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Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D. Roosevelt's Battle with the Supreme Court

Stephen R. Alton
Texas A&M University School of Law, salton@law.tamu.edu

LOYAL LIEUTENANT, ABLE ADVOCATE: THE ROLE OF ROBERT H. JACKSON IN FRANKLIN D. ROOSEVELT'S BATTLE WITH THE SUPREME COURT

Stephen R. Alton*

Before his appointment to the Supreme Court, Justice Robert H. Jackson played a highly visible role in Franklin D. Roosevelt's failed "court packing plan." Roosevelt's legislation would have increased the size of the Supreme Court and could have dramatically altered the functioning of our government. Jackson supported the plan from his post as Assistant Attorney General. This Article uses a chronological narrative to examine Jackson's role in Roosevelt's court fight. The Article examines his role in light of the surrounding history and the tension between the backers of the New Deal and the Supreme Court.

Jackson's testimony before the Senate Judiciary Committee was widely viewed as the most effective representation which the plan received. Roughly contemporaneously with his Senate testimony, Jackson gave five public addresses, some before groups adamantly opposed to the plan. Despite the poor prospects for the court legislation and his own ambivalence regarding the plan, Jackson worked loyally to sell Roosevelt's idea. This Article examines Jackson's often overlooked support of the court packing

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* Associate Dean and Professor of Law, Texas Wesleyan University School of Law; J.S.D. candidate, Columbia University School of Law. A.B., Harvard College, 1978; J.D., University of Texas School of Law, 1981; ED.M., Harvard University Graduate School of Education, 1986; LL.M., Columbia University School of Law, 1992. This article was written in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University. I would like to thank the following people for their helpful comments on earlier versions of this article: Dean Malinda Seymore; Phillip Robertson, Esquire; Dean Walter Pratt; Dean Dennis Olson; Professor Julia Armstrong; and Judith Kuhn Alton, Esquire. I also would like to thank my dissertation advisor, Professor Eben Moglen, for his comments, advice, and guidance. In addition, I am grateful for the help given to me by the staff of the Manuscript Division of the Library of Congress, the Oral History Research Office of Columbia University, the Special Collections Division of the University of Virginia Library, and the Research Room of the Franklin D. Roosevelt Library. I also am grateful to the Oral History Research Office of Columbia University, the Library of the University of Virginia, and William E. Jackson, Esquire for their generosity in permitting me to quote from certain unpublished works, and to Warner Gardner, Esquire, and the late Joseph Rauh, Jr., Esquire, for allowing me to interview them for this article. Finally, I gratefully acknowledge the financial support of the Lawrence A. Wien Foundation, whose generosity permitted me to pursue my J.S.D. studies at Columbia University School of Law, and the financial support of Texas Wesleyan University, whose generosity facilitated my research.

plan and provides considerable insight into the future Justice, illuminating both his strong political instincts and his blossoming abilities as an advocate.

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INTRODUCTION

In 1934, Robert H. Jackson, future Associate Justice of the United States Supreme Court, left his home in Jamestown, New York and, at the age of forty-two, went to New Deal Washington to serve as general counsel of the Bureau of Internal Revenue.[1] Jackson had established a successful law practice in Jamestown and was involved in Democratic Party politics at both the local and state levels.[2] Two years after his arrival in the nation's capital, the Western New Yorker transferred to the Department of Justice to become the Assistant Attorney General in charge of the Tax Division.[3] In January 1937, on the eve of President Franklin D. Roosevelt's announcement of his plan to "reorganize" the federal judiciary, Assistant Attorney General Jackson was asked to head the Justice Department's Antitrust Division.[4] It was in this role that Jackson participated in the 1937 battle over Roosevelt's so-called "court packing plan." During the months that the fight raged (February to July), Jackson's official position continued to be that of Assistant Attorney General in charge of Antitrust. The Solicitor Generalship, the Attorney Generalship, and the Supreme Court Associate Justiceship all lay in Jackson's future. He would serve in each of those capacities in turn, taking his seat on the Court in 1941.[5]

Jackson's background distinguished him from many other New Dealers. Forty-two years old when he first arrived in the nation's capital, Jackson was neither an aging party hack nor one of the legion of Felix Frankfurter's young Turks.[6] Instead, Jackson was a seasoned, canny, and successful trial attorney who, in the tradition of Louis D. Brandeis, had established his

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[1] EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 66-67 (1958).

[2] *Id.* at 62-64.

[3] *Id.* at 83-84.

[4] *Id.* at 88; *see* Warner W. Gardner, *Robert H. Jackson: 1892-1954—Government Attorney*, 55 COLUM. L. REV. 438 (1955); William L. Ransom, *Associate Justice Robert H. Jackson*, 27 A.B.A. J. 478 (1941).

[5] *See* GERHART, *supra* note 1, at 229-34.

[6] As a professor at Harvard Law School during this period, Frankfurter sent many of his brightest young students to Washington to work for the New Deal. WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932-1940, at 64 (1963). For more on Frankfurter's efforts in this regard, see JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 167-73 (1976).

professional reputation by representing small businesses.[7] Largely self-educated beyond the high school level, Jackson never attended college and spent only one year at a night law school;[8] most of his legal training was acquired through an apprenticeship in a Jamestown law office.[9] In the words of Warner Gardner, an attorney who worked closely with Jackson during the latter's tenure as Solicitor General, Jackson was "the ablest advocate to be drawn to Washington, and the foremost of the 'Roosevelt lawyers,' . . . [yet he] never served a day except in 'old line' agencies . . . . A lawyer he had been, and a lawyer he remained until he took his place on the Supreme Court."[10] Jackson was an advocate, not a policy-maker. It was as an advocate that he presented the administration's case for reforming the United States Supreme Court to the public and to Congress.[11]

It is undeniable that Jackson's rise from the Bureau of Internal Revenue to the Supreme Court (accomplished in a span of slightly more than seven years) was uncommonly rapid. Warner Gardner opined that "nobody in history has ever risen as rapidly as he."[12] Jackson's remarkably rapid rise is

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[7] GERHART, *supra* note 1, at 48-62.

[8] Jackson attended Albany Law School. *Id.* at 34.

[9] *See* Gardner, *supra* note 4, at 439; Ransom, *supra* note 4, at 480.

[10] Gardner, *supra* note 4, at 438.

[11] Auerbach summed up the paradoxes embodied in Jackson, the New Dealer:

> Robert H. Jackson was an unlikely New Deal lawyer. The prototypical New Dealer was an upwardly mobile urbanite, a second-generation member of an ethnic minority group with superior academic credentials and, perhaps, some Wall Street experience. Jackson was the obverse: an upstate Protestant New Yorker who never attended college, attended but never graduated from Albany Law School, served an apprenticeship in a Jamestown law office, and incessantly preached the nineteenth-century virtues of the small-town practitioner: "hard work, long hours, and thrift." . . . The consummate advocate, he defended the New Deal as special counsel for the Securities and Exchange Commission, as assistant attorney general in the tax and antitrust divisions of the Justice Department, and as solicitor general and attorney general. Regardless of office, Jackson remained the nineteenth-century liberal in the twentieth century; his anachronistic liberalism was conspicuous, yet as a New Dealer he seemed to march in step with the times. This was less paradoxical than might appear. His critique of the legal profession, a recurring theme in his public addresses, focused on the corporate lawyer as the personification of wrongdoing; for his was the animus of Main Street displaced professionally by Wall Street. Jackson's New Deal colleagues, who voiced similar complaints, fired at the same target for different reasons. Theirs was the cry of contemporary politics; his was the voice of nostalgic betrayal.

AUERBACH, *supra* note 6, at 174-75. *See generally id.* at 174-76. Jamestown, incidentally, is in Western New York—not, strictly speaking, "upstate." Such misdescription of the town seems to be a common mistake.

[12] Interview with Warner W. Gardner, Esquire, in Washington, D.C. (June 22, 1992). Gardner served in the Department of Justice from 1935 to 1941 and was the Assistant to the Solicitor General while Robert H. Jackson held the post. *Id.*

not, however, the primary subject of this Article. Rather, this Article focuses on Jackson's role in the 1937 court fight—a role that unfolded in the space of a few months' time. Still, Jackson's willingness to undertake important work on behalf of such administration initiatives as the 1937 attempt to reorganize the federal judiciary and the 1937-38 antitrust campaign was, in large part, responsible for his speedy ascent in American government.

Jackson played an essential role in the 1937 court battle: he was "one of the most effective public speakers on the topic."[13] He made five speeches in favor of Roosevelt's proposal and delivered what generally was considered the most effective Senate testimony on its behalf.[14] He also served occasionally behind-the-scenes as a presidential advisor during the course of the battle.[15] Although his role in planning the battle was relatively small, his role in fighting it was an important and highly visible one.

Despite the historical significance of Jackson's subsequent career at the bar and the bench, and despite the prominence of his role in the court fight, adequate examination of that role is lacking. This Article seeks to fill that void by examining, in detail, the part that Jackson played in the court fight. Robert H. Jackson, as a contributor to American Constitutional jurisprudence in the twentieth century, merits this undertaking.

This Article presents a chronological, narrative account of Jackson's participation in the court fight. The larger history of that campaign and its players also are presented in order to illuminate Jackson's role. Although a number of secondary works—both old and new—review the history of the fight,[16] the main purpose here is to relate Jackson's part in this larger history, drawing on those secondary works only to the extent that they are helpful.

This Article first recounts the historical background of the tension between the New Deal and the Supreme Court as well as the Roosevelt administration's proposed solution to the problem. An examination of Jackson's initial efforts on behalf of the administration in its struggle with the Court follows. Next, the Article presents an analysis of the Senate Judiciary Committee Hearings on the proposed legislation to reorganize the federal judiciary, with particular emphasis placed on Jackson's testimony before that body. A discussion of Jackson's post-hearings participation in the combat over the Supreme Court follows, after which the Article continues with a brief look at the Court's surprising about-face and the death of the President's plan. The Article concludes with comments about Roosevelt's struggle with the Supreme Court and the importance of Jackson's role in that struggle.

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[13] *Id.*

[14] *See infra* Part 5.

[15] *See infra* text accompanying notes 249-54.

[16] These sources are cited throughout this Article.

I. THE OLD COURT V. THE NEW DEAL

The Hughes Court[17] was, in the words of one writer, the "Court that Challenged the New Deal."[18] Pronounced division within this United States Supreme Court manifested itself during the 1933 Term.[19] Beginning with that term and accelerating during the two succeeding terms, the Court, bitterly divided both philosophically and personally, struck down as unconstitutional a dozen acts of Congress and only narrowly upheld the constitutionality of several others.[20] Among the important federal statutes invalidated during this period were the National Industrial Recovery Act of 1933,[21] the Agricultural Adjustment Act of 1933,[22] the Railroad Retirement Act of 1934,[23] and the Bituminous Coal Conservation Act of 1935.[24] Moreover, this Court negated several important, progressive state statutes designed to deal with the very real—indeed unprecedented—economic crisis confronting the nation, and it sustained other such statutes only by close votes.[25] Given the Court's narrow reading of federal powers under the Commerce Clause[26]

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[17] Chief Justice Charles Evans Hughes led the Supreme Court from 1930 to 1941.

[18] Russell W. Galloway, Jr., *The Court that Challenged the New Deal (1930-1936)*, 24 SANTA CLARA L. REV. 65, 65 (1984).

[19] *Id.* at 81-82.

[20] *See* BERNARD SCHWARTZ, THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT 10-16 (1957); *see also* ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 181 tbl. (1941).

[21] Ch. 90, 48 Stat. 195 (1933) (invalidated in *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935)). In a press conference held four days after the release of the *Schechter Poultry Co.* opinion, an angry President Roosevelt decried the Court's majority for having "relegated [the nation] to the horse-and-buggy definition of interstate commerce." William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 357 (quoting Roosevelt).

[22] Ch. 25, Tit. I, §§ 1-22, 48 Stat. 31 (May 12, 1933) (invalidated in *United States v. Butler*, 297 U.S. 1 (1936)). The National Industrial Recovery Act of 1933 and the Agricultural Adjustment Act of 1933 were the two cornerstones of the New Deal's economic recovery program and, together, were designed to aid farmers, labor, and industry. FRANK FREIDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 103-04 (1990).

In a bitter dissent in *Butler*, Justice Stone accused the conservative majority of resorting to "a tortured construction of the Constitution." *Butler*, 297 U.S. at 87 (Stone, J., dissenting). He admonished his brethren to remember that "[c]ourts are not the only agency of government that must be assumed to have capacity to govern." *Id.*

[23] Ch. 868, 48 Stat. 1283 (1934) (invalidated in *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935)).

[24] Ch. 824, 49 Stat. 991 (1935) (invalidated in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)).

[25] *See* JACKSON, *supra* note 20, at 181 tbl.

[26] U.S. CONST. art. I, § 8, cl. 3.

the Court's narrow reading of federal powers under the Commerce Clause[26] and the General Welfare Clause[27] and its expansive reading of the limiting aspects of the Due Process Clauses[28] and the Tenth Amendment,[29] momentum was building for a showdown between the Court and the two other branches of the federal government.

The early decisions of the Hughes Court were relatively progressive, upholding a number of federal and state laws which provided for varying degrees of government intervention in economic affairs.[30] These early decisions "engendered great hopes in the framers and champions of the New Deal."[31] How had the progressive promise of these early decisions by the Hughes Court turned into the conservative juggernaut of the 1934 and 1935 Terms? One answer may be found in a philosophical change regarding the scope of judicial review espoused by what had come to be a majority of the Court. According to Bernard Schwartz, Chief Justice John Marshall, writing in *Marbury v. Madison*,[32] propounded the view that the judicial role in reviewing legislation "was not unrestrained. The primary responsibility for government was in the elected representatives of the people."[33]

By the time of the New Deal's high-water mark, however, the Court "had abandoned this restrained approach to its function of judicial review and had come instead to conceive of itself as the Supreme Censor of all legislation."[34] The Court was acting as a superlegislature, often vetoing federal and state acts that it deemed unwise while cloaking its actions under the guise of the Commerce Clause, Due Process Clause, or Tenth Amendment. In fact, the Court had long since entered the realm of legislative politics on the side of business interests; its numerous laissez faire decisions made it increasingly difficult for both federal and state governments to regulate business in the public's interest.[35] Indeed, by the end of the nineteenth century, "judges and lawyers, but especially the Justices of the Supreme Court,

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[26] U.S. CONST. art. I, § 8, cl. 3.

[27] U.S. CONST. art. I, § 8, cl. 1.

[28] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

[29] U.S. CONST. amend. X.

[30] *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934) (upholding New York's maximum milk price regulation against substantive due process and equal protection challenges); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (upholding the Minnesota Mortgage Moratorium Law against a contract clause challenge).

[31] LEO PFEFFER, THIS HONORABLE COURT: A HISTORY OF THE UNITED STATES SUPREME COURT 296 (1965).

[32] 5 U.S. (1 Cranch) 137 (1803).

[33] SCHWARTZ, *supra* note 20, at 13.

[34] *Id.*

[35] *See generally* ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 235-37 (1976) (discussing the Supreme Court decisions of the 1890s and their relation to the "enshrinement of laissez-faire philosophy in constitutional law").

were conscious allies of the new private economic powers, and their constitutional doctrine was deliberately directed at defeating majoritarian movements in the state and federal legislatures intended to redress the imbalance between civil society and the state."[36]

In addition to a philosophical change, the personalities and the voting habits of the Supreme Court Justices during the first Roosevelt administration contributed to the marked conservative shift. The Court's nine members during the 1933 to 1936 Terms were Chief Justice Charles Evans Hughes and Associate Justices George Sutherland, Willis Van Devanter, Pierce Butler, James Clark McReynolds, Owen J. Roberts, Louis D. Brandeis, Harlan Fiske Stone, and Benjamin N. Cardozo. Russell W. Galloway, Jr. statistically demonstrated a phenomenon long recognized by many: the Court of this period broke neatly into three voting blocs—a conservative bloc (Sutherland, Van Devanter, Butler, and McReynolds), a liberal bloc (Brandeis, Stone, and Cardozo), and a centrist swing bloc (Hughes and Roberts).[37] Galloway established that Hughes's voting record placed him "almost exactly in the Court's statistical center. His disagreement rates with the Justices at the Court's extremes were almost perfectly symmetrical . . . ."[38] Roberts, however, voted to the "right of center" during these terms, disagreeing with the Court's liberal bloc almost twice as often as he disagreed with the conservative bloc.[39] His voting pattern matched that of Hughes more closely than that of any other Justice.[40] Although Hughes gave "substantial support" to the conservatives during the 1934 Term and especially the 1935 Term, it was Roberts who firmly aligned himself with the conservative bloc, thereby providing the crucial fifth vote against important social and economic legislation.[41] Whereas Roberts often voted with the liberal bloc prior to 1934, his alignment with the conservatives in the 1934 and 1935 Terms was largely responsible for the Court's shift to the right.[42]

The Justice's personalities also played a role in this history, for the tribunal was sharply divided personally as well as politically. The four conservatives, Van Devanter, Sutherland, Butler, and McReynolds (often collec-

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[36] Eben Moglen, *Holmes's Legacy and the New Constitutional History*, 108 HARV. L. REV. 2027, 2038 (1995) (reviewing OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (1993)). The quoted text is Moglen's synopsis of the instrumentalist view of the era attributed to progressive historians.

[37] *See* Galloway, *supra* note 18, at 98.

[38] *Id.* at 92-93.

[39] *Id.* at 92.

[40] *Id.* at 91-92.

[41] Russell W. Galloway, Jr., *The Roosevelt Court: The Liberals Conquer (1937-1941) and Divide (1941-1946)*, 23 SANTA CLARA L. REV. 491, 492 (1983).

[42] *Id.*

tively referred to as the "four horsemen"),[43] were "immutable as dried concrete" in their narrow, strict-constructionist constitutional views.[44] "Opinions delivered by any of these veterans were likely to be rasped at the waiting courtroom. Whether right or wrong, these bitter-enders displayed all the symptoms of hardened arteries."[45] The liberals Brandeis, Stone, and Cardozo stood "[s]olidly against this rock wall."[46] In the middle were Chief Justice Hughes and Justice Roberts.

Joseph Rauh, a law clerk for Justice Cardozo during these years,[47] observed, from his insider's perch, that the Court of this era "was hopelessly divided."[48] The "hostility" between the Court's four conservatives and its three liberals "was inevitable and open."[49] Rauh recalled that the four horsemen even traveled together in the same automobile to and from oral arguments and the Court's Saturday conferences.[50] In reaction, the three liberals would meet at Brandeis's house on Friday evenings "to plan their strategies for the Saturday conferences."[51]

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[43] *See* WESLEY MCCUNE, THE NINE YOUNG MEN 13 (1947).

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 213 (1990).

[48] *Id.* at 213-14.

[49] *Id.* at 214.

[50] *Id.*

[51] *Id.* Professor Herbert Wechsler, who was a law clerk for Justice Stone during the first administration of Franklin Roosevelt, related a delightful anecdote that captures the personal feelings that divided this Court.

One day, Wechsler was riding to the Supreme Court building in Stone's car with Stone and Stone's messenger, Edward. Mrs. Stone had asked the Justice to stop at Magruder's Grocery Store, which he did on the way to the Court. While Stone was in the store, Wechsler and Edward waited in the car. "All of a sudden," said Wechsler,

> I noticed on the curb of Connecticut Avenue, Mr. Justice McReynolds, who was a tall, powerfully built man, standing there waving, shaking a Malacca walking stick that he always carried. And just shaking it as if he was going to bring the heavens down.
>
> I said to Edward, "I see Justice McReynolds over there. I think he's trying to get a taxicab unsuccessfully. I assume he's going up to court. Don't you think it would be nice to ask him if he'd like a lift?"
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> So Edward said, "Well, Mr. Wechsler, if you're telling me to do this, I'll be glad to do it, of course. But if you're asking me whether Justice Stone would like me to do it, I have to tell you that he would not."
>
> "Well," I said, "forget it. Thank you, Edward."
>
> And then when Stone came back, meanwhile McReynolds had gotten his cab, and I told Stone this story, and Stone looked at me and he said, "well, it's perfectly clear, Wechsler, isn't it, that Edward has a lot more sense than you have."

Reminiscences of Herbert Wechsler 75-77 (1982) (Oral History Collection of Columbia

Thus, by the end of the 1935 Term, the Supreme Court was divided bitterly both personally and philosophically. The Court's four reactionaries appeared to be in the ascendancy, aided by the crucial swing vote of Roberts (and, on occasion, that of Hughes). The conservative wing and its fellow travelers had played naysayer to the New Deal for two successive terms.[52] Important New Deal legislation, such as the National Labor Relations Act,[53] the Public Utilities Holding Company Act,[54] and the Social Security Act,[55] had yet to come before this hostile tribunal, and there was, in administration circles, much fear regarding their fate, given the Court's hostility toward New Deal social and economic legislation.[56] Moreover, Roosevelt's dream of wages and hours legislation seemed to be "out of the question."[57]

A few years later, Roosevelt reflected on his feelings about the situation at the time:

> By June, 1936, the Congressional program, which had pulled the nation out of despair, had been fairly completely undermined. What was worse, the language and temper of the decisions indicated little hope for the future. Apparently Marshall's conception of our Constitution as a flexible instrument—adequate for all times, and, therefore, able to adjust itself as the new needs of new generations arose—had been repudiated.
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> . . . .
>
> But was it really the fault of our Constitution? Or was it the fault of the human beings who, in our generation, were torturing its meaning, twisting its purposes, to make it conform to the mold of their own outmoded economic beliefs?[58]

The administration believed that *something* needed to be done about the Court. The question was *what?*

University). Wechsler goes on to note that there was "no sense of camaraderie in the Supreme Court" of this era. *Id.*

[52] *See* Galloway, *supra* note 18, at 82-88.

[53] 29 U.S.C. §§ 151-69 (1935).

[54] 15 U.S.C. § 79 (1935).

[55] 42 U.S.C. §§ 301-1397 (1935).

[56] NATHAN MILLER, FDR: AN INTIMATE HISTORY 392 (1983); 6 FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT lix (Samuel I. Rosenman ed., 1941); LEUCHTENBURG, *supra* note 6, at 231.

[57] LEUCHTENBURG, *supra* note 6, at 231; *see also* Leuchtenburg, *supra* note 21, at 381-82.

[58] 6 ROOSEVELT, *supra* note 56, at lviii.

Before that question could be answered, Roosevelt's reelection needed to be won. In the 1936 election, the Supreme Court became an issue.[59] Roosevelt did not raise the Court as an issue during the campaign[60] but instead "maintained a studied silence on the Court question despite counsel from different sides that he urge action to alter the Court or that he assure the country that he would not pack the Court."[61] Although Roosevelt resisted Republican leaders' attempts to provoke a personal response on the court issue, Democratic Senator Alben Barkley of Kentucky repeatedly attacked the Court in his one-hour keynote speech at the 1936 Democratic National Convention.[62]

As Roosevelt remembered it, the campaign's single issue was the New Deal, "its objectives, its methods, its future proposals,"[63] and, he asserted, the "opposition pointed to the Court as the only obstacle which had stood in our way."[64] In fact, Republican supporters of Roosevelt's opponent, Kansas Governor Alfred Landon, stressed the point that the man elected president in 1936 likely would appoint a considerable number of Justices to the Court; Republicans asked the electorate whether it wanted that man to be Franklin Roosevelt.[65] The electorate soon responded in the affirmative.

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[59] Leuchtenburg, *supra* note 21, at 379-80.

[60] LEONARD BAKER, BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT 43 (1967).

[61] Leuchtenburg, *supra* note 21, at 379.

[62] BAKER, *supra* note 60, at 43-46. James M. Burns also noted that Roosevelt personally dodged the court issue in the course of the campaign: "During the campaign Hoover and others demanded that the President confirm or deny that he planned to pack the Court. Roosevelt not only ignored the specific question—as a seasoned campaigner would—but he skirted the whole problem of the Supreme Court." JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 296 (1956). Burns believed that Roosevelt's silence in response to the question "meant that he had gained no explicit mandate to act on the Court." *Id.* The fact that the Court was an important issue in the election, coupled with the size of the Roosevelt landslide, has led many observers to a different conclusion, however. *See infra* notes 63-65 and accompanying text.

[63] 6 ROOSEVELT, *supra* note 56, at lviii.

[64] *Id.*

[65] BAKER, *supra* note 60, at 43-44. It may be helpful to bear in mind that Roosevelt made no Supreme Court appointments during his first four-year term as president. Of those prior presidents who had served at least one full term, only James Monroe made no appointments to the Court during his first term in office (though he did make an appointment during his second term). Indeed, as of the time of his second inauguration, Roosevelt could have claimed accurately that only he, William Henry Harrison, Zachary Taylor, and Andrew Johnson had been unable to secure any appointments to the Court. Albert P. Blaustein & Roy M. Mersky, *The Statistics on the Supreme Court*, *in* 4 THE JUSTICES OF THE SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS 3187, 3192 (Leon Freidman & Fred L. Israel eds., 1969). Because the average age of the Justices at the end of 1936 was almost seventy-two, THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995 *passim* (Clare Cushman ed., 2d ed. 1995), it

Among those Democrats taking up the Republican-cast Court gauntlet in the 1936 campaign was the Assistant Attorney General in charge of the Justice Department's Tax Division, Robert Jackson. In an article entitled *Is Landon Constitutional?*,[66] Jackson sought to turn the tables on Landon and his supporters. In the unabashedly partisan piece, Jackson implied that Governor Landon should not be hurling stones at the President on the issue of the constitutionality of legislation. After accusing Landon of "perhaps rashly" bringing the "constitutional issue" into the campaign's "limelight,"[67] Jackson detailed six occasions during Landon's four years as Kansas's governor—four years which coincided with Roosevelt's first term as president—in which the Kansas Supreme Court found state legislation to be unconstitutional.[68] Though a closer examination of these Kansas cases reveals that most involved arcane matters regarding the relationship between Kansas and its units of local government (issues which were hardly comparable to the New Deal), Jackson most likely scored a political point or two, particularly in his enumeration of two separate instances in which the Kansas Supreme Court struck down state mortgage moratorium relief measures.[69]

Nevertheless, Jackson's article was a bit disingenuous, even by partisan political standards. According to Jackson, his purpose was "merely to read the [Kansas] court reports and to assay [Landon's] claim that he knows how to get along with the courts and how to get his program into constitutional shape."[70] Jackson failed to point out that the Kansas Supreme Court presumably invalidated the Kansas laws on grounds that such acts were violative of the *Kansas* constitution—a far cry from the federal High Court's invalidation of congressional acts under the United States Constitution. Moreover, Jackson cited no evidence to indicate that the Landon administration had shepherded the invalidated legislation through the Kansas legislature in a way that was analogous to the Roosevelt administration's efforts regarding the enactment of its policies by a cooperative Congress. Although such an omission on Jackson's part was hardly surprising, it does mean that a logical link in his argument was missing: Landon's personal involvement in the invalidated Kansas legislation was not demonstrated; thus, Jackson's point—that Landon's programs would fare better with the judiciary than had

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did indeed appear likely, at the time of the 1936 election, that the next occupant of the White House would make several appointments to the Court.

[66] Robert H. Jackson, *Is Landon Constitutional?*, THE NATION, Oct. 24, 1936, at 474.

[67] *Id.*

[68] *Id.* at 474-76.

[69] *Id.* at 475. The later of the two mortgage moratorium laws was apparently an unsuccessful attempt to address the specific objections which the Kansas high court had raised with respect to the earlier law. *Id.*

[70] *Id.* at 474.

FDR's—simply was not established.[71]

Despite the efforts made by Landon and his supporters to make the Court an issue, Roosevelt won an unprecedented landslide victory in his bid for a second term. "It was one of the greatest election sweeps in American history."[72] The President carried every state except Maine and Vermont, piling up 523 electoral votes to Landon's eight.[73] Roosevelt concluded that the election results "left little room for doubt as to whether the people of the United States wanted [the New Deal] fight to continue."[74]

II. THE ADMINISTRATION STRIKES BACK

With the political opposition "routed" and his policies "vindicated," Roosevelt "could now give full attention to the challenge posed by the Supreme Court."[75] The problem remained: what course of action was advisable—or even possible—with respect to the Court?

One alternative simply was to do nothing, to wait and see if the Court might "follow the election returns."[76] After all, a shift of even one vote on the Court could spell the difference between victory and defeat for New Deal programs.[77] Attorney General Homer Cummings thought it at least conceivable that the Court might begin to deliver "some more enlightened opinions," though he confessed that he had "not much hope in that direction."[78]

Significant problems existed, however, with a wait-and-see strategy.

> The Court had behaved so arrogantly in the spring of 1936 that the prospects for a change of views seemed slim. Not

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[71] In his conclusion, Jackson nonetheless attempted to drive home his point about the constitutional hypocrisy of the Republican foes of the New Deal:

> The strange parallel in the experiences of these two Executives in attempting to make economic, financial, and general-welfare policies meet the requirements of the courts does pose a serious question as to whether the legalists are not intruding technical and obstructive rules of legal philosophy where they do not belong. Both the Kansas record of Governor Landon and the speeches that he has made during the campaign indicate clearly that he has nothing to contribute to the solution of this problem.

