoff had made important contributions, a thorough going-over, and Cummings had to revise it before Roosevelt would give his approval. Even more care was lavished on the President's message, which Roosevelt recognized would be an important state paper. In the third week in January, Donald Richberg was called in to polish the draft, and on the night of January 30, when Judge Rosenman arrived at the White House for the President's birthday party, he was asked to contribute his talents. It was the first he had

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to FDR, May 30, 1934, FDRL OF 41-A; Mallon, *Purely Confidential*, Detroit News, Apr. 2, 1937; ALSOP 31-35.

<sup>159</sup> By January 5, the bill had reached a fifth draft. "Draft No. 5, January 5, 1937," FDRL PSF Supreme Court.

heard of the plan, even though he had helped write both the State-of-the-Union message and the Inaugural Address that month. When Rosenman told Corcoran, who had also been kept in the dark, what was happening, the President agreed that Corcoran, too, should be asked to go over the final draft of the message. But he instructed Rosenman not to let Cummings know that Corcoran was involved.<sup>160</sup>

The President's insistence on secrecy combined fear of premature disclosure that might promote bickering with his love of the dramatic. Save for Cummings, no one in the cabinet, not even the ubiquitous Ickes, knew of the plan. Indeed, Roosevelt, at one cabinet meeting in January, deliberately misrepresented what was going on. Nor was any member of Congress told. Some of the men who would soon bear the burden of defending it were busy drafting quite different proposals, and Henry Fountain Ashurst, who would shortly be called on to move the President's proposal through the Senate Judiciary Committee, was publicly denouncing court-packing as "the prelude to tyranny."<sup>161</sup>

Through all of this, the President gave almost no indication of the surprise he was about to spring. As Moley later wrote: "Roosevelt's pronouncements in the course of his good-will trip to South America would not have frightened the birds of St. Francis."<sup>162</sup> Despite some shafts aimed at the Supreme Court, Roosevelt's State-of-the-Union message was praised for its good-tempered restraint, and he made no mention at all of the Court in his Inaugural Address. Informed observers predicted that the President would wait to see

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<sup>160</sup> ALSOP 43-47; RICHBERG, *op. cit. supra* note 119, at 221-22; Raymond Clapper MS Diary, Jan. 14, 1938; ROSENMAN, *op. cit. supra* note 119, at 145-50. Two drafts of the message have been retained in the Samuel I. Rosenman MSS, FDRL, "Message to Congress on the Judiciary" folder.

<sup>161</sup> Washington Post, Feb. 13, 1937; 2 ICKES 31; Henry Morgenthau, Jr., MS Diary, FDRL, Feb. 6, 1937; Raymond Clapper MS Diary, Feb. 5, 1937; Edward Rees to William Allen White, n.d., White MSS, Box 186; CONG. REC., 75th Cong., 1st Sess., 562. After the plan was announced, Clapper reported on an interview with the President's press secretary, Stephen Early: "Steve says that only five people were told of plan by President. He said president wouldn't want him to reveal names but he thought I knew them. Said none was in Congress. . . . Steve said reason Rvt didn't talk it over with more people was that he was afraid of a leak which would tip off opposition and enable them to start hostile build up before he got his plan out." Clapper MS Diary, Feb. 8, 1937.

<sup>162</sup> MOLEY 356.

how the Court disposed of the Wagner cases before taking any action. On January 24, Dean Dinwoodey, editor of *United States Law Week*, wrote that "last week it was made plain that he does not at the present time have in mind any legislation directed at the Court."<sup>163</sup>

## VII. ROOSEVELT ENTERTAINS THE COURT

By the beginning of February, the bill, the letter, and the message had all been drafted, except for a few final details. All that remained was to decide when to launch the plan. It is conceivable that Roosevelt might have waited until the Wagner cases had been decided, although this seems unlikely, but if he had any such intention, he felt compelled to abandon it. The situation in Congress, where more and more members were committing themselves publicly to divergent proposals, was getting out of hand. Outside the government, progressives had called a national conference to reach agreement on an amendment. Most important, word of Roosevelt's own plan had begun to leak out, and speculation about what the President intended was getting closer and closer to the mark.<sup>164</sup>

Not everyone had thought that Roosevelt's State-of-the-Union address signaled inaction. Breckinridge Long noted in his diary:<sup>165</sup>

After I heard the speech I went home and read the printed speech twice. It is rather mysterious in that it is enshrouded somewhat in mystery in that he makes no intimation of his specific plan, but it is very plain that he has something definitely in mind. I say it is very plain, but I mean that it is very plain to those who read with a discriminating eye the words of his message and use as a background his whole history in connection with the Supreme Court.

