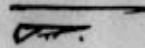


Law School of Harvard University,  
Cambridge, Mass.

-3-

take not merely much time but also an unharassed mind, and also leave you freer for continuing to energize the country with hope and faith and effort. I venture to say that after having had Tom take off your hands a thousand and one chores that you now have to do directly, you will wonder why you have so long been without the necessary help. The truth is that you have inherited a one-horse-shay method of running the country which simply will not do for the needs of a streamlined society.

Faithfully yours,



Hon. Franklin D. Roosevelt

J. A. Bunting of the  
Boston Herald  
feels me - speaking  
confidentially - that  
his news in the  
conforming room  
felt greatly stirred  
by the execution of  
leadership in your  
holding conference  
The way to more of that  
- Kind, he said

## Retreating in Disorder

If there were any doubts of the confusion, not to say panic, in which the Administration leaders are functioning, the poultry case announcement should resolve them. Not even the smoke-screen of misinformation sent up by Mr. Richberg could conceal the muddled rout in which N. R. A. is disappearing over the hill.

For the decision of the United States Circuit Court of Appeals in this case was exactly the reverse, in its most essential points, of what Mr. Richberg took it to be. So far from "sustaining the constitutionality of the N. R. A. right across the board," as he asserted, it tossed it out the window so far as its two most vital subjects are concerned—wages and hours of labor.

Moreover, it did so in an opinion of great force written by one of the ablest judges sitting on the United States bench, Judge Learned Hand. We present the main portions of his opinion elsewhere upon this page.

Perhaps the misunderstanding of the decision in Washington came from the fact that most of the counts in the indictment were upheld in a decision written by Presiding Judge Manton. These counts charged the defendants with violating N. R. A. code regulations directly affecting the health of the community. One, for example, prohibited the sale of poultry unfit for human consumption, another the sale of poultry not inspected and approved under New York City ordinances. As to these counts, all three of the sitting judges concurred in Judge Manton's opinion. Here was plainly a case in which the Supreme Court might well uphold N. R. A., the inspection and safeguarding of food shipped into a state being about as closely related to interstate commerce as anything not actually in transit well could be.

But two counts accusing the defendants of paying less than the code minimum wage of 50 cents an hour and working employees longer than the code maximum of a forty-eight-hour work week were quite another matter. These two vital parts of N. R. A. Judge Manton was alone in voting to sustain. The separate opinion of Judge Hand, concurred in by Judge Chase, is really the majority opinion of the court. Nor do we see how its logic can be set aside. In the Weirton case at Wilmington, where the question was of collective bargaining under 7-A, Judge Nields held that whole labor section unconstitutional as applied to a company manufacturing steel, even though the steel was ultimately to be shipped out of the state. So here, though the poultry had arrived from another state, work thereafter upon it was held to be the domestic concern of this state. As such Congress had no authority to regulate it under the interstate commerce clause.

Judge Hand puts, with his customary clarity, the issue presently to be decided at Washington, not by Mr. Richberg, not by the Attorney General, not by Congress, not by the President, but by the Supreme Court. That is whether we are to have "any Federal system at all." The New Dealers apparently know nothing and care less for this "basic framework" of the American system. Fortunately for the country, the courts still stand.

## The Poultry Cases

### Extracts From Majority Opinion of Judge Learned Hand

[This opinion of the United States Circuit Court of Appeals for the New York circuit was delivered in the case of *U. S. vs. Schechter Poultry Corp. et al.*]

I am one of the majority who thinks that counts 48 and 55 should be reversed, and the question at stake has enough importance to justify a statement of my reasons. It is always a serious thing to declare any act of Congress unconstitutional, and especially in a case where it is a part of a comprehensive plan for the rehabilitation of the nation as a whole. With the wisdom of that plan we have nothing whatever to do; and were only the Fifth Amendment involved I should be prepared to read the powers of Congress in the broadest possible way. Moreover, the phrase "fair competition" seems to me a definite enough cue or ground plan for the elaboration of a code. Assuming that the preamble of the whole statute will not serve alone, practices generally deemed unfair in any trade may, I think, be made the

medium which transmits all tremors throughout its territory; the only question is of their size. In the case at bar such activities as inspecting the fowls after they have arrived, licensing dealers and requiring reports, are directed, at least in part, to the control of their importation, and it is not necessary that they should impinge directly upon the importation itself. . . .

But the regulation of the hours and wages of all local employees who turn the fowls into merchantable poultry after they have become a part of the domestic stock of goods seems to me so different in degree as to be beyond the line. No one can indeed deny the prosecution's argument that hours and wages will, in fact, influence the import of the fowls into the state; and there are instances in which purely intrastate activities are so enmeshed with interstate that they must be included in interstate regulation, else none at all is possible. That is the case with railway rates. . . .

The only ground here for bringing hours and wages within the scope of Congress's power is because the raw material on which the men work is substantially all imported into the state; they make dressed poultry out of live fowls. If Congress can control the price of their labor, I cannot see why it may not control the rent of

At least one hopeful sign is to be described in the muddled decision of the Administration to go to bat with this case rather than with the Belcher lumber case, recently abandoned. That is the surrender to public opinion involved in this right-about-face. The obvious effort had been to jam through Congress a renewal of N. R. A. before the Supreme Court could speak its mind about it. A rising tide of protest in and out of Congress has halted this effort to sneak an unconstitutional bill past the "law of the land." We hope that the members of Congress will note this new respect for their opinions and act, accordingly. This surrender should kill finally any effort to railroad through an extension of N. R. A. Action should wait until the Supreme Court has spoken, definitely and finally.

*July 1935* *S. Frankfurter*  
Law School of Harvard University,  
Cambridge, Mass.

*PSF*

April 30, 1935

Dear Miss LeHand:

May I trouble you to hand  
this letter to the President. Thank  
you.

*It was a joy  
to see you again.*

Very cordially yours,

*Heri Ranquell*

Miss Marguerite LeHand

Law School of Harvard University,

Cambridge, Mass.

CV  
3-14-55  
April 30, 1955  
C M G

Dear Mr. President:

On my return I communicated to David Niles the substance of your conclusion on his suggestion for a frank exchange of views between you and the leading progressives in the Senate. He was, of course, perfectly delighted at the prospect, but wanted time to think over the right procedure for such a meeting in order to make it most effective. He now sends me the enclosed letter.

I have had opportunity to test Dave Niles' judgment in such matters for a good many years, and I have found him uncommonly shrewd, partly because he is shrewd, and partly because his judgment is not obstructed by any kind of egotism or self-interest. I hope you will approve of the mode of procedure outlined in his letter. I know he can do much by preliminary nursing of those whom he calls *prima donnas*.

I wonder if you could let me know that Monday, May 15th, or Tuesday, May 14th, can be set aside by you for the projected meeting, so that I can tell Niles and he may definitely fix with the Senators the date convenient for you.

I know how much your session with the two Bobs and Costigan did six weeks ago. I am wholly confident that this proposed wider meeting has potentialities for even greater good.

Always faithfully yours,

RF

Hon. Franklin D. Roosevelt

P. S. You may be interested in the enclosed editorials from the Boston Transcript and the Boston Herald on your Holmes message.



FOUNDED FEBRUARY 23, 1908  
INCORPORATED OCTOBER 1, 1928

### General Council

Mr. GEORGE W. COLEMAN,  
*President*  
Rev. HARRY LEVI,  
*Vice-President*  
Mr. J. ARTHUR SPARROW,  
*Vice-President*  
Mr. DAVID K. NILES,  
*Treasurer*  
Hon. LAWRENCE G. BROOKS,  
*Clerk*  
Mr. ROGER W. BABSON  
Mrs. GRACE E. BLANCHARD  
Mr. F. LAURISTON BULLARD  
Prof. ZECHARIAH CHAFFEE, JR.  
Mrs. ALICE B. COLEMAN  
Mr. WALDO L. COOK  
Mr. COURTENAY CROCKER  
Mr. HENRY S. DENNISON  
Mr. HERBERT B. EHRMANN  
Mrs. GLENDOWER EVANS  
Mr. ROBERT FECHNER  
Mr. EDWARD A. FILENE  
Mr. SAMUEL B. FINKEL  
Prof. FELIX FRANKFURTER  
Mr. RICHARD W. HALE  
Dr. LEWIS O. HARTMAN  
Mrs. HIRAM N. LATHROP  
Mr. ALFRED B. LEWIS  
Mr. REUBEN L. LURIE  
Miss FLORENCE H. LUSCOMB  
Prof. JOHN J. MAHONEY  
Mrs. DANIEL L. MARSH  
Prof. KIRTLEY F. MATHER  
Mr. ALTON L. MILLER  
Mrs. ETHEL P. MOORS  
Mr. JOHN F. MOORS  
Prof. SAMUEL ELIOT MORISON  
Mr. HENRY PENN  
Mr. WILLIAM PENN  
Hon. ANDREW J. PETERS  
Mr. ANTHONY J. PHILPOTT  
Dear ROSCOE POUND  
Mrs. WILLIAM Z. RIPLEY  
Mr. JAMES P. ROBERTS  
Mr. GEORGE E. ROEWER  
Mr. BERNARD J. ROTHWELL  
Prof. ARTHUR M. SCHLESINGER  
Prof. CLARENCE R. SKINNER  
Miss MARGARET SLATTERY  
Mr. LOUIS P. SMITH  
Rev. GEORGE H. SPENCER  
Rev. RUSSELL H. STAFFORD  
Mrs. MATHILDA G. SULLIVAN  
Prof. DAVID D. VAUGHAN  
Mr. FELIX VORENBERG  
Mrs. WINSLOW L. WEBBER  
Dr. DEWITT G. WILCOX  
Mr. BUTLER R. WILSON  
Mrs. GERTRUDE L. WINSLOW  
Mrs. MARY E. WOOLLEY  
Mrs. LOUISE M. YOUNG

GEORGE W. COLEMAN, PRESIDENT

DAVID K. NILES, DIRECTOR

# FORD HALL FORUM

OFFICE:

1242 LITTLE BUILDING, BOSTON, MASS.

April 29, 1935.

Prof. Felix Frankfurter,  
Harvard Law School,  
Cambridge, Mass.

Dear F. F.:

I do not need to tell you how much I was stimulated by my visit with you yesterday and by that part of your visit with the President that you shared with me. If all our progressives had the privilege of listening to you as I did yesterday most of their confused thinking would be cleared up.

Do you suppose that the President could set aside some evening about a fortnight off, say Monday, May 13th, or Tuesday, May 14th, and invite eight or ten of our progressive Senators of both parties? If that could be arranged, I would like to go over with you carefully the names of the Senators that should be invited. The reason that I suggest a date several weeks off is this: you know what prima donnas most of our Senators are and I would like to have a few days to visit with some of them and get them back into a proper frame of mind so that this conference will not be just a conference but will result in an enthusiastic rededication to the support of the President. You know some of them feel that they have been ignored and others that they have not been permitted to fulfill the destiny to which they have been especially called by the Lord. Last week when I was in Washington, I found them unusually nervous and irritable, and I imagine as the pressure keeps up they will become even more so. I do honestly think, however, that most of them recognize that they, themselves, will be sunk if the President isn't permitted to carry on for another term, and if they could be made to feel that the President really does count on them, they will play ball I am sure.

I do hope that it will be possible for you to be present at such a conference. I do not think there is anyone whom the progressives have more confidence in than in you, although frankly some of them think that your devotion to the President makes you a prejudiced advocate of his Program. Once this conference is out of the way, I think we immediately ought to attempt to get after the progressive leaders in the country who are not in the Senate and get them, as far as possible to see the picture as I know you see it and as I think I do.

I think the common denominator among all progressives is a fundamental



Prof. F. F.

4/29/35

-2-

faith in our democratic method and certainly no one in American history has done more to restore our faith in democratic procedure than has the President. That very attempt, however, of his to make a democratic vehicle work, a vehicle that had become creaky from disuse and unworkable because so many of our reactionary elements did not want it to work has been the factor that delayed the Recovery Program. Progressives should be called on to recognize this and remember that the President's attempts to prove that democracy can work is his most important contribution to the happiness and safety of our people. Some temporary kind of recovery might conceivably be obtained through undemocratic means but what progressive would want that? Their cooperation with the President at this time will insure the permanency of our democratic institutions. Anything short of that will make them, in spite of themselves, agents of those who are mobilizing many millions of our fellow citizens in strange and economically unsound campaigns. I feel certain that our progressive leaders can and will subordinate their personal ambitions to the support of the President once they recognize what is in store for all of us if he should fail.

Cordially,

*David K. Hiles*

David K. Hiles.

D  
K  
N  
/  
L

### THE HOLMES MESSAGE

Good writing, obviously good sense and a fine understanding of the late Justice Oliver Wendell Holmes characterize President Roosevelt's message to Congress relative to the Holmes bequest. Here was a really great gentleman, conspicuous throughout the English-speaking world for his learning in the law, his deep sympathies and his understanding of intimate human relations. The gift was remarkable in itself, and more remarkable in that he did not qualify it. He left it outright to the United States. His deliberate omission of limitations carries a certain implication—his belief that his legatee would accept and employ it in the spirit which animated him. Plainly he put the nation on its honor to devise an appropriate use for the funds.

In asking Congress not to mingle it with the general funds, but to set it aside until a proper agency can be found for making it truly expressive, the President did what the justice himself would have desired. To spend it perfunctorily for ordinary things—scholarships, a monument, photographs of former justices would be a profanation.

The proudest possessions of the justice were two objects embedded in his body and buried with him—two rebel bullets. As his country was his passion, and Memorial day was sacred to him, possibly the bequest could be so utilized as to magnify the significance of Memorial day. There may have been a touch of the quixotic to the bequest, if there were a dash of quixotism in administering it, and not too rigorous an insistence on immediate, measurable returns, his purposes would be more nearly approximated than if it were scattered in a commonplace way. An inspiring gift, it calls for an inspired utilization.

Boston Herald Apr. 29. '55.

# Boston Transcript

324 WASHINGTON STREET, BOSTON, MASS.

(Entered at the Post Office, Boston, Mass.,  
as Second Class Mail Matter)

SATURDAY, APRIL 27, 1935

MEMBER OF THE ASSOCIATED PRESS

The Associated Press is exclusively entitled  
to the use for republication of all news  
despatches credited to it or not otherwise  
credited to this paper, and also the local  
news published herein.

## Make It Worthy of Justice Holmes

Concerning the rare bequest of \$250,000 which the late Justice Holmes made to the United States Government, President Roosevelt now gives counsel worthy of universal acclaim. The identity of that gift, he advises the Congress, should not be lost in the nameless totality of the Treasury's general fund. Its substance should not be spent for the needs of a moment, but should be preserved, as the President says, to "mark for posterity our pride in his faith in American democracy, his confidence in the power of our legal institutions to realize, when rightly used, the highest American ideals."

That declaration expresses in words the thought which sprang to the minds of countless Americans when they first read the Holmes will. Having given utmost service and faith to the American nation throughout his long life—bearing wounds in war and carrying burdens in peace—it is true that the terms of his bequest, making a still further gift, gave evidence of his complete trust in the United States Government even after death. Oliver Wendell Holmes tied no string to his grant, leaving the nation free to employ it in any way the country might choose. But the entire faith thus shown by the great justice supplies the imperative reason why the nation must now choose rightly and wisely, devoting this almost sacred fund, as the President urges, to some purpose of lasting significance.

What the precise object should be, President Roosevelt would leave to the considered judgment of "a select committee of the Congress, acting in collaboration with a committee of the Supreme Court of the United States." That is a proper and promising plan of procedure. No one can make an adequate choice on the spur of the moment.

The whole matter requires the thought of well qualified men, taking time to evolve their decision. Senator Robinson has already suggested that the money might be used to buy portraits of former justices of the Supreme Court and to establish fifteen scholarships of \$1000 each for seniors in law schools. But it is possible to think of better purposes than that.

Since Mr. Justice Holmes was a man of superlative distinction, it is necessary that his memorial should be one of unusual distinction. Scholarships are good, but not exceptional. It is hard to feel sure that they could give what is needed in this case—a permanent inspiration or challenge not alone to good achievement but to extraordinary national service. In the field of law, the memorial committee may well consider numerous institutions, already existing for the improvement of America's judicial and legal system, which might receive this fund to endow special studies of the highest intellectual quality. The American Legislators' Association may be mentioned, for example. It is an organization notably unselfish in source, having resulted exclusively from the desire of various members in the Legislatures of the forty-eight States to perform better service for each of their Commonwealths—and so for the nation—by drawing on the experience and legislative learning of all the States. This association might be able to propose a plan meriting support from the Holmes fund.

But consideration should not be limited to intellectual work in jurisprudence. Surely it would be right to create a tangible memorial to Oliver Wendell Holmes at the nation's capital, if artists and architects can conceive an embodiment comparable in beauty and dignity to the Lincoln Memorial. In this relation it is known that the justice felt keenly the desire to see Washington become a city ever more and more pleasing to the eye. The construction of a bridge over the Potomac, in a design majestic and enduring, is a possibility which befits his own thought of a worthy civic development, and which some of the best recent architecture has shown that bridges can successfully attain. For this purpose, as for a monumental shrine, more than a quarter million of dollars no doubt would be needed, but this the nation should be glad to supply.

In any event Congress should promptly set up the Holmes bequest as a fund distinct and inviolate as the President requests. The fitting use will then be found, as able men give it thought inspired by this patriot's great example.

*July 7th*  
Laws School of Harvard University,  
Cambridge, Mass.

May 3, 1955

Dear Mr. President:

You were most kind to respond by wire fixing the evening of Tuesday the 14th. for the meeting of the progressives. Do I correctly assume that the hour is 8:50?

Niles and I are trying to plan the thing with the utmost care so as to assure the greatest success. Niles, himself, is to be in Washington on Monday next to do the necessary preliminary work. Senator Norris was here yesterday — you will be interested in the enclosed interview with him — and Niles sounded him about the meeting. He was happy at the prospect, deemed it most important that free exchange should take place as soon as possible.

As to the participants there are the difficulties of keeping the meeting sufficiently small without offending sensibilities. Norris was particularly emphatic about the importance of a small gathering for an effective interchange. Niles has had the happy thought of including only those Senators who were members of the National Progressive League for Franklin D. Roosevelt in the 1952 campaign. This means, alphabetically, Costigan, Cutting, Johnson, LaFollette, Norris and Wheeler. It draws, therefore, a relevant line against the inclusion of men like Bone, Nye, and Schwellenbach. What say you to this procedure?

Two members of your Cabinet, Wallace and Ickes, were also members of the Progressive League. What are your wishes in regard to their inclusion? If the visiting group is restricted to <sup>the above</sup> ~~these~~ six Senators, plus Niles and myself, it makes a party of nine. Wallace and Ickes would enlarge it to eleven.

May I trouble you to let me have your wishes so that Niles can have a specific mandate for going into action. Would it be at all possible to have word from you by wire or over the phone?

Always faithfully yours,

*+ Niles practically has the League*  
Hon. Franklin D. Roosevelt

# HOLDING BILL TO PASS, SAYS NORRIS

## Senator Predicts Favorable Report by Senate and House Committees With Passage This Session

BY LEIGHTON H. BLOOD

Senator George Norris of Nebraska, made an important announcement last night as he sat in his room at the Hotel Bellevue. It was that the bill to abolish holding companies for utilities will be reported favorably from the Senate committee either today or the first of the week, and that both House and Senate will pass the measure.

The original "Son of the Wild Jackass," as former Senator George H. Moses termed him, made no bones about what he thinks of the power companies, the New Deal, Huey Long, Father Coughlin and Dr. Townsend. Pacing the floor of his suite, with the Bulfinch front of the State House as a background, he talked in the crisp, staccato voice so well known to the Senate galleries.

### NOT AGAINST PRESIDENT

"You know it is more easy to criticize than to accomplish," said the Senator, chewing on a half-smoked cigar. "I have been wrongly headlined this afternoon as saying the 'Roosevelt Power is Slipping.' I never said any such thing.

"All administrations make mistakes. This one has, of course. But they have done a whole lot of good. We have seen legislation passed that 20 years ago everyone would have thought impossible.

"Mistakes? Sure. We all make 'em! But if they think that times are bad under Roosevelt just think what they would be if the last administration were in power! Think that one over if you think I am against the President."

### Holding Bill Important

"Let everyone know that I am for the President and his ideas—perhaps not for the ideas of some of his satellites. I think—I believe—that he is sincere. He is trying to do the right thing; so give him a chance!"

Senator Norris, on here as the guest at the annual banquet of the Ford Hall Forum, looked out the window.

"What is the most important legislation before Congress today?" he shot back at the questioner. "I'll tell you—the holding bill for power companies. That is real legislation and it will pass both House and Senate."

"The bill is now in both the House and Senate committees. The Senate committee, if I return in time, will report it out tomorrow, but at the latest by the first of the week. What will the report of the committee be? Easy. We will be favorable in the Senate and the House has told us that they will favor the bill as well."

### To Pass This Session

"Do you think that this law will be enacted this session, Senator?" he was asked.

"Certainly, and in spite of the propaganda of the power companies. That bill is 100 per cent right. It will not destroy any honest investment. Most of these power companies are entirely watered as to value.

"Let me cite you a case. Take Knoxville, Tenn. The committee found that the power company raised \$1,000,000 in one night without the investment of a single dollar. If that isn't water I don't know what is."

"No investor in power stock need worry if it is an honest stock. If investors lose by the government abolition of holding companies the men they go after are the men who sold the stock and who are the real

crooks. All this legislation does not strike at any honest investment. It strikes at the crooks and the men who mulcted people by selling worthless securities.

### Regulation Will Be "Real"

"The government at all times has been willing to take over the power companies at an honest appraisal—not an appraisal of watered stock—and eventually that is what will happen. I have predicted it for 20 years and the country has seen most of my predictions come true."

The Senator paused in his pacing and looked down across Boston Common. The cigar had gone out. He lighted it again.

"Well," he said, "you can say that George Norris says that bill will be passed, propaganda or no. And beside that we will put the power companies under the Interstate Commerce Commission in such a way that they really will be regulated."

### Calls Them "Trouble Makers"

"What do you think of Huey Long, Father Coughlin, Dr. Townsend and the rest?" he was asked.

"I'll tell you," he shot back, "Long is an egoist. The other two—well, I don't want to talk about them. All I'll say is that they are trouble makers—will be trouble makers. I don't think, after a lifetime in public office, that any of them will get anywhere. But, watch and see. They'll make plenty of trouble."

It was Senator George Norris speaking, the man who crowds the Senate gallery; the Norris who never pulls his punches; one of the few Senators from whom reporters in the gallery over the head of the Vice-President, never got a wrong answer. Looking 20 years less his age he watched the evening flutter of sparrows.

"You know," he said, "the fish ought to be biting pretty soon. Hope we get an early adjournment."

And in case you don't know, the man the Washington reporters sometimes call "Senator," but, mostly in private, plain "George," has a little camp on a lake up in Wisconsin that he built with his own hands. And up there every summer he goes, and builds up his energy for the next campaign on the floor of the Senate. Never defeated, himself, in 1928 he came out for Smith, although a Republican, but Nebraska sent him back to the Senate just the same.

*Felix Frankfurter*  
*PSF.*

THE WHITE HOUSE  
WASHINGTON

May 4, 1935.

MEMORANDUM FOR  
FELIX FRANKFURTER

If you are really hot  
under the collar at 11.55 P.M.  
on May eighth, write me before  
you go to sleep. I appreciate  
my cakes hot off the griddle!

F. D. R.

**The Harvard Crimson**

**HARLOW FOOTBALL COACH**

Council Meets Tonight to Decide On Validity of Election Receipt  
RAMFORD IN FAVOR OF LARGER FEWER SCHOLARSHIP AIDS  
Duck Hares Formerly With Pease State, Colgate, Western Maryland

*The Editors of the Crimson*

*request the pleasure of your company*



*at their Sixty-second Annual Dinner*

*at the Pantheon*

*Wednesday evening, May the Eighth*  
*at seven o'clock*

*The favor of a reply is requested before May first if you plan to be present.*

### Graduate Board

SHERMAN H. BOWLES '12

OSBORNE F. INGRAM '35

VICTOR O. JONES '28

CHARLES M. STOREY '12

EDWARD A. WHITNEY '17

### Toastmaster

ARTHUR ATWOOD BALLANTINE '04  
*Former Under Secretary of the Treasury*

### Speakers

WILLIAM JOHN BINGHAM '16  
*Director of Athletics*

JAMES PHINNEY BAXTER, 3D  
*Master of Adams House*

FELIX FRANKFURTER  
*Byrne Professor of Administrative Law*

LEWIS WILLIAMS DOUGLAS LL.D. '33  
*Former Director of the Budget*

### Dinner Committee

CHARLES M. STOREY, JR. '37, *chairman*

FREDERICK P. BARRETT '37

GEORGE E. ENOS '37

ROBERT C. HALL '36

STEPHEN V. N. POWELSON '38

WILLIAM W. WATERS '37

HANS H. ZINSSER '38

21  
Law School of Harvard University,  
Cambridge, Mass.

Wednesday

Dear Genl Le Grand

Please send the  
very important state  
paper to the President,  
and oblige.

Very cordially  
Finn Ranfurler

Law School of Harvard University,

Cambridge, Mass.