Id. at 476.

[72] FREIDEL, *supra* note 22, at 207.

[73] LEUCHTENBURG, *supra* note 6, at 195-96.

[74] 6 ROOSEVELT, *supra* note 56, at lix.

[75] Leuchtenburg, *supra* note 21, at 380.

[76] *Id.* at 381.

[77] *Id.*

[78] Homer S. Cummings, Diary (Nov. 15, 1936) (The Papers of Homer S. Cummings, Box 235, University of Virginia, Special Collections of Alderman Library) [hereinafter Cummings Diary].

> only did the Court's line of reasoning in its last Term leave little reason to suppose that the Court would not strike down such landmarks as the Wagner Act and the Social Security law, but it barred the way to new legislation. Returned to office with a tremendous grant of power, Roosevelt might be denied by the Court the opportunity to use that power. If he waited to see what the Court did, he might find himself with his past achievements obliterated and the momentum for future change lost.[79]

Roosevelt later wrote that "there was no time left for that kind of inaction and waiting."[80] He became convinced that the Court was hostile toward him on a personal level, and he "now sought a way not merely to liberalize the Court but to chastise the Justices for their past behavior."[81] The President agreed with Cummings, who became Roosevelt's chief advisor on the Court situation immediately after the 1936 election,[82] that the Constitution itself was not the problem; instead, "the entire difficulty has grown out of a reactionary misinterpretation" of the Constitution by the Court's conservative majority.[83]

If waiting for a change in the judiciary's attitude was out of the question, the administration had two basic routes open to it: it could draft legislation to fix the court problem, or it could propose a constitutional amendment.[84] The amendment route, however, was fraught with problems.[85] It would be difficult to draft an amendment that would ameliorate the situation.[86] Moreover, for Roosevelt, time was of the essence, and the ratification process would take too long.[87] Further, the entire process could, all too easily, be stymied: thirteen years after its ratification by Congress, the child labor amendment had yet to be ratified by the states.[88] Finally, even if

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[79] Leuchtenburg, *supra* note 21, at 381-82.

[80] 6 ROOSEVELT, *supra* note 56, at lxi.

[81] Leuchtenburg, *supra* note 21, at 382.

[82] JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 24-25 (1938).

[83] Cummings Diary, *supra* note 78 (Nov. 15, 1936).

[84] ALSOP & CATLEDGE, *supra* note 82, at 28-29.

[85] For Roosevelt's thoughts on the issue of a constitutional amendment, see generally 6 ROOSEVELT, *supra* note 56, at lxii-lxiv.

[86] Leuchtenburg, *supra* note 21, at 384.

[87] *Id.* at 384-85.

[88] *Id.* Cummings told Roosevelt that "those who were most content with existing conditions were most disposed to urge constitutional amendments because they welcomed that manner of dealing with the subject, hoping that time, money, propaganda, and a minority made effective could block the changes." Cummings Diary, *supra* note 78 (Dec. 26, 1936). In a diary entry written in late December 1936, Cummings confided that "the delays incident to amendments are rather appalling." *Id.* (Dec. 24, 1936).

these obstacles could be surmounted quickly, an amendment (and any legislation enacted under it) would still be subject to judicial interpretation by the very Court whose attitude necessitated the amendment in the first place.[89] Clearly, the amendment route was uninviting.[90]

Two possible statutory schemes also were abandoned. Legislation limiting the appellate jurisdiction of the Supreme Court (which was by no means unprecedented)[91] was deemed to be impracticable.[92] Similarly, legislation requiring the vote of more than five Justices in order to declare a congressional act unconstitutional was seen as an unworkable solution because the Court likely would nullify such a measure on constitutional grounds.[93]

One route would pass constitutional, if not popular, muster: legislation to increase the size of the Court, thereby enabling Roosevelt to appoint new Justices.[94] Such a plan had the advantage of precedent on its side.[95] Increasingly, Roosevelt and Cummings warmed to this idea, despite the fact that it "violated taboos and that some principle would have to be found to justify it."[96]

Cummings and his assistant, Carl McFarland, soon hit upon what they thought could serve as that justifying principle: the advanced age of the current Justices.[97] Sometime, most likely in January 1937, Cummings and

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[89] Leuchtenburg, *supra* note 21, at 386.

[90] *Id.*; ALSOP & CATLEDGE, *supra* note 82, at 28-29; 6 ROOSEVELT, *supra* note 56, at lxii-lxiv.

[91] *See, e.g.*, Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

[92] ALSOP & CATLEDGE, *supra* note 82, at 28-29; Leuchtenburg, *supra* note 21, at 386-87.

[93] ALSOP & CATLEDGE, *supra* note 82, at 28-29; Leuchtenburg, *supra* note 21, at 386.

[94] ALSOP & CATLEDGE, *supra* note 82, at 29-30.

[95] 6 ROOSEVELT, *supra* note 56, at lxiv. As both Jackson and Cummings later would emphasize in their Senate Judiciary Committee appearances, the Court's size had varied six times in the nation's history. *Reorganization of the Federal Judiciary: Hearings of the Senate Committee on the Judiciary*, 81 CONG. REC. Pt. 9 app. at 604, 606 (1937) (statement of Homer Cummings, Attorney General of the United States); *id.* at 523-27 (statement of Robert H. Jackson, Assistant Attorney General of the United States).

[96] Leuchtenburg, *supra* note 21, at 390.

[97] ALSOP & CATLEDGE, *supra* note 82, at 31-33; Leuchtenburg, *supra* note 21, at 391-92. For Professor Edward S. Corwin's role in this matter, see *id.* at 388-91. Warner Gardner, an Assistant Solicitor General at this time, had been given the task of researching possible legislative solutions to the court problem. He now was given the additional task of drafting the proposed bill. Warner W. Gardner, *Court Packing: The Drafting Recalled*, 1990 J. SUP. CT. HIST. 99, 99-100. After Gardner completed the initial work on the bill, he dropped out of the drafting process, probably in early January 1937. *Id.* at 100. At that point, according to Gardner (and much to his "dismay"), the entire rationale "of the bill was transformed into a measure to relieve the Justices of their crushing burden of work, made especially difficult by their advanced age." *Id.* Gardner believed that McFarland was responsible for this transformation of the

McFarland devised the idea that the administration's bill should use, as a model, a twenty-year-old plan espoused by a former Wilson administration attorney general. That earlier plan called for federal judges to retire at age seventy or face the appointment of additional judges to assist them.[98] To the great amusement of both Cummings and Roosevelt, that former attorney general was none other than the arch-reactionary Justice James Clark McReynolds.[99] Although the McReynolds proposal never was adopted (and, incidentally, did not include Supreme Court Justices within its purview), Cummings and his aides decided that there was no reason not to apply the idea to the High Court as well.[100]

Roosevelt insisted on absolute secrecy for the plan until it was ready to be sprung on the Congress, the cabinet, and the country.[101]

> No one was to be warned. No one was to be permitted even to seem to have participated in the great scheme. Message, bill and letter, the whole thing was to be flung at Congress and the country without advance notice, to be left or taken. There was not the slightest doubt in the President's mind that they would be taken.[102]

There were several reasons for this secrecy. The President most likely was motivated by a fear of premature disclosure of the plan[103] and by his usual flair for the dramatic.[104] Moreover, his recent landslide reelection had made him over-confident regarding his power over the Congress.[105] Biographer Frank Freidel offered another hypothesis for why Roosevelt kept Congressional leaders in the dark before announcing his plan: he simply was becoming bored with them.[106] Whatever his reasons, Roosevelt would pay dearly for his secrecy.

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legislation's rationale. *Id.* Cummings's diary noted that, on January 7, 1937, he met with McFarland, Gardner, and Solicitor General Stanley Reed regarding the progress of the drafting of the bill; earlier that day, Cummings had handed Roosevelt a draft of a proposed bill on the federal judiciary. Cummings Diary, *supra* note 78 (Jan. 7, 1937).

[98] WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 119-21 (1995); Leuchtenburg, *supra* note 21, at 391-92.

[99] ALSOP & CATLEDGE, *supra* note 82, at 33; Cummings Diary, *supra* note 78 (Jan. 17, 1937).

[100] Leuchtenburg, *supra* note 21, at 392.

[101] ALSOP & CATLEDGE, *supra* note 82, at 48; *see* BURNS, *supra* note 62, at 297.

[102] ALSOP & CATLEDGE, *supra* note 82, at 48-49.

[103] Leuchtenburg, *supra* note 21, at 396. *But see* BURNS, *supra* note 62, at 297.

[104] Leuchtenburg, *supra* note 21, at 396; BURNS, *supra* note 62, at 297.

[105] FREIDEL, *supra* note 22, at 222-23.

[106] *Id.* at 224.

In the years since the winter of 1936 to 1937, there has been considerable debate and speculation regarding who—other than Roosevelt and Cummings—was involved in devising (or was even privy to) what would come to be called the court packing plan. Certainly McFarland, Gardner, and Alexander Holtzoff, another Cummings assistant, were aware of the plan's formulation and had varying roles in drafting the plan and conducting preliminary research.[107] The same was also true of Solicitor General Stanley Reed.[108] Roosevelt later wrote that although he "discussed the objectives and the issues [regarding the court problem and its possible solutions] with many people," he was joined "in the final determination of details" by Cummings and Reed, "and . . . nobody else."[109]

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[107] For a discussion of Holtzoff's knowledge of the proposal, see ALSOP & CATLEDGE, *supra* note 82, at 43; Leuchtenburg, *supra* note 21, at 392. For a discussion of McFarland's and Gardner's participation see *supra* notes 97-100 and accompanying text.

[108] *See generally* LEUCHTENBURG, *supra* note 98, at 114-31. Cummings noted in his diary that he told Roosevelt that he "had not discussed this matter with anyone except Stanley Reed and that I called him in and explained it to him just to get his reaction and under seal of strictest confidence." Cummings Diary, *supra* note 78 (Dec. 26, 1936).

[109] 6 ROOSEVELT, *supra* note 56, at lx-lxi.

In late January 1937, presidential advisors Donald Richberg and Samuel Rosenman were called to help Cummings and Reed prepare Roosevelt's message to Congress that was to accompany the bill. There is no evidence, however, that either Richberg or Rosenman was involved in the earlier stages of the plan's formulation. *See* ALSOP & CATLEDGE, *supra* note 82, at 45-46 (discussing Richberg's and Rosenman's involvement in drafting Roosevelt's message); Leuchtenburg, *supra* note 21, at 395-96 (same); Cummings Diary, *supra* note 78 (Jan. 30 & 31, 1937) (same).

One of the mysteries surrounding the birth of the court packing bill is how much those ubiquitous presidential advisors, Tom Corcoran and Ben Cohen, knew about the plan. Alsop and Catledge stated flatly that Cohen and Corcoran had no role in formulating the plan. ALSOP & CATLEDGE, *supra* note 82, at 36-37. Joseph P. Lash said that the pair "knew something was afoot after the election about the court situation" but that "they too, were surprised when they finally learned of the Court-packing plan." JOSEPH P. LASH, DEALERS AND DREAMERS: A NEW LOOK AT THE NEW DEAL 292 (1988). Leuchtenburg and Lash indicated that Corcoran, at least, found out about the plan when Rosenman, with Roosevelt's permission, asked Corcoran to go over the final draft of the President's message to Congress. Roosevelt, however, specifically instructed Rosenman not to let Cummings know that Corcoran was involved. *Id.* at 293; Leuchtenburg, *supra* note 21, at 396. After the defeat of the court packing proposal in July 1937, Corcoran told Interior Secretary Harold Ickes that Cummings alone was responsible for the plan and that he (Corcoran) and Cohen were never involved in its formulation. 2 HAROLD L. ICKES, THE SECRET DIARY OF HAROLD L. ICKES 177 (1954) (Perhaps, with hindsight, Corcoran employed a selective memory). Jackson later wrote that, after the proposal became public, Cummings personally told him that no one except Reed, Holtzoff, and McFarland knew about the plan in advance; Cummings specifically told Jackson that "neither Ben Cohen nor Tommy Corcoran knew anything about

Assistant Attorney General Jackson had no role in the bill's planning. Cummings's diary for this period makes no mention of any participation by Jackson in the planning or drafting process prior to the legislation's announcement on February 5, 1937. Alsop and Catledge state that Jackson first learned of the plan when he read about it in the newspapers.[110] Moreover, Jackson himself denied having any part in the planning process.[111] Further confirmation of Jackson's lack of knowledge comes from Warner Gardner, who states categorically that Jackson had no part in the court pack-

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it." Robert H. Jackson, Autobiography 115 (June 8, 1944) (unpublished manuscript, Robert H. Jackson Papers, box 188, on file with the Library of Congress) [hereinafter Jackson Autobiography].

It would appear, then, that Cohen and Corcoran did not receive advance notice of the bill, except for a meeting during the course of the bill's drafting in which Gardner and Cummings "spent a morning with" Cohen and Corcoran and found "that they were in strong support and without suggestions for change." Gardner, *supra* note 97, at 100. Gardner maintained that the meeting lasted about two hours. If this is so, then it is not true that Cohen and Corcoran were ignorant of the bill's planning or that Cummings desired as much. Interview with Warner W. Gardner, *supra* note 12.

After the bill's introduction, however, Cohen informed Justice Brandeis that neither he nor Corcoran "'was consulted in the formulation of the Court proposals which the President . . . decide[d] to sponsor.'" Joseph L. Rauh, Jr., *A Personalized View of the Court-Packing Episode*, 1990 J. SUP. CT. HIST. 93, 96 (quoting Letter from Benjamin Cohen, attorney, to Justice Louis Brandeis (July 30, 1937) (Benjamin Cohen Papers, Box 13, Library of Congress)). Moreover, Cummings's diary for this period (November 1936 to February 1937) contains no mention of any meetings or discussions that either Cohen or Corcoran attended, though an entry for January 24, 1937, does note that Roosevelt told Cummings that "he had tried [the plan] on Tommy Corcoran [who] agreed it would work." LASH, *supra*, at 293 (quoting Cummings Diary, *supra* note 78 (Jan. 24, 1937)).

Joseph Rauh attempted to reconcile these seemingly contradictory accounts: "I suggest that the apparent contradictions may be explained by Corcoran and Cohen's unawareness of the age-inadequacy rationale for the packing as opposed to the packing itself." Rauh, *supra*, at 96. In other words, Rauh theorized that Corcoran and Cohen generally were aware of the plan but not its old-age rationale. Unsatisfying though this may be, it is likely that the truth will never be known about the extent of Cohen and Corcoran's participation in the creation of the court bill.

[110] ALSOP & CATLEDGE, *supra* note 82, at 36.

[111] Jackson said that

> [o]n the day that the President's message proposing reorganization of the judiciary went to Congress, I had been in New York and was returning on the train. I bought a Philadelphia paper and found the plan in the press. That was the first that I had known of the proposal. I had a vague notion that something was generating along the line of dealing with the judiciary, but I had been in on none of the conferences, knew nothing about the proposal and was as surprised as anybody at its nature.

Reminiscences of Robert H. Jackson 433 (1952) (Oral History Collection of Columbia University) [hereinafter Jackson Reminiscences].

ing bill from the time of its inception until its introduction.[112]

Despite what, in hindsight, is clear evidence to the contrary, contemporary reports stating that Jackson was somehow involved in the formulation of Roosevelt's proposal to reform the Court proliferated. According to Jackson, a January 29, 1937, speech that he gave to the New York State Bar Association[113] was "thought by many to be the opening gun of the fight against the judiciary which opened a few days later."[114] Jackson, however, claimed the speech "was not even cleared with the White House and was not connected in any way with the court plan."[115] Nevertheless, Paul Mallon, in his February 8, 1937, column in the *Washington Evening Star*, asserted that Jackson "had a hand in drafting the bill."[116] A week later, the *Philadelphia Inquirer* reported that "[t]here are many persons who assume that Assistant Attorney General Jackson had a part in formulating the President's plan for reorganizing the court."[117]

While the finishing touches were being put on the court plan, Jackson addressed the New York Bar Association at the Waldorf-Astoria in New York City.[118] Jackson began by telling his audience that the legal profession could "scarcely boast of its popularity," in part because the public believed that there were too many lawyers and that lawyers lacked "convictions."[119] Jackson next launched into a discussion of the role of lawyers on the Supreme Court and the influence of precedent on that Court. Although the prestige of the legal profession "rests on judicial supremacy in govern-

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[112] Interview with Warner W. Gardner, *supra* note 12.

[113] *See generally infra* notes 118-134 and accompanying text.

[114] Jackson Reminiscences, *supra* note 111, at 433.

[115] *Id.*

[116] Paul Mallon, *Roosevelt's Hand Forced in Court Move—Originally Planned to Await Coming Decisions*, WASH. EVE. STAR, Feb. 8, 1937. This article also erroneously reported that Samuel Rosenman was "the man behind the Roosevelt repacking process" and that Cohen and Corcoran, in addition to Jackson, had helped draft the bill. *Id.*

[117] *Jackson and Miss Perkins Mentioned for High Court*, PHIL. INQUIRER, Feb. 15, 1937 [hereinafter *Jackson and Miss Perkins*].

[118] Robert H. Jackson, Address at the New York Bar Association Annual Dinner (Jan. 29, 1937) (Robert H. Jackson Papers, Box 79, Library of Congress) [hereinafter Jackson Address].

[119] *Id.* at 2-3. Regarding the proliferation of attorneys, Jackson, with characteristic humor and a nod to the Agricultural Adjustment Act of 1933, remarked,

> I have long advocated a New Deal law to pay the law schools for not producing lawyers. The New Deal has performed a service to the Bar by keeping so many law professors busy in Washington. They could do less harm making new laws than at their usual task of making new lawyers . . . .Some think society would do well to plow under the worst of us. Others think the worst of us do less harm to society than the best of us. They point out that it takes good lawyers to kill great measures for public betterment . . . .

Id.

ment," he argued that only "public sufferance and tradition" permit "lawyer control [of the High Court]," for nothing in the Constitution mandates that the Justices be lawyers.[120] Because lawyer-judges have such reverence for precedents, there is a natural tendency toward conservatism, which, in turn, leads the judiciary into conflict with "progressive administration[s]."[121] Jackson warned that, in the future, "some 'radical' administration" could, without infringing the Constitution, "pack" the Supreme Court with non-lawyers.[122]

Jackson spent a considerable amount of time discussing constitutional interpretation and the legal profession's role in it. "The heaviest responsibility ever given by any nation to its bar is that of interpreting our Constitution," he averred.[123] The Constitution, however, is "not a legal document," but a relatively short, general outline establishing the framework for American government.[124] The Framers "never thought, when they spared words in the interest of simplicity, that we would reach a point where nothing is lawful unless the Constitution had a word for it . . . . [W]e cannot outlaw every action that can not show a precedent."[125] What Jackson termed

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[120] *Id.* at 3-4.

[121] *Id.* at 4-5.

[122] *Id.* at 4 ("Now suppose some 'radical' administration should propose to pack [the Supreme Court] with men of other vocations. There is no constitutional protection for our lawyer monopoly.").

Given his choice of the word "pack," it is easy to understand how some could think, in light of subsequent events, that Jackson was hinting that an administration attempt to pack the Court would follow. Further reflection on Jackson's words, however, make it clear that he was not floating a trial balloon. The Assistant Attorney General would not have referred to the Roosevelt administration as "radical"; his reference, doubtless, was to some hypothetical future administration. Indeed, had Jackson known that the court packing bill was imminent, he likely would have avoided the entire reference to a "radical" administration "packing" the Court with non-lawyers. If one focuses on Jackson's point that lawyers should not adhere slavishly (hence, conservatively) to precedent instead of focusing on the word "pack," one realizes that Jackson merely was calling on the legal profession (including judges) to be more liberal in its political outlook and constitutional philosophy. He was neither advocating court packing nor hinting at its imminence.

[123] *Id.* at 5.

[124] *Id.*

[125] *Id.* at 7. Jackson's statement is reminiscent of John Marshall's dictum in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819):

> [The Constitution was] intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of that instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which best can be provided for as they occur. To have declared, that the best

"government by litigation"[126] was immobilizing the implementation of public policy.[127] The American system of government is one that "must function by compromise,"[128] and attorneys were standing in the way of compromise:

> Contending social forces came to rest and equilibrium, at least temporarily, in such compromises as the N.R.A., the Guffey Coal bill, the Agricultural Adjustment Act, the minimum wage laws, the Labor Relations Act and Social Security Acts. We need as many constitutional powers and ways to compromise these struggles as possible. Lawyers have been closing the roads to political compromise of basic problems which are the country's route to economic and social peace. The detour may be rough![129]

Thus, Jackson criticized not only "government by litigation,"[130] but also specific, adverse decisions that were recently (or soon to be) rendered by the Supreme Court. By deprecating the lawyer-generated constitutional litigation that vexed the administration, Jackson implicitly was censuring the Supreme Court's conservative majority for its reflexive adherence to outmoded precedents and its strict construction of the Constitution. According to Jackson, such attitudes stymied both Congress and President in their efforts to deal

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> means shall not be used, but those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it.

Id. at 415-16. Marshall reminded his audience that "we must never forget that it is a *constitution* we are expounding." *Id.* at 407.

[126] Jackson Address, *supra* note 118, at 9.

[127] *Id.* at 7-9. Jackson stated:

> No administration can halt its policies dealing with such problems as a banking emergency, unemployment, relief, or the currency to seek the judiciary's views. The government can not learn the judges' views until after the law is passed and then only after a lapse of years as the view is slowly made available in private litigation. Moreover, the judicial contribution is only a negative. It may tell what can not be done to right a wrong or solve a problem, but it never tells what can be done.
>
> Government by litigation has destroyed effective enforcement of public policy.

Id. at 8-9.

[128] *Id.* at 9.

[129] *Id.*

[130] *Id.*

effectively with the nation's severe social and economic problems.[131]

Given his critical tone, Jackson surely surprised his audience when he concluded with a call for unity and fellowship within the profession. "We play on opposing teams but we play the same game," he told his fellow bar members.[132] The New York Bar Association speech was quintessential Jackson, from the hard-hitting and well-reasoned points of attack replete with nice turns of phrase to the conclusion that diplomatically attempted to soothe those whose feathers were ruffled.[133] Jackson not only criticized the legal profession on a number of counts in his speech but also took the Supreme Court to task in a way that, in hindsight, reasonably might have led an observer to believe that Jackson was hinting at the administration's upcoming court reorganization proposal.[134]

Predictably, Jackson's New York Bar Association speech drew considerable attention and criticism. A Philadelphia attorney berated Jackson, angrily informing him that he found "such a lack of respect for the Supreme Court and such narrow-minded views" both "disconcerting and regrettable."[135]

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[131] Indeed, Jackson issued the following warning:

> Our disorderly and inconclusive squabbles in lower courts over questions we know the lower courts can not settle, our intolerable delay in settling questions on which executives must act, and then our disposing of vast problems of statecraft, such as defining "general welfare," "interstate commerce" or "due process" by legal specialists guided by precedents and boastfully regardless of reason or wisdom are not portents of health for us lawyers nor for our country.

Id. at 10-11.

[132] *Id.* at 11.

[133] Here one sees evidence of the style that would soon make Jackson one of the best writers to serve on the United States Supreme Court.

[134] A careful examination of Jackson's speech tends to confirm his direct statement, *see supra* text accompanying notes 114-115, that the address was not intended as a trial balloon for Roosevelt's court plan and that, at the time of the speech, Jackson had no knowledge of the plan. Jackson's address contained no reference to the twin theories of old-age and over-work which Roosevelt and Cummings would use initially to justify the plan. *See infra* text accompanying note 145. As a fast-rising assistant attorney general, it seems unlikely that Jackson, had he known of the plan, would have made a reference to it in this speech while totally ignoring the official rationale. This is so despite the fact that Jackson disapproved of the old-age and over-work rationale for the legislation, *see infra* text accompanying note 210, and was the first administration official to state, publicly and candidly, the real motivation behind the proposal—disapproval of the kinds of decisions the Court delivered. It would have been foolish to have undermined the administration on this point in advance of the plan's official—and surprise—unveiling. Jackson was both too loyal and too savvy to have intentionally made such a move.

[135] Letter from Walter G. Dugger, Attorney, to Robert H. Jackson (Feb. 1, 1937) (Robert H. Jackson Papers, Box 79, Library of Congress). Dugger's letter continued,

> Such weird ideas as you have expressed cannot come from sound thinking, and the best thoughts of men in power. If you are unable to support our most honored and illustrious institution, the Supreme Court of the United States, I invite you to

The *New York Times* reported that the members of the New York Bar Association "made up an apparently unanimous chorus of adverse but informal comment" on Jackson's address.[136] In an editorial of February 1, 1937, the *Times* expressed interest in Jackson's assertion that the Constitution does not mandate lawyer-judges.[137] Yet because of "'lawyer control' of the Supreme Court," the *Times* thought it unlikely that "[a] court of learned laymen" would ever come to pass.[138]

On February 5, 1937, the administration's bill to reorganize the federal judiciary was ready to be sent to Congress, as was a message from the President and a letter from the Attorney General to the President which were intended to provide support and justification for the bill. The part that was the real heart and soul of the proposed law and that immediately would become a lightning rod for the opposition provided for presidential appointment of an additional judge for every federal judge who had served for ten or more years but failed to retire within six months after reaching his seventieth birthday.[139] Six Supreme Court Justices met this criterion.[140] All such appointments were to be permanent, although the bill capped the total size of the resulting Supreme Court at fifteen Justices.[141] Significantly, Cummings's letter which accompanied the bill purported to provide statistical evidence for the President's assertion that crowded federal court dockets necessitated this measure.[142]

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consider resigning from the Government service and I anticipate that the Country would profit by your act.

Id.

[136] *Narrow Viewpoint of Bar Is Assailed*, N.Y. TIMES, Jan. 31, 1937, at 1.

[137] Editorial, *Lawyers & Lawyers*, N.Y. TIMES, Feb. 1, 1937, at 18. Although perhaps incorrectly inferring that Jackson had actually advocated the appointment of non-lawyers to the Supreme Court, the *Times* opined that a "court of learned laymen, ignorant of law, pleases the imagination, however much it may irk lawyers." *Id.* The *Times* admitted that "the Founding Fathers, were [they] where they could be polled, . . . might be somewhat surprised by Mr. Jackson's suggestion." *Id.*

[138] *Id.*

[139] 6 ROOSEVELT, *supra* note 56, at 63 (referencing the proposed bill to reorganize the federal judiciary, § 1(a)).

[140] *See* Leuchtenburg, *supra* note 21, at 392.

[141] 6 ROOSEVELT, *supra* note 56, at 63 (referencing the proposed bill to reorganize the federal judiciary, § 1(b)).

[142] *Id.* at 60-63 (referencing a letter from Homer S. Cummings to the President, Feb. 2, 1937). It is interesting to note that in October 1936, the average age of the nine Justices was almost 72, while in October 1996, the average age of the nine Justices was slightly in excess of 62. Cushman, *supra* note 65, *passim*. Despite the youth of the current Supreme Court relative to that of the 1936 Court, the current Court issued full opinions in 75 cases during the 1995 Term while the 1936 Court issued full opinions in 146 cases during its last full Term. *Compare* Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L.

Roosevelt's message to Congress called for the bill's enactment in the interest of justice. The President maintained that the legislation was necessary "because the personnel of the Federal Judiciary is insufficient to meet the business before them;"[143] the Supreme Court, in particular, was laboring under the heavy burden of its docket.[144] According to Roosevelt, the crux of the problem was the plethora of aged federal judges who were unable both to keep up with the increased workload and to respond to "modern complexities."[145] The legislation provided for the "constant and systematic addition of younger blood [which] would 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."[146] Roosevelt noted in passing that Congress had changed the number of Supreme Court Justices several times before.[147] The legislation's twin grounds of old-age and over-work were about to be sprung, without prior warning, on the Congress, although the official rationale would fool no one.

The issue of timing remained. When should the bill and its supporting documents be sent to the Congress and announced to the cabinet, the press, and the nation? By the beginning of February 1937 word of the President's plan was starting to leak, and he felt that he could wait no longer.[148] Oral arguments before the Supreme Court in the National Labor Relations Act cases were set for Monday, February 8, and FDR wanted to make his plan public before then.[149] On February 2, however, Roosevelt was scheduled to host his annual White House dinner for the federal judiciary, and he did not want to spoil the occasion by announcing the plan in advance of the dinner.[150] Thus, Roosevelt chose Friday, February 5, 1937, to submit the plan to Congress.[151]

On that morning, at a White House cabinet meeting which the President

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REV. 577, 580 (1938), *with The Supreme Court 1995 Term*, 110 HARV. L. REV. 1, 367, tbl. I(A) (1996) (it should be noted that neither figure, 75 nor 146, includes *per curiam* decisions). This comparison deflates the notion that a younger Court necessarily does more work than an older one (to the extent that the amount of work accomplished by the Court is measured in terms of the number of full opinions issued).

