

● PSF: Subject File

Supreme Court, Jan.-July 1937

PSF: *my own hand*

Supreme Court of the United States  
Washington, D. C.

January 5, 1937

Dear Mr. President:-

Your letter is an elixir that is throbbing  
in my veins.

Alas, I have not strength to write the  
thanks that it deserves.

Even so, I cannot rest in comfort without  
telling you, however brokenly, of all my pride  
and gratitude.

Affectionately and respectfully yours,

*Benjamin Cardozo*

The President of The United States,  
The White House,  
Washington, D. C.

*file personal Supreme Court PSF: Supreme Court*

Draft No. 5  
January 5, 1937

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That

(a) When any judge of a court of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy years and has held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise<sup>1</sup>, and within six months<sup>2</sup> thereafter has neither resigned nor retired, the President shall nominate, and by and with the advice and consent of the Senate, shall<sup>3</sup>, for each such judge who has not so resigned or retired, appoint one additional judge to the court to which the former is commissioned.<sup>4</sup> Provided, That no additional judge shall be appointed hereunder if the judge who is eligible for retirement dies, resigns or retires prior to the nomination of such additional judge.<sup>5</sup>

1. The language is adapted from Sec. 260 of the Judicial Code (28 U.S.C. 375).

2. It seems more graceful to allow this relatively long period for reflection. Haste will not be a consideration after the system gets into operation and the three-month period has long since elapsed with respect to the judges over 70 now holding office.

3. The language is that of the Constitution (Art. II, Sec. 2, cl. 2). However, most acts providing for the appointment of an additional judge or judges merely provide that "the President is authorized, by and with the advice and consent of the Senate, to appoint \* \* \*."

4. The language of Section 260 is: The President shall appoint "an additional circuit judge of the circuit or district judge of the district to which such disabled judge belongs."

5. The purpose of this provision is to insure that a resignation of the aged judge after nomination of the additional judge will not prevent appointment of the latter. This eliminates any possibility that the aged judge will defer his resignation or retirement until he sees who is to be appointed.

(b) Until such time as the President is authorized under the provisions of subsection (a) of this section to appoint an even number of judges to the Supreme Court, the United States Court of Appeals for the District of Columbia, the Court of Claims or the United States Court of Customs and Patent Appeals, he shall appoint to such court one judge less than is authorized by such subsection (a).<sup>6</sup>

(c) The number of judges of any court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. No more than fifty judges shall be appointed thereunder, nor shall any judge be appointed if such appointment would result in (1) more than fifteen members of the Supreme Court of the United States, (2) more than two additional members so appointed to a circuit court of appeals, the Court of Claims, the United States Court of Customs and Patent Appeals, or the Customs Court, or (3) more than twice the number of judges now authorized to be appointed to any district court.<sup>7</sup>

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6. Alternatively, if appointment of the normal number of additional judges would result in an even number of judges, the President might be directed to appoint one more additional judge. Such a provision would probably be more harmonious with the purpose of the bill but lacks whatever merit may attach to restraint.

7. The most difficult aspect of this legislation is the necessity of choosing a method by which to prevent an indefinite expansion of the federal judiciary. Unless there is some limitation, an additional judgeship would be created every time a federal judge continued in service after becoming 70 years of age. Although only about 10 per cent of the judges are now over 70 years of age, in the course of time most, if not all, of the judgeships may at one time or another be occupied by men over 70 years of age. Theoretically, then, every existing judgeship may in the course of time occasion the appointment of an additional judge. When it is considered that these additional judges may themselves continue in service after becoming 70 years of age, it is seen that there is the possibility, over an indefinite period of time, of an unlimited increase

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7 (Continued).

in the number of federal judges. In practice this danger probably is not very real but it might constitute a formidable criticism of the proposed legislation.

The method which has been suggested in the text is a variant of the simplest proposal, merely to specify the maximum number of additional judges to be appointed under this Act. Such a limitation is not wholly satisfactory since it might result in a concentration at the additional judges in courts where an increase is wholly unnecessary. The additional limitations embodied in the text to some extent insure a more wide-spread increase in the number of judges.

An alternative method may be had if subsection (c) were to read:

(c) No additional judge shall be appointed under the provisions of subsection (a) of this section when an additional judge appointed hereunder, or his successor, or the successor of the judge eligible for retirement, becomes eligible for retirement.

Such a provision would insure that no more than one additional judge should be appointed for a given judgeship. It is subject to the objections:

(1) The theoretical possibility of doubling the judiciary may well be alarming; and (2) once applied to a given judgeship, the Act will never again be applicable to it. This to some extent contradicts, and certainly weakens, the argument based on lessened efficiency after 70 years of age.

A second alternative method may be had if subsection (c) were to read:

(c) If an additional judge is appointed under the provisions of subsection (a) of this section when an additional judge appointed hereunder, or his successor, or the successor of the judge eligible for retirement, becomes eligible for retirement, no successor shall be appointed on the first death, resignation or retirement thereafter occurring on such court.

This method has the merit of continuing, without exhaustion by one application to a given judgeship, the principle of inducing the retirement of or reducing the burdens of the judge over 70 years of age. Its defect is that it makes theoretically possible a considerable although temporary expansion of a given judgeship. This would occur whenever either of the two judges filling the judgeship as a result of this Act became eligible for retirement and would continue until his death,

(d) An additional judge shall not be appointed under the provisions of this section when the judge who is eligible for retirement is commissioned to an office as to which Congress has provided that a vacancy shall not be filled.

SEC. 2. The judge who is eligible for retirement shall be held and treated as if junior in commission to the judges of<sup>8</sup> (or who are assigned to) the court who are not eligible for retirement.<sup>9</sup> This section shall not be applicable to the Chief Justice of any court.<sup>10</sup>

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7 (Continued).

resignation or retirement. If they both became eligible for retirement, there would temporarily be four judges for a given judgeship now in existence. Although the number would revert to two, the theoretical possibility of this temporary expansion seems quite objectionable.

The basic difficulty with any of the subsections (c) is the necessity that there be combined into a single expedient (1) relief or retirement after 70 years, and (2) a limited expansion of the Federal judiciary. If the sole purpose were relief after 70 years, the problem would disappear merely by providing that no successor should be appointed on the death, resignation or retirement of the judge who continues in service after becoming 70 years of age.

8. The language, beginning with "shall be held \*\*\*" is that of Section 260 of the Judicial Code (28 U.S.C. 375), except that Section 260 speaks of the "remaining" judges of the court.

9. This makes the judge who is eligible for retirement senior to the retired judge, who, under Section 260, is junior to the "remaining" members of the court. On the assumption that it is desired to relieve, rather than to coerce, aged judges, this seems more appropriate than making them on equality with (or even junior to) the retired judges.

10. The purpose of this last provision is to remove any possible doubt as to power to demote a judge appointed as Chief Justice and somewhat to allay a rather effective source of judicial opposition. It could be extended by including "or to the senior circuit judge or to the presiding judge" of any court.

SEC. 3. The judges of the Customs Court shall be divided into three or more divisions of three judges each for the purposes specified in Section 518 of the Tariff Act of 1930, and any judge may be assigned from time to time to two or more divisions by the presiding judge.<sup>11</sup>

SEC. 4. (a) Any circuit judge hereafter appointed<sup>12</sup> may be designated and assigned from time to time by the Chief Justice of the United States for service in the circuit court of appeals for any circuit.<sup>13</sup> Any district judge hereafter appointed may be designated and assigned from time to time by the Chief Justice of the United States for service in any district court, or, subject to the authority of the Chief Justice, by the senior circuit judge of his circuit for service in any district court within the circuit. A district judge designated and assigned to another district hereunder may hold court separately and at the same time as the district judge in such district.<sup>14</sup>

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11. This section is made necessary because Section 518 of the Tariff Act of 1930 provides for "three divisions of three judges each."

12. If it were desired to take a smaller step toward the goal of a roving judiciary, "hereafter appointed" might be changed to "appointed pursuant to the provisions of subsection (a) of section 1 of this act."

13. This language, commencing after footnote 12, is taken from Section 201 of the Judicial Code (28 U.S.C. 214) providing for assignment of the judges of the old Commerce Court, except that "may" has been substituted for "shall".

14. Adapted from Section 14 of the Judicial Code (28 U.S.C. 18), dealing with transferred district judges.

All designations and assignments made hereunder shall be filed in the office of the clerk and entered on the minutes of both the court from and to which a judge is designated and assigned, and thereafter the judge so designated and assigned shall be authorized to discharge all the judicial duties (except the power of appointment to a statutory position or of permanent designation of a newspaper or depository of funds) of a judge of the court to which he is designated and assigned.<sup>15</sup> The designation and assignment of a judge shall not impair his authority to perform such judicial duties of the court to which he was commissioned as may be necessary or appropriate. The designation and assignment of any judge may be terminated at any time by order of the Chief Justice or the senior circuit judge, as the case may be.

(b) <sup>After</sup> ~~Upon~~<sub>^</sub> the designation and assignment of a judge by the Chief Justice, the senior circuit judge of the circuit in which such judge is commissioned may certify to the Chief Justice any consideration which such senior circuit judge believes to make advisable that the designated judge <sup>remain in or</sup> ~~return~~<sub>^</sub> for service in the court to which he was commissioned. If the Chief Justice deems the reasons sufficient he shall revoke, or designate the time of termination of, such designation and assignment.<sup>16</sup>

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15. Adapted from Section 13 of the Judicial Code (28 U.S.C. 17) dealing with the transfer of district judges.

16. It is intended to leave a considerable flexibility as to the time in which the senior circuit judge or the Chief Justice must act.

(c) In case a trial or hearing has been entered upon but has not been concluded before the expiration of the period of service of a district judge designated and assigned hereunder, the period of service shall be deemed to be extended until the trial or hearing has been concluded. Any designated and assigned district judge who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of any time limit in his designation, to decide all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon in writing filed with the clerk of the court where the trial or hearing was had shall be as valid as if such action had been taken by him within that district and within the period of his designation. Any designated and assigned circuit judge who has sat on another court than his own shall have power, notwithstanding the expiration of any time limit in his designation, to participate in the decision of all matters submitted to the court while he was sitting and to perform or participate in any act appropriate to the disposition or review of matters submitted while he was sitting on such court, and his action thereon shall be as valid as if it had been taken while sitting on such court and within the period of his designation.<sup>17</sup>

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17. Adapted from Section 18 of the Judicial Code (28 U.S.C. 22), dealing with transferred district judges.

SEC. 5. (a) The Supreme Court shall have power to appoint a Proctor.<sup>18</sup> It shall be his duty: (1) to obtain and, if deemed by the Court to be desirable, to publish information as to the volume, character, and status of litigation in the district courts and circuit courts of appeals, and such other information as the Supreme Court may from time to time require by order, and it shall be the duty of any judge, clerk or marshal of any court of the United States promptly to furnish such information as may be required by the Proctor; (2) to investigate the need of assigning district and circuit judges to other courts and to make recommendations thereon to the Chief Justice; and (3) to perform such other duties consistent with his office as the Court shall direct.

(b) The Proctor shall, by requisition upon the Public Printer, have any necessary printing and binding done at the Government Printing Office and authority is conferred upon the Public Printer to do such printing and binding.<sup>19</sup>

(c) The salary of the Proctor shall be \$10,000 per annum<sup>20</sup>, payable out of the Treasury in monthly installments, which shall be in full compensation for the services required by law. He shall also be allowed, in the discretion of the Chief Justice, stationery, supplies, travel expenses, equipment, necessary professional and clerical assistance and miscellaneous expenses appropriate for performing the duties imposed

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18. This language is taken from Sec. 219 of the Judicial Code (28 U.S.C. 325) dealing with the clerk, reporter and marshal.

19. Adapted from Sec. 225 of the Judicial Code (28 U.S.C. 332) dealing with the reporter of the Supreme Court.

20. This compensation compares with \$6,000 for the clerk (28 U.S.C. 541), \$8,000 for the reporter (28 U.S.C. 333), and \$5,500 for the marshal (28 U.S.C. 331).

by this section. The expenses in connection with the maintenance of his office shall be paid from the appropriation of the Supreme Court of the United States.<sup>21</sup>

SEC. 6. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$100,000 for the salaries of additional judges and the other purposes of this Act during the fiscal year 1937.

SEC. 7. When used in this Act —

(a) The term "circuit court of appeals" includes the United States Court of Appeals for the District of Columbia; the term "senior circuit judge" includes the Chief Justice of the United States Court of Appeals for the District of Columbia; and the term "circuit" includes the District of Columbia.

(b) The term "district court" includes the District Court of the District of Columbia but does not include the district court in any territory or insular possession.

(c) The term "judge" includes justice; and the term "Chief Justice" includes the Presiding Judge of the United States Court of Customs and Patent Appeals.

SEC. 8. This Act shall take effect on the thirtieth day after the date of its enactment.

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21. This paragraph is adapted from Sec. 226 of the Judicial Code (28 U.S.C. 333), dealing with the reporter.

PSF: Supreme Court



Office of the Attorney General  
Washington, D.C.

February 2, 1937.

P.F.

The President,

The White House.

My dear Mr. President:

Delay in the administration of justice is the outstanding defect of our federal judicial system. It has been a cause of concern to practically every one of my predecessors in office. It has exasperated the bench, the bar, the business community and the public.

The litigant conceives the judge as one promoting justice through the mechanism of the Courts. He assumes that the directing power of the judge is exercised over its officers from the time a case is filed with the clerk of the court. He is entitled to assume that the judge is pressing forward litigation in the full recognition of the principle that "justice delayed is justice denied". It is a mockery of justice to say to a person when he files suit, that he may receive a decision years later. Under a properly ordered system rights should be determined

PSF Supr (T)

promptly. The course of litigation should be measured in months and not in years.

Yet in some jurisdictions, the delays in the administration of justice are so interminable that to institute suit is to embark on a life-long adventure. Many persons submit to acts of injustice rather than resort to the courts. Inability to secure a prompt judicial adjudication leads to improvident and unjust settlements. Moreover, the time factor is an open invitation to those who are disposed to institute unwarranted litigation or interpose unfounded defenses in the hope of forcing an adjustment which could not be secured upon the merits. This situation frequently results in extreme hardships. The small business man or the litigant of limited means labors under a grave and constantly increasing disadvantage because of his inability to pay the price of justice.

Statistical data indicate that in many districts a disheartening and unavoidable interval must elapse between the date that issue is joined in a pending case and the time when it can be reached for trial in due course. These computations do not take into account the delays that occur in the preliminary stages of litigation or the postponements after a case might normally be expected to be heard.

The evil is a growing one. The business of the courts is continually increasing in volume, importance, and complexity. The average case load borne by each judge has grown nearly fifty percent since 1913, when the District Courts were first organized on their present basis. When the courts are working under such pressure it is inevitable that the character of their work must suffer.

The number of new cases offset those that are disposed of, so that the Courts are unable to decrease the enormous back-log of undigested matters. More than fifty thousand pending cases (exclusive of bankruptcy proceedings) overhang the federal dockets - a constant menace to the orderly processes of justice. Whenever a single case requires a protracted trial, the routine business of the court is further neglected. It is an intolerable situation and we should make shift to amend it.

Efforts have been made from time to time to alleviate some of the conditions that contribute to the slow rate of speed with which causes move through the Courts. The Congress has recently conferred on the Supreme Court the authority to prescribe rules of procedure after verdict in criminal cases and the power to adopt and

promulgate uniform rules of practice for civil actions at law in the District Courts. It has provided terms of Court in certain places at which federal Courts had not previously convened. A small number of judges have been added from time to time.

Despite these commendable accomplishments, sufficient progress has not been made. Much remains to be done in developing procedure and administration, but this alone will not meet modern needs. The problem must be approached in a more comprehensive fashion, if the United States is to have a judicial system worthy of the nation. Reason and necessity require the appointment of a sufficient number of judges to handle the business of the federal Courts. These additional judges should be of a type and age which would warrant us in believing that they would vigorously attack their dockets, rather than permit their dockets to overwhelm them.

The cost of additional personnel should not deter us. It must be borne in mind that the expense of maintaining the judicial system constitutes hardly three-tenths of one percent of the cost of maintaining the federal establishment. While the estimates for the current

fiscal year aggregate over \$23,000,000 for the maintenance of the legislative branch of the government, and over \$2,100,000,000 for the permanent agencies of the executive branch, the estimated cost of maintaining the judiciary is only about \$6,500,000. An increase in the judicial personnel, which I earnestly recommend, would result in a hardly perceptible percentage of increase in the total annual budget.

This result should not be achieved, however, merely by creating new judicial positions in specific circuits or districts. The reform should be effectuated on the basis of a consistent system which would revitalize our whole judicial structure and assure the activity of judges at places where the accumulation of business is greatest. As congestion is a varying factor and cannot be foreseen, the system should be flexible and should permit the temporary assignment of judges to points where they appear to be most needed. The newly created personnel should constitute a mobile force, available for service in any part of the country at the assignment and direction of the Chief Justice. A functionary might well be created to be known as proctor, or by some other suitable title, to be appointed by the Supreme Court and to act under its direction,

charged with the duty of continuously keeping informed as to the state of federal judicial business throughout the United States and of assisting the Chief Justice in assigning judges to pressure areas.

I append hereto certain statistical information, which will give point to the suggestions I have made.

These suggestions are designed to carry forward the program for improving the processes of justice which we have discussed and worked upon since the beginning of your first administration.

The time has come when further legislation is essential.

To speed justice, to bring it within the reach of every citizen, to free it of unnecessary entanglements and delays are primary obligations of our government.

Respectfully submitted,

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

Attorney General.

PSF: Supreme Court

March 1, 1937

NEW DEAL CASES  
DECIDED BY THE SUPREME COURT

1. "HOT OIL" STATUTE. Panama Refining Co. v. Ryan, 293 U. S. 388. Held invalid, on the ground of delegation of power, Section 9(c) of the National Industrial Recovery Act, authorizing the President to prohibit the interstate transportation of oil produced in excess of state-fixed quotas. Opinion by the Chief Justice. Dissenting opinion by Cardoso, J.
2. GOLD CLAUSE CASES. Norman v. Baltimore & Ohio Railroad Co., 294 U. S. 240. Held valid the Joint Resolution of June 5, 1933, abrogating gold clauses, as applied to obligations issued by private parties. Opinion by the Chief Justice. Dissenting opinion by McReynolds, J., in which Van Devanter, Sutherland and Butler, JJ., joined.

Norris v. United States, 294 U. S. 317. Held that the orders and regulations pursuant to the Emergency Banking Act of 1933, requisitioning gold certificates in exchange for legal tender currency of equivalent face amount, were valid. Opinion by the Chief Justice. Dissent as in the Norman case, infra.

Perry v. United States, 294 U. S. 330. Held that the Joint Resolution of June 5, 1933, was invalid in its application to Government bonds, but that the holders of such bonds were not entitled to recover in the Court of Claims more than the face amount thereof. Opinion by the Chief Justice. Separate concurring opinion by Stone, J. Dissent as in the two preceding cases.

Holyoke Water Power Co. v. American Writing Paper Co., decided March 1, 1937. Held that the Joint Resolution is applicable to money contracts payable in gold bullion as well as to contracts payable in gold coin. Opinion by Cardoso, J. Sutherland, Van Devanter, McReynolds and Butler, JJ., dissented without opinion.
3. RAILROAD RETIREMENT ACT. Railroad Retirement Board v. Alton Railroad Co., 295 U. S. 330. Held invalid, under the commerce and due process clauses of the Constitution, a statute providing for pensions for superannuated railroad employees. Opinion by Roberts, J. Dissenting opinion by the Chief Justice, in which Brandeis, Stone and Cardoso, JJ., joined.

4. N. R. A. United States v. Schechter Poultry Corp., 295 U. S. 495. Held the code-making provisions of the N. I. R. A. invalid on the ground of delegation of power and also, as applied to the poultry dealers involved in the case, on the ground of lack of power under the commerce clause. Opinion by the Chief Justice. Separate concurring opinion by Cardoso, J., in which Stone, J., joined. No dissent.
5. A. A. A. United States v. Butler, 297 U. S. 1. Held invalid the Agricultural Adjustment Act on the ground that it regulated matters reserved to the States by the Tenth Amendment. Opinion by Roberts, J. Dissenting opinion by Stone, J., in which Brandeis and Cardoso, JJ., joined.  

Rickert Rice Mills v. Fontenot, 297 U. S. 110. Held, on the authority of the Butler case, supra, that A. A. A. taxes paid into court should be returned to the taxpayer and the collector enjoined from making collection. Opinion by Roberts, J. No dissent.
6. T. V. A. Ashwander v. Tennessee Valley Authority, 297 U. S. 288. Held valid the Tennessee Valley Authority Act as applied to the sale of power produced at Wilson Dam. Opinion by the Chief Justice. Separate concurring opinion by Brandeis, J., in which Stone, Roberts and Cardoso, JJ., joined, to the effect that the complaining stockholder had no standing to challenge the transaction. Dissenting opinion by McReynolds, J.
7. SECURITIES ACT OF 1933. Jones v. Securities and Exchange Commission, 298 U. S. 1. Held that the Commission had improperly refused to permit the withdrawal of the registration statement and therefore had no power to continue with a stop order proceeding. The validity of the statute was not passed upon. Opinion by Sutherland, J. Dissenting opinion by Cardoso, J., in which Brandeis and Stone, JJ., joined.
8. BITUMINOUS COAL CONSERVATION ACT OF 1935 (Guffey Act). Carter v. Carter Coal Co., 298 U. S. 238. Held that Congress is without power under the commerce clause to subject the producers of bituminous coal to the regulation of wages and hours of employees. The price provisions were not passed upon. Opinion by Sutherland, J. Dissenting opinion by the Chief Justice, to the effect that the price provisions are valid and hence adherence to a code may be required. Separate dissenting opinion by Cardoso, J., in which Brandeis and Stone, JJ., joined, agreeing with the Chief Justice and adding that the wage and hour provisions were prematurely attacked.