May 1, 1935

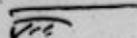
Dear Mr. Ex-President of the Crimson:

Permit me to report to you the sequel of the story concerning the arrangements for the forthcoming annual dinner.

On my return I found the enclosed invitation on which Lewis William Douglas LL.D.'33, appears as the last speaker. This program was sent out before the talk young Ballantine agreed to have with me. I have now had my talk with Ballantine, Jr., and made it clear to him that while I care nothing about precedence and all that, I should think he and the Crimson would care about fair-play. It was a three to one program against the New Deal — Toastmaster Ballantine, Professor Baxter, and Lew Douglas — and the decencies of the situation required that I should have the opportunity of answering and not be followed by the chief speaker against the New Deal. I indicated, of course, that we weren't going to have a cock fight, that it will be a pleasant and gentlemanly occasion, but that I should have to insist on fair-play, even though I happened to be one of the speakers, because vital public issues were at stake. I cleared away all the nonsense about the courtesy that was due to an "outsider", etc. etc. Arthur, who is a nice lad, said he really thought I was right, and that he would make arrangements accordingly.

And so the matter stands. From my talk with young Arthur I was convinced more than ever that it was Arthur Sr. who was pulling the strings.

Always yours,



Hon. Franklin D. Roosevelt

STANDARD FORM No. 14A  
APPROVED BY THE PRESIDENT  
MARCH 10, 1925

# TELEGRAM

OFFICIAL BUSINESS—GOVERNMENT RATES

*F. D. R. 9. 9. '33-35*

FROM

*Sp. 13*  
The White House  
Washington

*Frankfurter*

U. S. GOVERNMENT PRINTING OFFICE: 1925

May 6, 1935.

PROFESSOR FELIX FRANKFURTER  
LAW SCHOOL OF HARVARD UNIVERSITY  
CAMBRIDGE  
MASSACHUSETTS

IDEA OF THE ELEVEN YOU MENTION EXCELLENT HAVE NILES LET ME  
KNOW SO THAT PROPER INVITATIONS CAN GO OUT FROM THE WHITE  
HOUSE

FRANKLIN D. ROOSEVELT



Office of the Solicitor General  
Washington, D.C.

May 7, 1935.

PSP  
Frankfurter

Felix Frankfurter, Esq.  
Law School  
Harvard University  
Cambridge, Massachusetts

My dear Professor Frankfurter:

You were thoughtful to drop me a line about the Schechter brief. Unfortunately, you were quite correct in your anticipation that delegation was the "hot spot" of the argument. We had felt that Local 167 might bring Justice Butler to our viewpoint on interstate commerce, the unity of its flow, and the possibility of regulating both that commerce and its incidents, even including wages and hours.

Justices Sutherland, McReynolds and Butler made my life miserable by demanding to have pointed out to them the lines of the Act which laid down the definite standards for Presidential action. After what might be called a desultory bombardment on that question, in the last moments Justice Butler shifted to a barrage on Presidential findings. He wanted to know what facts the President or his delegated officers had found and how they had determined the necessity for wage and hour limitation. The argument did not close in any victorious paean, and one can only hope that the brief and an examination of the Act will persuade the Court that we are within the limits of the possibility of delegated authority.

McFarland and Paul Freund as usual were more than helpful. They really deserve, with Stanleigh Arnold, major credit for the brief.

Sincerely yours,

Stanley Reed

*Sally 7/10*  
TELEGRAM

*FW* *BSF*  
*Frankfurter*  
*1326 W 77*  
*Frank*  
*4x*  
The White House  
Washington

7WU MO 60 NL 7:31a.m.

Cambridge, Mass. May 8, 1935

Miss Marguerite LeHand:

Please convey following to President: I'm hotter than the hottest griddle cake you ever ate. You knew the tribe and I was a simp to believe that Arthur Ballantine would carry out the undertaking and so I was called on before Lew but I let them have it. The details will not cool off by the time I see you.

Felix Frankfurter.

08  
J. S. Drankfater  
Judy Rice  
J. S. Drankfater  
MEMORANDUM REGARDING CRIMSON DINNER, MAY 8, 1935  
P.F.

1. About the third week in April Arthur Ballantine, Jr. phoned me to say that the Annual Crimson dinner would be held on Wednesday, May 8. That his Dad was to be Toastmaster, Professor Baxter and Lew Douglas were to be speakers, and they very much wanted me also to speak -- perhaps on my Oxford experience. After a preliminary word of appreciation I told the boy that the Crimson dinner ought to be a gay affair, and that talk about educational matters is not apt to be exciting, at least in my mouth. And that in any event since three of their speakers were anti-New Dealers, and since his Dad would make not one but several anti-New Deal speeches during the course of the evening, of course I would not speak about Oxford were I to come, but would naturally take up the cudgels for the New Deal. The boy said they did not want to have a personal controversy, and I assured him that we were all gentlemen who were accustomed to handling differences of opinion in parliamentary ways, but that in any event I certainly would not go there to talk about education while Lew Douglas and his Dad lit into the New Deal. He then said they would be delighted to have me talk about the New Deal if I would, and I said that I would be delighted to come, but that inasmuch as there were three anti-New Dealers speaking, and his father would make a series of such speeches in his capacity as Toastmaster I should have to insist, in all fairness, on following Mr. Douglas, as it were, by way of rebuttal, particularly since his father would follow me and have a last word against the New Deal. The boy said that he thought that was entirely fair, and that he was perfectly delighted that I am ready to come and that the arrangements are entirely satisfactory to him, namely, that I should be the last speaker after Lew Douglas.

2. A few days thereafter, on April 22nd., I received a letter from young Arthur Ballantine, which bore every earmark of careful legal draftsmanship. In effect it stated that he had been reconsidering the arrangement that he had made with me, that he was troubled by it because Mr. Douglas is after all "not one of us", and therefore perhaps the proprieties required that he be the last speaker. He suggested that I might have a few minutes of rebuttal after Mr. Douglas spoke. In any event he wanted to have full talk with me so that there should be no mistake, and that the arrangements be all worked out before the dinner. I replied to him fixing a time to see him for a full talk, and assuring him that we certainly would not have a cock fight in the form of a public debate by having any such thing as a rebuttal after a main speech. I added that even before the talk I could not withhold the remark that Mr. Douglas would hardly like to

be called "not one of us" since Alma Mater had conferred upon him her highest degree.

3. On April 29 Arthur Jr. came to see me at my house. We had about an hour's talk, in which the whole matter was gone into with great detail for I resolved not to lay down any conditions — take it or leave it — but to address myself to Arthur's mind (he is a very intelligent fellow) and work things out so that he would see <sup>that</sup> what the fair thing in the situation was. The upshot of the talk was an unqualified statement by Arthur (who in the meantime has been elected President of the Crimson) that under the circumstances it was fair that I should be the last speaker, in view of the political outlook of the other speakers, the general sympathy of the audience, and the fact that his father, after all, did have the final word. The boy said that the thing was <sup>now</sup> wholly clear, and that he would advise his father of the arrangements he had made. And so the matter was left.

4. I had no further communication whatever from anybody, and went to the dinner in complete reliance on the arrangement thus made, not having planned at all what I was going to say, expecting, of course, to get cues from what Arthur, Sr. and Lew Douglas were going to say.

5. The next stage of this affair is the night of the dinner. I had a very pleasant talk with young Arthur on arrival at the Crimson, and a little later on his father's arrival a very cordial few words with Arthur, Sr. The latter insisted that after the dinner I must come for a drink to his daughter's house (she lives in Cambridge) so that "you, Lew and I can have a long talk." ~~And it was arranged, and~~ I agreed to come provided I might take along two friends with whom I had tentatively arranged to go off, Lawrence Winship and Geoffrey Parsons of the Boston Globe. The dinner proceeded as per schedule. As expected cracks against the New Deal were the leit-motiv of all of Arthur, Sr.'s main and interlarder remarks. Arthur, Jr., Arthur Sr., Bingham the Director of Athletics, Professor Baxter <sup>in</sup> spoke, and Lew Douglas, according to arrangements, was to be the next speaker. After two sentences or so Arthur Ballantine said something to the effect that "We shall now have some interesting glimpses into the impingement of the academic mind upon politics." Which was the first hint I had had that I was to be the next speaker. At that remark young Arthur, next to whom I sat, turned to me with his face as red as a beet, and said the following: "I made perfectly clear to Dad what my arrangements <sup>with</sup> you ~~was~~, and for anything that may happen in not carrying out that arrangement I am not responsible. Dad thoroughly understood my arrangement with you." I said to the boy, I hope very quietly, "What your father is doing isn't cricket." And the boy repeated, "I made perfectly clear to him my arrangement with you. For whatever he does now I am not responsible." And I assured him that I had no doubt whatever that he ~~was~~ not responsible. And just about this moment Arthur Ballantine called on "Felix Frankfurter." I shall not soon forget the

flushed face of that boy when he saw that his father had broken his son's word.

6. "Think fast, Captain, think fast." Well, never in my life did I have to think faster. When I got up my mind was like a completely empty bucket. I had, of course, quickly to decide whether to talk at all or whether to state the circumstances. Embarrassed as I was inside of me, it seemed to me that after all I ought to handle the situation as best I could without disappointing such expectations as the innocent audience had. Sparring for time I began by reading a fake telegram from "another distinguished former Editor of the Crimson" -- such a telegram having been read previously from the absent President Conant. And so I began: "Mr. Toastmaster, before I proceed to my own remarks, may I read a telegram which has come to me, for some reason, from another distinguished former Editor of the Crimson:

'Please tell young Arthur Ballantine how much I rejoice that he is improving upon his father, among other things, for realizing that the road to the White House is not on the Oggy Mills special, but through the presidency of the Crimson. Give Lew my regards and tell him that by 1941 I shall have piled up so huge a deficit that even his appetite for balancing the budget will be satisfied when he follows me in the White House. And finally give my warm greetings to the Crimson gathering, and tell them that in my irrelevant way I recall what I once heard Uncle Theodore say: 'I love Harvard men as individuals, but I always feel more comfortable when most of them are against me, because than I am quite sure that then most of the country is for me.'"

It was needless to read the signature because the crowd broke into long and sustained laughter and applause.

I proceeded verbatim:

"Since this is an intimate family affair, and there are no reporters present I will let you in to a little secret which thus far is shared only by Arthur, Sr. and Arthur, Jr. and myself. When I was asked to come here as a New Dealer, naturally it was expected that I would come empty headed. I was to wait until I got my education from Arthur Ballantine and Lew Douglas, and then I was to say what I could in reply to them. I was to be told what the New Deal really was, and what its sins are, and then say what I could in mitigation of its sins. But here I am, as you can see, called out of turn, and as empty-headed as I was when I came here. I haven't been told what the New Deal is, but I now know what a Raw Deal is. In plain English it was very explicitly arranged by young Arthur, here, that Lew Douglas was to precede me, and I was to follow him, but for some strange reason Arthur over there has seen fit to break that arrangement, and so, as you see, I am sparring for time, and not at all informed about Lew Douglas's conception of the New Deal, but with a keener understanding, as I have said, of what a Raw Deal is, and also, if I may say so [looking hard at Arthur Ballantine, a few seats away] with a better insight into the mentality of the Republican party, and its best minds."

By that time I had internally resolved what to say, and spoke for a little over a half an hour on the history of the state of mind of, what might be called, the governing classes of America from the Interstate Commerce Act down to date, towards reform measures. Taking administration by administration, not sponsoring this or that specific legislation, but drawing a generalization, which I roughly documented, to the effect that our governing classes, and their lawyers and their editors -- men like some of those who sit before me --

OS

have never realized with Macaulay, "that the way to conserve is to reform", and by violently resisting as destructive of reason, and fairness and of the Constitution, every effort to maintain our traditional system by adapting it to changing economic conditions, and making it fulfill the larger human needs of successive generations.

When I finished there was a really extraordinary outburst of applause, which I partly attributed to a resentment on the part of at least a good many of the audience against Arthur Ballantine's trickery. There was such applause that I had to "take a curtain."

Ballantine followed me with a seven to ten minutes rebuttal of some of the things I had said, in a most appreciative way, but not a word of reference to my introductory disclosure of the violation of his son's agreement. He then introduced Douglas who in his opening words dissociated himself from Arthur's conduct as follows:

"Let me say at the outset that I think Professor Frankfurter should have been the last speaker, because the best should be last."

Whereupon he proceeded to pour a whole barrel of molasses over me.

7. The dinner closed about midnight. I stood about a little while to talk to men who approached me, and finally took a cordial leave of Lew Douglas. Arthur Ballantine made no efforts to see me after the dinner, and I, of course, abstained from seeking him out. And I have had no word from him since, directly or indirectly, about the incident.

*Frederic Frankfurter*

*Justy Pitt* PSF *Frankfurter*

Law School of Harvard University,  
Cambridge, Mass.

*file*

May 10, 1935

Dear Mr. President:

1. The following comes to me this morning from one of the most important New England Republicans, who happens to be -- don't hold it against me -- a warm friend of mine:

"How stupid the Mills dissertation was! Eliot Wadsworth said on the telephone this morning that Ogden does not realize that he is living in the past; that the Republican party should readjust itself under the leadership of non-Hoover, non-Mills types; that the Hawley-Smoot tariff was the occasion for the erection of tariff barriers and the establishment of quotas throughout the world; that if other nations give full support to industrialists who are trying to win foreign markets, the American individual, working without governmental aid, will be obliterated as an international factor."

2. You will soon have a full minute of the whole Crimson episode, including the way in which I dealt with the extraordinary behavior of Arthur Ballantine in brazenly breaking his son's undertaking without a preliminary word of warning.

3. I am looking forward eagerly to the Tuesday night meeting. I know you will be able to accomplish much by it.

4. I hope you and I will have an opportunity for a private talk about the implications of the terrible decision in the Railroad Retirement Act case. It is hardly a profitable subject for discussion with the Senators. In this connection I should like you to see the enclosed letter from Stanley Reed, for it raises questions of strategy and tactics that I should much like to canvass with you.

I look forward much to Tuesday.

Always faithfully yours,

*W. F.*

Hon. Franklin D. Roosevelt

Frankfurter PSF ~~July 1935~~  
Law School of Harvard University,  
Cambridge, Mass.

22 May  
1935

Dear Louis Le Hard

Please be good  
enough to put his  
letter into the Pre-  
sident's hands.

Thank you.

Very cordially

FR

*Wick*  
Laws School of Harvard University,  
Cambridge, Mass.

(5) (2)  
May 22, 1935

Dear Mr. President:

Is not now, that the work relief wage scales are out, the psychological time for seeking reduction of unreasonable material prices? Intrinsically it is important not only as to Government purchases, but because of the enormous influence such price reductions would have upon private building and maintenance work. Politically it would prove to labor anew your even-handedness and shut the mouths of the exploiters of labor grievances, the McCarrens as well as the Longs. You would rally support very widely. For instance, not long ago I talked with Harry Kendall on this subject, and privately he agreed that prices of steel and cement should come down, but seemed impotent to do anything about it with his Council. I could multiply the instances of such feeling on the part of important business men with whom I have talked.

And is not steel the item on which to begin? Sprague -- who is advisor to General Motors -- was confident that the automobile industry would give real support, and so, I should suppose, would the railroads. Would it not be feasible for you to put Joe Eastman, perhaps brigaded with Morris L. Cooke, in charge of this, in view of Eastman's very considerable experience with steel prices.

Of one thing I am confident. A successful move to bring down unreasonable prices in steel and cement and other building materials would be a powerful spur to recovery. The effort to accomplish it, I am sure, would meet with great response throughout the country.

Always faithfully yours,  


Hon. Franklin D. Roosevelt

TELEGRAM

*F. Frankfurter*  
*PSF*

*Fully File*

*file*

The White House  
Washington

39 WU JM 29

Cambridge, Mass., May 22, 1935.

Miss Marguerite Le Hand:

Please convey the following to President You have certainly raised the standards to which the wise and honest will repair in form and substance and feeling It was admirable.

Felix Frankfurter.

F. Frankfurter

PSF

file

~~Tully File~~

Law School of Harvard University,  
Cambridge, Mass.

May 24, 1955

Dear Mr. President:

This is a postscript to my letter of the other day regarding steel prices.

Would it not effectively counter Grace, and the general attitude of the Steel Institute, for you to indicate by action that not the least important block to recovery lies in excessive steel prices. If the railroads and automobile industry could be quietly and quickly enlisted in support of the fact that reduced steel prices would really stimulate purchases a powerful impression would be created, especially with the momentum which your bonus veto triumph will now give to your leadership in all matters.

Always yours,

FF

Hon. Franklin D. Roosevelt

~~July File~~

Felix Frankfurter PSF

May 29, 1935.

Dear Mr. President:-

In the interests of clarity may I put in a few words on paper the gist of my thoughts on the issue of the Supreme Court vs. The President.

1. Postponement of the fighting out of that issue at the present time does not rule the issue out as one on which you may later go to the country. I assume that a strategist like you will select time and circumstances most favorable for victory. I suspect that events may give you better conditions for battle than you have even now.

Decisions in other cases may accumulate popular grievances against the Court on issues so universally popular that the Borahs, the Clarks, the Nyes and all the currents of opinion they represent will be with you in addition to the support you have today. That is why I think it so fortunate that the Administration has pending before Congress measures like the Social Security bill, the Holding Company bill, the Wagner bill, the Guffey bill. Go on with these. Put them up to the Supreme Court. Let the Court strike down any or all of them next winter or spring, especially

by a divided Court. Then propose a Constitutional amendment giving the national Government adequate power to cope with national economic and industrial problems. That will give you an overwhelming issue of a positive character arising at psychological time for the '36 campaign, instead of a mere negative issue of being "agin" the Court which, rising now, may not be able to sustain its freshness and dramatic appeal until election time.

2. That approach has these advantages:

(a) It defines a sharp issue -- of the increase of Congressional power on industrial and economic problems -- instead of attacking the Supreme Court's vague general powers. A general attack on the Court, unlimited in the changes it may cause, would give opponents a chance to play on vague fears of a leap in the dark and upon the traditionalist loyalties the Court is still able to inspire.

(b) *It Cuts* across all technicalities of law and presents an issue which the common man can understand and which he can feel means something personally important to him.

I am, be assured, as anxious as you are that you should not try to fool the American people into believing that you can do more than the Supreme Court permits you to do. But I also know how much you still can do, how

the Supreme Court can eat its words, and what a difference it makes in the Court's application of "the law" how statutes are drawn, how they are administered, how they are tested by the right selection of cases, how these cases are treated in lower courts by judges, district attorneys and government counsel, how they are handled and argued before the Supreme Court itself.

All of which is respectfully and affectionately submitted.

*Felix Frankfurter*

~~July 7, 1935~~

PSF

May 30, 1935

file  
Felix Frankfurter  
(5) (2)

Dear Mr. President:

This is intended as a brief outline of a program for immediate action in dealing with the consequences of the Schechter decision.

(1) Promptly introduce a bill empowering the President to attach fair labor clauses to contracts for Government purchases and to contracts made with the proceeds of Government loans and grants. Stanley Reed is now perfecting such a bill and plans to have it in your hands by Friday night. The bill will be short and ample in its discretionary powers.

Such a measure would directly affect extensive areas of industry. Indirectly, by the psychological force of the Government's authority, it would draw a much wider support to the standards promulgated by the Government.

To enforce such fair condition clauses will require ample and skilled administration.

(2) Therefore continue, by appropriate legislation or joint resolution, the administrative mechanism <sup>(or an appropriate part)</sup> of N.R.A. for a stated period, say to March 1937. This would also assure maintenance of the experience and technical information gained by N.R.A. to be used

- (a) as a clearing house for voluntary formulation and observance of fair standards, and
- (b) as an aid and stimulant to appropriate action by the States.

Moreover, it would keep intact the mechanism for whatever ultimate policy will be evolved. Finally, the continuation of the mechanism will

- (a) prevent any lapse on June 16th through possibility of filibuster, etc., and
- (b) avoid any jerry-built lawmaking on the substantive constitutional problems.

By the continuance of the mechanism something really important will have been accomplished at the same time that the necessary period for maturing wise legislation is secured.

(3) As to labor's interest, the Wagner Bill has become the effective symbol and therefore that measure should be vigorously pushed to passage.

This, of course, implies an adequate appropriation to enable the proposed board to do a real job.

Incidentally, it may be desirable to give an effective quietus, through one of those happy statements by the President at a press conference or otherwise, to the high-priced advice given by eminent New York lawyers that voluntary compliance with the labor provisions of the codes might be treated by the Government as a violation of the Anti-Trust Laws. An elementary lesson in law might be tendered — without charge — to the New York lawyers that while agreements to fix prices would offend the Sherman Law, agreements to maintain the decencies of life do not.

(4) The principle behind the Webb-Kenyon Act (liquor) and the Hawes-Cooper Act (convict goods) should be utilized by an appropriate bill to protect the decent labor policies of the several States by Federal legislation, to the end that importation into any State of goods produced under conditions not conforming to the labor policy of that State would become unlawful. This device could be of real and dramatic value in meeting, certainly in part, the child labor problem. It should, of course, be drawn so as to cover as wide a range of decent State industrial standards as possible. Such an act would be one more assertion of Federal power under the Commerce Clause and at the same time it would help to effectuate State policies.

In this connection and as part of the whole program, the ad-

vantage of calling a conference of State Governors may well be seriously considered. Education and stimulation of the States in connection with the Social Security Bill will be necessary when that bill becomes law. The two problems — complementary State legislation under the Social Security Act and the State N.R.A. legislation — might be dealt with effectively at such a conference for they are interrelated. Such a conference would not at all imply an abandonment of Federal action, inasmuch as Federal methods are also being pursued and others definitely explored. It is significant that several telegrams addressed to you suggest the calling of such a conference.

Such a conference could be used as the occasion for a rounded presentation of the New Deal aims and the diverse methods by which they are being pursued. This is, I believe, essential, to take out of the public mind the false equation that N.R.A. = New Deal instead of being simply one means of realizing some of its purposes.

(5) It has already been indicated that the Administration should vigorously proceed with legislation now pending, like the Social Security Bill, the Holding Company Bill and the Wagner Bill. These measures, as well as your proposals for taxes, are, of course, not at all an "answer" to the Supreme Court. But they will serve to the public mind as powerful symbols of the general popular direction of your purposes and prove that the momentum of your purposes and your leadership is unabated.

(6) The foregoing program, limited as it is, has, it is submitted, the following merits:

- (a) it is intrinsically sound;
- (b) it gives proof of prompt leadership and thereby satisfies the psychological needs of the situation;
- (c) it affords evidence of effective adherence to the underlying purposes of N.R.A.;

- (4) it leaves ample time for maturing a permanent policy.

Faithfully yours,

*Frederic R. ...*

The President  
The White House  
Washington, D. C.

P. D. F. Felix Frankfurter  
35

Apr. 13

OFFICE OF  
THE ATTORNEY GENERAL



(5) (2)

June 13/95

Dear Mr. President: -

The attached are  
returned as per your  
request.

Wm. J. ...  
WJ

PSF Frankfurter

The White House  
19 June 1935

I, Franklin D. Roosevelt,  
party of the first part,  
do hereby solemnly  
agree to submit, in  
ample time for full  
discussion to Marguerite  
Le Handau and her husband,  
parties of the second part,  
any and all proposed attacks,  
direct or indirect, upon the  
press or parts thereof, under any  
form or pretext. So help me God.  
In the presence of  
Grace G. Tully, Notary - Franklin D. Roosevelt

669 #

duplicate of #553-

Original of this document in  
LeHand Scrapbook

• RLS  
5/15/56

18

file  
personal

~~July 7th~~ PSF  
Frankfurter

THE WHITE HOUSE  
WASHINGTON

20 June '35

Dear Frank -

There have been Exhilarating and awing days for me. Exhilarating - for no one can be in your company without being exhilarated. Awoing - for, after all, you are not merely yourself, but the symbol of the majesty of the most powerful Nation. And it is indeed awing to have the head of our people so human,

so simple, so unspoiledly  
democratic, so gay, so  
purposeful.

Having spent so many  
hours in Lincoln's study,  
naturally Lincoln has  
been much in my mind.  
I'm sure he would have  
felt, had he had my  
experiences during the  
last few weeks, as I  
feel about you. Surely  
years after his death he  
would have found you  
dedicated to the noble  
purpose of the nation.

which he expressed in the Enderburg  
address.

You surely know that if I  
can lighten even so little your  
burden you only have to say the  
word. Have a good brief  
holiday - and I hope affairs will  
soon permit you to have a long one.  
Unselfishly & affectionately,  
W.

*Tully file*

*P. Frankfurter*

*Personal*

*BF*

Law School of Harvard University,  
Cambridge, Mass.

June 25, 1955

Dear Miss LeHand:

1. Since Frances Perkins asked me for suggestions and comments on people for the Social Security and Labor Boards I am writing her directly. The President, however, may like to see a copy of my letter to her. So I will trouble you to hand it to him.

2. Please tell him that I shall write him shortly regarding a list of possibilities, which he asked me to examine, for the Interstate Commerce Commission. I am waiting for some information about one of the suggestions from an especially qualified source.

3. Too bad you had to miss the varsity race. But what a good time was had on Friday last, and on all days preceding. It helps to do good work to infuse the spirit of play into it, doesn't it?