[143] 6 ROOSEVELT, *supra* note 56, at 52 (referencing President's message to the Congress on Feb. 5, 1937).

[144] *Id.* at 53.

[145] *Id.* at 55; *see id.* at 53-55.

[146] *Id.* at 55.

[147] *Id.* at 52. This point was made in order to establish that a plan to increase the size of the Supreme Court was neither unconstitutional nor unprecedented. *See infra* notes 313-16 and accompanying text.

[148] Leuchtenburg, *supra* note 21, at 397-99.

[149] *Id.* at 399.

[150] *Id.*

[151] *Id.*

had called the day before,[152] Roosevelt announced his plan to reorganize the federal judiciary to the assembled cabinet officers and to the Democratic congressional leaders, who attended the meeting at Roosevelt's invitation.[153] As soon as the President finished announcing his plan, he went to meet with the press, leaving the Cabinet (except Cummings) and the congressional leaders in stunned silence.[154] Roosevelt thereupon announced his plan to the White House press correspondents, who thought the news conference had been called to address wages and hours legislation.[155] He asked the reporters to hold the story until he delivered the legislation and his message to Capitol Hill shortly after midday.[156] At about the same time, the Supreme Court Justices would receive copies of the President's plan as they sat in their courtroom.[157]

Much to the administration's disappointment, initial congressional reaction was, at best, mixed. Moreover, opponents of the measure picked up crucial support as the days and weeks passed. Both Vice President John Nance Garner and House Judiciary Committee Chairman Hatton Sumners opposed the legislation, with Sumners declaring, "Boys here's where I cash in my chips," to fellow representatives in the car while returning to the Capitol from Roosevelt's White House announcement.[158] Back in the halls of the Capitol, Garner dramatized his views on the proposal to a group of senators by "holding his nose with one hand and energetically making the Roman gesture of the arena, thumbs down, with the other."[159] As a conservative who disliked massive government spending and the administration's support of big labor, the Vice President actually opposed the New Deal: "[t]o him the Supreme Court was not the menace but the savior."[160] Sumners's opposition, coupled with House Majority Leader Sam Rayburn's tepid support and House Speaker William Bankhead's resentment over Roosevelt's failure to consult congressional leaders, meant

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[152] Cummings Diary, *supra* note 78 (Feb. 4, 1937).

[153] BAKER, *supra* note 60, at 3-14.

[154] ALSOP & CATLEDGE, *supra* note 82, at 66-67; FREIDEL, *supra* note 22, at 228-29; TED MORGAN, FDR: A BIOGRAPHY 470-71 (1985).

[155] BETTY HOUCHIN WINFIELD, FDR AND THE NEWS MEDIA 133 (1990).

[156] ALSOP & CATLEDGE, *supra* note 82, at 66-68.

[157] BAKER, *supra* note 60, at 33. As a special courtesy to Justice Brandeis, Tom Corcoran was dispatched to inform him of the plan earlier that day. *Id.* at 33-35. Brandeis told Corcoran that he opposed the President's proposal and that he thought Roosevelt was making a serious mistake. *Id.* at 35.

No member of the Supreme Court publicly supported the bill. Even the liberal Cardozo, a New Deal stalwart, opposed the plan, commenting that "'no judge could do otherwise.'" Rauh, *supra* note 109, at 98 (quoting Justice Benjamin Cardozo).

[158] ALSOP & CATLEDGE, *supra* note 82, at 67.

[159] *Id.* at 69.

[160] BAKER, *supra* note 60, at 13-14.

that the Senate would consider the bill first.[161] Ominously for the administration, a number of conservative Democrats in that chamber immediately lined up against the bill;[162] soon, every conservative Democratic senator, as well as the entire Republican minority and, more significantly, a number of moderate Democrats, sided with the opposition.[163] Congressional leaders were dismayed that Roosevelt had failed to consult them before announcing his plan. House Speaker Bankhead confided to a colleague that Roosevelt avoided telling "'his own party leaders what he was going to do . . . because he knew that hell would break loose.'"[164] Senate Majority Leader Joe Robinson, who would lead the fight for the measure in the Senate, thought that the President probably made a mistake in failing "'to have advised more frankly with his friends before precipitating this issue.'"[165]

Shortly after the bill was sent to the Hill, Republican leaders in the Senate made the decision to let dissatisfied Democrats lead the fight against the administration.[166] Conservative Democratic opponents had a similar brainstorm at an early strategy dinner, where they decided to let Senator Burton K. Wheeler, the venerable liberal Montana Democrat, lead the opposition.[167] Wheeler's agreement to do so, coupled with the Republicans' decision to allow the Democrats to take the lead, ensured that the fight would not merely be one between Democrats and Republicans or even liberals and conservatives but instead would be fought across both party and ideological lines.[168] Effectively, this fight would be a contest between the executive and the legislative branch—more specifically, between Roosevelt and a rebellious Senate.

The President sent Corcoran to sound out Wheeler's views on the legislation soon after its introduction.[169] Corcoran learned that the Senator considered the true combatants to be the President and Congress, particularly the Senate. The real issue, according to Wheeler, was just how much power Roosevelt's landslide reelection conveyed to him.[170] Other liberal senators,

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[161] ALSOP & CATLEDGE, *supra* note 82, at 68, 88-89; BAKER, *supra* note 60, at 65-66; William E. Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, *in* ESSAYS ON THE NEW DEAL 69, 78 (Harold M. Hollingsworth & William F. Holmes eds., 1969).

[162] ALSOP & CATLEDGE, *supra* note 82, at 88.

[163] *Id.* at 96.

[164] BAKER, *supra* note 60, at 21 (quoting Rep. William Bankhead).

[165] *Id.* at 22 (quoting Sen. Joseph Robinson).

[166] ALSOP & CATLEDGE, *supra* note 82, at 97-100.

[167] BAKER, *supra* note 60, at 97-99.

[168] *Id.*; *see also* ALSOP & CATLEDGE, *supra* note 82, at 97-104.

[169] LASH, *supra* note 109, at 297.

[170] *Id.* As Wheeler explained to Corcoran, "'Once he was only one of us who made him. Now he means to make himself the boss of us all . . . . Well he's made the mistake we've been waiting for for a long time—and this is our chance to cut him down to

such as Joseph O'Mahoney of Wyoming, George Norris of Nebraska, William Borah of Idaho, and Hiram Johnson of California, joined Wheeler in opposing the bill.[171] The legislation "frightened many liberals who feared its use in the future by conservative or semi-Fascist administrations."[172] Many American liberals viewed the Court as "the bulwark of American liberties;" at a time when "European dictators were stripping populaces of their liberties, they were especially sensitive to the danger that the United States might suffer the same malign fate."[173] To some congressional liberals, enactment of the legislation would mean a further erosion of congressional power in favor of an executive branch that, in the view of many, already had accreted too much.[174]

The reactions of congressional leaders mirrored those of the public, which immediately reacted negatively to any administration efforts to tamper with the Supreme Court. Letters and telegrams to Congress soon ran nine to one against the plan.[175] Within a month after Roosevelt's announcement, a poll conducted by the American Institute of Public Opinion (Dr. George Gallup's organization) revealed that only thirty-eight percent of the public supported the legislation.[176] Tremendous press opposition to the plan existed, and the United States Chamber of Commerce and the American Bar Association quickly aligned themselves with the plan's opponents.[177] An ABA poll of lawyers found that eighty-six percent of the member-respondents and seventy-seven percent of the non-member respondents opposed increasing the size of the Court.[178]

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size.'" *Id.* at 298 (quoting Burton Wheeler).

[171] BAKER, *supra* note 60, at 136-39. Borah and Johnson, though Republicans, were progressives, as was Norris, who technically was an Independent.

[172] ALSOP & CATLEDGE, *supra* note 82, at 76.

[173] FREIDEL, *supra* note 22, at 230.

[174] BAKER, *supra* note 60, at 139-43.

[175] ALSOP & CATLEDGE, *supra* note 82, at 72.

[176] WINFIELD, *supra* note 155, at 133. Seven weeks after the announcement, though, Dr. Gallup reported that 47% of the populace supported the plan. George Gallup, *Poll Shows 27 States Against Roosevelt Plan*, WASH. POST, Mar. 25, 1937, at 9. It is unclear whether this represents a true trend in public opinion in favor of the plan or merely indicates that one (or both) of these polls was erroneous.

[177] BAKER, *supra* note 60, at 84-85.

[178] William L. Ransom, *Members and Non-Members of American Bar Association Take Same Stand on Court Issues*, 23 A.B.A. J. 338, 338 (1937) [hereinafter *Same Stand*]; William L. Ransom, *Members of the American Bar Association Decide Its Policies as to the Federal Courts*, 23 A.B.A. J 271, 274 (1937) [hereinafter *Decide Its Policies*]. Sixty-three percent of the ABA's members responded to its poll regarding the proposed increase in the size of the Supreme Court, Ransom, *Decide Its Policies*, *supra*, at 271-72, 274; 36% of the nation's non-ABA-affiliated attorneys responded to the question, Ransom, *Same Stand*, *supra*, at 338. The combined votes of all attorneys responding to this question yielded 20.3% in favor of the plan, *id.* at 338. In all, 41.1% of

Powerful publisher Frank Gannett, the owner of the third largest newspaper chain in America, also aligned himself with the opponents, forming the "National Committee to Uphold the Constitution," an ostensibly nonpartisan group dedicated to defeating the President's plan.[179] Gannett's committee sent out letters urging the recipients to use public demonstrations, petitions, and direct pressure on representatives in their efforts against the proposal.[180]

As churches, bar associations, and state legislatures flocked to the opposition, Roosevelt "was taken completely by surprise by the strength of the national reaction."[181] This "national reaction" included that of the press, whose response to the plan was also immediate and overwhelmingly hostile.[182] For example, the *New York Times*, in a February 7, 1937 editorial, blasted the plan's old-age rationale by reminding its readers of the advanced ages of the respected liberal Justices Oliver Wendell Holmes and Louis D. Brandeis.[183] The *Times* further ridiculed the crushing workload rationale, opining that adding Justices more likely would impair—rather than improve—the operation of the Court.[184] The *Times*'s "fundamental objection" to the legislation was that it "would make any President master of the Supreme Court, by the mere process of enlarging it . . . [thus] impair[ing] fundamentally the system of checks and balances on which the American Government is founded and by which the essential liberties of the American people have been preserved."[185] The editorial concluded by declaring that "those members of Congress who vote against [the proposed legislation] . . .

American lawyers responded to this poll question—a total of 70,486 respondents from among the 29,616 ABA-members and the approximately 142,000 non-member attorneys. *See Same Stand*, *supra*, at 338.

For the ABA's and the corporate bar's negative response to the plan, see generally AUERBACH, *supra* note 6, at 195-98. Auerbach concluded that the "Court fight offered anti-New Deal lawyers a rare opportunity to express resentment against the Roosevelt administration without incurring public censure." *Id.* at 196.

[179] BAKER, *supra* note 60, at 74-77; FREIDEL, *supra* note 22, at 276.

[180] BAKER, *supra* note 60, at 74-77.

[181] ALSOP & CATLEDGE, *supra* note 82, at 73.

[182] *Id.* at 71-72. Harold Ickes noted in his diary that "[p]ractically all of the newspapers are against [Roosevelt], even those in the Scripps-Howard chain which supported him during [his] election." 2 ICKES, *supra* note 109, at 74-75. After the friendly Scripps-Howard newspapers came out against the plan, Roosevelt, through Corcoran and Cohen, attempted to win over the chain's Washington bureau chief. This effort was largely unsuccessful. WINFIELD, *supra* note 155, at 134.

[183] Editorial, *Tampering with the Court*, N.Y. TIMES, Feb. 7, 1937, § 4, at 8. Justice Holmes served until age 90; Justice Brandeis retired at age 82. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 405 (Kermit L. Hall ed., 1992).

[184] *Id.*

[185] *Id.*

will prove themselves friends of democratic government."[186]

The administration also was disappointed by the less-than-enthusiastic reception the proposal received from two groups on whose support it was banking heavily: labor and farmers.[187] Both groups were prominent recipients of New Deal favors and overwhelmingly had supported Roosevelt in the 1936 election; he expected their continued support during the court packing fight.[188] Farm leaders, however, became cool to the administration after it refused their early demands for a commitment to certain pet projects as a condition precedent to their support for the bill.[189] As for labor, Congress of Industrial Organizations President John L. Lewis also demanded concessions from the administration in exchange for his blessings.[190]

Not all reaction was hostile. Predictably, certain members of the President's cabinet expressed their support of the plan. Ickes wrote in his diary that the proposed reforms "are fully justified," although he added his belief that "in the end we must have an amendment."[191] Cummings confided in his diary that Ickes and fellow cabinet secretaries Claude Swanson (Navy), Henry Wallace (Agriculture), and Frances Perkins (Labor) all offered the Attorney General words of support and congratulations after Roosevelt's announcement of the proposal.[192] Moreover, some Congressional leaders, such as Representative Maury Maverick, the liberal New Dealer from Texas, quickly backed the legislation.[193] American Federation of Labor President William Green publicly advocated the plan but he was one of the few labor leaders to do so.[194] Nevertheless, Ickes's early prediction that Roosevelt "has a first class fight on his hands"[195] ultimately proved accurate.

Early in the fight, Roosevelt was confident of his ultimate success, notwithstanding the astonishing amount of opposition the plan had engendered. The President believed that the American people supported him,[196] even though events would prove him seriously mistaken. On the day that Roosevelt announced his proposal, Senate Majority Leader Robinson and House Speaker Bankhead both predicted ultimate passage of the legislation.[197] Despite the fact that the administration "had revealed surprising weaknesses"

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[186] *Id.*

[187] BAKER, *supra* note 60, at 86.

[188] *Id.*

[189] *Id.* at 86-87.

[190] *Id.* at 88-89.

[191] 2 ICKES, *supra* note 109, at 64-65.

[192] Cummings Diary, *supra* note 78 (Feb. 5, 1937).

[193] ALSOP & CATLEDGE, *supra* note 82, at 68.

[194] BAKER, *supra* note 60, at 87-88.

[195] 2 ICKES, *supra* note 109, at 74.

[196] ALSOP & CATLEDGE, *supra* note 82, at 78-79; MORGAN, *supra* note 154, at 472.

[197] ALSOP & CATLEDGE, *supra* note 82, at 70.

and the opposition "had shown astonishing strengths," Alsop and Catledge noted that "[t]wo great tactical advantages still helped the President—the Democratic party tie, and the need for a solution to the court problem—and it was pretty clear that unless the second advantage could somehow be taken from him he would win in the end."[198]

After the legislation was sent to Congress, the press began to speculate about whom the President might appoint in the event that he was successful in increasing the Court's size by six Justices. Robert Jackson's name appeared on some of the lists. Almost immediately after the plan's announcement, the *Washington Post* mentioned Jackson as a potential appointee.[199] A week later, the *Philadelphia Inquirer* reported that Jackson was among a handful of persons who were "frequently mentioned in political and other circles" in Washington when conversation turned to possible new appointments to the Court.[200]

Even though Jackson was among those receiving attention as a potential nominee to the Court, his own "initial impressions of the plan were not particularly good."[201] Referring, perhaps, more to the Cummings-inspired rationale than to the legislation itself, Jackson expressed his belief that

> [i]t didn't seem to deal with the problem that was in the minds of most people—the kind of decision that the court had been making. It dealt with the number of decisions . . . . It was dry, statistical, rather uninspiring, and if I felt that way about it, I thought most people would be even less interested.[202]

By his own account, Jackson consistently held to his early view that both the proposal and its rationale "seemed . . . in many respects unsatisfactory."[203]

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[198] *Id.* at 105.

[199] *Among Oft-Mentioned Possibilities for Supreme Court*, WASH. POST, Feb. 6, 1937, at 28. Under this headline, the *Post* carried photographs of five men, including Jackson. *Id.*; *see also The News of the Week Passes in Brief Review*, WASH. POST, Feb. 7, 1937, § 3, at 3 (also listing Jackson among those under consideration for an appointment to the Court).

[200] *Jackson and Miss Perkins*, *supra* note 117.

[201] Jackson Reminiscences, *supra* note 111, at 434.

[202] *Id.*

[203] Jackson Autobiography, *supra* note 109, at 113.

III. JACKSON JUMPS INTO THE FRAY

Robert Jackson was soon instrumental in helping the administration develop a new, more honest rationale for the court legislation. Before then, however, Jackson dutifully went to bat for the President's proposal by preparing an article for the Newspaper Enterprise Association Service ("NEA") for distribution to its member newspapers.[204] The article was one in a series of three made available to NEA's member newspapers, and the series was designed to appear on consecutive days in conjunction with a reader poll on the proposed legislation.[205] Jackson devoted most of his article to a theme that he had sounded recently in his New York Bar Association speech: delays are inherent in a system of government by lawsuit, thus judicial reform is needed to make the government function properly.[206] Jackson concluded by reminding the public that Roosevelt's proposal merely called for "a blood transfusion and a reform of procedure in the interest of avoiding delay and stopping irresponsible use of process."[207]

Soon after writing the NEA article, Jackson wrote to a friend and revealed some of his private thoughts about the President's plan.[208] In his letter, Jackson gave a strong indication of the more straight-forward rationale which he would soon advance in support of the proposal before both the Senate (in his Judiciary Committee testimony on March 11, 1937) and the public (in a series of public addresses in March 1937). To his correspondent, he defended the proposed bill as a legitimate method of addressing court reform, one that was not only "left open by the Constitution" but was

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[204] Robert H. Jackson, *Delays, Lack of Uniform Rules in Present Federal Laws Cited* (Feb. 10, 1937) (clipsheet) (Robert H. Jackson Papers, Box 209, Library of Congress). NEA was a feature service owned by the Scripps-Howard newspaper chain. For a monthly fee, NEA made features available by mail to its members. Telephone Interview with Mack Williams, former publisher of the *Fort Worth News-Tribune* (Aug. 5, 1992).

[205] Jackson, *supra* note 204. One of the other two articles providing background information on the plan was authored by NEA Staff Correspondent Willis Thornton. ABA President Frederick H. Stinchfield was the author of the third article, which opposed the plan. NEA suggested that Thornton's background article run on the first day of the series, Jackson's piece run on the second day, and Stinchfield's run on the third. *See id.* The Scripps-Howard newspaper chain, NEA's owner, supported Roosevelt's 1936 reelection bid, though the chain opposed the court packing plan. *See*, 2 ICKES, *supra* note 109, at 74-75.

[206] Jackson, *supra* note 204.

[207] *Id.* The ultimate use of this article is unclear, as are its origins. The applicable file in the Jackson Papers contains no drafts of the article nor does it contain any newspaper clippings or correspondence which would indicate whether the article was ever published. *See* Robert H. Jackson Papers, Box 209 (Library of Congress).

[208] Letter from Robert H. Jackson to John G. Curtis, Esquire (Feb. 22, 1937) (Robert H. Jackson Papers, Box 79, Library of Congress).

also "well authenticated by history."[209] Jackson noted, however, that he thought "it [was] a mistake to discuss this question in terms of the number of certiorari granted or the condition of the Court's calendar or the age of the judges."[210] Instead, he wrote that he supported the proposed legislation as a means to counter the views of the four conservative Justices, who, "while honest enough, are entirely closed to any argument that this age may advance as to constitutional interpretations . . . . I think . . . they are creating some damn bad precedents which will plague us for years."[211]

In a letter to Roosevelt himself, Jackson candidly expressed these same views.[212] The Assistant Attorney General told the President that the public simply could not be expected to understand and warm to the argument that Supreme Court reform was necessitated by the congested court calendar and the number of writs of certiorari denied.[213] The remedy was to be more honest with the public about the real need for the legislation—namely, the Court majority's restrictive interpretation of the Constitution.[214] "The people are unquestionably ready to support you to the finish if they understand that this is a fight to make the court a contemporary and nonpartisan institution,"[215] Jackson concluded.

Thus, within three weeks of the announcement of the legislation, Jackson had advocated abandoning the disingenuous original rationale asserted by the administration. He urged the President to come clean as to the true reason for the plan—the need to counter the constitutional view of the Court's conservative majority. By now, Jackson certainly knew about the participation of his boss, Attorney General Cummings, not only in formulating the proposal but in devising its less-than-honest rationale. It is unclear, however, whether Jackson directly informed the Attorney General about their difference of opinion. This difference would soon become obvious, as the two men's upcoming Senate Judiciary Committee testimony would reveal. From the standpoint of his career at the Department of Justice, Jackson's candor on this point was a bold move.

Ben Cohen and Tom Corcoran, both loyal Roosevelt advisors, had, from the outset, disagreed with the old-age and over-worked rationales for the proposed legislation.[216] According to Joseph Rauh, Jackson was the first

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[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] Letter from Jackson to President Franklin D. Roosevelt (Feb. 22, 1937) (Robert H. Jackson Papers, Box 79, Library of Congress).

[213] *Id.* Jackson asserted that "nobody ever yet went into a fight over a set of statistics." *Id.*

[214] *Id.* "Instead of talking about cases the court would not take, let us talk about the cases they did take," Jackson advised. *Id.*

[215] *Id.*

[216] Rauh, *supra* note 109, at 96; Interview with Joseph L. Rauh, Jr., Esquire, in

within the administration to agree with them on this important matter.[217] Rauh reported that Jackson met with Cohen and Corcoran in February or early March 1937, possibly in anticipation of Jackson's Senate Judiciary Committee testimony.[218] Rauh was present at this meeting, during which Jackson expressed his agreement with Cohen and Corcoran on the need to switch to a more honest justification for the President's plan.[219] Recalling the fact that Cummings had not yet abandoned the old-age and over-worked rationale, Rauh noted that "it's quite a thing to get the Assistant Attorney General to disagree with the Attorney General. I mean, that's the kind of thing Cohen and Corcoran were so good at; they talked Jackson into it."[220]

The names "Jackson," "Cohen," and "Corcoran" were linked on another front in the court fight. According to several accounts, the three men were among a small number of New Dealers who formed a strategy group to advise the White House on its prosecution of the plan in Congress. Alsop and Catledge reported that this group also included: Charles West, Under Secretary of the Interior; Joseph Keenan, an assistant to Cummings; James Roosevelt, the President's son and confidential secretary at this time; Stephen Early, the President's press secretary; Charlie Michelson, the publicity director of the Democratic National Committee; and Edward Roddan, Michelson's assistant.[221] Alsop and Catledge also noted that Jackson (whom they described as "the agreeable, mild-mannered upstate New Yorker who brought to the assistant-attorney-generalship a remarkable intelligence in a very hard head") was merely "an occasional adviser" to the group.[222] The "principal officers" of this "new general staff" were Corcoran, Keenan, West, and James Roosevelt.[223]

At least three other writers have mentioned the existence of such a strategy group and have placed Jackson in that group. Joseph Lash stated that

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Washington, D.C. (July 10, 1992).

[217] Interview with Joseph L. Rauh, *supra* note 216.

[218] *Id.* Rauh could not recall the date with certainty. *Id.*

[219] *Id.*

[220] *Id.* Rauh may have engaged in a bit of overstatement in asserting that "they talked Jackson into it" because no written evidence indicates that Cohen and Corcoran did—or had to—talk Jackson into rejecting the old-age and over-worked argument. Indeed, Jackson's January 29, 1937, New York Bar Association speech, *see supra* notes 118-34 and accompanying text, already had sounded some of the themes that he would publicly propound in support of the plan, and there is nothing to suggest that either Cohen or Corcoran had any hand in that speech. Rather, Jackson likely arrived independently at the same conclusions as Cohen and Corcoran. With Jackson as an ally, Cohen and Corcoran (who were probably shut out of the bill's planning process), *see supra* note 109 and accompanying text, now had the opportunity to have the Senate hear views much more compatible with their own.

[221] ALSOP & CATLEDGE, *supra* note 82, at 81-86.

[222] *Id.* at 85.

[223] *Id.* at 84-85.

the group consisted of Corcoran, Keenan, Jackson, West, Michelson, Roddan, and James Roosevelt.[224] Lash did not include either Cohen or Early on his list, though he stated that Corcoran "spoke for" Cohen.[225] In his biography of President Roosevelt, Rexford Tugwell wrote that the daily meetings of the White House strategy group included Corcoran, Keenan, West, and Jackson.[226] Eugene C. Gerhart, in his biography of Jackson, stated that Jackson, along with Corcoran, Cohen, West, Keenan, Michelson, and James Roosevelt, were "selected to be on the President's 'general staff' to support the plan."[227]

Nevertheless, considerable evidence indicates that Jackson was *not* a member—or at least not a *regular* member—of this White House strategy group. The best evidence comes from Jackson himself. Years later, in his unpublished autobiography, Jackson denied that he was a member of any such group: "Michaelson [sic] says that I was a member of the board of strategy. In the first place, I doubt that a strategy board ever existed by any designation of the President. And if such did exist, I was not a member of it."[228]

Three other sources support Jackson's assertion that he did not participate in the White House strategy group. Warner Gardner, who was intimately involved with the drafting of the original legislation, opined that "if Jackson said he had no part in the strategy or planning, it would be true."[229] Rather, recalls Gardner, Jackson's role was that of an advocate supporting the bill: he was "one of the most effective public speakers on the topic."[230] Gardner thinks it unlikely that Jackson was part of a strategy team because "he ran rather more to independent action than to teamwork . . . . I doubt that he would have fitted in very comfortably with the planning group of Cohen, Corcoran, Keenan, and James Roosevelt."[231]

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[224] LASH, *supra* note 109, at 296.

[225] *Id.*

[226] REXFORD G. TUGWELL, THE DEMOCRATIC ROOSEVELT: A BIOGRAPHY OF FRANKLIN D. ROOSEVELT 404 (1957).

[227] GERHART, *supra* note 1, at 107. Gerhart does not cite his source for this statement. Gerhart's book is remarkably similar to Jackson's own unpublished autobiography. *Compare id.*, *with* Jackson Autobiography, *supra* note 109. One might infer that Jackson himself was the source but for Jackson's statement to the contrary. *See infra* text accompanying note 228.

[228] Jackson Autobiography, *supra* note 109, at 113-14. Such a board *did* exist, albeit without Jackson's formal or regular participation. *See supra* text accompanying notes 221-27. Jackson also stated that he "did not at any time engage in any lobbying for the bill." Jackson Autobiography, *supra* note 109, at 117.

[229] Interview with Warner W. Gardner, *supra* note 12.

[230] *Id.*

[231] *Id.* Jackson appears to have "fitted in very comfortably" with Cohen and Corcoran, particularly regarding their views towards the plan's rationale. *See supra* notes 216-20 and accompanying text; *infra* text accompanying note 291.

Another source which suggests that Jackson was not a member of such a planning group is Attorney General Cummings's diary.[232] On two occasions, one in May 1937 and one the following month, Cummings recorded in his diary that he attended lunches at the White House to discuss strategy on the court packing legislation.[233] Cummings, Keenan, Michelson, West, Roddan, Corcoran, and the host, James Roosevelt, were present at the May lunch.[234] Cummings, Solicitor General Stanley Reed, James Roosevelt, Gardner, Cohen, and Corcoran attended the June lunch.[235] Significantly, Jackson's name is absent from both of Cummings's lists. On a third occasion, in July 1937, late in the fight over the court packing plan, Cummings wrote that he had a "[l]ong conference" with Cohen, Corcoran, and Keenan about the legislative situation.[236] Once again, Jackson's name is not on the list of those in attendance. Jackson's absence from these three meetings further supports, at least by way of negative inference, Jackson's and Gardner's statements that the Assistant Attorney General was not a member of any White House planning group on the court packing fight.[237]

Perhaps the strongest documentary evidence contraindicating any *regular* participation by Jackson in the White House planning group is that found in James Roosevelt's diary. The younger Roosevelt kept a diary during the early course of the court packing fight (from February 1 to March 17, 1937), long enough to speak extensively about who was in the strategy group. In an entry for February 10, Roosevelt noted that he had spoken with Cummings about "our plans for a steering committee" for the legislation; he also noted that Cummings expressed displeasure over news reports that Cohen and Corcoran were involved in the authorship of the bill.[238] He listed two separate steering committees: one consisting of himself, Corcoran, West, Michelson, Roddan, Keenan, and Early (the very group that Alsop and Catledge listed, minus Jackson and Cohen), and the other consisting of James Landis, William O. Douglas, David Niles, Ray Stevens, Judge Wil-

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[232] *See* Cummings Diary, *supra* note 78 (May 4 and June 22, 1937).

[233] *Id.*

[234] *Id.* (May 4, 1937).

[235] *Id.* (June 22, 1937).

[236] *Id.* (July 19, 1937).

