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# THE ANSWER TO A MAIDEN'S PRAYER: HOMER CUMMINGS AND THE ORIGINS OF THE 1937 COURT PACKING PLAN

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The Answer to a Maiden's Prayer?  
Homer Cummings and the Origins of the 1937 Court-packing Plan

A thesis submitted in partial fulfillment of the requirements for the degree of Master of Arts at  
Virginia Commonwealth University.

By

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## Abstract

### THE ANSWER TO A MAIDEN'S PRAYER? HOMER CUMMINGS AND THE ORIGINS OF THE 1937 COURT PACKING PLAN

By Jason Daniel Carmichael, M.A.

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On February 5, 1937, President Franklin Roosevelt submitted to Congress "The Judiciary Reorganization Act of 1937," often simply called the Court-packing bill. The president hoped to circumvent the Court, which for years had been overturning New Deal programs, by appointing six new justices. However, the bill disguised its true intentions behind a veil of improving judicial efficiency. This misdirection backfired; the bill failed and Roosevelt's popularity plummeted just months after a landslide reelection. This thesis examines the origins of the infamous Court-packing bill. It argues that Roosevelt was largely a background figure in the development of the plan, as he charged Attorney General Homer Cummings with finding a solution to the Court's obstinacy. Cummings was the driving force behind the bill, particularly with regards to keeping it secret from other advisers and hiding its true intentions. Roosevelt's most crucial mistake was in relying almost exclusively on his cunning attorney general.

## Introduction

“I have a somewhat important matter to take up with you today,” President Franklin Roosevelt said to an eagerly awaiting White House press corps on February 5, 1937. Roosevelt had called the White House reporters into the Oval Office at noon to divulge a rather shocking announcement—as they spoke, the president was sending to Congress a judicial reorganization bill that would allow him to appoint up to six new Supreme Court justices.<sup>1</sup> The assembled reporters were not surprised that Roosevelt was attempting to circumvent the Court. After all, the judicial and executive branches had been waging a protracted war for more than two years. Four “conservative” justices routinely voted against New Deal programs, while three “liberal” justices, often joined by Chief Justice Charles Evan Hughes, demonstrated a willingness to expand the scope of the federal government. The linchpin, therefore, was Justice Owen Roberts, who appeared firmly entrenched in the conservative camp. The conservative justices, largely products of a long Republican domination of the federal government, reflected a nineteenth-century mindset. They valued state and local control over matters of governance, believed that federal government “bigness” was an evil to be avoided, and were charged with being disconnected from the social and economic conditions of the day. By 1932 this placed the Court directly in the path of a newly elected president who had promised a “new deal” for the

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<sup>1</sup> *The Public Papers and Addresses of Franklin Roosevelt* (hereafter *PPA*), Samuel Rosenman, ed. (New York: Russell and Russell, 1969), 6: 35-50.

American people. Roosevelt's New Deal programs represented an assault on decades of conservative jurisprudence; a showdown was nearly inevitable.

Rather, what really surprised the White House press corps in February 1937 was the method by which Roosevelt chose to attack the Court. The president was quick to mention that Congress had expanded the membership of the Court several times and that there was nothing sacrosanct about nine justices on the bench. Yet, as the reporters and the president well knew, "packing" the Court for clear partisan purposes violated major political taboos. Many considered the Supreme Court inviolable, a sort of sacred tribunal above the reach of petty partisanship. Roosevelt tried to hide the intent of the bill by placing a veil of overall judicial reorganization over the intended target of the Supreme Court. Yet, this misdirection was obvious to everyone and made the reorganization bill disingenuous and insulting in the eyes of even those on whom Roosevelt could always rely. In the end, the infamous Court-packing bill faltered in the Senate after a protracted and costly fight. Just months after securing reelection in one of the most lopsided victories in the history of American presidential elections, Roosevelt suddenly found himself under assault. He had not only given vanquished Republicans a cause around which to rally, but he opened himself up to attack from conservative Democrats who had been itching for a chance to rebuff the president. For a politician as seasoned and skilled as Roosevelt, the Court-packing bill represented a phenomenal fall from grace.

The story of President Roosevelt's Court-packing debacle has been widely covered by historians. Edward White, in his *The Constitution and the New Deal* (2000), analyzes the historiography of constitutional development in the New Deal and finds the rise of a "conventional account" that revolves around the Court-packing crisis, as well as prominent

challenges to that account in more recent scholarship.<sup>2</sup> That account argues that the implied pressure from the Court-packing bill caused Justice Roberts to reverse his prior anti-New Deal position in the famous *West Coast Hotel Co. v. Parrish* case and side with the Court's liberal wing in upholding minimum wage legislation. Following the famous "switch in time that saved nine," the Court regularly upheld New Deal measures and ushered in a new age of constitutional development. While White focuses specifically on constitutional development and jurisprudence, his arguments can be expanded to show that the same general idea applies to the historiography of the larger Court-packing narrative. There are three main groupings under which Court-packing scholarship falls: the early accounts of the 1930s and 40s, the first works by professional historians in the 1950s and 60s, and the more recent explosion in scholarship from the late 1980s to today.

Early work on Court-packing set the foundation for what has become the traditional account of the crisis. Early book length studies argue that the president made a mistake, but tend to shy away from attacking him for it. Instead, they reserve their ammunition for the Supreme Court, which comes across as dominated by a cantankerous, reactionary bloc of conservatives hell bent on thwarting the will of popularly elected representatives. An excellent example is Drew Pearson and Robert Allen's *Nine Old Men at the Crossroads*, a brief 1937 follow-up to their 1936 *The Nine Old Men*, which is essentially a diatribe against the Supreme Court. The authors strike an almost reverent tone, portraying Roosevelt as a man of courage for standing up to the Court, despite the public and Congressional outcry against the Court-packing bill.<sup>3</sup> More forgiving of the Court and less admiring of the president, Joseph Alsop and Turner Catledge's

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<sup>2</sup> G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000), 16-32.

<sup>3</sup> Drew Pearson and Robert S. Allen, *Nine Old Men at the Crossroads* (Garden City: Doubleday, Doran, and Company, Inc., 1937), 1-8.

*The 168 Days* (1938) nonetheless contributed to the creation of the traditional narrative of the Court-packing fight. Alsop and Catledge set up the court fight as a drama with Roosevelt cast as the “tragic hero.” Roosevelt seemed unable to get anything to go his way, and just when he needed the most support, those who previously supported him deserted the president.<sup>4</sup>

An important work published four years after the Court-packing fight is Edward Corwin’s *Constitutional Revolution, Ltd.* (1941), which established the narrative of a “constitutional revolution.” Corwin, a Princeton law professor and arguably the nation’s leading constitutional scholar, saw many ways in which there truly was a revolution in 1937. He argues that Roberts’ switch strikingly proved that the Court was a political entity based on “judicial freedom of decision.” He also argues that the switch led to a change in due process interpretation and destroyed the laissez-faire approach to government action. Because of the reversal, the Supreme Court clearly came out as losers in the court fight. The executive branch was strengthened at the expense of the judicial branch, and the Court’s reversal damaged its power of judicial review. Yet, for Corwin, the revolutionary aspect of the episode wasn’t that the Court shifted its position; the Court had reversed its previous rulings before. The truly revolutionary aspect was that the abrupt shift in philosophy happened without a single change in Court membership.<sup>5</sup>

The standout amongst the early book-length accounts of the Court-packing episode is Merlo Pusey’s *The Supreme Court Crisis* (1937). In stark contrast to Pearson and Allen, Pusey lauds the work of the Court, calling it “the balance wheel of democracy” and arguing that the Supreme Court is “one of the most remarkable contributions of the United States to the science

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<sup>4</sup> Joseph Alsop and Turner Catledge, *The 168 Days* (Garden City: Doubleday, Doran, and Company, Inc., 1938), 13, 50-59.

<sup>5</sup> Edward S. Corwin, *Constitutional Revolution, Ltd.* (Claremont: Claremont Colleges, 1941), 38, 64-65, 80-95, 105-108.

of government.” As the Court is sworn to uphold the Constitution, Pusey makes the case that the Court was simply doing its job when it struck down New Deal measures. Likewise, Pusey is very critical of Roosevelt. He argues that the president was blatantly hypocritical, noting that Roosevelt wanted a liberal interpretation of the Constitution when it came to the New Deal, but relied on a strict legalistic interpretation to argue that his Court-packing bill was constitutional.<sup>6</sup>

Professional historians took hold of Court-packing beginning in the 1950s and 1960s. Drawing upon the main contemporary sources, these historians essentially added authority to the traditional account. William Leuchtenburg and James MacGregor Burns published seminal works on the New Deal in this period. Burns’s *Roosevelt: The Lion and the Fox* (1956) and Leuchtenburg’s *FDR and the New Deal* (1963) portray Roosevelt as a master politician who made a rare mistake in introducing the Court-packing bill. Both historians, as well as constitutional scholar Carl Brent Swisher, furthered the reactionary stigma that had been attached to the Supreme Court.<sup>7</sup> Detached some from the New Deal, these scholars were able to look back with the benefit of hindsight and further develop the idea of a constitutional revolution. Building upon Edward Corwin’s argument, Carl Swisher claims that because the “switch in time” happened before any changes were made to the Court, it effectively shows that the Court fell in line with popular ideas about the New Deal and the scope of federal government. This “new trend in constitutional interpretation” became more noticeable as Roosevelt added his own appointees to the Court. Burns and Leuchtenburg tacitly agree with Corwin and Swisher’s

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<sup>6</sup> Merlo J. Pusey, *The Supreme Court Crisis* (New York: The MacMillan Company, 1937), 8-12, 33-38, 77-78.

<sup>7</sup> James MacGregor Burns, *Roosevelt: The Lion and the Fox* (New York: Harcourt, Brace, and World, 1956), 223-230, 297; William Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940* (New York: Harper and Row, 1963), 234-236; Carl Brent Swisher, *American Constitutional Development* (Cambridge: The Riverside Press, 1954), 921, 945.

arguments, but for them, the real significance of the court fight was the resulting split in the unity of the Democratic Party.<sup>8</sup>

By the late 1960s and early 1970s, there was a transition in Court-packing historiography that saw the first signs of challenges to the traditional account. Historian James Patterson's *Congressional Conservatism and the New Deal* (1967) marked one of the first attempts since Pusey's *The Supreme Court Crisis* to challenge the notion that Franklin Roosevelt was the uncontested master of Congress. In fact, Patterson argues that Roosevelt did a pretty lousy job of handling Congress. Like Leuchtenburg and Burns, Patterson focuses less on the constitutional ramifications of the court fight, and more on the effect it had on the Democratic Party. Where Patterson differs from Leuchtenburg and Burns is in arguing that the breakup of Democratic unity in Congress was underway well before the introduction of the Court-packing bill. By analyzing diaries, speeches, voting records, and newspaper articles, Patterson points to evidence of rising congressional dissatisfaction with the president as early as 1933.<sup>9</sup>

Charles Leonard's *A Search for a Judicial Philosophy* (1971) defends Justice Owen Roberts and the New Deal Supreme Court. In analyzing Justice Roberts's voting record in conjunction with that of the entire Court as early as 1930, Leonard, unlike any scholar to that point, was able to find some semblance of consistency in Roberts' rulings. He argues that Roberts was regularly in line with the Court as a whole, and that his findings demonstrate "the inaccuracy of the usual picture of the Court during this period as the 'nine old men' swinging with reckless abandon right and left with their judicial scimitars decapitating all attempts of

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<sup>8</sup> Swisher, *American Constitutional Development*, 954; Leuchtenburg, *FDR and the New Deal*, 238-239; Burns, *Lion and the Fox*, 311-315.

<sup>9</sup> James Patterson, *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939* (Lexington: University of Kentucky Press, 1967), 20-31, 73, 120-140.

government, state and federal, to serve the people.”<sup>10</sup> While Patterson and Leonard hardly mark the fiercest challenges to the traditional Court-packing account, they do mark some of the first challenges. Patterson put a chink in the armor that previous historians had placed around Roosevelt, while Leonard contended that the Court was perhaps not as anti-reform as early accounts would lead one to believe. These first challenges from Patterson and Leonard opened the door for later historians to further question the validity of the traditional account.

Shortly thereafter, however, there came a marked lull in Court-packing scholarship that coincided with the rise of social history at the expense of political history. It was not until the 1980s that a reemergence of Court-packing scholarship tested the foundations of the traditional narrative. Scholars disputed the portrayal of Roosevelt as a master politician and aimed to restore the reputation of the New Deal Supreme Court. Some historians and legal scholars, most notably Barry Cushman in his *Rethinking the New Deal Court* (1998), even contested the idea that a “constitutional revolution” ever happened.<sup>11</sup>

Robert Shogan took a fresh approach in *Backlash: The Killing of the New Deal* (2006) when he connected the failure of the Court-packing bill to Roosevelt’s failure to effectively handle labor uprisings. Marian McKenna perhaps offers the most stinging critique of Roosevelt to date, arguing that the president was intentionally subverting the Constitution with the Court-packing bill.<sup>12</sup> McKenna, along with Cushman and Edward White, reinterpreted the actions of the New Deal Supreme Court, disputing the traditional representation of the Court as “nine old

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<sup>10</sup> Charles A. Leonard, *A Search for a Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937* (Port Washington: Kennikat Press, 1971), 34-35, 94, 179.

<sup>11</sup> Michael Nelson, “The President and the Court: Reinterpreting the Court-packing Episode of 1937,” *Political Science Quarterly* 103 (1988): 280-284; Gregory A. Caldeira, “Public Opinion and The U.S. Supreme Court: FDR’s Court-packing Plan,” *The American Political Science Review* 81 (1987): 1139, 1150; Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), 105.

<sup>12</sup> Robert Shogan, *Backlash: The Killing of the New Deal* (Chicago: Ivan R. Dee, 2006), 233-234; Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-packing Crisis of 1937* (New York: Fordham University Press, 2002), xvii-xxi.

men.” They challenge the idea that the Court was simply a partisan body whose members voted their political inclinations, arguing that this interpretation belittles the justices’ duty to issue rulings based on constitutional jurisprudence. Finally, these three scholars contested the idea that a “constitutional revolution” took place in 1937. McKenna denies that the Court-packing bill had any effect at all on the Court’s rulings, while Cushman and White argue that the Court had slowly, but steadily signaled its intent to distance itself from its earlier approval of substantive due process.<sup>13</sup>

Challenges to the traditional account seemed to make some headway with William Leuchtenburg. In *The Supreme Court Reborn* (1995), a collection of articles that includes several on Court-packing, Leuchtenburg remains fairly neutral in his portrayal of the Supreme Court and defends his belief that there really was a revolution in 1937. He is, however, considerably more critical of Roosevelt than in his earlier works. He clearly argues that the Court-packing bill was a gross mistake on Roosevelt’s part, noting that Roosevelt’s power was never the same afterwards and even listing six ways in which Roosevelt came out as the loser in the court-fight.<sup>14</sup>

Still, not all historians have been convinced by this challenge and some have offered a spirited defense of the traditional account. James MacGregor Burns, Kenneth Davis, and David Kennedy offer different reasons for Roosevelt’s blunder, but still come across as sympathetic towards the president.<sup>15</sup> Other scholars have defended the “constitutional revolution” narrative, though they have begun to reinterpret its meaning. Analyzing trends shown by state and local

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<sup>13</sup> McKenna, *Constitutional War*, 43-66, 214, 435-436; Cushman, *Rethinking the New Deal Court*, 33-35, 105; White, *Constitution and the New Deal*, 33-34, 96, 238-273.