The conservative Republican congressman from Minnesota, Harold Knutson, also found the address unsettling. He wrote: "I rather

<sup>163</sup> 29 TIME 13-14 (Jan. 18, 1937); N.Y. Times, Jan. 5, 7, 10, 24, 1937.

<sup>164</sup> Mallon, *Purely Confidential*, Detroit News, Feb. 13, 1937; Mary Dewson to Stanley Reed, Dec. 10, 1936; Dewson to Mrs. Armstrong, n.d.; Elmer F. Andrews to Members of the New York State Minimum Wage Conference, Jan. 26, 1937; Mrs. J. C. Pryer to Mary Dewson, Jan. 11, 1937, Dewson MSS; Alfred M. Bingham to Thomas R. Amlie, Jan. 5, 1937, Amlie MSS, Box 35. Subsequently, Clapper summed up what Cummings had told him: "Didn't know until last minute whether Rvt would go through with it or not." Clapper MS Diary, Feb. 8, 1937.

<sup>165</sup> Breckinridge Long MS Diary, Jan. 6, 1937.

thought the President's message contained one or two disquieting features and the question that is bothering me is, will he attempt to 'pack' the Supreme Court. There is no limit on the number of judges that may be appointed to the Supreme Court and by adding two or three he could easily secure control of the judiciary. Will he go that far?"<sup>166</sup>

In divining the President's intentions, Long had an advantage. On the same day that Roosevelt gave his address, Long had lunched with Cummings. Afterward, he set down in his diary:<sup>167</sup>

Homer has devised a means and has a specific draft to carry out the provisions intimated. It contemplates a large treatment for the whole judicial system and is not confined to the Supreme Court alone. He thinks the President has the matter definitely in mind. Procedure along that line would permit the drafting of a bill to disqualify members of the judiciary over the age of 70 years, if they have not retired voluntarily within six months after they have passed that age, and the appointment of a successor. More than that, it makes various changes in the structure of the judiciary and mobilizes the framework of the system. Whether anything will come of it is to be determined only in the future, but in the light of the President's Annual Message to the Congress it seems to my mind clearly that he has some definite proposal in mind, and after my conversation today I am of the opinion that it is this proposal.

Roosevelt's speech-writers were no more discreet than his Attorney General. Over cocktails on January 20, Donald Richberg let slip what was going on. Ray Clapper noted in his diary:<sup>168</sup>

Richberg says Rvt has a number of bombshells ready to shoot which will astound country—says Rvt is in audacious mood and is even thinking of proposing to pack Supreme Court by enlarging it. R seems favor instead compulsory retirement. He says Rvt is determined to curb the court and put it in its place, and will go ahead even if many people think it unwise.

Before the month was out, the Senate began to sense what was happening. On January 24, Irving Brant, who as editor of the editorial page of the St. Louis *Star-Times* had often written on constitutional subjects, wrote the President: "Several senators have

<sup>166</sup> Knutson to Elmer E. Adams, Jan. 11, 1937, Adams MSS, Minnesota Historical Society, Box 42. See, too, Ray Lyman Wilbur to Dr. Arthur H. Daniels, Jan. 8, 1937, Wilbur MSS, Stanford University Library.

<sup>167</sup> Breckinridge Long MS Diary, Jan. 6, 1937.