[237] Admittedly, Cummings's diary entries alone are rather slim evidence. Jackson could conceivably have taken part in the strategy board activities generally but merely have missed these three particular meetings. Alternatively, Jackson could have been a group member earlier in the year but dropped out by this time. Certainly, as will become evident in the discussion below, Jackson had virtually ceased to participate in the court fight by the time of the second of these meetings (June 22, 1937) and had, even by the time of the first meeting (May 4, 1937), ceased his *public* efforts on behalf of the plan. *See infra* notes 531-600 and accompanying text.

[238] James Roosevelt, Diary (Feb. 10, 1937) (James Roosevelt Papers, Franklin D. Roosevelt Library) [hereinafter James Roosevelt Diary].

liam Denman,[239] Cohen, and *Jackson*.[240]

During the following month, the President's son mentioned, on numerous occasions, meeting with what he variously termed the "board of strategy," the "strategy board," the "steering committee," the "strategy committee," or simply the "strategy meeting."[241] He never directly indicated who attended the meetings. One might infer that these references were to the first, rather than the second, steering committee listed by Roosevelt, based on the relatively large number of times that he met with one or more individual members of the first group on or about the same date that he noted a meeting of the committee.[242] The two persons most often mentioned in this regard were Corcoran and West.[243] On only two occasions in February and March 1937 did the younger Roosevelt note that he met with Jackson, and on only one of those occasions did he expressly note that the court legislation was discussed.[244] There is a similar dearth of specific reference to other members of the second strategy committee during this time period; indeed, other than Jackson, only Cohen and Niles are listed as having met again with the younger Roosevelt.[245] All of this leads to the conclusion that the second strategy committee did not exist—at least not beyond its initial meeting— in any formal or organized sense and that Jackson was not a member of the more formal first committee.[246]

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[239] For more on the early, influential thinking of Judge William Denman on the administration's court plan, see LEUCHTENBURG, *supra* note 98, at 112-14. Denman, a judge on the Court of Appeals for the Ninth Circuit and an old friend of Roosevelt, lobbied the President and the Attorney General for the creation of several new federal judgeships at all levels. Denman's rationale was the crowded condition of the federal docket—a rationale upon which Cummings would seize in justifying the addition of associate Justices to the Supreme Court. *Id.*

[240] James Roosevelt Diary, *supra* note 238 (Feb. 10, 1937). Roosevelt noted that both committees met that afternoon, but neglected to note what business the second committee (which included Jackson) considered at its meeting. By contrast, he wrote that the first committee dealt with Cummings's upcoming radio address on the court packing bill. *Id.*

[241] *See id.* (Feb. 10-Mar. 3, 1937) *passim*. The variety of names used by Roosevelt in reference to the group suggests that it was unofficial.

[242] *See id.*

[243] *See id.* (Feb. 8-Mar. 3, 1937) *passim*.

[244] *Id.* (Feb. 24, 1937) (noting a meeting at which Cohen and Jackson were present to discuss dealing with wages and hours legislation); (Mar. 2, 1937) (noting a lunch with Jackson and "Judge Wil Clark" to discuss the "court situation").

[245] *See id.* (Feb. 10-17, 1937) *passim*.

[246] The primary strategy group seems to have met far too frequently during this time period for Jackson to have been a regular participant. Unlike Corcoran, West, Keenan, and James Roosevelt, Jackson, as Assistant Attorney General for Antitrust, had many duties in connection with his official position; these duties would have severely limited his availability for frequent group meetings.

Because it appears that Jackson was not a member of any formal strategy team

Group member or not, Jackson was among a number of New Dealers who urged Roosevelt to break his early silence on the plan and directly go to the public with the real reasons for it. After Roosevelt delivered his message to Congress on February 5, 1937, he became strangely and uncharacteristically silent about the bill. Apparently, his strategy was to let the opposition vent and play itself out, after which time he hoped the legislation would carry handily.[247] In fact, the opposition was gaining strength in these early days.[248] Alarmed, Cohen, Corcoran, West, and Jackson, among others, urged Roosevelt to break his silence with one or more "fighting speeches" on the court packing plan.[249] As early as February 23, the more formal White House strategy group discussed the possibility of the President making a radio broadcast or addressing a Democratic Victory Dinner on the

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assembled to advise the White House in the court fight, how is one to explain the fact that Alsop and Catledge, Lash, Tugwell, and Gerhart all have stated that Jackson was a member of such a team? The simplest and most obvious explanation is that all of these accounts are erroneous. Alternatively, one could try to explain all but the Gerhart account in the following manner. (Because Gerhart was not a contemporary observer and failed to disclose his source on this point, it is difficult to know whether this same explanation might apply to his account. The Gerhart matter is especially puzzling given that his book is similar in so many respects to Jackson's autobiography. *See supra* note 227.). Jackson, on a number of occasions, in fact worked closely with Cohen and Corcoran on matters pertaining to the court plan. *See supra* text accompanying notes 216-20; *infra* text accompanying note 291. Indeed, by the beginning of Roosevelt's second term, Jackson had become "an intimate" of Cohen and Corcoran. LASH, *supra* note 109, at 290. Moreover, according to Rauh, Jackson attended one or more court packing strategy sessions in Cohen's office, the substance of which likely were conveyed to the White House strategy group through Corcoran. Interview with Joseph L. Rauh, *supra* note 216. Jackson himself mentioned that he discussed his Senate testimony with Cohen and Corcoran in advance. *See infra* text accompanying note 291.

Furthermore, Jackson, Judge Wilbur Clark, and James Roosevelt had a conversation about the court matter over lunch at the White House on March 2, 1937. *See* Letter from Robert H. Jackson to James Roosevelt (Mar. 3, 1937) (Robert H. Jackson Papers, Box 29, Library of Congress); James Roosevelt Diary, *supra* note 238 (Mar. 2, 1937). Based on facts such as these, as well as the fact that Jackson was a prominent spokesman for the court proposal, Alsop and Catledge, Lash, and Tugwell reasonably, but erroneously, might have concluded that Jackson was a member of the White House strategy board.

In deference to Alsop and Catledge, it should be recalled that they claimed that Jackson was merely "an occasional adviser" to the group, ALSOP & CATLEDGE, *supra* note 82, at 85, although earlier in their account they stated that Jackson was among a cluster of the President's "*principal* advisers and the officers of his troops . . . [who] made a sort of general staff at the White House" in connection with the court bill. *Id.* at 81 (emphasis added).

[247] *See* ALSOP & CATLEDGE, *supra* note 82, at 109-10; FREIDEL, *supra* note 22, at 230.

[248] ALSOP & CATLEDGE, *supra* note 82, at 109-10.

[249] *Id.* at 109.

subject of the Supreme Court.[250] For their part, Cohen, Corcoran, and Jackson took the position that, in any address, Roosevelt candidly should admit that the Supreme Court was the true target of the bill.[251]

Jackson made his case personally to the President. Senate Judiciary Committee Chairman Henry Ashurst had called the Assistant Attorney General to be an early witness in favor of the bill at the upcoming Senate Hearings, and Jackson wanted to clear the appearance with the White House.[252] On February 25, 1937, Jackson and Solicitor General Reed (who was the acting Attorney General during Cummings's absence on vacation) lunched with Roosevelt at the White House, seeking the President's approval for Jackson's appearance.[253] During the meeting, Jackson not only reiterated his disagreement with the old-age and over-worked rationale and his hope of testifying about the real reason for the bill, but also counseled Roosevelt to break his silence and speak directly to the nation about the need for the legislation.[254]

Various White House insiders made suggestions on the content of

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[250] James Roosevelt Diary, *supra* note 238 (Feb. 23, 1937).

[251] ALSOP & CATLEDGE, *supra* note 82, at 108.

[252] Jackson Autobiography, *supra* note 109, at 114-15.

[253] *Id.* at 115; FDR: Diary and Itineraries: Jan. 2-Dec. 31, 1937 (Feb. 25, 1937) (microfiche, card 6 of 14, Franklin D. Roosevelt Library) [hereinafter Roosevelt Diary].

[254] Jackson Autobiography, *supra* note 109, at 115-17; *see also supra* notes 212-15 and accompanying text. Jackson later recalled this discussion with Roosevelt regarding the importance of a presidential address:

> I, in common with many others, felt that there was great danger that sentiment [against the legislation] would crystallize . . . and that if his speech had any influence it must be delivered promptly. In fact, there were indications that sentiment was already tending to be solidified against the plan. Knowing that I had an appointment, Thomas Corcoran and Mr. Oliphant urged me to impress upon him the necessity of speaking at once. I waded into it and told him I was afraid public sentiment would form against him in his absence [during an upcoming vacation]. . . . I pointed out that his original message did very little to arm . . . [his supporters] for a discussion and that before he left he must put in the minds of his lay followers the answers to the questions that were certain to be asked. He made no commitment, but within a half hour after I left the White House it was announced that he would speak on March 9.

Jackson Autobiography, *supra* note 109, at 116-17. According to James Roosevelt's diary, it was actually the day after—not thirty minutes after—Roosevelt's February 25 lunch with Jackson and Reed that the White House announced that there would be a March 9 fireside chat. James Roosevelt Diary, *supra* note 238 (Feb. 26, 1937).

Notably, Jackson referred only to Roosevelt's March 9 fireside chat and not to the March 4 address which the President delivered at the Democratic Victory Dinner in Washington. *See infra* notes 262-71 and accompanying text. Presumably, the fact that Jackson, along with Cohen, Corcoran, West, and others, urged Roosevelt to speak out generally about the court matter prompted the President to make *both* addresses, even though Jackson mentioned only the fireside chat.

Roosevelt's March 4 Democratic Victory Dinner address and his March 9 fireside chat dealing with the proposed court legislation. Jackson stated that he "was among those who supplied suggestions" for the March 9 speech, though he made no claim of involvement in the March 4 address.[255] Samuel Rosenman later claimed to be the drafter of both speeches.[256] Alsop and Catledge reported that it was Cohen and Corcoran who did the primary work on these addresses.[257] Ickes noted in his diary that Corcoran, Richberg, and Rosenman had worked on the March 9 radio address.[258] Cummings wrote that he too discussed the contents of both addresses with the President.[259] The facts indicate that a number of different persons contributed to these two works, though Corcoran (and through him, Cohen), Rosenman, and Richberg most likely were the principal authors.[260]

None of the primary sources, except for Jackson's own account, mention any participation by Jackson in these efforts. Jackson may have "supplied suggestions" for the fireside chat. Yet the dearth of evidence suggests that it would be an overstatement to assert, as Gerhart did, that the Assistant Attorney General "had a large hand in" the March 9 address.[261]

On March 4, 1937, Roosevelt gave the first of his two public addresses concerning the court bill. The occasion was the Democratic Victory Dinner at the Mayflower Hotel in Washington, where some thirteen hundred assembled Democrats paid one hundred dollars per plate for the privilege of dining with the President.[262] Roosevelt's words also were heard, through a telephonic link, by Democrats attending similar dinners that evening in more than eleven hundred cities throughout America.[263] Roosevelt publicly admitted, for the first time, the real impetus for the bill: "[T]he 'personal economic predilections' of a majority of the Court [dictate] that we live in a Nation where there is no legal power anywhere to deal with its most difficult practical problems—a No Man's Land of final futility."[264] Given the Court's attitude, Roosevelt challenged his audience to design specific legislative solutions for the nation's pressing problems (as he had attempted to do) which the Supreme Court's conservative majority would uphold:

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[255] Jackson Autobiography, *supra* note 109, at 117.

[256] SAMUEL I. ROSENMAN, WORKING WITH ROOSEVELT 160 (1952).

[257] ALSOP & CATLEDGE, *supra* note 82, at 110.

[258] *See* 2 ICKES, *supra* note 109, at 95.

[259] *See* Cummings Diary, *supra* note 78 (Mar. 4 and 8, 1937).

[260] James Roosevelt Diary, *supra* note 238 (Feb. 26-28, Mar. 1-2 and 7, 1937). On these dates, James Roosevelt wrote that he worked with Corcoran, Rosenman, and Richberg on one or both of the addresses; on some of these occasions, Harry Hopkins or Franklin Roosevelt himself also met with the group. *See id.*

[261] GERHART, *supra* note 1, at 107.

[262] ALSOP & CATLEDGE, *supra* note 82, at 110.

[263] *Id.* at 111.

[264] 6 ROOSEVELT, *supra* note 56, at 118 (referencing the address of Mar. 4, 1937).

> I defy anyone to read the opinions concerning AAA, the Railroad Retirement Act, the National Recovery Act, the Guffey Coal Act and the New York Minimum Wage Law, and tell us exactly what, if anything, we can do for the industrial worker in this session of the Congress with any reasonable certainty that what we do will not be nullified as unconstitutional.[265]

He concluded with a call for immediate action on his proposed legislation so that such problems could promptly be addressed: "If we would keep faith with those who had faith in us, if we would make democracy succeed, I say we must act—NOW!"[266]

On March 9, 1937, Roosevelt gave the second of his two public addresses on the matter.[267] In his fireside chat, the President again decried the Court's intransigence regarding New Deal legislation, asserting that the Court had upset the balance among the co-equal branches of the federal government.[268] Roosevelt explained his reasons for preferring a legislative solution to the problem (as opposed to a constitutional amendment)[269] and denied that his proposed bill was an attempt to "pack" the Court with "spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided."[270] He concluded by reiterating his

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[265] *Id.* at 119. He made the same point regarding other national problems such as flood and drought control, the generation of electrical power, and aid to farmers. *Id.* at 117, 120.

[266] *Id.* at 121.

[267] This second address also happened to be the first fireside chat of his second term. *Id.* at 122. The address is published in *id.* at 122-33.

[268] Said Roosevelt:

> The Court in addition to the proper use of its judicial function has improperly set itself up as a third House of the Congress—a super-legislature, as one of the justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there.
>
> We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. . . . We want a Supreme Court which will do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men.

Id. at 126. Rauh recalled that the sentence about saving "the Constitution from the Court and the Court from itself" was Cohen's. Interview with Joseph L. Rauh, *supra* note 216.

[269] 6 ROOSEVELT, *supra* note 56, at 130-33.

[270] *Id.* at 129. Roosevelt continued,

> But if by that phrase ["packing the court"] 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

purpose:

> During the past half century the balance of power between the three great branches of the Federal Government has been tipped out of balance by the Courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed. You and I will do our part.[271]

Despite the effort represented by Roosevelt's two addresses, "there were no signs that the speeches had changed the situation in any important fashion."[272] Jackson later admitted that none of the speeches made during the course of the fight did much to convince people to change their minds on the proposal.[273]

On the night of the Democratic Victory Dinner in Washington, Assistant Attorney General Jackson was in Rochester, New York, where he was the featured speaker at the local Democratic Victory Dinner.[274] While the

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> Justices who will not undertake to override the judgment of the Congress on 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.

Id.

[271] *Id.* at 133. The statement about doing "our part" could have been a sly and ironic—or even unconscious—reference to the Court-nullified National Recovery Administration, whose slogan had been, "We Do Our Part."

[272] ALSOP & CATLEDGE, *supra* note 82, at 113.

[273] Jackson Reminiscences, *supra* note 111, at 444-45. Presumably, this opinion extended to Jackson's own speeches, as well.

On the other hand, Ickes believed that Roosevelt's Democratic Victory Dinner address was "the greatest he has ever made, and I think that it will go down in history as one of the outstanding speeches delivered by an American statesman." 2 ICKES, *supra* note 109, at 88. Cummings was equally effusive in his praise for this speech, calling it "gorgeous" and "tremendously effective." Cummings Diary, *supra* note 78 (Mar. 4, 1937). Historian Kenneth Davis's assessment of the speech corroborates the observations of Ickes and Cummings: "[It] was among the very best of his fighting speeches, and his delivery of it . . . was superb." KENNETH S. DAVIS, FDR: INTO THE STORM, 1937-1940, A HISTORY 73 (1993).

Ickes believed the fireside chat was "very effective," although "it didn't rank with the Victory Dinner effort." 2 ICKES, *supra* note 109, at 95. Davis agrees with the assessment of Jackson, Alsop and Catledge, and, indeed, with history itself, that Roosevelt's public appeals on the court plan very "surprisingly . . . failed to work." DAVIS, *supra*, at 75.

[274] *Democrats Told Court Bars Trend*, Rochester Democrat and Chronicle (N.Y.),

Washington dinner of that evening featured Roosevelt and cost one hundred dollars per plate, the Rochester dinner provided merely a live broadcast of the President's remarks.[275] For the price of the Rochester dinner (a mere twenty-five dollars per plate), however, the diners had the opportunity to hear Jackson praise Roosevelt and his proposed court reforms and upbraid both the Republicans and the Supreme Court for their alleged transgressions.[276]

Jackson told the assembled faithful that the massive Democratic victory in November was a rebuke to the opposition press, to big business, to the bar associations, and to the Supreme Court, all of whom had asserted that Roosevelt "was not regardful of the Constitution."[277] Then, he sounded two of the themes that he would repeat, at greater length, during his Senate Judiciary Committee appearance the following week.[278] First, Jackson reminded his audience that strong chief executives, such as Andrew Jackson, Abraham Lincoln, and Theodore Roosevelt, had encountered problems with the Supreme Courts of their day.[279] He suggested that Roosevelt's criticism of the current Court was, by comparison, mild.[280] Next, Jackson touched upon the theme of states' rights.[281] He criticized the fact that the Tenth Amendment issue of "states' rights" had been raised in lawsuits challenging New Deal legislation not by the states themselves but by "private interests who use them to create a no man's land where they escape all government."[282]

The *Rochester Democrat and Chronicle* correctly inferred that the speeches by Jackson and Roosevelt "indicated that the ruling party was unleashing an organized campaign to vindicate its leader's program of court changes."[283] The Assistant Attorney General, who, until this time, was a relatively minor, behind-the-scenes participant in the court fight, had now stepped onto the national stage. During the month of March 1937, he would become one of the administration's leading spokesmen in the debate, delivering a total of five speeches[284] (including the Rochester address) and giv-

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Mar. 5, 1937, at 21 [hereinafter *Democrats Told*].

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *See infra* Part IV.

[279] *Democrats Told*, *supra* note 274, at 21.

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] Gerhart incorrectly reports that Jackson made only two speeches, both in New York City, during the course of the court fight. GERHART, *supra* note 1, at 114. Although Jackson did give the two New York speeches to which Gerhart refers, he also made speeches in Boston and Pittsburgh, as well as the Rochester address. *See infra*

ing important Senate testimony in favor of Roosevelt's plan.

IV. THE SENATE JUDICIARY COMMITTEE HEARINGS

In response to a call from Senate Judiciary Committee Chairman Ashurst, Robert Jackson agreed to appear before the Committee as the administration's second witness in favor of the proposed judiciary bill.[285] Jackson's appearance would follow, by one day, the lead-off appearance by the Attorney General. As discussed above,[286] Jackson went to the White House in order to clear the appearance with the President.[287] According to Jackson, Roosevelt gave his approval, even though Jackson candidly told the President that he could not support the original old-age and over-worked grounds for the plan[288] and that his testimony therefore might differ from that of the Attorney General.[289] Jackson later recalled that Roosevelt thought that this difference "didn't matter and that I should go and give the plan whatever support I could."[290]

Jackson discussed his testimony with Cohen, Corcoran, Oliphant, "and some of the younger men in my own [Jackson's] organization."[291] Although his testimony was not submitted to the White House or to the Attorney General for pre-clearance,[292] one might reasonably assume that the blessings of Cohen and Corcoran carried great weight at the White House (although, probably *not* at the Department of Justice).[293] Jackson's testimony was the extent of his involvement with the Senate Judiciary Committee hearings: he neither aided anyone else in preparing Senate testimony nor solicited others to testify before the Committee.[294]

The Senate Judiciary Committee's hearings on the bill to reorganize the federal judiciary opened on March 10, 1937. The first and only witness that day was Attorney General Homer Cummings.

The Attorney General began his testimony by laying out the "four pillars" upon which, he claimed, the court bill rested: the "reckless use of injunctions" against the operation of federal laws, the presence of "aged or

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Part V.

[285] Jackson Autobiography, *supra* note 109, at 114; *see also supra* text accompanying note 252.

[286] *See supra* text accompanying note 252.

[287] Jackson Autobiography, *supra* note 109, at 115.

[288] *Id.* at 115-16.

[289] Jackson Reminiscences, *supra* note 111, at 437-38.

[290] *Id.* at 438.

[291] Jackson Autobiography, *supra* note 109, at 118; Jackson Reminiscences, *supra* note 111, at 440.

[292] Jackson Autobiography, *supra* note 109, at 118.

[293] As to Cumming's jealousy of Cohen and Corcoran, see *supra* note 109.

[294] Jackson Autobiography, *supra* note 109, at 118.

infirm judges" on the federal bench, the "crowded condition of the Federal docket" with its concomitant delays in the lower courts and heavy burden upon the Supreme Court, and the need for "an effective system for the infusion of new blood into the judiciary."[295] It was clear that Cummings was sticking to the emphasis upon old-age and over-work as justification for the legislation. Indeed, early in his testimony, he cited statistics (at length) in an effort to make these grounds appear credible.[296] Still, in discussing the need for "new blood" in the judiciary, Cummings came close to admitting the real reason for the plan:[297] "We are facing not a constitutional crisis but a judicial crisis."[298] The legislation was not designed to "enslav[e]" the judiciary but merely "to rejuvenate the judicial machinery, to speed justice, and to give the courts men of fresh outlook who will refrain from infringing upon the powers of Congress."[299] Cummings rejected the claim that the Court could be "packed" or that the President was in some way seeking dictatorial powers.[300] Finally, he firmly rejected any resort to a constitutional amendment as a solution to the problem for three reasons: first, the proposed legislation was itself constitutional and necessitated no amendment; second, any amendment would be difficult to draft and might become tied-up indefinitely in the ratification process; third, any amendment would be subject to construction "by the same judges who have brought us to our present pass."[301]

After reading his statement, Cummings answered the committee members' questions. A significant amount of the questioning was hostile. Cummings was on the defensive much of the time on such matters as a constitutional amendment[302] and the over-worked judges rationale.[303] The committee forced him to admit that, should the new appointees turn out to be conservative in judicial philosophy, "we would be just where we are now."[304] Cummings, however, consistently denied that the bill represented an attempt to subvert the independence of the judiciary:[305] "I do not want a subservient judiciary. Nobody wants a subservient judiciary. We want an independent judiciary, but we want a judiciary that will permit the country

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[295] *Hearings on S. 1392 Before the Senate Committee on the Judiciary*, 75th Cong., 1st Sess. 4 (1937) [hereinafter *Hearings*] (statement of Homer S. Cummings).

[296] *Id.* at 5-7.

[297] *Id.* at 8-11.

[298] *Id.* at 9.

[299] *Id.* at 11.

[300] *Id.* at 11-12.

[301] *Id.* at 12.

[302] *See id.* at 13, 15-18, 21-25, 30.

[303] *See id.* at 25-29.

[304] *Id.* at 14. He also conceded that there were no absolute guarantees that this would not come to pass. *Id.* at 30.

[305] *Id.* at 24, 31.

to move."[306] Cummings also expressed his insouciance regarding whether the adoption of the President's plan would establish a precedent that could be seized upon in the future by a conservative administration: "I am not so much worried about precedents as I am about the present situation. I think we should let future generations deal with their own problems in their own way."[307]

Cummings's committee appearance seems, at best, to have had very limited success. He stuck to his increasingly discredited and disingenuous rationale for the proposal, and he came under a barrage of hostile questioning. Kenneth Davis has concluded that many Senators "were angered, [and] few [were] persuaded" by Cummings's testimony.[308] There would be markedly less hostility during Jackson's appearance the next day.

Jackson began his prepared statement by telling the Committee members that his approach would be "a little different" from that of the Attorney General.[309] Whereas Cummings had asserted that the Justices' advanced ages and crushing case loads necessitated the legislation, Jackson cut to what he saw as the heart of the matter: the judicial crisis stemmed from the Court's assumption of a judicial veto over state and federal legislation and from the serious division among the Justices, which impaired both the Court's ability to function and its prestige.[310]

Jackson continued by noting that the Constitution grants to the legislative and executive branches significant responsibility for the Supreme Court's operation: Congress determines the size and the jurisdiction of the Court, the President and the Senate determine the Court's personnel, and Congress and the President are responsible for carrying out the tribunal's judgments and decrees.[311] Because the Constitution grants to Congress "such conclusive powers over jurisdiction . . . of the Court, and over appointment and behavior of its personnel, it is idle to contend . . . that it was ever intended that the Supreme Court should become a supergovernment."[312]

Jackson next engaged in an extended analysis of the six occasions on which Congress had altered the Supreme Court's size.[313] He defended the

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[306] *Id.* at 31.

[307] *Id.* at 35.

[308] DAVIS, *supra* note 273, at 75.

[309] *Hearings*, *supra* note 295, at 37 (statement of Robert H. Jackson).

[310] *See generally id.* at 37-51.

[311] *Id.* at 38-39.

[312] *Id.* at 39.

[313] *Id.* at 40-41. Actually, according to Jackson's testimony, there were seven instances when Congress changed the size of the Court (although the first instance appears to have been unsuccessful): (1) in 1801, there was an attempt to reduce the size from six to five; (2) in 1802, the size was restored to six; (3) in 1807, the size was increased to seven; (4) in 1837, the size was increased to nine; (5) in 1863, the size was increased to

use of such changes in size "as a method of bringing the elective and non-elective branches of the Government back into a proper coordination."[314] "Changing the size of the Court has never deprived it of independence or prestige," Jackson asserted.[315] "It is just as constitutional to add members to keep the Court up with the country as it is to add members to keep the Court up with its business," he declared.[316]

Jackson went into greater detail than had his boss in attempting to explain why the administration's proposed bill was preferable to a constitutional amendment.[317] Jackson, perhaps having taken a lesson from Cummings's rather unsatisfactory experience before the committee, declared that while he was not necessarily opposed to a constitutional amendment in this matter, there were problems inhering in the amendment solution.[318] Any amendment would be subject to interpretation, the effect of which would be impossible to predict at the time of its drafting.[319] Moreover, the current crisis had arisen not over a single decision of the Court but, rather, over a series of its decisions which indicated a certain mind-set on the part of the Court's majority.[320] "You cannot," said Jackson, "amend a state of mind and mental attitude of hostility to exercise of governmental power and of indifference to the demands which democracy attempting to survive industrialism makes upon its Government."[321] "Judges who resort to a tortured construction of the Constitution may torture an amendment," he asserted.[322]

Jackson next propounded the view that judicial power over federal legislation increasingly was assuming the nature of a veto.[323] "The outstanding development in recent constitutional history is the growing frequency with which the Supreme Court refuses to enforce the acts of Congress on the ground that such acts are beyond the constitutional powers of the Congress."[324] He produced a table to back this claim. This table showed, by

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ten; (6) in 1866, the size was decreased to eight; and, (7) in 1869, the size was again increased to nine. *Id.*

[314] *Id.* at 40.

[315] *Id.*

[316] *Id.* The previous day, Cummings briefly discussed the fact that the Court's size had changed six times over the course of the nation's history, thus implying that Roosevelt's proposal was neither an unprecedented nor a dangerous move. *Id.* at 11. Jackson's statement on this point nicely implied the difference between his and the Attorney General's rationale.

[317] *Compare id.* at 42-43, *with id.* at 12.

[318] *Id.* at 42.

[319] *Id.* at 42-43.

[320] *Id.* at 43.

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] *Id.*

decade, the number of congressional acts held unconstitutional by the Court, and it demonstrated that the rate of invalidation had accelerated and become particularly marked during the New Deal, with the result that "[n]early every newly organized institution of the Government rests today under a legal cloud."[325] The earlier presumption of the constitutional validity of legislative enactments had been subtly transformed by the Court, and the power of judicial review inexorably was being transformed into "a veto power over legislation"[326]—a veto which, in contrast to that of the executive, could not be overridden by a congressional vote.[327]

Jackson further asserted that the Court's increasing tendency to review the wisdom of legislation was impairing the states' Tenth Amendment rights.[328] Had the Court allowed the states greater latitude in experimenting with legislation to solve the social and economic problems confronting them, there would be less need for federal action in these areas, Jackson argued.[329] Instead, the Court had used the Tenth Amendment to restrict federal power, ostensibly in favor of the states, but then had proceeded to use the Due Process Clause of the Fourteenth Amendment "to cut down the State power."[330] "The States have no rights which the courts have been bound to respect," lamented Jackson; the states' rights argument "is heard sympathetically only when pleaded by private interests in support of laissez faire economics to create a 'no man's land' beyond the reach of both Federal and State power."[331]

The last major point Jackson made in his prepared statement was that the Court's serious internal division necessitated the addition of new members in order to restore the Court's impaired functioning and prestige.[332] Even though a conservative majority on the Court was in "implacable, although unquestionably sincere, opposition to the use of national power to accomplish the policies so overwhelmingly endorsed by the voters,"[333] neither Congress nor the President "in any manner sought to interfere with the judicial function . . . [nor] failed to obey any decision of the Court."[334]

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[325] *Id.* at 43-44. Jackson ignored the possibility that the increase in the number of laws invalidated by the Court during the New Deal might have been, at least in part, a result of an increase in the number of hastily and sloppily drafted statutes which Congress had passed at the administration's behest.