<sup>14</sup> William Leuchtenburg, *Supreme Court Reborn* (New York: Oxford University Press, 1995), 132-162.

<sup>15</sup> James MacGregor Burns, *The Crosswinds of Freedom*, Vol. 3 in *The American Experiment* (New York: Alfred A Knopf, 1989), 89-91; Kenneth S. Davis, *FDR: Into the Storm, 1937-1940* (New York: Random House, 1993), 58-62, David M. Kennedy, *The American People in the Great Depression* (New York: Oxford University Press, 1999), 325-331.

judicial rulings during this period that are often overlooked by Court-packing historians, Roger Corley finds a significant acceptance of more and more governmental power at the state level. That trend worked its way to the Supreme Court, but started with the 1930 appointments of Hughes and Roberts to the bench, not with the 1937 “switch in time.”<sup>16</sup> Patrick Garry and Burt Solomon both argue that there was a constitutional revolution, but that it actually enlarged judicial power. Garry finds that the Court gained a significant amount of power during the growth of the administrative state through its ability to exercise more authority over governmental agencies and individual rights, while Solomon argues that the Court became the center of American political life.<sup>17</sup>

The last twenty years of historiography is marked by this back-and-forth between challenge and defense, with the indication being that the challenges have made some headway in reinterpreting the Court-packing crisis. Yet the traditional narrative of the Court-packing episode still resonates strongly. The two most recent book-length studies of the topic, Burt Solomon’s *FDR v. the Constitution* (2009) and Jeff Shesol’s *Supreme Power* (2010), blend together both the conventional Court-packing tale and the scholarly objections of the past few decades. Despite differing interpretations of Court-packing, there are many aspects of the episode about which historians almost unanimously agree. One is that Roosevelt made a drastic political mistake. Coming just months after his smashing reelection, Roosevelt’s defeat in the Court fight damaged both his power and his prestige. Roosevelt “had won reelection in 1936 by a larger margin than any president in more than a century,” writes David Kennedy. “And yet

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<sup>16</sup> Roger W. Corley, “Was There a Constitutional Revolution in 1937?” in *Franklin D. Roosevelt and the Transformation of the Supreme Court*, ed. Stephen K. Shaw, William D. Pederson, and Frank J. Williams (Armonk: M.E. Sharpe, 2004), 37, 53.

<sup>17</sup> Patrick M. Garry, *An Entrenched Legacy: How the New Deal Constitutional Revolution Continues to Shape the Role of the Supreme Court* (University Park: Pennsylvania State University Press, 2008), 41-43, 76-83; Burt Solomon, *FDR v. the Constitution: The Court-packing Fight and the Triumph of Democracy* (New York: Walker and Company, 2009), 273-276.

before the year 1937 was out... the president's political fortunes would tumble to depths not touched since Herbert Hoover's presidency."<sup>18</sup> Historians also agree that the Court markedly shifted its position on New Deal measures. There are disagreements over why, but almost every scholar admits that the Court's rulings were decidedly more liberal with regards to the reach of the federal government following the Court fight. Historians are also consistent in their portrayal of Congress. Tired of being considered nothing more than Roosevelt's rubber stamp, Congress is usually shown to jump at the chance to push back against growing executive power. Most historians also agree that Congress became far more independent of Roosevelt following the defeat of the bill.

While Roosevelt's Court-packing bill has been well-covered by scholars, there are still areas left scarcely explored by seventy years of historiography, the most noticeable of which is the origins of the plan. Scholars all agree that Roosevelt made a gross political miscalculation, but their focus has largely been on the ramifications of the bill. The important question of where the bill came from remains, and this question has not been adequately explored by historians. On the surface, the Judiciary Reorganization Act of 1937 was a rash reaction to an obstinate Supreme Court. Beneath the surface, however, the bill was the product of a four-year showdown between vastly different beliefs about the proper size and scope of the federal government.

Recent scholarship has begun to take the origins of the bill into account, but much of the focus remains on Roosevelt and how he should have handled the situation differently. This thesis will focus strictly on the origins of the Court-packing plan, and in doing so will show that Attorney General Homer Cummings, not Franklin Roosevelt, was the driving force and central figure in the development of the infamous and politically disastrous Judicial Reorganization Act

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<sup>18</sup> Kennedy, *American People in the Great Depression*, 323.

of 1937. Recent scholarship has begun to focus some attention on Cummings, but he remains a bit of a shadowy figure in the Court-packing narrative. Ambitious, politically shrewd, and eager to please, Homer Cummings gradually became one of Roosevelt's most trusted advisers at a time when several advisers who were willing to stand up to the president were being pushed out of the White House. This thesis will show that Roosevelt's reliance on Cummings led to several disastrous decisions during the formation of the bill, most notably the decision to settle on Court-packing as the best way to rein in the Supreme Court.

Chapter one of this thesis explores the formation of the Supreme Court that the president and his attorney general faced at the start of Roosevelt's first term. It shows that the appointment of the nine justices and the jurisprudential landscape in which they worked were the product of decades of conservative domination of the federal government. It also shows that Roosevelt and Cummings were well aware that the New Deal would likely run into a judicial roadblock, and that they began considering ways around the Court as early as 1933. Chapter two focuses on the battle between the New Deal and the Supreme Court. It shows that the executive and judicial branches were waging a war for public opinion, which swung back and forth between the two and seemed to be behind the president by the end of the Court's 1935-1936 term. Chapter three chronicles the development of the eventual Court-packing bill. It shows that Roosevelt chose Cummings to research and develop a plan to circumvent the Court, and that Cummings increasingly became Roosevelt's key adviser. In showing the difficulties that Cummings had in settling on a plan, chapter three also demonstrates that the eventual Court-packing bill was not an impetuous reaction, but a carefully crafted product of a year-long search for a solution. Lastly, this thesis argues that Roosevelt's biggest mistake in the Court-packing debacle was not in refusing to campaign on the Court issue in 1936 or in acting out of hubris that came from his

overwhelming electoral victory, but rather in relying almost solely on Homer Cummings to develop the Court plan and in agreeing with Cummings to present the Court-packing bill under the thin veil of judicial reorganization. The failure of the Judiciary Reorganization Act of 1937 resulted not from violating the “taboo” of Court-packing, but rather in several fateful decisions imbedded in its origins.

## Chapter One: The Gathering Storm

Franklin Roosevelt's clash with the Supreme Court during the New Deal was a conflict decades in the making. On one side was Roosevelt's administration, wildly popular and full of reformist energy. On the other side were the aged justices of the Supreme Court, stewards of a conservative legacy and increasingly seen as obstinate and out of touch with the realities of the day. Yet, was the Court really as conservative as contemporary journalists and later historians have claimed? In a word, yes. This chapter will explore the jurisprudential background of the New Deal Court and its justices. It will show that the Court was the product of decades of Republican domination of national politics and that the New Deal marked an assault on established conservative jurisprudence. This chapter will also examine the key figure behind the defense of the New Deal and the creation of the Court-packing plan—Attorney General Homer Stille Cummings. It will argue that Cummings was largely responsible for poor staffing choices in the Justice Department and subsequently for the New Deal's struggles before the Court. Lastly, this chapter will detail early New Deal cases before the Court. It will note that, despite early struggles, the New Deal remained largely in place by early 1935, warranting optimism amongst New Dealers and rendering moot talk of attacking the Court in any way, shape, or form.

As widely covered as the New Deal's conflict with the Supreme Court has been, it is easy to overlook that it was Theodore, not Franklin, who was the first Roosevelt to have a run-in with the Court. Propelled to the presidency upon William McKinley's assassination in September of 1901, Teddy Roosevelt represented a "dramatic departure from the long line of Republican

mediocrities in the presidency” and was the rough-and-tumble embodiment of the Progressive reform spirit.<sup>1</sup> Teddy Roosevelt believed that the justices of the Supreme Court had an obligation as “chief lawmakers” to assist the cause of reform sweeping the nation. As his younger cousin later would, Teddy Roosevelt believed that the Court had to adjust to the spirit of the times. “It is the people, and not the judges,” Roosevelt proclaimed, “who are entitled to say what their constitution means.”<sup>2</sup> Alas, he was to be sorely disappointed. Despite Roosevelt’s three appointments during his presidency, the Supreme Court remained hostile to Progressive reform efforts. While the Court upheld some government trust-busting efforts, it proved unwilling to adapt to what Roosevelt saw as the demands of a modern, twentieth-century economy.

At the heart of the Court’s aversion to Progressive reform efforts was the justices’ acceptance of substantive due process. An “elusive concept,” substantive due process holds that the Fourteenth Amendment’s due process clause extends to property and contract rights, an idea based firmly in a laissez-faire conception of the market economy, the jurisprudential basis of which goes all the way back to Justice Stephen J. Field’s dissent in the 1873 *Slaughterhouse Cases*. While the majority maintained that the Fourteenth Amendment was meant to apply only to freed slaves, Justice Field argued that corporations should also receive protection under the amendment’s due process clause. Only thirteen years later, the Court accepted Field’s views and began to regard a corporation as a “person,” fully deserving of protection under the Constitution.<sup>3</sup> By the time Teddy Roosevelt took the oath of office, the “dominant *Laissez*

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<sup>1</sup> James MacGregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (New York: Penguin Press, 2009), 115-116.

<sup>2</sup> *Ibid.*, 123.

<sup>3</sup> Kennedy, *American People in the Great Depression*, 327; Jim Powell, *FDR’s Folly: How Roosevelt and his New Deal Prolonged the Great Depression* (New York: Crown Forum, 2003), 158-159; Solomon, *FDR v. the Constitution*, 42-43.

*Faire*-ism of the day” was firmly ensconced in a Supreme Court that espoused “freedom of contract,” which, according to contemporary constitutional scholar Edward Corwin, “meant specifically the freedom of employers to deal with their employees without government attempting to thrust its oar in.”<sup>4</sup>

Perhaps the best known substantive due process ruling came in 1905 with *Lochner v. N.Y.*, in which a Court majority struck down a seven-year-old New York law limiting working hours in bakeries. Joseph Lochner had been convicted of violating the law, and his conviction had been upheld by the New York Court of Appeals. Yet, in his majority opinion Justice Rufus Peckham overturned the conviction and warned against the “all-pervading power” of unchecked legislatures. Rhetorically questioning the soundness of the New York law, Justice Peckham asked, “Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?” Peckham and the majority concluded it was the latter.<sup>5</sup> Historian Michael McGerr notes that the Court had proven amenable to reform legislation protecting government workers and workers in dangerous occupations. However, the *Lochner* ruling found that regulation of bakery working hours was “mere meddlesome interferences with the rights of the individual.”<sup>6</sup> Justice John Marshall Harlan fervently disagreed with Peckham’s opinion, instead arguing that the judiciary should

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<sup>4</sup> Corwin, *Revolution*, 28-30.

<sup>5</sup> 198 U.S. 45: 56; Burns, *Packing*, 119-120; Corwin, *Revolution*, 29-30.

<sup>6</sup> Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America* (New York: Oxford University Press, 2003), 137-138.

keep its hands off of legislation unless it is clearly unconstitutional. Nonetheless, the *Lochner* precedent remained for almost thirty years.<sup>7</sup>

The Court continued its anti-labor assault with two important rulings in 1908. In *Adair v. U.S.*, the Court dealt a blow to railroad employees when it overturned congressional legislation that outlawed “yellow-dog” contracts—those that threatened to fire workers if they joined labor unions. “Once again,” argues James MacGregor Burns, “liberty of contract was the issue, with the justices imagining that employer and employee could be on equal footing in negotiations.”<sup>8</sup> The Court continued its determined stance against labor unions in *Loewe v. Lawlor*. Dietrich Loewe, a Connecticut hat manufacturer, sued his striking workers for triple damages by claiming that the United Hatters of North America, which had orchestrated a boycott of Loewe’s products, had violated the Sherman Anti-Trust Act. Amazingly, the Court accepted this stretch of an argument, agreeing that the Anti-Trust Act applied to organized labor and that the United Hatters had unconstitutionally restrained trade.<sup>9</sup>

The “single chink in [the Court’s] anti-labor armor” also came in 1908 with a pro-reform ruling in *Muller v. Oregon*. The issue at stake was an Oregon maximum-hour law for women. Citing the “inherent differences between the two sexes,” the Court concluded that because “healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest.”<sup>10</sup> A key factor in this anomalous ruling was the argument of a Boston attorney destined to play a critical role on the New Deal Court—Louis Brandeis. His “one-hundred-page sociological treatise that demonstrated the ill effects of long hours on the

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<sup>7</sup> Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (New York: W.W. Norton and Company, 2010), 31; Burns, *Packing*, 120.

<sup>8</sup> Burns, *Packing*, 120.

<sup>9</sup> McGerr, *A Fierce Discontent*, 144.

<sup>10</sup> 208 U.S. 412: 421; Burns, *Packing*, 120; McGerr, *A Fierce Discontent*, 137.

well-being—moral as well as physical—of working women” became the model for future “Brandeis briefs” prepared for the Court.<sup>11</sup> Yet, historians argue that too much can be read into this seeming abandonment of the “liberty of contract” doctrine. James MacGregor Burns concludes that the ruling was downright sexist, and Michael McGerr finds that maximum-hours laws defined women as weak and powerless and were non-conducive to improving women’s standing in the world of labor.<sup>12</sup> Additionally, the ruling was only a partial victory for progressive reformers, as it would be decades before they could secure similar workplace protections for men.

Primarily due to the United States’ entrance into World War I, the decade of the 1910s saw the powers of the federal government expand rapidly beyond previous boundaries. Yet, once the war ended, the Court quickly curbed enlarged federal powers and resumed its dismantling of reform legislation in what one historian termed a “constitutional counter-revolution.”<sup>13</sup> The first law to fall under the Supreme Court’s hammer was the Keating-Owen Child Labor Act, in which Congress used its commerce power to establish a cap on the number of hours children could work per week. In *Hammer v. Dagenhart* (1918), the Court overturned the law as an unconstitutional infringement on the power of the individual states to regulate conditions of manufacture. If Congress were permitted to “regulate matters entrusted to local authority...all freedom of commerce will be at an end,” wrote Justice William Day, “and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.”<sup>14</sup> Congress subsequently passed a similar statute using the taxing power

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<sup>11</sup> Burns, *Packing*, 120.