9. **ARMS EMBARGO.** United States v. Curtiss-Wright Export Corporation, decided December 21, 1936. Held valid the Joint Resolution of May 28, 1934, and the Presidential Proclamation pursuant thereto prohibiting the export of arms to nations engaged in armed conflict in the Chaco. Opinion by Sutherland, J. McReynolds, J., dissented without opinion.

OTHER SUPREME COURT DECISIONS  
INVOLVING IMPORTANT CONGRESSIONAL AND  
EXECUTIVE ACTION SINCE MARCH 4, 1933.

1. **PRESIDENT'S REMOVAL POWER.** Humphrey's Executor v. United States, 295 U. S. 602. Held invalid, on the ground of separation of powers, the President's removal of a member of the Federal Trade Commission on grounds not specified in the Federal Trade Commission Act. Opinion by Sutherland, J. No dissent.
2. **FRAZIER-LEMKE ACT.** Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555. Held invalid, on the ground of arbitrary interference with the rights of mortgagees, the farm bankruptcy act. Opinion by Brandeis, J. No dissent.
3. **MUNICIPAL BANKRUPTCY ACT.** Ashton v. Cameron County Water Improvement District, 298 U. S. 513. Held invalid, on the ground of invasion of powers reserved to the States, the municipal bankruptcy act. Opinion by McReynolds, J. Dissenting opinion by Cardozo, J., in which the Chief Justice, Brandeis and Stone, JJ., joined.
4. **ASHURST-SUMNERS CONVICT-MADE GOODS ACT.** Kentucky Whip & Collar Co. v. Illinois Central Railroad Co., decided January 4, 1937. Held valid the Act prohibiting the interstate transportation of convict-made goods into States where the sale of such goods is unlawful. Opinion by the Chief Justice. No dissent.
5. **TRANSFER OF SHIPPING BOARD FUNCTIONS.** Isbrandtsen-Moller Co. v. United States, decided February 1, 1937. Held that the transfer of the functions of the Shipping Board to the Secretary of Commerce by Executive Order was effective, in view of subsequent ratification of such transfer by the Merchant Marine Act of 1936. The Court found it unnecessary to consider the validity of the transfer under the original Order alone. Opinion by Roberts, J. No dissent.

Private file

PSF: Supreme Court

~~Jan 10~~  
2-37

The Speaker's Rooms  
House of Representatives U.S.  
Washington, D.C.

Feb. 8<sup>th</sup> 1937

My dear Mr. President:

I have acquainted  
James with some developments on  
the matter of your message on  
Judicial Reform, that I feel you  
should know about.

I think it quite important <sup>for</sup> you  
to ask Statton Sumner, Chm. of  
Judiciary to see you alone but  
as early a moment as possible.

Yours faithfully  
W. B. Bond

The President  
The White House

PSF: Supreme Court

file  
"personal"

THE WHITE HOUSE  
WASHINGTON

February 8, 1937

CONFIDENTIAL MEMORANDUM FOR THE PRESIDENT:

Regarding the resolution introduced in the Texas State Senate today, which denounces your proposal to the Congress for increased membership in the United States Supreme Court, etc., I telephoned the Vice President this afternoon. Later, with the Vice President's approval, I telephoned Governor Allred.

The Governor has just called back to say that he has given over his entire afternoon to efforts among the State Senators, but that the situation "is bad". He says the resolution was introduced and drafted by Senators Holbrook and Small.

Governor Allred says he will continue to do all in his power but he expects the resolution will pass the Senate by a substantial majority when the vote is taken tomorrow.

I have advised the Vice President. He and Senator Sheppard are working tonight, telephoning friends in Austin.

The V. P. said, confidentially, that Tom Connally would not give him or Sheppard any help.

It is interesting to note that all but three members of the Texas Senate are lawyers.



STEPHEN EARLY

PSF: Supreme Court

PSF: Supreme Court

P.F.  
Will Early  
H. C. ...  
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THE WHITE HOUSE  
WASHINGTON

February 8, 1937

CONFIDENTIAL MEMORANDUM FOR THE PRESIDENT:

You might know, before luncheon today, that Hatton Summers held an "off the record" conference with newspapermen this morning. At this conference, he was savage in attack upon your proposal. He called it "infamous".

He refused to let himself be quoted. He insisted that the conference be "off the record".

One of the newspapermen present just telephoned me and said that Summers gave the proposal "Hell, specifically and generally".

This, of course, will lead the press into writing more and more stories about bitter opposition by Congressional leaders, etc.

STEPHEN EARLY

PSF: Supreme Court

THE WHITE HOUSE  
WASHINGTON

*PSF:  
Supreme Court  
file*

February 9, 1937.

MEMORANDUM FOR

GENERAL JOHNSON

That broadcast of yours  
is a real contribution. Later I  
may use some of the language. I  
myself prefer yours at its luridist  
to the language of legal opinions.

F. D. R.

From the desk of—  
HUGH S. JOHNSON

W. B. ...  
Washington  
8/8/37

Dear Ben -

There is a ~~crisis~~ <sup>crisis</sup> ~~in~~ <sup>over</sup> a national boom-up  
for the newards that  
may occur you -

Hugh Johnson -

The President.

ADDRESS DELIVERED BY GENERAL HUGH S. JOHNSON  
OVER COLUMBIA BROADCASTING SYSTEM NET WORK  
SUNDAY, FEBRUARY 7, 1937, at 2:00 P.M. from  
NEW YORK CITY

In discussing the President's proposed reorganization of the judicial system, I am to trespass a little on the Columbia Symphony Orchestra on this peaceful Sunday afternoon. I'm sorry. I wouldn't mind crashing some commercial hour -- but to infringe politically on these great musical programs is like tin-canning a dog in the apse of a cathedral.

I do it because the opponents of the President have presented his proposals, melodramatically, as the death of the Constitution -- just as supporters of the lamented Mr. Landon talked about the end of the American way of life. That was bunk so blatant that it got what was coming to it -- the worst electoral rebuke in our history. Today's bunk is just as blatant. The Constitution still stands. That vote told Mr. Roosevelt to make democracy effective. One reason he couldn't do it before was an inflexible antiquity in the judicial system. He proposes to modernize it. What we have here is a man doing what he was elected to do.

He promised to do everything within the Constitution. Is he doing that? On nine-tenths of his astonishing message, I won't waste your time. It was a searchlight into the cobwebs of legalistic medieval dungeons. The President's worst enemies have only praise for that. It was a giant's stroke at the "insolence of office and the law's delay." It attacked the absurdity of letting district and circuit Judges in one part of the country suspend Federal laws, while Judges in other parts sustain them. It smashed at abuses of the injunctive power which give Judges some of the authority of oriental despots. It asked that the

Federal courts be opened to the petitions of the poor and proposed an efficient organization of our formless judiciary. Mr. Roosevelt's simple, and courageous proposals to end all this old abuse have reaped universal praise. If an ordinary President, in the whole terms of his Administration, had accomplished no more than this, he would, for that alone go down in history as "Commander of the Faithful and Protector of the Poor."

But it is charged that all this magnificent accomplishment is just camouflage of a sinister purpose to destroy the Constitution and subvert the Supreme Court. The center of this supposed sinning is the suggestion that, if any of those Justices, up to six, do not retire at the age of 70, the President shall appoint an extra Judge to supplement the failing powers of those who have passed beyond the Biblical limit of effective human life -- three score years and ten.

Standing on its merits, the President's worst enemy could find no logical fault with that. In other days, some of the most ardent reactionaries have made similar proposals -- Mr. Taft, once President and later Chief Justice, and Mr. McReynolds as Attorney General. If any other President had proposed it at any other time no Tory would have mourned. What's the matter with it now?

Merely that the President has had some New Deal plans frustrated by the Court, has complained about it, and that the effect of his proposal would be to permit him to appoint more Justices of the Court than any President since George Washington. The fear is that he will appoint Judges who would probably believe in what the country has just voted for overwhelmingly. All that is unquestionably true. He will do exactly that. But what is the matter with that?

It is said very vociferously that this is an assault on the

Constitution. Let's make no mistake about that. If there was one thing that the Constitution made plain beyond the possible obscurity of four-dollar judicial words, it is that the Congress has absolute power to prescribe the number of Judges on the Supreme Court and that when Congress names the number, the President makes the appointments. No more clearly Constitutional suggestion was ever proposed.

But it is charged that although the powers are within the letter of the Constitution, the result would be to violate its spirit. The argument is that the Constitution intended the Court to be a check on the Executive and Legislature and that a statute agreed between the latter, the effect of which is to pack the Court with Judges who are likely to differ with previous judicial decisions, is an affront to the Constitutional system of checks and balances.

The answer seems to me to be that, to whatever extent a system of checks and balances was intended by the Constitution, it was not absolute, and that what is here proposed must have been clearly intended since it was so clearly and specifically provided for. The very first act of Federal organization was for the first Executive, George Washington, to "pack the Court" -- if that is the way to describe appointing all the Judges.

The check of the Executive on Congress is the veto, of Congress on the President impeachment and the power to over-ride the veto. The check of the Court on the President and Congress is the power to invalidate a statute. That check is not expressly stated in the Constitution as a check. It was deduced by the Court. But what is the check of the President and Congress on the Court? That, too, is not explicit, but surely it is more clearly there than the check of the Court on them. It is the power to fix the number of Judges, to name

them, and to regulate their appellate jurisdiction. It has been exercised here and that is the sole justification for all this power. It seems to me that any lawyer must concede that, whatever else may be said against this proposal, there is no violation of either the letter or the spirit of the Constitution here.

It is fair to say, that Mr. Roosevelt was impatient with the Court's repeated frustration of laws the Congress thought necessary to save the capitalistic system in a world aflame with revolt against it. It is fair to say that he now seeks to use powers specifically provided by the Constitution to change the complexion of a reactionary Court. It is the truth that he intends to keep our constitutional system permanent, but flexible and abreast of human necessities. What is wrong with that? This is a reactionary Court. It was largely appointed by reactionary Presidents. If a Court, by appointment, can be made reactionary, can it not, by appointment, now be made liberal?

The need is great. The Court, controlled by ancient precedent, was getting into untenable ground. The Constitution gave the Federal government power to regulate "commerce among the states \*\* and with foreign nations." When that was written the meaning of the word "commerce" in common usage was much broader than now. It meant any human intercourse and not just something on wheels. The Great Chief Justice, John Marshall, ruled that the Federal power to regulate that intercourse extended to that commerce between man and man within a single state which concerns other states, or affects more states than one.

That was a sensible rule. No state has control of, or defense against, commerce within another state, even though the effect of that commerce is ruinous to it. Only the Federal government could, under the Constitution, protect one state against harmful effects of commerce within another state. In truth, the creation of such a control in the

Federal government was a primary purpose of the Constitution itself.

Labor contracts are commerce between man and man. Yet, the decisions of the Court, running through a primitive rut of precedent, at last seemed to say that labor relations within a single state are, in law, not such commerce as affects other states or concerns more states than one, even though, in fact, they threaten ruin to other states. There was recently a shipping strike on the Pacific Coast which paralyzed the interstate, intercoastal and international commerce of the West. Yet, on this legalistic theory, the federal government, despite the Constitution, was withheld from any effective power to intervene.

This very day there are labor troubles occurring within the states of Michigan and Indiana which seriously impair and more seriously threaten not merely the commerce of every state in the country, but our whole economic structure. No authority has been more eloquent about this interstate effect than General Motors. It has shown that through steel, rubber, glass, lumber, textiles, hides, petroleum, paints, oil, chemicals, finance, service and mechanical trades, the economic life of every single State of the Union is tremendously concerned.

None of these states can do anything about it. The only power under the sun that could effectively regulate these labor relations in their effect of other states, is the Federal government. Yet it is powerless, except for good offices, to intervene. Why? Because the Constitution says so? No! Because the Supreme Court says so. Constrained by almost absurdly erroneous precedent -- tied by tradition -- anchored to antiquity -- it has taken a position that the commerce of labor contracts in manufacture are beyond the Federal power.

"If you don't like that result, change the Constitution," says

Mr. Herbert Hoover. Kindly Heavens why should we change the Constitution? The Constitution decrees no such absurdity. In pretty plain words, it decrees exactly the reverse. The Supreme Court decreed this stultification. Why, then, change the Constitution? Why not change the Supreme Court?

As a lawyer and also as one who has been as close to these developments as any man, it seems to me that Mr. Roosevelt has on his side the law, the logic, and the overwhelming necessity of this situation. He has something more. In a world moving like an avalanche to new and untried forms, he has the fate of this nation and the preservation of the property and profits system on his shoulders and the means to preserve them in his hands. He must be supported to the utmost in his effort to preserve them.

Various old gentlemen may desire to die in the last ditch. That is their splendid privilege but that is no reason why the country and the American system must go down with them to dusty death.

You can't assume that the President's proposal constitutionally to rejuvenate a reactionary Court is evil unless you are willing to assume very much more. It must be thought that he will appoint to these great trusts unworthy servants. It is necessary to assume that the Senate would confirm such men. You must also assume that Americans, who have attained to a public stature sufficient to make them eligible, would register in Heaven the oath required of Supreme Court Justices -- would take on their shoulders the weight of this great responsibility -- and do all that with a contemptible subservience to some prearranged conspiracy.

The whole history of the Supreme Court refutes any such idea. Hand-picked appointees have disappointed the President who selected them more often than not. It was none other than Mr. Hoover who appointed Justice

Cardozo. We may doubt if the Supreme Court can be "packed" in any such scare-head sense as now fills the headlines. We should have too much faith in men under heavy personal responsibility to 125,000,000 people -- each with his place to make in the annals of his country.

The sensational idea of a Court made rabid by improper appointments ought to be dispelled by current newspaper conjectures of all the remotely possible appointees. First, let me say that Mr. Roosevelt has an almost impish delight in surprises and innovations. We may get a woman Justice. We may get a sociologist who is not even a lawyer. But the publicity panels of likely candidates are wrong in supposing an incumbent Senator -- except to a possible vacancy by resignation or retirement. That would violate the Constitution. But consider the newspaper-nominated possibilities -- except for one or two who couldn't be confirmed. What American could be afraid of men like Homer Cummings, Frank Murphy, John Dickinson, Jim Landis, Sam Rosenman, Lloyd Garrison, John Winant, Robert Jackson, Ferdinand Pecora, Adolph Berle, Paul McNutt and Fiorella LaGuardia -- just to mention nearly all the possibilities.

They are certainly as able, competent, learned, responsible and eligible as the average of older men who have mounted the Supreme Bench. From personal contact with all of them, I would say that they are far above that average. Liberals? Yes, but what does that mean? To me it means active, alert, patriotic Americans to whom I would as confidently entrust my cause as to any of the distinguished present Judges.

All this hullabaloo is a tempest in a tea-pot. It is the anguished beatings of Old Deal tom-toms by gentlemen who didn't want to see the President elected -- didn't want him to do what he promised to do, and now, regardless of his overwhelming majority, would very much like to see him stopped in keeping that promise.

What we have here is just one more necessary step in the President's plan to make Democracy work. It needs the support of the whole country.

*PSF: Supreme Court*

*File  
Private*

THE WHITE HOUSE  
WASHINGTON

February 15, 1937

CONFIDENTIAL

MEMORANDUM FOR MR. EARLY:

*Earl Bohannon*

E. G. just advised me, in strictest confidence, that Hearst had sent a telegram to all of his editors killing a vicious editorial by Jimmy Williams on the President's judiciary proposal and especially directed the Washington Times not to use this editorial under any circumstances. Hearst's message was substantially in this language: "I do not wish to crusade in this matter. Print the news of the debate on both sides without editorial comment".

WDH

THOS. J. WATSON  
270 BROADWAY  
NEW YORK

PSF; Supreme Court

file  
Personal

THE WHITE HOUSE  
FEB 17 1937  
RECEIVED

Gen. Wainwright

February 16, 1937.

Dear Mr. President:

Supplementing my recommendation of Mr. Owen D. Young for appointment to the United States Supreme Court, aside from his qualifications for such an eminent position, I feel that it would do more to stabilize thinking on the part of those people who are indulging in so much criticism regarding the proposed increase in the number of judges, than anything else of which I can think.

If you agree with me in regard to his qualifications, I should like to have you consider the psychology of such an appointment.

With kindest personal regards, I am

Sincerely yours,

Tom

The President,  
White House,  
Washington, D. C.

THOS. J. WATSON  
270 BROADWAY  
NEW YORK



February 16, 1937.

Dear Mr. President:

I respectfully recommend to you, Mr. Owen D. Young for appointment to the United States Supreme Court.

Mr. Young has had a successful and broad experience in practising law in Boston for many years before he was brought to New York by the General Electric Company to take charge of their legal affairs, and later to become Chairman of the Board of Directors.

I have worked with Mr. Young in connection with national and international institutions, including the New York Federal Reserve Bank where we have met for the past four years. Mr. Young has a progressive mind and a very deep appreciation of the changing conditions existing in our country, and a realization that all progress must come about through change. I have noted, for many years, that when there was anything controversial at meetings where Mr. Young was present, he has always been looked upon more in the light of a judge rather than a participant in the controversy.

I think he has one of the finest judicial minds in our country today, and in my best judgment he can be of great service to our country as a member of the United States Supreme Court.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Thos. J. Watson".

The President,  
White House,  
Washington, D. C.

PST: Supreme Ct

file  
personal

February 19, 1937.

Memo for the President:

Three suggestions:

A. ~~Extra~~ Meeting with the Senate leadership. Tommy Cochran providing you with a list tomorrow of Senators upon whom real pressure should be put. Suggest you ask Leadership to divide up the work and report direct to you as to their results with these people. It is absolutely important that Ashurst be given real orders as to his hearings. Start them on Wednesday next week if possible -- a limited time, two or three weeks in all. Time of the opposition to be handled by Borah as the ranking Republican member.

Also would appreciate your asking this group their opinion of Norris' proposal to pass legislation requiring seven-to-two vote of Supreme Court to invalidate legislation. Have explained Tommy's view to you already.

B. The second group of legislators in the Senate include Nye and Frazier, both wabbly (especially Nye). We don't know what he is going to say Sunday night. Suggest you ask LaFollette, Bone and Schwollenback to give you definite report on people they can contact.

C.           The Farm Group -- Monday morning.   Suggest you try to get them to secure official action of the Federation and give them permission to speak freely when they leave your conference.   We have asked O'Neil to put you "on the spot" as to what can be done for agriculture if your reorganization does not go through.

*J. R.*

J. R.

PSF: Supreme Court

February 25, 1937.

Dear Charles:

I agree with Molly Dawson! Strictly between ourselves there are two difficulties with any amendment method, at this time. The first is that no two people agree both on the general method of amendment or on the language of an amendment.

In general, four types of amendment have each of them substantial backing:

- (a) The Wheeler type which gives to the Congress an over-riding power on judicial decisions.
- (b) The proposal to take away or curtail the right of the Supreme Court to pass on constitutionality.
- (c) The type conferring specific or general powers over agriculture, mining and industry on the Congress.
- (d) The type setting an age limit on judges or giving them terms instead of life appointments.

To get a two-thirds vote, this year or next year, on any type of amendment is next to impossible. Those people in the Nation who are opposed to the modern trend of social and economic legislation realize this and are, therefore, howling their heads off in favor of the amendment process. They are joined by many others who do not know the practical difficulties.

Finally, if an amendment were to be passed by a two-thirds vote of both houses, this year or next, you and I know perfectly well that the same forces which are now calling for the amendment process would turn around and fight ratification on the simple ground that they do not like the particular amendment adopted by the Congress. If you were not as scrupulous and ethical as you happen to be, you could make five million dollars as easy as rolling off a log by undertaking a campaign to prevent ratification by one house of the Legislature, or even the summoning of a constitutional convention in thirteen states for the next four years. Easy money.

Therefore, my good old friend, by the process of reductio ad absurdum, or any other better-sounding name, you must join me in confining ourselves to the legislative method of saving the United States from what promises to be a situation of instability and serious unrest if we do not handle our social and economic problems by constructive action during the next four years. I am not willing to take the gamble and I do not think the Nation is either.

As ever yours,

Honorable Charles C. Burlingham,  
27 William Street,  
New York, N. Y.

FDR/dj

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WITHOUT  
APPROPRIATE  
AUTHORITY

**BURLINGHAM, VEEDER, CLARK & HUPPER**

ROSCOE H. HUPPER  
CHAUNCEY I. CLARK  
CHARLES BURLINGHAM  
EVERETT MASTEN  
GEORGE H. EMERSON  
RAY ROOD ALLEN  
JOHN L. GALEY  
A. HOWARD NEELY  
WILLIAM J. DEAN  
EUGENE UNDERWOOD

CABLE ADDRESS: POLYCARPON

*Le Hand*

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(2)*

CHARLES C. BURLINGHAM  
VAN VECHTEN VEEDER  
COUNSEL

27 WILLIAM STREET

NEW YORK February 19, 1937

*Acked  
2-23  
PJ*

Dear Miss Le Hand:

Thank you for passing on my ~~letter~~<sup>word</sup> to the President for the Homer Folks dinner. The letter came along in due course and was well received last night at the dinner.

And now will you do as much for me with this letter, which is far more personal?

Sincerely yours,

*Charles C. Burlingham*

CCB:A

Enclosure

BURLINGHAM, VEEDER, CLARK & HUPPER

ROSCOE H. HUPPER  
CHAUNCEY I. CLARK  
CHARLES BURLINGHAM  
EVERETT MASTEN  
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EUGENE UNDERWOOD  
CABLE ADDRESS: POLYCARPON

CHARLES C. BURLINGHAM  
VAN VECHTEN VEEDER  
COUNSEL

27 WILLIAM STREET  
NEW YORK

February 19, 1937.

Dear Franklin:

I haven't bothered you for quite a spell.

You can't feel more strongly than I about the majority opinions, especially AAA, Minimum Wage and Roberts J's. silly talk about railroad pensions. BUT I don't like your method. I suppose you are in a hurry and this is your Congress. It's all very well to refer to previous changes in the size of the Court. Only one involved a desire to affect decisions of the Court - the appointment of Bradley and Strong by President Grant in 1869 and there is still considerable doubt and confusion about that episode, which, however, has always been regarded as more or less scandalous and discreditable to Grant.