[326] *Id.* at 45.

[327] *Id.* at 44-45.

[328] *Id.* at 45-47.

[329] *Id.* at 47.

[330] *Id.*

[331] *Id.* Jackson's use here of the term "no man's land" echoed Roosevelt's use of the same phrase during the Victory Dinner speech at the Mayflower the previous week. *See supra* text accompanying note 264.

[332] *Hearings*, *supra* note 295, at 47.

[333] *Id.* at 48.

[334] *Id.* at 47-48.

The fate of governmental policy should not, he opined, turn on the vote of a single Supreme Court Justice: "A state of the law which depends upon the continuance of a single life or upon the assumption that no Justice will change his mind is not a satisfactory basis on which the Government may enter into new fields for the exercise of its power."[335] Furthermore, "there is a serious lag between public opinion and the decisions of the Court," and "sooner or later" every extremely controversial decision of the Court had been overturned, either by war, by amendment, or by the Court's own decision.[336] Jackson noted that even the current Supreme Court could reverse itself, as had its predecessors.[337] Nevertheless, he asserted, the Court's slavish devotion to precedent and unduly restrictive interpretations of the Constitution's General Welfare, Due Process, and Interstate Commerce Clauses had made the likelihood of such a reversal doubtful, given the Court's current composition.[338] The addition of new members to the Court

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Jackson's explicit refusal to question the sincerity of the conservative majority is noteworthy. He later recalled that his testimony made "no attack on the integrity of the court." Jackson Reminiscences, *supra* note 111, at 440.

> In fact, the problem of the court was not lack of integrity, but was its stubborn integrity in adhering to views which it honestly entertained. I had no feeling that the four judges who were being described as the "four horsemen" were anything but passionately sincere men. I had no personal grievance against the court. It had treated me very well in the appearances I had made before it.

Id.

During his combined tenure as chief of the tax and antitrust divisions of the Justice Department, Jackson successfully argued seven cases before the Supreme Court. These were: *McCaughn v. Real Estate Land Title & Trust Co.*, 297 U.S. 606 (1936); *Landis v. North Am. Co.*, 299 U.S. 248 (1936); *United States v. Hudson*, 299 U.S. 498 (1937); *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937); and *Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938).

[335] *Hearings*, *supra* note 295, at 48. Once again, Jackson supported his statements with evidence in the form of a table showing "the persistent and dramatic split among the Justices" with respect to the constitutionality of state and federal social and economic legislation enacted during the course of the New Deal. *Id.* at 48-49.

The "single life" to which Jackson referred was, doubtless, that of Justice Roberts, who had become the swing vote against key New Deal legislation during the Court's most recent terms. *See supra* notes 39-42 and accompanying text.

[336] *Hearings*, *supra* note 292, at 50. For example, *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), was overturned by the adoption of the Eleventh Amendment to the Constitution, and *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), was overturned by both the results of the Civil War and the adoption of the Fourteenth Amendment. A more recent example of this phenomenon is the case of *Brown v. Board of Education*, 347 U.S. 483 (1954), which effectively overruled the Court's earlier decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[337] *Hearings, supra* note 295, at 50.

[338] *Id.* at 50-51. The Court soon did reverse its course without the addition of any

would help to ensure that "the Court could proceed to mark out a less ambitious course for itself" through the exercise of greater judicial restraint and deference to legislative judgment, which would result in "greater harmony within the Government."[339]

The Committee's questioning of Jackson, which immediately followed his presentation, was less hostile than that which Cummings had encountered on the previous day. Democratic Senator Joseph O'Mahoney of Wyoming, an eventual foe of the plan, began the substantive interrogation of Jackson by complimenting the Assistant Attorney General on his presentation.[340] O'Mahoney then secured an admission from Jackson that the administration's bill could not guarantee the elimination of closely split decisions by the Court, though Jackson rejoined that the bill would make such decisions less likely "by bringing to the Court Justices who will have a viewpoint much more nearly that of modern times."[341] Jackson also was forced to admit that the proposed legislation did nothing to prevent the Court from overruling acts of Congress and that, if Congress or the President desired such a result, "some other method" would have to be used.[342] Jackson freely conceded that the bill contained nothing to prevent pursuit of a relevant constitutional amendment and that he personally had no objection to such an amendment as long as the administration's bill was not held up during the amendment process.[343]

As the committee's interrogation proceeded, Jackson disagreed with Nevada Senator Pat McCarran's implication that the addition of six new pro-administration Justices would undermine the public's confidence in the Supreme Court's independence.[344] Later, under questioning about his views on states' rights and the Tenth Amendment, Jackson conceded "the right of the people to create a 'no man's land,'" but questioned "the right to create it by judicial construction."[345] A question from Senator Edward Burke, a Democrat from Nebraska and an opponent of the legislation, forced Jackson to explain a view that he had first espoused in his New York Bar

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new members, but Jackson would have had to have been clairvoyant to have foreseen such a shift.

[339] *Id.* at 51.

[340] *Id.* at 52. O'Mahoney stated that Jackson "should be very much complimented upon the presentation which he has made here this morning. As an analysis of the activities of the Court in usurping legislative functions, I think it would be difficult to imagine a better statement of the facts." *Id.*

[341] *Id.*

[342] *Id.* at 53.

[343] *Id.* at 53, 60. Jackson quickly added that he was speaking only for himself on this point and not "for anyone connected with the administration, or even with the Department of Justice." *Id.* at 53.

[344] *Id.* at 54.

[345] *Id.* at 57.

Association speech in January.[346] Jackson said, "I do not advocate and never have advocated putting laymen on the Supreme Court. I have merely pointed out that the Constitution of the United States does not restrict that tribunal exclusively to lawyers."[347] Further, in response to a related question from Democratic Senator William King, Jackson denied that he made any recommendation that the number of Supreme Court Justices or federal judges be increased; according to Jackson: "It was never my province to make such recommendations."[348]

The Assistant Attorney General tried, with mixed success, to dodge a number of attempts to force him to contradict the Attorney General on the issue of the Supreme Court's workload. In his statement, Jackson, unlike Cummings, had been silent on the issue of whether the number of denials of writs of certiorari were evidence of an overwhelming burden on the Supreme Court and whether the number of writs denied constituted an adequate justification for an increase in the Court's size. Senator William Dieterich, an Illinois Democrat and a supporter of the plan, asked Jackson why he had not discussed the important issue of "whether the Supreme Court and the Federal courts are sufficient in number to properly transact the business before them?"[349] Perhaps Dieterich's question was designed to let Jackson glide quickly over this sensitive matter, for Jackson's response was that Cummings had covered the matter the day before, and "I am trying to avoid duplication."[350] In light of Jackson's distaste for the over-worked rationale, this reply seems less than candid. However, given the fact that this rationale was originally asserted by the administration at the insistence of Jackson's chief, Jackson's answer was an attempt to be suitably diplomatic.

But Senator Burke would not let Jackson off so easily. Burke persisted in pressing Jackson on the old-age and over-worked rationale, forcing Jackson to adhere, somewhat cryptically and uncomfortably, to the administration's line.[351] Continuing to beat this dead horse, Senator Warren Austin, a Republican from Vermont, secured a concession from Jackson that the Court, in exercising its discretion over the granting of writs of certiorari, had attempted to do so fairly, in spite of its "rather unfettered discretion" in this realm.[352] When Senators Austin and Burke persisted,[353] Jackson refused to concede any further points, particularly avoiding Burke's attempt to

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[346] Burke asked Jackson, "Do you feel that men who have had no training in the law are qualified to sit upon the Supreme Court?" *Id.* at 57.

[347] *Id.* at 58; *see supra* notes 118-38 and accompanying text (discussing Jackson's speech and the issue of nonlawyer Justices).

[348] *Hearings*, *supra* note 295, at 60.

[349] *Id.* at 59.

[350] *Id.*

[351] *Id.*

[352] *Id.* at 60.

[353] *Id.* at 60-62.

characterize his answers as "tak[ing] away some of the force of the argument of the distinguished Attorney General yesterday."[354] In the final analysis, the Assistant Attorney General was reasonably successful at avoiding any significant conflict with his boss.

In additional verbal sparring with the Committee, Jackson deflected a potentially damaging admission and attempted to turn it into a source of strength. Texas Senator Tom Connally, another Democratic opponent of the plan, tried to force Jackson to admit that the success of the plan "depends on the kind of judges you are going to appoint under this new authority."[355] Jackson responded, "We do not ask judges to commit themselves to us . . . . I am willing to take the adverse decision of an open-minded judge at any time."[356] Immediately after the Connally—Jackson exchange, Committee Chairman Ashurst and Senator Dieterich jumped in to bolster Jackson on the point that he merely desired six open-minded Justices from a younger generation.[357] Connally's tenacity in pursuing his point was matched both

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[354] *Id.* at 61.

[355] *Id.* at 62. Connally had had a lengthy exchange with Cummings on this point the day before, and the Senator appears to have bested the Attorney General. *See id.* at 30-32.

[356] *Id.* at 62. Connally's further pressing of his point resulted in the following exchange:

> SENATOR CONNALLY: . . . After all, whether this plan works or not will depend upon the men who are selected.
>
> MR. JACKSON: That is very largely true.
>
> SENATOR CONNALLY: Is it not absolutely true?
>
> MR. JACKSON: Yes; I think it is fair to say that it is absolutely true that it will depend on the men appointed.
>
> SENATOR CONNALLY: . . . [I]f we get six judges whose views on the powers conferred by the Constitution are our way, then we can change the judicial interpretation or construction and get a favorable construction where we now may get an unfavorable construction. Is not that true?
>
> MR. JACKSON: Yes; in substance.
>
> SENATOR CONNALLY: Is not that the purpose of it?
>
> MR. JACKSON: If the Constitution is what the judges say it is, then we should have something to say about who the judges are.
>
> . . . .
>
> SENATOR CONNALLY: The thing that interests you is that the Court, as now constituted, does not construe the Constitution like you think it should be construed, and you believe by getting six new judges they might construe it in the way it should be done.
>
> MR. JACKSON: I think one of two things would happen. They would either construe it as I think it should be construed, or I would know that fair judges of my generation think I am wrong.

Id. at 62-63.

[357] *Id.* at 63. Ashurst asserted that Jackson's position was "that the Supreme Court should not be ignorant of or blind to that which is transpiring in the world today," *id.*,

by Jackson's refusal to duck the issue regarding the nature of potential court appointments and by Jackson's skill in parrying Connally's verbal thrusts.

Thus, Jackson's appearance before the Committee ended on a positive note, and he emerged relatively unscathed from the hearings. By maintaining his poise, charm, and wit under fire, Jackson played his position more successfully than had Cummings the day before. In comparing the tenor of Cummings's appearance with that of Jackson's, Warner Gardner stated that "the Cummings statement, directed exclusively to the unfair burden cast on these aged men, was a smoothly crafted bit of hokum, while the Jackson statement, which never mentioned over-work but only judicial tyranny, was a brilliantly effective demonstration of what the matter was really about."[358] Historian Kenneth Davis opined that Jackson "undid some of the damage [caused by Cummings the day before] with a powerful argument frankly couched in terms of 'the real mischief.'"[359] Jackson's testimony before the Senate Judiciary Committee represented the most effective advocacy of the administration's position.

Reaction to Jackson's appearance poured in during the following days. Predictably, he received a number of letters of congratulation from both congressional and administration figures involved in the fight. Immediately after his appearance, Committee Chairman Ashurst sent Jackson a handwritten note which heartily congratulated the Assistant Attorney General on his "superb argument."[360] The bill's House sponsor, Maury Maverick, commended Jackson, saying that his "was by far the best testimony that has been given on the question of the Supreme Court . . . . You faced the issue honestly and squarely—and did it in a very pleasant way."[361] Democratic Senator Key Pittman of Nevada also sent his compliments,[362] and Senator Claude Pepper, the staunch New Deal Democrat from Florida, asked Jackson for a copy of his statement for personal use.[363] Even Senator Arthur Capper, a Kansas Republican who opposed the legislation, congratulated Jackson on his presentation, writing that "I am on the other side of the question but I feel like telling you that you made a remarkably strong statement

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and Dieterich reiterated that "[t]he purpose is to get open, fair-minded, qualified men who will use their own judgment and independence in determining the constitutionality of acts that may be passed by this Congress." *Id.*

[358] Gardner, *supra* note 97, at 102.

[359] DAVIS, *supra* note 273, at 76.

[360] Letter from Senator Henry Ashurst to Robert H. Jackson (Mar. 11, 1937) (Robert H. Jackson Papers, Box 79, Library of Congress).

[361] Letter from Representative Maury Maverick to Robert H. Jackson (Mar. 12, 1937) (Robert H. Jackson Papers, Box 29, Library of Congress).

[362] Letter from Senator Key Pittman to Robert H. Jackson (Mar. 11, 1937) (Robert H. Jackson Papers, Box 29, Library of Congress).

[363] Letter from Senator Claude Pepper to Robert H. Jackson (Mar. 16, 1937) (Robert H. Jackson Papers, Box 29, Library of Congress).

from your standpoint. I have heard many similar comments from others, therefore, I venture to offer my congratulations."[364]

Administration officials proved at least as complimentary. Attorney General Cummings wrote to Jackson immediately after the appearance, noting that "I continue to hear fine reports of the splendid manner in which you performed today. Your friends are very proud of you."[365] On the same day, Cummings confided in his diary that "Assistant Attorney General Jackson appeared today before the Committee and made a very forceful statement and a profound impression."[366] Cummings gave no indication that he found Jackson's testimony contradictory to his own or that he was displeased with anything that Jackson said to the Committee. Democratic Party stalwart Postmaster General Jim Farley also sent Jackson his congratulations on "a splendid job."[367] Former National Recovery Administration Board Chairman Donald Richberg told Jackson,

> I have heard in many different places and from people not altogether friendly that you made a very effective presentation, both in its content and in your manner of handling the subject.
>
> When a man is given a tough assignment, I think he is entitled to hear from as many people as possible that he did a good job, because he is sure to get plenty of criticism from those who disagree with him.[368]

The Assistant Attorney General *did* "get plenty of criticism from those who disagree[d] with him."[369] An individual from Buffalo, New York

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[364] Letter from Senator Arthur Capper to Robert H. Jackson (Mar. 16, 1937) (Robert H. Jackson Papers, Box 29, Library of Congress). At the bottom of the typed letter, Capper added, by hand, the following notation: "But I am still opposed to the increase to 15 judges." *Id.*

Two days later, Jackson replied, saying that he appreciated Capper's letter "very much." "The fact that you are not in agreement with my viewpoint," Jackson continued, "does not detract in the least from the pleasure I received from your congratulations. Regardless of how our views may conflict, I value your good opinion highly." Letter from Robert H. Jackson to Senator Arthur Capper (Mar. 18, 1937) (Robert H. Jackson Papers, Box 29, Library of Congress).

[365] Letter from Attorney General Homer S. Cummings to Robert H. Jackson (Mar. 11, 1937) (Robert H. Jackson Papers, Box 29, Library of Congress).

[366] Cummings Diary, *supra* note 78 (Mar. 11, 1937).

[367] Letter from Postmaster General James Farley to Robert H. Jackson (Mar. 12, 1937) (Robert H. Jackson Papers, Box 29, Library of Congress).

[368] Letter from Donald Richberg, former chairman of the NRA board, to Robert H. Jackson (Mar. 25, 1937) (Robert H. Jackson Papers, Box 29, Library of Congress).

[369] *Id.*

wrote that he would "far rather rely on the judgment of the 'nine old men' than on that of Franklin Delano Roosevelt, Jim Farley, your esteemed Chief [Cummings] or yourself—or all of you."[370] Another man angrily informed Jackson that

> Mr. Roosevelt is trying to put something over on the people. They did not ask for, and they do no want, his reforms. I defy him to put it to a national vote and I'll bet you $100 that such a vote won't disclose that the people want his court reforms. He is merely trying to cram something down their throats, which is a type of Americanism worthy of such characters as Benedict Arbold [sic] of the Revolution. THE NEW DEAL IS NOT ON THE LEVEL. NEVER WAS. NEVER WILL BE![371]

Still, at the end of the month, Johnston Avery, the office manager of Jackson's Antitrust Division, was able to inform his boss that the letters received in response to Jackson's Senate appearance were running approximately twelve-to-one in favor of Roosevelt's plan.[372]

Further evidence of the positive reception and effects of Jackson's Senate Judiciary Committee testimony came from Henry A. Wallace, the Secretary of Agriculture. Years later, Wallace recalled that "the best argument for the legislation was that put out by Robert Jackson . . . . He put out a *beautiful* argument."[373] Although Wallace would have preferred a constitutional amendment to a mere change in the Court's personnel, he "supported the President in the approach which he took, for loyalty reasons, and because Solicitor General [sic] Robert Jackson had convinced [Wallace] to some extent by his presentation that it was a good approach."[374] At first doubtful

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[370] Letter from J.B. McCreary to Robert H. Jackson (Mar. 13, 1937) (Robert H. Jackson Papers, Box 29, Library of Congress).

[371] Letter from Thomas Elder to Robert H. Jackson (Mar. 13, 1937) (Robert H. Jackson Papers, Box 79, Library of Congress).

[372] Memorandum from Johnston Avery, office manager of the Department of Justice Antitrust Division, to Robert H. Jackson (Mar. 28, 1937) (Robert H. Jackson Papers, Box 79, Library of Congress). Avery did note, though, that he had not "catalogue[d] the crank letters." *Id.* One might well wonder just what constituted a "crank" letter in Avery's mind—and whether the inclusion of such letters in Avery's tabulation would have altered significantly the tally that he reported to Jackson.

[373] Reminiscences of Henry A. Wallace 461 (1951) (Oral History Collection of Columbia University).

[374] *Id.* at 469. Wallace erroneously believed Jackson was the Solicitor General at the time of the court fight. Stanley Reed held that position at that time; Jackson was not confirmed as Reed's successor until March 1938, after Reed was appointed to the Supreme Court. *See* GERHART, *supra* note 1, at 142-43.

of the President's plan, Wallace found Jackson's arguments "so convincing that I [Wallace] became quite sold on it and went down to Richmond, Virginia, and made a speech for it which was broadcast."[375]

Jackson's Senate appearance—indeed, all of Jackson's efforts in favor of the court plan—was something more than a mere political act: as Wallace's response indicates, Jackson's efforts were those of a capable advocate. Jackson was acting much as any skillful lawyer would act on behalf of a client. In this particular matter, the client happened to be the Roosevelt administration.

Press coverage of Jackson's appearance before the Judiciary Committee was widespread, and the reaction was largely favorable, even from some newspapers which opposed the plan.[376] Writing in the *New York Herald-Tribune*, Joseph Alsop was complimentary:

> Mr. Jackson's presentation of the Administration side in the court controversy was both one of the ablest and most eloquent made to date, and the frankest in its statement of the plan's basic aims. He spoke without equivocation of the court's conservative majority's "implacable opposition to the use of national power so overwhelmingly indorsed by the voters" and made it clear that from his point of view the main object of the President's court plan was to overcome that opposition.[377]

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[375] Reminiscences of Henry A. Wallace, *supra* note 373, at 461.

[376] The nation's daily newspapers generally opposed Roosevelt's court plan. GRAHAM J. WHITE, FDR AND THE PRESS 91 (1979). Such major dailies as the *New York Times*, the *New York Herald-Tribune*, the *Chicago Tribune*, the *Washington Post*, the *Baltimore Sun*, the *Philadelphia Inquirer*, the *New York Sun*, and the *Washington Star* all opposed the proposal. *Id.* at 76-77 tbl. 1; Editorial, *Editorial Comment From Nation's Press on Roosevelt Plan to Enlarge Supreme Court*, N.Y. HERALD-TRIB., Feb. 10, 1937, at 10 [hereinafter *Editorial Comment*]; *The Court Fight*, WASH. STAR, Feb. 9, 1937; *Not a Partisan Issue*, N.Y. SUN, Feb. 10, 1937. For a discussion of the *New York Times*'s editorial opposition, see *supra* text accompanying notes 183-86.

The opposition of the influential *New York Times* must have been particularly unpleasant for the administration, because the *Times*—unlike the *New York Sun*, the *Chicago Tribune*, and the *Baltimore Sun*—had supported the Democrats in the 1936 election. *See* ARTHUR M. SCHLESINGER, JR., THE POLITICS OF UPHEAVAL 633-35 (1960); WHITE, *supra*, at 76-77 tbl. 1. The *Philadelphia Record* was virtually alone among the major dailies discussed in this Article in its general support for Roosevelt's proposal to increase the size of the Supreme Court. *See Editorial Comment*, *supra*, at 10.

[377] Joseph Alsop, Jr., *Congress's Duty to Keep Court "Up with Country," Senate Hearing Is Told*, N.Y. HERALD-TRIB., Mar. 12, 1937, at 1. In *The 168 Days*, his book about the court fight published the following year, Alsop, writing with Turner Catledge, was even stronger in his praise of Jackson's appearance, calling the presentation "the most convincing defense of the bill offered during the whole court fight." ALSOP &

In a column that was generally hostile to the plan, G. Gould Lincoln also took a favorable view of Jackson's effectiveness, commenting that Jackson "presented the most convincing statement that has yet been advanced in any quarter in support of the President's court bill."[378] One reporter noted that "it's even suggested that the young upstate New York lawyer made out a more convincing case for the plan than his White House boss himself."[379]

Other reporters also were laudatory. Robert S. Allen of the *Philadelphia Record* reported that Jackson's "scintillating argument . . . drew open expressions of admiration from opposition members of the Senate Judiciary Committee."[380] "So penetrating and conclusive was Jackson's presentation," continued Allen, "that the opposition sharpshooters displayed reluctance to badger him. It was apparent from their attitude that they felt they had run up against an adversary who was too much for them."[381] Writing for the *New York Times*, Turner Catledge observed that during the questioning following his statement, Jackson "rode calmly through the barrage, never conceding more than minor points to the opposition."[382] "Open clashes which marked Attorney General Cummings' Wednesday brush with the opposition were lacking, as the witness, adopting a conciliatory attitude, parried questions lightly," reported Robert Albright in the *Washington Post*.[383]

Not all of the coverage was complimentary, for Jackson had not succeeded in charming all of the opposition press. Chesley Manly of the *Chicago Tribune* reported that Jackson had told the Senate Judiciary Committee "that the Supreme Court must be 'brought into line with the people'" and that this suggestion "supported the thesis of opposition senators that [the court bill] will clear the road for dictatorship."[384] Writing in the *Philadelphia Inquirer*, William Murphy characterized the Committee's response to Jackson's testimony as "amazed" and theorized that the members "were

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CATLEDGE, *supra* note 82, at 123. Reflecting late in his life, Alsop remembered the court fight as "the greatest single political drama I have witnessed in Washington in over half a century of reporting." JOSEPH W. ALSOP & ADAM PLATT, "I'VE SEEN THE BEST OF IT": MEMOIRS 115 (1992).

[378] G. Gould Lincoln, *The Political Mill*, WASH. EVENING STAR, Mar. 12, 1937.

[379] Frank W. Wile, WASH. EVENING STAR, Mar. 15, 1937.

[380] Robert S. Allen, *Jackson Refutes "Dangers" in Court Reform*, PHILADELPHIA REC., Mar. 12, 1937, at 1.

[381] *Id.*

[382] Turner Catledge, *Jackson Urges Congress End Supreme Court Veto on Economic Legislation*, N.Y. TIMES, Mar. 12, 1937, at 1.

[383] Robert C. Albright, *Supreme Court Majority Called Hostile, States Right Opposition Assailed at Hearing of Senate*, WASH. POST, Mar. 12, 1937, at 1.

[384] Chesley Manly, *Tells of Hopes for High Court Change in View*, CHI. DAILY TRIB., Mar. 12, 1937, at 1.

caught so much off balance that opponents of the Roosevelt bill were unprepared to question Jackson as vigorously as had been anticipated."[385] In an editorial, the *New York Herald-Tribune*, although acknowledging that Jackson's pleas were "frank and calm and reasoned" and agreeing that there was "nothing sacrosanct about" the Court's membership, took exception to "[t]he idea that a majority of the [C]ourt [has] become increasingly conservative and [has] stretched their findings and the Constitution to halt the New Deal."[386] Instead, the *Herald-Tribune* saw the problem resting not with any "hardening of judicial arteries, but [with] the megalomania of a revolutionary administration," and it rhetorically asked how, "[u]nder Mr. Roosevelt, hot for change and avid for power, . . . could such a packing be anything but fatal?"[387] The *Philadelphia Inquirer* disdainfully opined that Jackson and Cummings "added little of constructive merit to the momentous debate when they appeared before the Senate Judiciary Committee."[388] And the *Baltimore Sun* suggested that

> [i]f Mr. Jackson really means that he and his associates would trust judicial decisions adverse to them if the majority justices were young enough, it would appear that the class war has shifted into a combat between youth and age, and that, in the view of youths of 40-odd, even nonsense is acceptable if it proceeds out of the mouths of babes.[389]

Some of the most trenchant criticism of Jackson's Senate testimony came from political pundit and columnist Walter Lippmann. Lippmann, whose early lukewarm reaction to Franklin Roosevelt's presidential candidacy in 1932 included the now-famous judgment that the candidate was "a pleasant man who, without any important qualifications for the office, would very much like to be President,"[390] had publicly supported Roosevelt against Herbert Hoover, though "he was not happy with the choice."[391] The President-elect's ideas and actions during the 1932-33 interregnum and his decisive deeds of the First Hundred Days won Lippmann's fuller sup-

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[385] William C. Murphy, Jr., *Shuffling Court Is Congress Duty, Jackson Asserts*, PHILADELPHIA INQUIRER, Mar. 12, 1937. A careful reading of the record of Jackson's appearance gives no indication that the Committee members were either "amazed" or caught "off balance" and thus gave Jackson an easier time during the questioning.

[386] *First Burn Down the House*, N.Y. HERALD-TRIB., Mar. 13, 1937, at 14.

[387] *Id.*

[388] *What About 8-to-7 Decisions?*, PHILADELPHIA INQUIRER, Mar. 12, 1937.

[389] Editorial, *Youth Politics*, BALT. SUN, Mar. 13, 1937.

[390] JOHN LUSKIN, LIPPMANN, LIBERTY, AND THE PRESS 94 (1972) (quoting Lippmann).

[391] RONALD STEEL, WALTER LIPPMANN AND THE AMERICAN CENTURY 295-96 (1980).

port, which lasted for more than two years.[392]

Lippmann, however, disliked "a planned society," believing it incompatible with political freedom.[393] Thus, by the fall of 1935, with the Second New Deal well under way,[394] the columnist had begun to sour on Roosevelt and his programs.[395] In the 1936 election, Lippmann broke ranks with liberal colleagues and endorsed Republican candidate Alfred Landon for President, though he admitted that the choice was merely the lesser of two evils.[396] In writing about Lippmann's ultimate perspective on the New Deal, his biographer, Ronald Steel, states that the columnist's

> qualifications about some measures and his later repudiation of others were such that no New Dealer could have considered him a true believer. Yet his fears that a cavalier attitude toward the law might play into the hands of an indigenous American fascism were deeply felt and not without some chilly European examples. Unlike many liberals, who were willing to swallow some very questionable means to achieve morally desirable ends, he abhorred dictatorship and demagoguery so much that he was less sensitive than he might have been to economic injustice and inequality. He saw the New Deal, not as a touch-and-go process of experimentation, but as a step toward authoritarianism.[397]

Given his increasing antipathy toward the New Deal and his support of Landon in 1936, it should have come as no surprise that Lippmann strongly opposed Roosevelt's court plan. Indeed, Lippmann "led the pack" in opposition.[398] Beginning in February 1937 and continuing for the next five months, Lippmann wrote thirty-seven columns denouncing the plan, some of which warned the reading public that if the administration succeeded in mastering the Supreme Court, the free press would be its next target.[399] In a June 1937 speech, Lippmann went so far as to label the court plan "a

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[392] *Id.* at 301-02, 310.

[393] *Id.* at 309, 311-12. This view helps to explain Lippmann's criticism of the NRA, whose 1935 death at the hands of the Supreme Court "was a boon in disguise" and a relief to the administration, as far as Lippmann was concerned. *Id.* at 311.

[394] The so-called "Second New Deal" was marked by the flurry of legislative enactments of 1935, which included the Wagner Act, the Social Security Act, the Public Utilities Holding Company Act, the Wealth Tax Act, the Guffey Act, and rural electrification and banking legislation. *See* LEUCHTENBURG, *supra* note 6, at 150-62.

[395] STEEL, *supra* note 391, at 315-17.

[396] *Id.* at 317-19.