<sup>12</sup> Burns, *Packing*, 120; McGerr, *A Fierce Discontent*, 137.

<sup>13</sup> Maxwell Bloomfield, *Peaceful Revolution: Constitutional Change and American Culture from Progressivism to the New Deal* (Cambridge: Harvard University Press, 2000), 70.

<sup>14</sup> 247 U.S. 251: 276; Bloomfield, *Peaceful Revolution*, 70.

to regulate child labor, and the Court again overturned the law as a violation of the Tenth Amendment's reservation of state powers in *Bailey v. Drexel Furniture Company* (1922). Chief Justice William Howard Taft concluded for the majority that "the good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half."<sup>15</sup>

1923 saw "the most dramatic instance of deregulation" when the court ignored its precedent in *Muller v. Oregon* and decided in *Adkins v. Children's Hospital* that "liberty of contract" did indeed apply to women. The Court overturned a Washington, D.C., minimum-wage law for women, arguing through Justice George Sutherland that the law "forbids two parties having lawful capacity...to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree."<sup>16</sup> Thus did the Court establish conflicting precedents in which women were considered inherently different than men and in need of protection from excessive work hours, yet were expected to negotiate with employers with the same force as men. In 1937, Franklin Roosevelt, looking back at the history of the Court, argued that "these cases seemed to stand in the way of any intelligent and far-sighted program by either the Federal

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<sup>15</sup> 259 U.S. 20: 37; William F. Swindler, *Court and Constitution in the Twentieth Century: The Old Legality, 1889-1932* (New York: The Bobbs-Merrill Company, 1969), 235.

<sup>16</sup> 261 U.S. 525: 554-555; Bloomfield, *Peaceful Revolution*, 81; Powell, *FDR's Folly*, 157.

or State Governments to handle the constantly growing problem of the relations between industry and labor.”<sup>17</sup>

The conservative nature of the Supreme Court that took on the New Deal was clearly not a new development. The White House had been almost solely in the hands of Republican presidents since before the turn of the century, and with the exception of two justices appointed by Woodrow Wilson, the justices of the New Deal Court were a product of that Republican political domination. While Teddy Roosevelt bemoaned the lack of progressive spirit on the Court, his successor, William Howard Taft, relished it. In his one term in the White House, Taft made an incredible six appointments to the Court. All of his appointments were party politicians, well-educated, strongly religious, and stoutly conservative. By the time Taft unceremoniously left office, the only progressive left on the bench was Oliver Wendell Holmes, whose belief that the Constitution needed to adjust to “the felt necessities of the time” stood in a lonely and sharp contrast to the views of his conservative brethren.<sup>18</sup>

One of Taft’s most conservative appointees was Willis Van Devanter, whom Justice Harlan F. Stone would later call the “commander-in-chief of judicial reaction.”<sup>19</sup> Van Devanter, the first justice appointed of those whom would later comprise the New Deal Court, moved to Wyoming prior to statehood, where “the ethos of the last frontier shaped his approach to the law.” A firm believer in property rights and small government, he served the territory as its chief justice. Upon stepping down from the bench, Van Devanter moved into private practice, where he defended the Union Pacific Railroad. His work with the Wyoming Republican Party gained the attention of Washington, and he worked in the Justice Department prior to his elevation to

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<sup>17</sup> *PPA*, 4: 4-5.

<sup>18</sup> Burns, *Packing*, 123-125.

<sup>19</sup> *Ibid.*, 125.

the Supreme Court.<sup>20</sup> Drew Pearson and Robert Allen, authors of the famous Supreme Court diatribe *The Nine Old Men*, claimed that by 1936 Van Devanter was physically unable to perform the duties of the Court, but because he was such a “fanatical reactionary” he “brushed aside his failing health, to sit, unproductive but obstructive, in the path of government progress.”<sup>21</sup>

The next two members of the eventual New Deal Court were appointed by Woodrow Wilson, Taft’s Democratic successor, and could not have possibly been any more different from one another. James Clark McReynolds, Wilson’s first appointment, was hardly the most popular person at anything he ever did. A “reactionary ideologue and a racist,” McReynolds felt blacks and Jews were inferior, was at times blatantly sexist (he once griped, “I see the female is here again,” when a woman attorney showed up in the courtroom), and overall had an unpleasant demeanor. In *The Nine Old Men*, Drew Pearson and Robert Allen called him the Court’s “greatest human tragedy” and simply titled the chapter on McReynolds “Scrooge.”<sup>22</sup> Born in Tennessee and educated in the South, McReynolds began his political career as a conservative Democrat and gained a reputation as a trust-busting attorney in the Roosevelt and Taft administrations. He continued working in the Justice Department as Wilson’s attorney general, but his “reformist gloss” hid a severe hatred of government power. “Bigness is bigness,” argued Pearson and Allen, “and [McReynolds’s] Tennessee fundamentalist soul revolts against it.”<sup>23</sup>

Aversion to “bigness” was the one area in which McReynolds seemed to find agreement with Wilson’s second appointment—Louis D. Brandeis. The Boston attorney made famous by

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<sup>20</sup> Shogan, *Backlash*, 164; Solomon, *FDR v. the Constitution*, 49-50.

<sup>21</sup> Drew Pearson and Robert S. Allen, *The Nine Old Men* (Garden City: Doubleday, Doran and Company, 1936), 187-188, 195.

<sup>22</sup> Burns, *Packing*, 126; Solomon, *FDR v. the Constitution*, 50; Pearson and Allen, *Nine Old Men*, 222.

<sup>23</sup> Burns, *Packing*, 126; Pearson and Allen, *Nine Old Men*, 228.

his presentation in *Muller v. Oregon* was a champion of human rights and “superbly ruthless” as a lawyer. Pearson and Allen claimed that Brandeis was as passionate about human rights as the conservative justices were about property rights.<sup>24</sup> In many ways, Brandeis’s philosophy of sociological jurisprudence embodied the competing ideological viewpoints that would later surface during the New Deal’s battles with the Court. Brandeis’s opposition to “bigness” was based on principles of “morality and political theory,” according to biographer Melvin Urofsky; whether in government or in the private sector, bigness was dangerous to democracy and to individual opportunity. Yet, Brandeis also understood that justices could not hand down rulings based solely on “abstract reasoning, deliberate ignorance of the facts of industrial society, a limited role for the state, and a belief in immutable law combined with an emphasis on individualism” that dominated the Taft Court.<sup>25</sup>

For Brandeis, there was absolute right and absolute wrong. Truth was not relative, as he told Harvard law professor Manley Hudson, but “had been revealed to men in an unbroken, continuous, and consistent flow by the great prophets and poets of all times.”<sup>26</sup> This belief garnered Brandeis a reputation as a reformer and the nickname “the people’s attorney.” Still, his philosophy of sociological jurisprudence enabled him to open his eyes to a wider vision of society than that which embodied only his personal beliefs. As Urofsky put it, “the man who despised savings bank life insurance understood the needs of the working poor, and what an affordable insurance scheme would mean to them.”<sup>27</sup> Here was where Brandeis differed starkly from the conservative justices of the Court. While they may have agreed that “bigness” was bad, Brandeis knew that government and the Constitution had to be flexible enough to adapt to

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<sup>24</sup> Pearson and Allen, *Nine Old Men*, 170-173, 183-184.

<sup>25</sup> Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York: Pantheon Books, 2009), 300, 593-594.

<sup>26</sup> *Ibid.*, 568.

<sup>27</sup> *Ibid.*, 593-594.

changing economic and social conditions. While he may have been uneasy about the size of its programs, Brandeis believed that the New Deal should at least have the chance to address the problems facing the nation.<sup>28</sup>

Of all the appointments that shaped the New Deal Court, perhaps none was as important as that of a justice who did not even live to see the New Deal. In 1921, President Warren Harding appointed William Howard Taft to the chief justiceship. From his high perch, Taft used his considerable influence over the president to make sure that he filled the bench with like-minded jurists. Taft successfully lobbied Harding for the appointments of George Sutherland and Pierce Butler. Sutherland was a nearly predetermined pick, as Harding had passed him over to appoint Taft. However, Taft was adamant that Butler be appointed, and he drummed up a wide array of endorsements to support Butler's candidacy.<sup>29</sup> Taft's activism in the process of judicial selection led preeminent New Deal historian Arthur Schlesinger to argue that the New Deal Court was mostly the creation of Warren Harding.<sup>30</sup>

Sutherland and Butler would prove to vindicate Taft's support, as they remained staunchly conservative throughout their tenure on the bench. Raised in Utah, Sutherland was a successful corporate attorney before winning election to the United States Senate as a Republican. On the Supreme Court, he became the leader of the conservative wing, proving every bit as reactionary as McReynolds, but with a friendly manner that made him much more agreeable. "This sweetness of disposition," argued Pearson and Allen, "makes Sutherland all the more effective. The dynamite-laden reaction which falls from his mild, scholarly lips creates a more profound impression upon a gullible public than the hotheaded blasts of McReynolds or

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<sup>28</sup> Solomon, *FDR v. the Constitution*, 20, 39, 50-51; Shesol, *Supreme Power*, 60-61.

<sup>29</sup> Burns, *Packing*, 130-132; Swindler, *Old Legality*, 226-229.

<sup>30</sup> Arthur Schlesinger, *The Politics of Upheaval*, vol. 3 of *The Age of Roosevelt* (Boston: Houghton Mifflin, 1960), 454-455.

Butler.”<sup>31</sup> Nominally a Democrat, Pierce Butler of Minnesota was known for his tough cross-examinations as a railroad attorney. He proved to be as equally brutal in his questioning of attorneys from the bench. Very much a Taft man, Butler had little regard for progressivism and “no more regard for dissidents, or for blacks or workers.”<sup>32</sup>

While Harding made four appointments to the Court in three years (his third was Edward Sanford, who was squarely in Taft’s corner), Calvin Coolidge made just one in five years—Harlan Fiske Stone. Initially, Stone seemed like a solid conservative choice for the Court. A New Englander with “an old-line Republican father,” Stone went to Amherst College with Coolidge, had practiced corporate law, and had admirably served in the Coolidge administration as attorney general. Yet, he defied expectations and began voting with Holmes and Brandeis in most cases. James MacGregor Burns claims that Taft believed the two liberal justices had corrupted the new appointee.<sup>33</sup> Stone may have indeed been the “most unexpected of the liberals,” but Arthur Schlesinger points out that there were important differences between Stone and Taft’s group of conservatives. “As a law school professor,” Schlesinger argues, “Stone had been exposed to the new breezes blowing through the legal-academic world. While he did not accept all the new sociological jurisprudence, he accepted enough to conclude, with Holmes, that the life of law was not logic, but experience, and that the law grew as judges reinterpreted it against changing social settings.”<sup>34</sup> Jeff Shesol agrees with Schlesinger that Stone was not a New Dealer just because he voted with the liberal justices, but rather he was an individualist who saw little wrong with the existing social order. Yet, Stone also deplored the conservative justices’ belief in a static, unchanging Constitution. He felt government had to be able to

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<sup>31</sup> Burns, *Packing*, 131-132; Solomon, *FDR v. the Constitution*, 45-46; Pearson and Allen, *Nine Old Men*, 199.

<sup>32</sup> Pearson and Allen, *Nine Old Men*, 119-126, 134; Burns, *Packing*, 132.

<sup>33</sup> Burns, *Packing*, 134-135.

<sup>34</sup> Schlesinger, *Politics of Upheaval*, 462-463.

respond to the requirements of the day and argued that “the issues cannot be settled by an appeal to the eighteenth-century philosophy of individualism in the abstract, for that philosophy cannot be completely adapted to the twentieth-century state.”<sup>35</sup>

With the surprising addition of Stone to the consistent dissents of Brandeis and Holmes, Chief Justice Taft began to worry about the conservative legacy of his Court. He believed that dissent was a reflection on his leadership of the Court and tried to promote unanimity, only to find it fleeting. Late in his career he worried about the Court’s ability to remain a bulwark against “the unwise demands of ‘the leviathan, the People.’”<sup>36</sup> Yet, his worries were largely unfounded; the legacy of the Taft Court is staunchly conservative. Under Taft’s leadership, the Supreme Court set a new standard for judicial obstinacy, averaging eighteen judicial vetoes per year between 1922 and 1928, peaking with twenty-four in 1926. Whereas two acts of Congress were found unconstitutional between 1789 and 1865, twenty-two were overturned between 1920 and 1932.<sup>37</sup> The Taft Court slammed the door on reform efforts and rejected the government’s ability to regulate business in the public interest. While in 1916 there was a “bright promise of reform,” the Taft Court, the “last fortress of laissez-faire,” decisively destroyed it. Justice Sutherland summed up the overarching philosophy of the Taft Court when he proclaimed, “We have developed a mania for regulating people...The errors of a democracy and the errors of an autocracy will be followed by similar consequences. A foolish law does not become a wise law because it is approved by a great many people.”<sup>38</sup>

While Taft and his colleagues were slamming the door on progressivism, the reform spirit was dying out in the American public. The 1920s was what William Swindler called a “decade

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<sup>35</sup> Shesol, *Supreme Power*, 63-64.

<sup>36</sup> Burns, *Packing*, 135-137.

<sup>37</sup> Burns, *Packing*, 133; Schlesinger, *Politics of Upheaval*, 455.

<sup>38</sup> Burns, *Packing*, 132-133; Swindler, *Old Legality*, 226-228.

of normalcy,” a decade in which conservative domination extended to the executive and legislative branches of the federal government. Democrats and progressives were roundly rejected at the ballot box in each major election of the 1920s.<sup>39</sup> Still, liberals and progressives formed a potent, if not numerous opposition. Foreshadowing a key conflict over which the New Deal Court would later split, Holmes, Brandeis, and Stone maintained that society had changed since 1787 and the Constitution had to change with it. In addition, “progressive animus towards the Taft Court” led to the formation of the Progressive Party, whose 1924 platform called for allowing Congress to override the Supreme Court by reenacting a vetoed law. Another idea advanced for limiting the power of the Court was to require the votes of seven justices to overturn an act of Congress.<sup>40</sup> While these motions were soundly rejected, they formed the basis for similar proposals advanced to curb the New Deal Court a decade later.

Firmly defeated at the polls, progressives relied on senators such as Wisconsin’s Robert M. La Follette and Nebraska’s George Norris to take the fight to the Senate floor. Indeed, La Follette and his progressive allies proved to be a formidable obstacle to Coolidge’s successor, Herbert Hoover. The progressives believed enough justices already “spoke for the interests of the rich and well-born,” and they would do their best to prevent the appointment of any more.<sup>41</sup> Hoover’s first nomination hardly seemed likely to rouse debate. Nominating Charles Evan Hughes to succeed Taft as Chief Justice, Hoover selected arguably the best available man for the job. A former governor of New York, Hughes had already sailed through Senate confirmation once, only to resign his seat on the Court to run against Wilson in 1916. After his narrow defeat, he returned to corporate law, only to return to Washington as Secretary of State to Harding and

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<sup>39</sup> Swindler, *Old Legality*, 231-232.