My warm appreciation for all the kindness that you and Grace Tully showed me. And my cordial greetings to both of you.

Very sincerely yours,

*Paul Frankfurter*

Miss Marguerite LeHand

S.C. <sup>16</sup>  
J. Frankfurter

Tully Photo

Law School of Harvard University,  
Cambridge, Mass.

ASF

June 27, 1935

Dear Mr. President:

not real business. 1. Some time ago you were good enough to ask me to think about the problems presented in safeguarding properly the papers you have collected before you came to the White House and since. It occurred to me that the best way to help was to consult the wisest man at Harvard on the subject, Samuel Eliot Morison, the Historian (I assume you have read his delectable Maritime History of Massachusetts). He is at once very discreet and very knowing, and I put the matter to him in confidence. He undertook to think about it and I now have from him the enclosed letter. If I can be of further use of course I am at your disposal, as is, I know, Sam Morison, who is a very warm supporter of yours,

2. My Boston newspaper friends who keep most track of the press of the country — Burton of the Herald and Larry Winship of the Globe — tell me that your tax message has had the most favorable response possible from the press throughout the country, as well as among people whose views do not get into the press.

3. Naturally I have been following with the keenest interest the dispatches from Washington regarding the legislative strategy of the tax legislation. As I read between the lines you were up against another astute effort to put action on the message off until the Ides of March, and by very skillful manœuvering you have placed the leaders in a situation where they had to promise action at this session. The whole game, of course, was to put it off until next year, and then next year have the forthcoming campaign put it off. In the meantime not only would there have been a new claim of business uncertainty due to unknown future

Law School of Harvard University,

Cambridge, Mass.

- 2 -

taxes, but also the claim that your tax message was a "mere gesture" and not real business. Instead, as the dispatches make abundantly clear, you so guided matters that Doughton and Pat Harrison could not escape being committed to the promise of legislation now. That will clear the decks and give you the momentum of an accomplished program with which to enter the campaign. I suspect even the leaders on the Hill, as professionals, must appreciate the professional skill with which you steered things toward the result you desired.

With warmest regards,

Faithfully yours,

W. I.

Hon. Franklin D. Roosevelt

W. I. Even I am with  
surprised by  
Ballentine's  
opposition to your  
tax plan!!

# Roosevelt's Tax Plan Assailed By Ballantine

Hits Roosevelt's Tax Plan

Nassau Republican Women Hear 'Soak-Rich' Scheme Is Social Experiment

as Sources Drying Up

ate Incomes Should Escape, He Insists

*The Herald Tribune*  
N. Y., June 26.—  
President Roosevelt's wealth now  
is the subject of a committee  
formed today  
formerly  
known as the  
Nassau  
Republican Women's



Herald Tribune photo—Steffen  
Arthur A. Ballantine



1636 - 1936

from S. E. MORISON  
Editor

Harvard College Library, 417  
Cambridge, Massachusetts  
June 25th  
1935

Dear Felix,

It would not be wise for me to prescribe in the case of the President's papers, without knowing something of their bulk, scope, and complexity. The safe, general principle in archives is that of integrity, or as the French call it, respect du fonds, which means that the material should all be deposited in the same place, and that the order of it should not be disturbed. But there may be special conditions in the President's correspondence which would justify an exception being made. The obvious repository is the National Archives; and the President would earn the gratitude of historians as well as setting a proper precedent if he would make arrangements to deposit his material there, instead of, like his predecessors, taking it away with him from the White House.

The principal archival expert in the United States is Dr. Waldo G. Leland, Secretary of the Council of Learned Societies, 907 15th Street, Washington, D.C.; and a close second is Dr. R. D. W. Connor, head of the new National Archives Building in Washington. I would suggest that the President consult either, or both.

Faithfully yours,

*S. E. Morison*

Professor Felix Frankfurter

#2

~~Daily File~~ Grant Carter  
PSF

THE WHITE HOUSE  
WASHINGTON

July 10, '31

Dear Mr. President: <sup>Banking</sup> <sup>problem</sup>

1. Secora will study  
Raven Rice & see  
submits whatever the  
demonstrations he has to  
make.

2. He is also pre-  
paring himself, especially  
to gain suggestions, to  
appear before Conference  
Comm<sup>tee</sup> - as to underwriting.

3. Secora's arguments  
regarding the...

July 10, 1935.

MEMORANDUM FOR THE PRESIDENT:

1. Attached is the memorandum you mentioned this morning in connection with the open market committee.
2. Also attached is a memorandum furnished to Senator La Follette at his request, which gives a more extended discussion of the reasons against governor representation.

If there is to be any compromise on this question, I would suggest that the new Federal Reserve Board be reduced from seven to five and that two governors be added under a rotational system, making a committee of seven, who would be given all three powers of monetary policy. A Reserve Board of five in any case would be preferable to a Board of seven and would insure far better results and a much more efficient administration of the Federal Reserve System.

A handwritten signature in dark ink, appearing to be 'M. S. C.', is located in the lower right quadrant of the page. The signature is fluid and cursive, with a large initial 'M' and a distinct 'S' and 'C'.

Whatever reasons there may have been for governor representation on the open market committee have been eliminated by the Senate bill and whatever disposition existed on the part of the Administration not to oppose a reasonable compromise can no longer be regarded as implying any obligation.

In brief the Senate bill has completely altered the situation because by creating an entirely new reserve board with long terms, removing the ex-officio members, requiring that the Board be bi-partisan and that two members must be bankers, it removes such objections as had been raised by the bankers to being without representation. They objected to the bill as it passed the House because it provided that the existing board act with five governors in an advisory but non-voting capacity, the bankers argument being that the Board was notoriously weak, that it lacked public confidence, and that it was composed entirely of appointees representative of the Administration in power. In a spirit of conciliation and with the understanding that the opposing bankers would furnish support for the measure, it appeared advisable not to oppose a compromise whereby, if the present Board were to be retained, the five governors be given a voting instead of merely advisory status. However, the bankers, insisting first upon a five to four, then upon a six to five arrangement, in either case giving the Board a majority of but one, refused to accept suggested compromises and did not withdraw their strenuous opposition to the bill.

While creating an entirely new and designedly independent Board of seven members, and thus removing the grounds upon which the bankers based their original objections, the Senate bill nevertheless gives the governors--otherwise private banker representatives--five votes on the open market committee. Aside from the fact that this number (twelve votes) might lead to a deadlocked tie, such an arrangement means that the bankers would have seven out of the total of twelve

votes. In other words there would be two bankers required on the Board and five governors voting on open market policy, a disproportion of banker representation which would be difficult to defend from the standpoint of this or any Administration. Moreover, such an arrangement is open to the further practical objection that whereas the original purpose of the Administration bill was to place all three existing but badly diffused monetary powers in a single, responsible body, the Senate bill leaves discount rates and reserve requirements in the Board but puts open market policy in the Board plus five governors, so that it would be possible that the two groups would work at cross purposes, with the representatives of the private banker viewpoint able to obstruct or frustrate the execution of policy deemed essential from a national standpoint by the non-bankers.

Beyond all this, it is a fundamental principle demonstrated by long experience that to place representatives of special vested interests upon a permanent government regulatory body can result only in violent conflict and in stultification of that authority's functions.

#### CONTROL OVER CREDIT AND MONETARY POLICIES

In proposing the Banking Bill of 1935 the most important general purpose was to establish unified responsibility in a public body for national credit and monetary policies. The existing diffusion of responsibility between the Federal Reserve Board, the Federal Open Market Committee, and the 108 directors of the twelve Reserve banks was the most serious defect in the structure of the Federal Reserve System which the Banking Bill was intended to correct.

Under the bill as reported by the Senate Banking and Currency Committee, open-market operations of the Federal Reserve System would be subject to control by an Open Market Committee consisting of the seven members of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve banks elected with a view to representation of the different regions of the country.

Recognition in the Senate bill of the importance of giving a national body full responsibility for open-market operations is an important step in the right direction. In view, however, of the great importance of this matter to the welfare of the nation, a close study of the proposal is necessary with a view to determining whether it falls short in any important respect of accomplishing the desired purpose.

In the first place, let us consider the question whether representation of the Federal Reserve banks on the Open Market Committee is in the best interests of the country. Two-thirds of the directors of the Reserve banks, who would elect the Reserve banks' representatives on the Open Market Committee, are in turn elected by the member banks. These

members of the committee, therefore, would be definitely representative of banking interests. The question, therefore, arises whether there is any reason why all but equal power over open-market operations should be given to representatives of the banks.

This is no new question. It was prominent at the time that the Federal Reserve Act was proposed. At that time there had been serious agitation in favor of selection by the banks of some of the members of the Federal Reserve Board. This proposal, however, which was sponsored by the chairman of the Banking and Currency Committee of the House of Representatives, was not approved by President Wilson, who asked the pertinent question whether anyone would advocate that the railroads should select members of the Interstate Commerce Commission. By raising this point President Wilson made it clear that it would not be good policy to have the institutions that are to be supervised and controlled represented on a board charged with the duty of controlling them. In his address to the Joint Session of Congress on June 25, 1915, President Wilson said: "The control of the system of banking and of issue must be vested in the Government itself, so that the banks may be the instruments--not the masters--of business and of individual enterprise and initiative."

That this view expressed by President Wilson was accepted by Congress is indicated by the following passage from the Statement of Views accompanying the Senate report on the original Federal Reserve Act: "Many of the big banks quite urgently insisted that the bankers should have representation upon the Federal Reserve Board. This was denied for the obvious

reason that the function of the Federal Reserve Board in supervising the banking system is a governmental function in which private persons or private interests have no right to representation except through the Government itself. The precedent of all civilized governments is against such a contention."

Recognition of the necessity of public control of monetary policy was, therefore, in the minds of Congress as early as 1913. The need for public control has become even more apparent during the twenty-odd years that the Federal Reserve System has been in operation.

The world has gone through a period of war, of inflation, and of deflation, of radical readjustments accompanied by the disappearance of the more automatic controls over monetary conditions, which to some extent had protected the countries of the world against excesses of inflation or deflation. Such controls were reasonably effective when world trade was sufficiently balanced to make it possible for an international gold standard to function freely. Such a condition does not prevail at the present time and no one can tell when if ever it will return again. One thing is clear, that it is not safe at this time to provide for a monetary system that depends in an important degree on automatic controls. If, however, controls are not to be automatic, then there has to be discretion and management, and if there is to be management, it must be in the interests of the nation as a whole and not in the interests of any particular group of people, be they bankers or politicians.

In these circumstances it is more imperative than ever that the control of monetary and credit policies be entrusted to a body that has complete and unescapable responsibility for the adoption of these policies. This body must be free from the influence of bankers or other special interests and must devote itself exclusively to the public service. Representatives of the Federal Reserve banks, however, do have banking constituents and might be swayed by considerations that are more in the interests of these constituents than of the nation as a whole.

When the bill was originally proposed, there was more reason for giving consideration to participation by the Federal Reserve banks in the determination of open-market policy. This was because the Federal Reserve Board contained two ex-officio members, because there was no requirement that two members must be persons of tested banking experience, and that no more than 4 shall belong to one political party. The Senate bill has eliminated the ex-officio members from the Federal Reserve Board which would consequently be more independent of the administration. The bill also provides that two members of the Board shall be men of tested banking experience. This would insure a proper understanding of banking technique by the Board and also provide for representation of the banking point of view. The bankers on the Board, however, would have severed their connection with the banks, and while they would understand the bankers, they would owe allegiance to no one but the country as a whole. They would have no special constituents. The Senate bill also provides that not more than four of the Board members shall belong to one political party. It is a Board, therefore, that is not likely

to be swayed by partisan considerations and a Board that will have adequate representation of banking knowledge and of the banking point of view. Whatever reason there may have been for direct bank representation on the policy making body with the old Reserve Board, there would be no such reason with the Board as it would be reconstituted by the Senate bill.

It is clear, therefore, that the power over open-market operations should be vested in the Board of Governors, and that the Reserve banks should not be represented except by an advisory committee with which the Board should consult before taking action on credit or monetary policies.

It should also be pointed out that to give authority over open-market operations to any body other than the Board would perpetuate the diffusion of authority that now prevails. The Board has now and would continue to have under the bill, authority over the two other instruments of monetary policy—changes in discount rates and in reserve requirements.

It would be possible, therefore, under the Senate proposal, to have the different instruments of monetary policy used in opposite directions. The Open Market Committee, for example, might decide by a vote of five bank members and two Board members against the other five Board members to ease credit conditions through the purchase of Government securities, while the Board might decide by a vote of five to two to tighten conditions through raising discount rates or reserve requirements. There ought not to be the possibility of such a conflict in the administration of the nation's monetary policy. All the three instruments of monetary policy should be lodged in

one public body with single unescapable responsibility. No other procedure would insure the prompt and courageous action that is necessary to protect the country from inflation and deflation, and to assure it that the influence of the monetary system will be exerted toward sustaining continuous employment of labor and of the productive capacity of the nation.

"(b) The Committee shall consult and advise with, and give recommendations to, the Board from time to time with regard to the open-market policy of the Federal Reserve System. The Committee shall also aid in the execution of open-market policies adopted from time to time by the Board and shall perform such other duties relating thereto as the Board may prescribe. The Board shall accept the Committee's recommendations on changes in its own initiative in the open-market policy, in the rates of interest or discount to be charged by the Federal Reserve banks, or in the currency interests required to be maintained by member banks.

"(c) After consulting with and receiving the views and recommendations of the Committee, the Board may from time to time and shall, if possible, the open-market policy of the Federal Reserve System. The Federal Reserve banks shall carry out the open-market policy of the Board and shall give effect to the Board's instructions in the execution of the open-market policy of the Board in the extent and in such manner as may be required by the Board in order to effectuate the open-market policies adopted by the Board from time to time under the provisions of this section and each Federal Reserve bank shall cooperate fully, in every way, in making such policies effective.

"(d) All transactions of Federal Reserve banks under authority of section 14 of this Act shall be subject to such regulations, limitations, and restrictions as the Board may prescribe."

AMENDMENT TO SECTION 204 of H.R. 7617

Page 149, lines 19 and 20, strike out the words:

"the members of the Board of Governors of the Federal Reserve System and".

Page 150, commencing with line 17, strike out everything through line 14 on page 151 and substitute the following:

"(b) The Committee shall consult and advise with, and make recommendations to, the Board from time to time with regard to the open-market policy of the Federal Reserve System. The Committee shall also aid in the execution of open-market policies adopted from time to time by the Board and shall perform such other duties relating thereto as the Board may prescribe. The Board shall consult the Committee before making any changes on its own initiative in the open-market policy, in the rates of interest or discount to be charged by the Federal Reserve banks, or in the reserve balances required to be maintained by member banks.

"(c) After consulting with and considering the recommendations of the Committee, the Board, from time to time, shall prescribe the open-market policy of the Federal Reserve System. Each Federal Reserve bank shall purchase or sell obligations of the United States, bankers' acceptances, bills of exchange, and other obligations of the kinds and maturities made eligible for purchase under the provisions of section 14 of this Act to such extent and in such manner as may be required by the Board in order to effectuate the open-market policies adopted by the Board from time to time under the provisions of this section and each Federal Reserve bank shall cooperate fully, in every way, in making such policies effective.

"(d) All transactions of Federal Reserve banks under authority of section 14 of this Act shall be subject to such regulations, limitations, and restrictions as the Board may prescribe."

*file  
personal*

~~Study file~~ PSF  
*Frankfurter*

THE WHITE HOUSE  
WASHINGTON

August 21, 1935.

MEMORANDUM FOR THE PRESIDENT:

Re: Securities and Exchange Commission Vacancy.

1. May I suggest that you tell Ben and Tom, when you have them in, that while Ben is doubtless the man best qualified to administer the three laws — looking forward to a Holding Company Act — which he largely drew, nevertheless, some men are needed for staff rather than line service and you will continue to need the team, Ben and Tom, for staff work. That is the reason Tom has not been utilized for other important posts.

2. If you think well of it, it would help to tell Ben that you have had a frank talk with me about the matter and that I felt very clearly that membership on the Commission was not the best use of Ben's abilities.

3. It would be well to ask the boys for names of people really qualified for the vacancy. I have tipped off Tom and he will propose Ross's name and give a number of powerful considerations that would make Ross a really ideal appointment.

4. The Commission ought to have a man with seasoned experience in utility affairs who is, at the same time, dependably liberal. Either at this session (as now seems likely) or next year a Holding Company Bill will become a law. Whether it does so at this session or not, a man with appropriate qualifications in this most vital field ought to be appointed because, in any event, utility issues constitute a large part of the business coming before the S.E.C.

5. Ross comes from the right section; he is liberal and has a record for fairness. Politically as well as intrinsically he would add enormous strength to the Commission. (Healy is very finicky and unimaginative and obstructive rather than constructive.)

6. Jim Landis is greatly concerned lest a mediocre new man really impair the work of the Commission. He says that their honeymoon period is over and, as a matter of fact, they have not yet touched *(the some of)* the most difficult problems before the Commission. He thinks it would be better to leave the place open until next year rather than have a mediocre man, a man who has had merely brokerage experience or is a second-rate lawyer.

7. I should think that since Ross is down here on P.W.A. work, it should not be difficult to persuade him to go on the S.E.C. certainly for a year or two, and thereby help see the Commission through the very critical year that lies ahead.

*F.F.*  
FELIX FRANKFURTER

MEMORANDUM FOR THE PRESIDENT

FROM----F. F.

PSF Gully Lico  
Frank J. Rater

[Sept. 13 1935]

(1) Had a talk with Stanley Reid, particularly about the Belcher case. Made clear to him what seemed to me the decisive reasons for dismissing this appeal in view of the proposed changes in NRA legislation. He indicated that the NRA people are anxious for a ruling from the Supreme Court even if adverse in order to guide the new legislation. I told him I thought that was a suicidal policy from any point of view. He, himself, believes the case should be dismissed but wondered whether the views of the NRA people if they had come to him were not a reflection of yours. I assured him that if he were convinced, as he is, of the wisdom of dismissing the appeal he would have your support.

(2) I had a visit from Sam Rayburn. He is keen for the message early next week. He wants the message restricted to Holding Company Legislation---Title (1) of his Bill. He agrees highly with you that the Holding Company feature must be separated from the other features 2 and 3--regulatory rate making features---are not at all "must Legislation." He has pr

*file personal*  
*July file PSF*  
*Frankfurter*  
~~xxx~~  
5 September [1935]

Dear Miss LeHand:

1. Please tell the President that Tom and I had a long good talk with Pecora last night. There is no doubt whatever that he wants to come and expects to come, but he really has a problem on his hands with Mrs. Pecora - with her doctor's aid and with time, and with a few suggestions that I made to him (to treat New York as his headquarters and thereby to ease her into accepting Washington) he hopes to work the thing out. He is really rarin' to go, not only because of the investigation into A.T. & T. but to get into the fight with you. The Bull Moose movement of 1912 was Ferdie's great political romance - and he rightly says that next year's fight will be hotter and better and more important, and he, in his own words is "eager to shoulder a musket".

He would be of enormous help, not only as investigator and generally, but also because he has red hot stuff, growing out of his banking inquiry, that he wants to publish and give in speeches, which would considerably help the President's cause.

2. I wonder if it would not be possible for the President to find time to ask Pecora to Hyde Park before he leaves for the West. That sort of thing has tremendous significance for Ferdie.

3. May I also suggest two important business men who ought to be of considerable help next year, for whom a Hyde Park visit would greatly matter? One is Zemurray - if his boy's illness permits, and the other is James L. Richards, President of the Boston Gas Co., the most influential director of the New Haven R.R. etc. etc. - and old gentleman of the old school (I spoke to you about him as you will recall - and the President once wrote him a note which the old gentleman carries around as one does a love-letter).

4. The enclosed admirable review of the Nazi-anti-catholic outrages is from the non-Catholic London "New Statesman". The President, as well as you, may be interested in it.

5. Tell the President I did not hold out on him about the abandonment of the western trip. The time is too ~~h~~short - for I must soon be back training young lawyers for Wall Street!

Very cordially, F.F.

77

Law School of Harvard University,  
Cambridge, Mass.

September 5 -

Dear Miss Le Hand:

1. Please tell the President that  
 Tom → had a long good talk with  
 Secora last night. There is no doubt  
 whatever that he wants to leave and  
 expects to leave, but he really takes  
 problem on his hands with Mr. Secora.  
 With her doctor's aid and with mine, &  
 with a good suggestion that I made to  
 him (to treat her here as if he had  
 quarters & thereby to ease her into  
 accepting Washington) he hopes to  
 work the thing out. He is really pouring  
 his life into it, not only because of the investigation  
 into A. T. & J. but to get into the fight  
 next year. The Bull Moose movement  
 of 1912 was the first in political  
 romance - and he rightly says that  
 next year's fight will be to see



A Hyde Park visit would really do  
nothing. But is your way - if you  
had; illness prevents - and the  
other is James L. Richards, President  
of the Boston Gas Co., the most influential  
director of the New Haven R.R. -  
an old gentleman of the old  
~~school~~ (I spoke to you about this,  
as you will recall - and the President  
once wrote him a note which the  
old gentleman carried around  
as one does a love letter)

4. The enclosed admirable review of  
the Nazi anti-Catholic outrages in  
from the non-Catholic London  
"New Statesman." The President, as  
well as you, may be interested in it.

5. Tell the President I did not  
"hold out" on him about the abandoned  
ment of the western trip. The time is too  
short - for I must soon be back  
training my young lawyers for Wall Street!

per room. The handbook makes no pretence that effective gas masks can be provided for more than a tiny fraction of the population and it admits that the full costume necessary for those who must work outside during an air-raid is so stifling as to be unusable for any prolonged period. It discusses a temporarily effective gas-mask and a costume in which only a small part of the body would be liable to the burns of mustard gas or lewisite. It does not tell us of any way of guarding children or animals—though the Union of Democratic Control pamphlet *Poison Gas* informs us of a Frenchman who has invented an ingenious device for sewing children up in cowhide while the father, if alive, pumps in oxygen at intervals. A great deal of attention is necessarily devoted to the problem of decontamination, for mustard gas and lewisite lie on the ground in liquid form and may continue to kill for several weeks after a raid. Some idea of the impossibility of the task of decontamination may be gathered from the information that boiling may be necessary to free clothes from contamination and that anyone who walks in a street that has been contaminated may have to take his leather boots to be treated at a special depot; while if a concrete surface has been soaked with liquid mustard gas "it may be necessary to break up the surface and relay it." The handbook classifies the effects of several types of gas, but does not emphasise the fact that of all the deaths known to man, there are few more painful than death from mustard gas, though some of the new gases are said to produce an even more intense agony. It would be useful if, when reprinting this handbook, the Home Office would add short descriptions by eye-witnesses—we should be happy to contribute one ourselves—of deaths by gas in the last war.

This is a very inadequate summary of the Home Office's careful account of all the complicated methods which the ordinary citizen aided by his local authority is supposed to take to lessen the chances of death, but it is enough to make it clear that such precautions are almost meaningless except for the very few. While Lord Londonderry, who has boasted of his efforts to prevent the abolition of aerial bombing, may successfully secure his own house in London against gas or retire into the comparative safety of his Durham estate, the mass of the population in poorer districts would be virtually helpless. Instead of wasting our time on such precautions for the poor, it would be cheaper and more humane to make stocks of morphia available for those who prefer a gentle death.

The result of any large-scale gas, explosive, and incendiary bombardment of a big city would be a panic-stricken rush by the mass of people for the open country. Some might prefer to storm the big houses in the West End where there were known to be effective gas-proof rooms. This should keep the police and soldiers busy. The only hope of winning a war of this kind is, as Mr. Baldwin has shown, that what is known as the morale of the civilian population in the enemy country would be destroyed before that of our own population. The object of all air-raid precautions is not so much to persuade people to spend money on quite inadequate defences as to make them believe that these defences will at least give some security and therefore to postpone panic until after the outbreak of war itself. Consequently the keynote of this handbook is discipline. The population is

to be regimented before the war because it will be too late after war has begun. We are to be drilled in the use of gas masks, to be told where the nearest shelters are, to equip our houses with gas-proof rooms and join up as special constables, Red Cross orderlies, or firemen. We are to get into the habit of regarding this horror as inevitable; we are to show our British courage by not getting excited. If we display our characteristic ability to die more quietly than other people, they may surrender first.

We publish to-day a letter by Mr. Reginald Stamp, a prominent member of the L.C.C., who was one of the speakers at a meeting held last week to consider alternatives to this ghastly programme. Several well-known Labour spokesmen, as well as technical experts, were present, and if their expressions of opinion are any indication of a determination to act, the Labour Party Executive, which hurriedly committed itself to co-operation with the Government in carrying out these precautions, may find itself surprised by the force of the opposition at the next Annual Conference. But this is no party issue; it is a choice which affects everyone. A number of local authorities have already refused to accept the Home Office injunctions, and some have set up sub-committees to examine the whole issue. An intelligent local authority may decide that if precautions are to be carried out at all, they must be complete. If so they must spend many times as much as the Government proposes. They must erect huge gas-proof shelters and insist on commandeering the houses and taxing the incomes of rich people in order as far as possible to make the risks of death equal for rich and poor. In any case, they must reject the present fraudulent policy. For the individual the question is vital. He is being asked to accept as inevitable a situation which might never have arisen if the Government had not itself given the lead in jettisoning proposals for air disarmament, and is invited voluntarily to take the first steps towards conscription, to put himself at the disposal of the Government as if war had already been declared. He is to forget that the one consideration that is likely to check a bad Government—and we may have Governments much less anxious for peace than the present one—is the fear in a Government's mind that the ordinary civilian understands too much about foreign policy and about war to be willing to fall in quietly and take what's coming to him.

