

March 9, 1937

[Firestone Chat - Supreme Court Reorganization]

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FDR Speech File

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March 1, 1937. *for him*

Hon. Harry Hopkins,
Administrator,
Works Progress Administration,
Washington, D. C.

Dear Harry:

Enclosed you will find a very crude draft of material that might possibly be suggested. I have endeavored for the most part not to repeat matter which is already contained in speeches delivered by you and numerous other persons.

I think it particularly important that the President should spell out the meaning of the word "unconstitutional" and should point up the fact that according to the dissenting Justices, a majority of the Court has been acting unconstitutionally.

I am hurrying to get this off tonight. Tomorrow I shall try to send you some more material.

I shall be in Washington Wednesday morning and will phone you promptly. I want very much to be helpful in any possible way. I suggest - not from any desire to make myself prominent but merely in the notion that I could be more helpful - that perhaps I could sit in on some of the pow-wows relating to the March 9th address.

Yours sincerely,

Jerome

JEF:RG

Encs.



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Jerome Frank

*See "A" enclosed 4/3-4
See "B" enclosed*

"A"

There are the following obvious propositions:

(1) The following legislation enacted by a democratically elected Congress, was needed and designed to meet grave national economic problems:

(Here insert list of statutes held unconstitutional)



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question of the
(2) The desirability of that legislation was fought

out during the last election campaign, being one of the principal issues of that campaign. That the great majority of the American people are in favor of that legislation is now a matter of record, (To use lawyers' language, that issue was made res adjudicata, at the polls, last November). For in the last speech of the last campaign, I specifically listed as my objectives, if elected, every single one of those statutes. I said specifically that for those objectives and for others like them we had only just begun to fight. I said that our vision for the future contained more than promises. I meant what I said and of course the American people when they elected me and the present Congress, said that they wanted me to carry out those objectives and not to leave them mere promises. *that the people wanted*
That meant the enactment and enforcement of legislation embodying those objectives. It meant that so far as that legislation could be enacted and enforced within the constitutional powers of Congress, you wanted those laws enacted and enforced.

(3) That legislation is not forbidden by the provisions of the Constitution, according to three learned Justices of the Supreme Court, speaking principally through Mr. Justice Stone, former



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Attorney General of President Coolidge. In asserting in recent years that the Constitution forbids the enactment of such statutes, the majority of the Court, according to Mr. Justice Stone, was violating the Constitution and attempting to sit as a super-legislature concerned not with whether such laws were legal, but unconstitutionally concerned with whether those laws were desirable.

[See attached page entitled "What Mr. Justice Stone has Charged"]

It is immensely important that you should understand what is meant by the statement that a law enacted by Congress is "un-constitutional." That means that Congress had no right to enact such a law. It does not mean that such a law is unwise or offensive to someone's notions of what is good for the Country. Whether a law is wise or socially desirable has nothing to do with the question whether the law is constitutional. A very desirable statute might be expressly forbidden by the Constitution and Congress therefore would not have the power to enact it. On the other hand, many a statute which many people would consider most undesirable, Congress could without question lawfully enact.

Now when a court says that a statute is unconstitutional, it is supposed to mean, by what it says, merely that there is something in the Constitution which makes it unlawful for Congress to



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pass such a law. The courts have no constitutional or other right to condemn a statute simply because they believe it to be undesirable. They have a very restricted power - the power to say that such a law is not lawfully permitted by the Constitution. If a court, when stating that a statute is beyond the constitutional power of Congress, in fact reaches that conclusion merely because the court thinks that such a law ought not to have been passed, then the court is acting unconstitutionally - because the court has no right or power to give a decision on that basis. The court is then usurping the functions of Congress.

Now in the last few years we have witnessed an amazing spectacle. Five out of the nine Justices, or sometimes six out of the nine Justices, have again and again held that a statute, needed and demanded by the bulk of our people and enacted by Congress, is unconstitutional. At the same time three or four of the Justices have joined in opinions stating in effect, that their colleagues, in making such decisions, are actually motivated solely by their belief that those statutes are economically undesirable. The minority - usually through Mr. Justice Stone - has thus, in effect, charged the majority with trying to sit not as a court but as a super-legislature.*

* See the attached memo, "That Mr. Justice Stone has charged."