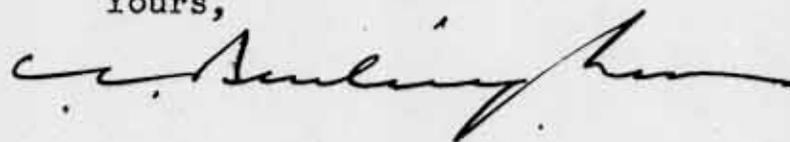
Let me give you a plan that would work:

1. Pass the retirement bill so that no justice can be treated as scurvily as Holmes was.
2. Pass a joint resolution (Burke's perhaps - I have not seen the text) for an Amendment making retirement at 75 compulsory.

This, however, should not apply to the present sitting justices. I am confident that if such a joint resolution is passed, all the justices over 75—Brandeis, Hughes, Van Devanter and McReynolds—would retire without waiting for the adoption

of the Amendment itself, which might take six months to a year. It would not be decent for them to hang on after Congress had adopted such a resolution. I told this to Molly Dewson this morning, and she said "Produce their signatures and I will believe it"!

Yours,

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

CCB:G



Office of the Attorney General  
Washington, D.C.

March 8, 1937

PSF: Supreme Court

File of

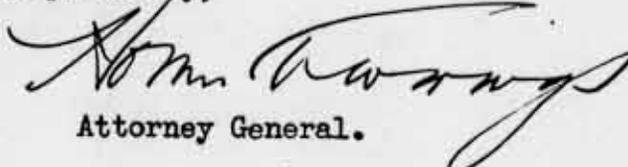
My dear Mr. President:

The Supreme Court at its session today rendered no decisions in Government cases pending on the merits.

The Court denied petitions for writs of certiorari filed by opponents in seven cases. The only one of these petitions which is of particular interest was that in Halsted L. Ritter v. United States. In this case a suit was filed in the Court of Claims by the petitioner, who was formerly a United States District Judge for the Southern District of Florida, to recover salary accruing after a judgment of impeachment had been pronounced against him by the Senate of the United States. The Court of Claims, in dismissing the suit, held that the Senate was the sole tribunal for the trial of impeachments and that its judgment of impeachment could not be reviewed or collaterally attacked in any court. Although the question involved was obviously an important one, the Supreme Court refused to review the case by denying the petitioner's application for a writ of certiorari, presumably on the ground that the constitutional question involved was one as to which the Senate had exclusive and final jurisdiction. The Senate Committee on the Judiciary expressed the desire that the Department oppose the granting of a writ of certiorari in this case. Our opposition was based upon the ground indicated above, which the Department considered a valid objection to the granting of the writ.

The Supreme Court today decided to review a case involving the constitutionality of the Alabama Unemployment Insurance Act (Carmichael v. Southern Coal & Coke Company).

Respectfully,

  
Attorney General.

The President,  
The White House,  
Washington, D. C.

PSF: Supreme Court

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HOTEL BILTMORE  
NEW YORK CITY

MURRAY HILL 2-7400

JAMES A. FARLEY  
CHAIRMAN

MARY W. DEWSON  
VICE-CHAIRMAN

March 19, 1937

Honorable Franklin D. Roosevelt  
Warm Springs, Georgia

My dear Mr. President:

Of course you are going to win  
on your Court plan. Therefore you will be  
looking for strong liberals to appoint to the  
Court.

Lucy Mason says that E. Marvin  
Underwood of Atlanta, Georgia would be in her  
opinion the best person from the South.

Very sincerely yours,

*Mary Dewson*

Miss Mary W. Dewson

MWD:HAK

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March 10, 1937.

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WALTER F. WILLCOX, Cornell University  
MARY E. WOOLLEY, Mt. Holyoke College

Dear Molly:

That was the right sort of a board meeting, wasn't it? Maybe there will be fireworks later. Thank goodness the board is in earnest, enough of it. I do not feel lonesome at board meetings as I did for a long time.

This letter is about a judge - the only judge in the south that I personally know that I would be willing and glad to see on the Supreme Court. I have been so afraid that some of the prominent southern politicians might finally land on that Court - horrible thought and a McReynolds history repeated - that I have deliberately searched for liberal southern lawyers and judges.

The only one I have found of Supreme Court caliber is federal judge E. Marvin Underwood of Atlanta. Pauline Goldmark knows him too and admired his work for the Adamson 8 hour law in Wilson's day.

When Judge Underwood was appointed to the bench in Atlanta in 1931 liberals, labor, lawyers, civic bodies - all hailed the appointment with delight. It was a perfect appointment and has proved so.

Under the Wilson administration, Judge Underwood was Assistant Attorney General, March, 1914, to September, 1917; Solicitor General of the Railroad Administration, April 15, 1919, to August 15, 1919, and then General Counsel of the Railroad Administration to June 15, 1920.

I wangled this information out of him when I was dining in the Underwood home in Atlanta recently. His record is one easy to look up before he was a federal judge and afterwards. He must be about 50 years old, maybe 55. Sterling character, social understanding, strong New Dealer. Obviously in sympathy with the court liberalizing movement, though properly cautious in discussing it. I got his sympathy with it also from what his wife said on the subject - evidently reflecting his opinion, as she wouldn't have had one of her own on that subject.

Now remember, Molly darling, if a southerner gets appointed to that Bench, work for a real progressive and an honest man and I am nominating that man. This is a private affair of my own and a secret. Don't want it to get back to the Underwoods. Good night - blessings to you.

Yours

Lucy R. Mason



*file*

PSF: Supreme Court

Office of the Attorney General  
Washington, D.C.

March 29, 1937

My dear Mr. President:

A number of important decisions were rendered by the Supreme Court at its session today.

Of the opinions handed down by the Court in cases in which the Government was a party or participated in oral argument four opinions were favorable to the Government and two adverse.

The majority and dissenting opinions in the case of West Coastal Hotel Co. v. Parrish, involving the constitutionality of the Washington statute providing minimum wages for women, are already in your hands. There are no particular comments to make as the arguments pro and con are known to you. The decision marks a complete reversal of the Court's decision in Adkins v. Children's Hospital.

The case of Virginian Railway Co. v. System Federation No. 40 involved the Second Railway Labor Act. The railroad was enjoined by the lower court from interfering with the organization of its employees, was required to treat collectively with its employees' representatives, and the railway's objection to the Act as being beyond the commerce power because it covered all employees regardless of their occupation and as being violative of the Fifth Amendment because of an interference with the right to contract, was overruled. The decree was affirmed by the Supreme Court today.

The railway argued two main contentions: (1) That there was no legal sanction to compel the railway to treat with the representatives of its employees; and (2) that insofar as the Act attempted to regulate labor relations between petitioner and its back-shop employees it was not a regulation of interstate commerce; and if it were held to be a regulation of interstate commerce it was unlawful as a denial of due process.

The Court said that "denial by railway management of the authority of representatives chosen by their employees" was a prolific source of dispute. The Court construed the decree as requiring collective bargaining with the "authorized representatives of the

↖

employees." The "statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them." The decree permitted bargaining with individuals. The Court pointed out that this was bargaining for individual rights and that the decree merely forbade collective bargaining with any except the duly chosen representatives of the employees.

In Sonzinsky v. United States the Court upheld the validity of Section 2 of the National Firearms Act which imposes an annual license tax of \$200 on dealers in sawed off shotguns and similar firearms. This was one of the series of acts concerning crime and criminal methods. The opinion sustained the right of the Federal Government to tax dealings in these articles.

In Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, et al the Court held that the new Frazier-Lemke Act had removed the objectionable features of the original statute and that the relief extended under the new Act to the farmers under the bankruptcy clause of the Constitution did not deprive the secured creditor of his property without due process of law.

In United States v. George W. Norris the Court held that under the Federal statute defining perjury retraction does not neutralize false testimony previously given and exculpate the witness of his crime. This is a case which grew out of the attempt by political trickery to defeat Senator Norris of Nebraska at the Republican primary in 1930.

Under the Revenue Act of 1918 a reorganization transaction was nontaxable unless cash was paid for the assets in whole or in part. In the case of Commissioner of Internal Revenue v. Tex-Penn Oil Co. the Board of Tax Appeals found that a small amount of the purchase price was paid in cash rather than stock. The Circuit Court of Appeals was of the view that this finding was without support in the evidence. The Supreme Court reached the same conclusion.

Other Government cases decided were United States v. Madigan and American Propeller & Manufacturing Co. v. United States. In the first case, a Government life insurance case, the Court's decision was favorable, whereas in the second case, a tax case, the decision was unfavorable.

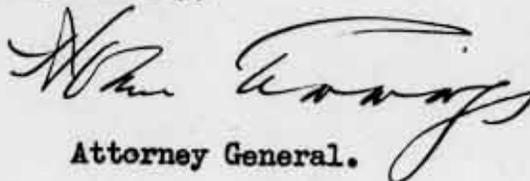
In Steward Machine Co. v. Davis, Collector of Internal Revenue the Court granted certiorari to review the constitutionality of the taxes imposed by Title IX of the Federal Social Security Act and set the case for hearing immediately following the cases of

- 3 -

Carmichael, Attorney General of Alabama v. Southern Coal and Coke Co. and Gulf States Paper Corporation, involving the validity of the Alabama Unemployment Insurance Act.

In eleven other cases petitions by opponents for certiorari were granted in one case and denied in ten.

Respectfully,

A handwritten signature in cursive script, appearing to read "W. H. Sawyer".

Attorney General.

The President,

The White House,

Washington, D. C.

P.S.F. Supreme Ct.  
OFFICE OF  
THE ATTORNEY GENERAL

Rebonds

file



Mar 29/37

Dear Mr President ;  
Enclose copies  
of Hughes opinion &  
Cathulow's dissent.  
W. H. H. H.

OFFICE OF  
THE ATTORNEY GENERAL



*file*

*Mar 29/37*

*Dear Mr President ;  
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W. H. H.*

PSF: Supreme Ct.

# SUPREME COURT OF THE UNITED STATES.

No. 293.—OCTOBER TERM, 1936.

West Coast Hotel Company, Appellant, vs. Ernest Parrish and Elsie Parrish, his wife.	}	Appeal from the Supreme Court of the State of Washington.
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[ ]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the State of Washington.

The Act, entitled "Minimum Wages for Women", authorizes the fixing of minimum wages for women and minors. Laws of 1913 (Washington) chap. 174; Remington's Rev. Stat. (1932), secs. 7623 *et seq.* It provides:

"Section 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

"Sec. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

"Sec. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women".

Further provisions required the Commission to ascertain the wages and conditions of labor of women and minors within the State. Public hearings were to be held. If after investigation the Commission found that in any occupation, trade or industry the wages paid to women were "inadequate to supply them necessary

cost of living and to maintain the workers in health", the Commission was empowered to call a conference of representatives of employers and employees together with disinterested persons representing the public. The conference was to recommend to the Commission, on its request, an estimate of a minimum wage adequate for the purpose above stated, and on the approval of such a recommendation it became the duty of the Commission to issue an obligatory order fixing minimum wages. Any such order might be reopened and the question reconsidered with the aid of the former conference or a new one. Special licenses were authorized for the employment of women who were "physically defective or crippled by age or otherwise", and also for apprentices, at less than the prescribed minimum wage.

By a later Act the Industrial Welfare Commission was abolished and its duties were assigned to the Industrial Welfare Committee consisting of the Director of Labor and Industries, the Supervisor of Industrial Insurance, the Supervisor of Industrial Relations, the Industrial Statistician and the Supervisor of Women in Industry. Laws of 1921 (Washington) chap. 7; Remington's Rev. Stat. (1932), secs 10840, 10893.

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was \$14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the State, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. *Parrish v. West Coast Hotel Co.*, 185 Wash. 581. The case is here on appeal.

The appellant relies upon the decision of this Court in *Adkins v. Children's Hospital*, 261 U. S. 525, which held invalid the District of Columbia Minimum Wage Act which was attacked under the due process clause of the Fifth Amendment. On the argument at bar, counsel for the appellees attempted to distinguish the *Adkins* case upon the ground that the appellee was employed in a hotel and that the business of an innkeeper was affected with a public interest. That effort at distinction is obviously futile, as it appears that in one of the cases ruled by the *Adkins* opinion the employee was a

woman employed as an elevator operator in a hotel. *Adkins v. Lyons*, 261 U. S. 525, at p. 542.

The recent case of *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587, came here on certiorari to the New York court which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the *Adkins* case and that for that and other reasons the New York statute should be sustained. But the Court of Appeals of New York had said that it found no material difference between the two statutes and this Court held that the "meaning of the statute" as fixed by the decision of the state court "must be accepted here as if the meaning had been specifically expressed in the enactment". *Id.*, p. 609. That view led to the affirmance by this Court of the judgment in the *Morehead* case, as the Court considered that the only question before it was whether the *Adkins* case was distinguishable and that reconsideration of that decision had not been sought. Upon that point the Court said: "The petition for the writ sought review upon the ground that this case [*Morehead*] is distinguishable from that one [*Adkins*]. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted. . . Here the review granted was no broader than that sought by the petitioner . . . He is not entitled and does not ask to be heard upon the question whether the *Adkins* case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar". *Id.*, pp. 604, 605.

We think that the question which was not deemed to be open in the *Morehead* case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State. In reaching that conclusion the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the *Adkins* case as determinative and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of the state court demands on our part a reex-

amination of the *Adkins* case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

The history of the litigation of this question may be briefly stated. The minimum wage statute of Washington was enacted over twenty-three years ago. Prior to the decision in the instant case it had twice been held valid by the Supreme Court of the State. *Larsen v. Rice*, 100 Wash. 642; *Spokane Hotel Co. v. Younger*, 113 Wash. 359. The Washington statute is essentially the same as that enacted in Oregon in the same year. Laws of 1913 (Oregon) chap. 62. The validity of the latter act was sustained by the Supreme Court of Oregon in *Stettler v. O'Hara*, 69 Ore. 519, and *Simpson v. O'Hara*, 70 Ore. 261. These cases, after reargument, were affirmed here by an equally divided court, in 1917. 243 U. S. 629. The law of Oregon thus continued in effect. The District of Columbia Minimum Wage Law (40 Stat. 960) was enacted in 1918. The statute was sustained by the Supreme Court of the District in the *Adkins* case. Upon appeal the Court of Appeals of the District first affirmed that ruling but on rehearing reversed it and the case came before this Court in 1923. The judgment of the Court of Appeals holding the Act invalid was affirmed, but with Chief Justice Taft, Mr. Justice Holmes and Mr. Justice Sanford dissenting, and Mr. Justice Brandeis taking no part. The dissenting opinions took the ground that the decision was at variance with the principles which this Court had frequently announced and applied. In 1925 and 1927, the similar minimum wage statutes of Arizona and Arkansas were held invalid upon the authority of the *Adkins* case. The Justices who had dissented in that case bowed to the ruling and Mr. Justice Brandeis dissented. *Murphy v. Sardell*, 269 U. S. 530; *Donham v. West-Nelson Co.*, 273 U. S. 657. The question did not come before us again until the last term in the *Morehead* case, as already noted. In that case, briefs supporting the New York statute were submitted by the States of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey and Rhode Island. 298 U. S., p. 604, *note*. Throughout this entire period the Washington statute now under consideration has been in force.

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described:<sup>1</sup>

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community". *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 565.

This power under the Constitution to restrict freedom of contract has had many illustrations.<sup>2</sup> That it may be exercised in the public interest with respect to contracts between employer and employee

<sup>1</sup> *Allgeyer v. Louisiana*, 165 U. S. 578; *Lochner v. New York*, 198 U. S. 45; *Adair v. United States*, 208 U. S. 161.

<sup>2</sup> *Munn v. Illinois*, 94 U. S. 113; *Railroad Commission Cases*, 116 U. S. 307; *Willecox v. Consolidated Gas Co.*, 212 U. S. 19; *Atkin v. Kansas*, 191 U. S. 207; *Mugler v. Kansas*, 123 U. S. 623; *Crowley v. Christensen*, 137 U. S. 86; *Gundling v. Chicago*, 177 U. S. 183; *Booth v. Illinois*, 184 U. S. 425; *Schmidinger v. Chicago*, 226 U. S. 578; *Armour v. North Dakota*, 240 U. S. 510; *National Fire Insurance Co. v. Wanberg*, 260 U. S. 71; *Radice v. New York*,

is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (*Holden v. Hardy*, 169 U. S. 366); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co. v. Harbison*, 183 U. S. 13); in forbidding the payment of seamen's wages in advance (*Patterson v. Bark Eudora*, 190 U. S. 169); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas*, 211 U. S. 539); in prohibiting contracts limiting liability for injuries to employees (*Chicago, Burlington & Quincy R. R. Co. v. McGuire*, *supra*); in limiting hours of work of employees in manufacturing establishments (*Bunting v. Oregon*, 243 U. S. 426); and in maintaining workmen's compensation laws (*New York Central R. Co. v. White*, 243 U. S. 188; *Mountain Timber Co. v. Washington*, 243 U. S. 219). In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, *supra*, p. 570.

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden v. Hardy*, *supra*, where we pointed out the inequality in the footing of the parties. We said (*Id.*, 397):

"The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their

264 U. S. 292; *Yeyser v. Dysart*, 267 U. S. 540; *Liberty Warehouse Company v. Burley Tobacco Growers' Association*, 276 U. S. 71, 97; *Highland v. Russell Car Co.*, 279 U. S. 253, 261; *O'Gorman v. Hartford Insurance Co.*, 282 U. S. 249, 251; *Hardware Insurance Co. v. Glidden Co.*, 284 U. S. 151, 157; *Packer Corporation v. Utah*, 285 U. S. 95, 111; *Stephenson v. Binford*, 287 U. S. 251, 274; *Hartford Accident Co. v. Nelson Co.*, 291 U. S. 352, 360; *Peterson Baking Co. v. Bryan*, 290 U. S. 570; *Nebbia v. New York*, 291 U. S. 502, 527-529.

judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority".

And we added that the fact "that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself". "The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer".

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest. That phase of the subject received elaborate consideration in *Muller v. Oregon* (1908), 208 U. S. 412, where the constitutional authority of the State to limit the working hours of women was sustained. We emphasized the consideration that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and that her physical well being "becomes an object of public interest and care in order to preserve the strength and vigor of the race". We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that "though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right". Hence she was "properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained". We concluded that the limitations which the statute there in question "placed upon her contractual powers, upon her right to agree with her employer as to the time she shall labor" were "not imposed solely for her benefit, but also largely for the benefit of all". Again, in *Quong Wing v. Kirkendall*, 223 U. S. 59, 63, in referring to a differentiation with respect to the employment of

women, we said that the Fourteenth Amendment did not interfere with state power by creating a "fictitious equality". We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the State. In later rulings this Court sustained the regulation of hours of work of women employees in *Riley v. Massachusetts*, 232 U. S. 671 (factories), *Müller v. Wilson*, 236 U. S. 373 (hotels), and *Bosley v. McLaughlin*, 236 U. S. 385 (hospitals).

This array of precedents and the principles they applied were thought by the dissenting Justices in the *Adkins* case to demand that the minimum wage statute be sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. 261 U. S., p. 564. That challenge persists and is without any satisfactory answer. As Chief Justice Taft observed: "In absolute freedom of contract the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to the one is not greater in essence than the other and is of the same kind. One is the multiplier and the other the multiplicand". And Mr. Justice Holmes, while recognizing that "the distinctions of the law are distinctions of degree", could "perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate". *Id.*, p. 569.

One of the points which was pressed by the Court in supporting its ruling in the *Adkins* case was that the standard set up by the District of Columbia Act did not take appropriate account of the value of the services rendered. In the *Morehead* case, the minority thought that the New York statute had met that point in its definition of a "fair wage" and that it accordingly presented a distinguishable feature which the Court could recognize within the limits which the *Morehead* petition for certiorari was deemed to present. The Court, however, did not take that view and the New York Act was held to be essentially the same as that for the District of Columbia. The statute now before us is like the latter, but we are unable to conclude that in its minimum wage require-

ment the State has passed beyond the boundary of its broad protective power.

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the *Adkins* case is pertinent: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld". 261 U. S., p. 570. And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character: "Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large". *Id.*, p. 563.

We think that the views thus expressed are sound and that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. Those principles have been reenforced by our subsequent decisions. Thus in *Radicè v. New York*, 264 U. S. 292, we sustained the New York statute which restricted the employment of women in restaurants at night. In *O'Gorman v. Hartford Fire Insurance Company*, 282 U. S. 251, which upheld an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute

dealing with a subject within the scope of the police power and to the absence of any factual foundation of record for deciding that the limits of power had been transcended. In *Nebbia v. New York*, 291 U. S. 502, dealing with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination and we again declared that if such laws "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied"; that "with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal"; that "times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power". *Id.*, pp. 537, 538.

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system", the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many

States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest". If "the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied". There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. *Carroll v. Greenwich Insurance Co.*, 199 U. S. 401, 411; *Patsone v. Pennsylvania*, 232 U. S. 138, 144; *Keokee Coke Co. v.*

*Taylor*, 234 U. S. 224, 227; *Sproles v. Binford*, 286 U. S. 374, 396; *Semler v. Oregon Board*, 294 U. S. 608, 610, 611. This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the State's protective power. *Miller v. Wilson*, *supra*, p. 384; *Bosley v. McLaughlin*, *supra*, pp. 394, 395; *Radice v. New York*, *supra*, pp. 295-298: Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment:

Our conclusion is that the case of *Adkins v. Children's Hospital*, *supra*, should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is affirmed.

*Affirmed.*

# SUPREME COURT OF THE UNITED STATES.

No. 293.—OCTOBER TERM, 1936.

West Coast Hotel Company, Appellant,  
vs.  
Ernest Parrish and Elsie Parrish,  
his wife. } Appeal from the Supreme  
Court of the State of  
Washington.

[March 29, 1937.]

Mr. Justice SUTHERLAND.

Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, Mr. Justice BUTLER and I think the judgment of the court below should be reversed.

The principles and authorities relied upon to sustain the judgment, were considered in *Adkins v. Children's Hospital*, 261 U. S. 525, and *Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587; and their lack of application to cases like the one in hand was pointed out. A sufficient answer to all that is now said, will be found in the opinions of the court in those cases. Nevertheless, in the circumstances, it seems well to restate our reasons and conclusions.

Under our form of government, where the written Constitution, by its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional. The Constitution makes it clear that the power has been intrusted to this court when the question arises in a controversy within its jurisdiction; and so long as the power remains there, its exercise cannot be avoided without betrayal of the trust.

It has been pointed out many times, as in the *Adkins* case, that this judicial duty is one of gravity and delicacy; and that rational doubts must be resolved in favor of the constitutionality of the statute. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the court, in the process

of reaching a right conclusion, to give due weight to the opposing views of his associates; but in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And in passing upon the validity of a statute, he discharges a duty imposed upon *him*, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.

The suggestion that the only check upon the exercise of the judicial power, when properly invoked, to declare a constitutional right superior to an unconstitutional statute is the judge's own faculty of self-restraint, is both ill considered and mischievous. Self-restraint belongs in the domain of will and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution and by his own conscientious and informed convictions; and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint. This court acts as a unit. It cannot act in any other way; and the majority (whether a bare majority or a majority of all but one of its members), therefore, establishes the controlling rule as the decision of the court, binding, so long as it remains unchanged, equally upon those who disagree and upon those who subscribe to it. Otherwise, orderly administration of justice would cease. But it is the right of those in the minority to disagree, and sometimes, in matters of grave importance, their imperative duty to voice their disagreement at such length as the occasion demands—always, of course, in terms which, however forceful, do not offend the proprieties or impugn the good faith of those who think otherwise.

It is urged that the question involved should now receive fresh consideration, among other reasons, because of "the economic conditions which have supervened"; but the meaning of the Constitution does not change with the ebb and flow of economic events.

We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.

The words of Judge Campbell in *Twitchell v. Blodgett*, 13 Mich. 127, 139-140, apply with peculiar force. "But it may easily happen," he said, "that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things.

" . . . Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances . . . But, where evils arise from the application of such regulations, their force cannot be denied or evaded; and the remedy consists in repeal or amendment, and not in false construction." The principle is reflected in many decisions of this court. See *South Carolina v. United States*, 199 U. S. 437, 448-449; *Lake County v. Rollins*, 130 U. S. 662, 670; *Knowlton v. Moore*, 178 U. S. 41, 95; *Rhode Island v. Massachusetts*, 12 Pet. 657, 723; *Craig v. Missouri*, 4 Pet. 410, 431-432; *Ex parte Bain*, 121 U. S. 1, 12; *Maxwell v. Dow*, 176 U. S. 581, 602; *Jarroll v. Moberly*, 103 U. S. 580, 586.

The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase "supreme law of the land" stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections.

If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—and the only true remedy—is to amend the Constitution. Judge Cooley, in the first volume of his *Constitutional Limitations* (8th ed.), p. 124, very clearly pointed out that much of the benefit expected from written constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion. He pointed out that the common law, unlike a constitution, was subject to modification by public sentiment and action which the courts might recognize; but that "a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. . . . What a court is to do, therefore, is to *declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."

The *Adkins* case dealt with an act of Congress which had passed the scrutiny both of the legislative and executive branches of the government. We recognized that thereby these departments had affirmed the validity of the statute, and properly declared that their determination must be given great weight, but we then concluded, after thorough consideration, that their view could not be sustained. We think it not inappropriate now to add a word on that subject before coming to the question immediately under review.

The people by their Constitution created three separate, distinct, independent and coequal departments of government. The governmental structure rests, and was intended to rest, not upon any one or upon any two, but upon all three of these fundamental pillars. It seems unnecessary to repeat, what so often has been said, that the powers of these departments are different and are to be exercised independently. The differences clearly and definitely

appear in the Constitution. Each of the departments is an agent of its creator; and one department is not and cannot be the agent of another. Each is answerable to its creator for what it does, and not to another agent. The view, therefore, of the Executive and of Congress that an act is constitutional is persuasive in a high degree; but it is not controlling.

Coming, then, to a consideration of the Washington statute, it first is to be observed that it is in every substantial respect identical with the statute involved in the *Adkins* case. Such vices as existed in the latter are present in the former. And if the *Adkins* case was properly decided, as we who join in this opinion think it was, it necessarily follows that the Washington statute is invalid.

In support of minimum-wage legislation it has been urged, on the one hand, that great benefits will result in favor of underpaid labor, and, on the other hand, that the danger of such legislation is that the minimum will tend to become the maximum and thus bring down the earnings of the more efficient toward the level of the less-efficient employees. But with these speculations we have nothing to do. We are concerned only with the question of constitutionality.

That the clause of the Fourteenth Amendment which forbids a state to deprive any person of life, liberty or property without due process of law includes freedom of contract is so well settled as to be no longer open to question. Nor reasonably can it be disputed that contracts of employment of labor are included in the rule. *Adair v. United States*, 208 U. S. 161, 174-175; *Coppage v. Kansas*, 236 U. S. 1, 10, 14. In the first of these cases, Mr. Justice Harlan, speaking for the court, said, "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . In all such particulars the employer and employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

In the *Adkins* case we referred to this language, and said that while there was no such thing as absolute freedom of contract, but that it was subject to a great variety of restraints, nevertheless, freedom of contract was the general rule and restraint the excep-

tion; and that the power to abridge that freedom could only be justified by the existence of exceptional circumstances. This statement of the rule has been many times affirmed; and we do not understand that it is questioned by the present decision.

We further pointed out four distinct classes of cases in which this court from time to time had upheld statutory interferences with the liberty of contract. They were, in brief, (1) statutes fixing rates and charges to be exacted by businesses impressed with a public interest; (2) statutes relating to contracts for the performance of public work; (3) statutes prescribing the character, methods and time for payment of wages; and (4) statutes fixing hours of labor. It is the last class that has been most relied upon as affording support for minimum-wage legislation; and much of the opinion in the *Adkins* case (261 U. S. 547-553) is devoted to pointing out the essential distinction between fixing hours of labor and fixing wages. What is there said need not be repeated. It is enough for present purposes to say that statutes of the former class deal with an incident of the employment, having no necessary effect upon wages. The parties are left free to contract about wages, and thereby equalize such additional burdens as may be imposed upon the employer as a result of the restrictions as to hours by an adjustment in respect of the amount of wages. This court, wherever the question is adverted to, has been careful to disclaim any purpose to uphold such legislation as fixing wages, and has recognized an essential difference between the two. *E. g.*, *Bunting v. Oregon*, 243 U. S. 426; *Wilson v. New*, 243 U. S. 332, 345-346, 353-354; and see Freund, *Police Power*, § 318.

We then pointed out that minimum-wage legislation such as that here involved does not deal with any business charged with a public interest, or with public work, or with a temporary emergency, or with the character, methods or periods of wage payments, or with hours of labor, or with the protection of persons under legal disability, or with the prevention of fraud. It is, simply and exclusively, a law fixing wages for adult women who are legally as capable of contracting for themselves as men, and cannot be sustained unless upon principles apart from those involved in cases already decided by the court.

Two cases were involved in the *Adkins* decision. In one of them it appeared that a woman 21 years of age, who brought the

suit, was employed as an elevator operator at a fixed salary. Her services were satisfactory, and she was anxious to retain her position, and her employer, while willing to retain her, was obliged to dispense with her services on account of the penalties prescribed by the act. The wages received by her were the best she was able to obtain for any work she was capable of performing; and the enforcement of the order deprived her, as she alleged, not only of that employment, but left her unable to secure any position at which she could make a living with as good physical and moral surroundings and as good wages as she was receiving and was willing to take. The Washington statute, of course, admits of the same situation and result, and, for aught that appears to the contrary, the situation in the present case may have been the same as that just described. Certainly, to the extent that the statute applies to such cases, it cannot be justified as a reasonable restraint upon the freedom of contract. On the contrary, it is essentially arbitrary.

Neither the statute involved in the *Adkins* case nor the Washington statute, so far as it is involved here, has the slightest relation to the capacity or earning power of the employee, to the number of hours which constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment. The sole basis upon which the question of validity rests is the assumption that the employee is entitled to receive a sum of money sufficient to provide a living for her, keep her in health and preserve her morals. And, as we pointed out at some length in that case (pp. 555-557), the question thus presented for the determination of the board can not be solved by any general formula prescribed by a statutory bureau, since it is not a composite but an individual question to be answered for each individual, considered by herself. What we said further in that case (pp. 557-559), is equally applicable here:

"The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he

is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

“The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz, that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely

ignored. The necessities of the employee are alone considered and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States."

Whether this would be equally or at all true in respect of the statutes of some of the states we are not called upon to say. They are not now before us; and it is enough that it applies in every particular to the Washington statute now under consideration.

The Washington statute, like the one for the District of Columbia, fixes minimum wages for adult women. Adult men and their employers are left free to bargain as they please; and it is a sig-

nificant and an important fact that all state statutes to which our attention has been called are of like character. The common-law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept. And it is an arbitrary exercise of the legislative power to do so. In the *Tipaldo* case, 298 U. S. 587, 615, it appeared that the New York legislature had passed two minimum-wage measures—one dealing with women alone, the other with both men and women. The act which included men was vetoed by the governor. The other, applying to women alone, was approved. The "factual background" in respect of both measures was substantially the same. In pointing out the arbitrary discrimination which resulted (p. 615-617) we said:

"These legislative declarations, in form of findings or recitals of fact, serve well to illustrate why any measure that deprives employers and adult women of freedom to agree upon wages, leaving employers and men employees free so to do, is necessarily arbitrary. Much, if not all, that in them is said in justification of the regulations that the Act imposes in respect of women's wages applies with equal force in support of the same regulation of men's wages. While men are left free to fix their wages by agreement with employers, it would be fanciful to suppose that the regulation of women's wages would be useful to prevent or lessen the evils listed in the first section of the Act. Men in need of work are as likely as women to accept the low wages offered by unscrupulous employers. Men in greater number than women support themselves and dependents and because of need will work for whatever wages they can get and that without regard to the value of the service and even though the pay is less than minima prescribed in accordance with this Act. It is plain that, under circumstances such as those portrayed in the 'Factual background' prescribing of minimum wages for women alone would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work."

An appeal to the principle that the legislature is free to recognize degrees of harm and confine its restrictions accordingly, is but to beg the question, which is—since the contractual rights of men and women are the same, does the legislation here involved, by restricting only the rights of women to make contracts as to wages, create an arbitrary discrimination? We think it does. Difference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free. Certainly a suggestion that the bargaining ability of the average woman is not equal to that of the average man would lack substance. The ability to make a fair bargain, as everyone knows, does not depend upon sex.

If, in the light of the facts, the state legislation, without reason or for reasons of mere expediency, excluded men from the provisions of the legislation, the power was exercised arbitrarily. On the other hand, if such legislation in respect of men was properly omitted on the ground that it would be unconstitutional, the same conclusion of unconstitutionality is inescapable in respect of similar legislative restraint in the case of women, 261 U. S. 553.

Finally, it may be said that a statute absolutely fixing wages in the various industries at definite sums and forbidding employers and employees from contracting for any other than those designated, would probably not be thought to be constitutional. It is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages. And yet, if both powers be exercised in such a way that the minimum and the maximum so nearly approach each other as to become substantially the same, the right to make any contract in respect of wages will have been completely abrogated.

A more complete discussion may be found in the *Adkins* and *Tipaldo* cases cited *supra*.

STEVE: PSF: Supreme Court  
Will you speak to me  
about this.  
F.D.R. *Did Apr 6  
will  
S.K.*

OFFICE OF  
THE ATTORNEY GENERAL



Apr 3/37

Dear Mr President:  
No doubt you have  
seen this grossly libelous  
article.

Must the same tactics  
are being employed in  
other quarters.

Perhaps we should  
take account of it  
before long.

Sincerely,  
A. S. W.

# The Great Game of Politics

By FRANK R. KENT

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## He Should Resign

AMONG THE THINGS that have been made by Senator Carter Glass and other members of the judicial branch of the Government was revealed by the President, is that the country needs a new Attorney General very much more than it needs a new Supreme Court. The recent letter of Chief Justice Charles E. Hughes to the Senate Judiciary Committee lends substance to that statement. In it the Chief Justice categorically disproved the statements about the court made in the President's message with which he sent his bill to Congress and which was based on information furnished him by Mr. Homer Cummings, his Attorney General, and included a letter of the Attorney General's.

IN THAT MESSAGE Mr. Roosevelt, on data furnished by his Attorney General, in effect, alleged that the court was behind in its work; that its docket was clogged; that because of the burden upon it, it had been unable to hear many cases it should have heard; that additional justices would facilitate the work of the court and end delay. All of these allegations had been refuted by the record long before the letter of Mr. Hughes. By Mr. Cummings' own report, by the written testimony of Mr. Roosevelt's friends—Dr. Frankfurter and Mr. Landis—by the figures of the cases heard and the character of the cases refused, the statements made were proven misleading and the implications false. So completely was this true that they were immediately abandoned. No one has repeated them. Not one of them was — nor could be — sustained. The letter of the Chief Justice was not really needed to shoot those allegations to pieces, but it was effective and important because it was an authoritative statement of the court's position, concurred in by the oldest liberal, Mr. Justice Brandeis, and the oldest conservative, Mr. Justice Van Devanter, and it served to make clear the position which Mr. Roosevelt and Mr. Cummings now occupy.

THE ATTORNEY GENERAL, we must believe, supplied his Chief with incorrect and misleading information on a vitally important question, which led him to make unfounded and unfair charges which cannot be sustained and had to be dropped under fire. As a result, the President has been weakened in his fight and embarrassed before the country — or, anyhow, should be. Under these circumstances, the resignation of the Attorney General would seem indicated. The natural thing, in a private individual placed by a subordinate in the position the President has been placed by his Attorney General would be either an apology to the other side or, at least a retraction, coupled with a rebuke to the subordinate. It is difficult to see why under such conditions the President of the United States should not react in the same way as any other decent man.

It is true that to do this might weaken Mr. Roosevelt's fight against the court and undoubtedly would hurt his pride. It is a difficult thing for a man such as the President to confess that he has made a mistake — particularly hard to make that sort of confession in connection with an historic and sensational indictment as that contained in his message about the court. It is not easy for a man with the kind of following the President has to stand up and tell if he was wrong, even in the matter of details.

A professor of infidelity is an essential political asset of a certain type of public man. The rule is never to admit error on your own side, never concede victory on the other. It is disappointing to find the President unable to bring himself to rise above that one now. Even though it weakened his case and temporarily confused his strategy, to have rebuked Mr. Cummings and expressed regret at the inaccuracy of his information would have merited a gun for him in the respect of understanding people, whether on his own side or in the opposition. As it is, he is left in possession of having abandoned his charges, but not retracted them. It isn't a pretty position for a President to occupy. It isn't a pretty position for any man, President or private citizen, to occupy.

AS FOR THE Attorney General, it would seem that after the Chief Justice's letter he would feel better equipped and he had admitted his mistake and apologized. There are some who think he may be doing that as a ploy on the part of the President or the effect upon the fight. There are bigger and more important things to be done than winning a battle or saving one's face.

PSF: *Supreme Court*  
Saturday, April 24, 1937

# INFORMATION SERVICE

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## The Supreme Court Controversy

As explained last week the projected analysis in this SERVICE of the President's proposal for reorganization of the federal judiciary was deferred on account of the necessity to consider the bearing on the controversy of the opinions handed down by the Supreme Court in the five cases arising under the National Labor Relations Act, decided on April 12. These opinions, while adding nothing qualitatively new to the substance of the controversy, furnish a fresh setting and a more adequate perspective for the entire discussion. The debate in Congress, in the press, and over the radio, on the proposal has now proceeded far enough to warrant the assumption that all the important aspects of the matter have been canvassed and all important opinions have been aired. The discussion has at least partially clarified the issues but it has also in some measure obscured them. This number of INFORMATION SERVICE is devoted to an effort to sift the arguments, presenting the central issue against a background of fact, and to furnish a basis for appraising the contentions, having particular regard to the opinions handed down in recent weeks.

Admittedly, the President's proposal is aimed chiefly at changing the personnel of the Supreme Court in such a way as to liberalize the character of its opinions in cases involving judicial review, that is, passing on the constitutionality of legislation. This discussion, therefore, is principally concerned with that question. The fact that the President's initial message on the subject and the official arguments in defense of his proposal stressed the congestion of court calendars has led to the accusation that the President obscured his real purpose. This is one of the points at which confusion has persisted. No charge appears to have been made on behalf of the Administration that the Supreme Court calendar is congested, although it is contended that the use of *certiorari*—the certification by the Supreme Court of cases which it is willing to hear on appeal—is at present too sharply limited.

### EFFICIENCY AND NUMBERS

Since the question of the relation of size to efficiency has been raised, however, it is necessary to note that as the Supreme Court now operates an increase in numbers would accentuate the difficulty of arriving at a consensus—or defining dissensus—in the consideration of legal

principles. If it be assumed that *certiorari* should be granted on a larger scale and if there be any merit in the proposal that the Court sit in divisions for a substantial part of its business, an increase in numbers might be defended on procedural grounds. Sitting in divisions is a highly debatable matter, however.

As to the lower courts, although the situation is far from uniform, it is admitted that congestion has occurred and that the continuance of aged judges on the bench is a problem. Congress in 1919 undertook to deal with this problem by providing for the appointment of an additional judge in a court where an aged judge was found to be disabled for effective service. The solution was not a practicable one, however.

### "NEW BLOOD"

What seems to have happened in the present controversy is this: that the President made no clear distinction between incapacity due to the actual infirmity of age and an incapacity due to inability to temper tradition by an appraisal of current facts. That the latter was his chief concern, however, could be fairly inferred from the following passage in his court message on February 5:

"Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the government and in private business. A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.

"We have recognized this truth in the civil service of the nation and of many states by compelling retirement on pay at the age of 70. We have recognized it in the army and navy by retiring officers at the age of 64. A number of states have recognized it by providing in their constitutions for compulsory retirement of aged judges.

"Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the

courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world."

In view of these statements it can scarcely be charged that the President did not at the outset state his full purpose.

The dates of birth of the present justices of the Supreme Court and of their appointment and the names of the presidents who chose them are listed below:

NAME	BORN	APPOINTED	PRESIDENT
Willis Van Devanter	April 17, 1859	1911	Taft
James C. McReynolds	February 3, 1862	1914	Wilson
Louis D. Brandeis	November 13, 1856	1916	Wilson
George Sutherland	March 25, 1862	1922	Harding
Pierce Butler	March 17, 1866	1922	Harding
Harlan F. Stone	October 11, 1872	1925	Coolidge
Charles E. Hughes	April 11, 1862	1930	Hoover
Owen J. Roberts	May 2, 1875	2nd appointment 1930	Hoover
Benjamin N. Cardozo	May 24, 1870	1932	Hoover

It will be noted that five of the justices are 75 or over. Mr. Chief Justice Hughes, before his second appointment to the Supreme Court, remarked on the strange reluctance of aged judges to retire and intimated that 75 years might be considered not an unreasonable retiring age.

That there is no uniform relationship between chronological age and the decline of mental vigor is, of course, clear, yet a rough correlation is assumed in all retirement plans, many of which terminate official service years before the age which most of the Supreme Court Justices have now reached. The relation of age to mental outlook and capacity to entertain new opinions is, of course, anything but uniform. The late Mr. Justice Holmes, and Mr. Justice Brandeis have given monumental evidence of the continuance of social vision in advanced years. But it must be noted that the general assumption underlying the President's plan is not being questioned. It is freely recognized that new blood is needed in a court as in a law office or a bank; the question is whether dependence should always be entirely upon automatic processes.

A fair statement of the central issue would seem to be somewhat as follows: When the Supreme Court has made clear in a number of decisions, most of them divided, that it is averse to sustaining a legislative program, adopted in a very critical period, which is in line with a broad declaration of policy that the people have decisively approved at the polls, is it sound policy to bring about a change in the tenor of decisions by appointing additional members of the Court whose views are known to be more favorable to the general aims of the Administration and to the character of the measures designed to implement them? This is the issue in a nutshell.

"PACKING" THE COURT?

It will be noted that this statement is worded differently from the way in which the issue is defined by most critics of the plan. This is not done by way of prejudging in any sense the issue itself, but precisely because in order to be fair it is necessary to refrain from smuggling judgments into definitions. If, for example, the proposal is stated in terms of a plan to "pack the Court" the question is begged. Presumably "packing the Court" means the naming of judges with the express purpose and understanding that they will render desired opinions on specific proposals—in other words, that in their judicial conduct such appointees of the President will be "his men."

This is precisely what many critics of the President charge that he is proposing to do. It will be pointed out presently that certain passages from one of the President's addresses on the subject are somewhat ambiguous on this point. The fear and indignation that have been aroused over this proposition, particularly in the legal profession but also among many other groups, can scarcely be exaggerated. It is contended that the independence of the judiciary is at stake. Prominent citizens are asking whether the Supreme Court is to be "controlled." It is pointed out that in the Colonial Period this was one of the most important issues which our history discloses. Our Supreme Court justices hold office during "good behavior." In the Colonial Period, however, the judges held office "at the King's pleasure." A bitter fight was waged to establish the principle of judicial independence. The Declaration of Independence includes the charge: "[The King] has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Thus the independence of the judiciary was one of the issues in the American Revolution.

But to characterize the President's proposal as a packing of the Court is to assume that he will, if his bill is enacted, appoint men to the Supreme Court only after ascertaining their opinions on specific measures. Indeed, it is expressly charged that what the President is proposing is to secure additional judges in order to reverse some of the recent decisions of the Court affecting the New Deal. This is something which, according to recent researches, President Grant closely approximated when, pursuant to an act of Congress increasing the number of Supreme Court justices from seven to nine, he appointed Justices Strong and Bradley on the very day the decision in the Legal Tender case was announced, a decision which he very much wished reversed and which he had good reason to believe the new appointees would aid in reversing—as they did.