## THE NEW KULTURKAMPF

[FROM A CORRESPONDENT IN GERMANY]

IN the minds of German Catholics the impending *Kulturkampf* is of a more decisive character than that conducted by Bismarck sixty years ago. They are convinced that their resistance against the omnipotent State and its dark forces, against neo-paganism and against the cult of violence, is not only in defence of their Church and the rights solemnly conceded to it. They regard it as a struggle for the fundamental principles of German civilisation and for their country's future. They know that its conduct cannot be left to the Holy See or to their Bishops alone—though they anxiously await the watchword to be given out at the Fulda conference of German Bishops which will assemble during the next few days.

They are well aware that it is they who will have to bear the brunt of the fight, that it is upon them that the full force and brutality of the totalitarian State will be turned. Clergy and laymen alike are however resolved to see the struggle through

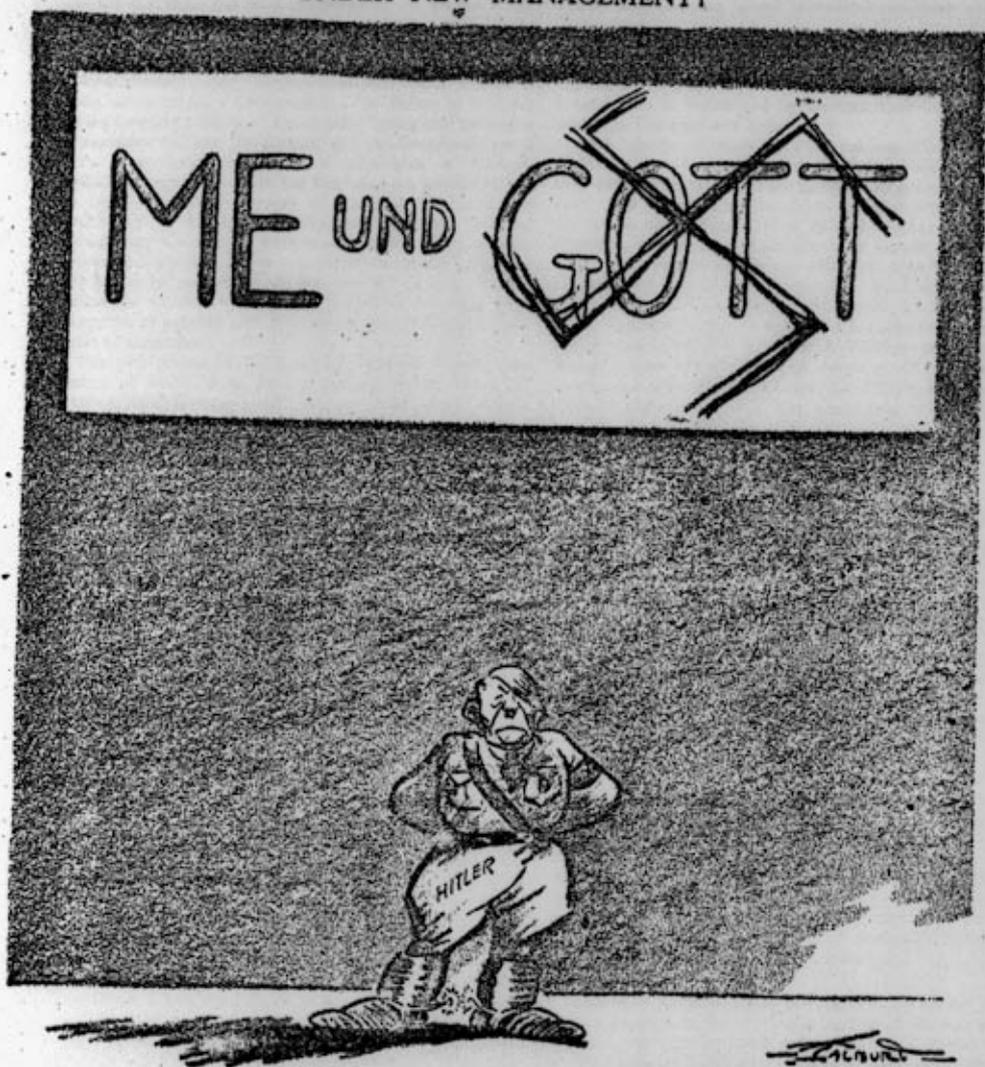
both as Catholics and as Germans. Like their Protestant brethren they are at bay for the sake of their country and their people, no less than for the sake of the Church. Anybody who has been able to talk intimately with German Catholics during the last few weeks must have been struck by the spirit of holy warfare with which they are imbued and the all-pervading conviction that fate has laid upon them the duty of taking up the gauntlet against paganism and barbarism for a nation which they love as fervently as any other Germans.

During the last few weeks the fight against the Roman Catholic Church has been greatly intensified. The masses have been stirred up by manifestations against so-called "political Catholicism"—by which is meant any state of mind incompatible with the Nazi idea of the proper relationship between Church and State. Herr Rosenberg, the Nazi "Leader of Culture," stung to fresh anger by the Vatican's ban upon

his works, is carrying on a lively campaign against what he calls the "Dunkelmänner," or Catholic opponents of the various brands of Nazi ideology—particularly, of course, his own.

The trials of members of religious orders for currency smuggling have been exploited to the full in order to maintain an anti-Catholic spirit amongst the masses. Anti-clerical caricatures are published throughout the press and especially in *Das Schwarze Korps*, the official organ of the S.S. protective guards. Fat and greasy priests of malevolent aspect are depicted as plotting against the simple, healthy, honest members of the Nazi party. Any offence, whether civil, political or criminal, attributed to a priest or nun is given tremendous prominence in the press; young people belonging to the Catholic Church are subtly presented as obeying standards humanly or nationally inferior to those proclaimed by the

### UNDER NEW MANAGEMENT!



Reproduced by permission from the NEW YORK WORLD-TELEGRAM

Party. The whole apparatus of the press has been set to work to prove that no good Catholic can be a good German, or vice versa.

The favourite target remains, of course, the Catholic associations which have, ever since the Concordat was signed, failed to enjoy the protection that Article 31 purports to afford. Numerous members have been arrested for alleged attacks on the Party and the State, for maltreating members of the Hitler Youth organisations and for similar offences. Wherever friction occurs the Catholics are described as the assailants. At Solingen a hostel of the Hitler Youth group was devastated; the malefactors wrote inscriptions on the walls denouncing themselves as Catholics. The hostel in question had been closed for some little time before the desecration was detected—locally it is said, in order that members of the Hitler Youth might prepare it at their leisure. At Werne, in Westphalia, several young workmen were arrested for distributing slanderous poems on the currency trials and ribald couplets directed against the Bishop of Münster. The Nazis asserted that these had been composed by the workmen, but in point of fact they are well known and often sung by the Storm Troopers and S.S. on the march and at Nazi meetings.

More recently young Catholics have been openly accused of being connected with Communists. The Bishop of Freiburg having asked for evidence, "Communist" pamphlets proposing co-operation between the Catholic and the Communist youth were conveniently found shortly afterwards in Munich. Catholics compare this with the Reichstag fire technique. In an open letter, the secretary of Cardinal Faulhaber, the Archbishop of Munich, had expressed the hope that the Gestapo may discover the authors and printing office of these obscure pamphlets. Active and ingenious though it is, this task has so far proved beyond the Gestapo's powers. Nevertheless the *Voelkischer Beobachter* persists in regarding these pamphlets as genuine and they may afford a basis for a fresh series of allegations.

The part played by the so-called "Catholic" press (the decline of which to its present position would require an article to itself) is stranger still. Not one of the former Catholic papers, such as the *Germania* or the *Kölnische Volkszeitung* dares to tell the truth about this scandalous misleading of public opinion. More remarkable still, they are compelled by Dr. Goebbels not only to print the official reports and communiqués manufactured at his headquarters, but also their own commentaries condemning the various "crimes" for which Catholics have been punished. It is believed here that this is being done in preparation for a final dissolution of all Catholic associations—to be justified, with chapter and verse, by the fact that "even Catholic newspapers have been impelled time after time to deplore the criminal and felonious acts committed by politicians wearing the mask of religion." Having performed this function it is likely that the former Catholic newspapers will themselves be liquidated as relics of "political Catholicism."

There is still a Concordat between Germany and the Holy See. It was signed on July 20th, 1933, and quickly ratified as being the first international agreement to which the Nazi Government had set its signature.

In the opinion of the Vatican it was almost as quickly broken. The German Government, however, denies this by manipulating that elastic phrase "political Catholicism" with which Herr von Papen made such successful play when dealing with his opposite number at the Vatican to whom, as in Italian, it implied a very different background. The Church, say the Nazi apologists, is not being attacked, but only individual German Catholics foolish enough to oppose the Third Reich. Freedom of worship and doctrine is respected, it is maintained, and was indeed secured by the Nazis for Catholics when they "overthrew Communism." It is pointed out that Catholic associations and the Catholic press do still in fact exist. They are, of course, not allowed to show any external sign of their existence. State officials and their families are, it is quite

truthfully asserted, permitted to be members of Catholic associations. The fact that such membership implies resignation from their State positions is not mentioned. In reply to the question why certain Catholic workmen's unions and juvenile associations were dissolved last week, it is pointed out that they had committed "political obstruction." A State based like the present one on "positive Christianity" would, of course, never interfere with religious convictions as such. And so on.

The Vatican has in the meantime realised its mistake in taking words for facts and phrases for realities. Naturally it continues to insist upon the full provisions of the Concordat being maintained. An official note on the Reich violations of this instrument is understood to have been delivered in Berlin last month and stronger protests will follow in due time. But protests are not an effective weapon; the State authorities hide behind the Party and the Party hides behind the State authorities. Where Herr Rosenberg's opinions are concerned he is put forward as a private individual. When any Catholic attacks him, however, he has committed an offence against a Nazi official.

The Concordat is only one position in a struggle the ultimate object of which is Christianity itself and the maintenance of Germany within the orbit of western civilisation. This is the present task as understood by German Catholics and their leaders in Germany and Rome.

There can be no doubt as to the political effects of a new *Kulturkampf* on Germany. German Catholics are not rebels; they will fight for their faith and for their Germany, for nothing else. But that the struggle against Catholics with its unfair methods is highly destructive of political morality—not of the Catholics, but of their opponents—is a simple truth which ought to be understood by any authority, even by the Nazi Government. The charge of political and moral decomposition advanced by the Nazis against the Catholics falls back on the Nazis themselves. In a letter to *Reichsstatthalter* Wagner of Baden, written on July 24th, the Archbishop of Freiburg—formerly Herr Hitler's strongest supporter in the German episcopate—solemnly pointed out this responsibility to the German authorities. Will they understand what they are about? *Caveant Consules* . . .

## A LONDON DIARY

CAPTAIN Kane, the English merchant sailor who was sentenced to two years and eleven months' imprisonment in Majorca for assaulting the police, is apparently to be pardoned. It was a fantastic sentence. Unfortunately for the Captain his affair occurred at a time when, as a result of the October revolt, any offence against the police in Spain was tried by a political tribunal. While the Spanish authorities are tacitly admitting a mistake in the case of Capt. Kane, the news comes of a new and far worse example of Spanish justice as at present administered. A journalist named Sirval was murdered last autumn, in Oviedo, by Lieut. Ivanov, a Bulgarian in the Foreign Legion sent to suppress the miners' revolt. It was a brutal and cold-blooded affair. Ivanov has just got six months. The last has not been heard of this scandalous sentence, for it is well known that Sirval was murdered because he had collected details of atrocities committed by the Foreign Legion. A group of distinguished writers and politicians, led by Unamuno, whose name means more to the rest of the world to-day than that of any other living Spaniard, and Besterio, the leader of the Socialist party, has issued a protest demanding the re-trial of Ivanov and denouncing the lawless methods of the Lerroux Government. In the meantime, it is obviously cheaper to kill a journalist in Spain than to hit a policeman.

Apropos of Captain Kane, my friend X., who has lived much in Spain, remarks that even at the best of times, in order to obtain anything in Spain from justice downwards, it is necessary to have "influence." *Influencia* is not merely helpful;

July file PSF

Frankfurter

Law School of Harvard University,

Cambridge, Mass.

14 September '34 -

Dear Rand -

Here are four documents that I believe you will want to see.

1: The first is Johnny Burris's reply to the question that was raised about Samuel Lyne. The matter is now academic, but since Lyne is one of Johnny's most intimate friends, he naturally does not want to leave in your mind any deposit of doubt as to Lyne's character.

2: The letter from Lincoln Filene's associates about John Fabry came out of a clear sky. I need in the course of the night that it deals on Fabry's business connections and influences.

3: Johnny Burris reported some Joe's account to the former of his talk with Joseph Hyde Park. Johnny says that Joe just personally does not like John Fabry - he does not know why.

But, as you know, there are not many people - outside his entourage - of whom I've heard well. I thought (in view of his estimate) it would be illuminating to know what Isaiah thought of Fabry. And so I asked him for his estimate, without telling him the purpose of the inquiry. The enclosed telegram was his answer.

4° Finally, I send you a letter from a young colleague, Henry M. Hart, a most enthusiastic but detached New Dealer, who is just back from his active Spokane and who crossed the continent according to your prescription. He is a man of very good judgment - and, for what it's worth (I think it's worth a good deal) Harlan agrees with Hart as to the kind of detailed exposition that only you can make by a

Law School of Harvard University,

Cambridge, Mass.

few speeches - the kind of elucidation  
that will not only dispel a good  
deal of confusion and doubt  
but also serve the friends of the  
best cause with the necessary ar-  
guments

You must have had a fine day  
yesterday, at Whiteface Mountain,  
and you were evidently in the  
best of health. But I see no occasion  
for you till you get aboard &  
do some happy fishing.

I never told you what those  
days had been well meant -  
but surely you know, and  
words could not tell.

Ever faithfully yours

W. A.

JOHN J. BURNS  
1776 PENNSYLVANIA AVE. N. W.  
WASHINGTON, D. C.

(A) September 6, 1935

Dear Felix:

At the time the President was considering the vacancy since filled by Honorable George L. Sweeney, United States Judge of the District Court of Massachusetts, you informed me that it had been reported to the President that Mr. Lyne, whom I had recommended, had some connection with a bank which had closed under circumstances which might be embarrassing to the President or Mr. Lyne should his name have been submitted.

At your suggestion I have made a very careful inquiry into Mr. Lyne's professional career. This inquiry was an added precaution because I have known Mr. Lyne intimately, and am very well acquainted with his career at the Bar. My unequivocal conclusion is that Mr. Lyne is completely free from any alliances, relationships or associations which could in the slightest way be the subject of critical comment. His only association with banks in any form has been his activity as one of a number of counsellors for the First National Bank of Boston which, as you know, is the outstanding financial institution of New England and one of the largest in the country. For this concern his office has acted as counsel in conveyancing work of all kinds and Mr. Lyne personally has acted for the firm in a number of reorganizations.

I am at a loss to understand, in view of Mr. Lyne's outstanding accomplishments, what could have been the source of the rumor you spoke of. There is nothing in his history which would furnish the slightest clue to the origin of this charge. The only possible basis for this claim was that after leaving the office of Herrick, Smith, Donald & Farley he became associated with General Logan in the firm of Lyne & Logan, which

Professor Felix Frankfurter,  
~~109 Bratton Street~~, 192 *Bratton Street*  
Cambridge, Mass.

JOHN J. BURNS  
1778 PENNSYLVANIA AVE. N. W.  
WASHINGTON, D. C.

association dissolved in 1924. Subsequently, General Logan was counsel for the Federal National Bank, which is now in receivership.

As you will recall, the necessity for such a letter as I am writing seemed to you quite important for purposes of clearing Mr. Lyne's record of the charge, whatever its source may have been. I hope that you will find that it is proper to have this letter called to the attention of the President to counteract any adverse impression he may have of Mr. Lyne. This is all the more true because Mr. Lyne's professional career is singularly free from any circumstances affecting his high standards of honor and integrity.

Sincerely yours,



LINCOLN FILENE  
428 WASHINGTON STREET  
BOSTON, MASS.

(2)

September 11, 1935

Professor Felix Frankfurter  
Harvard Law School  
Cambridge, Massachusetts

Dear Felix:

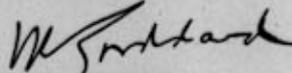
I talked with L.F. at the Cape the other day about a great many things, and in particular one thing, namely the Department of Commerce situation.

John Fahey's appointment to that post would make possible holding together a business group which would at least be of some constructive help to the President.

As you know, Mr. Filene will not let go the idea that Fahey should have that appointment. I believe that we wrote you about it some months ago, and that very likely you showed that letter to the President. There are a great many considerations, of course, in making this appointment, but I do not think that Mr. Filene is in the least moved by personal friendship for Fahey.

I am leaving this with you to do what you think best.

Sincerely yours,



W. L. Stoddard  
Personal Associate

WLS:K

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

1201-S

**CLASS OF SERVICE**

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

W.A.

**R. B. WHITE**  
PRESIDENT

# WESTERN UNION

**NEWCOMB CARLTON**  
CHAIRMAN OF THE BOARD

**J. C. WILLEVER**  
FIRST VICE-PRESIDENT

**SYMBOLS**

DL = Day Letter
SER = Serial
NM = Night Message
NL = Night Letter
CDE = Code Cable
LC = Deferred Cable
NLT = Cable Night Letter
Ship Radiogram

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination.

Received at Western Union Building, 218 Congress St., Boston, Mass.

1935 SEP 13 PM 8 21

WA623 47 NL=WASHINGTON DC 13 (3)  
 PROF FELIX FRANKFURTER=  
 192 BRATTLE ST CAMBRIDGE MASS=

MINUTES IN TRANSIT	
FULL-RATE	DAY LETTER

I THINK HIGHLY OF FAHEY STOP HE EXHIBITED IN MATTERS IN WHICH I HAD OPPORTUNITY TO OBSERVE HIM BOTH FINE PUBLIC SPIRIT AND GOOD JUDGMENT STOP HAS BEEN MUCH EDUCATED BY CONTACTS IN CHAMBER OF COMMERCE AND PUBLIC FRANCHISE LEAGUE AS WELL AS IN HIS OWN BUSINESS=  
 LOUIS D BRANDEIS.

WESTERN UNION MESSENGERS ARE AVAILABLE FOR THE DELIVERY OF NOTES AND PACKAGES

75  
Law School of Harvard University,  
Cambridge, Mass.

(4)  
September 11, 1935

Dear Felix:

Perhaps you would be interested in some of my impressions about politics in the West, drawn from a summer's conversations.

I have little doubt that Roosevelt's hold on Washington and its neighboring states is still secure. Several young Republican party workers to whom I talked had little doubt of it either. But no doubt also his hold has slipped. The dominant state of mind might be called one of disillusion. More accurately, I would call it one of confusion. There is of course a great deal of intensified and intensifying bitterness. But this is mostly among inveterate Republicans, and a good many even of this group are surprisingly tolerant. Outside of these, and on the hither side of the party Democrats who are of course contented, are great numbers of honestly troubled people - the group whose votes will, I suppose, be decisive in 1936. Their hearts, I think, are mostly still with Roosevelt, but their minds are beginning to wonder. Perhaps their toes have been stepped on by some part of the Administration program; almost certainly the criticisms of some part of it seem to them convincing. Now for almost two years, it must be remembered, they have been subjected to a barrage of misleading newspaper reports of events at Washington and of predominantly hostile

editorial comment.

I hope that this situation will be taken into account in the plans for the President's western trip. Immense good could be done out there, it seems to me, by a series of candid and specific discussions of what the Government has been doing, and why. There is an appetite for that sort of thing which ought to be ministered to, and the President himself can do it as no one else can. This, moreover, is peculiarly the time for it. It can be done this year, not as the opening salvo of the campaign, but in the tone and spirit of discharging the educational functions of his job. It can be done too, now that Congress is adjourned, with emphasis not on plans for legislation but simply on making clear the difficulties which have been faced and what has been done about them.

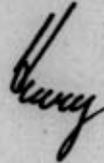
The relief problem will give an illustration of what I mean. I talked with dozens of people who are disturbed about relief and all its implications. There are a lot of things to be said to them, things which are obvious but which none the less need saying. Relief at best is a bad business. Yet no one seriously proposes to give it up. The ultimate cure is to straighten out the economic tangle. Meanwhile, the best we can do is to make relief administration as free from abuse as possible. These specific abuses are to be guarded against, and the Government is doing its best to guard against them. Don't be deceived

Law School of Harvard University,  
Cambridge, Mass.

3

by occasional reports of malingering. And so on. . . I can imagine such a speech conveying a vast amount of reassurance, - and all the more if it were given in the temper not of glossing over difficulties but of taking people into confidence about them and making them think straight about the alternatives. A few such speeches, cementing Roosevelt's appeal to the sympathies of people by an appeal to their understanding, would leave me no worries about the outcome in 1936.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Henry".

P. S. F. 3.7. 1935  
'33-'25

file  
personal

PSF  
Frankfurter

September 14, 1935.

Dear Frank:-

Here are four documents that I believe you will want to see.

1. The first is Johnny Burns' reply to the question that was raised about DANIEL LYNE. The matter is now academic, but since Lyne is one of Johnny's most intimate friends, he naturally does not want to leave in your mind any deposit of doubt as to Lyne's character.

2. The letter from Lincoln Filene's associate about John Fahey came out of a clear sky. I send it because of the light that it sheds on Fahey's business connections and influences.

3. Johnny Burns reported to me Joe's account to the former of his talk with you at Hyde Park. Johnny says that Joe just personally does not like John Fahey. He does not know why. But, as you know, there are not many people - outside his entourage - of whom Joe thinks well. I thought (in view of Joe's estimate) it would be illuminating to know what Isaiah thought of Fahey. And so I asked him for his estimate without telling him the purpose of the inquiry. The enclosed telegram was his answer.

4. Finally, I send you a letter from a young colleague, Henry M. Hart, a most enthusiastic but detached New Dealer, who is just back from his native Spokane and

and who crossed the continent according to your prescription. He is a man of very good judgment - and, for what it's worth (I think it's worth a good deal) Marion agrees with Hart as to the kind of detailed exposition that only you can make by a few speeches - the kind of elucidations that will not only dispel a good deal of confusion and doubt but also serve the friends of the New Deal with the necessary arguments.

You must have had a fine day yesterday, at Whiteface Mountain, and you were evidently in the best of fettle. But I see no vacation for you till you get aboard and do some happy fishing.

I never told you what those days this summer meant - but surely you know, and words could not tell.

Ever faithfully yours,

F. F.

Tracy Pitts

Law School of Harvard University,  
Cambridge, Mass.

BSF

[1935]

Dear King  
fill  
personal

25 Sept  
file  
(with Frankfurt)

Here are two communications  
from Lillian that which the President  
may want to see, especially

(1) the figures which he may  
want to see at Boulder Dam,  
if he has not already seen these  
charts...

(2) The telegram about Senator  
Knox followed the latter's visit  
with the T. V. & people.

John came here and about  
two courses & had a good  
talk with him.

How do you have a work  
sketch of a California (and  
also Texas) and a jigsaw puzzle  
being sent

TENNESSEE VALLEY AUTHORITY

Knoxville, Tennessee

September 12, 1935

BOARD OF DIRECTORS  
ARTHUR E. MORGAN, CHAIRMAN  
HARCOURT A. MORGAN  
DAVID E. LILIENTHAL

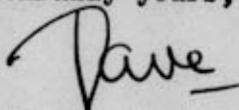
Professor Felix Frankfurter  
Harvard Law School  
Cambridge, Massachusetts

My dear Felix:

I am sending you three charts showing at a glance some salient points about the effect of drastically lower rates on: (1) increase in use of electricity; (2) increase in the number of people using electricity; (3) rapidity of recovery of revenues lost by the rate decrease. I am also sending financial statements indicating the financial success of the yardstick rates.

I had hoped the President might make some reference to the actual operation of his yardstick idea in his Boulder Dam speech.\* Perhaps the most important effect has been that of example, resulting in an interest in electricity rates, a growing conviction that if they are lower everyone will be better off, and the translation of those two things into huge rate reductions throughout the country. I don't suggest that the TVA rates are the only factors by any means, but it is hard to deny that they are important ones. One of the best demonstrations of this regulation by example is the fact that way out in Oklahoma and in Colorado private utilities are publishing pamphlets attacking the TVA rates, which pamphlets are distributed to their customers. Nobody expects TVA to serve electricity in Oklahoma or Colorado; and the inference is clear.

Faithfully yours,



David E. Lilienthal

\* I have sent him copies, although it is unlikely they will actually reach him.