<sup>40</sup> Leuchtenburg, *Supreme Court Reborn*, 83; Swisher, *American Constitutional Development*, 771-774.

<sup>41</sup> Leuchtenburg, *Supreme Court Reborn*, 83.

Coolidge. When he received Hoover's nomination, Hughes was representing the United States on the World Court.<sup>42</sup>

Interestingly, Hughes had demonstrated liberal tendencies in his prior stint with the Court. He often voted with Brandeis and Holmes in cases involving civil rights and civil liberties and had shown a willingness to uphold worker protection laws. Yet, Hughes's conservative credentials and his legal experience as a defender of railroad, oil, insurance, and mining companies seemed to justify *Time*'s assessment that "the pure white flame of Liberalism had burned out in him to a sultry ash of Conservatism... His mind had captured his heart."<sup>43</sup> Senator George Norris declared that "no man in public life exemplifies the influence of powerful combinations in the political and financial world as does Mr. Hughes."<sup>44</sup> The attack on Hughes was less a personal attack than a protest over the constitutional interpretations of the Taft Court. Despite their posturing, the progressives were outnumbered and they knew it. Hughes was confirmed by a vote of 52-26.<sup>45</sup>

Still, the progressives were not finished with Hoover's nominations just yet. A mere two months after Hughes's confirmation, Justice Edward Sanford died, and Hoover nominated John J. Parker to fill the seat. Hoover again expected a smooth confirmation, but progressives railed against Parker's anti-labor leanings and disparaging comments the nominee had made about African-Americans. Progressives celebrated the 39-41 vote that rejected the nomination.<sup>46</sup> After two grueling confirmation battles, the Senate seemed practically anxious to confirm Hoover's second choice—Owen J. Roberts. A corporate lawyer from Philadelphia, Roberts had gained

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<sup>42</sup> Shesol, *Supreme Power*, 25-28; Swindler, *Old Legality*, 297.

<sup>43</sup> Quote in Shesol, *Supreme Power*, 28.

<sup>44</sup> *Ibid.*, 28.

<sup>45</sup> Swindler, *Old Legality*, 298-299.

<sup>46</sup> *Ibid.*, 299.

national attention when President Coolidge appointed him to investigate the Teapot Dome scandal that had broken out in the Harding administration. Some scholars have simply called Roberts “an enigma.” “Wildly inconsistent, even within a single opinion,” Roberts was decidedly difficult to classify, as nobody seemed to know where he would fall on any particular issue. Some contemporaries saw him as liberal, others as conservative, and still others as moderate. Charles A. Leonard, a scholar who has studied Roberts closely, notes that two men who knew Roberts well believed that the justice did not subscribe to a certain set of convictions, but was actually a pragmatist, and not a theorist.<sup>47</sup> Pointing to a 1923 speech Roberts gave in which he decried government regulation of business, Drew Pearson and Robert Allen argued Roberts was a conservative corporate lawyer at heart and always had been. “The biggest joke ever played upon the fighting liberals of the United States Senate,” Roberts initially leaned left before, according to Pearson and Allen, Justice Butler wooed him to the conservative fold.<sup>48</sup>

The final addition to the New Deal Court came in 1932 when Hoover nominated Benjamin Cardozo to fill vacancy created by Holmes’s retirement. A brilliant liberal jurist, Cardozo had served on the New York Supreme Court before moving to the New York Court of Appeals, where he was Chief Justice before being appointed to the United States Supreme Court. Cardozo differed from many of his brethren in that he never practiced corporate law, a fact that the conservatives on the bench held against him. However, Justice Stone firmly pressed his nomination on Hoover, who relented despite initial misgivings.<sup>49</sup> Cardozo’s confirmation was relatively smooth, as the Senate conservatives were simply replacing one liberal justice with another.

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<sup>47</sup> Solomon, *FDR v. the Constitution*, 53-67; Shesol, *Supreme Power*, 122-126; Leonard, *Search*, 10-12.

<sup>48</sup> Pearson and Allen, *Nine Old Men*, 139-149, 160-162.

<sup>49</sup> *Ibid.*, 213-217.

Thus the balance of the Court in 1932 stood at four staunch conservatives (Van Devanter, McReynolds, Sutherland, and Butler), three reliable liberals (Brandeis, Stone, and Cardozo), and two swing votes (Hughes and Roberts). It is clear that the justices of the Supreme Court were intensely political. Many were party politicians and had held elected office or served in an administration at some point. The Supreme Court may have appeared calm on the surface at the outset of the New Deal, but it was, as Justice Holmes put it, “the quiet of a storm center.” “Behind the judicial masks,” argues James MacGregor Burns, “there burned passionate convictions about politics and policy. Judges are human, and their decisions...are not brought by constitutional storks, but are born out of the travail of economic and social circumstances.”<sup>50</sup> Some scholars rightly point out that too much can be made about the divisions in the New Deal Court. Between 1930 and 1932, when the New Deal Court was almost entirely in place, the justices were unanimous in 85% of cases involving state or federal economic power, and even Burns admits that the rulings of the Court were fluid, with justices aligning and realigning on the basis of individual cases.<sup>51</sup> On the divisions within the Court, Justice Stone said, “It is not so much a contest between conservatism and radicalism, nearly so much as a difference arising from an inadequate understanding of the relation of law to the social and economic forces which control society.”<sup>52</sup>

Still, those differences were real, and they were intense. In the history of the Court, the factions of justices had arguably never been as divided as they were during the New Deal. The conservative justices, the so-called “four horsemen,” were largely marked as nineteenth-century men. For these men, “laissez-faire, undisturbed property rights and the sanctity of contracts were

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<sup>50</sup> Burns, *Lion and the Fox*, 230.

<sup>51</sup> Shesol, *Supreme Power*, 34; Burns, *Crosswinds of Freedom*, 71-72.

<sup>52</sup> Quote in Leonard, *Search*, 18.

a trinity of doctrines at whose shrine they worshipped daily.” The coming of the New Deal marked an assault on everything that these justices had spent decades trying to protect.<sup>53</sup> On the other hand, the liberals of the Court believed that government had to be permitted to respond to the needs of the day, that it was “the duty of a justice...to impose the judicial veto only when the constitutional mandate for it was abundantly clear.”<sup>54</sup> At times, the ideological differences between the justices led to outright hostility in the Court’s sessions, such as when Justice McReynolds would read a newspaper or simply get up and leave when a liberal justice read an opinion. Hughes, intensely concerned with the reputation of the Court, was stuck in the middle, trying in vain to quell strife and piece together unanimity on a fiercely divided Court.<sup>55</sup>

Such was the state of the Supreme Court when Franklin Delano Roosevelt, Democratic governor of New York, soundly defeated Hoover in the election of 1932. Swept into office in the wave of anti-Republican sentiment that accompanied the Great Depression, Roosevelt offered the electorate a promise of reform, of a way out of the despair brought by the Depression. A showdown between the largely conservative Supreme Court and the new reform-minded administration was almost inevitable. Yet, ironically, Roosevelt lost the opportunity to preempt the entire conflict before he even took office. In an August 1932 effort to cut government expenditures, Congress passed a law fixing government pensions at \$10,000. Because retired Supreme Court justices relied on Congress to establish the level of their pension, this effectively cut Justice Holmes’s retirement pay in half. Congress likely did not intend for this to apply to the Court, but failed to remedy the error until the spring of 1933.<sup>56</sup> The real impact of the law, however, lay not in cutting Holmes’s salary (for he was reasonably wealthy), but rather in

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<sup>53</sup> Alsop and Catledge, *The 168 Days*, 3-4; Burns, *Packing*, 139-141.

<sup>54</sup> Alsop and Catledge, *The 168 Days*, 5.

<sup>55</sup> Solomon, *FDR v. the Constitution*, 47-49; Pearson and Allen, *Nine Old Men*, 94-97.

<sup>56</sup> Shesol, *Supreme Power*, 40-41.

keeping Justices Van Devanter and Sutherland on the bench. According to Chief Justice Hughes, both men would have stepped down “had it not been for the failure of Congress to make good its promise to continue to pay in full the salaries of Justices who resigned.”<sup>57</sup> Thus, instead of providing Roosevelt with two early appointments, Sutherland and Van Devanter fought off poor health to remain on the bench.

Roosevelt’s ambitious New Deal was sure to throw a wrench into decades of conservative jurisprudence, and the president-elect knew it. Furthermore, Roosevelt suspected the motives of the Court. Campaigning in Baltimore, Roosevelt told a frenzied crowd, “After March 4, 1929, the Republican Party was in complete control of all branches of the Federal Government—the Executive, the Senate, the House of Representatives, and, I might add for good measure, the Supreme Court as well.”<sup>58</sup> At the height of the conflict between Roosevelt and the Court, Justice Harlan Stone recalled this speech when he claimed that “some members of the Court, being only human, were much offended by Roosevelt’s conduct and were going too far during their anger.”<sup>59</sup> Roosevelt had extemporaneously added the comment about the Court to the prepared speech, and Republicans pounced on it. They argued that the Court was above politics and that Roosevelt was trying to reduce it to an instrument of policy. Roosevelt kept quiet on the Court for the rest of the campaign, but defended his statement to Senator James Byrnes of South Carolina: “What I said last night about the judiciary is true, and whatever is in a man’s heart is apt to come to his tongue—I shall not make any explanations or apology for it!”<sup>60</sup> The *New York Times* correctly assessed the situation when proclaiming that the Republicans’

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<sup>57</sup> William F. Swindler, *Court and Constitution in the Twentieth Century: The New Legality, 1932-1968* (New York: The Bobbs-Merrill Company, 1970), 5-6.

<sup>58</sup> *PPA*, 1: 837.

<sup>59</sup> Quote in Swindler, *New Legality*, 15.

<sup>60</sup> Shesol, *Supreme Power*, 10-12; Leuchtenburg, *Supreme Court Reborn*, 83.

“sense of outrage is highly artificial and will have not the slightest effect upon the Presidential campaign.”<sup>61</sup>

Perhaps a bit surprised by the negative response to his comments in Baltimore, Roosevelt decided to tone down his rhetoric for the time being. Contrary to the claims of Republican opponents, Roosevelt was not seeking personal control of the federal government. Rather, he was seeking cooperation. Hoping to recreate the kind of close ties he held as governor with the New York Court of Appeals, Roosevelt reached out to Chief Justice Hughes prior to the inauguration and proposed that the two meet often to discuss the constitutionality of New Deal policies before the executive branch moved forward with them. Hughes was “Olympianly chilly” in his response, telling Roosevelt, “Mr. President, the Court is an independent branch of government.” “You see,” Roosevelt would later complain, “he wouldn’t cooperate.”<sup>62</sup>

Despite this rebuff from the Chief Justice, Roosevelt spoke like a man sure of the Court’s support. “Our Constitution,” Roosevelt proclaimed in his first inaugural address, “is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form.”<sup>63</sup> While this message appeared hopeful, Roosevelt privately remained wary of placing the New Deal before the Court too soon. His strategy was to let public support for the New Deal build in the hopes that the Court could not reasonably strike it down. Thus the administration passed on initial test cases that might have validated—or wrecked—the New Deal before it had the chance to get off the ground.<sup>64</sup>

When it was the New Deal’s day in Court, the man Roosevelt would rely on to defend it was Attorney General Homer Stille Cummings. Cummings rose to national prominence through

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<sup>61</sup> Shesol, *Supreme Power*, 11.

<sup>62</sup> Shesol, *Supreme Power*, 50-51; Shogan, *Backlash*, 11-12; Alsop and Catledge, *The 168 Days*, 16.

<sup>63</sup> *PPA*, 2: 14-15.

<sup>64</sup> Leuchtenburg, *Supreme Court Reborn*, 84; Shogan, *Backlash*, 14-15.

Connecticut politics, where, according to two contemporary journalists, “Democrats were so scarce that one who could sign his name, made a habit of blowing his nose and had not murdered his mother automatically became a party leader.”<sup>65</sup> Yet, Cummings showed political promise, winning election as mayor of Stamford, a Republican stronghold, and serving as state’s attorney for Fairfield County. In 1920, he was chosen to be the chairman of the Democratic National Committee. An ardent supporter of Franklin Roosevelt, Cummings served as a floor manager in the 1932 convention and assisted with the presidential campaign. As Roosevelt prepared to take office, Cummings was tapped to be the governor-general of the Philippines, but was asked to temporarily take over as Attorney General when Roosevelt’s first choice, Senator Thomas Walsh, died of a heart attack shortly before inauguration day. Pleased with Cummings’s early performance, Roosevelt shortly thereafter made the appointment permanent.<sup>66</sup>

Historian Marian McKenna rightly sees Cummings as one of the “forgotten figures” of the New Deal. Known primarily as Roosevelt’s “legal yes-man,” Cummings worked quite hard “to find ways that permitted [Roosevelt] to do whatever he wanted to do.”<sup>67</sup> Roosevelt quickly found that he quite liked his Attorney General. He liked Cummings personally, he liked Cummings’s wife, and he really liked that rather than immediately telling him why something he wanted was unconstitutional, which Cummings would do if he had no other recourse, Cummings would first labor to logically find a way to fit it in the framework of the Constitution. Capable and opportunistic though he may have been, Cummings was no Thomas Walsh. Whereas Walsh was widely respected, Cummings was somewhat held in a measure of contempt by Roosevelt’s

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<sup>65</sup> Alsop and Catledge, *The 168 Days*, 25.

<sup>66</sup> McKenna, *Constitutional War*, 3-10.

<sup>67</sup> *Ibid.*, 11.

inner circle of advisors, who largely felt that Cummings's ambition exceeded his professional abilities.<sup>68</sup>

Despite Roosevelt's approval of Cummings, the new Attorney General oversaw disastrous staffing choices and was largely responsible for turning the Justice Department into "one of the great patronage reservoirs of the government." Eager to please and always faithful to the Democratic Party, Cummings was an easy target for James Farley, a Roosevelt advisor who shoveled many political appointments into Justice.<sup>69</sup> Most of these political appointees were woefully unqualified, and the Justice Department was quickly bogged down with ineptitude and inefficiency. By 1936, the problems with the Justice Department were so pronounced that journalists Drew Pearson and Robert Allen called it "the most tragic conglomeration of political hacks recently assembled in Washington" and claimed it was "poorly equipped to handle even routine defense of government legislation."<sup>70</sup>

Even Cummings's colleague in Roosevelt's Cabinet, Harold Ickes, the Secretary of the Interior, decried the lack of quality appointments to Justice: "It is indeed weak. It is full of political appointees. It has some hard-working, earnest lawyers, but no outstanding ones."<sup>71</sup> Ickes strongly protested against an attempt to concentrate the legal staffs of each Cabinet agency into the Justice Department:

If an attempt is made to abolish the Solicitor's office in this Department, I shall certainly put up a stiff fight. I could not function without my legal staff... Moreover, I would not have any confidence in decisions from the Department of Justice. That Department is simply loaded with political appointees and hardly anyone has any respect for the standing and ability of the lawyers over there. Cummings himself is a man of considerable ability, but he is

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<sup>68</sup> McKenna, *Constitutional War*, 6-11; Solomon, *FDR v. the Constitution*, 87; Shogan, *Backlash*, 71-74.