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One check on Congress to prevent it from acting unconstitutionally is its own conscience. Another is the constitutional power of the Supreme Court to hold that a statute is unconstitutional; that acts as a check upon Congress - to prevent it from acting unconstitutionally beyond its powers. There are also checks on the Supreme Court to prevent it from acting unconstitutionally. One check is the conscience of the members of the Court, their own sense of self-restraint. Mr. Justice Stone has said that the present majority of the Supreme Court has failed to exercise that self-check of self-restraint. He attempted to use the check of his own published criticisms of the majority. But that criticism has proved unavailing.

There is one other check on the Court to prevent it from abusing its powers and acting unconstitutionally. That check is found in the Constitution. For the founding fathers, while providing for the creation of the Supreme Court, left to Congress - a democratically elected body - the determination from time to time, of the number of judges who are to compose the Supreme Court. And, in the Constitution, they also left to the President and the Senate, jointly, the naming of the persons who should sit on the Court. So that the only effective way to prevent the Judges who constitute the Supreme



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Court, at any given time, from acting unconstitutionally, is for Congress to exercise the constitutional power of increasing the number of judges and for the President and the Senate to exercise the constitutional power of naming new judges.

Now it happens with judges, as with most human beings, that as they grow very old their attitude towards life tends to become fixed and hardened. They do not easily adapt themselves to changed circumstances; and they are prone, when very old, stubbornly to insist upon their own views even to the point where, often without being too much aware of that fact, they will actually abuse whatever powers they may have to prevent change. They come to consider themselves as infinitely wise and to look upon the views of other people, if different from their own, as utterly impossible.

That is not true of all very old men. But I ask you to consider whether that is not true on the average of men over 70. Do you not find that in spite of the great changes which came about with the closing of our banks in 1933, most of your acquaintances who are past 70 are still exceedingly reluctant to accept the necessity for adopting new methods to meet our new problems? Some notable exceptions there are to be sure, but they are indeed exceptions. And these old men over 70, whom you know, were most of them sharing with you the difficulties which the depression brought upon us. Think



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how far less likely they would be to accept new views if, like members of the Supreme Court, they were cut off from their fellow citizens, living an easy and secluded life, far from immediate contacts with the tragic circumstances with which the rest of us have had to deal.

Now most of the Justices of the Supreme Court who are over 70, have been so horrified at the suggestion of the use of new methods to meet new problems (the nature of which they did not recognize because they were cut off from them) that it is perhaps but natural that, without complete awareness of what they were doing, they converted their horror at the suggested changes into a belief that those proposed changes were beyond the lawful powers of Congress. They have been acting unconstitutionally because of their inability quickly to focus their attention upon and to comprehend what has been going on in the outside world. Their unimaginative response to the grave needs and demands of the American people, due to their advanced years, has led to decisions which, if adhered to, will render our government impotent to meet the problems of our times.

It is for that reason that it is proposed to exercise the constitutional check of Congress upon the abuse of its constitutional power by the Supreme Court in the least drastic form possible - by using that check with specific reference to the exercise of power by



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those of the Justices who are over 70 years of age. Since it is those elderly Justices who are peculiarly the persons responsible for the present impasse, it is wise to limit the use of the Congressional power (to check the activities of the Court) to neutralizing or removing the effects of the unconstitutional decisions of those very elderly Justices. By thus using constitutional means to keep the Court from unconstitutionally holding illegal laws which are clearly within the constitutional power of Congress, there will be retained or restored the constitutional power of the elected representatives of the people to do what the people want them to do. That is the essence of the democratic process.