INCREASE IN CUSTOMERS SERVED UNDER TVA

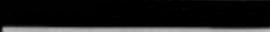
JULY 1934 - JULY 1935

<b>ATHENS, ALABAMA</b>		
1934		766
1935		918
	20% INCREASE	
<b>TUPELO, MISSISSIPPI</b>		
1934		1,352
1935		1,659
	23% INCREASE	
<b>ALCORN COUNTY (MISSISSIPPI) ELECTRIC POWER ASSOCIATION</b>		
1934		1,566
1935		2,019
	29% INCREASE	
<b>PRENTISS COUNTY (MISSISSIPPI) ELECTRIC POWER ASSOCIATION</b>		
1934		698
1935		746
	7% INCREASE	
<b>PONTOTOC COUNTY (MISSISSIPPI) ELECTRIC POWER ASSOCIATION</b>		
1934		455
1935		619
	36% INCREASE	
<b>TISHOMINGO COUNTY (MISSISSIPPI) ELECTRIC POWER ASSOCIATION</b>		
1934		481
1935		545
	13% INCREASE	

**INCREASE IN RESIDENTIAL USE FOR ELECTRICITY UNDER TVA**

**Last Month of Private Service**

**vs  
TVA service for July, 1935**

		KWH
	Athens, Alabama	
May 1934		51
July 1935	 169% Increase	137
<hr/>		
	Tupelo, Mississippi	
Jan. 1934		49
July 1935	 106% Increase	101
<hr/>		
	Alcorn County (Mississippi) Electric Power Association	
May 1934		49
July 1935	 116% Increase	106
Association organized June 1, 1934 - served direct from May 1934		
<hr/>		
	Prentiss County (Mississippi) Electric Power Association	
May 1934		44
July 1935	 139% Increase	105
Association organized June 20, 1935 - served direct from May 1934		
<hr/>		
	Pontotoc County (Mississippi) Electric Power Association	
May 1934		33
July 1935	 130% Increase	76
Association organized March 1, 1935 - served direct from May 1934		
<hr/>		
	Tishomingo County (Mississippi) Electric Power Association	
May 1934		25
July 1935	 192% Increase	73
Association organized Aug. 15, 1935 - served direct from May 1934		

NATIONAL AVERAGE IS 53 KWH PER MONTH

Pulaski, Tennessee (municipal plant), connected Jan. 4, 1935 - average residential use has increased from 56 KWH monthly to 89 KWH - 59%

Dayton, Tennessee (municipal plant), connected Feb. 1, 1935 - average residential use has increased from 38 KWH monthly to 59 KWH - 55%

In Colbert County (Alabama rural network) average monthly residential use has increased from 79 KWH in March, 1935 to 117 KWH in August - 49%

In Lauderdale County (Alabama rural network) has increased from 27 KWH in Nov. 1934, to 82 KWH in August, 1935 - 200%



COMPARATIVE INCOME AND EXPENSE STATEMENTS  
 FIRST YEAR OF OPERATION UNDER THE TVA  
 ALCORN COUNTY, ATHENS AND TUPELO

	<u>Alcorn County E.P.A.</u>	<u>Athens, Ala.</u>	<u>Tupelo, Miss.</u>
Plant and Equipment	\$128,155.16	\$82,844.74	\$138,762.41
Total Assets	142,531.23	93,098.26	169,481.89
Number of Customers	1,694	844	1,354
KWH Sold	3,239,673	1,677,808	5,691,996
Period Covered	Year Ended 5/31/35	Year Ended 5/31/35	Year Ended 1/31/35
<u>Gross Operating Revenue</u>	\$ 76,587.98	\$36,279.05	\$ 88,295.04
Operating Expenses			
Cost of Power	21,971.20	12,115.00	36,449.01
Distribution	2,774.02	4,908.70	4,776.69
Utilization	1,307.29	289.34	569.77
Commercial and New Business	3,788.51	1,271.10	1,114.37
General	<u>5,481.36</u>	<u>1,163.80</u>	<u>2,062.64</u>
Total Operating Expenses	\$ 35,322.38	\$19,747.94	\$ 44,962.48
<u>Net Operating Revenue</u>	\$ 41,265.60	\$16,531.11	\$ 43,332.56
Other Operating Deductions			
Uncollectible Accounts	\$ 36.04	\$ 106.94	\$ 69.89
Taxes Assignable to Operations	5,786.19	2,332.05	6,657.32
Depreciation	4,893.24	3,293.98	5,227.21
Amortization of Intangibles	<u>43.40</u>	<u>--</u>	<u>--</u>
Total Other Deductions	\$ 10,758.87	\$ 5,732.97	\$ 11,954.42
<u>Gross Operating Income</u>	\$ 30,506.73	\$10,798.14	\$ 31,378.14
Non-Operating Income	<u>1,200.50</u>	<u>209.11</u>	<u>647.80</u>
Gross Income	\$ 31,707.23	\$11,007.25	\$ 32,025.94
Deductions from Gross Income			
Interest	\$ 3,417.38	\$ 148.87	\$ 2,580.56
Return on City's Investment	<u>--</u>	<u>4,356.45</u>	<u>4,570.54</u>
Total Deductions	\$ 3,417.38	\$ 4,505.32	\$ 7,151.10
<u>Net Income</u>	\$ 28,289.85	\$ 6,501.93	\$ 24,874.84

Division of Rates, Research, and Economics  
 Tennessee Valley Authority

COMPARATIVE INCOME AND EXPENSE RATIOS  
FIRST YEAR OF OPERATION UNDER THE TVA  
ALCORN COUNTY, ATHENS AND TUPELO

(Cents Per Kilowatt Hour Sold)

	<u>Alcorn County E.P.A.</u>	<u>Athens, Ala.</u>	<u>Tupelo, Miss.</u>
<u>Gross Operating Revenue</u>	2.36¢	2.16¢	1.55¢
Operating Expenses			
Cost of Power	0.68¢	0.72¢	0.64¢
Distribution	0.08¢	0.29¢	0.09¢
Utilization	0.04	0.02	0.01
Commercial and New Business	0.12	0.08	0.02
General	<u>0.17</u>	<u>0.07</u>	<u>0.03</u>
Total Operating Expenses	1.09¢	1.18¢	0.79¢
<u>Net Operating Revenue</u>	1.27¢	0.98¢	0.76¢
Other Operating Deductions			
Uncollectible Accounts	0.00¢	0.01¢	0.00¢
Taxes Assignable to Operations	0.18	0.14	0.12
Depreciation	0.15	0.19	0.09
Amortization of Intangibles	<u>0.00</u>	<u>--</u>	<u>--</u>
Total Other Deductions	0.33¢	0.34¢	0.21¢
<u>Gross Operating Income</u>	0.94¢	0.64¢	0.55¢
Non-Operating Income	<u>0.04¢</u>	<u>0.01¢</u>	<u>0.01¢</u>
Gross Income	0.98¢	0.65¢	0.56¢
Deductions from Gross Income			
Interest	0.11¢	0.01¢	0.04¢
Return on City's Investment	<u>--</u>	<u>0.26</u>	<u>0.08</u>
Total Deductions	0.11¢	0.27¢	0.12¢
<u>Net Income</u>	0.87¢	0.38¢	0.44¢

COMPARATIVE INCOME AND EXPENSE RATIOS  
FIRST YEAR OF OPERATION UNDER THE TVA  
ALCORN COUNTY, ATHENS AND TUPELO

(Dollars Per Customer)

	<u>Alcorn County E.P.A.</u>	<u>Athens, Ala.</u>	<u>Tupelo, Miss.</u>
<u>Gross Operating Revenue</u>	\$45.21	\$42.99	\$65.21
Operating Expenses			
Cost of Power	\$12.97	\$14.35	\$26.92
Distribution	1.64	5.82	3.53
Utilization	0.77	0.34	0.42
Commercial and New Business	2.24	1.51	0.82
General	<u>3.23</u>	<u>1.38</u>	<u>1.52</u>
Total Operating Expenses	\$20.85	\$23.40	\$33.21
<u>Net Operating Revenue</u>	\$24.36	\$19.59	\$32.00
Other Operating Deductions			
Uncollectible Accounts	\$ 0.02	\$ 0.13	\$ 0.05
Taxes Assignable to Operations	3.42	2.76	4.92
Depreciation	2.89	3.90	3.86
Amortization of Intangibles	<u>0.02</u>	<u>--</u>	<u>--</u>
Total Other Deductions	\$ 6.35	\$ 6.79	\$ 8.83
<u>Gross Operating Income</u>	\$18.01	\$12.80	\$23.17
Non-Operating Income	<u>0.71</u>	<u>0.24</u>	<u>0.48</u>
Gross Income	\$18.72	\$13.04	\$23.65
Deductions from Gross Income			
Interest	\$ 2.02	\$ 0.18	\$ 1.91
Return on City's Investment	<u>--</u>	<u>5.16</u>	<u>3.37</u>
Total Deductions	\$ 2.02	\$ 5.34	\$ 5.28
<u>Net Income</u>	\$16.70	\$ 7.70	\$18.37

COMPARATIVE INCOME AND EXPENSE RATIOS  
FIRST YEAR OF OPERATION UNDER THE TVA  
ALCORN COUNTY, ATHENS AND TUPELO

(Cents Per Dollar of Gross Revenue)

	<u>Alcorn County E.P.A.</u>	<u>Athens, Ala.</u>	<u>Tupelo, Miss.</u>
<u>Gross Operating Revenue</u>	100.00¢	100.00¢	100.00¢
Operating Expenses			
Cost of Power	28.69¢	33.39¢	41.28¢
Distribution	3.62	13.53	5.41
Utilization	1.71	0.80	0.65
Commercial and New Business	4.95	3.50	1.25
General	<u>7.15</u>	<u>3.21</u>	<u>2.33</u>
Total Operating Expenses	46.12¢	54.43¢	50.92¢
<u>Net Operating Revenue</u>	53.88¢	45.57¢	49.08¢
Other Operating Deductions			
Uncollectible Accounts	0.05¢	0.29¢	0.08¢
Taxes Assignable to Operations	7.55	6.43	7.54
Depreciation	6.39	9.08	5.92
Amortization of Intangibles	<u>0.06</u>	--	--
Total Other Deductions	14.05¢	15.80¢	13.54¢
<u>Gross Operating Income</u>	39.83¢	29.76¢	35.54¢
Non-Operating Income	<u>1.57¢</u>	<u>0.58¢</u>	<u>0.73¢</u>
Gross Income	41.40¢	30.34¢	36.27¢
Deductions from Gross Income			
Interest	4.46¢	0.41¢	2.92¢
Return on City's Investment	<u>--</u>	<u>12.01</u>	<u>5.18</u>
Total Deductions	4.46¢	12.42¢	8.10¢
<u>Net Income</u>	36.94¢	17.92¢	28.17¢

COMPARATIVE INCOME AND EXPENSE RATIOS  
FIRST YEAR OF OPERATION UNDER THE TVA  
ALCORN COUNTY, ATHENS AND TUPELO

(Cents Per Dollar of Total Assets)

	<u>Alcorn County E.P.A.</u>	<u>Athens, Ala.</u>	<u>Tupelo, Miss.</u>
<u>Gross Operating Revenue</u>	53.73¢	38.97¢	52.09¢
Operating Expenses			
Cost of Power	15.41¢	13.01¢	21.50¢
Distribution	1.95	5.27	2.82
Utilization	0.92	0.31	0.34
Commercial and New Business	2.66	1.37	0.66
General	<u>3.84</u>	<u>1.25</u>	<u>1.21</u>
Total Operating Expenses	24.78¢	21.21¢	26.53¢
<u>Net Operating Revenue</u>	28.95¢	17.76¢	25.56¢
Other Operating Deductions			
Uncollectible Accounts	0.03¢	0.11¢	0.04¢
Taxes Assignable to Operations	4.06	2.51	3.93
Depreciation	3.43	3.54	3.08
Amortization of Intangibles	<u>0.03</u>	--	--
Total Other Deductions	7.55¢	6.16¢	7.05¢
<u>Gross Operating Income</u>	21.40¢	11.60¢	18.51¢
Non-Operating Income	<u>0.84¢</u>	<u>0.22¢</u>	<u>0.38¢</u>
Gross Income	22.24¢	11.82¢	18.89¢
Deductions from Gross Income			
Interest	2.39¢	0.16¢	1.52¢
Return on City's Investment	<u>--</u>	<u>4.68</u>	<u>2.70</u>
Total Deductions	2.39¢	4.84¢	4.22¢
<u>Net Income</u>	19.85¢	6.98¢	14.67¢

RECEIVED AT

22 BRATTLE STRE  
TRDWBIDGE 9765

STANDARD TIME  
INDICATED ON THIS MESSAGE

# Postal Telegraph

THE INTERNATIONAL SYSTEM

Commercial  
Cables



All America  
Cables

Black  
Radio

This is a full rate Telegram, Cablegram or Radiogram unless otherwise indicated by signal in the check or in the address.

DL	DAY LETTER
NL	NIGHT LETTER
NM	NIGHT MESSAGE
LCC	DEFERRED CABLE
NLT	NIGHT CABLE LETTER
	RADIOGRAM

Form 16

B4 74 GOVT NL=KNOXVILLE TENN 23

PROF FELIX FRANKFURTER=

192 BRATTLE ST CAMBRIDGE=

SEP 24 AM 7 24

=PERSISTENT REPORT THAT SENATOR NORRIS PLANS TO DECLINE TO RETURN TO THE SENATE AFTER NINETEEN THIRTY SIX STOP THIS WOULD BE CALAMITOUS AT THIS TIME AS HIS PRESENCE IN SENATE ESSENTIAL WHILE TVA IS GETTING ESTABLISHED STOP DO YOU SUPPOSE THE PRESIDENT WOULD CONSIDER DIRECTLY URGING SENATOR NORRIS TO STAY IN THE SENATE STOP I RELAIZE SUGGESTION PRESUMPTUOUS FROM ME BUT DESPITE NEED OF NORRIS ACTIVE PARTICIPATION FOR PRESIDENTS PROGRESSIVE PROGRAM OUTWEIGHS OTHER CONSIDERATIONS=

=DAVID E LILIENTHAL=

TELEGRAMS TO POSTAL TELEGRAPH

8  
Paula:

File under Frankfurter - Personal

F. D. R.

~~Jelly Fish~~ Frankfurter

PSF

85  
COPY

November 16, 1955

Dear Dick,

At least you must have enough filial reverence to admit that paternal pride triumphed over passion and saved your father from charging me with responsibility for your misdeeds. What a weight that takes off my shoulders!

Honest to God, Dick, I had nothing whatever to do with the kidnapping of little Charlie Ross, but--I have always been truthful with you--I must confess that I collaborated on the brief that led the Second Circuit Court of Appeals to sustain the conviction of Captain Van-Schaik of the "General Slocum" and sent that poor devil to the pen. To your Dad that would prove conclusively that of course I was guilty of sinking the "General Slocum", so for God's sake don't tell him.

Do tell him that unfortunately I see no prospects of an early visit to Vienna, but I am planning before long to visit Dallas. When calling on your Dad, should I wear white or gray gloves? On such an important matter, I don't want to go wrong.

You can't disguise your style from my experienced eye. It was very charming of you to make such delightful copy of your "old man" for the Dallas Inquirer and I am grateful to you for letting me see it.

This wicked world seems to be going well with you.

Constitutionally yours,

Richard A. Knight, Esq.  
32 Broadway  
New York City

Continuation of your letter.

This indeed would seem to be going well with you.

For the Ladies Institute and I am gratified to you for letting me see it. was very pleasing of you to make such delightful use of your "old man"

You can't disagree from my experience etc. It is important matter, I don't want to be wrong.

When calling on your Dad, amidst I read notice on Erny Brown's (in such early visit to Vienna, but I am planning before long to visit Paris.

Do tell him that unfortunately I see no prospect of an sinking the "General Bloom", so for God's sake don't tell him.

Your Dad that would prove conclusively that of course I was knight of Order of the "General Bloom" and sent that poor devil to the pen. Do

and Circuit Court of Appeals to sustain the conviction of Charles Van- you--I must confess that I collaborated on the plot, that led the suc-

cessing of little Charles here, and--I have always been truthful with honest to God, that I had nothing whatever to do with the sin-

takes off my shoulders! concerning me with responsibility for our sins. What a selfish plot

that befell me! I'm glad that you and your wife were not taken in. At least you must have enough of this revelation to settle

Dear Dick,

28  
A  
1979  
10081

Handwritten notes and signatures, including a large signature at the bottom right.

TELEPHONE DIGBY 4-7788  
CABLE ADDRESS "RICKNITE"

RICHARD A. KNIGHT  
COUNSELLOR AT LAW  
32 BROADWAY  
NEW YORK

*y - Frankfurter  
to*

November 14, 1935.

Felix Frankfurter, Esq.,  
Harvard Law School,  
Cambridge, Mass.

Dear Felix Frankfurter:

My old man has been in town spending a week with us. It seems that the voice from the burning bush has sent him out in the evening of his days to save the world from the menace of your perfectly monstrous and deep, if slightly elusive, machinations. The only crimes he is not prepared "irrefragibly", (to use one of his favorite words) to prove you have already committed are the kidnapping of little Charlie Ross and the sinking of the General Slocum. You are a socialist and a communist and a Bolsheviki and a nihilist and a fascist, and indeed, all them goddam things, and you'd oughta goddam well be sent back to where you goddam come from. Except they probly wouldn't let you back, by God.

I enclose for the good of your soul an expurgated transcript of one of his typical dying-eyed transports.

Ever yours,

*Rak*

## Knight (From the South, Suh) Up North to Joust New Deal

From The Evening Post  
NEW YORK, April 22.  
ROBERT H. LOUIS KNOTT, former editor of the States here, one of the best of the major race of Southern Cotton and a great-to-the-wood Democrat with the nomination, appeared in New York today, speaking for against his own party's national administration.

The New Deal has done what is not unlikely to happen in 100 years of death ages, in which civilization would have been a challenge to them that the nation was dead.

dem in the Southern legs of industrial price and deep despair."

"If these people in Washington are Democrats," remarked the Colonel, standing up. "I'm a hill-past."

Although Colonel Knight travels light, being content with a single hotel chamber for his New York visits, his movements are always slightly reminiscent of the tradition of an army with trophies.

He came into town today to see the lawyer and Richard Knight, but the visit was no more than an inspection of the files.

## Col. Knight (of South) Unhorseshoes New Deal

Continued From First Page

arrived in a march on Washington, where the Colonel plans to tell the House Committee on Agriculture just what he thinks of the New Deal in the cotton belt. A band of one of Democratic's severe philippic and a few of Jeremiah's Swarthton's indignation would be a pair, was being compared to the Colonel's description of his own thoughts on the New Deal in the cotton belt.

In Other Words, Notes

"What do I think of the New Deal of the country, you say? What do I think of the New Deal of the country?" roared the Colonel, shutting both eyes judicially and opening the interview with something approaching a crash. "I say the country was in a hell of a fix. The United States is the victim of a philosophy evolved by educated imbeciles. There has been talk about on this fair and a magnificent success, a triumph of industrial abundance and modern progress. The path we follow and leads only to destruction, and I wouldn't stand if it were a personal war, unless I have loved you, remember Thomas Rhymes, no doubt by the heavens ends. It's a damned New Deal, uncomprehensible road into the bargain."

The Colonel talked back his notes, considerably disordered by the heat of his phlegm, and ground his eyes in anger as he spoke. He was the product of the great cotton belt, or indeed, a man of the farm. His appearance before Texas today, on which occasion he is said to play with great gusto, has been, he himself, so much that the influence of a body. And it has been in his capacity as a cotton grower, he explained, that the majority of the New Deal has been a disaster. "I was in the cotton belt, I received \$14 cents for my cotton. I was told the cotton was worth \$15. We were all told that we were all free. Now they say in Wash-

ington, those conservative monsters setting the tempo of our national life, those destroyers of the great tradition of our land, have forced 12-cent cotton upon me, forced it, I say."

Wares And Wares

"And with it they have forced an increase in the price of all the necessities of my household, so that I am worse off than I was before, and I have lost my freedom. My word to the public cotton growers of the South is that we must fight for our lives or surrender unconditionally to a system of absolute tyranny and enslavement."

These things were said, then New Deal's have ruled the world market for our cotton. And the Colonel, closing his eyes, "I'm farmers of the South. Cotton, cotton, with cotton above 10 cents, we have the fertile acres. We have the necessary labor. We have the knowledge to grow cotton, but we can never sell in the world markets with our cotton artificially driven above the world price of 10 cents."

Continued on Page 1, Column 1

~~Sully File~~  
Law School of Harvard University,

Cambridge, Mass. PSF (5) (✓)

Frankfurter

November 26, 1955

Dear Mr. President,

Here are three bits, one in lighter vein and the others not so light, that you may want to look at as part of your bed reading:

(1) A piece of mine dealing nominally with technical procedural decisions at the last Term of the Supreme Court, but necessarily raising the deepest aspects of constitutional adjudication. Skip, of course, the statistical stuff; the only things that may interest you are the introduction, pages 68-69, part 2 beginning at page 90, and especially part 3 pages 98 to 107.

(2) The estimate of Landon comes from a discerning younger editor on one of the leading mid-western papers who recently spent several hours with Landon.

(3) Finally, the correspondence with Richard Knight, a pupil of mine out of this School for about ten years who, incidentally, married Lewis Cass Ledyard's daughter, reflects the dramatis personae.

With warmest regards,

Faithfully yours,

FT.

Hon. Franklin D. Roosevelt

The White House

58

THE BUSINESS OF THE SUPREME COURT AT  
OCTOBER TERM, 1934

EVENTS are again demonstrating that in the context of the country's history, the history of the Supreme Court is a rhythm of quiescence and liveliness pulsating with alternating periods of relative placidity and vitality in American politics. But probably at no time could Mr. Justice Holmes more truly than now have said of the Court, "We are very quiet there, but it is the quiet of a storm centre. . . ."<sup>1</sup> To be sure, much comment, and not only by laymen, on the work of the Court is not placed in the perspective of the long process of constitutional adjudication by the Court. A just understanding of its functions, the Court's self-consciousness as to what it is doing when it is deciding, the extent to which it is confined by the very terms of the Constitution or by the streams of doctrine which it has poured into the Constitution and on which future adjudications more or less must float (how much "more" and how much "less" being the crucial intellectual problem) — on these underlying aspects of a specific controversy the Court itself can shed not a little illumination by the accent and atmosphere of speech through which it conveys a particular decision. But much also must be left to the disinterested learning of commentators on the Court's work. Confidence in the Supreme Court as the ultimate arbiter of controversies to which a federalism like ours inevitably gives rise has never been furthered by treating constitutional opinions as opaque mystery or esoteric mysticism.<sup>2</sup>

<sup>1</sup> From his speech *Law And The Court*, delivered at a dinner of the Harvard Law School Association of New York on Feb. 15, 1913, printed in *COLLECTED LEGAL PAPERS* (1930) 292.

<sup>2</sup> See the remarks of one of the most distinguished members in the Court's history: "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters

Another lesson from the Court's history is the relation of the practical and procedural circumstances which attend adjudication to the effectiveness of the Court as constitutional arbiter. The pressure of its business, the bearing of this and other factors upon the serenity and amplitude of its deliberations, the strict observance of the Court's traditional restrictions against premature or unnecessary disposition of constitutional issues — all these considerations are reflected not merely in specific decisions but in the rôle of the Supreme Court in the life of the country.

## I

A tradition of prompt disposition of business for which Mr. Chief Justice Taft did so much to lay the foundations appears to have become fixed under his successor. For the sixth successive year the Court at the last term kept abreast of its docket.<sup>3</sup> It is not enough, however, for a court to dispose of a huge volume of litigation with despatch. Especially gratifying is it that a tribunal with the Supreme Court's scope of jurisdiction should do so with increasing attention to those details of administration which are the safeguards of its processes against undue pressure and inadequate deliberation.

The total volume of appellate business disposed of during the term declined substantially from the peak of the year before — from 1021 cases to 926. This reduction, however, brought the Court no corresponding relief in the discharge of its essential deliberative functions. Complex and subtle issues, and the extensive and recondite investigations they may entail, are not revealed by statistical averages. But even by the inadequate test of numbers, the burden of intensive exploration of issues deemed worthy of full consideration was undiminished; six more cases were decided by full opinion than at the 1933 term<sup>4</sup> and but two

are full of life and health; only in the still waters is stagnation and death." Mr. Justice Brewer, *Government by Injunction* (1898) 15 NAT. CORP. REP. 849.

<sup>3</sup> See Frankfurter and Landis, *The Business of the Supreme Court* (1930) 44 HARV. L. REV. 1, 2; (1931) 45 *id.* 271, 272; (1932) 46 *id.* 226, 227; Frankfurter and Hart (1933) 47 *id.* 245, 248; (1934) 48 *id.* 238, 241. For earlier articles in this series, see Frankfurter and Landis, *The Supreme Court Under the Judiciary Act of 1789* (1928) 42 *id.* 1; *The Business of the Supreme Court* (1929) 43 *id.* 33.