<sup>69</sup> Alsop and Catledge, *The 168 Days*, 26; McKenna, *Constitutional War*, 15-16.

<sup>70</sup> Pearson and Allen, *Nine Old Men*, 238-239.

<sup>71</sup> Harold L. Ickes, *The Secret Diary of Harold L. Ickes* (New York: Simon and Schuster, 1953-1954), 1: 247.

easygoing and apparently has deliberately delivered himself entirely into the hands of the place hunters.<sup>72</sup>

While some of the staffing choices could be chalked up to Cummings's sense of party loyalty, an important early blunder that would have serious consequences for the New Deal was attributable solely to Cummings's vindictiveness. Dean Acheson was a rising star in the legal profession and had the support of Harvard law professor Felix Frankfurter and Justice Louis Brandeis for the important position of Solicitor General. However, five years earlier, Acheson's father, an Episcopal bishop in Connecticut, had denied church sanction for Cummings's third marriage. Cummings got his revenge by denying the younger Acheson the post he sought and for which he was immensely qualified.<sup>73</sup> Subsequently, Cummings gave the job to J. Crawford Biggs, a North Carolina attorney who had no business being in such an important role. Roosevelt's first Solicitor General "floundered around like a ship with a hole in its side," losing ten of his first seventeen cases before the Court. The Justice Department did such a poor job preparing briefs and arguments for its early tests before the Supreme Court that some, including Chief Justice Charles Evan Hughes, felt the Court had no choice but to rule against the government. Thus Biggs's incompetence and Cummings's vindictive side cost the New Deal early victories before the Court when Roosevelt was at the peak of his popularity.<sup>74</sup>

To be entirely fair, Cummings deserves some credit for the simple fact that the Justice Department did not implode under the pressure. Marian McKenna rightly argues that any Cabinet agency would have been in over its head with the amount of work expected of Justice. During Roosevelt's first year in office, Cummings and his lawyers rendered more legal opinions than Justice did during the entire Hoover administration. The Justice Department "carried on,

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<sup>72</sup> Ibid., 243.

<sup>73</sup> Shogan, *Backlash*, 71; McKenna, *Constitutional War*, 13-14.

<sup>74</sup> Shogan, *Backlash*, 72; McKenna, *Constitutional War*, 24-25; Pearson and Allen, *Nine Old Men*, 240-242.

haltingly sometimes, often with difficulty, and always in trouble with the conservatives on the bench, but it carried on,” wrote Joseph Alsop and Turner Catledge.<sup>75</sup>

Like his boss, Cummings also saw the potential for conflict with the right wing of the Court. In January of 1933, Cummings recorded in his diary a discussion he held with Senator William McAdoo, of California, in which the senator brought up the idea of somehow getting the “antiquated” judges off the Supreme Court. He actually urged Cummings to study the feasibility of an amendment that would automatically retire justices at 70 or 72, extend lifetime salaries, and allow the Chief Justice, at his discretion, to call on any retired justice for assistance. “McAdoo said that this would get rid of some of the ‘old fossils’,” recalled Cummings, “though he would regret to see Brandeis go off the bench.”<sup>76</sup> In January 1934, *Literary Digest* reported that “in the intimate Presidential circle the idea of reconstituting the Supreme Court has been considered... In the conversation within the Roosevelt circle, a court of fifteen, instead of the present nine, has been mentioned.”<sup>77</sup> While these suggestions were quite forward thinking, and in fact contained pieces of the eventual Court-packing bill, it is clear that at the time, they were merely speculation. Roosevelt and Cummings may have liked the ideas, but it would be years before the President and Attorney General seriously entertained proposals to challenge and change the Supreme Court.

After all, in early 1934 the New Deal and the Supreme Court had not yet become acquainted. Some historians have argued that when they did, the Court essentially had little choice but to rule against the entire premise of the New Deal. Patrick Garry concludes that the New Deal threatened the foundations of federalism and separation of powers. He argues that

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<sup>75</sup> McKenna, *Constitutional War*, 20-21; Alsop and Catledge, *The 168 Days*, 25-26.

<sup>76</sup> Homer Cummings Diary, entry for January 16, 1933, Homer Stille Cummings Papers, Albert and Shirley Small Special Collections Library, University of Virginia, Charlottesville, VA (hereafter SSCL).

<sup>77</sup> Leuchtenburg, *Supreme Court Reborn*, 85.

there was strong support and precedent for the Court's position on non-delegation of powers from the legislative to executive branches as well as for blocking the intrusion of federal power on the power of the states.<sup>78</sup> Bruce Ackerman contends that the Court's critique of the New Deal helped to broaden the national debate and let Americans know that the reform program was on shaky constitutional ground. He adds that, because the Court was designed by the Framers to be the most conservative branch of the federal government, the New Deal Justices were never about to completely toss out the traditional framework of laissez-faire and property rights. In that sense, he argues, "the Old Court was redeeming—not betraying—America's constitutional tradition."<sup>79</sup>

Yet, other historians find that the Court was certainly not handcuffed by previous jurisprudence. Arthur Schlesinger argues that at the outset of the New Deal, the Court had enough conflicting precedent to rule just about any way it pleased. With the appointment of Hughes and Roberts to the bench, some felt the Court had moved to the left and would take an open-minded approach with regards to applying legal precedent. Indeed, as the Court took on initial New Deal cases, it ruled in favor of state reform efforts. However, it soon became clear that the conservative hold on the Court remained firm. According to William Swindler, Hughes and company were applying beliefs and conclusions from a "decade of normalcy to a decade which was anything but normal."<sup>80</sup>

While the Hughes Court's refusal to sanction growing federal reform power at the outset of the Great Depression was an ill omen for the New Deal, the Court did initially prove open to state reform efforts, upholding reform statutes in California and Oklahoma during the Hoover

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<sup>78</sup> Garry, *Entrenched Legacy*, 11-17.

<sup>79</sup> Bruce Ackerman, *We the People: Transformations* (Cambridge: Belknap Press, 1998), 259, 291, 303-305.

<sup>80</sup> Schlesinger, *Politics of Upheaval*, 451-452; Swindler, *Old Legality*, 300-302.

administration as well as upholding two state reform statutes early in the Roosevelt administration.<sup>81</sup> In *Home Building and Loan Association v. Blaisdell* (1934), the Court upheld a Minnesota “mortgage moratorium” statute designed to help struggling farmers keep their homes. Dismissing the argument that Minnesota had violated the Constitution, Chief Justice Holmes declared, “While emergency does not create power, emergency may furnish the occasion for the exercise of power.” Justice Sutherland furnished a stinging dissent, ridiculing Hughes’s elastic conception of the Constitution. The Constitution “does not mean one thing at one time and an entirely different thing at another time... If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned.”<sup>82</sup>

In *Nebbia v. New York* (1934), the Court upheld a New York statute regulating the price of milk. “This court from the early days affirmed that the power to promote the general welfare is inherent in government,” Justice Roberts argued for the majority, adding that “neither property rights nor contract rights are absolute.” This was a distinct break from the jurisprudence of the Taft Court, and this time the dissent fell to Justice McReynolds. “The adoption of any ‘concept of jurisprudence’ which permits facile disregard of the Constitution as long interpreted and respected will inevitably lead to its destruction,” the ultra-conservative jurist declared. “Then, all rights will be subject to the caprice of the hour; government by stable laws will pass.”<sup>83</sup> Writing privately to a friend, McReynolds decried *Blaisdell* and *Nebbia* as “the end of the Constitution as you and I regard it. An Alien influence has prevailed.”<sup>84</sup>

Yet, McReynolds and the conservatives need not have worried too much. While the two rulings were victories for the New Deal on the surface, they involved state laws, not federal

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<sup>81</sup> Swindler, *New Legality*, 8.

<sup>82</sup> 290 U.S. 398: 426, 449, 483; Shesol, *Supreme Power*, 65-68; Leuchtenburg, *FDR and the New Deal*, 143.

<sup>83</sup> 291 U.S. 502: 523-524, 558-559; Shesol, *Supreme Power*, 70-72.

<sup>84</sup> Quote in Leuchtenburg, *FDR and the New Deal*, 144.

legislation. “Furthermore,” notes constitutional scholar Carl Brent Swisher, “even though the two statutes were upheld, the opinions were so carefully phrased that if conditions changed slightly...the Court could easily shift its ground without reversing the decisions.”<sup>85</sup> Roosevelt and Cummings knew these early victories were shallow, both coming by a 5-4 ruling. While they might have celebrated the wins, they were not yet willing to move forward with test cases of federal New Deal legislation. This was partially, as some critics charged, because of the ineptitude of the Justice Department, but it was also a strategy recommended by Cummings to let public support for the New Deal build. However, the strategy backfired; failure to move on early test cases only encouraged violation of New Deal laws. By the time the first New Deal cases finally made their way before the Supreme Court, Cummings’s task had become incredibly daunting and the constitutionality of New Deal measures exceedingly unclear.<sup>86</sup>

The New Deal finally met the Court head-on in the Hot Oil Cases, so called because the statute under question—Section 9C of the National Industrial Recovery Act—empowered federal agents to prohibit interstate shipments of oil produced in violation of state law (“hot” oil). This seemingly inauspicious clause would become “the wedge which the Nine Old Men would drive into the entire structure of government regulation.”<sup>87</sup> As he prepared to argue the government’s case before the Court in December 1934, Assistant Attorney General Harold Stephens made a startling discovery. It turned out that the critical section of the NIRA code that actually made producing hot oil a crime was omitted from the final draft of the law. Clearly no one had discovered this omission prior to Stephens, as the case had worked its way through the judiciary without a single mention of it. In revealing it to the Court, Stephens likely cost himself any

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<sup>85</sup> Swisher, *American Constitutional Development*, 924.

<sup>86</sup> Shesol, *Supreme Power*, 53-57.

<sup>87</sup> Pearson and Allen, *Nine Old Men*, 244.

chance of winning.<sup>88</sup> New Dealers hoped that the NIRA and the National Recovery Administration that the act had created could build upon the government-business cooperative model witnessed during World War I, and by extension, establish nationalized labor practices that would protect workers and stabilize the economy.<sup>89</sup> While a loss in the Hot Oil cases would not invalidate the NRA, it would be a bad omen for future challenges before the Court.

Government lawyers knew the Court might accept the defense's argument that the code represented an unlawful delegation of legislative power to the executive branch, but held out hope that the justices would sanction federal regulation of petroleum through a broad interpretation of the commerce clause. As Chief Justice Hughes began reading his opinion in the case, it appeared the government might win. He recited a litany of precedent upholding delegation of power to the executive branch, noting that such delegation was permissible so long as an "intelligible principle" guided administrators. "The Court," Hughes then declared, "has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that Section 9C goes beyond those limits." Thus in an 8-1 ruling, the Court decided that the Hot Oil code was unconstitutional on the basis of unlawful delegation of power, the first time the Court had ever used such reasoning to invalidate a law.<sup>90</sup>

Hughes's refusal to issue any judgment on the constitutionality of petroleum regulation through the commerce clause was a blow to government lawyers. While the fault for the missing code rested primarily with the Petroleum Advisory Board's lawyers, Stephens and the Justice Department took the hit for being slipshod in researching and presenting the case. Marian McKenna notes that oral arguments before the Supreme Court generally do not decide the

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<sup>88</sup> Ibid., 247-250.

<sup>89</sup> Leuchtenburg, *FDR and the New Deal*, 57; McKenna, *Constitutional War*, 82; Kennedy, *American People in the Great Depression*, 359.

<sup>90</sup> 293 U.S. 388: 428-430; Pearson and Allen, *Nine Old Men*, 251-253; McKenna, *Constitutional War*, 44-45.

outcome of a case, but “Stephens may have been the exception that proved the rule.” Criticism came from all corners, including from within Roosevelt’s Cabinet. “It makes me sick when I think of the way Special Assistant Attorney General Stevens [sic] handled our oil case before the Supreme Court last week, and yet men on my legal staff think he was the best man in the whole Department to argue it,” Harold Ickes vented in his diary before the ruling was even handed down.<sup>91</sup>

The New Deal had not gotten off to a good start. Despite a crushing Democratic victory at the polls in the 1934 midterm elections, the Court had issued a stiff rebuke to New Dealers. Conservatives rejoiced over the decision, which, according to an editorial in the *New York Herald Tribune*, “has thrown this reactionary nonsense into the Potomac where it belongs.”<sup>92</sup> The ruling may have “destroyed the sense of FDR’s invulnerability and breathed new life into a moribund opposition,” but it was a fixable setback for the administration. The NIRA, the centerpiece of the New Deal, was still in effect, and new legislation revised and reimplemented the oil codes. Indeed, the Court’s ruling, according to Roosevelt’s advisers, would help the government by ensuring that future codes were more carefully drafted.<sup>93</sup>

In any case, the administration was less concerned about the ruling than on the upcoming arguments in the Gold Clause Cases. As part of an effort to tighten federal control of the gold market, the government had voided contractual clauses guaranteeing payment in gold. As gold cost \$1.69 for every \$1.00 in paper money, the holder of a \$10,000 gold bond could demand \$16,900 in paper money. The primary issue at stake was the inviolability of contracts. Did Congress have the authority to abolish contractual obligations if doing so impacted the public

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<sup>91</sup> McKenna, *Constitutional War*, 43-45; Ickes, *Secret Diary*, 1: 247.

<sup>92</sup> Quote in McKenna, *Constitutional War*, 47.

<sup>93</sup> Shesol, *Supreme Power*, 87-92.

interest? The financial stability of the government itself was at stake; an adverse ruling would increase the national debt by almost \$70 billion.<sup>94</sup>

Attorney General Cummings held the oral arguments so important that he chose to make them himself. For luck, Cumming donned gold cufflinks he received from Roosevelt and appeared before the Justices to argue that, while the government had to abide by its contractual obligations, those obligations could not be allowed to overrule the government's constitutional right to coin money and regulate the currency. He then detailed the dire consequences of an adverse ruling, painting a bleak picture of the United States as "a cripple among the nations of the earth."<sup>95</sup> Public reaction to Cummings's performance was varied. A fellow Harvard alumnus wrote to the President that "the impression made by your Attorney General in his argument of the Gold Clause cases before the Supreme Court was pitiful... Why not get yourself an Attorney General who believes in the New Deal and will help you establish it?"<sup>96</sup> Yet, another letter to Roosevelt praised Cummings for "so ably and so patriotically" arguing the government's case and suggested that Roosevelt give a fireside chat outlining "the serious consequences which would inevitably attend the rejection of the Government's case by the Court." In response to this suggestion, Roosevelt asked an aide to reply that such an address "might be construed as trying to influence the Supreme Court."<sup>97</sup>

Though Roosevelt publicly demurred, he and Cummings were active in searching for avenues to negate an adverse ruling. On January 11, 1935, Cummings discussed the cases at a Cabinet meeting and suggested that the administration hurry a statute through Congress that

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<sup>94</sup> Shesol, *Supreme Power*, 93-94; McKenna, *Constitutional War*, 48-51; Leuchtenburg, *Supreme Court Reborn*, 85-86.