President Roosevelt, however, indignantly denies any such intention. In his address over the radio on March 9 he said:

"If by that phrase, 'packing the Court,' it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer—that no President fit for his office would appoint, and no Senate of honorable men fit for their office would confirm that kind of appointees to the Supreme Court."

This is a categorical denial of the charge that justices are to be appointed in order to effect specific reversals of New Deal cases. Continuing, he said:

"But, if by that phrase the charge is made that I would appoint and the Senate would confirm justices worthy to sit beside present members of the Court who understand those modern conditions—that I will appoint justices who will not undertake to override the judgment of the Congress or legislative policy—that I will appoint justices who will act as justices and not as legislators—if the appointment of such justices can be called 'packing the courts,' then I say that I and with me the vast majority of the American people favor doing just that thing—now."

AN AMBIGUOUS DECLARATION

It cannot be denied that this statement offers difficulty. Is the Supreme Court to have no hand in shaping policy as a part of its progressive interpretation and application

FEARS FOR THE BILL OF RIGHTS

A more serious objection, perhaps, arises from the fact that with all its conservatism the Supreme Court has been in a very important way the defender of the people's liberties. Consider, for example, the recent decision in the De Jong case in Oregon, in which a conviction under the state's Criminal Syndicalism Law was set aside; the famous Oregon School case in which the right of parents to send their children to private schools was upheld; the Scottsboro case in which the Supreme Court protected Negro boys from execution under what it pronounced an unfair conviction by state courts. These and instances of similar import are cited as showing that when state and municipal governments yield to the pressure of popular hysteria the courts, and particularly the federal Supreme Court, may be the greatest bulwark of popular liberty. Senator Wheeler in his opposition to the present proposal makes much of his own experience during the war when his state was swept by wartime hysteria which caused his personal integrity as a federal district attorney to be assailed.

It will be seen, therefore, that the opposition to the President's proposal comes from a number of sources and is variously based. The fear and suspicion with which the plan is viewed could hardly be exaggerated. It is against such a background that any justification of the proposal must be developed if it is to meet the test of fair appraisal.

AN ATTEMPT AT APPRAISAL

An attempt will be made here to consider the merits of the President's proposal in the light of the criticisms that have been recited, not with a view to expressing any final judgment upon the issue but in order to show as clearly as possible what is involved. We shall consider the following factors:

1. The relevance of the economic and social philosophy of judges to the determination of their qualifications;
2. The probable effect of the President's proposal on New Deal legislation;
3. The probable effect of the plan upon popular attitudes toward the courts;
4. The importance of the "precedent" argument;
5. The probable effect of the plan upon the maintenance of civil liberties;
6. The merits of the plan as compared with current proposals for substantive amendments to the Constitution designed to meet the problems which the President is confronting.

THE RELEVANCE OF THE ECONOMIC AND SOCIAL PHILOSOPHY OF JUDGES TO THE DETERMINATION OF THEIR QUALIFICATIONS

It is at this point that the recent Washington Minimum Wage and Wagner Act decisions become particularly pertinent. Indeed the entire case of the Administration with reference to the character of the Supreme Court decisions on the constitutionality of acts of Congress could be documented by reference to majority and minority opinions in these cases. Mr. Roosevelt has made no criticism of the Supreme Court that has not been made much more caustically by members of that tribunal when writing minority opinions. Furthermore, these sharp differences of opinion are not technical and for lawyers only; they arise out of the conflict between realistic views of social and economic facts and situations and that tra-

of the Constitution? The difficulty is increased by the following passage which occurs a little later in the same address: "[The proposal is advanced] because it will provide a series of federal courts willing to enforce the Constitution as written and unwilling to assert legislative powers by writing into it their own political and economic policies."

That the Constitution should be enforced "as written" is precisely what Mr. Justice Sutherland argues in his dissent in the Washington Minimum Wage case, decided since the President's proposal was put forward. The attempt to interpret the basic law literally, as if nothing significant or controlling had happened since it was formulated, is the main target of the liberal criticism of the courts.

It seems pertinent to point out that much of the criticism of his proposal arises out of the fact that his words have been taken as committing him to a policy of reducing the functions of the Supreme Court in judicial review almost to the vanishing point. Thus Senator Pepper says: "If the President had his way, the Congress would decide whether an act is constitutional. . . ."

We feel warranted in saying, however, that the President does not consider the doctrine of judicial review to be involved in his plan and that the above quotation does not at all express his philosophy; that he does expect the Constitution to be "interpreted" and desires only the kind of interpretation which will make possible legislation in line with the policies of his Administration which he considers his last election a clear mandate to carry out. This construction of the matter is clearly supported by his reference to the opinion expressed by Mr. Justice Washington in *Ogden v. Saunders* in 1827. At that time, and indeed until the *Dred Scott* decision in 1857, the Supreme Court had declared but one act of Congress unconstitutional. Mr. Justice Washington said: "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt." The present position of the Administration is that the Supreme Court has departed very far from the doctrine here laid down.

Nevertheless, there are many members of Congress and leaders in American public life who believe that, whatever his present intention or whatever the quality of his purpose, appointments made by the President pursuant to the passage of the present bill would be political appointments in the most dangerous sense of that word. This fear is perhaps accentuated by the fact that one of the decisions cited by the President in criticism of the Supreme Court was that handed down in the *N. R. A.* case. This, however, was a unanimous decision. It is pointed out that even if all the appointees to vacancies in the Supreme Court should resemble in judicial outlook the most liberal men now on the bench the *N. R. A.* decision could not be reversed. If, therefore, the President's intention were to appoint men hostile even to that decision he would indeed be injecting a new and alien element—although the Wagner Act cases may be construed as opening the way for a reconstructed *N. R. A.* Even the explicit statement of the President that he has no such crude purpose as has been imputed to him has failed to quiet fear. As suggested above, an ambiguity in some of his own remarks may be accountable for this.

ditional attitude which the President described as characterizing a "static" court.

In the Washington Minimum Wage case the Court reversed the decision given in 1923 in the *Adkins* case. In delivering the opinion of the Court Chief Justice Hughes said: "We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved." This is an emphatic declaration that judicial review is not merely a matter of literal, objective statement of the law.

This case has a dramatic touch in that the minority opinion was written by Mr. Justice Sutherland who wrote the prevailing opinion in 1923. In his current opinion Mr. Justice Sutherland says: "The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation." This, however, may well be read against the background of the following sentences from his majority opinion in 1923: "Relation between earnings and morals is not capable of standardization. The well to do are not less likely than the poor to lapse morally. It cannot be shown that highly paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages; and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former." In this decision, which brought sharp criticism upon the Court and a rebuke from Mr. Chief Justice Taft in his dissent, the economic views of the majority were written into the Constitution by a process of "interpretation."

The Wagner Act decisions turn on the definition of interference with interstate commerce, which has been the occasion of many a controversial issue in the courts. The heart of the matter is the question whether labor disturbances such as that Act seeks to abate by the establishment of unimpeded collective bargaining constitute an "immediate" or a "remote" interference with interstate commerce. Thus the most pertinent argument in these highly significant decisions has to do primarily with the weighing of factors in the present social-economic situation. Passage after passage in these opinions shows how sharply the line is drawn between those upon whom the modern scene has made a profound impression and those who are still looking through lenses fitted in an earlier age.

For example, Mr. Chief Justice Hughes in the majority opinion in the *Jones and Laughlin* case, referring to possible stoppage of work in the company's manufacturing operations, said:

"In view of the respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . .

"When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? . . .

"Experience has abundantly demonstrated that the recognition of the right of employes to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. . . .

"The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall."

All of this seems obvious to a layman, but note these passages from the minority opinion written by Mr. Justice McReynolds:

"The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined.

"Any effect on interstate commerce by the discharge of employes shown here, would be indirect and remote in the highest degree, as consideration of the facts will show. In No. 419 [one of the cases at bar] ten men out of 10,000 were discharged; in the other cases only a few. . . .

" . . . Whatever effect any cause of discontent may ultimately have upon commerce is far too indirect to justify Congressional regulation. Almost anything—marriage, birth, death—may in some fashion affect commerce."

The fundamental antagonism between social philosophies could hardly be more clearly brought out. It strongly suggests the irreconcilable conflict between fundamentalist and liberal points of view in religion.

Or consider the *Associated Press* decision. Here the majority opinion holds that the *Associated Press* is to be considered in the same category as other businesses in interstate commerce with reference to the requirement that the rights of their employes to organize shall not be interfered with. In this case the minority, speaking through Mr. Justice Sutherland, does not contend that the *Associated Press* is not engaged in interstate commerce. Rather, the First Amendment to the Constitution, with its guarantee of freedom of the press from Congressional interference, is invoked against the Wagner Act. The minority declares that liberties guaranteed in the First Amendment are "in a category apart" and "incapable of abridgment by any process of law." With this premise the minority proceeds to find invalid the application of the Wagner Act to a news gathering and dispensing agency, in these words: "It would seem to be an exercise of only reasonable prudence for an association engaged in part in supplying the public with fair and accurate factual information with respect to the contests between labor and capital, to see that those whose activities include that service are free from either extreme sympathy or extreme prejudice one way or the other."

Here again a social philosophy is expressed which is so divorced from reality as to leave the layman mystified. The *Associated Press* would be obliged in carry-

ing out this principle to find employes who were so remote from current affairs as to have no interest in the all-absorbing issue of employer-employee relations—including their own economic status!

A multitude of cases might be cited to the same effect. These are chosen because of their current interest. Mr. Justice Stone, in what is likely to be a famous dissent in the *A.A.A.* case, said that, "while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

There are numerous records in our history of conflict between the Executive and the Supreme Court, growing out of serious differences in policy. Thomas Jefferson once expressed his great satisfaction that a vacancy had occurred in order that one of his own political faith might be appointed by way of redeeming the Court. During President Johnson's quarrel with Congress a future limit to the number of justices was set at seven instead of nine in order to prevent any appointees of his from taking seats on the Court. Woodrow Wilson was undoubtedly trying to liberalize the Court when he named Justices Brandeis and Clark. These appointments gave William Howard Taft great concern and he urged the election of Mr. Harding partly on the ground of probable appointments to the Supreme Court. A personal letter is cited in which he referred to "the four places likely to be filled by Wilson's successor," and added, "Think of the danger of another Brandeis and Clark. The power and the usefulness of that Court would be broken down under such appointments if the majority of the Court were to be made up of them." When Theodore Roosevelt was considering the appointment of Mr. Justice Holmes he wrote a letter to Senator Henry Cabot Lodge in which he said: "Now I should like to know that Judge Holmes was in entire sympathy with our views, that is, with your views and mine, and Judge Gray's, for instance, just as we know that ex-Attorney General Knowlton is, before I would feel justified in appointing him. . . . I should hold myself as guilty of an irreparable wrong to the nation if I should put in his [Gray's] place any man who was not absolutely sane and sound on the great national policies for which we stand in public life."

The very great relevance of economic and social philosophy to the fitness of a judge has been amply testified to by Senator Borah, who is one of the leading opponents of the President's proposal. When the nomination of Mr. Chief Justice Hughes was before the Senate Mr. Borah, criticizing a decision of the Supreme Court, said: "I do not want to strengthen the viewpoint of the majority." Mr. Borah objected to the Hughes appointment because he believed that Mr. Hughes held the view that "practically no restraint ought to be placed on the vast corporate interests of the United States."

It may be pointed out here that the actual character of a judge's opinions cannot be accurately forecast from his record. Mr. Chief Justice Hughes, as everyone knows, has written some very liberal opinions. Mr. Justice McReynolds, who is included in the conservative group of justices, was apparently appointed by President Wilson on the strength of his trust-breaking prosecutions because the latter believed his opinions would be in line with the prevailing policy of the government. It may also be noted

that this uncertainty of predicting the quality of a judge's opinions has been advanced as an argument against the present proposal. Senator Wheeler says, "Who can be sure that the appointees may not turn out to be reactionaries?" It would seem, however, that the question here is one of gauging probabilities, and few opponents of the President's proposal doubt that his appointments would very seriously change the complexion of the Court.

The most important point at which this issue arises is in the judicial interpretation of the term, "due process of law." As is well known, it occurs in the Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property without due process of law"; and in the Fourteenth Amendment: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law." Mr. Justice Curtis, writing the ruling opinion in *Murray's Lessee et al vs. Hoboken Land and Improvement Company* in 1856, made clear the original significance of this term:

"The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50) says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the federal Constitution, following the language of the great charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.' The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.

" . . . To have followed, as in the state constitutions, and in the ordinance of 1787, the words of *Magna Charta*, . . . would have been in part superfluous and inappropriate. To have taken the clause 'law of the land,' without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on the *Magna Charta* had declared to be the true meaning of the phrase, 'law of the land,' in that instrument, and which were undoubtedly then received as their true meaning."

In other words, the original meaning of the "due process" clause is that every man shall have "his day in court." Under the influence of *laissez-faire* economic theory with its emphasis on individual initiative the Supreme Court has developed a meaning of "due process of law" which makes possible drastic limitations of the power of the federal and state legislatures, in the interest of maintaining free competition. It should be noted that this is not equivalent to charging that big business controls the courts. In theory, at least, "due process" has been invoked to preserve competition against monopoly. But in the light of the original meaning of "due process," as above stated, a construction of the Constitution "as it is written" would seem to call for something widely different from the construction presented in, for example, Mr. Justice Sutherland's opinion, already referred to, in the famous *Adkins* case.

#### PROBABLE EFFECT ON NEW DEAL LEGISLATION

If the President's proposal should be approved by Congress several possibilities might result. If no Supreme Court justices should retire the President would appoint six new justices. If the six justices who are now over seventy should retire in recognition of a declaration of prin-

ciple on the part of Congress as an announcement of public policy, the President would also appoint six justices. Then again, some of the six might retire and some remain, so that there is theoretically a possibility of new appointments ranging from one to six. It should be noted that the pending bill provides that the number of justices would be permanently increased by any additional appointments made. This has no visible relation to the purpose of the measure. For example, if six new and relatively young judges should be appointed and within the next few years the older judges, including the more conservative members of the bench, should retire, there would be no advantage, in terms of the purpose of the President's proposal, in filling all these vacancies. The significance, therefore, of the provision that the increase shall be permanent does not appear. It may, of course, be argued on behalf of the President's proposal that if the older Supreme Court justices consider an increase in the size of the Court undesirable they have only to resign on the passage of the bill by Congress in order to prevent this from happening. In other words, the increase in the size of the Court is not an essential part of the President's plan but is contingent only upon the continued refusal of the older justices to retire.

In gauging the effect of the proposal it is necessary to make some assumption on the point previously referred to as to the President's intentions. Putting the best construction upon them, the proposal means that lawyers having such views and general judicial outlook as Justices Brandeis, Stone and Cardozo would be appointed to the Court.\* It must be granted at once that if the most hostile critics of the plan are correct in their assumption that the President would exact from his appointees a promise to vote for reversal in specific cases or to decide in prescribed ways with reference to specific legislative proposals—in short, that they would agree to represent the President on the Supreme Court—there is nothing to argue about. No one who is not committed to a philosophy of political dictatorship could view such a proposal with complacency. It would seem, however, that the President is entitled to have his proposal at least weighed on the assumption that he would look into the economic-social philosophy of respective appointees precisely as other presidents have done and that he would be guided by his conclusion as to the probability that the will of the people concerning legislative policies, as expressed in the election of last November, could be carried out without interference by the Supreme Court as reconstituted. The argument comes down to this, that the dissenting opinions that have been written in cases arising under New Deal legislation give the Administration reasonable hope that it might be possible to carry out a program of legislation designed to effectuate the New Deal, whereas the majority opinions taken in the aggregate—up to the time the Court plan was drafted—constitute a fairly conclusive finding against the possibility of implementing the main purposes developed during Mr. Roosevelt's first administration. The recent decisions, to be sure, change the picture. Yet from the Administration viewpoint, an advantage precariously held by means of one problematic vote is not a victory.

It should be noted that some of the critics of the President's plan believe that the requirements of the present

\* The suggestion that lay members should be appointed to the Court has gained no visible support.

situation could be met by a different type of legislation. Those who hold that the economic problems of the country could be solved by a frontal attack upon monopoly contend that there is no constitutional impediment to drastic legislation directed toward this end.

In any case, this whole controversy is set in the framework of a new economic era which, according to a great body of opinion, both expert and lay, requires an increasing measure of regulation of business by government running away beyond what the Supreme Court has, as a rule, allowed in its interpretation of the limits of federal power and of the meaning of the due process clauses of the Fifth and Fourteenth Amendments. The recent decisions extensively quoted above may be taken as definitive of a liberal policy on the part of the Court only to the extent that the one member holding the balance of power continues to range himself on the liberal side. It is probably fair to say, therefore, that the New Deal philosophy, including its diagnosis of our economic problems and the methods proposed for their solution, has much at stake in the early strengthening of the liberal point of view on the nation's highest tribunal.

#### THE PROBABLE EFFECT OF THE PLAN UPON POPULAR ATTITUDES TOWARD THE COURTS

It is at this point that the question assumes in many minds its most distinctly moral aspect. Again, it is apparent that much depends on how the proposal is conceived. If it is thought of as a means of implementing a definite public demand for a liberalizing of judicial review in the light of an extraordinary emergency rather than as a personal exploit on the part of a very powerful executive, the argument loses much of its force. For emergencies such as the nation has been passing through are not of frequent occurrence, and it does not appear that such moral prestige as the courts enjoy would necessarily be impaired by effectuating a rather sudden change in the quality of judicial interpretation of basic law. When a president, a senator or a governor is replaced by an overwhelming vote of the people the prestige of his office does not suffer in a measure proportional to the vote. On the other hand, those who see the current proposal as a corruption of the judiciary are manifestly right in fearing that its results might be far-reaching.

A serious aspect of the matter is the doubtful character of current assumptions with reference to the "independence of the judiciary." Conservative minds regard it as a heritage to be preserved; many liberals, and probably the working classes very generally, regard it as a goal to be achieved. It seems hardly possible that judges could render decisions year after year which their own liberal colleagues characterize as prejudiced and unfair without impairing respect for the courts. The way in which labor rights have been disregarded in court decisions is a matter of common knowledge among students of industrial problems. In this respect the chief offenders have been the lower courts. But the body of precedent that has now been built up in Supreme Court opinions interpreting the Constitution in the interest of outworn economic doctrine has had an influence with the masses of our people which most members of the legal profession do not realize. It is probably safe to say that the supporters of the President's proposal for the most part regard it as a rather drastic but necessary expedient to render the Supreme Court "independent" of the strong

individualistic tradition which our economic system has developed and more dependent upon the will of the people as to the spirit in which the language of the Constitution shall be interpreted.

#### THE IMPORTANCE OF THE "PRECEDENT" ARGUMENT

In the minds of lawyers, particularly, the setting of legal precedents is a matter of primary importance. In the present controversy, as has been pointed out, attention is sharply called to the possibility that in future a president having reactionary aims might follow the precedent of increasing the size of the Court for the purpose of securing judicial blessing for his legislative purposes. While this is, of course, a matter of opinion, two factors must be taken into account.

a) "Precedents" have two historical uses, one to be followed, the other to be avoided. Past policies in government are as often pointed to as "horrible examples" as they are cited for guidance. Just now, opponents of the President's plan are regarding the "precedent" set in the Grant Administration for increasing the number of justices in the Supreme Court and making appointments in the light of particular desired decisions, as a pitfall to be avoided. The size of the Court has been frequently changed but that precedent ceased to be operative some decades ago. If the results of the present plan should be generally regarded as unsatisfactory to the nation, there is little ground for fearing repetition.

b) As has been pointed out in the Senate hearings, it is only during periods in which liberal policies are developed that Congress and the Executive are likely to have any contest with the Supreme Court, so far as federal power is concerned. A conservative Congress and Executive are likely to develop and enact only measures that are well within the Constitution as conservatively interpreted. Thus the influence of precedent would, in any case, be curtailed by its limited availability as a support.

#### THE PROBABLE EFFECT OF THE PLAN UPON THE MAINTENANCE OF CIVIL LIBERTIES

As to the very important question of civil liberty the issue again depends on the character of the men selected for the Supreme Court. While it has been pointed out that conservative justices may be quite inflexible in defense of the rights of minorities, it would seem that justices who would qualify under Mr. Roosevelt's specifications as to the promotion of the general welfare would not be lacking in appreciation of the religious, political or economic rights of any individual or minority group which may come into jeopardy. In other words, while those defenders of the Supreme Court in the present controversy who point to its function as a bulwark against popular hysteria are undoubtedly correct in that contention, it is difficult to see how a Court made up of justices of the ilk of the present liberal members would constitute a peril to minority rights.

#### THE MERITS OF THE PLAN AS COMPARED WITH CURRENT PROPOSALS FOR SUBSTANTIVE AMENDMENTS

It is now necessary to consider the alternative proposals. The idea of amending the Constitution seems to have become popular all at once. Apparently the controversy has had the effect of calling attention to a serious national need. Critics of the President's plan have ad-

vanced three types of amendment pursuant to the contention that if there is anything wrong with the functioning of our highest tribunal the people, not the President or Congress, must correct it. The three types of amendment may be described as having the following purposes:

- To redefine the powers of federal and state governments under the Constitution;
- To limit the power of judicial review;
- To effect the retirement of Supreme Court justices at a given age.

Amendment proposals of the first type are directed at extending the power of the federal government in the interest of public welfare and at freeing the state legislatures from the restraint inherent in the present interpretation of the due process clause. It has been proposed, for example, that Congress be given explicit power to provide social security and to regulate industrial relations. Such powers as Congress now has in these areas are precariously held and limited to application under the interstate commerce clause.