<sup>4</sup> See Table I. These figures are based on cases, not opinions, two or more cases being frequently decided in conjunction with each other.

pace  
90

TABLE I  
ADJUDICATIONS ON APPELLATE DOCKET

<i>Adjudications by Full Opinion</i>					
	1930	1931	1932	1933	1934
Affirmed	115	87	93	82	93
Reversed	106	69	83	89	85
Dismissed*	1	4	5	3	2
Questions Answered	10	7	4	2	3
Miscellaneous†	3	8	2	3	2
Total	235	175	187	179	185

<i>Adjudications Per Curiam</i> ‡					
	1930	1931	1932	1933	1934
Affirmed	16	24	8	24‡	12
Reversed	2	6	9	8	3
Dismissed	50	55	43	58	41
Questions Answered	2	2	0	0	1
Miscellaneous	2	0	0	1	0
Total	72	87	60	91	57

<i>Total Adjudications</i>					
	1930	1931	1932	1933	1934
Affirmed	131	111	101	106	105
Reversed	108	75	92	97	88
Dismissed	51	59	48	61	43
Questions Answered	12	9	4	2	4
Miscellaneous	5	8	2	4	2
Total	307	262	247	270	242

\* Including petitions for *certiorari* dismissed by full opinion.

† Including partial affirmances, decisions on petitions for *certiorari*, on motions, etc.

‡ Excluding petitions for *certiorari* disposed of *per curiam*.

§ Excluding four cases (Nos. 18, 19, 20, 21), affirmed by an evenly divided court, which were set down for argument at the 1934 term on petition for rehearing. See 290 U. S. 591 (1933), 292 U. S. 612 (1934), 293 U. S. 191 (1934).

fewer opinions were written.<sup>6</sup> The Court heard 181 oral arguments, five less than at the previous term and one more than at the 1932 term.<sup>6</sup> For this purpose it was compelled to devote an additional week of the term, or 16 weeks out of 35, to open session. Yet no excessive pressure was apparent; during three of the 16 weeks of session — the last time at the closing one — the Court recessed in the middle of the week for want of cases on the day calendar ready for argument.<sup>7</sup> Adjourning for the term, it left but 96 cases, all of which were too recently docketed to be prepared for hearing.<sup>8</sup>

An appraisal of the Court's balance sheet thus directs attention to the sifting processes by which cases are selected for full hearing, for it is among the cases which do not survive for argument that the chief variables have occurred in the figures for recent terms. Tables IV and VI particularize the principal items in last year's decline — a decrease of 43 in the total number of appeals disposed of, and one of 62 in the number of petitions for *certiorari* denied or dismissed. The impressive falling-off in the number of appeals, from 128 to 85, is reflected in Table III, showing the unusual predominance of discretionary over obligatory jurisdiction. Whether this decrease can be attributed to the effectiveness of lower federal and state court judges in discouraging the taking of improper appeals, under the recent amendments to Rule 12,<sup>9</sup> is doubtful, for the proportion of cases which failed for defect of jurisdiction remained unchanged — approximately

<sup>6</sup> See Table VIII. The total of 156 opinions includes five in cases on the original docket.

<sup>7</sup> See Frankfurter and Hart, *supra* note 3, 48 HARV. L. REV. at 239. Cases argued or submitted on the merits, and finally disposed of, numbered 209. Of these, 28 were cases decided in conjunction with some other. The total of 242 considered adjudications, shown in Table I, is completed by the 33 appeals which were disposed of upon the jurisdictional statement.

<sup>8</sup> See (1934) SUP. CT. J. 46 (Oct. 18, 1934); *id.* 160 (March 7, 1935); *id.* 216 (May 7, 1935).

<sup>9</sup> This figure compares with 92 at the previous term. Of the 96 cases, 36 were granted *certiorari*, and 11 appeals in which the jurisdictional statement had been passed upon. In addition, there were 45 petitions for writ of *certiorari* and three appeals docketed but not yet submitted to the Court, together with one certificate.

<sup>10</sup> The amendments require the showing of probable jurisdiction to be made in the first instance to the judge authorized by law to allow the appeal. See 286 U. S. 602 (1932), discussed in Frankfurter and Hart, *supra* note 3, 47 HARV. L. REV. at 262-63; 48 *id.* at 247-49.

TABLE II

## COURTS FROM WHICH CASES CAME

	1930	1931	1932	1933	1934
<b>DISTRICT COURTS</b>	48	40	41	39	29
Affirmed	31	30	18	21	13
Reversed	8	7	19	10	13
Dismissed	2	2	4	5	5
Miscellaneous	2	1	0	3	1
<b>CIRCUIT COURTS OF APPEALS</b>	149	94	107	118	121
Affirmed	57	45	52	54	63
Reversed	76	31	49	58	51
Dismissed	3	6	6	3	5
Questions Answered	11	7	0	0	1
Miscellaneous	2	5	0	1	1
<b>HIGHEST STATE COURTS</b>	81	102	70	102	79
Affirmed	20	23	22	31	24
Reversed	16	28	10	19	19
Dismissed	44	51	38	52	36
Miscellaneous	1	0	0	0	0
<b>COURT OF APPEALS, DISTRICT OF COLUMBIA</b>	8	9	15	6	7
Affirmed	6	7	2	0	4
Reversed	2	1	12	6	3
Dismissed	0	0	0	0	0
Questions Answered	0	1	1	0	0
<b>SUPREME COURT, DISTRICT OF COLUMBIA</b>	0	5	0	0	1
Affirmed	0	2	0	0	1
Reversed	0	3	0	0	0

TABLE II (continued)

	1930	1931	1932	1933	1934
<b>COURT OF CLAIMS</b>	25	10	12	7	8
Affirmed	17	4	6	2	0
Reversed	7	5	3	2	2
Dismissed	0	0	0	1	0
Questions Answered	1	1	3	2	3
<b>COURT OF CUSTOMS AND PATENT APPEALS</b>	0	0	2	0	0
Affirmed	0	0	2	0	0
<b>PHILIPPINE SUPREME COURT</b>	1	2	0	0	0
Affirmed	0	0	0	0	0
Dismissed	1	0	0	0	0
Miscellaneous	0	2	0	0	0
<b>Total</b>	307	282	247	270	242

TABLE III

## EXTENT OF DISCRETIONARY REVIEW

	1930	1931	1932	1933	1934
Obligatory Jurisdiction	131	125	104	132	92
Discretionary Jurisdiction	176	137	143	138	150
<b>Total</b>	307	262	247	270	242
Obligatory Jurisdiction	42.7%	47.7%	42.1%	48.9%	38.0%
Discretionary Jurisdiction	57.3%	52.3%	57.9%	51.1%	62.0%

two out of every five.<sup>12</sup> By contrast, the Supreme Court's own sifting procedure operated with extraordinary effectiveness; all but four of the 34 appeals dismissed were disposed of without oral argument on the printed statement as to jurisdiction.<sup>13</sup> The *certioraris* tell a somewhat different story. While the number of petitions before the Court fell from 880 to 835, the number granted, both absolutely and proportionately, was substantially greater.<sup>14</sup> One petition out of every five was successful.

Last year's recession in the tide of litigation does little to allay fears as to the danger of undue increase in the Court's burdens.<sup>15</sup> The rise in the proportion of *certioraris* granted is indicative of a higher level of importance in the cases seeking review, a development which, if it continues as is likely, will in the end be decisive of the weight of the Court's task. Nor does the decrease in numbers itself appear to be other than transitory. Most striking is the falling-off in the number of petitions for *certiorari* to which the Government was a party. These cases, which at the 1933 term totalled 382, dropped at the last term to 289.<sup>16</sup> Thus the number of petitions involving federal taxes fell from 199 to 148,<sup>17</sup> a trend unlikely to be permanent. Counterbalancing these tendencies was an actual increase in the volume of private litigation from the circuit courts of appeals. It is noteworthy that the 1935 term commences with approximately 50 more cases on the docket than its predecessor.<sup>18</sup> These circumstances emphasize

<sup>12</sup> Of the 85 appeals disposed of with consideration, 41 were decided by full opinion and 11 by *per curiam* opinion after argument. Of the 33 remaining, three were summarily affirmed upon the jurisdictional statement and the rest dismissed. In addition, there were three cases, heard together, in which the appeals were dismissed but in which *certiorari* was granted upon the appeal papers.

<sup>13</sup> In all four cases the jurisdictional question had been marked as doubtful, and further consideration of it postponed to the merits, when the jurisdictional statement was before the Court. Three of the cases were disposed of by *per curiam* opinion; in the fourth the jurisdictional question was elaborately considered and the judgment of dismissal evoked three dissenting votes. *Herndon v. Georgia*, 295 U. S. 441 (1935).

<sup>14</sup> See Table V.

<sup>15</sup> See Frankfurter and Hart, *supra* note 3, 48 HARV. L. REV. at 277-80.

<sup>16</sup> See 48 *id.* at 244. The Government was petitioner in 49 cases and successful in 24, or 49%. It was respondent in 240 cases, in 34 of which, or 14%, the petition was successful.

<sup>17</sup> See Table VII. Cf. Frankfurter and Hart, *supra* note 3, 48 HARV. L. REV. at 251.

<sup>18</sup> See (1935) 3 U. S. L. WEEK 56.

TABLE IV  
MODE OF ARRIVAL

	1930	1931	1932	1933	1934
<b>DISTRICT COURTS</b>					
Appeal	43	40	41	39	29
<b>CIRCUIT COURTS OF APPEALS</b>					
Appeal	1	5	1	2	0
Certiorari	133	80	101	112	117
Certificate	15*	9	5	2	4
<b>HIGHEST STATE COURTS</b>					
Appeal	69	63	53	86	56
Error	2	0	0	0	0
Certiorari	10	39	17	16	23
<b>COURT OF APPEALS, DISTRICT OF COLUMBIA</b>					
Certiorari	8	7	14	6	8
Certificate	0	2*	1	0	0
<b>SUPREME COURT, DISTRICT OF COLUMBIA</b>					
Appeal	0	5	0	0	0
<b>COURT OF CLAIMS</b>					
Appeal	0	0	0	1	0
Certiorari	24	9	9	4	2
Certificate	1	1	3	2	3
<b>COURT OF CUSTOMS AND PATENT APPEALS</b>					
Certiorari	0	0	2	0	0
<b>PHILIPPINE SUPREME COURT</b>					
Certiorari	1	2	0	0	0
<b>Total</b>	<b>307</b>	<b>263</b>	<b>267</b>	<b>270</b>	<b>243</b>

\* Including cases originally before the Court on certificate but in which the Court ordered the entire record to be transmitted to it.

the continuing importance of striving to perfect the Court's barriers against excessive demands upon it — excessive, that is, for the intellectually high and austere standards that our constitutional system exacts from nine judges.

Major problems of Supreme Court administration center about the large number of cases disposed of by memorandum orders. Competing considerations require to be reconciled. Primarily the Court is under the necessity of reducing the volume and burden of opinion-writing. Such is the basic assumption of that elaborate selective mechanism which is the most characteristic feature of its present jurisdiction and practice. Yet the Court must avoid or mitigate the dangers of decision without reasons, or without adequately explained reasons. Particularly must it seek to familiarize litigants with its exclusionary rules and the grounds upon which its exclusionary powers are exercised. Last year's 34 appeals dismissed and 670 petitions for writ of *certiorari* denied or dismissed furnish the measure of this problem. Errors unexplained make for errors repeated. Thus a summary procedure, unless discriminatingly employed and thoroughly understood by the bar, may serve to increase that very burden of mistaken or trivial applications which it is the object of such a procedure to diminish.

The Court's use of memorandum orders in the disposition of argued cases at the last term illustrates the flexibility and resources of its practice. There were 24 such cases, of which 13 were affirmed or reversed and the remainder dismissed for defect of jurisdiction. In these cases the orders, in every instance fully explanatory, ranged from one-sentence statements, with or without citations, to *per curiams* comparable in length to the shorter signed opinions.<sup>17</sup> The danger of *per curiam* adjudications on the merits, without more than the citation of controlling cases, is the creation of blind precedents, the *sub silentio* making of new law. By the much more extensive use than heretofore of brief individualized explanations, the Court last year was able to reduce to the appropriate minimum its orders of naked affirmance or reversal and at the same time to avoid elaborate opinion-writing.<sup>18</sup>

<sup>17</sup> The writing of *per curiam* of substantial length and content renews a practice common in the days of Mr. Chief Justice White.

<sup>18</sup> See, e.g., *Squibb & Sons v. Mallinckrodt Chem. Works*, 293 U. S. 290 (1934); *George v. Victor Talking Mach. Co.*, 293 U. S. 377 (1934); *Stanley v. Public*

Similarly, in dismissals on grounds of jurisdiction the Court varied the detail of its explanation according to the requirements of the particular case, several cases evoking concise statements of exceeding value for the guidance of future litigants.<sup>19</sup>

Such a degree of individualization of treatment is neither necessary nor possible in the disposition of appeals on the preliminary statement as to jurisdiction. So far as individualization is attained at all, it is by the citation of pertinent authorities accompanying the conventional formula. The Court's increasing use of such authorities and their increasing pertinency has been a noteworthy development of the last few terms.<sup>20</sup> Particularly has this been true of judgments on the merits — whether by affirmance or reversal, or by dismissal (in theory for the lack of jurisdiction) "for the want of a substantial federal question."<sup>21</sup> Such adjudications, having the force of precedent, contribute materially to the corpus of federal law, and it is imperative that their existence and their grounds be discoverable by the bar.

Somewhat different considerations obtain in dismissals for technical defects of jurisdiction. An enumeration of the formalized reasons assigned in orders at the last term is virtually a catalogue of the requisites of jurisdiction on appeal, chiefly on appeal from the state courts: "for the want of a properly presented federal question"; "because 'the judgment . . . is based upon a non-

*Util. Comm.*, 295 U. S. 76 (1935); *Motlow v. State ex rel. Koeln*, 295 U. S. 97 (1935); *Fox v. Gulf Refining Co.*, 295 U. S. 75 (1935); *Texas & N. O. R. R. v. United States*, 295 U. S. 395 (1935); *Hollins v. Oklahoma*, 295 U. S. 394 (1935).

<sup>19</sup> See *Pfueger v. Sherman*, 293 U. S. 55 (1934), dismissing a certificate framed with objectionable generality; *Abrams v. Van Schaick*, 293 U. S. 188 (1934), refusing to consider the constitutionality of a statute authorizing plans of reorganization in advance of the promulgation of any plan; *Wilshire Oil Co. v. United States*, 295 U. S. 100 (1935), refusing to decide important constitutional questions upon certificate in advance of determination of the facts by the district court. See also *Hunt v. Western Casualty Co.*, 293 U. S. 530 (1934); *Peters Patent Corp. v. Bates & Klinka*, 295 U. S. 392 (1935).

<sup>20</sup> *Cf. Frankfurter and Landis*, *supra* note 3, 43 *HARV. L. REV.* at 230-31.

<sup>21</sup> At the last term three cases were summarily affirmed upon the jurisdictional statement and 16 dismissed as "unsubstantial" (in three of which another reason was also assigned). See note 22, *infra*. At the 1933 term 26 cases were dismissed for this reason.

<sup>22</sup> Assigned in five cases, in three of which the Court also found the federal question not "substantial". Proper presentation of the federal question means its timely and specific raising in the state courts. Frequently cited cases dealing with varied situations subsumed under this heading are: *Dewey v. Des Moines*, 173 U. S.

TABLE V  
PETITIONS FOR CERTIORARI\*

	1930	1931	1932	1933	1934
Granted	159	137	148	148	165
Denied	565	590	639	720	664
Denied for Failure to File in Time	0	3	3	0	1
Dismissed on Motion	0	2	2	4	2
Dismissed per Stipulation	1	0	0	3	1
Dismissed Pursuant to Rules of Court	1	2	1	2	0
Denied for Lack of Juris- diction	0	0	0	2	0
Stricken from Files	0	4	4	1	2
Total	726	738	797	880	838

TABLE VI  
APPELLATE BUSINESS FINALLY DISPOSED OF

	1930	1931	1932	1933	1934
Adjudications	307	262	247	270	242
Cases Disposed of without Consideration	19	20	10	19	14
Petitions for Certiorari De- nied and Dismissed	567	601	649	732	670
Total	893	883	906	1021	928

\* Exclusive of appeals treated as petitions for certiorari under the provisions of the Act of Feb. 13, 1925; of petitions for certiorari disposed of by full opinion of the Court, when denied; of petitions for certiorari, when denied, filed in cases in which review by appeal was also sought; and of petitions for certiorari granted to enable reversal of a case without consideration. The disposition of these petitions has been excluded from this table in order to prevent duplication in the statistics.

federal ground adequate to support it";<sup>25</sup> "because it does not appear that the decision of a federal question was necessary to the determination of the cause or was actually decided";<sup>26</sup> because "the judgment . . . is joint and the record fails to disclose summons and severance";<sup>27</sup> "for the want of a final judgment";<sup>28</sup> compendiously, "for the want of jurisdiction";<sup>29</sup> and, finally, "upon the ground that the jurisdictional statement fails to disclose any properly presented substantial federal question".<sup>30</sup> If the defect pointed out be in any degree subtle, repetition of it may indicate the appropriateness of elucidation.<sup>31</sup> More often, however, the failing is obvious, and disposition of the particular case requires only that it be communicated. For dealing with recurrences of these drains upon the Court's energy, the order last quoted suggests a method more effective than any single opinion. If this order means, as it appears to do, that whenever the jurisdictional statement fails to disclose—in understandable detail—

193, 197-200 (1899); *Howe v. Scott*, 233 U. S. 658, 664-65 (1914); *Live Oak Water Users' Ass'n v. Railroad Comm.*, 269 U. S. 354, 357-59 (1926). See also *Herndon v. Georgia*, 295 U. S. 441 (1935).

<sup>25</sup> Assigned in two cases. This familiar canon, often elusive in application, covers situations where the state court has undertaken to decide intermingled state and federal questions as well as where on state grounds it has refused to consider the federal question. See *Consolidated Turnpike Co. v. Norfolk & O. V. Ry.*, 228 U. S. 596, 599 (1912); *McCoy v. Shaw*, 277 U. S. 302, 303 (1928); *Utley v. St. Petersburg*, 292 U. S. 106, 111-12 (1934).

<sup>26</sup> Assigned in two cases, both of which rely upon *Lynch v. New York ex rel. Pierson*, 293 U. S. 52 (1934). In that case the state court had invalidated a state administrative order attacked under both the state and federal constitutions, without indicating which of the two claims it was sustaining. Mr. Chief Justice Hughes, while pointing out that "jurisdiction cannot be founded upon surmise", indicated that the decision would have been the same had both state and federal claims been sustained. See note 23, *supra*.

<sup>27</sup> Assigned in one case. See *Hartford Accident & Indemnity Co. v. Bunn*, 285 U. S. 159 (1932).

<sup>28</sup> Assigned in one case. See Note (1934) 48 *HARV. L. REV.* 302.

<sup>29</sup> Assigned in four cases. This reason, in appeals from state courts, refers to the absence of any "statute", state or federal, the validity of which has been put in question, with the appropriate decision, *JUDICIAL CODE* § 237; or, in appeals from the district courts, to non-fulfillment of the more detailed but likewise more specific requirements of *JUDICIAL CODE* § 238. In the only case of any difficulty at the last term, explanatory citations, contrary to the usual practice, were appended. *Wishnatski & Nathel v. Railway Express Agency*, 293 U. S. 532 (1934).

<sup>30</sup> Assigned in two cases. See note 30, *supra*.

<sup>31</sup> As was done, for example, at the last term in *Lynch v. New York ex rel. Pierson*, 293 U. S. 52 (1934), *supra* note 24.

TABLE VII  
SUBJECT MATTER OF PETITIONS FOR CERTIORARI  
DURING 1934 TERM

	Granted	Denied or Dismissed	Total
Admiralty	8	25	33
Antitrust Laws	3	6	9
Bankruptcy	26	49	75
Bill of Rights	3	2	5
Commerce Clause			
1. Constitutionality of Federal Regulation	3	2	5
2. Constitutionality of State Regulation	0	5	5
3. Construction of Federal Regulation			
a. General	2	5	7
b. Federal Employers' Liability Act and Related Acts	1	29	30
Common Law Topics	7	122	129
Constitutional Law §	8	2	10
Construction of Miscellaneous Statutes			
1. Federal	10	28	38
2. State	3	22	25
Crimes and Forfeitures *	4	53	57

§ Not otherwise classified.

\* Exclusive of cases under the Prohibition Acts.

TABLE VII (continued)

	Granted	Denied or Dismissed	Total
Due Process and Equal Protection			
1. Regulation of Economic Enterprise	2	21	23
2. Relating to Procedure	4	32	36
Full Faith and Credit	2	6	8
Immigration and Naturalization	3	14	17
Impairment of Contract	1	5	6
Indians	2	3	5
International Law	0	3	3
Jurisdiction, Practice and Procedure			
1. Supreme Court	0	0	0
2. Inferior Courts	17	49	66
Land Laws	1	6	7
National Banks	8	7	15
Patents, Copyright and Trademarks	15	31	46
Prohibition Acts	1	6	7
Separation of Powers	2	0	2
Suits against Government	1	2	3
Suits by or against States	0	0	0
Taxation			
1. Federal	28	120	148
2. State	0	15	15
Total	166	670	836

a substantial federal question properly presented to the court below, such failure is ground for dismissal regardless of the actual presence of these requisites in the record,<sup>30</sup> it represents a most promising development in the Court's practice.<sup>31</sup> The existence of such a rule might well be enforced upon the attention of counsel by incorporation in Rule 12 of a statement in terms requiring these essential elements of jurisdiction to be explicitly set forth.<sup>32</sup>

Decisions upon petitions for writ of *certiorari* present distinctive problems. Jurisdiction upon *certiorari* is discretionary; denial of the writ, of course, implies a judgment not that the decision below is right but rather that, right or wrong, there is no sufficient ground for its review. Clarification of the substantive law is thus not an immediate objective in the disposition of petitions. Clarification of the canons which guide the Court's exercise of discretion, however, whether by grant or denial, is of the utmost importance. So long as these canons remain obscure and unfamiliar, so long will the Court be flooded with trivial and mistaken applications to its discretion. But the needed elucidation can evidently be given by means less time-consuming, and hence self-defeating, than the appending of an expressed reason to every

<sup>30</sup> See *Rosen v. Fry*, 293 U. S. 526 (1934); *Stephens v. Pennsylvania*, 294 U. S. 691 (1935). The *Rosen* case was an attack upon the constitutionality of the Indiana Alcoholic Beverages Act. While it is doubtful whether the attack presented, on any hypothesis, a substantial federal question, the state court opinion makes it tolerably clear that the question, such as it was, had been properly raised and presented. See *Fry v. Rosen*, 189 N. E. 375 (Ind. 1934). The Supreme Court's order cited no cases to show the question to be in fact without substance, but relied solely on Rule 12. The jurisdictional statement consisted of three pages of bare recital with a 33-page appendix setting forth the statute involved; it contained no indication as to when or how the federal question was raised below, and, while enumerating the sections of the statute under attack and the clauses of the Federal Constitution relied upon, omitted all statement of facts necessary to show the precise nature of the issue. The *Stephens* case having been brought in *forma pauperis*, no statement as to jurisdiction is available. The Court's order, of dismissal cited only Rule 12 and the *Rosen* case.

<sup>31</sup> The formula of the *Rosen* case, relying not upon the existence of a jurisdictional defect on the record but upon the inadequacy of the jurisdictional statement, appears not before to have been used.

<sup>32</sup> The only reference to such a requirement in the present rule is the indeterminate injunction that "the statement shall show that the nature of the case and of the rulings of the court were such as to bring the case within the jurisdictional provision relied upon." See 286 U. S. 603 (1932). Cf. Frankfurter and Hart, *supra* note 3, 48 HARV. L. REV. at 257.

order of denial.<sup>33</sup> The value of an occasional full opinion upon the denial of a petition for *certiorari* has heretofore been suggested.<sup>34</sup> At the last term most of the Justices, when writing for the Court, resorted to the still more helpful practice of explaining, in the ultimate opinion on the merits, the reasons which had moved it to grant the writ.

Out of 141 cases coming up upon *certiorari* in which opinions were written, the reasons for the grant were expressly stated or clearly implied in 45. In detail and in informativeness these explanations go beyond anything in the previous practice of the Court. On many grounds is the giving of them to be welcomed. It is appropriate, when the right to appear before the highest tribunal is so closely guarded, that every case which does gain a hearing should bear on its face, as a matter of course, the evidences of its title to be heard. Cases in the past have not come so accredited; though the title was good the opinion ordinarily failed to disclose it.<sup>35</sup> Such disclosures are important as public assurances that great powers are exercised in accordance with considered, discernible standards. They are important no less as guides to inform and remind counsel of the bases by which applications will be tested.

The opinions of the last term cast new light upon the suggestions ventured in these pages a year ago concerning the review of cases from the circuit courts of appeals.<sup>36</sup> To three of the published "character of reasons" for review<sup>37</sup> no opinion makes reference.

<sup>33</sup> In rare instances the Court does give reasons, or cite authorities, in its order denying *certiorari* where the defect in the petition is jurisdictional. See, e.g., at the last term, *Warshauer v. Lloyd Sabauo*, 293 U. S. 610 (1934) (failure to file in time); *Morgenthau v. Stephens*, 294 U. S. 720 (1935) (failure to show summons and severance of joint judgment); *Wolfe v. International Re-Insurance Corp.*, 294 U. S. 725 (1935) (failure to file in time). The Court's practice in this respect, however, does not appear to be invariable. Thus, no order has been noted denying *certiorari* to a state court because the judgment sought to be reviewed could be rested on an adequate nonfederal ground or because the federal question was not properly presented, although such defects must be not uncommon.