[397] *Id.* at 322.

[398] *Id.* at 319.

[399] *Id.*

bloodless, deviously legalized *coup d'etat.*"[400] Although Lippmann's hostility toward the President's proposal placed him squarely within a large group of liberal opponents, his position on this issue marked him "as an implacable reactionary in the eyes of New Deal loyalists."[401]

In his March 16, 1937, *Today and Tomorrow* column, Lippmann challenged Robert Jackson's Senate testimony on a number of points.[402] Lippmann began by conceding that Jackson was "surely one of the ablest and most engaging" of "the younger men who have come to Washington under President Roosevelt."[403] Lippmann then signaled his disagreement with the conclusion which Jackson had drawn from the fact that the Constitution makes Congress and the President responsible for maintaining the Judiciary:[404] "I cannot believe that Mr. Jackson really thinks that because the Constitution makes Congress responsible for maintaining a judiciary, it meant to make the judiciary responsible to Congress."[405]

In fairness to Jackson, one should note that Lippmann's characterization of Jackson's conclusion is inaccurate. Jackson never testified that the Constitution "meant to make the judiciary responsible *to* Congress."[406] Instead, Jackson had asserted that, in light of the Constitution's grant to Congress of the power over the jurisdiction and (in conjunction with the President) the personnel of the Supreme Court, "it is idle to contend . . . that it was ever intended that the Supreme Court should become a supergovernment."[407] Jackson's assertion that there was no constitutional intent that the Supreme Court "become a supergovernment" is not tantamount to the view that the Constitution intended the judiciary to be "responsible to Congress." The latter premise does not inevitably follow from the former.

Lippmann also mocked Jackson's assertion that a "state of law which depends upon the continuance of a single life, or upon the assumption that no justice will change his mind, is not a satisfactory basis" on which to run the government.[408] Jackson "wants to obviate . . . not close decisions but decisions with which he does not agree," Lippmann rejoined.[409] Jackson had specifically responded to the grilling from Senator Connally on this point by declaring, "I am willing to take the adverse decision of an open-

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[400] LUSKIN, *supra* note 390, at 105 (quoting Lippmann).

[401] STEEL, *supra* note 391, at 320-21.

[402] Walter Lippmann, *Today and Tomorrow: Another Official Defense*, N.Y. HERALD-TRIB., Mar. 16, 1937, at 23.

[403] *Id.*

[404] *Id.*

[405] *Id.*

[406] *Id.* (emphasis added); *see supra* text accompanying note 405.

[407] *Hearings*, *supra* note 295, at 39; *see supra* text accompanying note 312.

[408] Lippmann, *supra* note 402, at 23 (quoting Jackson).

[409] *Id.*

minded judge at any time."[410] Lippmann failed to report fully Jackson's testimony on this point, but one hardly can argue with the notion that elimination of disagreeable court decisions was indeed the motivating force behind the administration's plan.

Lippmann made two additional points in connection with the "continuance of a single life" issue. First, he stated that "Jackson is living in a glass house and should not throw stones at the Supreme Court" because so much power depended on, and was already vested in, the life of one single individual, Franklin D. Roosevelt; thus, Jackson "ought to be a trifle embarrassed when he talks about how unsatisfactory it is that so much should depend on one life and one opinion."[411] This argument, although a bit of a red herring, does serve to highlight Lippmann's strong antipathy not only to the court plan but to the presidential pique that was a motivating force behind it. Second, Lippmann averred that close decisions by the Supreme Court meant that there was reasonable doubt as to the proper interpretation of the Constitution; the answer to such doubt was not "to pack the [C]ourt" but instead "to submit the question to the people for a clarifying decision."[412] The wisdom of Lippmann's suggestion is debatable. If he meant that close constitutional questions should be put to a national vote or otherwise be subjected to the amendment process, the impracticability of such a suggestion is self-evident.[413]

Lippmann's concluding point hit Jackson's argument at one of its most vulnerable spots. The columnist suggested that the Assistant Attorney General was wrong to assert that conservative administrations would have no need to pack the Supreme Court because such administrations would tend to pass little legislation that would need protection from that tribunal.[414] Lippmann responded that conservative governments, when "aroused . . . can pass more laws than Mr. Jackson can shake a stick at."[415]

> [I]f liberals habituate the people to the idea that their "mandate" must be carried out rudely and ruthlessly and—now—then still ruder and more ruthless movements will be encouraged to carry out their mandates ever more rudely and ruthlessly.
>
> And then Mr. Jackson and those who think this is liberal-

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[410] *Hearings*, *supra* note 295, at 62; *see supra* text accompanying note 356.

[411] Lippmann, *supra* note 402, at 23.

[412] *Id.*

[413] Lippmann had, for example, advocated amending the Constitution in order to liberalize the Court's interpretation of the Commerce Clause. STEEL, *supra* note 391, at 319.

[414] *See* Lippmann, *supra* note 402, at 23. Lippmann's characterization of Jackson's remark on this point is accurate. *See Hearings*, *supra* note 295, at 58.

[415] Lippmann, *supra* note 402, at 23.

> ism will soon find that they have been hoist by their own petard.[416]

Clearly, one of the reasons Lippmann feared the administration's bill was the precedent it could furnish to an unscrupulous future administration which also desired to tamper with the make-up of the Supreme Court. Jackson's assertion that the bill would not serve as such a precedent was one of the most logically flawed aspects of his Committee testimony.[417] Successfully packing the Court in 1937 would have served as an important precedent. In fact, in his attempt to bolster his case, Jackson had cited the six previous instances in which Congress had changed the size of the Supreme Court.[418]

A few days after his Judiciary Committee appearance, Jackson related some of his hopes for the President's proposal, as well as some of his own thoughts about his appearance, to his Jamestown friend, colleague, and frequent correspondent, attorney Ernest Cawcroft. "I have been much gratified at the reception which the press, generally, has given to my effort, and the cordial treatment that I had from members of the Committee on both sides of the question," Jackson wrote.[419] He postulated—perhaps wishfully—that "there seems to be a breakdown of the intellectual side of the opposition, leaving them nothing but an emotional persistence. That is indicated by the cross examination of the Attorney General and myself, which served very little purpose except to give us the chance to make additional speeches."[420]

On the subject of liberal opposition to the court proposal, Jackson expressed confidence that "[m]ost of the liberals . . . will line up all right eventually. As Bob LaFollette said, one of the chief benefits of the President's plan is to find out who the liberals really are."[421] History was to belie Jackson's confidence about the reemergence of liberal support for the plan; the fact that a goodly number of Senate liberals remained opposed to the plan proved fatal for the legislation.

For two weeks, the administration presented its case to the Senate Judiciary Committee, while the opposition sought to slow down the testimony.[422] Then, at a time when fewer than half of the administration's

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[416] *Id.*

[417] It should be recalled that the committee had challenged Cummings, too, on this issue. *See supra* text accompanying note 307.

[418] *See supra* notes 313-16 and accompanying text.

[419] Letter from Robert H. Jackson to Ernest Cawcroft, Esquire (Mar. 16, 1937) (Robert H. Jackson Papers, Box 79, Library of Congress).

[420] *Id.*

[421] *Id.*

[422] ALSOP & CATLEDGE, *supra* note 82, at 124. Among the others testifying on behalf of the legislation were political scientists Edward S. Corwin and Charles Grove Haines, American Federation of Labor President William Green, and St. Louis *Star-*

witnesses had appeared before the Committee, the opposition made the following proposal: the proponents should take another week, then give the opponents two weeks, with the two sides thereafter alternating their presentations on a weekly basis.[423] The opponents' goal was to drag out the hearings in an effort to let their side gather strength by exposing the bill as a bald attempt by the President to secure a compliant judiciary.[424] Administration aides, led by Corcoran and Keenan, refused to accept the opponents' proposition.[425] Instead, they unsuccessfully tried to persuade Committee Chairman Ashurst to conclude the hearings quickly.[426] When Ashurst refused, telling the administration's operatives that there was nothing to fear from full hearings,[427] the administration made the tactical decision to rest its case, even though it was incomplete, in order to avoid being trapped in a filibuster.[428] The hearings were of minimal value to the administration, for "[n]o new friends" were won as a result.[429]

The opposition immediately began the presentation of its case, parading almost seventy witnesses before the Committee in a show that lasted four weeks—twice as long as the administration's presentation.[430] Senator Wheeler led off this parade, presenting to a stunned audience a letter from Chief Justice Hughes which convincingly refuted the administration's charges that the Court was overworked and could not keep abreast of its cases.[431] Hughes, who had been willing to appear in person before the Committee until Justice Brandeis opposed the idea, wrote that the addition of more Justices actually would make the Court less efficient.[432] The letter's concluding paragraph implied that the other Justices completely agreed with Hughes.[433]

Times Editor Irving Brant. BURNS, *supra* note 62 at 301.

[423] ALSOP & CATLEDGE, supra note 82, at 124.

[424] BAKER, *supra* note 60, at 150-51.

[425] *Id.* at 149; ALSOP & CATLEDGE, *supra* note 82, at 124.

[426] BAKER, *supra* note 60, at 152.

[427] *Id.*

[428] ALSOP & CATLEDGE, *supra* note 82, at 124. Ashurst was a secret opponent of the legislation and believed that time was its enemy. BAKER, *supra* note 60, at 152.

[429] BAKER, *supra* note 60, at 149.

[430] *Id.*

[431] ALSOP & CATLEDGE, *supra* note 82, at 124-27; BAKER, *supra* note 60, at 153-59; MILLER, *supra* note 56, at 400.

[432] BAKER, *supra* note 60, at 153-54, 158.

[433] Hughes wrote:

> On account of the shortness of time I have not been able to consult with the members of the Court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

Id. at 159 (quoting Chief Justice Charles Evans Hughes). The wording of this last para-

The Hughes letter provided a great boost to the opposition.[434] Jackson believed that the letter "pretty much turned the tide" against the President's proposal.[435] Never "within memory had a chief justice taken an active role in a public controversy."[436] Roosevelt was furious with Hughes, who, the President believed, had unforgivably played politics in the matter, and had outfoxed the administration to boot.[437] Nothing else which transpired during the four weeks of opposition testimony approached the Hughes letter in either drama or impact.

V. JACKSON RETURNS TO THE STUMP

On March 17, 1937, while the administration was still presenting its case to the Senate Judiciary Committee, Robert Jackson returned to the hustings, flying to Boston to deliver another address in favor of the bill. Jackson's appearance at a dinner given by the Charitable Irish Society of Boston was not planned; originally, Harold Ickes was slated to make a pro-administration pitch to the group, but illness prevented his attendance.[438] Also speaking that night was Martin Conboy, whom Ickes described as "an old friend of the President's who was supposed to speak along [a]dministration lines."[439] Surprisingly, Conboy attacked the President's plan.[440]

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graph may have been intended to lead observers to conclude that all of the Justices concurred in Hughes's statements. *Id.* Only Brandeis and Van Devanter, however, had been consulted about the letter beforehand; Brandeis was instrumental in helping Senator Wheeler secure it. *Id.* at 153-56. Baker notes that not all of the Justices fully agreed with the content of the letter; Justice Stone later said that he opposed portions of it. *Id.* at 160-62.

[434] *Id.* at 159-60. According to Alsop and Catledge, the letter's effect "was to show up for good and all as utterly hollow the smooth propositions with which the President had offered his bill." ALSOP & CATLEDGE, *supra* note 82, at 127.

[435] Jackson Reminiscences, *supra* note 111, at 441.

[436] MILLER, *supra* note 56, at 400.

[437] ALSOP & CATLEDGE, *supra* note 82, at 127; BAKER, *supra* note 60, at 162; MILLER, *supra* note 56, at 401. Roosevelt largely had himself to blame for much of the effectiveness of the Hughes letter. According to Harold Ickes, the letter pointed up the weakness of the original old-age and over-worked rationale for the bill, which, though since abandoned, allowed Hughes to "fight his skirmish where we were the weakest." 2 ICKES, *supra* note 109, at 104. Even Ickes admitted that the letter represented "good tactics" on the part of the opposition. *Id.* at 103-04.

[438] 2 ICKES, *supra* note 109, at 75, 97-98. The group had originally asked FDR to speak at the dinner, which was to commemorate its 200th anniversary, but the President asked Ickes to appear in his place. *Id.* at 75.

[439] *Id.* at 97.

[440] *Id.* The *Boston Herald* reported that Conboy, "once a Roosevelt intimate, delivered a scathing attack on the national administration." *Conboy Blast Against Roosevelt Stirs Banquet of Irish Society*, BOSTON HERALD, Mar. 18, 1937, at 1.

Given such a turn of events, Jackson's defense of the court plan received a "mixed reception" at the Boston banquet.[441] Ickes noted that Jackson was "given a pretty rough time" and that there was even "subdued booing at times."[442]

Because he had not expected to attend the dinner, Jackson had not prepared a speech; thus, his remarks were extemporaneous.[443] Judging from the report in the *Boston Globe* (which contained only limited excerpts of the remarks), Jackson largely drew upon the themes he had developed during his Senate appearance and his New York Bar Association address.[444] "What we have now is only the old struggle that democracy may live free from the dead hand of the past," he told his audience, concluding that "[w]e're going to keep a rendezvous with destiny."[445] In light of the adverse circumstances surrounding the appearance, Jackson's performance in Boston was the best that could be expected; he dutifully represented the administration under difficult conditions.

One week later, Jackson traveled to New York City, where, on March 24, 1937, he spoke in favor of the court plan before two different audiences. Addressing the New York Economic Club at the Hotel Astor, Jackson defended the proposal against an assault from Senator Burke, who made the case for the opposition that evening.[446] Later that night, Jackson joined Senators Robert LaFollette and Hugo Black in speaking in support of the plan before a mass meeting of the American Labor Party at Carnegie Hall.[447] Local newspapers covered both events.[448]

The New York Economic Club address was delivered to a conservative group, most of whom, no doubt, opposed the President's proposal to alter the size of the Supreme Court.[449] Jackson began his case by attempting to paint Roosevelt's proposal as a moderate one, calling for no modification of

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[441] *FDR Praises Deeds of Irish*, BOSTON DAILY GLOBE, Mar. 18, 1937, at 1.

[442] 2 ICKES, *supra* note 109, at 97. Ickes wrote that "this was the reception that had been prepared for me" and, "considering the state of my nerves, it was just as well that I didn't go to Boston." *Id.* at 97-98.

[443] Letter from Robert H. Jackson to Philip J. O'Connell (Mar. 22, 1937) (Robert H. Jackson Papers, Box 33, Library of Congress).

[444] *FDR Praises Deeds of Irish*, *supra* note 441, at 1.

[445] *Id.*

[446] *Burke Assails Court Plan as Blow at People*, N.Y. HERALD-TRIB., Mar. 25, 1937, at 7.

[447] *Id.*

[448] *See, e.g.*, *Burke Attacks Court Change*, N.Y. SUN, Mar. 25, 1937, at 3; *Labor Strife Laid to Supreme Court*, N.Y. TIMES, Mar. 25, 1937, at 21.

[449] Jackson acknowledged this fact in his opening sentence by forthrightly declaring, "I shall address you as conservatives, who will probably disagree with most that I say." Robert H. Jackson, Address to the New York Economic Club 1 (Mar. 24, 1937) (Robert H. Jackson Papers, Box 33, Library of Congress) [hereinafter Jackson, New York Economic Club Address].

the Court's powers or independence; Jackson asserted that the plan rested between what he characterized as the liberal "extreme" of a constitutional amendment to abolish judicial review and the laissez-faire conservative extreme, which "want[s] nothing done to the Court" which "stand[s] as a buffer" against the New Deal.[450]

Jackson explained how the President's plan would work, saying that "[t]o us citizens of New York, whose Constitution has long retired all state judges at 70 years," the appointment of a new Justice for every one who failed to retire on reaching the age of seventy "is no shock."[451] Launching into a critical history of recent Supreme Court constitutional jurisprudence, Jackson asserted that there existed an "almost complete absence of public defense of the most controverted of the Court's decisions. Those who say the President's plan is wrong rarely say the Court's attitude is right."[452] The Court, he continued, had abused the doctrine of judicial review by resorting, with increasing frequency, to consideration of the wisdom of the statutes before it.[453] As a result, the high tribunal had become the "wailing wall" for "[p]owerful interests, whose causes are lost in election or in Congress," and, in the process, the Court also had become "hopelessly divided."[454] Legal challenges affected most new federal agencies and threatened both state and federal laws "of such widespread interest as old age benefits, unemployment compensation, . . . relief acts, the labor relations act, the Utility Holding Company Act, and several tax acts."[455] Particularly in the field of labor relations, said Jackson, the Court's decisions during the past generation had hindered or foreclosed both federal and state legislative action on such important matters as collective bargaining, minimum wages, maximum hours, retirement benefits, child labor, and restrictions on the use of injunctions.[456]

The Court "can not permanently be used as a [conservative] veto power," Jackson proclaimed.[457] Government by litigation was inefficient,

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[450] *Id.* By labeling the constitutional amendment option the liberal "extreme," Jackson created a rhetorical straw person. Certainly, some liberal opponents of the plan, such as Senator Wheeler, favored a constitutional amendment to deal with the Court. *See* JACKSON, *supra* note 20, at 179-80. Yet most of the plan's supporters were political liberals who saw no need to resort to an amendment. Moreover, many of the legislation's most reactionary opponents at least paid lip service to one of the various proposed constitutional amendments, though such support often was given for the sole purpose of delaying and defeating the President's proposal.

[451] Jackson, New York Economic Club Address, *supra* note 449, at 2.

[452] *Id.* at 4.

[453] *See id.*

[454] *Id.* at 5.

[455] *Id.*

[456] *Id.* at 5-7.

[457] *Id.* at 8.

causing delay and uncertainty.[458] Jackson opined that the judges' "almost oriental devotion to precedent" obviated their "need to reason" and restricted the actions not only of the legislative and the executive branches, but of the courts themselves.[459] The United States' "complicated governmental system," steeped in federalism, required compromise and understanding from all sides in order to solve "basic problems arising out of the depression and out of troubled industrial relations," but "[t]he Courts have lately been closing the ways to political compromise."[460] The Assistant Attorney General concluded by declaring that Roosevelt sought "in his policy and in his Court proposal to open the highway to economic and social peace" and by warning that "[t]he closed road may mean a rough detour."[461]

Later that night, before a somewhat friendlier labor audience, Jackson touched upon many of the same themes, but with a different emphasis. He told the Carnegie Hall crowd that the liberals who sought a constitutional amendment on judicial review were the ones who would "destroy the power of the Court,"[462] yet, incongruously, those persons asked that nothing be done to the Court in the interim.[463] Jackson did not deny that a constitutional amendment might be needed as well, but noted that that route posed the problem of considerable delay and risked the vagaries of judicial interpretation.[464] On the other hand, claimed Jackson, the President's proposal was moderate,[465] and "there is no reason why we should reject the moderate remedy now in our reach in order to follow the amendment rainbow through dreary years."[466]

Reiterating a theme he had stressed in his Rochester speech earlier in the month,[467] Jackson reminded his audience that strong chief executives of the past, such as Jefferson, Jackson, and Lincoln, had experienced diffi-

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[458] *Id.* at 8-10.

[459] *Id.* at 10-11. "Each such adverse decision goes ringing down legal history as a probable restriction for all time upon the power of future Congresses and future generations—at least until some majority of the Court has the courage to throw overboard the doctrine that precedents rule constitutional decisions." *Id.*

[460] *Id.* at 11.

[461] *Id.*

[462] Robert H. Jackson, Address at Carnegie Hall 1 (Mar. 24, 1937) (Robert H. Jackson Papers, Box 33, Library of Congress) [hereinafter Jackson, Carnegie Address].

[463] *See id.*

[464] *Id.* With regard to the delays inherent in amending the Constitution, Jackson was following Roosevelt's lead. *See supra* text accompanying note 269.

[465] Jackson, Carnegie Address, *supra* note 462, at 8.

[466] *Id.* at 10. Jackson had, by now, developed the rhetorical strategy of placing Roosevelt's plan in the middle of an imagined spectrum which ranged from a hands-off attitude toward the Court (the right) to a constitutional amendment (the left). Jackson's characterization of the amendment option as "liberal" is questionable. *See supra* note 450 and accompanying text.

[467] *See supra* text accompanying note 279.

culties with the Supreme Court; indeed, unlike some of those earlier presidents, the current administration "has accepted every decision . . . [and] obeyed every mandate, and yet it is accused of bad sportsmanship."[468] When the Republican administrations of the previous decade frankly appointed conservative Justices who used the Court to protect property rights, "we heard nothing from the bar associations or the great newspapers about the immorality of 'packing' the Court."[469] Jackson declared that his intention was not to asperse "the sincerity or the integrity of the justices of the Supreme Court"—even the conservative ones.[470] Indeed, Jackson admitted that courts tended to be conservative institutions by nature, but this inherent conservatism caused trouble to the extent that judges refused "to see the real and living problems which men are trying to solve when they set up industrial relations acts, or social security acts, or minimum wage acts."[471]

Much of the remainder of Jackson's speech was identical to his New York Economic Club address. Jackson surveyed the Court's recent record in the realm of labor relations,[472] telling his labor listeners that in no other area had "the effects of the reactionary personal views of individual Supreme Court justices been more disastrous."[473] It was against this background that Roosevelt's proposal must be judged, Jackson said.[474]

Jackson began his conclusion with the assertion that the Republican opponents of the administration had made the Court an issue in the 1936 election.[475] "The morning after the election," he continued, "the opposition to the President openly counted on the Supreme Court to check the New

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[468] Jackson, Carnegie Address, *supra* note 462, at 2. Jackson was alluding to a remark reportedly made by Justice McReynolds to the effect that the administration was guilty of "bad sportsmanship" because, having lost numerous contests before the Court, it now endeavored to alter that outcome indirectly by means of a personnel change. *See* BAKER, *supra* note 60, at 164. Taking a further swipe at McReynolds (without mentioning the Justice by name), Jackson countered that "we are unable to regard advocacy in the courts of the rights of the people's government, to legislate a solution of our problems, as a sport." Jackson, Carnegie Address, *supra* note 462, at 2.

[469] Jackson, Carnegie Address, *supra* note 462, at 3-4. In effect, Jackson was accusing recent Republican presidents of court packing through their appointments of conservative ideologues to the bench. Perhaps the appointments of Stone and Cardozo by Coolidge and Hoover, respectively, temporarily had slipped his mind.

[470] *Id.* at 8.

[471] *Id.* at 10.

[472] *See generally id.* at 4-8.

[473] *Id.* at 4.

[474] *See id.* at 8.

[475] "The opposition told you that President Roosevelt was following unconstitutional ends, proposing unconstitutional legislation, and as a witness they always called the Supreme Court. They lost no opportunity to identify the Court with themselves and themselves with the Court." *Id.* On the matter of the Court as an issue in the 1936 presidential campaign, see *supra* notes 59-65 and accompanying text.

Deal."[476] He finished with a plea to support the President's proposal so that the federal government might regain its "freedom to solve our problems in our own life time and pass a new freedom to our children."[477]

Jackson delivered his fifth speech about the plan at a Democratic Victory Dinner held in Pittsburgh on March 27, 1937. Based on the extensive excerpts of Jackson's Pittsburgh speech as reported in the *Pittsburgh Press*, the address was drawn largely from Jackson's Carnegie Hall speech,[478] though some of the prefatory remarks came directly from the Rochester victory dinner talk.[479] In short, the New Yorker broke no new ground in his fifth, and final, public address on the court legislation.[480]

During March 1937, Jackson made five speeches in support of the administration's proposal to enlarge the Supreme Court. He also gave effective Senate testimony in favor of the plan. A number of themes ran throughout his presentations. The United States Constitution established a flexible framework for the federal government, and that framework accorded the government wide latitude in fashioning responses to changing economic and social conditions. The federal government's efforts in this regard, however, were being thwarted both by a conservative—but increasingly divided—judiciary which slavishly adhered to precedent and which entertained disingenuous claims of states' rights, and by opponents of the New Deal who were resorting to "government by lawsuit."[481] The Tenth Amendment claims often were being used as a ruse in attempts to restrict the federal government's actions in the challenged areas while, at the same time, the

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[476] Jackson, Carnegie Address, *supra* note 462, at 11.

[477] *Id.* at 12.

[478] I have arrived at this conclusion by comparing the remarks as reported in *Foes Remain In Dark About Election, Jackson Says*, PITT. PRESS, Mar. 28, 1937, at 10, with the text of the Carnegie Hall address, Jackson, Carnegie Address, *supra* note 462.

[479] *See generally Foes Remain in Dark About Election, Jackson Says*, *supra* note 478, at 10; *Democrats Told*, *supra* note 274, at 21.

[480] One scheduled appearance which Jackson was unable to keep was a return bout between him and Senator Burke set for April 8, 1937, before the Chicago Economics Club. Although Jackson originally accepted the club's invitation to appear on the platform with Senator Burke, Letter from Guy A. Richardson, Chicago Economics Club President, to Robert H. Jackson, confirming Jackson's acceptance (Mar. 15, 1937) (Robert H. Jackson Papers, Box 33, Library of Congress), he was forced to cancel when he learned that the oral arguments in the Social Security cases had been set for April 7 or 8. Telegram from Robert H. Jackson to Joseph H. Dion, Executive Secretary of the Chicago Economics Club (Mar. 29, 1937) (Robert H. Jackson Papers, Box 33, Library of Congress). Thurman Arnold (who would soon succeed Jackson as Assistant Attorney General in charge of Antitrust upon Jackson's promotion to Solicitor General) stood in for Jackson in Chicago and "did a very fine job in presenting and defending his side of the question." Letter from Joseph H. Dion to Robert H. Jackson (Apr. 13, 1937) (Robert H. Jackson Papers, Box 33, Library of Congress).

[481] *See supra* text accompanying note 458.

state governments' freedom to act also was being judicially circumscribed. The increasing use of what amounted to a judicial veto was upsetting the delicate balance of federalism, thereby decreasing the effectiveness of both federal and state governments. The gravity of this situation justified executive and congressional action in order, once again, to set right the system of checks and balances among the three branches of the federal government—a system that had been thrown out of kilter by the judicial branch. Roosevelt was by no means the first chief executive to have his troubles with the Supreme Court. Indeed, the size of the Court had been altered before. The President's proposal was actually moderate in nature, for it would leave the Constitution unamended. These were the themes which Jackson repeatedly sounded. Jackson had assumed the role of an advocate presenting the case for the legislation on behalf of the Roosevelt administration.

In spite of his efforts, the tangible political results flowing from Jackson's five public addresses were negligible, at least in terms of arousing support for the bill. It is unlikely that he won many (if any) converts among the conservative membership of the New York Economic Club or, judging from his mixed reception, among Boston's Charitable Irish. Organized labor's lukewarm backing for the bill did not appear to undergo any major movement in the administration's direction following Jackson's appearance at Carnegie Hall. The remarks at the Rochester and Pittsburgh Democratic Victory Dinners were aimed at audiences that were already friendly; in both instances, the Assistant Attorney General largely was preaching to the choir. Still, the five speeches Jackson delivered in support of the plan during March 1937, in conjunction with his Senate testimony that same month, marked him as a loyal, able, and indefatigable proponent of the administration's case. He had done his best to pitch an increasingly unpopular proposal.

From the standpoint of his personal reputation and standing within the Democratic party, Jackson's efforts did have some noticeable effects. *United States News* featured him as one of its "People of the Week," reporting that Jackson's rise "both in public attention and [in] prestige in inner councils of the New Deal [was] particularly rapid during the past year."[482] *Pittsburgh Press* columnist John Townley expressed his belief that the Assistant Attorney General "should go places in public life."[483] And *Newsweek* reported in its "For Your Information" column that the "[y]outhful, alert, and personable" Jackson would "be a sure bet for the Supreme Court if high New

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[482] *People of the Week: Robert H. Jackson, Plays Major Legal Role in Supreme Court Drama*, U.S. NEWS, Mar. 22, 1937. The article erroneously went on to attribute to Jackson "an important part in drafting plans for the change of the Supreme Court." *Id.*

[483] John B. Townley, *Lewis' Boom for Kennedy Excites Politicians; Bitter Fight for Nomination is Now Possible*, PITT. PRESS, Apr. 4, 1937.

Dealers weren't grooming him for the [New York] Governorship—to be followed by the Presidency [in] 1944."[484] Unquestionably, his participation in the court battle convinced many observers that Jackson, the Roosevelt administration's loyal lieutenant and able advocate, was indeed "going places."