It is important to remember that controversy over the constitutionality of legislation has two main aspects. The powers of Congress to invade the domain of the states have been curbed by the Supreme Court by a rigid interpretation of the interstate commerce clause and a broad construction of the due process clause in the Fifth Amendment—which relates to the federal government. On the other hand, the powers of the states to legislate in economic matters have been curtailed by the federal Supreme Court by a correspondingly broad construction of the due process clause in the Fourteenth Amendment. Thus the effort to liberalize judicial review looks toward increased federal power even at the expense of state power, on the one hand, and toward extension of the powers of state legislatures within their own sphere, on the other.

Senator Borah has proposed an amendment which would repeal the Fourteenth Amendment, reenact the major portion of it, and expressly define "due process" as follows:

"Due process of law as herein used shall have reference only to the procedure of executive, administrative, or judicial bodies charged with the execution and enforcement of the law."

Concerning such proposals it is probably safe to say that most supporters of the President's plan would welcome, in addition, substantive changes in the Constitution in line with these suggestions. The main difficulty lies, of course, in the fact that if there is any merit in the President's Court plan time is of the essence. If changes in policy such as Mr. Borah's amendment contemplates are not so urgent as to preclude a waiting period of as much as seven years (the time limit specified in his amendment) it may well be argued that no emergency exists. There is, however, a widespread opinion that it is of the greatest urgency that the contemplated changes in public policy be promptly made. The long and tortuous process by which the Child Labor Amendment has made its way even to its present precarious position, in spite of endorsement by former President Hoover, Governor Landon, and other eminent conservatives, and notwithstanding impressive evidence of popular approval, furnishes a formidable argument against dependence upon the slow amending process to bring about changes in policy which great jurists in their dissenting opinions have insisted are urgently needed.

There is also the unavoidable suspicion that many of those who are now calling for substantial constitutional changes by amendment are using this argument for the purpose of killing the President's proposal. The much talked of amendments might be chief mourners at the funeral of his court plan.

The second type of amendment would limit, or even take away, the right of judicial review of acts of Congress. Senator Norris has proposed that an act of Congress shall stand unless two-thirds of the Supreme Court vote to annul it. Senators Wheeler and Bone would give Congress power by a two-thirds vote to reenact a measure annulled by the Supreme Court, after the occurrence of a general election subsequent to the Court's decision. Walter Lippmann would add to this a referendum to the people who, he believes, should alone be able to override the Supreme Court.

The third type of proposed constitutional amendment is represented by Senator Burke's proposal which would retire all federal judges automatically at 75 who had not elected to retire between the ages of 70 and 75. In either case full pay would be continued. It has been predicted that should Congress now propose such an amendment, the judges over 75 would regard the decisive vote of Congress as a mandate to retire. In any case, the speedy adoption of the amendment would mean the retirement of five justices who are this year 75 or over. Three of these are in the consistently conservative group—Sutherland, Van Devanter and McReynolds. Such a consummation would, of course, give the President power to liberalize the Court without altering its size. It would be a permanent reform accelerating the process of infusing new blood into the Court. If it should be invoked now by a constitutional amendment which both parties would heartily support as a way out of the constitutional crisis, a bitter controversy might perhaps be ended in a constructive way.

Whatever may be thought of the several propositions offered as alternatives to the plan in dispute, it must be recognized that, with the exception of compulsory retirement of judges, they are all essentially more radical than the President's plan in their effect on governmental process. This does not mean that they are not preferable, nor does it mean that some of them are not, in any case, needed as supplementary remedies for the evil of anachronistic court decisions. The support given by critics of the President's plan to the proposal to give Congress power to override adverse decisions on the constitutionality of its own acts is surprising in view of the patent exaltation of the legislative and executive branches of the government over the judiciary that would result.

#### CONCLUSION

The "conclusion of the whole matter" seems to be that those who think that the nation is now in a critical situation, who are deeply impressed with the inferior economic status of one-third of our people, to which the President has called attention, who share the concern expressed by the Chief Justice himself in the recent Minimum Wage

decision over "the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent," and who believe these conditions can be met only by immediately securing a liberal attitude on the part of the Supreme Court toward New Deal legislation, will tend to favor the President's proposal as the quickest method of infusing new blood into the Court. On the other hand, those who do not regard the situation as grave and think that with a little patience and in the course of nature changes in the personnel of the Court will bring about changes in interpretation as well as substantive amendments to the Constitution, and those who fear the precedent of changing the Court in any way without the approval of the whole people will be inclined to oppose the President's plan and favor proceeding by way of amendment.

Whatever the outcome, the controversy seems to have served an educational purpose. It has brought to the attention of the country, as evidenced by the surprising satisfaction voiced in the conservative press over the recent liberal decisions of the Supreme Court, the necessity of a modern judicial interpretation of our basic law. Thus we are seeing demonstrated the truth of Mr. Justice Holmes' great dictum which now adorns a mural in the new Department of Justice building in Washington: "The life of the law has not been logic, it has been experience."

#### SUGGESTED READINGS

- Hughes, Charles E. *The Supreme Court of the United States*. New York, Columbia University Press, 1928.
- Warren, Charles. *The Supreme Court in United States History*. Boston, Little, Brown and Company, 1926. 2 vol.
- Frankfurter, Felix and J. M. Landis. *The Business of the Supreme Court*. New York, Macmillan Company, 1927.
- Corwin, Edward S. *Twilight of the Supreme Court*. New Haven, Yale University Press, 1934.
- Frankfurter, Felix, ed. *Mr. Justice Holmes*. New York, Coward-McCann, Inc., 1931.
- Social and Economic Views of Mr. Justice Brandeis*. New York, Vanguard Press, 1930.
- Corwin, Edward S. "Judicial Review." *Encyclopedia of the Social Sciences*. New York, Macmillan Company, 1932, vol. 8, pp. 457-64.
- Cushman, Robert E. "Amendments, Constitutional." *Encyclopedia of the Social Sciences*. New York, Macmillan Company, 1930, vol. 2, pp. 21-3.
- "Due Process of Law." *Encyclopedia of the Social Sciences*. New York, Macmillan Company, 1931, vol. 5, pp. 264-8.
- Beard, Charles A. *The Constitution and Social Issues*. New York, Council for Social Action, 1935.
- "The Constitution Today." *Information Service*. New York, Federal Council of Churches, vol. 15, no. 8, February 22, 1936.

#### Magazine Note

- Annals of the American Academy of Political and Social Science* (Philadelphia). March, 1937.
- "Current Developments in Housing."—A symposium on different aspects of the factors involved in providing adequate housing for all economic groups. Among the main topics discussed are "Nature of Housing Problems," "The Production of Housing," "Special Aspects of the Housing Market," "Housing as a Problem of Government," and "Housing Policies Abroad."

PSF: Supreme Court

OFFICE OF  
THE ATTORNEY GENERAL



Apr. 27/57

Dear Mr President:

If you want a big laugh & also a lot of inward satisfactions do not fail to read (at a relaxed moment) the attached article about the Court Plan.

It will appear in the next issue of the American Bar Ass. Law Journal & is a devastating reply to the six articles that appeared in the last issue. It is written by Prof Thurman Arnold of Yale and was a spec. assist to the Atty General under a temporary leave from Yale.

It is a peach,

Wm. W. W.

*Confidential*  
*Not for the use of*  
*outside the Executive*  
*staff*

A Reply  
PSF  
S.C.  
Thomson Arnold

It is with some reluctance that the writer responds to a  
a member of the Journal's Board  
request from ~~the American Bar Association~~ for an article supporting  
the President's Supreme Court proposal. In the first place, I argue  
in a hostile form, with the satisfaction which comes from making a  
convert virtually denied me in advance. Secondly, in the articles  
of the Journal  
appearing in the last issue ~~the President's proposal~~ is so smothered  
in symbolism and garnished ~~in~~ with poetry that it is difficult to  
reply in an orderly and logical fashion. Thirdly, I reply to writers  
who, for the most part, shy at realism, where the Supreme Court is  
concerned. Such generally recognized premises as that the Constitution  
is what the judges say it is, that the Court controls far-reaching  
matters of social and economic policy, that judges in their decisions  
are not above criticism seem not to be recognized by those to whom  
such premises should be undeniable. Thus to argue adequately I must  
prove propositions of which even the layman takes judicial notice.  
The burden is too great--the time is too short.

Oddly enough, I find myself, an academician, pleading with  
practical men to be realists. The set up is wrong.

Journal  
~~American Bar Association~~ has spoiled my disposition. Ordinarily a  
seriously-minded person, I find myself sorely tempted to be otherwise.  
This is another handicap which confronts me at the start. I will  
illustrate this handicap by reviewing the dangers which <sup>the spokesmen for the</sup> ~~the American~~ majority  
Bar Association appears to see in the President's proposal. <sub>view of</sub>

PSF

~~to the effect of anger and suspicion on the powers of observation of even the most intelligent people~~

~~This may be illustrated by reviewing briefly the dangers which the American Bar Association sees in the President's proposals~~

In the April issue of this Journal eight distinguished and alarmed leaders of the Bar and one editor have made it abundantly clear that the proposal is fundamentally immoral. That being so, it follows that the wages of sin are death. Grave peril lies in wait for us of a somewhat unspecific character. The nation is about to lose its immortal soul and become at best a bureau-asy, and at worst a tyranny. The whole issue is keyed to a note of warning of impending doom.

For example, President Stinchfield, who contributes the first article, tells us that if we adopt the plan "We shall have government from Washington covering a territory of 150 million people." The superficial observer might think that this was one of the objectives for which the Civil War was fought and therefore had its good points. But President Stinchfield goes on to say: "We must inevitably become a government by bureaucracy; . . ." Such mysterious matters, of course, cannot be proved, but President Stinchfield's faith in the essential malevolence of Congress is such that he doesn't think they need any proof. He says: "I think we are in great danger at the moment."

- 2a -

Mr. Olney, who followed Mr. Stinchfield, is also gloomy and sad about the remote future, through whose mists his prophetic vision penetrates without any difficulty. He is particularly worried because he is afraid that labor unions will disappear if the President's proposal is passed. He says that the measure will put them "at the mercy of a President and Congress who choose to pass a law forbidding the persuasion of men to join a union." This seems a very odd thing to worry about

just now. However, Mr. Olney shows us how foolish it is for labor to be cheerful about their future right to organize. He says:

"It is no answer to this to say that such a thing could not happen in this country. It has happened elsewhere in countries no less civilized than ours. It has happened in Germany and Italy."

Elsewhere in the article Mr. Olney points out that Germany and Italy are not the only countries which we may become like. We may also become like the South American republics, of whose judiciary Mr. Olney seems to have a low opinion. The trouble with Germany, Italy and the South American republics is that in their blindness they bowed down to the wrong principles, like the heathen. For example, the German people, having a choice between the right principles and the wrong ones, chose the wrong ones. Persecution of the Jews and a subservient judiciary automatically followed (as everyone knew they would). This, Mr. Olney thinks, is tough on Germany, but it is a lucky break for us, because <sup>as a result</sup> labor and the underprivileged groups <sup>in this country</sup> ~~can~~ <sup>now</sup> see the dangers of getting what they want.

The writer is attracted to Mr. Olney's analysis of the complex conditions in Europe and South America because he makes it so simple and easy to understand and shows just why we are on the verge of becoming like these countries. He does not tell us, however, whether, if the President's plan is adopted, we will become like Germany, Italy and/or the South American republics separately and in succession or whether we will resemble all of them at the same time.

Another thing appears to annoy Mr. Olney. There are many people, he says, who claim that the Court has been vetoing laws by decisions which are unwarranted by the language of the Constitution itself. He thinks that it is very wrong to make such a claim. He says:

"\* \* \* how can the Court, in performing its judicial duty in deciding the case do otherwise than decide it in accord with the Constitution and refuse to give the effect to the law in conflict with it and hold such law invalid? And this, and only this, is all that the Supreme Court has ever done."

The truth of the last sentence, we think, is beautifully illustrated by the following remarks of Mr. Justice McReynolds from the Bench in the gold clause case:

"Here undertake to exercise that power. Six centuries ago in France it was regarded as a prerogative of the sovereign. \* \* \* It seems impossible to overestimate what has been done here today. The Constitution is gone. \* \* \* The people's fundamental rights have been preempted by Congress. Some day the truth will be seen."

But, in spite of all this, some people persist in claiming that the Court has been declaring laws invalid in a completely unwarranted way. This unfortunate tendency is one of the dangers against which Mr. Olney is warning us in his article. It would not be so bad if such remarks were confined to irresponsible people, but it is dangerous to find them in the highest places. For instance, Mr. Justice Stone, in the A.A.A. case, clearly intimated that the Court had usurped

power in the exercise of which they could only be limited by their own economic predilections. And Mr. Chief Justice Hughes was even more outspoken and specific in what the Court was doing in the railway pension case when he said:

"I think the conclusion reached is a departure from sound principles and places an unwarranted limitation upon the commerce clause of the Constitution."

Such attacks on the Court, Mr. Olney says, are "untrue" and the consequences of their being broadcast in public are "mischievous." (In fairness to Mr. Olney, however, it should be said that the general impression one gets from his article is that he is not condemning *Mr. Justice Stone and Mr. Chief Justice Hughes*, *left only* those who have the bad taste to repeat the language of these dissenting opinions in public.)

These unfortunate and untrue remarks about the Court not following the Constitution at all times are, however, not the main point of Mr. Olney's article. He points out:

"But untrue as are the attacks upon the Supreme Court and mischievous as are the consequences of their being broadcast to the American people, the danger to the nation by reason of them is not to be compared with the danger inherent in the proposal to add presently six more members to that court."

At this point Mr. Olney analyzes the struggle for human liberty. He has some very unkind things to say about the old court of the Star Chamber and he leaves little doubt in the reader's mind that he disapproves of the way that court carried on. On the other

hand, he is enthusiastic about the language of the Declaration of Independence, particularly where it refers to "life, liberty and the pursuit of happiness." He is quite convinced that the President's proposal not only destroys the Supreme Court but also the Declaration of Independence.

The next article is by Louis A. Lecher, a distinguished member of the Milwaukee Bar. It is evident that he has been thinking along the same lines as Mr. Olney. However, he is more specific. The Potato Act was, he thinks, not merely an unwise agricultural measure; ~~it~~ was also a subtly concealed attack on human liberty. I gather from the following quotation that Mr. Lecher thinks that any quota of agricultural products, as such as the Jones-Costigan Sugar Act, or even the Tariff Act, is a threat to human liberty, particularly on Sunday. He asks: "Does the President believe that a regulation which provides that the serving of potatoes to guests at a Sunday dinner shall constitute a criminal offense if not done 'according to statute and regulations issued pursuant thereto' does not deprive our people of their liberties?"

Mr. Lecher points out another specific danger which no one else has thought of. "What," he asks, "would happen to State rights, for example, if the President were to appoint the Hon. John Dickinson . . ." ~~Manufacturers~~ ~~the~~ ~~writer~~ ~~indicates~~ that this is a real body blow because Mr. Dickinson's present position as <sup>general</sup> solicitor for the Pennsylvania Railroad is such an effective disguise for his dangerous "ideas."

The next article is by George Wharton Pepper. Mr. Pepper is convinced that the enlargement of the Court in effect amounts to the unconstitutional removal of the existing justices, even though they are expressly permitted to remain by the act itself. This is an interesting idea, but the writer confesses that he does not understand it very well.

The rest of Mr. Pepper's discussion, however, is quite clear because it deals with the broader issues of freedom and respect for government on which all sound lawyers agree. He says:

"Here the question is not whether A or B shall be elected to political office but whether A and B shall be deprived of their guaranties of civil and religious liberty."

He says in the plan danger to labor and the Jews and the Catholics and the schools and points out that professors like the writer are foes to education within its own household, because they do not realize that the defeat of the plan is essential to academic freedom. He observes that "Unless labor leaders, Jews, Catholics, educators and editors come to their senses before it is too late they will find themselves in an America which is anything but a land of the free."

Mr. Pepper's article is particularly gloomy because he shows that so far as this generation is concerned the harm has already been done. When Mr. Roosevelt agreed with the dissenting justices that the A.A.A. was not forbidden by the Constitution but was therefore

destroyed by judicial veto, Mr. Pepper says "he did more harm in ten seconds than patriots can repair in a generation." It was Mr. Wallace, however, who drove the last nail in the coffin according to Mr. Pepper, who says: "When his Secretary of Agriculture publicly criticized the A.S.A. decision as a "legalized steal" he was subordinating the good of his country to an emotional satisfaction. Such intemperate expressions by men in high place give great encouragement to the lawless element in the country . . ."

There is an interesting paradox here which is difficult to explain to the layman and which even the writer does not understand very well. That paradox is the fact that it is perfectly proper for justices of the Supreme Court of the United States to write dissenting opinions but highly dangerous and subversive to repeat the sentiments containing these opinions in public. ~~Only~~  
~~great constitutional lawyers can really understand why this is~~  
~~because it requires many years of intensive study~~

Mr. Pepper's fourth and concluding point is as follows:

"But the most dangerous of all the consequences of the President's proposal is the inevitable impairment of respect for government."

This argument has a certain familiarity. The writer recalls that in 1933, the closing days of prohibition, a poll was taken by a national economic organization of ~~jurists~~ <sup>and economists,</sup> lawyers, and they were asked to point out what they considered the greatest danger facing America. <sup>An overwhelming majority</sup> ~~about 80% of them~~ said that it was lack of respect for law. The depression which followed indicated that the lack of respect for law engendered by the prohibition amendment was actually not such a real danger as something else which the distinguished lawyers and economists overlooked at the time; to wit, maldistribution of purchasing power throughout the country. However, "lack of respect" is the kind of argument the older generation always uses against the younger and therefore it is not surprising to see it bobbing up again in the debate on the President's proposal.

The next big gun to go off is Mr. George Bogert. Mr. George Bogert is a legal scholar like the writer and not a practicing lawyer. This makes him a little more cautious in his predictions of disaster because legal scholars are not closely in touch with the world of affairs and therefore more academic and less practical. However, Mr. Bogert is convinced on the main issue, and that is that "he is forced to see in the new plan something subtly immoral and dishonest . . ."

Mr. Bogert is, of course, not the kind of man who is willing to justify immorality of any kind and therefore he is against the plan.

Mr. Donovan then speaks. He analyzes the groups that are in imminent danger from the plan. They are religious groups, ~~(particularly the Catholics)~~, racial groups, ~~(particularly the negroes)~~, citizens of foreign descent, labor unions and persons charged with crime. All of these people would, in Mr. Donovan's opinion, be in a bad way if more justices were added to the Court under the plan.

Then comes Dean Smith of Columbia University. He admits that the Supreme Court has "read into the Constitution limitations upon the powers of government not required by its language." He thinks this is a bad thing. However, he believes that when the Supreme Court goes wrong thirteen states scattered indiscriminately all over the country should be permitted to perpetuate that error forever by having the power to block an amendment. Of course, as a scholar he knows that the President's plan is constitutional. However, he thinks that it is a very weak point in the Constitution and that the constitutional fathers were very wrong in giving to Congress this power to avoid an impasse between the Court and the legislature. He proves this by quoting Mr. James Bryce, an Englishman, who saw this mistake which the fathers had made and called it "a weak point." Dean Smith now insists that the time has come to create a sort of sentimental amendment to the Constitution to correct this

original blunder of the fathers pointed out by James Bryce. He does not think that this sentimental amendment should be submitted to the people because it is too hard for them to understand. His theory is as follows. Congress should not attempt to exercise a constitutional power over the Court unless it is not only a power that has been given to Congress but also a power that ought to have been given to Congress. In other words, Congress ought <sup>not</sup> to exercise any constitutional powers which were given but which ought not to have been given, even though in doing so they correct constitutional interpretations which the Court ought not to have made. This point is a very scholarly one and requires a good deal of study. If you read it over and over again several times, it becomes more clear than on the first reading. He is against the plan on scholarly grounds, and for Mr. Roosevelt's general objectives on economic grounds. He is too good a legal scholar to allow his economic ideas to get mixed up with his legal ones.

Honorable Frank E. Atwood of the Jefferson City Bar fires the last shot in the barrage. <sup>Judge</sup> Mr. Atwood takes a new position. He says: "If nothing more than 'constant infusion of new blood in courts' were intended, the reason assigned would hardly be challenged." By this he means that if the Supreme Court were not giving Congress any trouble, the plan would be all right. It is the use of the President's plan to avoid an impasse between the legislature and the Court which <sup>Judge</sup> Mr. Atwood thinks is bad. His position is a little like Dean Smith's,

except that he thinks that the power of Congress over the personnel of the Court is perfectly all right to exercise when there is no particular occasion for it. He is very much worried about something which he calls "absolute collectivism," which he says has already destroyed the democracies of continental Europe. He closes with a familiar quotation from the well-known poet Naevius.

On finishing <sup>Judge</sup> ~~the~~ Atwood's article, the writer, who had been on the receiving end of this barrage, thought that the firing had ended. However, he soon found that he was mistaken. The editors of the Journal did not consider that these eight heavy legal howitzers were quite sufficient to blow the plan completely out of water, so to make things absolutely sure they dropped an editorial bomb on it of more than usual weight and length.

I am glad, however, that this editorial bomb was dropped because it makes some things clear which had confused me from reading the articles themselves. For instance, Mr. Pepper had said that the plan was really one for the removal of the judges in spite of the fact that the proposed statute not only let the judges stay but preserved their right to vote and to deliver opinions and Mr. Lecher intimated that the plan might be unconstitutional because it "constitutes an unconstitutional attempt to delegate legislative authority to the very six justices who are accused by the President of usurping legislative powers." Both of these ideas, and particularly the last, are

very complicated, like the fourth dimension, and a little difficult to grasp. I thought at first that Mr. Lecher meant that the decision on the Wagner Labor Act was unconstitutional because since the act itself was unconstitutional a decision declaring it constitutional would certainly be unconstitutional. However, the editorial clears the difficulty up very nicely by pointing out that if the new fifteen judge Court should declare the President's proposal constitutional because it followed the letter of the Constitution it would be an unconstitutional decision. The editorial puts it in this way:

"If the proposed act violates the spirit of the Constitution and threatens the breakdown of an essential part of it, 'constitutional morality' certainly forbids it. To act under such circumstances is simply to exercise a brute power. And the spirit is more important than the letter. As long as the spirit of the Constitution is followed, there will be small trouble about the letter, and the great instrument and guarantee of our liberties is safe. But when the letter is followed in disregard of the spirit, catastrophe may be near."