<sup>95</sup> McKenna, *Constitutional War*, 53.

<sup>96</sup> Horace A. Davis to FDR, January 14, 1935, Box 7, File 249, Franklin Roosevelt Papers, Franklin D. Roosevelt Library, Hyde Park, NY (hereafter FDRL).

<sup>97</sup> Adrien B. Herzog to FDR, January 13, 1935, and FDR to Marvin McIntyre, January 16, 1935, Box 7 File 249, Roosevelt Papers, FDRL.

would remove the government's consent to be sued for payment under gold clause contracts. "The Attorney General went so far as to say that if the Court went against the Government," recalled Harold Ickes, "the number of justices should be increased at once so as to give a favorable majority. As a matter of fact, the President suggested this possibility to me during our interview on Thursday, and I told him that this is precisely what ought to be done."<sup>98</sup> Roosevelt even went so far as to suggest to his Treasury Secretary that they could destabilize the bond market in order to prompt a crisis. Thankfully, Roosevelt instead settled on a harsh radio address announcing his refusal to abide by a ruling which would "imperil the economic and political security of this nation." So strong was the address that Joseph P. Kennedy, chairman of the Securities and Exchanges Commission, claimed Americans would "burn the Supreme Court Justices in effigy."<sup>99</sup>

As late as February 9, 1935, about a week before the Court's ruling, Cummings was still holding long discussions with Roosevelt about available steps should the government lose the cases. Their preparations turned out to be unwarranted. On February 18, Hughes delivered the majority opinion to a tense courtroom. By a 5-4 margin, the Court upheld Congress's right to regulate the currency as the overriding factor in the cases. Hughes criticized the government for renegeing on its contractual obligations, but ruled that a plaintiff "can recover no more than the loss he has suffered and of which he might rightfully complain. He is not entitled to be enriched."<sup>100</sup> In offering a stinging dissent, Justice McReynolds seemed to practically spit his contempt for the Court's ruling. He took the majority's reasoning to the extreme, arguing that the government now had the power to reduce "the standard gold dollar to one grain of gold, or

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<sup>98</sup> Ickes, *Secret Diary*, 1: 273-274.

<sup>99</sup> Shesol, *Supreme Power*, 96-100; Leuchtenburg, *Supreme Court Reborn*, 87-88; McKenna, *Constitutional War*, 56.

<sup>100</sup> Cummings Diary, February 9, 1935, SSCL; 294 U.S. 330: 354-355; McKenna, *Constitutional War*, 57-59.

brass or nickel or copper or lead...The attempt to [negate gold clauses] was plain usurpation, arbitrary, and oppressive...Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is appalling.” After this diatribe, he supposedly added, “This is Nero at his worst. And as for the Constitution, it does not seem too much to say that it is gone.”<sup>101</sup>

As unpleasant and ornery as McReynolds was in delivering his dissent, the majority of the Court likely sympathized with his position. They felt the government was shirking its financial responsibilities and leaving it to the Court to justify its actions. Justice Brandeis was decidedly uncomfortable with the government’s policies, arguing that “the deliberate repudiation by the Government of its own obligations...involves an alarming application of its power. If the Government wished to extricate itself from the assumed emergency, taxation would have afforded an honorable way out.”<sup>102</sup> Irked as they might be, the majority felt even stronger that to rule against the government would mean financial chaos. Upset at having been “virtually coerced into supporting the government against their convictions,” the majority’s “indignation at New Deal methods would carry over to the decision of other cases where the results of adverse action would be less dangerous.”<sup>103</sup>

The administration knew that their victory was narrow. “I shudder at the closeness of five to four decisions in these important matters,” wrote Roosevelt.<sup>104</sup> Still, this alone would not spoil their celebration. After listening to the opinion, which he considered “a great government victory in an historic case,” Cummings made his way over to the White House and found that

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<sup>101</sup> 294 U.S. 240: 375, 381; McKenna, *Constitutional War*, 60-61; Pearson and Allen, *Nine Old Men*, 233-235.

<sup>102</sup> Corwin, *Revolution*, 45-46; Leuchtenburg, *FDR and the New Deal*, 144; Brandeis quote in McKenna, *Constitutional War*, 52.

<sup>103</sup> Swisher, *American Constitutional Development*, 929.

<sup>104</sup> Leuchtenburg, *Supreme Court Reborn*, 88.

“everyone was smiling.” Meeting with Roosevelt and other advisers, Cummings “told him I had not felt so cheerful since the day of his election.”<sup>105</sup> In a note to Joseph Kennedy, Roosevelt proclaimed, “How fortunate it is that [Kennedy’s] Exchanges will never know how close they came to being closed up by a stroke of the pen of one J.P.K.” Roosevelt’s one regret seemed to be that “the Nation will never know what a great treat it missed in not hearing the marvelous radio address the ‘Pres’ had prepared for delivery to the Nation Monday night if the cases had gone the other way.”<sup>106</sup> Unable to read it to the nation, Roosevelt settled for his advisers as an audience. “He insisted on reading a portion of the statement that had been prepared in anticipation of a possible unfavorable decision,” Cummings recalled. “In retrospect it produced a humorous effect which he enjoyed and so did all the rest of us. I think we all felt enormously relieved.”<sup>107</sup>

The New Deal’s early struggles in the Supreme Court were largely because, as Chief Justice Hughes put it, “the laws have been poorly drafted, the briefs have been badly drawn and the arguments have been poorly presented.” Hughes let it be known whom he held responsible: “We’ve had to be not only the Court but we’ve had to do the work that should have been done by the Attorney General.”<sup>108</sup> Hastily drafted legislation soured the Court’s opinion of the New Deal, pushing the justices to resort to legal reasoning never before utilized by the Court. Additionally, Cummings’s poor staffing choices had taken their toll, and Cummings himself was to blame for not identifying adequate test cases to place before the Court when the New Deal was at the zenith of its popularity.<sup>109</sup> Just two days after the Court’s ruling in the Gold Clause Cases,

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<sup>105</sup> Cummings Diary, February 18, 1935, SSCL.

<sup>106</sup> Quote in Leuchtenburg, *Supreme Court Reborn*, 88.

<sup>107</sup> Cummings Diary, February 18, 1935, SSCL.

<sup>108</sup> Quote in McKenna, *Constitutional War*, 25.

<sup>109</sup> Carl Brent Swisher, “The Supreme Court in Transition,” *The Journal of Politics* 1, no. 4 (November 1939): 352-353.

Roosevelt himself recognized the poor draftsmanship in New Deal laws, even while pleading with Congress to extend the NIRA for two years:

We must rightly move to correct some things done or left undone. We must work out the coordination of every code with every other code. We must simplify procedure. We must continue to obtain current information as to the working out of code processes. We must constantly improve a personnel which, of necessity, was hastily assembled but which has given loyal and unselfish service to the Government of the country. We must check and clarify such provisions in the various codes as are puzzling to those operating under them. We must make more and more definite the responsibilities of all the parties concerned.<sup>110</sup>

Still, by February, 1935, the New Deal and its centerpiece—the NIRA—remained largely in place. The Hot Oil ruling had certainly been an embarrassment and a setback, but it was easily fixed by subsequent legislation. *Blaisdell*, *Nebbia*, and the Gold Clause Cases were all wins for the New Deal, even if the first two only involved state legislation. Justice Roberts and Chief Justice Hughes had voted in favor of the government in the Gold Clause ruling, which many interpreted as a sign of a subtle shift in the Court’s ideological orientation. All in all, Cummings and Roosevelt appeared to be fully justified in celebrating the government’s good fortune. However, the constitutional storm was about to hit.

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<sup>110</sup> *PPA*, 4: 81-82.

## Chapter Two: The Battle for Public Opinion

Celebrating in the Oval Office following its victory in the Gold Clause cases, the Roosevelt administration seemed to have everything going its way. Republican opposition was almost non-existent. In the 1934 midterm elections, Democrats won thirty-nine governorships, took control of three-fourths of the Senate, and added nine seats to their already impressive majority in the House of Representatives. The Republican Party, with no identifiable platform and no national leader, was adrift. Indeed, all that the electorate seemed to know about Republicans was that they seemed to be for the Constitution and against Roosevelt.<sup>1</sup> The primary obstacle left for the New Deal was the Supreme Court. The Gold Clause victory indicated a potential shift in the Court's ideological stance and pointed to the possibility of a judicial sanction for Roosevelt's reform program. Still, all was not as it seemed. As the 1934-1935 Supreme Court term came to a close, the justices prepared to move from their courtroom in the Capitol basement to an impressive new residence across the street. "It is a magnificent structure," remarked the *New Yorker*, "with fine big windows to throw the New Deal out of."<sup>2</sup>

Indeed, the Nine Old Men were about to launch a full frontal assault against the administration. The thirteen months between May 1935 and June 1936 turned into a fierce battle for public opinion. This chapter will examine the conflict between the judicial and executive branches during that timeframe. It will chronicle the major New Deal cases decided by the

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<sup>1</sup> Shesol, *Supreme Power*, 83-85.

<sup>2</sup> Kennedy, *American People in the Great Depression*, 328-329.

Court, focusing in particular on the rulings that invalidated the two pillars of the New Deal—the National Recovery Administration and the Agricultural Adjustment Act. This chapter will also examine executive, legislative, press, and public reaction to the Court’s rulings. In doing so, it will show that the Court steadily lost ground in the battle for public opinion. The Court’s invalidation of the NRA in May 1935 was largely met with apathy; by the end of the 1935-1936 term, calls for circumventing the Court were coming from the press, politicians, and public alike.

The first major piece of New Deal social legislation to fall under the Supreme Court’s sword was the Railroad Retirement Act. The goal of the law, which required railroad companies to offer pensions for their employees, was to persuade older workers to retire and thus create new jobs for younger workers and the unemployed. New Dealers considered the law, an early attempt at social security legislation, to be a step in the right direction. It was, however, hastily thrown together by Congress in late 1934 and accordingly had its problems. Admitting the act was “crudely drawn,” Roosevelt urged Congress to fix it as soon as possible.<sup>3</sup> Railroad companies were not at all happy about having to pay into the pension plan, especially at double the rate that the employees were required to contribute. 134 of those companies joined together in lawsuit and in early 1935 took their case, *Railroad Retirement Board v. Alton*, before the Supreme Court, where they received an especially warm welcome from a tribunal filled with former railroad lawyers.<sup>4</sup>

On May 6, 1935, the Court again issued a 5-4 ruling, but this time it signaled an ominous trend: Justice Owen Roberts had switched his vote and joined the Court’s conservatives. In issuing the majority opinion, Roberts put on a performance, reciting the ruling from memory and scarcely looking at the paper in front of him. “Roberts, a former railroad lawyer,” argues Jeff

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<sup>3</sup> Solomon, *FDR v. the Constitution*, 68-69; Shesol, *Supreme Power*, 116.

<sup>4</sup> Solomon, *FDR v. the Constitution*, 68-69.

Shesol, “sounded at times as if he were arguing the case as counsel for the carriers, not deciding it as an impartial judge.”<sup>5</sup> Roberts ruled that Congress had no constitutional authority to interfere with the railroad companies’ operations unless the pension plans impacted such operations as they crossed state lines. He ridiculed the assertion that pension plans promote worker contentedness and efficiency. Should such a plan be upheld, “the catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless...Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things?” The act, Roberts concluded, was an unconstitutional “attempt for social ends to impose by sheer fiat...a means of assuring a particular class of employees against old age dependency.”<sup>6</sup>

Roberts seemed to have defected wholeheartedly to the conservative fold. Two contemporary journalists argued, based on a discussion with Chief Justice Hughes, that Roberts believed Roosevelt and the New Deal were wasting the nation’s resources. The same journalists also posited another explanation for Roberts’s sudden switch—he had grown close to the conservatives, even the irascible Justice McReynolds.<sup>7</sup> Whether or not Roberts would remain in the conservative corner was anyone’s guess. Justice Brandeis, for one, believed not all was lost. “Justice Roberts is a young man,” Brandeis said, “he’ll learn.”<sup>8</sup>

Chief Justice Hughes assigned the dissenting opinion in *Alton* to himself. “I am unable to concur in the decision of this case,” he began. “The gravest aspect of the decision is that it does not rest simply upon a condemnation of particular features of the Railroad Retirement Act, but

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<sup>5</sup> Shesol, *Supreme Power*, 117.

<sup>6</sup> 295 U.S. 330: 368, 374; Solomon, *FDR v. the Constitution*, 68-69.

<sup>7</sup> Alsop and Catledge, *The 168 Days*, 6.

<sup>8</sup> Shesol, *Supreme Power*, 126.

denies to Congress the power to pass any compulsory pension act for railroad employees.”<sup>9</sup>

Hughes blasted the majority for placing unnecessary restraints on Congress so as to prevent the legislature from even attempting to fix the law. He also drew a connection between pension plans and workers’ compensation laws, which the Court had previously found constitutional. “The conclusion thus reached [by the majority],” argued Hughes, “is a departure from sound principles, and places an unwarranted limitation upon the Commerce Clause of the Constitution.”<sup>10</sup>

Brandeis, Stone, and Cardozo joined in Hughes’s dissent, though Stone privately vented his frustrations. “About the worst performance of the Court since the *Bake shop case* [*Lochner v. New York*]...to say that [the bill] is beyond the range of constitutional power puts us back at least thirty years,” the justice wrote to Felix Frankfurter. Writing to his sons, Stone added that the Railroad Retirement Act “was not a very good bill, but it seems to me that constitutionalism has gone mad when it assumes to forbid the federal government from establishing such a system.”<sup>11</sup> Justice Stone was not alone in his condemnation of the ruling, which Roosevelt simply called “rotten.” Indeed, Roberts’s thorough rejection of any constitutional connection between interstate commerce and pension plans seemed to place a barrier in front of any future pension or social security laws.<sup>12</sup>

Attorney General Homer Cummings reported as much to the President in a memo he sent to report on the *Alton* decision. Cummings felt that close split-Court rulings such as *Alton* were “a forecast of what we may expect with reference to almost any form of social legislation the Congress may enact. Apparently there are at least four Justices who are against any attempt to

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<sup>9</sup> 295 U.S. 330: 374-375.

<sup>10</sup> 295 U.S. 330: 375; McKenna, *Constitutional War*, 69; Shesol, *Supreme Power*, 118.