VI. THE COURT'S ABOUT-FACE AND THE DEATH OF THE PLAN

Roosevelt's court bill, however, was *not* going places, despite the efforts of Jackson and others on its behalf. A series of astonishing Supreme Court rulings was beginning to seal the fate of the legislation. On March 29, 1937, the Court upheld the state of Washington's minimum wage law in *West Coast Hotel Co. v. Parrish*.[485] On the same day, a day Jackson later dubbed "White Monday,"[486] the Court upheld the amended Railway Labor Act[487] and the amended Frazier-Lemke Act[488] against Fifth Amendment substantive due process challenges and, in the case of the Railway Labor Act, against a Commerce Clause challenge as well.[489] Although it may have appeared that the Court was acting under the stimulus of the President's bill, the tribunal probably was responding belatedly to the 1936 election results, for the original conference vote in the *Parrish* case—the vote at which Justice Roberts had switched to the liberal side—was taken before Roosevelt announced his plan.[490]

The President seemed pleased with the Court's conversion to a new interpretation of the substantive due process/freedom of contract doctrine

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[484] *For Your Information: Jackson-for-President*, NEWSWEEK, Apr. 10, 1937, at 41.

[485] 300 U.S. 379 (1937).

[486] JACKSON, *supra* note 20, at 207. The name "White Monday," by way of contrast, recalled "Black Monday"—May 27, 1935—the day on which the Court had announced its decision in *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935), invalidating the National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195 (June 16, 1993). *See* FREIDEL, *supra* note 22, at 160-61; LEUCHTENBURG, *supra* note 6, at 145.

[487] Ch. 347, 44 Stat. 577 (May 20, 1926), *as amended by* 45 U.S.C. §§ 151-88 (1988).

[488] Ch. 869, 48 Stat. 1289 (June 28, 1934).

[489] Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515 (1937); Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, 300 U.S. 440 (1937).

[490] ALSOP & CATLEDGE, *supra* note 82, at 139-40; BAKER, *supra* note 60, at 176-77.

In *Rethinking the New Deal Court*, Barry Cushman views the question of whether the court plan influenced the Court's early 1937 decisions as being somewhat wide of the mark. Cushman asserts that the Court's apparent "switch in time" was a result of an evolutionary (rather than a revolutionary) change in the constitutional philosophy of governmental powers. This change resulted from many forces; least among them, according to Cushman, was Roosevelt's bill. *See generally* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994). *See also infra* note 632.

which the *Parrish* holding represented.[491] Harold Ickes believed that, had the Court earlier adopted and consistently followed this attitude, the "strained relationship that [existed] between the Supreme Court on the one side and the legislative and executive branches on the other" probably would not have arisen;[492] to Ickes, the Court's switch was an admission that its conservative majority formerly had been following its own social and economic predilections rather than the dictates of the Constitution.[493] To Roosevelt, though, the margin of victory effected by Roberts's switch was alarmingly narrow: "Here was one man—not elected by the people—who by a nod of the head could apparently nullify or uphold the will of the overwhelming majority of a nation of 130,000,000 people."[494]

On April 12, 1937, the week after Robert Jackson and Charles Wyzanski represented the government in the Social Security cases before the Supreme Court,[495] the Court handed down its long-awaited decisions in the National Labor Relations Act[496] (NLRA) cases,[497] upholding the Act as within Congress's interstate commerce power and rejecting the employers' substantive due process claims. Speaking for a five-Justice majority in the *Jones & Laughlin* case, Chief Justice Hughes asserted that Congress's

> power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement"; to adopt measures "to promote its growth and insure its safety"; "to foster, protect, control and restrain." That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exer-

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[491] 6 ROOSEVELT, *supra* note 56, at lxvii.

[492] 2 ICKES, *supra* note 109, at 106.

[493] *Id.* at 106-07.

[494] 6 ROOSEVELT, *supra* note 56, at lxvii.

[495] Reminiscences of Charles E. Wyzanski, at 275-76 (1954) (Oral History Collection of Columbia University); *see also* PETER H. IRONS, THE NEW DEAL LAWYERS 290-92 (1982). Despite his position at Antitrust, Jackson, along with Wyzanski, argued the Social Security cases before the Supreme Court. Jackson's involvement in these cases dated from his prior Justice Department post—that of Assistant Attorney General in charge of the Tax Division.

[496] 29 U.S.C. § 151-69 (1935).

[497] The leading case was *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

cise that control.[498]

Had the tribunal accepted such a broad view of the Commerce Clause during its two previous Terms—as Justices Stone, Cardozo, and Brandeis had urged—the entire court fight would have been unnecessary. Justice McReynolds tacitly admitted as much when, in a dissent in the case which was joined by the other three horsemen, he accused the majority of departing from the "well-established principles" that were followed in the *Schechter* and *Carter* decisions.[499] The rulings were an "amazing thing," in the words of a delighted Attorney General Cummings.[500] The President called them "further evidence that the Court was in full retreat,"[501] and expressed his own satisfaction with the rulings.[502] "Today is a very, very happy day," he told reporters.[503]

Yet the Court's emerging five-Justice liberal majority was indeed the slimmest of margins, and the administration believed that the gains could be lost all too easily.[504] Roosevelt wryly observed that "the 'No Man's Land' has been eliminated but . . . [w]e are now in 'Roberts' Land.'"[505] He worried about the fate of the Social Security Act,[506] still pending before the Court.[507] For his part, Harold Ickes thought that Roberts and Hughes were simply "playing politics in order to defeat the President's proposal."[508] Privately, Roosevelt also believed that the Court's switch in direction was a purely political effort designed to defeat his legislation.[509] Whatever the reason, the NLRA decision, in hindsight, marked "the turning point of the court fight," in the opinion of Alsop and Catledge; "after it everything that the Court did, even the announcement of the Social Security Act's validity, was the purest, weariest anticlimax."[510]

Anticlimax or not, the Court's May 24, 1937, decisions upholding the constitutionality of the Social Security Act were "the coup de grace" in the fight.[511] The Social Security Act cases[512] sustained both the unemploy-

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[498] *Id.* at 36-37 (citations omitted).

[499] *Id.* at 76 (McReynolds, J., dissenting). McReynolds was correct: the Court indeed was departing from recent precedent.

[500] Cummings Diary, *supra* note 78 (Apr. 12, 1937).

[501] 6 ROOSEVELT, *supra* note 56, at lxvii.

[502] FREIDEL, *supra* note 22, at 234-35.

[503] *Id.* at 234 (quoting Roosevelt).

[504] BAKER, *supra* note 60, at 180-81.

[505] *Id.* at 181 (quoting Roosevelt).

[506] Ch. 531, 49 Stat. 620 (Aug. 14, 1935).

[507] *Id.*; FREIDEL, *supra* note 22, at 235; 6 ROOSEVELT, *supra* note 56, at lxix.

[508] 2 ICKES, *supra* note 109, at 137. This view was relatively widely held at the time. *See* LEUCHTENBURG, *supra* note 6, at 143.

[509] ALSOP & CATLEDGE, *supra* note 82, at 153-54.

[510] *Id.* at 147.

[511] *Id.* at 214.

ment compensation and the old-age pension provisions of the Act. Although the vote was once again an uncomfortable five-to-four (with the four irreconcilable conservatives dissenting), the administration had won both cases. "The blunt fact, therefore, is that by this time the Supreme Court fight had actually been won, so far as its immediate objectives were concerned," Roosevelt later wrote.[513] He explained, perhaps defensively, that the "legislative fight was not discontinued immediately, however, because it was not certain whether this victory was permanent or temporary."[514] In other words, Roosevelt still was concerned about both the solidity and the margin of the Court's new majority.

Jackson initially agreed with Roosevelt's assessment of the situation. Jackson told a friendly reporter that, in pleading the Social Security cases, his entire argument was directed at Roberts; "'I was arguing to a one-man court.'"[515] In a May 26, 1937, letter, Jackson wrote that the Court's newfound liberalism "proves the justification of the President's criticism of the Court," and he disparaged suggestions that the recent decisions obviated the necessity of the legislation's passage.[516]

Less than a week later, though, Jackson proclaimed to his friend Ernest Cawcroft that "the President has won his fight. It is even better than to have a new court reverse the old decisions."[517] The Court's rulings left no doubt in Jackson's mind that the tribunal had begun "to beat its retreat."[518] After the Social Security decisions came down, Jackson "became convinced that the court plan as originally proposed was at an end because the court's action took care of the great multitude of the people," and, as a result, the plan had lost its "popular appeal."[519]

The week before the Court issued its decisions in the Social Security cases, two events occurred that further undermined the administration's position. On May 18, 1937, the Senate Judiciary Committee voted ten-to-eight to issue an unfavorable report on the bill.[520] On the same day, Justice Van Devanter submitted to Roosevelt a letter of retirement, effective at the end of the current Court Term. The President immediately acknowledged receipt

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[512] Helvering v. Davis, 301 U.S. 619 (1937) (upholding old-age pensions); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (upholding unemployment compensation).

[513] 6 ROOSEVELT, *supra* note 56, at lxx.

[514] *Id.*

[515] MORGAN, *supra* note 154, at 475 (quoting Robert H. Jackson); *see also supra* text accompanying note 494.

[516] Letter from Robert H. Jackson to Harry P. Lawther (May 26, 1937) (Robert H. Jackson Papers, Box 29, Library of Congress).

[517] Letter from Robert H. Jackson to Ernest Cawcroft (June 1, 1937) (Robert H. Jackson Papers, Box 10, Library of Congress).

[518] Jackson Reminiscences, *supra* note 111, at 450.

[519] *Id.* at 486.

[520] ALSOP & CATLEDGE, *supra* note 82, at 209.

of the letter.[521] Van Devanter's retirement, timed to coincide with the Committee's vote on the bill,[522] seemed to eliminate one of the main arguments in favor of the legislation: that conservative Justices were holding on to their seats in order to frustrate Roosevelt's desire to appoint liberal successors.[523]

Roosevelt was now in an awkward position. To the public, it seemed that he could shore up the emerging five-member liberal majority simply through his appointment of Van Devanter's successor; he no longer appeared to have any need to resort to legislation in order to deal with the Court.[524] Unfortunately for Roosevelt, he had promised this first appointment to Senate Majority Leader Joe Robinson, a conservative Southern Democrat, as a reward for captaining the fight for the bill in the Senate, and Roosevelt could not, as a practical matter, retract his promise.[525] Given Robinson's age[526] and political philosophy, his appointment would have made a mockery of the original old-age and over-worked rationale for the court legislation. As a result, Roosevelt was, in Ickes's opinion, "in a hole."[527] On May 21, the President met with Cummings, James Farley, and James Roosevelt and discussed Robinson's "availability" for the Van Devanter seat.[528]

The public and the press, unaware of Roosevelt's private commitment to Robinson, immediately began to speculate on Van Devanter's successor. In a story printed the day after the Justice's letter to the President became public, the *New York Times* listed Jackson's name among the candidates for the seat.[529] The next day, however, Turner Catledge reported that Robinson was the leading contender for the court post and that Assistant Attorney General Jackson stated that he did not wish to be considered for the seat and would not accept it if offered.[530] It is unclear whether Jackson truly did not desire the seat at this time, or whether his reluctance stemmed primarily from knowledge that he might have possessed about Roosevelt's promise to Robinson.

By the time of Van Devanter's letter, Jackson had been out of the public eye with respect to the court fight since his last speech on the issue in Pitts-

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[521] *Id.* at 208.

[522] MORGAN, *supra* note 154, at 475.

[523] BAKER, *supra* note 60, at 226.

[524] ALSOP & CATLEDGE, *supra* note 82, at 209.

[525] *Id.*; FREIDEL, *supra* note 22, at 236; LEUCHTENBURG, *supra* note 98, at 145.

[526] Robinson was sixty-five years old at the time of the court fight. ALSOP & CATLEDGE, *supra* note 82, at 219.

[527] 2 ICKES, *supra* note 109, at 144.

[528] Cummings Diary, *supra* note 78 (May 21, 1937).

[529] *Capital Guessing on the New Justice*, N.Y. TIMES, May 19, 1937, at 18.

[530] Turner Catledge, *Robinson Leads for Court Place; Compromise Seen*, N.Y. TIMES, May 20, 1937, at 1.

burgh (a period of almost two months). As Assistant Attorney General in charge of the Justice Department's Antitrust Division, Jackson turned his public attention from the court fight to the problem of monopolies. In mid-March, Jackson had accepted an invitation from the Georgia Bar Association to speak at its annual convention at Sea Island, Georgia, in May.[531] Senator Walter George, a Democratic foe of the court bill, had urged Jackson to accept the invitation, despite their differing views on the bill.[532] At the time of his acceptance, Jackson intended to speak about the court matter; by the end of April, however, he had changed his mind and had decided to speak about the administration's new move against monopolies.[533] He told the Bar Association's Secretary that he believed that the court fight, as a topic of address, had "worn thin and might any day become a settled issue."[534]

Jackson later recalled that the impetus for his shift in topic was his initial reluctance "to go down there and attack George in his home territory."[535] Perhaps that was the real reason for the change, and perhaps Jackson's letter to the Association's Secretary predicting the imminent settlement of the court issue was merely diplomatic window-dressing designed for public consumption. Alternatively, the astute Jackson may have seen which way the court fight was going and decided no longer to be publicly identified with it. Certainly, he thought that popular support for the President's plan was undercut by the decisions in the Social Security cases.[536] The truth may well contain elements of both explanations. In any event, Jackson's Georgia speech dealt with the subject of monopolies rather than that of the judiciary,[537] and he increasingly turned his attention to-

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[531] Letter from Alexander W. Smith, Jr., President of the Georgia Bar Association, to Robert H. Jackson (Mar. 13, 1937) (Robert H. Jackson Papers, Box 33, Library of Congress).

[532] Jackson Reminiscences, *supra* note 111, at 463. George was one of the conservative Democrats whose opposition to Roosevelt on the court packing plan and other New Deal measures inspired Roosevelt's largely unsuccessful "purge" in the 1938 party primaries. George withstood the President's personal efforts against the Senator's renomination. *See* LEUCHTENBURG, *supra* note 6, at 267.

[533] Letter from Robert H. Jackson to John B. Harris, Secretary of the Georgia Bar Association (Apr. 29, 1937) (Robert H. Jackson Papers, Box 33, Library of Congress). For a discussion of the administration's 1937 to 1938 antitrust policies and Jackson's role therein, see generally ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 55-136 (1995); LEUCHTENBURG, *supra* note 6, at 246-48.

[534] Letter from Robert H. Jackson to John B. Harris, *supra* note 533.

[535] Jackson Reminiscences, *supra* note 111, at 464.

[536] *See supra* text accompanying note 519; Jackson Reminiscences, *supra* note 111, at 486.

[537] *See* Robert H. Jackson, Address to the Georgia Bar Association (May 28, 1937) (Robert H. Jackson Papers, Box 33, Library of Congress).

ward a campaign denouncing the profits of large corporations.[538]

Eventually, circumstances forced Roosevelt to accept the introduction of a compromise bill on the reorganization of the federal judiciary. Initially, the President opposed any compromise. As early as April 13, 1937, the day after the decisions in the NLRA cases were announced, Senator Robinson urged Keenan to prevail upon Roosevelt to accept a compromise—the addition of perhaps only two Justices—in light of the Court's apparent change in attitude.[539] After discussing the matter with Cummings and White House aides, Roosevelt rejected the notion: he wanted an overwhelmingly liberal Supreme Court, and his promise to appoint Robinson to the first vacancy would neutralize the effectiveness of any liberal appointment made under a two-Justice compromise.[540] Moreover, Roosevelt could not be certain that the current Court would continue along its new, "enlightened" path.[541] Jackson also believed that the timing was not right for a compromise at this point; instead, he felt that the administration ought to "wait and see, that the time for compromise would be at hand when the Court had plainly demonstrated there was meaning in the promise of the Wagner Act decisions."[542]

Although Jackson stopped speaking in public on behalf of the court bill, Alsop and Catledge indicated that he still had a role (though perhaps a small one) in the behind-the-scenes planning on the project.[543] Working with Cohen and Corcoran in early May, the three men developed the idea that the administration ought to put the bill on hold temporarily and, instead, concentrate on enactment of the rest of the legislative program.[544] Realizing that it might be a mistake to hold up the remainder of the President's program in order to push through the court legislation, Jackson, Cohen, and Corcoran believed that moving forward with other portions of the administration's agenda might pay off in the form of new support for the court bill from the heretofore unenthusiastic labor and agriculture constituencies.[545] Furthermore, delaying the bill might weaken the opposition, as would any adverse decision that the Court might issue in the then-pending Social Security cases.[546] Robinson, however, opposed any suggestion that the bill be put on hold, and his opposition settled the matter for the time-be-

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[538] *See* FREIDEL, *supra* note 22, at 251. This campaign was carried out amid a severe recession, caused largely by Roosevelt's 1937 attempt to cut federal spending and to balance the federal budget. *See generally id.* at 248-57.

[539] ALSOP & CATLEDGE, *supra* note 82, at 152-53.

[540] *Id.* at 153-61.

[541] FREIDEL, *supra* note 22, at 235.

[542] ALSOP & CATLEDGE, *supra* note 82, at 160.

[543] *Id.* at 198-99.

[544] *Id.*

[545] *Id.* at 198.

[546] *Id.* at 198-99.

ing.[547]

By mid-May, a split was developing among White House advisors regarding a compromise plan, with Cummings and Keenan in favor of compromise and the Jackson-Cohen-Corcoran group opposed.[548] The latter three were beginning to believe that having no legislation at all would be preferable if the only alternative was a "pork barrel compromise."[549] With Jackson as an occasional participant in their discussions, Cohen and Corcoran formulated a new strategy: Congress should take no further action on the bill during the current session, and the bill should be held over until the next session.[550] This delay not only would give the administration plenty of time to rally its supporters, but it also would give the President a face-saving way out of the matter, should he conclude that the Court's switch had eliminated the necessity for legislation.[551] Finally, the reintroduction of the bill at a later date could be held out as a threat against any backsliding on the part of the Court.[552]

While the President was away on a fishing trip in early May, Robinson and several other senators met with James Roosevelt and urged him to convince his father that they should be allowed to secure the best possible compromise for the administration.[553] On May 4, in the President's absence, Cummings, Keenan, Michelson, West, Roddan, Corcoran, and James Roosevelt met for lunch at the White House to discuss the matter.[554] Alsop and Catledge reported that the group (which they said included press secretary Stephen Early) agreed that James Roosevelt should pass along Robinson's message directly to the President upon his return.[555] On May 14, Roosevelt once again rejected the renewed suggestions of a compromise.[556] Nor did the Van Devanter resignation a few days later prompt the President to change his mind.[557] By May 22, however, Ickes observed that the President seemed to be seriously considering the possibility.[558]

On the night of June 3, 1937, the President changed his mind. After an evening swim and a family dinner at the White House, Roosevelt met with Robinson for two hours,[559] and the Majority Leader finally prevailed upon

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[547] *Id.* at 199.
[548] *Id.* at 197-98.
[549] *Id.*
[550] *Id.*
[551] *Id.*
[552] *Id.*
[553] *Id.* at 202-03.
[554] Cummings Diary, *supra* note 78 (May 4, 1937).
[555] ALSOP & CATLEDGE, *supra* note 82, at 203-04.
[556] *Id.* at 204.
[557] *Id.* at 210-14.
[558] 2 ICKES, *supra* note 109, at 145.
[559] *FDR: White House Usher Books* (June 3, 1937) (Franklin D. Roosevelt Library)

the President to accept a compromise.[560] The deciding factor seemed to be the President's pride: he simply "could not bear the public humiliation which a resort to the Cohen-Corcoran-Jackson scheme would have brought upon him."[561]

[hereinafter, *Usher Books*].

[560] ALSOP & CATLEDGE, *supra* note 82, at 215-16. Alsop and Catledge said that Cummings and Reed were also instrumental in persuading Roosevelt to accept the compromise. *Id.* at 235.

[561] *Id.* at 216.

The "Cohen-Corcoran-Jackson scheme" to which Alsop and Catledge referred was to refuse a compromise and press ahead with the plan as originally conceived, making the defeat of the proposal an issue in the 1938 elections. *Id.* at 214-16. The authors claimed that Jackson and Corcoran presented this plan to Roosevelt on the evening of June 3, 1937, immediately before Robinson's meeting with the President. *Id.* at 215. The problem with this version of the story is that there is no evidence that either Corcoran or Jackson (or Cohen, for that matter) met with Roosevelt immediately before Robinson—or at any time on June 3, 1937. In fact, there is nothing to indicate that any of the three met with the President at any time between May 29 and June 4, 1937: the White House Usher Books and the President's Diary and Itineraries for this period show that he was away at Hyde Park from Saturday, May 29, through Wednesday morning, June 2. Although he was in the White House from Wednesday, June 2, through Friday, June 4, these records do not reflect that either Jackson, Corcoran, or Cohen saw the President on any of those days, though Robinson's June 3 meeting is clearly reflected. Indeed, these sources indicate that Jackson's only White House meetings with Roosevelt during the entire court fight were those which took place on February 25 and June 29, 1937. *See* Roosevelt Diary, *supra* note 253 (Jan. 2 to Dec. 31, 1937); *Usher Books*, *supra* note 559 (Feb. 7 to May 15, 1937 and May 16 to Aug. 21, 1937). Both Jackson's Autobiography and his Columbia Oral History Collection interview refer only to two White House meetings between Roosevelt and Jackson during this time frame (though Jackson failed to mention any dates). *See* Jackson Autobiography, *supra* note 109, *passim*; Jackson Reminiscences, *supra* note 111, *passim*.

One is led to conclude, therefore, that the June 3, 1937, meeting of Roosevelt, Jackson, and Corcoran reported by Alsop and Catledge never occurred. A less plausible alternative is that this June 3 meeting took place, but was off-the-record. Such an alternative seems unlikely in light of the fact that there was indeed a June 29, 1937, White House meeting of Roosevelt, Jackson, and Corcoran, the contents of which appear to coincide in a number of respects with those of the alleged June 3 meeting as reported by Alsop and Catledge. Thus, it appears that these two reporters simply got their dates—and some of their facts— wrong. *See generally infra* notes 580-83 and accompanying text.

Jackson conceivably could have made his pitch directly to Roosevelt while the two were on an overnight cruise aboard the *USS Potomac* on Saturday, June 5, and Sunday, June 6, 1937. However, any extended, on-board discussion of political matters is doubtful, given Roosevelt's guest list for the cruise, which included Jackson and his wife, Irene, Mr. and Mrs. Harry Hopkins, and Marguerite (Missy) LeHand, the President's personal secretary and close companion. *Usher Books*, *supra* note 559 (June 4-5, 1937). The cruise largely was a pleasure trip, with Saturday afternoon spent "visiting and fishing" and Saturday evening featuring "gay conversation on general topics," GERHART,

In early June, Jackson was back in front of a congressional committee, this time testifying in favor of the administration's proposed wages and hours legislation.[562] Jackson's appearance before the committee initially was opposed by the Attorney General, who was concerned that conservative opposition to legislation on wages and hours might make passage of the court bill more difficult.[563] Despite Cummings's hesitation, Jackson was the first witness called.[564] According to Joseph Lash, Jackson performed well: "His statement on the bill's constitutionality was hailed as 'a brilliant summation.'"[565]

On June 14, 1937, the Senate Judiciary Committee released its negative report on the President's original plan to enlarge the Supreme Court.[566] The report was scathing: it called for "the rejection of [the] bill as a needless, futile, and utterly dangerous abandonment of constitutional principal," and concluded that the proposed legislation "is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[567] Harold Ickes sarcastically observed that if Roosevelt was "guilty of what this report says, then he should be impeached."[568]

The administration seriously considered calling for a minority report from the Committee. Robinson thought that such a report should be written,

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supra note 1, at 94, though a bit of politics would inevitably intrude upon any sojourn with a sitting president. However purely social the activities may have appeared, one cannot escape the conclusion that Jackson's invitation to join the party was an important occasion in the career of the fast-rising Assistant Attorney General—an occasion which provided his chief the opportunity to look over and size up the younger New Yorker (and his wife) in a setting that was (at least for Roosevelt) relatively relaxed.

[562] Jackson Reminiscences, *supra* note 111, at 466.

[563] *Id.* at 466, 471-72. Jackson recalled that "the Attorney General, who was a very good estimator of political things, [feared] that [the wages and hours legislation] would complicate the court measure, and perhaps it did." *Id.* at 472.

[564] *Id.* at 466; LASH, *supra* note 109, at 336.

[565] LASH, *supra* note 109, at 336. Lash reported that when Labor Secretary Frances Perkins appeared before the joint Senate-House committee conducting the wages and hours hearings, the Secretary, who "rarely was at a loss for words," told the committee that "I do not believe that I could add anything of value to the thorough and scholarly testimony of Mr. Jackson on the constitutional problems with which this legislation is confronted." *Id.* at 337.

During the first part of 1937, Jackson worked with Cohen and Corcoran on the administration's draft of the Fair Labor Standards Act, notwithstanding what Lash called "their preoccupation with the Court-packing measure." *Id.* at 335.

[566] ALSOP & CATLEDGE, *supra* note 82, at 235; SENATE COMMITTEE ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711 (1937) [hereinafter SENATE REPORT].

[567] SENATE REPORT, *supra* note 566, at 23.

[568] 2 ICKES, *supra* note 109, at 152.

though Senate Judiciary Chairman Ashurst told Corcoran that the move would be a mistake.[569] Still, Ashurst told Joe Keenan that if Robinson insisted on a minority report, he (Ashurst) would go along; Ashurst added his opinion that Jackson should be the author of any such report.[570] Alsop and Catledge stated that Corcoran and Keenan actually drafted a minority report, which mainly embodied the arguments that Jackson had made in his Judiciary Committee appearance; nevertheless, Ashurst's opposition ultimately prevented the draft from seeing the light of day.[571] No evidence indicates that Jackson had any hand in drafting the proposed minority report (if one was prepared) or that Jackson even knew of Ashurst's suggestion. That Ashurst suggested that Jackson prepare any minority report can be taken as an indication of the esteem in which the Senate Judiciary Committee Chairman held the Assistant Attorney General, as well as, perhaps, the wariness with which the Arizonan viewed Corcoran and Keenan. According to Alsop and Catledge, the failed attempt to secure a minority report from the Committee was the last "important participation of . . . the White House general staff in the court fight."[572]

In mid-June, Vice President Garner left Washington for an extended vacation in Texas. His departure, coupled with his refusal to aid the President in the court fight, "seemed to be notice that he was disassociating himself from his President and his President's program."[573] An angry Roosevelt demanded to know "[w]hy in hell did Jack have to leave at this time?"[574] Things appeared to be moving from bad to worse for the administration.

"To many observers," wrote William Leuchtenburg, "it seemed improbable that Roosevelt could salvage anything from the debris."[575] Nevertheless, "at precisely this point, when his fortunes had sunk to their lowest, Roosevelt brought about an astonishing recovery that breathed new life into the apparently moribund idea of Court packing."[576] Having already agreed to a compromise, Roosevelt, on June 16, invited all 407 Democratic members of Congress to meet with him during the weekend of June 25 at the Jefferson Island Club off the Maryland coast in an effort to restore party

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[569] Memorandum from Joseph B. Keenan to File 1, 3 (May 22, 1937) (James Roosevelt Papers, File: Secretary to the President—Judicial, 1937, Franklin D. Roosevelt Library).

[570] *Id.* at 3.

[571] ALSOP & CATLEDGE, *supra* note 82, at 234-35.

[572] *Id.* at 235. Regarding Jackson's limited participation in any "White House general staff in the court fight," see *supra* notes 221-46 and accompanying text.

[573] BAKER, *supra* note 60, at 220-21.

[574] *Id.* at 221 (quoting Roosevelt).

[575] William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 677.

[576] *Id.*

harmony.[577] According to Leuchtenburg, the "Jefferson Island frolic proved to be an inspired idea."[578] Alsop and Catledge thought differently, reporting that "no one was conciliated, no one was charmed out of rebellion, and the net result of the whole business was a public spectacle in which the scoffers took infinite pleasure."[579]

The week after the Jefferson Island "frolic," Jackson and Corcoran met with the President in a last-ditch effort to head off a compromise on the court legislation.[580] In his unpublished autobiography, Jackson recalled his pitch:

> I had a long discussion with the President in his study in the evening. I advised him strongly against accepting the compromise of adding two judges to the Court, but urged him instead to avoid a vote by a message pointing out that the Court reconsidered its attitude on many of the questions which had concerned him so greatly, had announced new doctrine in accordance with the contentions of the Administration, and that he withdrew his recommendation for the time being at least. I pointed out to him that he was in a position to claim the victory in the Court if not to claim one over the Court and that bitterness which was developing dangerously could be terminated. The President told me that he thought that would be the wiser thing to do, but that he could not do it at that time. He said candidly that he had promised to appoint Joe Robinson to the Court and that he had committed himself to accepting the proposition of two additional Justices. I argued even further against the plan. I pointed out that if he added Robinson and one other who, I assumed, would be of a more liberal school of thought, the two appointments would offset each other and he would have made no change in the balance of power on the Court. I told him bluntly that the only excuse that history would accept for packing the Court was that a packing was needed and that it was successfully done and that to have the odium of packing it and have it fail was, I feared, the outcome of accepting two additional Justices.[581]

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[577] ALSOP & CATLEDGE, *supra* note 82, at 241-42; Leuchtenburg, *supra* note 575, at 677-79.