The more the writer considers this new doctrine of "constitutional morality," the more he wishes he had thought of it himself. The beauty of this kind of argument is that it makes the Constitution very elastic indeed, so that it can be used on both sides of any moral question without the user being bothered with what the Constitution actually says. However, I do not think it is fair for me to use on my side an argument which was thought up by the opposite side, so I will not do it.

The editorial closes on a high poetic note as follows:

"It was not made with the mountains, it is not  
one with the deep,  
Man, not gods, devised it; man, not gods, must  
change it."

I have read this over several times and am still not quite sure whether it means that more men should be added to the Supreme Court or not. In any event, it is certainly a very lovely thought, beautifully expressed and quite in keeping with the general atmosphere of the entire issue of the Journal.

I hope that the reader will understand from this brief review of the April issue of the Journal why I was reluctant to introduce a note of doubt or lack of faith in such a revival meeting. I do not wish, however, to end my review of that issue on a critical note. Organizations like the American Bar Association are necessarily as dependent on slogans, symbols and ceremony as colleges, or churches, or <sup>rotary</sup> ~~fraternal~~ clubs. The Supreme Court of the United States has always occupied the central place on the high altar of the American Bar. It is obviously as impossible to expect them to be objective and realistic about it as for communists to be realistic about Karl Marx. The only point I am making is that such an atmosphere makes calm discussion very difficult.

~~It is not, therefore, to be made a matter of assertion,  
with which the writers of the last issue will violently disagree, but  
which can be as quite obvious, I hope that I may be forgiven if some~~

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Therman Arnold  
6/25

- 18 -

Since the entire opposition is based on a note of fundamental moral principle, one cannot hope to carry conviction to those who believe that the President's plan is some sort of social sin. The reasons for urging the plan are practical. The reasons for opposing it are mystical. In such a situation all I can do is to make the following dogmatic assertions which show why I believe the plan is not only a common sense measure but also a conservative method of solving an acute problem.

In the first place, I assert that there is absolutely no danger in this country of a repetition of the experiences in Germany, Italy, Russia, Spain or South America. It is difficult for me to conceive how anyone can really be afraid of such conditions at the beginning of an economic recovery. These conditions are the products of the psychology of misery and defeat. We are emerging into an atmosphere of hope and confidence. ~~I am sure that the writers in the last issue of the Journal really think that this danger exists in their own country.~~

In the second place, I assert that anyone who predicts what will happen in future generations is talking absolute nonsense. The constitutional fathers did not foresee the Civil War. If they had foreseen it, they could have done nothing to prevent it. At the close of the Civil War men could not have predicted the automobile or any of the tremendous changes which are taking place in this country. In 1928 no one had any idea of the extent and magnitude of the depression which

was to follow. The pesterity argument does not deserve a place in a rational discussion of this problem.

In the third place, I assert that the present Supreme Court of the United States does not present the spectacle of an impartial judicial tribunal operating in an atmosphere of judicial calm. It has lost the confidence of large sections of the American public because it represents two mutually irreconcilable groups which swing back and forth according to the opinion of one or two men. The very fact that constitutional law is now being referred to as "Roberts' land" indicates the complete lack of faith in the existence of constitutional doctrine as opposed to personal predilections. To take a conspicuous example, I do not see how anyone can deny that constitutional law today is in complete confusion with the Gaffey Coal Act decision and the Wagner Labor Act decisions, both standing as the law of the land.

In the fourth place, I assert that the Court presents the spectacle of two bitter irreconcilable groups who are attacking each other from the Bench, even in as simple a situation as was presented by the Herndon case, where no social or economic policies but only civil liberty was involved. Herndon was kept in jail by a six-to-three decision. He is liberated by a five-to-four decision. He has served years under an indictment against which the Constitution is supposed to protect him. The Court cannot be a battle ground between irreconcilable men and preserve its prestige as a judicial body.

~~In the fifth place, I assert that this particular Court, whenever  
facts it may be, is now completely engulfed in political questions in  
raising social and economic policy. It was used in the last campaign  
as the last refuge for minority social and economic opinion. It has  
permitted itself to become an instrument of political opposition. Its  
change of attitude while the President's proposal has been pending is  
to be explained from a social point of view, but with respect to the  
prestige of the institution, it has only served to demonstrate to the  
public the bitter conflict within the Court itself.~~

In the fifth place, I assert that when a court which is supposed to represent the ideal of rule of law and the symbol of national unity becomes a bitter battle ground between opposing political theories, the only remedy is to appoint men on the court who are sufficiently aware of the function the court must play among American ideals, to exercise adequate judicial statesmanship. No institution torn by such internal dissension can assume the kind of leadership which the Supreme Court of the United States owes to the American people.

More points could, of course, be added and the dogmatism of these assertions could, I think, be removed by more extensive treatment. I see, however, no point in this type of argument here. The real struggle is between practical common sense and moral mysticism. In such a struggle preaching is more effective than detailed facts; analogy is more effective than analysis.

Centuries ago people looked at the human body as they look upon social institutions today. Each organ had its divine function and anyone who intimated that the human constitution was not the best constitution that could have been devised was excommunicated for heresy. In such a climate of opinion the Jesuits discovered a remedy for fever called Peruvian bark, since it was found in Peru. It is now called quinine.

Up to that time the remedy for fever had been bleeding the patient. It was an excellent remedy because it was at the same time so logical and so disagreeable. It was logical because fever was supposed to be a humour which had gotten into the blood. Obviously, it had to be drained out before the patient stood any chance of recovery. More people died of bleeding than of fever. But it was all in a good cause, for were they not getting rid of humours? (I should explain that this was unconscious humour. It was not a deliberate practical joke on the patient, any more than preventing the passage of constitutional minimum wage laws for fourteen years was a deliberate practical joke.)

The fact that this cure for fever was disagreeable added to the faith men had in it. In medicine then, as in government today, there was great confidence in curative methods which made people suffer, because suffering itself was supposed to be good for people. It gave them character. As the Supreme Court has frequently intimated, we

only realize that we have got a Constitution when it pinches and therefore great care should be taken not to so construe it that it does not pinch because otherwise we might forget all about it.

Now, of course, argued the wise men of the middle ages, a time honored remedy like bleeding should not lightly be thrown aside in favor of one which simply made the patient feel better. There were also people who disliked the Jesuits who pointed out the grave danger that if Jesuitical remedies were used the world might be plunged into Jesuitism--just as today nervous people thunder that if national power is used to solve national problems America will become like Germany, or Italy, or we will grow beards and start drinking vodka like the Russians. Then there was a third group who were learned in the great fundamental principles of medicine, handed down by the constitutional doctors of the human constitution. These men proved by exhaustive briefs and research into the medical opinions of the past that Galen, in spite of the fact that he had never heard of quinine, would have been opposed to it on principle and that he was not probably turning over in his grave whenever it was mentioned. These learned men also pointed out that quinine was a mere temporary palliative which caused only an artificial recovery. The patient might feel better at the time, but he would really be worse and die later because he had violated the fundamental principles of medicine and left the noxious humours still in the blood. This was easy to prove because they always did die later. What advantage this temporary relief, these great authorities said, if in using it we undermine the

sacred and fundamental principles of medicine, destroy our respect for medical authority, turn the world over to the Jesuits, leaving the noxious humours still in the blood. Medical principles are not things which change from day to day.

And so the University of Paris, which occupied in the eyes of learned and conservative people almost the same place that the Supreme Court of the United States does today, banned the use of quinine as a remedy by any physician under its jurisdiction.

Now, the odd thing about this historical incident was that there were many people at the time who knew that quinine was a better remedy for fever than bleeding. They did not think that the fundamental principles of medicine required that it be banned. The witnesses who have testified in opposition to the President's proposal have practically all been sure that the majority of the Supreme Court has been misinterpreting the Constitution. There were many in the middle ages who felt the same way about the decree on quinine. But, they said, in spite of this, now is the time for all good men and true to come to the aid of the University of Paris. It is much better, they solemnly intoned, that we undergo any amount of suffering and confusion, even that thousands die, rather than damage the prestige of that great medieval institution. Where would the learning of the middle ages be if it were not for the University of Paris? Therefore, if we are to have any principles left, we must not damage the authority of that great institution by any common sense methods. Medicine is going ahead too fast, anyhow, they said, and we have got to watch it in order to keep it back. In this particular effort their success was overwhelming.

It is a long, long time since this incident in the history of medicine occurred. We know now, however, that had more liberal-minded medical authorities been put on its faculty, it would not have lost in prestige, but gained. We know that the institutions of the middle ages would not have fallen. We know that institutions have sunk and not risen in authority when composed of men of stubborn and mutually irreconcilable views. We know that institutions become in danger when they do not keep up to date and that no great university, or court, has ever been destroyed by bringing into it men who were abreast of the times.

It is odd that today we can understand the middle ages so much better than the times in which we live.

Letter from  
F. Frankfurter to  
FDR, 6/8/37

and

Carbon of Frankfurter's  
letter to C.C. Burlingham  
6/8/37

removed to Frankfurter  
file. (H. Kahn)

10/19/50  
AcB

PSF: Supreme Court ✓

THE WHITE HOUSE  
WASHINGTON

PERSONAL

June 10, 1937.

MEMORANDUM FOR C. C. BURLINGHAM

Pursuing the general questioning in my letter to you of the other day, what do you think of J. P. M.'s exposition of Christianity when he landed the other day? How many Englishmen occupying a similar position in London would publicly express the same ethical viewpoint? And, incidentally, what British Courts have ever handed down opinions on tax avoidance or tax evasion similar to the opinions of some of our Courts with which you are doubtless familiar?

Finally, ask yourself what Christ would say about the American Bench and Bar were he to return today?

F. D. R.

THE WHITE HOUSE  
WASHINGTON

*file  
Burlingham*

PERSONAL

June 10, 1937. ✓

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F. D. R.

THE WHITE HOUSE  
WASHINGTON

June 10, 1937.

Dear F.:-

I have sent the enclosed to  
C. C. B. just to cap your climax!

F. D. R.

PSF: Supreme Court

THE WHITE HOUSE  
WASHINGTON

*Senate*

June 17, 1937

File - confidential - under "Robinson"

6/17/37

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Putts Sen Pro/

Ashurst	Herring	Pope
Berry	Hitchcock	Reynolds
Barkley	Hughes	Robinson
Bilbo	LaFollette	Schwartz
Bone	Lee	Schwellenbach
Black	Lewis	Sheppard
Brown, Fred	Logan	Smathers
Bulkley	Lundeen	Thomas (Utah)
Byrnes	McAdoo	Thomas (Oklahoma)
Caraway	McKellar	Truman
Chavez	Minton	Wagner
Dieterich	Murray	
Ellender	Neely	
Green	Norris	
Guffey	Overton	
Harrison	Pittman	
Hayden	Pepper	

*Pretty Lame No!*

Adams	Holt	Walsh
Austin	Johnson	Wheeler
Bailey	Johnson	White
Borah	King	
Bridges	Lodge	
Byrd	Lonergan	
Burke	McCarran	
Copeland	McNary	
Clark	Maloney	
Capper	Moore	
Connally	O'Mahoney	
Davis	Shipstead	
Frazier	Smith	
George	Steiwer	
Gerry	Townsend	
Gibson	Tydings	
Glass	Vandenberg	
Hale	VanNuys	

Heckman?  
?

McGill

Russell

Radcliffe

11/20/77

2-

Andrews

Donahey

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Bulow

Ryan Duffy

Gillette

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Bankhead

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Nye

Hatch

Brown (Prentiss)

PSF: Supreme Ct



Office of the Solicitor General  
Washington, D. C.

June 18, 1937

MEMORANDUM FOR THE ATTORNEY GENERAL:

In re: Judiciary Bill Substitute.

I return the draft of the proposed substitute for the President's judiciary bill. I think the following suggestions and comments might be made:

The draft does not require that the 75-year-old justice shall have served for ten years. It is theoretically possible that, by appointing 76-year-old men to the Court, the President could secure an indefinite number of additional appointments. However, the provisions for only one appointment a year and limiting the Court to fifteen should satisfy the most captious.

It seems desirable, in the proviso to the first sentence of the amended Section 215, to provide for the appointment of an additional justice "for each justice, including the Chief Justice, who at the time of the appointment has passed the age of 75 years." Addition of the italicized words would make clear that: (1) if justices now over 75 should die, resign or retire prior to appointment of all of the additional justices (which will take four years), the occasion for appointment of the additional justices will to that extent be eliminated; and (2) the death, resignation or retirement of an additional justice, before the justice over 75 who occasioned his appointment leaves the Court, will permit the appointment of a second additional justice. This is the probable result with the bill as now drafted, but the present language contains some degree of ambiguity.

The first appointment, if the bill were passed now and in this form would fill the present vacancy arising from the retirement of Mr. Justice Van Devanter, since by appointment of the additional justices the Court is "temporarily increased" above its normal figure of nine.



Appointment of additional judges may be made (within the limitation of fifteen) in successive years so long as there are justices over 75 whose continuance in office has not occasioned an existing additional appointment even though the Court have a membership over nine and even though a death, resignation or retirement has made a vacancy which on account of the shrinking provision cannot be filled. The provision against filling vacancies applies to those "caused by the death, resignation or retirement of a justice," and the vacancy to which the additional justice would be appointed is caused by a continuance in office.

The last paragraph of amended Section 215 provides that "no appointment \* \* \* to fill a vacancy, shall be made from the territory of any circuit court of appeals having a member of the Supreme Court \* \* \*." If the Chief Justice were to die, resign or retire, this would require that the new Chief Justice be appointed from an unrepresented circuit. To give the widest choice for the Chief-Justiceship, it seems desirable to add: "\* \* \* or to fill a vacancy, except that in the office of Chief Justice, shall be made \* \* \*."

The disadvantages of limiting the choice of justices to unrepresented circuits are as obvious as are the advantages.

Section 2 amends Section 238 of the Judicial Code by reenacting the provisions of that section and adding thereto a new paragraph (6). The following are the chief points of difference between this paragraph and the revised draft of the Summers bill (H.R. 2260) which the Attorney General submitted to the Senate Judiciary Committee:

The Summers bill\* gives the United States the right to take part in the hearing and trial and to introduce evidence in any case between private parties in which the constitutionality of a federal statute is drawn in question in any federal court. In such cases the United States must also be given notice. Section 2, which deals only with review by the Supreme Court, confers no corresponding rights.

As to direct review by the Supreme Court, Section 2 is in some respects broader and in some respects narrower than the Summers bill. Section 2 authorizes the United States to obtain such review whenever the judgment, decree or order of a federal district court prohibits any person or agency from carrying out, or acting under, the provisions of a federal statute, whereas the Summers bill authorizes such review whenever any federal court holds a federal statute unconstitutional. Where action under a federal statute is enjoined for reasons other than its invalidity, for example, upon the ground that the statute has been erroneously construed, Section 2 would apply and the Summers bill would not. Where, on the other hand, an act of Congress is held unconstitutional but the judgment does not prohibit action thereunder, i. e., a suit to recover taxes, the Summers bill would apply and Section 2 would not.

Under the Summers bill, although only the United States can initiate an appeal to the Supreme Court, when it does so the parties to the case can also obtain a review by that Court. Under Section 2, the effect of a motion or an appeal by the United States upon the appellate rights of the parties or other parties is not entirely clear. For example, if the plaintiff seeks an injunction against three separate sections of a statute and the decree entered grants relief against only one section and if the United States asks the Supreme Court to reverse this decree, presumably the plaintiff, in

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\*References to the Summers bill are to the Attorney General's revision thereof.

order to protect his rights, would have to both prosecute an appeal to the Circuit Court of Appeals with respect to the relief denied and defend in the Supreme Court with respect to the relief granted.

The Summers bill permits appeals to the Supreme Court from any court of the United States. Section 2 appears to permit appeals only from federal district courts. The importance of this limitation upon the scope of the section is to be judged in the light of the fact that circuit courts of appeal directly review the decisions of several important federal commissions and boards.

Because federal judicial power is limited to "cases" or "controversies," the constitutionality of a statute in so far as it authorizes an appeal by the United States from a final judgment or decree entered in private litigation when no party to the case appeals is doubtful. The Summers bill therefore contains two sections applicable to appeals entered in private litigation, one authorizing an appeal when a party also appeals and the other authorizing an appeal when there is no such appeal. There is also a separability clause. Section 2 ignores the possible unconstitutionality of certain applications of its provisions.

The following minor changes in Section 2 are believed desirable: (1) A change in the time for appeal or motion from 10 to 30 days. The present draft allows only 10 days within which (a) to obtain and study a copy of the court's opinion, in order to determine the advisability of requesting review by the Supreme Court; (b) to prepare assignments of error, which usually would require some familiarity with the record, as required by the rules of the Supreme Court (Rule 9) if an appeal is taken and as these rules might require if a motion is made; (c) to serve notice of the appeal or motion on the parties to the case. The 10-day period would hardly be adequate under the most favorable circumstances and it would clearly be insufficient if the court involved were in the far west or the issues of fact and law were complex. (2) The meaning will be clarified if the word "serve" is substituted for the word "execute" in line 13. (3) Insert a comma after the words "disposed of" in the seventh line from the end. (4) Quotation marks should appear at the end of paragraph (6) instead of at the end of paragraph (5).

There is attached, as a basis for comparison, a revised draft of the Summers bill which the Attorney General submitted to the Senate Judiciary Committee, marked "A," and an earlier draft prepared in the Department, marked "B," which embodies the substance of the Summers bill as passed by the House but does not endeavor to follow its express language or provisions.

Section 3(a) should be changed to read: "An additional judge of a any court of the United States other than the Supreme Court may be appointed \* \* \*."

To be precise, it should be "the United States Customs Court" in Section 3(b).

Section 3(d) is a survival from the original use of seventy as the turning point and should be changed to read: "An additional judge shall not be appointed under the provisions of this section when the judge who is ~~of retirement age~~ over seventy-five years of age \* \* \*."

Two qualifications found in the last paragraph of the amended Section 215 are omitted from the analogous Section 3(e). I think each should probably be present. (1) The provision for one judge per state in the circuit should operate "as soon as may be, and in so far as possible \* \* \*." Most circuits have more states than circuit judges (1st, 4th, 5th, 8th, 9th and 10th) and the qualification applied to the Supreme Court should be repeated here to avoid confusion. (2) The prohibition against appointment should be of a resident of "any State having a member of the court who ~~is~~ was a bona fide legal resident of such State At the time of his appointment \* \* \*." A change of residence after appointment would otherwise serve to defeat the purpose of the provision.

Section 4 provides for the appointment of a proctor ~~for~~<sup>by</sup> the Supreme Court. Since the provisions permitting compulsory assignment of district and circuit judges have been eliminated the office is relatively unimportant. The proctor's functions and efficacy will not be impressive if confined merely to making suggestions and the compilation of statistics.

Section 5 should be changed to authorize the appropriation of "the sum of \$100,000 \$ \_\_\_\_\_, for the salaries of additional judges and the other purposes of this Act during the fiscal year ~~1937~~ 1938."

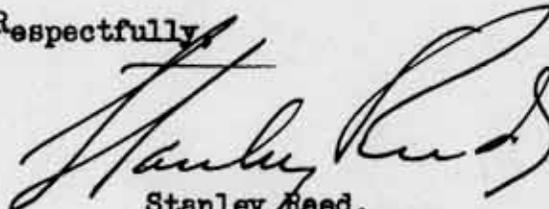
Section 6(c) defines "district court" to exclude the territorial and insular courts. District courts are referred to only in Section 3(b), which provides the maximum number of appointments. If the judgeship in any territorial court should hereafter be a life appointment, additional judges could be appointed under Section 3(a) without the limitation found in Section 3 (b). I therefore suggest that Section 6 (c) be changed to read: "The term 'district court' includes the District Court of the District of Columbia, ~~but does not include the district court in any territory or insular possession.~~" If this change is not made, the italicized word in the stricken material should be added.

As the amended Section 215 of the Judicial Code would read, it is not absolutely certain that the term "justice" does not include a retired justice. While this would be the reasonable interpretation, it seems desirable to add a further definition as follows: "6(d) The term 'justice' means a justice in regular, active service."

Attention is called to the limitations of selection to unrepresented circuits. While no precedents for the Supreme Court have been found, reasonable limitations are customary in subordinate offices and were approved in Myers v. United States, 272 U. S. 52 at 128. It may well be questioned whether this rule would apply to justices of the Supreme Court, the power of nomination of which is conferred exclusively upon the President by the Constitution.

With the elimination of the power of the Chief Justice to order judges of inferior courts to other districts and circuits, the permanent increase of district and circuit courts because of age of judges becomes much more difficult to defend.

Respectfully,



Stanley Reed,  
Solicitor General.

PSF: Supreme Court

File  
(private papers)

MEMORANDUM  
(Judicial Reform)  
June 18, 1937

The attached statement and outline of a Bill are intended to provide the basis for an appropriate restatement of position and an immediate end of the Supreme Court controversy by legislation absolutely assured of wide support and wholly consistent with maintaining the President's fundamental position.

Without compelling retirements or enlarging the Supreme Court, this program would in practical effect result in the voluntary retirement of at least three and probably four Justices within one or, at most, two years. It would also serve to hold a majority of five or six to a liberal position. The Bill is constitutional.

The Bill can only be appraised correctly if read as the product of reasoning presented in the statement. Together they should explain themselves. The statement is a hurried draft which can be vastly improved. But I urge very strongly that this should be read carefully as soon as possible.

PSF: Supreme Ct

## JUDICIAL REFORM

### 1. Background of the President's Proposal:

As it became evident that economic recovery was under way and as panic fears subsided, there developed in 1934 - 1936 a rising tide of judicial opposition to the New Deal program. More and more frequently the courts were asked to set aside or to interfere with the enforcement of laws where the power invoked was not true judicial authority, but an unconstitutional extension of judicial power into the domain of legislative authority.