It is almost unbelievable that anyone should suggest that such a proposal in any way smacks of dictatorship. That is the first slogan of every dictator who has ever risen. It is of course to strike down that part of the government which is popularly elected to enact laws. Dictators are the enemies of parliament and Congresses. As soon as they come into power they dissolve and get rid of such legislative bodies. My proposal is the exact antithesis of dictatorship. It seeks to restore to the democratically elected Congress the power, unhampered by the negative dictatorship of a few very old men, to carry out the will of the people.



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Some misguided persons have told you that while it is true that I am trying to put this power back where it belongs, in Congress, that is only because I control Congress. Could anything be more absurd? If I have any power over Congress, it is merely the power that I possess because I am asking Congress to do what you have said you want Congress to do. You said so in 1934 and you said it again emphatically in 1936. If you do not like the statutes that Congress enacts, you can plainly say so in 1938, by electing a Congress which will repeal those laws.

Those opposed to my proposal say that they fear for a democracy. I say that they fear democracy. It is not dictatorship that they want to avoid. It is what they call the ["]tyranny of the ["]majority. But that is merely an offensive word. It is the fundamental principle of our institutions that the majority of the people shall determine by what laws it shall be governed - provided those laws are within the provisions of the Constitution properly interpreted. It is not the spirit of our institutions that a few very ancient gentlemen should abuse their powers by holding illegal democratically desired legislation merely because those old gentlemen think those laws are not desirable. To remove the hampering restriction of the prejudices of the very aged, operating under the false guise of



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constitutional power, from the enactment and enforcement of laws which our people imperatively need, is of course not a step in the direction of dictatorship.

Those who oppose my proposal do not have the temerity to call it unconstitutional. If they regret the fact that such a measure is constitutional, then it is their privilege to seek an amendment to the Constitution which will deprive Congress of the power to increase the number of judges. The consequences ^{might} be unfortunate, particularly if the judges have a life tenure of office, as they now have under the Constitution. For then we may often have a repetition of what is now occurring - the hampering of the functions of our government by the ^{excess of} prejudice and unrestrained unconstitutional power by a few old men.



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"B"

That Mr. Justice Stone Has Charged

1. In Lorhead v. Tivaldo, 298 U. S. 587, 631-636 (June 1, 1936), he charged the following

The problem
That a majority of the Court interprets the Constitution

"according to its preference for some particular set of economic beliefs." That it does not leave the selection and the method of the solution of many problems where "the Constitution has left them, to the legislative branch of the government." That it is difficult "to imagine any grounds" for certain decisions of the majority "other than" its "own personal economic predilection." That it has interpreted "the vague and general pronouncement" of the due process clause on the basis of "fine-spun distinctions," and incorrectly as if it were a formula for the exercise of legislative power rather than a limitation on such power. That it has incorrectly construed the Constitution contrary to the principle that "the legislature must be free to choose" methods for meeting many problems "unless government is to be rendered impotent."

2. In Colgate v. Harvey, 295 U. S. 404, 436, 445 (December 16, 1935), Mr. Justice Stone said that, with respect to state legislation, the majority is now attempting to "sit as a super-legislature" and is trying to do so by adopting a construction of the equal protection clause of the Fourteenth Amendment which it had theretofore rejected in 44 decisions, and that that attitude



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will "enlarge judicial control of state action and multiply restrictions upon it to an extent difficult to define, but sufficient to cause serious apprehension for the rightful independence of local governments."

3. In Butler v. United States, 297 U. S. 1, 78-88 (Jan. 6, 1936), he ascribed to the majority "a tortured construction of the Constitution," and plainly intimated that the majority believes "that it is the business of courts to sit in judgment on the wisdom of legislative action." He said that the courts "may falter or be mistaken in the performance of their constitutional duty." And he ascribed to the majority the "assumption that the responsibility for the preservation of our institutions is the exclusive concern of" the court and "that it alone can save them from destruction."

That assumption, he said, is likely "in the long run to obliterate the constituent members of an indestructible union of indestructible states." He also said that "judicial power may be abused," and indicated clearly that the majority was not exercising a proper check or "self-restraint" upon its "own exercise of power," and was unwilling to rely "for the removal of unwise laws from the statute books" upon "the ballot and the processes of democratic government."



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