<sup>168</sup> Raymond Clapper MS Diary, Jan. 20, 1937.

told me that you expect to make a statement about the Supreme Court within a few days."<sup>169</sup> On February 2, in a speech that seemed to imply more than it said, Senator William Borah of Idaho deprecated the "purloining" of state powers by the federal government and lauded the Supreme Court as the shield of individual liberties.<sup>170</sup> Alert Washington columnists knew that something was in the wind, but they had not yet discovered what it was. "Strange things are being said in Congress," Paul Mallon noted in his column of February 4. First there had been a speech by Ashurst, then one by Congressman Samuel Pettengill, now Borah. But what were they aiming at? Borah, he pointed out, "left the definite impression he was attacking something Mr. Roosevelt was going to propose, but he did not say what."<sup>171</sup>

Roosevelt could wait no longer. Since the Court was scheduled to begin hearings on the constitutionality of the Wagner Act on Monday, February 8, he wanted to submit the message before then so that it would not be interpreted as a threat to the Court. On February 2, he was scheduled to entertain the judiciary at dinner at the White House; so he could not very well present the plan before then.<sup>172</sup> Richberg later recalled that the President had said impishly that "his choice should be whether to take only one cocktail before dinner and have it a very amiable affair, or to have a mimeographed copy of the program laid beside the plate of each justice and then take three cocktails to fortify himself against their reactions."<sup>173</sup> The President was thus limited to the interval between February 3 and February 6. On February 3, the Senate recessed until February 5; so Friday, February 5, became the day the President chose to act.

The real ending of the odyssey of the search for the Court plan came not on February 5 but three days earlier when the guests assembled in the East Room of the White House for the judiciary dinner. It was a gala evening. Among the ninety guests were most of the Supreme Court Justices, Mrs. Woodrow Wilson, Senator Borah, and the Gene Tunneys. In the room sat men like Reed, whom the Justices did not suspect might soon be their colleague,

<sup>169</sup> Brant to FDR, Jan. 24, 1937, FDRL PPF 2293; *Washington Post*, Feb. 13, 1937.

<sup>170</sup> *N.Y. Times*, Feb. 2, 1937; *Detroit News*, Feb. 2, 1937.

<sup>171</sup> Mallon, *Purely Confidential*, *Detroit News*, Feb. 4, 1937.

<sup>172</sup> *Washington Post*, Feb. 13, 1937; Raymond Clapper MS Diary, Feb. 8, 1937.

<sup>173</sup> RICHBERG, *op. cit. supra* note 119, at 222.



and Cummings, who was told by Rosenman that he had the lean and hungry look proper to a conspirator.<sup>174</sup> Two of those present, Senator Ashurst and Representative Hatton Sumners, chairmen of the Senate and House Judiciary Committees, would in three more days be handed a bill to curb the power of the honored guests of the evening. As the guests filed out of the dining room, Roosevelt, in high spirits, remained seated talking to Justices Hughes and Van Devanter. Borah, seeing them together, remarked: "That reminds me of the Roman Emperor who looked around his dinner table and began to laugh when he thought how many of those heads would be rolling on the morrow."<sup>175</sup>

### VIII. THE REALITY AND THE MYTH

To put together the complete puzzle of the origins of the Court plan, one still needs a few pieces. The opening of the Homer Cummings papers, now privately held, and of the Stanley Reed memoir in the Columbia Oral History Collection, now closed, should be instructive. But most of the pieces are now available. It is clear that many of the men alleged to have been authors of the plan either knew nothing of it or played quite minor roles. The main operation, from beginning to end, involved a very few men, all of them concentrated in the Justice Department. Of those who exerted influence from outside the department, Corwin, a department consultant, was more important than such putative architects as Corcoran.

Of the plan itself, few have found much good to say. Much of this criticism is surely justified. Yet the presentation of the plan was not a capricious act but the result of a long period of gestation. During this time, other alternatives were carefully examined, favored for a while, and then discarded on not unreasonable grounds. Throughout this same period, Roosevelt was called on repeatedly to take action, and it appeared, in particular, that he would have a sizable following for a recommendation which would justify the appointment of additional Justices by stressing the infirmity of the Hughes Court. That Roosevelt misjudged the state of opinion seems probable in retrospect, but, at the time, the plan seemed to have an inherent logic and even inevitability.

<sup>174</sup> ROSENMAN, *op. cit. supra* note 119, at 153-54.

<sup>175</sup> RICHBERG, *op. cit. supra* note 119, at 222; 29 *TIME* 15 (Feb. 15, 1937); *id.* at 13 (Mar. 1, 1937).