In the Supreme Court this judicial opposition manifested itself early in the dissents of four Justices from the majority opinion by Mr. Justice Roberts in the *Nebbia* case and from the majority opinion by Mr. Chief Justice Hughes in the *Minnesota Mortgage* case. As the tendency to curb legislative and executive power developed, majorities of varying sizes were found: (1) to deny the validity of delegated legislative power in the *Panama Oil* case, (2) to deny the validity of delegated legislative power and adequate power to regulate interstate commerce, in the *N. R. A.* case, (3) to deny federal power to provide old age pensions for employees engaged in interstate commerce in the *Railroad Retirement* case, (4) to deny federal power to provide for the general welfare by agricultural regulations in the *A. A. A.* case, (5) to deny federal power to regulate coal mining and labor relations therein in the *Guffey* case, (6) to deny federal power to extend bankruptcy relief to municipal corporations in the *Municipal Bankruptcies* case.

A common theme of these decisions was that the Congress would not be permitted to decide what laws were necessary and proper to regulate commerce and to provide for the general welfare, but that the Court would review the wisdom of such legislation and reject it

if it ran counter to the economic or political theories approved by a majority of the Justices. Although the right to exercise this super-legislative power was denied in words, the power was quite clearly exercised in fact, and finally, although there had been much talk of preserving the sovereignty of the States from invasions by the federal government, the Court went on beyond its attack upon federal legislation to deny the power of the states to regulate minimum wages.

Before the summer of 1936 there was such widespread disapproval of the exercise of this extended authority of the courts that both major parties agreed that constitutional amendment would be necessary if this judge-made law could not otherwise be changed. Both parties in national convention emphasized the desirability of avoiding constitutional amendment unless absolutely necessary. Both indicated their hope that the judiciary would reform itself in some measure.

The Democratic party, however, went far beyond the Republican position and made it very clear in its platform that a judicial reformation must go to the extent of re-establishing the authority of federal and state legislatures within their respective fields of granted power to enact laws which they regarded as necessary and proper to fulfill their constitutional obligations. The Democratic party made it clear that the usurpation of legislative power by the courts must be stopped by any available means including, if necessary, constitutional amendment.

Following the overwhelming endorsement of the Democratic National Administration by 27,000,000 voters, the President in his first message to the new Congress put forward the need for an enlightened interpretation of the Constitution. In his inaugural

address the President stressed the urgent need for legislation of the character previously nullified by the Supreme Court.

Then, in a special message of February 5th, the President proposed the passage of a series of laws intended to improve the efficiency of the federal courts and to revitalize and modernize their personnel. The proposition was advanced that, with the infusion of new blood, the courts and particularly the Supreme Court could be expected to restrain themselves within the limits of their constitutional authority and cease to exercise an unconstitutional control over legislation, an unwarranted authority to which some of the older members of the Supreme Court seemed to be irrevocably attached.

2. The President's Proposal.

This proposal of judicial reform has had unusually wide discussion. It has been encouraging to observe the eagerness and eloquent interest with which the questions involved have been debated. One part of the program, providing for the voluntary retirement of judges over seventy years of age, has been enacted into law. Other parts of the program having obvious merits would have been enacted if the intensity of feeling and bitterness of hostility aroused by the Supreme Court issue had not prevented a reasonable consideration of matters even remotely related to the question of changing the personnel of the Supreme Court.

Probably no issue in modern times has been debated more seriously or with more varied appeals to reason, to passion and to prejudice than the proposal intended to assure that there should be at all times nine members of the Supreme Court under seventy years of age. The fundamental nature of such a proposal would not ordinarily be regarded as extraordinary or revolutionary even among conservative directors of big business who are accustomed to retiring

corporate officials at the age of seventy or earlier. But the practical consequences of applying this principle in 1937 to a court in which six out of nine members were over seventy, in which indeed five of the six are over seventy-five, have blinded many people to the reasonableness of applying this principle under ordinary circumstances. It can hardly be questioned that a proposal to retire judges at the age of seventy-five, or even seventy, would not normally be opposed as an attack upon the very foundations of the government! But just because the enactment of such a law at the present time would authorize the President to appoint several judges immediately, the President's proposal has not been calmly considered as a reasonable method of retiring elderly judges in the interest of public service, but has been attacked as a deliberate effort to control judicial opinion by changing the judges.

Now, after an extended nation-wide debate over the proposed judicial reorganization, it is well to resurvey the situation and appraise developments.

### 3. Effects of the Proposal.

In the first place, it must be acknowledged that the effect of this debate upon the Supreme Court itself has been profound and beneficial. A majority of the Court have quite evidently sought to re-establish the Court in public confidence by definitely asserting its authority in support of constitutional exercises of legislative power and by definitely receding from unconstitutional extensions of judicial authority into a control over legislative discretion.

The results of this changed attitude have been significant and far reaching. (1) State minimum wage laws previously nullified as "unconstitutional" are now judicially sanctioned as "constitutional",

- (2) federal regulations of labor relations previously nullified as "unconstitutional" are now judicially sanctioned as "constitutional",
- (3) federal regulations of interstate commerce previously nullified as "unconstitutional" are now judicially sanctioned as "constitutional",
- (4) federal regulations to provide for the general welfare through such means as old age pensions previously nullified as "unconstitutional" are now judicially sanctioned as "constitutional".

We may reasonably anticipate that if this enlightened construction of the Constitution shall continue, the government of the United States may be permitted hereafter to render an adequate public service to farmers, to industrial workers, to business men, to the unemployed and the distressed - to all its citizens who have a right to such public service. We may reasonably hope that as an enlightened construction of the Constitution becomes assured, legislatures may enact and executives enforce necessary and proper laws free from the constant harassment of unpredictable judicial injunctions, and free from a pervading fear of judicial nullification of laws that may not meet with the personal approval of judges who permit their economic or political prejudices to divert them from the path of judicial duty laid down in the Constitution.

But our anticipations and our hopes must depend upon the mental attitude of individuals who hold judicial office and who, under the Constitution, exercise an authority uncontrolled by the legislative or executive branches of the government and unrestrained by any direct responsibility to the people. We have had a most convincing demonstration in recent months of the tremendous power that is ~~re~~posed in our Judiciary and particularly in the Supreme Court of the United States. We have seen that the legislative powers of

forty-eight State legislatures and the Congress of the United States are theoretically granted and restricted by the words of the National Constitution, but that practically all those powers are granted or restricted by the meaning given to the words of the National Constitution by a majority of the Justices of the Supreme Court.

4. Present Public Opinion.

The people of the United States have been able to see in recent months more clearly than ever before, that the pulse-beat of our Nation, the flow of blood through its arteries and the resulting health or sickness of our society, may be finally regulated by the decision of a few men appointed for life and holding their power, whether it be wisely or unwisely exercised, so long as they wish to remain in office. Accordingly, it has become evident that it is a matter of profound national concern to make sure that the Justices of the Supreme Court are truly representative of the thought and purpose of the generation they must serve, that they do not become single-minded in devotion to outworn theories and conceptions of the public interest, that the membership of the court as a whole is not too old and fixed in the thinking of an earlier generation so that they are unable to respond to the needs of the present day.

No one of an open mind and any breadth of view could fail to be impressed or to have his previous ideas not affected by the nation-wide debate of recent months over the functions and personnel of the Supreme Court. It must appeal to many that, however great the need today for an enlightened construction of the Constitution in aid of the solution of imminent, urgent problems, there is a much greater need that such an enlightened construction shall always be assured. To accomplish this end, we must so provide for the appointment of Justices of the Supreme Court <sup>as to warrant the hope</sup> that the Court as a whole shall always

have an intimate understanding of the changing needs of the Nation, shall always interpret the broad provisions of the Constitution and enforce the laws written thereunder in harmony with the prevailing philosophy of the times, and shall always heed and be responsive to the vision of the people which must be written into the laws of a government that is to be respected and competent to serve the public will.

5. Common Misunderstandings.

The proposal originally made to provide for the appointment of additional members of the Supreme Court when Justices of retirement age fail to retire, was not designed to provide for any permanent enlargement of the Court, unless it should be evident that more Justices were needed to accomplish expeditiously the work of the Court. In the proposal made there was perhaps too much reliance upon a commonsense understanding of the idea that if the Congress of the United States by proper legislation expressed the public opinion that Justices of the Supreme Court should retire at a certain advanced age, no members of the Court would insist upon remaining in active service unless in their judgment it would be in the public interest for them to remain. According to this commonsense understanding, it might have been expected that the Court would continue to have nine active members, with the possibility of occasional aid from retired Justices as their services might be needed. Unhappily, this commonsense understanding of the proposal was obstructed by the fact, which seemed all important particularly to political opposition, that if as many as six judges failed to avail themselves of retirement privileges, the President would be given the power to appoint immediately six new <sup>and additional</sup> members of the Court.

Since, however, the President of the United States is always entrusted with the power of appointing Justices of the Supreme Court, it cannot be reasonably assumed that a President given the opportunity to appoint <sup>several</sup> judges, would make appointments any less worthy than those which would be made by a President having the opportunity to appoint only one or two judges. But because the President's proposal, if enacted into law would give him (solely because of the advanced age of so many Justices) the opportunity to appoint several Justices at one time, it appeared logical to a political opposition to charge that it would undermine the independence of the Judiciary for such a number of appointments to be made possible by the enactment of a law instead of, as might well have happened, by natural causes.

It is useless to attempt to ignore any of the facts of the present situation. An unfair and unsound public opinion, which should have been or could have been avoided, must be dealt with as a fact when it exists. It is a fact that today, if the opportunity were granted to the President by the enactment of a law to appoint immediately several Justices of the Supreme Court, the result would be that, however carefully and wisely the executive power were exerted, the integrity of the President's action would be under suspicion, the impartiality of his appointees would be questioned and the functioning of the Supreme Court, which is of the greatest importance <sup>in</sup> our constitutional system, would be impaired. Time would undoubtedly allay unjust suspicion, quiet unfounded fears and restore any impaired prestige of the Court; but in the meantime a present generation which needs to have the fullest confidence in its Government as the agency of the people to aid them through troublous times, would suffer.

It seems therefore that, in seeking assurance that the Supreme Court will hereafter support all constitutional exercises of legislative power, we should also take care to give assurance that neither the legislative nor the executive branches of the federal government have any desire to exert any unconstitutional control or influence over the judicial branch. This assurance will be given if future changes in the personnel of the Supreme Court depend entirely upon causes outside legislative and executive control and upon the operation of a law of general and permanent application.

From the discussions of recent months it is evident that the Congress could now promptly enact such a law, providing for the permanent composition of the Supreme Court and an automatic reinvigoration of its personnel, which would meet with practically universal approval. In order to make this suggestion concrete and clear an outline of a bill (which is not offered as a finished draft) is herewith presented.

OUTLINE OF A BILL.

Sec. 1. The Supreme Court shall consist of a Chief Justice and eight Associate Justices, excluding the number of retired Justices. Each member of the Court shall be appointed by the President by and with the advice and consent of the Senate; and each member hereafter appointed shall accept appointment and serve under the following requirements:

I. He shall hold his office during good behavior.

II. He shall retire from active service within one year after becoming eligible for retirement under the present or any future Act of Congress which authorizes such retirement, after reaching a certain age or after a certain period of service, without diminishment of compensation.

III. He shall not be counted, at any time after retirement, in the number of nine members constituting the Court as established by this Act; but he shall be qualified to serve from time to time in substitution for an active member of the Court who is temporarily unable to serve, if he responds to a request for such service from the Court.

Sec. 2. The requirements of this Act regarding retirement shall be obligatory only upon members of the Supreme Court who are appointed subsequent to the passage of this Act; provided however, that no retired Justice of the Supreme Court regardless of when appointed shall be counted in the number of nine members constituting the Court as established by this Act.

CIRCUIT JUDGES

KIMBROUGH STONE  
KANSAS CITY, MO.  
ARCHIBALD K. GARDNER  
MURON, S. DAK.  
JOHN B. SANBORN  
ST. PAUL, MINN.  
JOSEPH W. WOODROUGH  
OMAHA, NEB.  
SETH THOMAS  
FORT DODGE, IOWA  
ARBA S. VAN VALKENBURGH, RETIRED  
KANSAS CITY, MO.  
WILBUR F. BOOTH, RETIRED  
MINNEAPOLIS, MINN.  
CHARLES B. FARIS, RETIRED  
ST. LOUIS, MO.

UNITED STATES CIRCUIT COURT OF APPEALS  
EIGHTH CIRCUIT

Fort Dodge, Iowa  
July 23, 1937

HON. PIERCE BUTLER  
CIRCUIT JUSTICE  
WASHINGTON, D. C.

Honorable Henry A. Wallace,  
Secretary of Agriculture,  
Washington, D. C.

Dear Henry:

I view with deep regret the action of the Senate on the Court Bill. Is not this the time, now or next year, to find out whether or not this is a government of and for the people or of and for the big corporations?

The people are bewildered by the propaganda which has filled the air since February. But a great majority of them still have confidence in the administration. The war must be carried into Africa. I hope that you and the President and Homer Cummings will at the opportune time fill the sky with thunderbolts which can be seen and heard everywhere. The betrayers in the Senate who come up for election next year surely ought to be given a taste of war. Can you be more useful in the Cabinet or in a race to defeat Gillette?

Cordially yours,

A friend of the administration,

*Seth Thomas*

PSFI Supreme Court  
6. Pres.

*PSF: Supreme Court  
file  
personal*

**TELEGRAM**

**The White House**

11WUAB 106 N.L. 11:58 p.m.

**Washington**

Colorado Springs, Colo. July 25, 1937.

The President:

The defeat is not yours but is really that of the apparently triumphant ones. They have misread the signs of the future and have overlooked the claims of the nation. Nevertheless in spite of the bitterness of the old guard element and the high ambition of a few it would seem that the constructive outcome would inevitably rest on the foundation of unity for the democratic party under your leadership. I am convinced the future is bright with promise but not for these who have so headstrongly and selfishly gone against the tide of the future. History will be on your side.

Henry A. Wallace, Secretary of Agriculture.

PS F: Supreme Court

July 28, 1937

My dear Mr. Wilkinson:

The President has asked me to thank you, and through you the other members of the bar of the United States Circuit Court of Appeals for the Seventh Circuit, who joined in addressing to him a petition urging the appointment of Judge Evan A. Evans to the Supreme Court of the United States.

The President wanted me to assure you and your co-signers that your statements on behalf of Judge Evans will have every consideration.

Sincerely yours,

M. H. McINTYRE  
Secretary to the President

George L. Wilkinson, Esq.,  
First National Bank Building,  
Chicago,  
Illinois.

RB/mrd



Office of the Attorney General  
Washington, D.C.

July 26, 1937.

*Mac  
to ack & return  
to S. G. T. for  
special file*

My dear Mr. President:

Mr. Charles L. Byron, of the firm of  
Wilkinson, Huxley, Byron and Knight, First National  
Bank Building, Chicago, called this morning and  
submitted a petition signed by members of the bar  
of the United States Circuit Court of Appeals for  
the 7th Circuit, advocating the selection of Judge  
Evan A. Evans for the vacancy on the Supreme Court.  
As this petition is addressed to you, I inclose it  
herewith.

Sincerely yours,

*Wm. Cummings*  
Attorney General.

The President,  
The White House.

TO THE HONORABLE FRANKLIN D. ROOSEVELT,

PRESIDENT OF THE UNITED STATES:

We, the undersigned, members of the Bar of the United States Circuit Court of Appeals for the Seventh Circuit, in the active practice of patent, trade mark and copyright law at Chicago, Illinois, respectfully urge you to appoint JUDGE EVAN A. EVANS a justice of the Supreme Court of the United States.

In urging his appointment, we respectfully call to your attention that Judge Evans has served continuously and with notable distinction on the Court of Appeals for the Seventh Circuit since his appointment by President Wilson in 1916. He was probably the youngest man ever appointed to the United States Circuit Court of Appeals.

During his twenty-one years on the bench, he has written many opinions in important cases, and he has presided in the United States District Court in many notable suits.

A large number of patent and trade mark cases are reviewed each year by the Seventh Circuit Court of Appeals, and Judge Evans, by reason of his long experience, his industry and his ability to concentrate on technical subjects, is recognized as an outstanding judge in this special field.

We believe it to be of great importance to the public and to those interested in patents and trade marks, that there should be appointed to the Supreme Court a man of the experience and possessing the qualifications of Judge Evans.

*Samuel Bryan*  
*Miss G. Smith*

Judge Evans is an exceedingly able judge of the highest integrity. He has the judicial temperament, and is always patient, courteous and attentive. He has the confidence and respect of those who know him as a judge and as a man. *John P. Berman*

The Seventh Circuit has not been represented on the Supreme Court of the United States since the death of Chief Justice Fuller in 1910, although the said circuit comprises the populous states of Illinois, Indiana and Wisconsin, and the work of its courts is probably the largest of any circuit, except the Second.

The appointment of Judge Evans would give the Seventh Circuit a long deserved representation on the Supreme Court; would be a recognition of the great public and property interests involved in patents and trade marks, and we are sure would meet the approval of the public and the Bar of the Seventh Circuit.

Respectfully,

*Samuel Bryan*

*Clarence E. Mellore*

*W. E. Wilkinson*

*Samuel R. Coffey*

*William T. Woodson*

*Clarence F. Pyle*

*Victor J. Linnane*

*Frank R. Davis*

*Ward R. Ross*

*Henry C. Throckmorton*

*Gus J. Wright*

*Geo. T. May, Jr.*

*Reuben H. Hill*

*Paul C. Pippel*

<u>Geo L. Byron</u>	<u>George A. Britton</u>
<u>Wm G. Smith</u>	<u>George S. Jones</u>
<u>Edward Knight</u>	<u>Jules L. Brady</u>
<u>William E. Lucas</u>	<u>Harry W. Lindsey</u>
<u>Carl C. Botz</u>	<u>John Potts Barnes</u>
<u>William B. Graham</u>	<u>William B. Davies</u>
<u>Henry D. Brown</u>	<u>Charles W. Hill</u>
<u>Edward K. Gelle</u>	<u>Carleton Hill</u>
<u>Lawrence V. Darnell</u>	<u>Alexander C. Mabe</u>
<u>Geo. S. Cheidaw</u>	<u>Eben O. McNeil</u>
<u>James P. Hume</u>	<u>Samuel W. Tripnis</u>
<u>Gordon F. Hook</u>	<u>Charles F. Meroni</u>
<u>H. Allan Irvine</u>	<u>Charles Hill</u>
<u>James L. McManus</u>	<u>John L. Javison</u>
<u>Chas H. Miller</u>	<u>Arthur H. Boettcher</u>
<u>Edgar H. Beaubien</u>	<u>Otto R. Barnett</u>
<u>A. D. Mann</u>	<u>Russell H. Clark</u>
<u>James H. Brown</u>	<u>C. A. Fowler</u>
<u>Levi H. Tieson</u>	<u>Samuel W. Hill</u>
<u>Ray H. Olson</u>	<u>Carl E. Johnson</u>
<u>Emuel N. Ford</u>	<u>Walter M. Kuller</u>
<u>Howard L. Merrill</u>	<u>Harvey L. Hanson</u>

Ransom Mow  
Edward Fay Wilson  
Geo. Woods  
Wm. H. Zabel  
William J. Miller  
Cyril A. Doane  
Fred Gerlach  
Arthur W. Carlson  
Greek Wells  
Edward C. Gutzbaugh  
William B. Cottman  
O. H. Donald  
Henry H. Hopkins  
Wm. H. Murray  
Arthur A. Olson  
A. Arnold Sand  
Albert H. Penolletan  
Arthur B. Seibold Jr  
B. Gordon Allen  
Norman H. Galach  
Enloe Wilkinson  
John D. Parker

Ray White  
Archibald H. Keller  
C. Paul Carter  
Lincoln B. Smith  
Lowell E. Toys  
Frank H. Foley  
Norman S. Parker  
James T. Geist  
Robert Lewis Ames  
Richard L. Schroder  
J. C. Shantz  
Earl G. Carlson  
Wm. J. Johnson  
Adney Verman  
Thos. Byron Foster  
Ralph Menden  
Paul D. Blanton  
Albert F. Mecklerburg  
Ronald M. Carter  
James T. Miller  
James W. Brown  
John Parker Smith

<u>Harvey Knight</u>	<u>Elmer Noble</u>
<u>James A. Williams</u>	<u>John James</u>
<u>Clifford A. Bradley</u>	<u>M. K. Hobbs</u>
<u>Robert S. McCulloch</u>	<u>John A. Anderson</u>
<u>Ross A. Hince</u>	<u>John J. McLaughlin</u>
<u>Alvin C. Ahlberg</u>	<u>Sidney Wallenstein</u>
<u>J. Bernhard Weiss</u>	<u>Walter S. Bayne</u>
<u>Benjamin F. Wupper</u>	<u>Arthur K. Kelle</u>
<u>Elwood Hansmann</u>	<u>Samuel J. ...</u>
<u>Robert H. Wendt</u>	<u>Robert H. Bell</u>
<u>Warren A. Horton</u>	<u>Walter Darley</u>
<u>Casper William Ooms</u>	<u>George N. Hippen</u>
<u>Ed. Mass, Jr.</u>	<u>Geo. H. Karch</u>
<u>Benton Baker</u>	<u>W. F. Trendelenburg</u>
<u>Geoff. F. Sappard</u>	<u>Voland C. Behm</u>
<u>Frederick F. Mason</u>	<u>Louis Robertson</u>
<u>Walter Klaus</u>	<u>Joanna L. Mueller</u>
<u>George Manke</u>	<u>Arthur W. Keller</u>
<u>Armin J. Goffen</u>	<u>P. H. Stueder</u>
<u>Rich. M. ...</u>	<u>Fred M. Davis</u>
<u>Geo. W. Hansen</u>	<u>Geo. Fochmann</u>
<u>Kent W. Howell</u>	<u>W. R. Rummel</u>