<sup>11</sup> Quoted in Solomon, *FDR v. The Constitution*, 69-70 and Shesol, *Supreme Power*, 119, respectively.

<sup>12</sup> Shesol, *Supreme Power*, 117-120; McKenna, *Constitutional War*, 70.

use the power of the Federal Government for bettering general conditions, except within the narrowest limitations.”<sup>13</sup> New Deal historian William Leuchtenburg notes that the *Alton* ruling marked the first time that a large interest group (railroad labor unions) had turned against the Supreme Court. One railroad worker seemed to sum up the general feeling of his brethren when he wrote to Roosevelt, “The Supreme Court is a Public Nuisance.”<sup>14</sup> Following the Railroad Retirement case, the battle for public opinion would become extremely important in Roosevelt and Cummings’s search for a way to get around the Supreme Court.

While *Alton* may have been a blow to the New Deal, it was hardly the constitutional showdown that surrounded the fate of the National Recovery Administration. The NRA was the centerpiece of the New Deal, a massive cooperative business-government initiative that aimed to restore the American economy. Businesses across the United States initially displayed the Blue Eagle, the symbol of the NRA, with pride, showing their commitment to the cause. However, by the time the 1934 midterm elections approached, business-government cooperation was falling apart, signaling the weakness and decline of the NRA. At the heart of the problem was the fact that it largely served the interest of big businesses. The code authorities that drafted NRA wage, hour, and price codes were dominated by big businesses, which ensured that the codes were skewed in their favor. Additionally, government oversight and enforcement of the codes was so lax that many businesses began to ignore them as soon as they went into effect. The NRA limped on “in the limited sense that the codes remained on the books—like a marriage still valid in the eyes of the state, even though mutual affection had given way to suspicion and bitter recrimination.”<sup>15</sup>

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<sup>13</sup> Cummings to Roosevelt, May 7, 1935, Box 170, Cummings Papers, SSCL.

<sup>14</sup> Leuchtenburg, *Supreme Court Reborn*, 89.

<sup>15</sup> Shesol, *Supreme Power*, 78-81.

Adding fuel to the fire was the administration's refusal to press NRA test cases in the courts. U.S. attorneys were in the unenviable position of attempting to enforce NRA codes and prosecute violators, only to find that the Justice Department did not have their backs. Unable to really tackle big businesses, prosecutors focused on small-business owners, a strategy that turned out to be a public relations nightmare for the administration. "One imagined the White House cheering its legal triumph as, say, a tailor was handcuffed and hauled off to prison for giving his seamstress shorter cigarette breaks than the code permitted," argues Jeff Shesol.<sup>16</sup> Nonetheless, on February 20, 1935, Roosevelt asked Congress to extend the life of the NRA for two years. Despite the NRA's problems and growing unpopularity, Roosevelt did not recommend fundamental changes, instead ambivalently asking Congress to clarify ambiguous codes. "The fundamental purposes and principles of the Act are sound. To abandon them is unthinkable. It would spell the return of industrial and labor chaos," the President told Congress.<sup>17</sup> Despite Roosevelt's pleading, Congress proved unwilling to extend the NRA until the Court ruled on its constitutionality.

The first major case that was to put the NRA before the Supreme Court came in the form of *U.S. v. Belcher*. William Belcher, owner of a handful of sawmills in Alabama, was indicted on charges of violating the NRA's lumber code with regard to minimum wage (Belcher paid seven cents an hour instead of the mandated twenty-four) and maximum hours (he worked his employees forty-eight hours per week instead of forty). Belcher found an ally in district court judge William Grubb, an avowed opponent of the New Deal. Grubb found the NRA unconstitutional and cleared Belcher of the charges. U.S. attorneys appealed directly to the

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<sup>16</sup> McKenna, *Constitutional War*, 85; Shesol, *Supreme Power*, 129.

<sup>17</sup> *PPA*, 4: 81-82.

Supreme Court, which agreed to hear the case.<sup>18</sup> However, the Justice Department began to express doubts about whether or not *Belcher* was the best test case for the NRA. The lower court ruled against the government and, to boot, the Supreme Court had just issued its ruling in the Hot Oil cases, invalidating parts of the NRA's oil codes. Cummings and Solicitor General Stanley Reed were opposed to pursuing *Belcher* and Roosevelt, according to his attorney general, "was not particularly enthusiastic about going on with the case."<sup>19</sup> On March 25, 1935 the Justice Department requested that the case be dismissed, and the Court readily complied.

On the same day, hoping to quell the uncertainty surrounding the NRA and the almost certain rash of code violations that would follow the dismissal of *Belcher*, Roosevelt wrote a letter to Donald Richberg, chairman of the National Industrial Recovery Board. The President expressed his "desire that the full power of the National Recovery Administration shall be exerted to insist upon and to obtain compliance with the requirements of approved codes of fair competition. There is no excuse whatsoever at the present time for members of trade and industry who have sponsored and are subject to these codes to fail to give them wholehearted support."<sup>20</sup> Roosevelt's plea was as ineffective as it was transparent. While the administration claimed that it wanted *Belcher* dismissed because there had been deception on the part of government lawyers in the lower courts, the press and the public saw a very visible lack of faith in the NRA's constitutionality at a time when Roosevelt was requesting that Congress extend the program. Code violations skyrocketed, but perhaps the greatest significance of the *Belcher*

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<sup>18</sup> McKenna, *Constitutional War*, 85-87.

<sup>19</sup> McKenna, *Constitutional War*, 87; Shesol, *Supreme Power*, 130-131.

<sup>20</sup> *PPA*, 4: 114.

debacle, as Marian McKenna points out, was that it put pressure on the Justice Department to quickly find another test case.<sup>21</sup>

The opportunity came shortly thereafter in a case involving the Schechter brothers, who owned a Brooklyn poultry shop. Indicted on sixty counts of violating the NRA's live poultry code, the Schechters were convicted on nineteen counts in district court. The U.S. Court of Appeals for the Second Circuit upheld seventeen of the nineteen convictions, overturning the convictions on violation of minimum wages and maximum hours. On that basis, government lawyers appealed to the Supreme Court.<sup>22</sup> On the surface, *Schechter v. U.S.* appeared to be a good test case with regard to the two main points of contention—that the NRA's code-making provisions represented an unconstitutional delegation of legislative power to the executive branch and that the Schechters' business was not interstate in nature and was thus out of the purview of federal regulation. The lower courts had largely sustained the government's position, and more importantly the Court of Appeals ruled that the NRA did not unlawfully delegate power. Additionally, in 1932 the Supreme Court had upheld the conviction of nearly one hundred New York poultry racketeers on the grounds that their business did affect interstate commerce and was thus subject to federal regulation.<sup>23</sup>

Beneath the surface, however, the situation was less than ideal. Marian McKenna points out the absurdity of jailing four Jewish poultry dealers from Brooklyn for code violations while looking the other way as big businesses broke the same codes. Felix Frankfurter, who knew that even Justice Brandeis would likely oppose such a large program as the NRA, strongly advised against using *Schechter* as a test case and had a Roosevelt aide telegram his plea to Roosevelt,

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<sup>21</sup> Leonard, *Search*, 65; McKenna, *Constitutional War*, 87-90.

<sup>22</sup> Solomon, *FDR v. the Constitution*, 72; McKenna, *Constitutional War*, 90.

<sup>23</sup> McKenna, *Constitutional War*, 90-91; Pearson and Allen, *Nine Old Men*, 262-263.

who was vacationing in the Caribbean. “F.F. suggests most impolitic and dangerous...because fundamental situation on court has not changed. Further suggests you wire Cummings not to take hasty action.” Yet, Frankfurter was too late; Cummings had appealed the case to the Supreme Court. “We’re galloping to the guillotine,” wrote a Justice Department official.<sup>24</sup>

The coup de grace came on Monday May 27, 1935, which New Dealers would come to call Black Monday. A packed courtroom anxiously waited to see if it would be the day that Hughes and his fellow Justices would finally decide the fate of the NRA. After Justice Butler dealt with a minor case involving an insurance company, Justice Sutherland issued the majority opinion in *Humphrey’s Executor v. U.S.* The case involved the late William Humphrey, a Federal Trade Commission official who had been fired after refusing to resign at Roosevelt’s request. The seeming precedent for the Court was *Myers v. U.S.*, a 1926 case in which a 6-3 majority ruled that officials appointed by a president could unequivocally be removed by a president; Chief Justice Taft had called it a power without limit. Sutherland, who had voted with the majority in *Myers*, completely reversed his stance and concluded that Roosevelt had overstepped his authority because the president had no power to remove members of independent regulatory commissions without cause.<sup>25</sup>

Roosevelt was furious at the *Humphrey’s* decision, which he took as a personal affront from the justices. “That damn little case made Roosevelt madder at the Court than any other decision,” recalled Robert Jackson, a Treasury official and later Supreme Court justice.<sup>26</sup> Homer Cummings vented to his diary that “in order to decide against the Government, the Supreme Court had to reverse itself and attempt to make distinctions which, I must admit, do not exist.

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<sup>24</sup> Amity Shlaes, *The Forgotten Man: A New History of the Great Depression* (New York: HarperCollins, 2007), 239; Shesol, *Supreme Power*, 132-133.

<sup>25</sup> Shesol, *Supreme Power*, 144; McKenna, *Constitutional War*, 97-98.

<sup>26</sup> Shesol, *Supreme Power*, 143.

The significance of this decision, however, lies in the disposition of the Court to curb the executive powers of the President.”<sup>27</sup>

Justice Brandeis then read an opinion overturning the Frazier-Lemke Farm Mortgage Moratorium Act, a bill designed to help farmers regain property they had lost due to foreclosure. Brandeis held that the act violated the rights of mortgage holders by confiscating private property without compensating for the loss and was thus unconstitutional. Though this was not a major New Deal program, it was nevertheless a government loss.<sup>28</sup> The suspense in the courtroom was at a tipping point when Chief Justice Hughes announced that he had the opinion for *Schechter*. While the fact that Hughes was reading the opinion as opposed to a conservative justice might have given the government hope, the prior defeats issued from the bench that day were ominous. Additionally, Solicitor General Stanley Reed felt the oral arguments had gone rather poorly for the government. In a letter to Felix Frankfurter, Reed told the Harvard law professor that McReynolds, Butler, and Sutherland had made his life “miserable” through their insistent demands that he specifically point to the lines in the National Industrial Recovery Act (the legal basis of the NRA) “which laid down the definite standards for Presidential action.” “The argument did not close in any victorious [sic] paean,” Reed concluded, “and one can only hope that the brief and an examination of the Act will persuade the Court that we are within the limits of the possibility of delegated authority.”<sup>29</sup>

Hope as he might, Reed quickly realized that it simply wasn’t the New Deal’s day. Hughes ruled that section three of the NIRA, which authorized the NRA’s code making powers,

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<sup>27</sup> Cummings Diary, May 27, 1935, SSCL.

<sup>28</sup> Shogan, *Backlash*, 17; Shesol, *Supreme Power*, 134.

<sup>29</sup> Reed to Frankfurter, May 7, 1935, President’s Secretary’s File, Box 135, Roosevelt Papers, FDRL.

was unconstitutional due to its delegation of legislative power to the executive branch.

Addressing section three, Hughes declared:

It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them...the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.<sup>30</sup>

The Court's second reason for invalidating the NRA was more damaging to the New Deal.

Hughes held that the Schechter's poultry business was only indirectly involved in interstate commerce, and thus beyond the reach of federal regulation. In doing so, Hughes stuck to legal precedent, though the Court had demonstrated a more expansive view of interstate commerce since the start of the twentieth-century.<sup>31</sup> Now his ruling threatened the administration's very ability to regulate industry across the nation.

Still, the most shocking aspect of the Black Monday rulings was not the government's defeat, but rather the scope of its defeat—all three rulings were unanimous against the New Deal. When news of the rulings reached Roosevelt, the President replied, "You mean it was unanimous against us? Where was Old Isaiah (Roosevelt's nickname for Brandeis)? What about Ben Cardozo?"<sup>32</sup> For his part, Cardozo wrote a concurring opinion distancing himself and Justice Stone from the majority's take on the interstate commerce clause but nonetheless admonishing the administration for the NRA. "This is delegation running riot," wrote the normally reliably liberal justice.<sup>33</sup> As for Brandeis, Roosevelt's questioning showed just how much he failed to understand the liberal jurist's philosophy. Brandeis abhorred centralization and government

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<sup>30</sup> 295 U.S. 495: 541-542; Swisher, *American Constitutional Development*, 931.

<sup>31</sup> Solomon, *FDR v. the Constitution*, 72; Shesol, *Supreme Power*, 135.

<sup>32</sup> Solomon, *FDR v. the Constitution*, 73-74.

<sup>33</sup> 295 U.S. 495: 553; Shesol, *Supreme Power*, 135-136.

“bigness,” instead believing firmly in the importance of state and local power and action. Following the rulings, Brandeis summoned Tommy Corcoran to the robing room. “This is the end of this business of centralization, and I want you to go back and tell the president that we’re not going to let this government centralize everything. It’s come to an end,” the justice told Roosevelt’s aide. “The president has been living in a fool’s paradise.”<sup>34</sup>

In the United States and abroad the general reaction to the Black Monday rulings was one of shock at its scope. “La Mort du Bleu,” read the headline on a French newspaper. London’s *Daily Express* added: “America Stunned; Roosevelt’s Two Years’ Work Killed in Twenty Minutes.”<sup>35</sup> “Today was a bad day for the Government in the Supreme Court,” Homer Cummings wryly remarked in his diary. “The sweeping character of the opinion indicates the Court has reverted to doctrines which liberal minded lawyers had supposed were no longer to vex the government in the use of its relief powers.” If unchallenged, Cummings argued, the Court’s ruling would make it impossible for the administration to address “manifest evils, sweatshop conditions, child labor, or any other unsocial or anti-social aspects of the economic system.”<sup>36</sup>

In contrast to Cummings’s ranting, public reaction seemed to mainly support the Court’s decision. “Well my Dear Sir they gave you rope and you hung yourself, as I knew you would,” wrote an Indiana businessman to Roosevelt. A letter from Shelburne Falls, Massachusetts, extolled the Court’s decision and proclaimed, “May the axe soon descend on all other treacherous and traitorous acts and legislation.”<sup>37</sup> Drew Pearson and Robert Allen believed that

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<sup>34</sup> Shogan, *Backlash*, 18-19; Solomon, *FDR v. the Constitution*, 73; Shlaes, *The Forgotten Man*, 243.

<sup>35</sup> Solomon, *FDR v. the Constitution*, 74; Leuchtenburg, *FDR and the New Deal*, 145.

<sup>36</sup> Cummings Diary, May 27, 1935, SSCL.