<sup>34</sup> See Frankfurter and Hart, *supra* note 3, 48 HARV. L. REV. at 275.

<sup>35</sup> References to the fact of conflict between circuits as a ground for review of decisions of the circuit courts of appeals have been the only instances noted and these have been comparatively infrequent.

<sup>36</sup> See Frankfurter and Hart, *supra* note 3, 48 HARV. L. REV. at 266-74.

<sup>37</sup> "Where a circuit court of appeals . . . [1] has decided an important question of local law in a way probably in conflict with applicable local decisions, or

TABLE VIII

## DISTRIBUTION OF OPINIONS

	<i>Opinions of the Court</i>				
	1930	1931	1932	1933	1934
Hughes	27	25	24	21	22
Holmes *	22	5	—	—	—
Van Devanter	5	1	1	8	3
McReynolds	13	13	18	14	13
Brandeis	18	14	16	15	13
Sutherland	19	21	18	16	15
Butler	16	19	23	19	18
Stone	22	21	21	22	26
Roberts	24	21	22	20	21
Cardozo *	—	10	25	23	25
Total	186	180	188	188	188

*Concurring Opinions*

Hughes	0	0	0	0	0
Holmes *	0	0	—	—	—
Van Devanter	0	0	—	—	—
McReynolds	0	0	1	1	0
Brandeis	0	0	0	0	0
Sutherland	1	0	0	1	0
Butler	0	0	0	1	0
Stone	0	1	0	1	0
Roberts	0	0	0	0	0
Cardozo *	—	0	0	0	0
Total	1	1	1	4	4

*Dissenting Opinions*

Hughes	2	0	1	1	1
Holmes *	0	1	—	—	—
Van Devanter	0	0	0	0	0
McReynolds	3	1	0	3	3

\* Mr. Justice Holmes retired on Jan. 22, 1932. On March 24, 1932, Mr. Justice Cardozo succeeded him.

TABLE VIII (continued)

	1930	1931	1932	1933	1934
Brandeis	0	3	1	0	0
Sutherland	2	1	1	1	0
Butler	2	2	3	2	0
Stone	2	6	5	5	6
Roberts	1	0	1	2	1
Cardozo *	—	2	5	4	3
Total	12	16	17	18	14

*Total Opinions Delivered*

Hughes	29	25	25	22	23
Holmes *	22	6	—	—	—
Van Devanter	5	1	1	9	3
McReynolds	16	14	19	17	16
Brandeis	18	17	17	15	13
Sutherland	22	22	19	18	15
Butler	18	21	26	22	18
Stone	24	28	26	18	34
Roberts	25	21	23	22	22
Cardozo *	—	12	30	27	30
Total	179	187	188	180	174

*Dissenting Votes*

Hughes	2	0	3	4	3
Holmes *	4	3	—	—	—
Van Devanter	4	4	3	3	5
McReynolds	13	7	8	9	5
Brandeis	5	15	11	9	10
Sutherland	5	3	5	5	5
Butler	6	5	10	9	7
Stone	6	14	14	13	11
Roberts	2	3	3	4	3
Cardozo *	—	4	13	11	11
Total	67	88	70	67	60

The inference seems justified that these reasons, so commonly invoked by counsel, are but uncommonly invoked by the Court. The conclusions as to the preponderant importance, on the other hand, of a conflict between circuits<sup>88</sup> and a failure to follow applicable Supreme Court decisions,<sup>89</sup> as a ground for review, are confirmed. The bulk of the cases which find a place on the day calendar are there for these reasons. It is essential that the character of issues involved in such cases should not mislead counsel as to the standards of public importance which are requisite when those reasons are absent. In *The Ansaldo San Giorgio I v. Rheinstrom Bros. Co.*,<sup>90</sup> involving the effect upon a carrier's liability of a certain clause in the bill of lading, Mr.

[3] has decided an important question of general law in a way probably untenable or in conflict with the weight of authority, . . . or [6] has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Rule 38(5)(b), 286 U. S. 622, 624 (1932), as amended, (1933) *Sup. Ct. J.* 250-51.

<sup>88</sup> "Where a circuit court of appeals [1] has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter." See *McCandless v. Furlaud*, 293 U. S. 67, 70, 71 (1934); *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84 (1934); *British-American Tobacco Co. v. Helvering*, 293 U. S. 95 (1934); *McNally v. Hill*, 293 U. S. 131, 139, 140 (1934); *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 176 (1934) (three cases); *National Paper Products Co. v. Helvering*, 293 U. S. 183, 184 (1934) (two cases); *Clifton Mfg. Co. v. United States*, 293 U. S. 186, 187 (1934); *Helvering v. Union Pac. R. R.*, 293 U. S. 282, 283, 284 (1934); *Schumacher v. Beeler*, 293 U. S. 367, 371 (1934); *Smith v. Snow*, 294 U. S. 1, 3 (1935); *Waxham v. Smith*, 294 U. S. 20 (1935); *Keystone Driller Co. v. Northwest Engineering Corp.*, 294 U. S. 47, 44 (1935) (three cases); *Lerner v. First Wisconsin Nat. Bank*, 294 U. S. 116, 117 (1935) (two cases); *Helvering v. Grinnell*, 294 U. S. 153, 158 (1935); *Schoenamsgruber v. Hamburg American Line*, 294 U. S. 454, 455 (1935) (two cases); *Helvering v. Inter-Mountain Life Ins. Co.*, 294 U. S. 686, 689 (1935); *Berger v. United States*, 295 U. S. 78, 80, 81 (1935); *Van Wart v. Commissioner*, 295 U. S. 112, 115 (1935); *Hartley v. Commissioner*, 295 U. S. 216, 217 (1935); *Stelos Co., Inc. v. Hosiery Motor-Mend Corp.*, 295 U. S. 237, 238 (1935) (two cases); *Ivanhoe Bldg. & Loan Ass'n v. Orr*, 295 U. S. 243, 245 (1935); *Mobley v. New York Life Ins. Co.*, 55 *Sup. Ct.* 876 (1935); *Kenward v. The Admiral Peoples*, 55 *Sup. Ct.* 885, 886 (1935).

<sup>89</sup> "Where a circuit court of appeals . . . [5] has decided a federal question in a way probably in conflict with applicable decisions of this court." See *Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co.*, 293 U. S. 268, 291 (1934); *Douglas v. Cunningham*, 294 U. S. 207, 209 (1935); *The Ansaldo San Giorgio I v. Rheinstrom Bros. Co.*, 294 U. S. 496, 495, 496 (1935); *Baltimore & Carolina Line v. Redman*, 55 *Sup. Ct.* 890, 891 (1935). See also *Helvering v. Union Pac. R. R.*, 295 U. S. 282, 283, 284 (1934).

<sup>90</sup> 294 U. S. 494 (1935).

Justice Roberts indicated the kind of approach which should be second nature among lawyers in appraising the likelihood of review:

"Though no conflict of decision in the federal appellate courts is cited, and the novelty of the question presented would not, in the absence of general importance, move us to grant certiorari, we issued the writ because the decision below is alleged to conflict with principles established by our decisions."<sup>41</sup>

Upon the answer, elusive of statement, to the question of what level of general importance will move the Court, in the absence of the more usual reasons, the opinions furnish valuable data. Nine opinions refer reviewability to this ground,<sup>42</sup> in addition to several in which express statement was superfluous. These appear to be the first instances of the Court's addressing itself specifically to this point.

Contrasting examples occurred at the last term in which the opinion was regrettably silent as to the reasons for granting the writ. Thus one can only wonder as to the basis of review in a war risk insurance case in which the opinion could state that "the sole question presented for our consideration" is whether "the evidence was . . . sufficient to sustain the verdict."<sup>43</sup> The review of such issues is reminiscent of the Court's former liberality in cases under the Federal Employer's Liability Act, for long at striking variance with its practice in other cases.<sup>44</sup> If it is desired, as part of the Court's general supervisory function in the administration of federal law<sup>45</sup> to set a standard to correct laxity

<sup>41</sup> *Id.* at 495-96.

<sup>42</sup> "Where a circuit court of appeals . . . [4] has decided an important question of federal law which has not been, but should be, settled by this court." See *Gregory v. Helvering*, 293 U. S. 465, 468 (1935); *Central Vt. Transp. Co. v. Durning*, 294 U. S. 33, 35 (1935); *Pennsylvania v. Williams*, 294 U. S. 176, 177 (1935); *Gordon v. Ominsky*, 294 U. S. 186, 187 (1935); *Domenech v. Nat. City Bank*, 294 U. S. 199, 201 (1935); *Aktieselskabet Casco v. The Sucareco*, 294 U. S. 394, 399 (1935); *Swinson v. Chicago, St. P., M. & O. Ry.*, 294 U. S. 519, 521 (1935); *Gordon v. Washington*, 295 U. S. 30, 31 (1935); *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 573 (1935). *Cf.* *Penn. Gen. Casualty Co. v. Pennsylvania*, 294 U. S. 189, 190 (1935).

<sup>43</sup> *United States v. Spaulding*, 293 U. S. 498, 500 (1935).

<sup>44</sup> See *Frankfurter and Landis, supra* note 3, 46 *HARV. L. REV.* at 240-51.

<sup>45</sup> *Cf. Frankfurter and Landis, supra* note 3, 45 *HARV. L. REV.* at 293-301.

TABLE IX

## SUBJECT MATTER OF OPINIONS

	1930	1931	1932	1933	1934
Admiralty	2	4	6	5	9
Antitrust Laws	5	2	4	4	1
Bankruptcy	1	6	8	7	9
Bill of Rights (other than Due Process)	3	5	1	2	2
Commerce Clause					
1. Constitutionality of Federal Regulation	0	3	1	0	2
2. Constitutionality of State Regulation	4	6	2	1	1
3. Construction of Federal Regulation					
a. General	14	8	13	9	6
b. Federal Employers' Liability Acts, etc.	3	14	6	4	1
Common Law Topics	5	11	6	15	8
Constitutional Law §	0	0	0	1	4
Construction of Miscellaneous Statutes					
1. Federal	14	10	10	13	10
2. State	0	0	0	0	0
Crimes and Forfeitures *	0	0	0	4	3

† Not otherwise classified.

\* Exclusive of cases under the Prohibition Acts.

TABLE IX (continued)

	1930	1931	1932	1933	1934
Due Process and Equal Protection					
1. Regulation of Economic Enterprise	8	8	6	8	12
2. Relating to Procedure	1	1	7	7	2
3. Relating to Liberties of the Individual Citizen	2	1	1	0	4
Full Faith and Credit	0	0	0	1	3
Immigration	0	0	0	2	0
Impairment of Contract	0	1	0	3	3
Indians	3	0	0	2	3
International Law	0	1	1	2	0
Jurisdiction, Practice and Procedure					
1. Supreme Court	0	2	5	1	3
2. Inferior Federal Courts	21	8	19	15	13
3. State Courts	0	0	0	1	0
Land Laws	0	3	0	0	2
National Banks	0	0	0	3	8
Patents, Copyright and Trademarks	12	3	1	2	7
Prohibition Acts	1	7	3	1	1
Separation of Powers	0	5	2	0	3
Suits against Government	1	4	2	3	0
Suits by or against States	6	1	3	4	3
Taxation					
1. Federal	44	32	40	24	22
2. State	15	3	11	13	11
Total	168	160	168	166	166

in the lower courts, the purpose would at once be furthered, and an encouragement of futile applications avoided, by so stating. A dissimilar commentary, under different circumstances, is suggested by the opinions in the talking-picture patent cases.<sup>48</sup> In these, *certiorari*, at first denied, was later granted on rehearing,<sup>49</sup> but without explanation then or thereafter. Examination of the petition for rehearing suggests that the Court must have been moved by the forcible argument that, because of the respondents' success in concentrating litigation in a single circuit, no conflict of decision was likely ever to arise.<sup>50</sup> In the silence of the opinions, however, the cases stand as unexplained exceptions to the usual rule denying review in patent cases in the absence of conflict, thus permitting the patent bar to infer that further exceptions may be made on no other ground than that large sums of money are similarly involved.

Study of many other opinions upon granted *certiorari* and of papers in cases in which *certiorari* was denied furnishes cumulative evidence of the desirability of making explicit the grounds upon which review is given. No less by impressing upon the consciousness of the bar matters which ought to be well understood than by illuminating matters which are obscure, the Court can do much to strengthen confidence in the *certiorari* process and to increase its workability.

2

A court the scope of whose activities lies as close to the more sensitive areas of politics as does that of the Supreme Court must constantly be on the alert against undue suction into the avoidable polemic of politics. Especially at a time when the appeal from legislation to adjudication is more frequent and its results more far-reaching, laxity in assuming jurisdiction adds gratuitous friction

<sup>48</sup> *Paramount Public Corp. v. American Tri-Ergon Corp.*, 294 U. S. 404 (1935); *Altoona Public Theatres, Inc. v. American Tri-Ergon Corp.*, 294 U. S. 477 (1935) (two cases).

<sup>49</sup> 293 U. S. 528, 537 (1934). *Cf.* *Douglas v. Willcuts*, 55 Sup. Ct. 642 (1935), in which the Court gave its reason for granting the petition upon rehearing, "it appearing that a conflict of decisions has arisen since the order denying the petition for writ of *certiorari* herein was entered."

<sup>50</sup> See *Paramount Public Corp. v. American Tri-Ergon Corp.*, *Petition for Rehearing of Petition for a Writ of Certiorari*, pp. 2-6.

to the difficulties of government. Conversely, observance of seemingly technical rules is then revealed as wise statecraft. Inevitably, fulfillment of the Supreme Court's traditional function in passing judgment upon legislation, especially that of Congress, occasions the reaffirmation of old procedural safeguards and the assertion of new ones against subtle or daring attempts at procedural blockade-running.

From the beginning, the Supreme Court has laid down strict canons for protection against inroads upon the defined limits of federal power and federal judicial authority, in non-constitutional as in constitutional litigation. It is a postulate of administration for trial and appellate courts alike that federal jurisdiction must appear affirmatively on the record, and that its existence will be challenged by the Court on its own motion even though no party denies it.<sup>51</sup> Every term furnishes illustrations of the Supreme Court's persistent scrutiny of the action of the lower federal courts in this regard, and the last was no exception.<sup>52</sup> Empty legalism would be content with the *clichés* that the federal courts are courts of limited jurisdiction,<sup>53</sup> that jurisdiction is dependent — save in the narrow class of cases provided for by the Constitution — wholly upon statute. But the Court's practice has been based on the deeper insight that conflicts of jurisdiction between state and federal courts, actual or potential, are questions of power as between the states and the nation.<sup>54</sup>

Questions of power are questions of statesmanship, but the attempted imprisonment of varied and delicate manifestations of power in terms of explicit rules may beget a rigidity inadequate

<sup>51</sup> See, e.g., the much cited decision in *Mansfield, C. & L. M. Ry. v. Swan*, 111 U. S. 379, 382 (1884).

<sup>52</sup> A notable instance was *Mitchell v. Mauerer*, 293 U. S. 237 (1934), where the Circuit Court of Appeals for the Ninth Circuit had held that jurisdiction existed on a bill for the appointment of ancillary receivers, without observing that diversity jurisdiction was negatived on the face of the bill and that, even if such jurisdiction were not necessary in a suit ancillary to a proceeding in another federal district court, this suit was ancillary to a proceeding in a state court. *Cf.* *McCandless v. Furlaud*, 293 U. S. 57 (1934).

<sup>53</sup> *Cf.* *McCormick v. Sullivan*, 10 Wheat. 192 (U. S. 1825).  
<sup>54</sup> Mr. Justice Curtis' reminder cannot be too often repeated: "Let it be remembered, also, — for just now we may be in some danger of forgetting it, — that questions of jurisdiction were questions of power as between the United States and the several States." Notice of the Death of Chief Justice Taney, Proceedings in Circuit Court of the United States for the First Circuit, 9.

to the demands of statesmanship. Nowhere does the Court's consciousness of its rôle as mediator in a federal system appear with greater clarity than in its recognition of this paradox. "The *summum jus* of power, whatever it may be," said Mr. Justice Cardozo at the last term, "will be subordinated at times to a benign and prudent comity."<sup>52</sup> The reach of this conception, expressed with increasing frequency in recent years,<sup>53</sup> was illustrated in several cases during the term. Thus vigorous check has been given to the unhealthy luxuriance with which the doctrine of *Swift v. Tyson*<sup>54</sup> has unfolded its long and tortuous history. It is apparent that the decision in *Kuhn v. Fairmont Coal Co.*,<sup>55</sup> so far as it has been thought to sanction the disregard on occasion of state court decisions rendered after the accrual of the claims in controversy, will be confined to its narrowest limits, if not abandoned altogether.<sup>56</sup> And in matters of "general law" choice "balanced with doubt" will be resolved in favor of harmony with state court decisions, whenever such harmony can be attained "without the sacrifice of ends of national importance."<sup>57</sup> Not less significant, district courts have been halted in their improvident assumption of jurisdiction in certain classes of equity receiverships. Power conferred by priority of application<sup>58</sup> should not be exercised where a state administrative procedure makes adequate provision for "the preservation of . . . assets . . . and the proper distribution of funds realized from their liquidation."<sup>59</sup> "It is in the public interest," said Mr. Justice Stone, in one of a notable series

<sup>52</sup> In *Mutual Life Ins. Co. v. Johnson*, 293 U. S. 335, 339 (1934).

<sup>53</sup> See, e.g., Mr. Chief Justice Taft in *Harkin v. Brundage*, 276 U. S. 36, 55 (1928); Mr. Justice McReynolds in *Gilchrist v. Interborough Rapid Transit Co.*, 279 U. S. 159, 221 (1929); Mr. Justice Cardozo in *Hawks v. Hamill*, 288 U. S. 52, 62 (1933); *Trainer Co. v. Aetna Casualty & Surety Co.*, 290 U. S. 47, 54, 55 (1933).

<sup>54</sup> 16 Pet. 1 (U. S. 1842).

<sup>55</sup> 215 U. S. 349 (1910).

<sup>56</sup> *Marine Nat. Exch. Bank v. Kalt-Zimmers Mfg. Co.*, 293 U. S. 357, 366-67 (1934). See also *Hawks v. Hamill*, 288 U. S. 52, 57-60 (1933). But cf. *Concordia Ins. Co. v. School Dist. No. 98*, 282 U. S. 545, 553-54 (1931).

<sup>57</sup> *Mutual Life Ins. Co. v. Johnson*, 293 U. S. 335, 339 (1934); see Note (1935) 45 HARV. L. REV. 979.

<sup>58</sup> As to the usual "principle" governing conflicts of jurisdiction between state and federal court receivers, see *Harkin v. Brundage*, 276 U. S. 36, 43 (1928).

<sup>59</sup> *Gordon v. Ominsky*, 294 U. S. 186, 188 (1935); *Pennsylvania v. Williams*, 294 U. S. 176 (1935); cf. *Penn. Gen. Casualty Co. v. Pennsylvania ex rel. Schnader*, 294 U. S. 189 (1935); *Gordon v. Washington*, 295 U. S. 30 (1935).

of opinions for the Court, "that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy."<sup>60</sup>

Other considerations, in addition to those of "the rightful independence of state governments", operate in the review of state court judgments. Respect for such decisions, founded on large considerations of policy—referable both to our political system and to the stricter aspects of judicial administration—appears in the Court's insistence that the determination of the federal question sought to be reviewed shall have been indispensable to the conclusion reached.<sup>61</sup> The same factor underlies the congeries of rules designed to prevent the assertion of federal rights as an afterthought—after the case has been lost on state grounds.<sup>62</sup> But these rules rest in part also upon the policy expressed in the more general canon that federal questions, and particularly federal constitutional questions, will be decided only when it is necessary to decide them. *Herndon v. Georgia*<sup>63</sup> discloses the application of these canons in their least sympathetic but for that reason all the more striking aspect. In that case the accused was held to be foreclosed by his failure to make timely assertion of a constitutional right of free speech, although assertion of the right would have required anticipation, on the basis of recent statements by the state supreme court, that a favorable ruling of the trial court under which the issue was not raised would later be held erroneous.<sup>64</sup> More representative is the Court's holding, announced by the Chief Justice, in *Lynch v. New York ex rel. Pierson*.<sup>65</sup> When a state court has invalidated a state statute attacked under both federal and state constitutions, the decision will be reviewed only if it affirmatively appears that it rests solely upon the federal constitutional grounds.

In all constitutional cases, whether on review from the state or

<sup>60</sup> *Pennsylvania v. Williams*, 294 U. S. 176, 185 (1935).

<sup>61</sup> See notes 23, 24, *supra*; cf. *Patterson v. Alabama*, 294 U. S. 600 (1935).

<sup>62</sup> See note 22, *supra*.

<sup>63</sup> 295 U. S. 441 (1935).

<sup>64</sup> Mr. Justice Cardozo, dissenting, insisted that the statements relied upon had no proper application to the defendant's case, a view which, if accepted, makes the result doubly harsh.

<sup>65</sup> 293 U. S. 52 (1934); see note 24, *supra*.

federal courts, jurisdictional limitations assume peculiar importance, intensified where the Court's adjudication resolves what is in effect a controversy between itself and the Congress, or between itself and the Executive. Into the tradition of constitutional adjudication has gone the accumulated experience of a century and a half. Conventions and practices too subtle and flexible to be adequately summarized into rules determine the everyday administration of the Court. They express the sensibilities of statesmen, not the formulation of technicians. Such conventions and practices derive from an insight into conditions essential for the effective administration of the "peculiar jurisprudence" of the Supreme Court, because they are essential to the continuance of the Court's traditional share in the government of our democratic society.

And so the threshold requirement of the existence of a "case" or "controversy" is basic to the assumption of authority by all United States courts. It has the liveliest public importance, and not merely technical relevance, when the scope of the Constitution is an issue. It is neither intellectual timidity nor adherence to the mumbo-jumbo of legal jargon that has made the Supreme Court from the very outset, on appeals to it, give very restricted scope to the concept of a "case" or "controversy". The instinct of statesmen who were either participants in or witnesses to the fashioning of the Constitution decisively rejected any practice which would make of the Court a standing body of expert expounders of the Constitution. If the Court was to have the vital function which it evolved for itself, the occasions for its authoritative intervention had to be severely circumscribed.

What the earliest judges felt by instinct has from time to time been translated into unquestioned canons for constitutional administration. It is not enough that a conflict should be in the offing. Judicial abstention is imperative unless real conflicting interests have reached a point of immediate litigious ripeness. Appeals to the Court must be denied until appeals to the Constitution can no longer go unheeded. "But there is presented here, as respects the State," said the Court in *United States v. West Virginia*,<sup>87</sup> "no case of an actual or threatened interference with the

<sup>87</sup> 295 U. S. 463, 473-74 (1935).

authority of the United States. At most, the bill states a difference of opinion between the officials of the two governments, whether the rivers are navigable and, consequently, whether there is power and authority in the federal government to control their navigation, and particularly to prevent or control the construction of the Hawks Nest dam, and hence whether a license of the Federal Power Commission is prerequisite to its construction. There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion." An ordinary lawsuit was here again, as so often, attempted to be made the vehicle for adjusting great conflicts of interests and policies and governmental authorities. Beneath the quiet words of jurisdictional denial was an unwillingness prematurely to enter an essentially political conflict which, for one reason or another, may find adjustment outside of court, or, if it eventually reaches the Supreme Court, will then have assumed different form and come with more vivid reality.

The presence of an actual controversy is the condition precedent of the Court's power to act; it does not of itself, however, assure the appropriateness of its acting. Thus in *Abrams v. Van Schaick*<sup>88</sup> the Court refused to interfere in a present dispute over the propriety of expenditures incurred in contemplation of reorganization where the dispute turned upon the validity of a statute authorizing reorganization plans to be promulgated, but where the eventual impact of the statute upon the present complainants depended upon a plan as yet inchoate. Plainly enough, narrow concrete issues are more wisely decided than broad conjectural ones. No tenuous chain of interest should suffice to call into question aspects of a considered legislative policy not of immediate and demonstrable concern to the party invoking the Court's judgment.

The importance of having a concrete issue derives partly from the importance of having data relevant and adequate to an informed judgment. Data must always be relevant to something. They depend upon the presence of a specific issue for determination. The untutored assumption that adjudication in the most difficult areas of constitutional conflict requires only an effort of the mind and a reading of prior judicial decisions receives scant

<sup>88</sup> 293 U. S. 188 (1934).

recognition in the practice of the Court. Constitutionality is not a fixed quantity. The decision in *Nashville, C. & St. L. Ry. v. Walters*<sup>68</sup> at the last term is a reminder that a statute valid as to one set of facts may be invalid as to another, and hence of the necessity of a full presentation of the context of circumstances under which the issue of validity is posed. Failure to make such a presentation was the assigned ground of reversal in *Borden's Farm Products Co. v. Baldwin*,<sup>69</sup> where the lower court had proceeded to the decision of "grave constitutional questions", without final hearing upon the pleadings and proof, upon a motion for preliminary injunction and a motion to dismiss.<sup>70</sup>

The Court's sense of its position and function as an appellate tribunal leads it to emphasize not only the necessity of adequate data but of data already explored and sifted by trial and intermediate tribunals. This insistence rests not merely upon administrative considerations of the pressure of business. It rests also upon awareness of adjudication as a process, as a process in which the deliberations of successive tribunals serve to illumine final judgment and in which particularly "the special knowledge of local conditions" possessed by local tribunals may be indispensable. Thus, in the *Walters* case the Court, despite the presence in the record of a large mass of material, reversed the judgment and remanded the cause to the state court for appropriate consideration.<sup>71</sup>

<sup>68</sup> 294 U. S. 405, 415 (1935).