[578] Leuchtenburg, *supra* note 575, at 679.

[579] ALSOP & CATLEDGE, *supra* note 82, at 242.

[580] This is evidently the meeting which Alsop and Catledge erroneously reported to have taken place on June 3, 1937. *See supra* note 561.

[581] Jackson Autobiography, *supra* note 109, at 119-20.

Jackson and Corcoran reiterated that the entire bill should either be put on hold or pursued as originally conceived, even if the latter course meant outright defeat, because a defeat could be made an issue in the 1938 elections.[582] Despite their efforts, the President stuck to his agreement to seek a compromise on his court proposal.[583]

Jackson was now out of the loop in the court fight, and his active service in the matter had come to an end.[584] He increasingly was turning his attention to the monopoly situation; he was, after all, the head of the Justice Department's Antitrust Division. During the recession in the fall and winter

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[582] ALSOP & CATLEDGE, *supra* note 82, at 214-15; *see supra* note 561.

[583] Alsop and Catledge reported that the President had not decided on a course of action even at this late hour, and that the decision to accept the compromise "must have been made during his talk with Robinson" on June 3, 1937, which they inaccurately placed immediately after the meeting with Jackson and Corcoran. ALSOP & CATLEDGE, *supra* note 82, at 215. Indeed, the two reporters stated that Roosevelt "had met [Jackson's and Corcoran's] arguments in such fashion that when they left him they had hopes." *Id.* Jackson's autobiography makes no reference to any such "hopes"; on the contrary, one infers from Jackson's account that Roosevelt had already made up his mind to accept a compromise in advance of his audience with Jackson and Corcoran. *See* Jackson Autobiography, *supra* note 109, at 119-21. All of this provides further proof that Alsop and Catledge were wrong in stating that Jackson and Corcoran had met with Roosevelt on June 3 immediately before the latter's meeting with Robinson on that date.

Jackson, at least in private, held fast to his belief that compromise was a mistake. Overnight, on July 13, 1937, Senator Robinson died. ALSOP & CATLEDGE, *supra* note 82, at 266-67. In the wake of the Senator's sudden death, Jackson wrote to Henry Edgerton, confiding that he would still "rather see the President defeated than to see a compromise which would give him the appearance of victory without its substance." Letter from Robert H. Jackson to Henry Edgerton (July 15, 1937) (Robert H. Jackson Papers, Box 79, Library of Congress). In the letter, Jackson also observed that Robinson's recent death "may change the course of events here substantially." *Id.* Jackson's prognostication proved accurate as to the latter point, and in regard to the former, Jackson got his wish: the compromise legislation was resoundingly recommitted to the Senate Judiciary Committee. *See infra* text accompanying note 597.

[584] As early as June 12, 1937, he informed a correspondent that he was "completely out of touch with the strategy in connection with the Court plan." Letter from Robert H. Jackson to Judge Wilbur Clark (June 12, 1937) (Robert H. Jackson Papers, Box 79, Library of Congress). Clark wrote Jackson several letters during the course of the court fight and had by this time perhaps become something of a pest. James Roosevelt found the judge to be "eccentric." James Roosevelt Diary, *supra* note 238 (Mar. 2, 1937). Jackson's statement to Clark appears to have been a white lie—a diplomatic way of brushing the judge off. For the series of letters between Jackson and Clark, see generally Robert H. Jackson Papers, Box 79, Library of Congress. Jackson's pronouncement, however, was two and one-half weeks premature: most likely, Jackson's last participation of any consequence in connection with the fight came on the evening of June 29, 1937, when he and Corcoran met with Roosevelt in the unsuccessful attempt to head off a compromise. *See supra* notes 580-83 and accompanying text.

of 1937-1938, Jackson became "the most eloquent" proponent of the administration's neo-Brandeisian anti-monopoly policies.[585]

In the wake of the Jefferson Island gathering, and in spite of Jackson's and Corcoran's counsel, Robinson and the administration drafted a compromise bill, which was formally submitted to Congress on July 2.[586] The new bill would have permitted the President, once each calendar year, to name one additional Justice for every Justice over the age of seventy-five who failed to retire; at the time, there were four Court members over seventy-five.[587] If the legislation was enacted, Roosevelt immediately could name two additional Justices—one under the new law and one to replace Van Devanter—and he could make another appointment under the bill on January 1, 1938, if no other aged Justices retired in the meantime.[588] At the time of its introduction, the prospects for the bill seemed good.[589]

The Senate began its floor debate on the bill on July 6, 1937, in the midst of a Washington heat wave.[590] During Robinson's presentation of the administration's case to the Senate, the debate became increasingly rancorous.[591] Then fate intervened: Robinson, whose health had deteriorated throughout the debate, was found dead on the floor of his apartment on the morning of July 14, 1937, the victim of a heart attack.[592] The President's allies in the Senate now "were leaderless and without morale."[593]

Amid accusations from some opposition senators that Robinson's death was Roosevelt's fault,[594] Senate supporters "who had been tenuously committed to the court plan only by ties to Senator Robinson concluded that the time had come to bail out."[595] There "was no man left among the few enthusiastic faithful with sufficient force to beat the waverers back into line."[596] The Senate, on July 22, voted to recommit the bill to the Judiciary Committee, which reported out an "emasculated and meaningless substitute" the following week.[597] Leuchtenburg believes that Robinson's death sealed

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[585] FREIDEL, *supra* note 22, at 251.

[586] ALSOP & CATLEDGE, *supra* note 82, at 247; LEUCHTENBURG, *supra* note 98, at 148-49.

[587] Leuchtenburg, *supra* note 575, at 680.

[588] *Id.*

[589] *Id.*

[590] ALSOP & CATLEDGE, *supra* note 82, at 252-54.

[591] *Id.* at 254-65.

[592] *Id.* at 260-63, 266-67.

[593] *Id.* at 268.

[594] Leuchtenburg, *supra* note 575, at 686.

[595] *Id.* at 687.

[596] ALSOP & CATLEDGE, *supra* note 82, at 268.

[597] *Id.* at 288-94 (quotation at 294). Roosevelt flirted, at least briefly, with the idea of vetoing the revised bill. Cummings Diary, *supra* note 78 (July 30, 1937). Even more astonishingly, as late as July 26, 1937, the President improbably entertained the notion that a face-saving compromise on the judiciary bill might still be salvageable—a com-

the fate of the court bill.[598]

In early August 1937, Congress enacted the revised Judiciary Act,[599] which made certain reforms in the lower federal courts, but left the Supreme Court untouched.[600] The bitter battle over the Supreme Court had finally come to an end. By its conclusion, more than a month had passed since Assistant Attorney General Robert Jackson had been a participant in the struggle.

VII. CONCLUSION

Franklin Roosevelt ultimately could not escape responsibility for the court fiasco. Still, engaging in an early form of spin control, he later claimed, with a certain amount of accuracy, that "the Supreme Court fight had actually been won" when the Court reversed its position and began to take a broader view of the Constitution and the constitutionality of New Deal social and economic legislation.[601] Robert Jackson shared Roosevelt's view on this point.[602] Nevertheless, the President's original goal of increasing the size of the Court had failed miserably.

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promise which would have included additional members of the Supreme Court. *Id.* (July 26, 1937). On that date, Cummings, at the President's behest, canvassed two Democratic members of the House regarding the chances for such a compromise. Memoranda (1) and (2) from Homer S. Cummings to Franklin D. Roosevelt, July 26, 1937 (President's Secretary's File, Justice Department—Homer Cummings, 1937, Franklin D. Roosevelt Library). Both men told the Attorney General that, in the words of one, there would not "be any chance of doing anything if it contained any reference to the Supreme Court." *Id.* (Memorandum (1)) at 1. Exactly how long the President held his unrealistic belief and when he abandoned it are unknown; however, abandon it he soon did, for Roosevelt neither vetoed the "emasculated and meaningless substitute" nor sought a new compromise on the matter of additional Justices. ALSOP & CATLEDGE, *supra* note 82, at 294.

In light of his resounding July 22 defeat in the Senate, the fact that Roosevelt even entertained the thought of attempting further legislation on the Supreme Court is additional evidence of how important Roosevelt deemed the plan and how little faith he had in the Court's new-found Constitutional philosophy. It is also evidence that the misjudgment behind the President's defeat in the court fight was not immediately dissipated by the Senate's July 22 recommittal vote: the master politician had just received the greatest political thrashing of his career but he failed to realize it. Roosevelt, however, would soon understand the wide scope and consequences of his defeat in the court fight. Though to the outside world he continued to appear to be in high spirits, Corcoran recalled that the President was depressed for months after the set-back. FREIDEL, *supra* note 22, at 239.

[598] Leuchtenburg, *supra* note 575, at 687.

[599] Ch. 754, 50 Stat. 751 (Aug. 24, 1937).

[600] FREIDEL, supra note 22, at 238.

[601] 6 ROOSEVELT, *supra* note 56, at lxx.

[602] *See, e.g.*, *supra* text accompanying notes 517-18.

More significantly, the court fight had split the Democratic party wide open. Leuchtenburg believes that "Roosevelt lost the war" in this larger sense.[603] "The Court fracas destroyed the unity of the Democratic party and greatly strengthened the bipartisan anti-New Deal coalition. The new Court might be willing to uphold new laws, but an angry and divided Congress would pass few of them for the justices to consider."[604]

The President's legislative agenda suffered from his strategy of placing it on hold while pursuing the reorganization of the federal judiciary.[605] Freidel concurred in the judgment that Roosevelt had paid a high political price for the battle:

> Roosevelt had suffered a staggering setback from a Congress top-heavy with Democrats. He had expended a large part of his political capital on a failed enterprise. He had given a winning cause to conservatives long opposed to him, and had seen former allies, even some of the strongest progressives, join them. What he doubtless intended to be political showmanship, drama to enlist the interest of the electorate, appeared to his opponents and even a considerable part of the public to be a dangerous deviousness, smacking of dictatorial ways. The suspicions the court fight engendered carried over into struggles over other domestic issues, and ominously colored the growing debate over foreign policy. It was, Corcoran mused long afterward, as though one had a million dollars in the bank and suddenly received notice one was overdrawn.[606]

In 1938, Roosevelt struck back in a largely futile attempt to purge the Democratic party of some of his most conservative office-holding opponents.[607] Such was the legacy of the 1937 battle over the Supreme Court.

There are many reasons why the administration's court plan was unsuc-

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[603] LEUCHTENBURG, *supra* note 6, at 238.

[604] *Id.* at 238-39. Recently, Leuchtenburg has gone further, noting that the Court fight "'provided a rallying point around which so much latent opposition [to Roosevelt] could coalesce.' . . . [T]o attempt to explain the erosion [of Roosevelt's popularity and power] of 1937 and ignore the Supreme Court donnybrook is like accounting for the coming of the Civil War without reference to slavery." LEUCHTENBURG, *supra* note 98, at 156-57 (quoting Robert J. Maddox, *Roosevelt vs. The Court*, AM. HIST. ILLUSTRATED 4, Nov. 1969, at 10-11).

[605] BURNS, *supra* note 62, at 311.

[606] FREIDEL, *supra* note 22, at 239.

[607] LEUCHTENBURG, *supra* note 6, at 266-72. *See generally* FREIDEL, *supra* note 22, at 280-88.

cessful: the initial secrecy surrounding the proposal,[608] including the failure to consult congressional leaders;[609] the legislation's original and disingenuous old-age and over-worked rationales,[610] which allowed the Chief Justice to score easy tactical points in his letter to the Judiciary Committee;[611] the revolt of Democratic conservatives, as well as many party moderates and liberals, against the bill;[612] Van Devanter's retirement;[613] and the death of Senate Majority Leader Robinson.[614] Each of these played its part in the President's defeat. Perhaps the biggest factor in the proposal's defeat was the Court's own about-face in its constitutional philosophy; *Parrish*, the National Labor Relations Act decisions, and the Social Security Act decisions seemed to obviate the necessity for any alteration of the Court's structure. The switch in time did indeed save nine.[615]

Beginning shortly after Reconstruction, the Supreme Court acted increasingly like a super-president, exercising what amounted to a judicial veto over the acts not only of the federal and state legislatures but of the president, as well. "After 1900," wrote Grant Gilmore, "the Supreme Court withdrew from the decision of private law questions and became a forum for the resolution of political controversies dressed up as issues of constitutional law."[616] The targets of the Court's judicial vetoes often were legislative and executive actions (both federal and state) designed to regulate or otherwise limit increasingly powerful concentrations of industrial wealth.[617]

The Supreme Court was becoming a body that used its judicial power to serve entrenched propertied interests. In the process, the Court had begun to step out of its judicial role and into a political one. Writing three decades later, Alexander Bickel recognized the danger in such a state of affairs:

> [T]he Supreme Court touches and should touch many aspects

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[608] BURNS, *supra* note 62, at 297; LEUCHTENBURG, *supra* note 6, at 233-34.

[609] MILLER, *supra* note 56, at 396; MORGAN, *supra* note 154, at 479.

[610] FREIDEL, *supra* note 22, at 231. The single mistake which Roosevelt later admitted having made was the failure, when originally presenting the plan, to "place enough emphasis upon the real mischief—the kind of decisions which . . . had been coming down from the Supreme Court." 6 ROOSEVELT, *supra* note 56, at lxv.

[611] For a discussion of Jackson's belief that the Hughes letter "turned the tide" in the entire battle, see *supra* text accompanying note 435. *See also* ALSOP & CATLEDGE, *supra* note 82, at 127; BAKER, *supra* note 60, at 159-60; MILLER, *supra* note 56, at 400-01.

[612] LEUCHTENBURG, *supra* note 6, at 234-36.

[613] Leuchtenburg, *supra* note 161, at 96-97.

[614] Leuchtenburg, *supra* note 575, at 687.

[615] *See* Leuchtenburg, *supra* note 161, at 93-97. *But see generally* Cushman, *supra* note 490, *passim*.

[616] GRANT GILMORE, THE AGES OF AMERICAN LAW 61 (1977).

[617] *Id.* at 62-64.

> of American public life. But it would be intolerable for the Court finally to govern all that it touches, for that would turn us into a Platonic kingdom contrary to the morality of self-government; and in this world at least, it would not work. If one takes the rule of law to mean the full and unrelenting dominion of the Court's principles wherever and whenever applicable, then the problem becomes one of limiting, and limiting with extreme severity, the kind and thus the number of principles the Court is permitted to evolve and apply.[618]

This dangerous trend reached its climax during Franklin Roosevelt's first term as president.

In the 1932 election, the American people clearly indicated that they wanted change—change to deal with the unprecedented economic crisis facing the nation.[619] The President and Congress responded with a broad range of legislation designed to address the massive social and economic problems caused by the Great Depression. In the process, both the welfare state and the strong federal government (complete with a powerful executive branch) were born in modern America. In 1934 and 1936, the American electorate signaled its approval of these developments through its overwhelming endorsement of the New Deal.[620] No one can claim that all of the actions taken by the federal government in those years were successful; some were poorly planned or poorly executed (or both). But the people needed—and demanded—action, and they received it from the Roosevelt administration.[621] They also received something they craved at least as much: hope and leadership.[622] There were some notable successes, such as the Agricultural Adjustment Administration, the Tennessee Valley Authority, the Securities and Exchange Commission, the National Labor Relations Act, and the Social Security Act, but there were also some notable failures, including the National Recovery Administration. Yet, as the editors of *The Economist* opined in 1937, "Mr. Roosevelt may have given the wrong answers to many of his problems, . . . [b]ut he is at least the first President of modern America who has asked the right questions."[623]

By the time of Roosevelt's second inauguration in 1937, the New Deal

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[618] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 199-200 (1962). Bickel's warning seems particularly apt in matters such as the judicially-created constitutional doctrine of substantive economic due process.

[619] LEUCHTENBURG, *supra* note 6, at 17.

[620] *Id.* at 146, 195-96.

[621] *See generally id.* at 330-33.

[622] *Id.*

[623] *Id.* at 326 (quoting THE EDITORS OF THE ECONOMIST, THE NEW DEAL 149 (1937)).

had restored most Americans' faith in themselves and in their system of government.[624] Admittedly, some New Deal programs (most prominently the NRA, with its corporatist tenor of business-government cooperation and the suspension of antitrust laws) bore a faintly fascist odor. Other programs (such as the AAA) seemed ominously to engage in the kind of centralized planning then used in Soviet Russia. But Roosevelt was neither a fascist nor a Marxist. He was a masterful, self-assured democrat (and Democrat) with a deep sense of American history and tradition and of his place therein. His bold experimental actions helped to ensure continued American democracy and capitalism by restoring Americans' self-confidence at a time when these institutions were under unprecedented pressure.[625] The New Deal's experimentation, at the very least, bought invaluable time during which American democracy "had survived its severest test; it was to have a second chance."[626]

But, the Supreme Court—or, more specifically, its activist, conservative four and their sometime-companions (most particularly Roberts)—had assumed for itself the task of thwarting many of the New Deal's boldest experiments, such as the NRA and the AAA, the New Deal's original cornerstones of industrial and agricultural recovery.[627] Through a broad reading of the Tenth Amendment and the Fifth Amendment's Due Process Clause and through cramped readings of Article I's Commerce and General Welfare Clauses, the Tribunal was severely constricting the realm of federal action. At the same time, through a similarly broad reading of the Fourteenth Amendment's Due Process Clause, the Court was limiting greatly the scope of permissible action on the part of state governments. The Court had indeed created the "no-man's land" about which Roosevelt had complained and, in so doing, had heightened its political role. The conservative Justices' Court had entered into a spitting contest with an activist President.

More than a decade before Roosevelt assumed the presidency, Benjamin Cardozo, then the Chief Judge of the New York Court of Appeals, recognized the tension, inherent in a judge's role, between the need to adhere to precedent and the need to reform outdated legal rules—in effect, to engage in judicial legislation:

> My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which

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[624] *See generally id.* at 330-33.

[625] *Id.* at 337-39.

[626] George Wolfskill, *New Deal Critics: Did They Miss the Point?*, *in* ESSAYS ON THE NEW DEAL 49, 68 (Harold M. Hollingsworth & William F. Holmes eds., 1969).

[627] The NRA decision was unanimous, with even the Court's liberal triumvirate (Brandeis, Stone, and Cardozo) joining in the program's demise.

> singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial . . . . Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs.[628]

Cardozo recognized, however, that symmetrical development may be too costly:

> Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey.[629]

Cardozo was anything but a reactionary, as his judicial record demonstrated. When he wrote of judges acting in a quasi-legislative capacity and rejecting precedent when necessary, he had in mind the social and economic needs of the times. These needs should guide a judge in reaching an appropriate and equitable decision in a given case even if that might require the rejection of precedent. Although Cardozo was speaking about the common law process, much of what he said was (and is) equally applicable to the process of constitutional adjudication—particularly as that process had come to be dominated by a narrow and conservative constitutional (hence, political) outlook on the part of the Supreme Court's majority in the mid-1930s.

Roosevelt was not one to back away from a brawl. His response to the Court's intransigence was to fight fire with fire, and, as a result, he propounded the so-called court packing plan. Roosevelt's acceptance of the political challenge laid down by the Court, and his response in the form of

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[628] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921).

[629] *Id.* at 112-13.

his Act to Reorganize the Federal Judiciary, amounted to a game of political chicken. One way or another, Roosevelt would have a Supreme Court whose majority was more in tune with the conditions facing 1930s America.[630] The Court would either change its cramped readings of the Constitution or it would face the addition of new Justices of Roosevelt's choosing. The Court blinked first in this game, and, to the delight of the administration, the National Labor Relations Act and the Social Security Act survived. So, too, would other New Deal legislation survive when it came before the Court in succeeding terms.[631]

Both sides could claim victory—or at least partial victory—in this fight. The Court (particularly Roberts and, to a lesser extent, Hughes) beat a swift retreat from its earlier anti-New Deal decisions, but it did so without suffering the humiliation of an alteration to its size. Indeed, its initial retreat in the spring of 1937 was undertaken without any change in personnel, though the Four Horsemen were pained noticeably by the turn of events. The Supreme Court returned to its proper constitutional role—that of engaging in limited judicial review—and its size remained unchanged.[632]

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[630] As George Wolfskill commented in regard to Roosevelt's constitutional philosophy:

> It was not that Roosevelt was flagrantly unconcerned about the supreme law of the land, that he rejected constitutional methods, that he deliberately sought to flout the Constitution, circumvent it, and, when the moon was right, murder it. He recognized, however, that it was capable of many interpretations (at least it always had been in the past). And he did not intend to stand idly by if it meant letting people starve by strict constitutional methods. If honest men who stood in awe of the Bible could differ, sometimes vehemently, over its meaning, so other men equally honest could dispute the meanings of the Constitution, which, after all, was not Holy Writ.

Wolfskill, *supra* note 626, at 59.

[631] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act of 1938); United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act of 1938). Justice Robert H. Jackson delivered the opinion of the Court in the latter case, which is based on what is arguably the broadest reading of congressional power under the Commerce Clause ever undertaken in American Constitutional History.

[632] Barry Cushman has challenged this conventionally held view of the fight between Roosevelt and the Supreme Court. *See generally* Cushman, *supra* note 490. In his well-written article, Cushman asserts that "[t]he history of the Supreme Court during the New Deal is not a simple tale of the unmediated interplay of judicial purposes, external political events, and case outcomes." *Id.* at 257. The conventional wisdom regarding the court plan and the plan's impact on the Court's decisions of early 1937 is largely erroneous, according to Cushman. *Id.* at 260. On the contrary, the story of the New Deal Court

> is instead the more complex story of how a structurally interdependent system of thought gradually unraveled over the first forty years of the twentieth century and how, after it had unraveled so far as to become completely unserviceable, it was

America doubtless is better off as a result of these developments. If Roosevelt had succeeded in his attempt to increase the Court's size, it would have established a precedent for future administrations to employ as a weapon with which to intimidate the judiciary in its role as a co-equal branch of the federal government. In the years leading up to 1937, the delicate balance among the three branches of government had begun to tip in the direction of the judiciary. Had Roosevelt prevailed in 1937, that balance might have tipped too far away from the judiciary and too far toward the executive. The events of 1937, though bitter, political, and even tragic, served roughly to restore the proper equilibrium among the three branches of government.

Those events, however, left a bitter legacy which resulted largely from Roosevelt's uncharacteristic political ineptitude in the presentation and prosecution of his court plan. Roosevelt may have transformed the Court, but he lost his Congress in the bargain. After that hot, acrimonious summer of 1937, the New Deal slowed to a snail's pace. Over the next year, Congress did give the President a new housing bill, a new farm bill, wages and hours legislation, and legislation to reorganize the executive branch of the federal government, but nothing more. Furthermore, Roosevelt had to pry these measures with great difficulty from a recalcitrant Congress, accepting much less than he initially had requested in each instance.[633]

The main purpose of this Article has been to examine the role played in the court fight by the fast-rising Assistant Attorney General, Robert H. Jackson. Admittedly, the court fight would have proceeded without him, and Jackson's participation in the battle did not change its outcome. The legislation to alter the size of the Supreme Court died in the end, and hindsight indicates that it would have done so irrespective of Jackson's participation.[634] Nevertheless, his role in the battle was an important one. He made

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abandoned by a generation of jurists with no stake in salvaging its remains. The surface plausibility of the conventional wisdom has for too long obscured our view of this important dimension of constitutional history.

Id.

Although Cushman has constructed a forceful argument in support of his thesis, I am not entirely persuaded. Even if the court plan came only after the Court (or, more accurately, after Roberts, and to some extent, Hughes) had already secretly made up its mind to reject substantive economic due process and to adopt a very broad reading of the Commerce Clause, the Justices' shift in thinking certainly had been influenced by the results of the 1936 presidential election. The election's results, in turn, had emboldened Roosevelt and Cummings to the point where the court plan seemed to be a practicable solution to the impasse with the Court. Hence, the 1936 election, the court plan, and the about-face of Roberts and Hughes, were all parts of a piece.

[633] *See* FREIDEL, *supra* note 22, at 273-82; LEUCHTENBURG, *supra* note 6, at 250-63. In 1939, he received an unwelcome gift from Congress—the Hatch Act, which, in the wake of the unsuccessful purge of 1938, prohibited federal employees from taking part in political activities. FREIDEL, *supra* note 22, at 287-88.

[634] Whether Barry Cushman's view of the court fight or the conventional view of the

five speeches in support of the plan; he delivered widely publicized and widely praised Senate testimony in its favor which succeeded in placing before the public, for the first time, the true reasons for the legislation (and did so in a way that minimized the negative impact of the original, disingenuous rationale); and he occasionally acted as a White House strategist and advisor in the fight.

Jackson's embrace of the administration's ill-fated effort to "reorganize" the Supreme Court might, at first blush, appear somewhat enigmatic. At a time when the overwhelming majority of his colleagues were vehemently denouncing the plan, Jackson publicly and outspokenly swam against the tide. One might chalk up his support to loyalty, to a sense of political duty, or, more cynically, to political ambition. There was, however, more to it than that.

For the quarter-century during which he had been an attorney, Jackson had seen an increasingly conservative and activist United States Supreme Court strike down important federal and state social legislation. He doubtless felt much of the same frustration in this regard that his political patron, Franklin Roosevelt, felt. Moreover, the instrumentalist philosophy of the Legal Realists was in ascendancy in the nation's most elite law schools at this time. Indeed, Legal Realists such as William O. Douglas, Jerome Frank, and Thurman Arnold had come to Washington to participate in the New Deal and to put their academic theories into practice.[635] Jackson worked with many of these individuals, and he was exposed to their ideas. These ideas coalesced in Jackson's thinking at the time of the court fight, and Jackson signed on as a supporter of the administration's plan, although not without some misgivings. With the benefit of more than a decade of hindsight, and with the rather lofty view from the bench, Associate Justice Robert H. Jackson would attempt to distance himself somewhat from the court packing plan,[636] but Assistant Attorney General Jackson was, by no means, as cool to the notion. Given the Assistant Attorney General's very real service to Roosevelt in connection with the court battle, Justice Jackson had little cause to be embarrassed by his participation in the affair.

By late 1937, the career of Jackson, the New Dealer from Western New

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fight is correct ultimately matters little, if at all, to the story of Jackson's participation in the affair. Jackson could not have known about much of the behind-the-scenes politics and deliberations of the Court which Cushman has described. Nor could Jackson have known anything of the constitutional course on which the Court was about to embark. Jackson's role in the matter, then, must be examined in light of what he knew or could have known in the winter and early spring of 1937. The fact that Roosevelt's court packing plan might have been unnecessary, irrelevant, or doomed from the outset does not change the part that Jackson played on its behalf, nor does it change what he later thought about the matter.

[635] *See* AUERBACH, *supra* note 6, at 179.

[636] *See supra* text accompanying note 228.

York, was very much alive and on the move. In January 1938, Roosevelt tapped Jackson to succeed Stanley Reed as the Solicitor General, upon the latter's elevation to the nation's highest bench. In March, Jackson was confirmed as the Solicitor General of the United States. Soon there was talk in administration circles about a Jackson bid for New York's governorship in 1938, although this did not come to pass.[637] In January 1940, Jackson became the Attorney General at a crucial moment in American history, with the world at war. At the opening of the United States Supreme Court's 1941 Term, Jackson took his seat as the junior associate Justice on the high bench. He held his seat on the Court for the remaining thirteen years of his life.[638]

To claim that Jackson's meteoric rise was solely or even primarily the result of his service in support of the Roosevelt administration's 1937 court packing plan would be an overstatement. His colleagues and superiors, however, did not overlook his extensive service in the matter. Jackson's willingness to undertake highly visible roles in such matters as the court fight sped his ascent within the administration. His career was also advanced by the very qualities which Jackson exhibited during the court fight—intelligence, loyalty, stamina, tact, and consummate advocacy skills.

Robert H. Jackson played a significant part in American political, legal, and constitutional history during the years 1938 to 1954. Jackson's subsequent judicial philosophy, which called for judicial deference to federal legislative judgment in matters of economic regulation, may be seen as stemming, in no small part, from the experience he gleaned during his time in the Roosevelt administration as it battled the nation's High Court. Indeed, the high watermark of the Court's expansive reading of federal powers under the Commerce Clause, the 1942 decision in *Wickard v. Filburn*,[639] was a Jackson-authored opinion. Jackson's often-overlooked role in the 1937 court fight thus deserves consideration alongside the other important events in his career as an advocate and a jurist.[640]

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[637] *See generally* GERHART, *supra* note 1, at 122-32.

[638] In 1945 and 1946, Jackson took time away from his duties at the Court in order to serve as the chief United States prosecutor at the Nuremberg war crimes trials. *See* GERHART, supra note 1, at 21-25, 253-57.

[639] 317 U.S. 111 (1942).

[640] In a future article, I plan to discuss the continued significance of the court fight in Jackson's subsequent career and in his later thinking regarding the proper role of the federal judiciary.