<sup>69</sup> 293 U. S. 194 (1934). Upon the remand of the case it was referred by the district court to a special master who made elaborate findings of fact, concluded that the statute was unconstitutional, and recommended that the defendants be enjoined. The court, relying largely on the master's findings as to matters upon which the Supreme Court had found the record silent or uncertain, upheld the statute. *Borden's Farm Products Co. v. Ten Eyck*, S. D. N. Y., July 25, 1935.

<sup>70</sup> Cf. *Chastleton Corp. v. Sinclair*, 264 U. S. 543 (1924); *City of Hammond v. Schappi Bus Line, Inc.*, 275 U. S. 164 (1927).

<sup>71</sup> "That determination should, in the first instance, be made by the Supreme Court of the State. . . . Moreover, since that court held the facts relied upon to be without legal significance, it did not enquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State. Other facts of importance may possibly be deducible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the state tribunals may be of great weight." 294 U. S. at 433. Cf. Note (1930) 43 HARV. L. REV. 940.

The *per curiam* opinion in *Wilshire Oil Co. v. United States*<sup>72</sup> at the last term epitomizes many of these aspects of the Court's practice in constitutional decisions. The Circuit Court of Appeals for the Ninth Circuit had certified to the Supreme Court two questions purporting to test the validity, as delegated legislation, of the provisions of the National Industrial Recovery Act affecting the petroleum industry and of the code of fair competition created thereunder. The certificate showed, however, that the case was in the circuit court of appeals on appeal from an order of the district court granting the application of the United States for a preliminary injunction; and the Supreme Court inquired of counsel whether, under the well settled rule,<sup>73</sup> such an appeal "presents any question other than whether the District Court committed an abuse of discretion" in granting the order.<sup>74</sup> Thereupon the circuit court of appeals amended its certificate to show that the district court had also denied a motion to dismiss and submitted that this ruling made reviewable on an interlocutory appeal the question as to the total absence of any cause of action. Though technical jurisdiction accordingly existed, the Supreme Court none the less refused to permit either itself or the court below to be entangled thus prematurely in a prickly and heated controversy. As it had done once before in the term,<sup>75</sup> it admonished the circuit court of appeals for the objectionable generality of its questions,<sup>76</sup> which alone was a sufficient ground for refusing to answer them. But the Court also pointed out the impropriety of the circuit court of appeals itself hearing the case; that court, it said, "is not bound to decide, upon the allegations of the bill, an important constitutional question, as to which the Court of Appeals is in doubt, in advance of an appropriate determination by the District Court of the facts of the case to which the challenged statute is sought to be applied."<sup>77</sup> What was true of the lower court, the opinion concluded, was true also of the Supreme Court, and hence no justification existed, at the present stage, for exercising the power to order up the entire record for full consideration.

<sup>72</sup> 295 U. S. 100 (1935).

<sup>73</sup> *Alabama v. United States*, 279 U. S. 229 (1929); see Frankfurter and Landis, *supra* note 3, 46 HARV. L. REV. at 253-57.

<sup>74</sup> 295 U. S. at 102.

<sup>75</sup> *Pfueger v. Sherman*, 293 U. S. 55 (1934).

<sup>76</sup> See 295 U. S. at 102.

<sup>77</sup> *Id.* at 102-03.

Judged from the unworldly heights of "pure law", all these instances present the familiar process of pouring new wine into old bottles, if they do not have the worse appearance of finicky observance of dry technicality. The technicality is the avoidance of a decision on what is loosely called the merits. The old bottle — the very old bottle — is the common law instinct for empiricism in deciding live, concrete, real adversary issues, sticking close to fact, avoiding abstraction and the enunciation of premature generalization.<sup>79</sup> But this healthy pragmatic instinct, this concentration on the complications of the present and not heedlessly borrowing trouble by seeking to discern the too dim image of the future, will be disdained only by those who have not adequately experienced the serious clash of forces so often embedded in the procedural interstices of constitutional litigation, or who do not appreciate to what extent the Supreme Court's prestige has been won through its self-denying ordinances.

3

The wisdom of the attitudes disclosed in the day-to-day practice of the Court appears most clearly in occasional departures. At least three opinions of the last term collide, in essential respects, with the Court's own statements of its functions and with its avowed criteria for their discharge. That these opinions were all rendered in cases freighted to an uncommon degree with implications for the national destiny sharpens the questions of procedural responsibility which they raise.

The decision of the Court in the Liberty Bond Gold Clause

<sup>79</sup> Compare the remarks of Mr. (later Mr. Justice) Higgins in the debates upon the Commonwealth of Australia Bill: "I feel strongly that it is most inexpedient to break in on the established practice of the English law, and secure decisions on facts which have not arisen yet. Of course, it is a matter that lawyers have experience of every day, that a judge does not give that same attention, he cannot give that same attention, to a supposititious case as when he feels the pressure of the consequences to a litigant before him. . . . But here is an attempt to allow this High Court, before cases have arisen, to make a pronouncement upon the law that will be binding. I think the imagination of judges, like that of other persons, is limited, and they are not able to put before their minds all the complex circumstances which may arise and which they ought to have in their minds when giving a decision. If there is one thing more than another which is recognized in British jurisprudence it is that a judge never gives a decision until the facts necessary for that decision have arisen." REP. NAT. AUSTRAL. CONV. DEB. (1897) 966-67.

Case<sup>80</sup> was that the plaintiff Perry, under the circumstances presented, had suffered no damage and could not recover. Whatever the grounds of this conclusion,<sup>81</sup> a judgment that the Joint Resolution of June 5, 1933,<sup>82</sup> was unconstitutional was plainly not among them. Perry's failure to recover was in spite of and not because of the invalidity of the Resolution. Yet the opinion pronounced the Resolution void.<sup>83</sup> In the Railway Pension Case,<sup>84</sup> an Act of Congress was attacked upon the double ground that it offended the due process clause of the Fifth Amendment and that it overstepped the bounds of Congressional power under the commerce clause. The Court's opinion upheld the first contention, a decision wholly adequate to dispose of the controversy. Nevertheless it then proceeded to sustain also the second. And in so doing it used language which not only condemns the particular statute in question but which, in the words of the Chief Justice, "denies to Congress the power to pass any compulsory pension act for railroad employees."<sup>85</sup> Similarly, in *A. L. A. Schechter Poultry Corp. v. United States*,<sup>86</sup> the Court began by invalidating the poultry code in litigation upon the ground that it had been adopted pursuant to an unconstitutional delegation of legislative power to the President. It then condemned the code a second time under the commerce clause. Not only did the Court in this branch of the opinion fail to confine its declaration to the poultry code, so that its decision was widely understood as concluding analogous questions under other codes, but it did so in language seemingly applicable, especially in the political and emotional context of the times, to many other and widely different types of legislation.

The substantive problems in all these decisions are quite outside the province of this paper. With the broader issues of jurisdiction and procedure — of the process of adjudication underlying

<sup>80</sup> *Perry v. United States*, 294 U. S. 330 (1935).

<sup>81</sup> See Hart, *The Gold Clause in United States Bonds* (1935) 48 HARV. L. REV. 1057.

<sup>82</sup> 48 STAT. 112, 31 U. S. C. A. § 463 (Supp. 1934).

<sup>83</sup> "We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power." 294 U. S. at 354. Compare the concurring opinion of Mr. Justice Stone, *id.* at 358.

<sup>84</sup> *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330 (1935).

<sup>85</sup> 295 U. S. at 374-75.

<sup>86</sup> 295 U. S. 495 (1935).

all decisions — we are directly concerned. Those issues are implied in the classic statement of Mr. Justice Matthews:

" [This Court] has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered; one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."<sup>87</sup>

Let us apply these canons — and every member of the Court unquestionably yields abstract fealty to them — to the great constitutional cases of the last term. The bearing of the second of Mr. Justice Matthews' canons on the Railway Pension Case is sufficiently underscored by the Chief Justice's own statement, rendered in dissent, that the opinion "denies to Congress the power to pass any compulsory pension act for railroad employees."<sup>88</sup> No such question, of course, was or could have been before the Court. The corresponding aspect of the *Schechter* decision requires fuller comment. The business of the *Schechters* was part of the network of distribution; and the opinion is in terms applicable<sup>89</sup> — without differentiation — to the regulation of hours and wages in all such businesses, if their operations are likewise outside the technical "current" or "flow" of interstate commerce.<sup>90</sup> Whether large abstract concepts — involving the dual nature of our political society and, what is more relevant, questions of degree in the application of those vast concepts — should abstractly be applied to situations not before the Court is sufficiently doubtful. And the

<sup>87</sup> *Liverpool, N. Y. and P. S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885). Compare Marshall's statement, when sitting on circuit, in *Es parie Randolph*, 20 Fed. Cas. No. 11,558, at 254 (C. C. D. Va. 1813): "No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed."

<sup>88</sup> 295 U. S. at 374-75 (italics ours).

<sup>89</sup> See, especially, 295 U. S. at 546-50.

<sup>90</sup> *Id.* at 543.

tendering of some such issue by the Government does not of itself justify a yielding to the temptation. But in any event the Court's opinion did not confine itself to distributive businesses.<sup>91</sup> So far at least as it invites the reading that it bears also upon similar regulation of factors in production for interstate shipment, plainly it "formulate[s] a rule . . . broader than is required by the precise facts to which it is to be applied."

To be sure, every judicial opinion contains the implicit qualification — commonplace to a sophisticated bar — that it is to be read as applying only to the circumstances of the case before the court. But the relevance of this convention to a *Schechter* opinion implies a degree of precision in the application of precedent in case law which is foreign to the discipline even of lawyers. Nor are constitutional opinions written only for the legal profession. Questions of the liveliest concern not only to members of the coordinate branches of government but to the public at large ought not to be left to be resolved by the subtlest and least determinate of the lawyer's arts. The whole force of Mr. Justice Matthews' canon is that in constitutional cases the Court should not be content with the usual inference but, out of respect for the delicacy of its function and in view of the touchiness of the subject matter, should expressly confine itself to what is needed to dispose of the controversy before it and not stray outside the strict circumference of the record.

Mr. Justice Matthews' warning against deciding more than is required is of secondary importance compared with his warning against deciding when no decision is required at all. The conclusion that the *Perry* opinion anticipated a question of constitutional law in advance of the necessity of deciding it seems unescapable. So is it, if less palpably, with the pension and *Schechter* opinions. Specifically, the inappropriateness in both cases of considering the scope of Congressional power under the commerce clause seems manifest. The Court has perhaps formulated no express canon

<sup>91</sup> See, especially, 295 U. S. at 549: "The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices. . . . All the processes of production and distribution that enter into cost could likewise be controlled." (italics ours).

that of two constitutional issues the lesser, that is, that which involves a narrower circumscription of Congressional power, shall be decided before the greater.<sup>82</sup> Yet surely such a canon is implicit, if not in the theoretical bases of the power to review legislation, at least in the practical conventions of decision according to which in wisdom that power has been employed. The defects of due process and delegation in the pension and recovery legislation were in part at least curable. The commerce clause questions were entangled, in a quite different manner, with ultimate issues of governmental power. These questions "are not to be lightly treated," said Mr. Justice Miller of a matter far less complex and extensive in its ramifications, "nor are we authorized to make any advances to meet them. . . ."<sup>83</sup> That observation was in the traditional spirit of American constitutional law. It applies with peculiar force to a question of such breadth of impact — so resistant to final justiciability — as that of the extent of federal power over the national economy.

Logical difficulty there may be, when a decision is rested upon two constitutional grounds, in singling out either one as unnecessary. What at least is clear is that both are not necessary.<sup>84</sup> In the pension case and in the *Schechter* case alike the ground of decision first stated not only disposed of the controversy before the Court, but it was conclusive of the entire invalidity of the statute in question. In the *Schechter* case the entire code structure which had given rise to the litigation was destined in any event to expire in twenty days.<sup>85</sup> Further discussion of any constitutional issue, being wholly prospective in its bearing, was thus relevant only to future exertions of legislative power. Against such advisory pronouncements the constitutional theory and practice of a century

<sup>82</sup> But cf. Miller, J., in *The Trade-Mark Cases*, 100 U. S. 83, 95 (1879).

<sup>83</sup> *Bartemeyer v. Iowa*, 18 Wall. 129, 134 (U. S. 1873). The question here reserved, the power of a state to forbid the sale of liquor owned before the law took effect, was not resolved for another fourteen years. *Mugler v. Kansas*, 123 U. S. 623 (1887).

<sup>84</sup> See WAMBAUGH, *THE STUDY OF CASES* (2d ed. 1894) § 25. When a state court finds a state statute to be in violation of both the state and the Federal Constitution, the Supreme Court treats the decision of the federal question as unnecessary and refuses jurisdiction. See note 24, *supra*.

<sup>85</sup> The decision was rendered on May 27, 1935; the Act was to expire on the succeeding June 16. See Act of June 16, 1933, c. 90, 48 STAT. 195, 206, 15 U. S. C. A. § 707(c) (Supp. 1934).

and a half unite in protest, howsoever strong may be the eagerness for guidance on the part of draftsmen of potential legislation or the cooperative desire on the part of the Court to give light.

The critical problem of American constitutional law was never more acutely stated than it was by Judge Pendleton in Virginia before ever the Constitution was adopted:

"How far this court, in whom the judiciary powers may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, *without exercising the power of that branch*, contrary to the plain terms of that constitution, is indeed a deep, important, and I will add, a tremendous question, the decision of which would involve consequences to which gentlemen may not have extended their ideas."<sup>86</sup>

The well understood tradition of the common law, whereby for centuries common law judges had occupied themselves exclusively with settling the rights of parties to lawsuits, provided the foundation for the answer to Judge Pendleton's question. The incorporation into the law of the Constitution of the concept of a "case" or "controversy" reënforced that tradition, just as the adoption of the Constitution, with its formal division and limitation of the powers of government, made it doubly significant. In turn, the existence of a controversy between parties before the Court, and the necessity of resolving it, became the avowed and exclusive basis of the power of judicial review.<sup>87</sup> Finally, the

<sup>86</sup> In *Commonwealth v. Catton*, 4 Call 5 (Va. 1782) (italics ours).

<sup>87</sup> See the presidential address of John W. Davis, Esq., to the American Bar Association: "There is a curious misconception underlying much that is said and written on this subject as to the duties that the court is called upon to discharge. One might suppose from some of these outgivings that the court sat at the outer gate of Congress waiting to visit a jealous censorship on the laws that issue from that portal; and that over them it had a general power of life and death, of approval or of veto. But august as are the functions of the court, surely they do not go one step beyond the administration of justice to individual litigants. As the court itself has said but yesterday [quoting *Frothingham v. Mellon*, 262 U. S. 447, 488 (1923)], 'We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only where the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.'" (1929) 48 A. B. A. REP. 204.

avoidance, by leaning backwards, of encroachment upon the legislative province became the common theme of all those conventions of administration, evolved by the Court in the exercise of that power, of which the chief are the canon which requires every doubt to be resolved in favor of the validity of legislation<sup>98</sup> and that which forbids the issue of validity to be considered at all "unless by the case presented its consideration is imperatively required."<sup>99</sup> It is but a confirmation of Judge Pendleton's prophetic insight to say that the gravest of the Court's "self-inflicted wounds"<sup>100</sup> have invariably been associated with laxity in the observance of these standards.

Even with standards the most rigorous and their observance the most austere, judges are bound to render decisions which — unless the judicial process becomes petrified — will require modification. For facts change, insight deepens, or a different balance is struck in the choice of values which underlies decisions. The history of the Supreme Court has been the history of a dynamic process, partly revealed by explicit overruling of earlier decisions.<sup>101</sup> Even more inevitable in such a judicial history have been corrections of lapses into dicta. In most instances the dicta have been retrospective, as it were; later cases have disclosed an unintended and inadmissible breadth of application implicit in the language of an earlier opinion. The extent to which such lapses are avoided varies, of course, with the felicity of style of individual authors of opinions, with their literary sensitiveness, their prophetic instinct for future contingencies, and the intensity of their conviction regarding the importance of sticking in the bark of the particular litigation. These are limitations of fallibility of even the greatest judges. But it is precisely because of these limitations that the Court has evolved its doctrines of constitutional administration as

<sup>98</sup> For impassive justification of this doctrine, see James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (1893) 7 HARV. L. REV. 129.

<sup>99</sup> Mr. Justice Field, in *San Bernardino County v. Southern Pac. R. R.*, 118 U. S. 417, 423 (1886).

<sup>100</sup> See HUGHES, *THE SUPREME COURT OF THE UNITED STATES* (1928) 50.

<sup>101</sup> See the dissenting opinion of Mr. Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 405 et seq. (1932); Sharp, *Movement in Supreme Court Adjudication — A Study of Modified and Overruled Decisions* (1933) 46 HARV. L. REV. 361, 593, 795.

barriers against avoidable excesses in adjudication. The occasional disregard of these barriers has usually been followed by an awakening to renewed consciousness of the wisdom of adhering to them. For permeating confidence in the judicial process is weakened by important retractions. More concretely, political action is often taken on the basis of weighty dicta, and its dislocation by later decisions erasing the dicta adds needlessly to the frictions of government.

The practical importance of all this was illustrated in a case decided the very day the *Schechter* opinion was handed down.<sup>102</sup> The constitutional issue there presented concerned the power of Congress to restrict the President's power to remove a member of the Federal Trade Commission. The President had relied in his action, and the Government relied in argument, upon the Court's opinion in *Myers v. United States*,<sup>103</sup> in the course of which Mr. Chief Justice Taft had said:

"Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed."<sup>104</sup>

The context of this utterance, and other observations in the opinion,<sup>105</sup> left no doubt that it included and was intended to include removal of members of the Federal Trade Commission. The weight of the utterance, particularly as a solemn injunction to the President as to his constitutional duty as well as his constitutional power, can only be appreciated in the light of the extraordinary circumstances attending the rendition of the *Myers* decision. Few, if any, constitutional issues have ever been decided by the Court with more focused attention or after more elaborate consideration. The controversy — specifically, the scope of the President's

<sup>102</sup> *Rathbun v. United States*, 55 Sup. Ct. 869 (1935).

<sup>103</sup> 272 U. S. 52 (1926).

<sup>104</sup> *Id.* at 135.

<sup>105</sup> See, especially, *id.* at 171-72.

power to remove a first-class postmaster — was a phase of a debate which had been waged intermittently since early in the first session of the First Congress and to which had contributed virtually all the great figures of American political history. From the beginning, and particularly since the question had been made acute by the Tenure of Office Act, 1867,<sup>106</sup> the Supreme Court had "studiously avoided deciding the issue until it was presented in such a way that it could not be avoided".<sup>107</sup> The Court first heard argument in the *Myers* case on December 5, 1923. Thirteen months later it restored the case to the calendar for reargument; and invited one of the most distinguished lawyers of the time, Senator George Wharton Pepper of Pennsylvania, to participate as *amicus curiae* and present the constitutional position of the Congress. The reargument extended over two days, April 13 and 14, 1925, and this time the Court held the case under consideration for a year and a half. When at length the case was decided, on October 25, 1926, four Justices delivered opinions, the report occupying 243 pages in the United States Reports. The judgment of the Court was pronounced by the Chief Justice, whose unique experience as a former President gave him unparalleled insight as judge into the great issues of government at stake. His opinion, which is 72 pages in length, instead of restricting itself to the *ad hoc* situation, undertook to pronounce authoritatively upon the whole subject of the removal power.

Less than nine years later we find Mr. Justice Sutherland stating on behalf of a unanimous Court:

"Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved."<sup>108</sup>

<sup>106</sup> Act of March 3, 1867, 14 STAT. 430, c. 154.

<sup>107</sup> See 272 U. S. at 176.

<sup>108</sup> *Rathbun v. United States*, 55 Sup. Ct. 869, 873 (1935). Compare Mr. Justice Van Devanter in *Baltimore & Carolina Line v. Redman*, 55 Sup. Ct. 890 (1935), qualifying *Slocum v. New York Life Ins. Co.*, 228 U. S. 364 (1913).

Pressure of work has greatly stimulated the invention of procedural devices and accelerated the tempo in the despatch of business by the Court. The volume of litigation of which the Court now disposes at a single term, the smoothness of the administrative mechanism by which this is accomplished, the extent to which argument has become a Socratic dialogue between Court and counsel, would startle the shades of Marshall and Taney even as they would have hampered the eloquence of Clay and Webster. While great changes have thus ensued during the course of a century in the details for coping effectively with the vast changes in the amount of business that has come to the Court, the essential conditions remain the same under which the ultimate issues of our federalism — the distribution of power as between the nation and the states — added to the ultimate issues of every government — the conflict between authority and liberty — are with us left for settlement by the Supreme Court through the form of an ordinary lawsuit. As governmental problems become more and not less complicated, as the dislocating impact of technological advances becomes more powerful and less imperceptible, as the forces of economic interdependence demand more and more determination and ingenuity for the maintenance of a simpler but perhaps socially more satisfying society, the deep wisdom of the Court's self-restraint against undue or premature intervention, in what are ultimately political controversies, becomes the deepest wisdom for our times.

Felix Frankfurter,  
Henry M. Hart, Jr.\*

HARVARD LAW SCHOOL.

\* We are indebted to Mr. Lyman Mark Tondel, Jr., of the third-year class of the Harvard Law School for helping to explore one of the phases of this study.

# HARVARD LAW REVIEW

Published monthly, during the Academic Year, by Harvard Law Students

SUBSCRIPTION PRICE \$4.50 PER ANNUM . . . . . 75 CENTS PER NUMBER

## Editorial Board

W. GRAHAM CLAYTON, Jr., <i>President</i>	REESE H. HARRIS, Jr., <i>Treasurer</i>
LOFTUS E. BECKER, <i>Note Editor</i>	JAMES H. MCGLOTHLIN, <i>Cases Editor</i>
HENRY S. REUSS, <i>Legislation Editor</i>	GERALD P. ROSEN, <i>Book Review Editor</i>
NORMAN S. ALTMAN	NOEL HEIMENDECKER
ROBERT L. AUGENBLICK	THOMAS P. JOHNSON
ROBERT R. BARRETT	EDMUND H. KELLOGG
SAMUEL W. BLOCK	V. NORMAN LANDSTROM
SAMUEL BROSKY	ARNOLD GEORGE MALKAM
LAWRENCE EARL BROU-KAHN	JACK R. MELTZER
HERBERT B. COHN	HERMAN I. ORENTLICHER
ARCHIBALD COX	ISAACSON PAINNER
A. FAIRFIELD DANA	LOUIS REIDENSTEIN, Jr.
NATHAN H. DAVID	LAURENS H. RISEWLANDER
ADRIAN S. FISHER	JOHN THOMAS SARGENTA
NESTOR S. FOLEY	CHRISTOPHER S. SARGENT
MORRIS L. FORER	MILTON R. SCHLESINGER
HARRY E. GREEN	PETER SHUEBRUK
ABRAHAM S. GUTERMAN	DONALD W. SMITH
HOWARD L. HAUSEMAN	FRANCIS VANICE

W. WILLARD WINTZ

The unfortunate death of Wallace P. Roudebush, Jr., on September 9, 1935, prevented his election to the Editorial Board of the Review. The Editors mourn the loss of one who would have been a valued friend and colleague.

## CONTRIBUTORS TO THE NOVEMBER ISSUE

THOMAS REED POWELL, A.B., University of Vermont, 1900; LL.B., Harvard, 1904; Ph.D., Columbia, 1913; LL.D., University of Vermont, 1925. Langdell Professor of Law, Harvard Law School.

MAX RADIN, A.B., College of the City of New York, 1899; LL.B., New York University, 1902; Ph.D., Columbia, 1909. Professor of Law, University of California.

FELIX FRANKFURTER, A.B., College of the City of New York, 1902; LL.B., Harvard, 1906. Byrnie Professor of Administrative Law, Harvard Law School.

HENRY M. HART, JR., A.B., Harvard, 1926; LL.B., 1930; S.J.D., 1931. Assistant Professor of Legal History, Harvard Law School.

**TELEGRAM**

33WUD 54 DL

*July Files* *PSF*  
*file* *Frankfurter*  
**The White House**  
**Washington**

Cambridge Mass 456pm Dec 10 1935

The President

The White House

Having a class and not being able to hear your agricultural speech yesterday over the radio I asked my friend Frank W Buxton editor of the Boston Herald what he thought of the speech to which he replied "Too damn good for a Republican editor" I should say it was.  
with warm regards

Felix Frankfurter.

53opmd