<sup>37</sup> F.L. Evans to FDR, May 28, 1935, President’s Official File, Box 11, File 446, Roosevelt Papers, FDRL; J.B. Parsons to FDR, May 27, 1935, President’s Official File, Box 11, File 466, Roosevelt Papers, FDRL.

public approval of the Black Monday rulings likely provided impetus to other anti-New Deal rulings. “The general exclamation escaping from a...wearied public was: ‘Whoopee! Good for the Supreme Court!’ The Nine Old Men are only human, and those hosannas rang in their ears for a long time,” wrote the prominent journalists.<sup>38</sup>

Yet not all was lost for the administration and the New Deal. Some of Roosevelt’s contemporaries believed that the Court might have done Roosevelt a favor. Constitutional scholar Edward Corwin felt the administration “was well aware that Mademoiselle Nira had outlived her reputation and even her usefulness, but still didn’t know just how to get rid of the baggage.”<sup>39</sup> Even Homer Cummings saw a silver lining in the rulings. “While in a certain sense they are a set-back for America, they are a God-send for the Administration,” wrote the Attorney General. “The whole scene is shifted. We are no longer on the defensive.”<sup>40</sup> Pearson and Allen, as well as columnist Max Lerner, believed that Roosevelt was actually relieved to be rid of the Blue Eagle. Indeed, the Court’s dismissal of the NRA saved Roosevelt from what was certain to be a long and politically costly battle in Congress over whether or not to extend the program.<sup>41</sup>

Yet, some historians dispute the contention that Roosevelt felt relieved by the *Schechter* ruling. “In fact,” argues William Leuchtenburg, “the President believed deeply in the NRA approach and never gave up trying to restore it.” Marian McKenna claims that Roosevelt was furious at the Court’s ruling and quotes presidential secretary Missy LeHand as saying that Roosevelt was “very irritable and troubled that evening.”<sup>42</sup> Unsure of how to respond publicly, Roosevelt initially kept the rhetoric to a minimum. On May 29, he held his first press conference

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<sup>38</sup> Pearson and Allen, *Nine Old Men*, 272.

<sup>39</sup> Corwin, *Revolution*, 52.

<sup>40</sup> Cummings Diary, May 28, 1935, SSCL.

<sup>41</sup> Pearson and Allen, *Nine Old Men*, 30-31; Leonard, *Search*, 69.

<sup>42</sup> Leuchtenburg, *FDR and the New Deal*, 145-146; McKenna, *Constitutional War*, 105.

since the rulings. “I haven’t any news at all,” he somberly told reporters. Bombarded with questions about how the administration would react to the Court’s decision, Roosevelt told reporters that the real story was not in Washington, but rather “what is happening as a result of the Supreme Court decision in every industry and in every community in the United States.”<sup>43</sup>

A mere two days later, Roosevelt was in a far more playful mood as the press crowded around his desk in the Oval Office. “What is the news?” he asked reporters who were starved for some indication of Roosevelt’s thoughts on the Court. “Do you care to comment any on the NRA?” asked one reporter. “If you insist,” the president replied. “That’s an awful thing put up to a fellow at this hour of the morning just out of bed.”<sup>44</sup> It was soon clear that Roosevelt wanted little more than to expound on the Court’s decision. He had a large pile of telegrams supporting the NRA on his desk and proceeded to read a total of fifteen of them before remarking “and so forth and so on.” He then went on to dissect the Court’s opinion, arguing that “the implications of this decision are much more important than almost certainly any decision of my lifetime or yours, more important than any decision probably since the *Dred Scott* case.” Roosevelt ridiculed the Court’s narrow interpretation of the interstate commerce clause, arguing that “the country was in the horse-and-buggy age when that clause was written.” Surely nearly one hundred and fifty years later, Roosevelt reasoned, the reach of interstate commerce was far broader. The government was attempting to solve major problems on a nationwide scale only to find that “it has been thrown right straight in our faces. We have been relegated to the horse-and-buggy definition of interstate commerce.” After listening to the crescendo of Roosevelt’s diatribe, a reporter asked, “Can we use the direct quotation on that horse-and-buggy stage?”

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<sup>43</sup> *PPA*, 4: 198-200.

<sup>44</sup> *Ibid.*: 200-201.

Roosevelt replied, “I think so,” before Press Secretary Steve Early jumped in and said, “Just the phrase.”<sup>45</sup>

The phrase was all that was needed to set off a wave of criticism. One historian remarked that the horse-and-buggy conference was “a long dissenting opinion by a man who had been following a moderate course helping and mediating among businessmen, workers, and farmers alike, and now to his surprise finds the props knocked from under him.”<sup>46</sup> However, the public, press, and fellow politicians were quick to condemn the statement, which they saw as an attack on the Court. “I don’t think the President has any thought of emulating Mussolini, Hitler or Stalin, but his utterance as I have heard it is exactly what these men would say,” remarked Republican Senator Arthur Vandenberg of Michigan.<sup>47</sup> Despite the fact that Roosevelt was actually referring to the interstate commerce clause and not the Supreme Court when he made the comment, his remarks were largely reported out of context. Fellow Democrats tried to distance themselves from the president, who saw his popularity take a hit following the press conference. “The public reaction, far from being anti-Supreme Court, as he had expected, was in fact anti-Roosevelt,” concludes one historian.<sup>48</sup>

Stinging from the blow of public backlash, the administration still had to face the question of what to do about the Supreme Court. Some historians have argued that the severity of the Black Monday rulings was the catalyst for the eventual Court-packing plan, and there is some evidence to support their claims. Following the “horse-and-buggy” conference, such politicians as Vice-President James Garner and powerful Senators James Byrnes and Robert La Follette began to express interest in pursuing a constitutional amendment that would limit the

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<sup>45</sup> Ibid.: 205-221.

<sup>46</sup> Burns, *Lion and the Fox*, 223.

<sup>47</sup> Quoted in Leuchtenburg, *Supreme Court Reborn*, 90.

<sup>48</sup> McKenna, *Constitutional War*, 114-115.

Court's power. In addition, after Black Monday Homer Cummings was purported to have exclaimed to Roosevelt: "I tell you, Mr. President, they mean to destroy us. ... We will have to find a way to get rid of the present membership of the Supreme Court."<sup>49</sup> In his diary, Cummings added that *Schechter* "has revived talk about Constitutional amendments, or other methods of endeavoring to prevent the Supreme Court from thwarting the purposes of the people. ... This decision shifts the whole political situation and introduces strange and unexpected elements. A difficult question is presented to the Administration. We can throw up our hands and say we have done our best to bring order out of chaos but the Supreme Court won't let us, or we can strive for some alternative and more circumscribed line of action."<sup>50</sup> Secretary of the Interior Harold Ickes added that he had "predicted that sooner or later the Supreme Court would become a political issue. Apparently that time has come and I, for one, am ready to meet it. ... We have to meet this issue or abandon any effort to better the social and economic conditions of the people."<sup>51</sup>

Despite this evidence, Black Monday did not provide the impetus for the Court-packing plan. For one, the rulings were not split decisions but were rather 9-0 against the government. Any amendment attempting to circumvent a unanimous Court would surely go down in defeat. Another reason that Black Monday did not spark Court-packing was that the battle for public opinion had not yet swayed in the administration's favor. While the Court's invalidation of the NRA added those who had benefited from the program to the growing list of the Court's detractors, the public had largely grown tired of the NRA and approved the Court's decision. The outrage over the "horse-and-buggy" comment proved that the time simply was not right to

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<sup>49</sup> Leuchtenburg, *Supreme Court Reborn*, 91; Kennedy, *American People in the Great Depression*, 328.

<sup>50</sup> Cummings Diary, May 27, 1935, SSCL.

<sup>51</sup> Ickes, *Secret Diary*, 1: 372.

attack the Court.<sup>52</sup> Almost alone amongst Roosevelt's advisers, Felix Frankfurter counseled patience:

Decisions in other cases may accumulate popular grievances against the Court on issues so universally popular that the Borahs, the Clarks, the Nyes and all the currents of opinion they represent will be with you in addition to the support you have today. That is why I think it is so fortunate that the Administration has pending before Congress measures like the Social Security bill, the Holding Company bill, the Wagner bill, the Guffey bill. Go on with these. Put them [Frankfurter's emphasis] up to the Supreme Court. Let the Court strike down any or all of them next winter or spring, especially by a divided Court. Then [Frankfurter's emphasis] propose a Constitutional amendment giving the national Government adequate power to cope with national economic and industrial problems.<sup>53</sup>

Keeping Frankfurter's advice in mind, Cummings and Roosevelt met in June to discuss forthcoming New Deal legislation that would have to "run the gauntlet of the Supreme Court." Cummings discussed the Wagner labor relations bill ("rather doubtful constitutionality"), the Guffey Coal Act ("clearly unconstitutional"), and the proposed amendments to the Agricultural Adjustment Act ("not in good condition to meet the constitutional test"). With no plan in place to address the Court's obstinacy and Frankfurter's sound advice in the back of their minds, President and Attorney General decided the only course of action seemed to be to let the Court, as Frankfurter put it, continue to take "slow poison."<sup>54</sup>

New Dealers held out hope that when the Supreme Court reconvened in October for its next term its justices might have modified their views on the ability of the federal government to address the nation's ills. Yet, a Court ruling early into the new term, little covered by the press or by later historians, spelled disaster for those seeking reduced judicial activism. On December 16, 1935, Justice Sutherland issued a 6-3 opinion in *Colgate v. Harvey* overturning a Vermont

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<sup>52</sup> Leuchtenburg, *Supreme Court Reborn*, 91; Alsop and Catledge, *The 168 Days*, 17.

<sup>53</sup> Frankfurter to FDR, May 29, 1935, President's Secretary's File, Box 135, Roosevelt Papers, FDRL.

<sup>54</sup> Cummings Diary, June 20, 1935, SSCL; McKenna, *Constitutional War*, 179.

law that assessed higher taxes on loans originating out of the state than on those coming from within the state. The majority's legal basis for its ruling was that the law violated the Fourteenth Amendment's "privileges and immunities" clause that banned discrimination against out-of-state citizens. It was the first time the Court ever invoked the clause when invalidating a law.<sup>55</sup> "As citizens of the United States we are members of a single great community consisting of all the states united, and not of distinct communities consisting of the states severally... This fact is so obvious and vital, and no elaboration is required to establish it," wrote Sutherland. The irony of this statement was not lost on historian Jeff Shesol, who notes that it came "from a justice who had stood, so consistently and stridently, for the rights of those distinct communities above those of the nation." For Justice Stone, who spoke for the minority (and almost certainly for New Dealers), the majority's hypocrisy was almost too much to take. The Court, he argued, was attempting to turn itself into a "Superlegislature."<sup>56</sup>

In late 1935, Cummings discussed with the president their options should the upcoming New Deal cases before the Court go poorly for the government. Cummings did not indicate what course of action they settled on, likely because with the Court seemingly taking the role of Congress upon itself, Cummings and Roosevelt were at a loss for what to do. For his part, Roosevelt seemed content to lay the burden of the nation's problems at the Court's doorstep. In his 1936 State of the Union address, Roosevelt rhetorically asked Congress if the federal government should say to farmers, to the unemployed, to laborers that it simply did not have the power to help them. The president clearly felt that the executive and legislative branches were working together, but that the answer to his question would lay with the Court.<sup>57</sup>

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<sup>55</sup> Shesol, *Supreme Power*, 181.

<sup>56</sup> 296 U.S. 404: 426-427, 441; Shesol, *Supreme Power*, 181.

<sup>57</sup> Cummings Diary, December 27, 1935, SSCL; *PPA*, 5: 15-16.

The first major case that would be decided in the Supreme Court's majestic new building across the street from Congress involved the future of the Agricultural Adjustment Act (AAA), the farm equivalent of the NRA. Marian McKenna argues that the AAA was as unconstitutional as any piece of New Deal legislation: "The act was posited on an alternate set of broad commerce clause and taxing power precedents rooted in early-twentieth-century decisions from the Progressive Era, but the claims of authority under it were so sweeping and unqualified as to betray little concern for constitutional limitations or the authority of the states."<sup>58</sup> When the NRA met its fate at the hands of the Court, AAA officials acted quickly, seeking clarifying standards from Congress in an attempt to pass the constitutional test. That test would come when a group of textile mill owners in Massachusetts refused to pay the AAA's processing tax. Despite the fact that processors passed it on to consumers by charging more for their products, the processing tax was considered the weakest point of the AAA and thus became the focal point for attacks against the act. When an appeals court ruled against the government, the administration appealed to the Supreme Court.<sup>59</sup>

As with the *Schechter* case, oral arguments in *U.S. v. Butler* went poorly for the government. George Wharton Pepper, a former senator and mentor to Justice Roberts, argued against the government and put on a masterly performance. Calling the processing tax "the general welfare clause gone mad," Pepper built up to his final plea: "I believe I am standing here today to plead the case of the America I have loved; and I pray Almighty God that not in my time may 'the land of the regimented' be accepted as a worthy substitute for 'the land of the

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<sup>58</sup> McKenna, *Constitutional War*, 121.

<sup>59</sup> McKenna, *Constitutional War*, 127-132; Shesol, *Supreme Power*, 174-176.

free.’” Stanley Reed, who argued the government’s case and nearly fainted during his presentation, was badly outmatched.<sup>60</sup>

In a confusing and convoluted opinion, Justice Roberts spoke for the Court’s majority. He began by describing Hamiltonian and Jeffersonian views of government, constantly switching between the two. No one seemed to know how he would rule, but he eventually argued that Hamilton, who advocated a strong central government, had it right. It seemed as though the government may have come away the victors. Yet, Roberts then proceeded to dismantle the AAA, concluding that because agriculture was a local activity the processing tax violated the Tenth Amendment. A tax “in the general understanding of the term, and as used in the Constitution,” argued Roberts, “signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another.”<sup>61</sup> Then, addressing the contention that the Court was assuming legislative power, Roberts added: “When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy.”<sup>62</sup>

Justice Stone was angry about the way the case was debated in the justices’ conference, complaining that, in contrast to the Court’s prior practice, “the whole history of the case was

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<sup>60</sup> Shesol, *Supreme Power*, 177-179.

<sup>61</sup> 297 U.S. 1: 61; Swisher, *American Constitutional Development*, 934; Solomon, *FDR v. the Constitution*, 76-77.

<sup>62</sup> 297 U.S. 1: 62-63.

characterized by inadequate discussion and great haste in the production and circulation of opinions.”<sup>63</sup> His anger carried over to his scalding dissent in *Butler*. Stone blasted Roberts for his “tortured construction of the Constitution” and ridiculed his reasoning that the processing tax was coercive. “The limitation now sanctioned must lead to absurd consequences,” Stone argued. “Government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even use it to support their families.”<sup>64</sup> Stone mocked the majority for its transparent attempt to appear impartial and apolitical. “While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check on our own exercise of power is our own sense of self-restraint...Courts are not the only agency of government that must be assumed to have the capacity to govern,” Stone warned.<sup>65</sup>

In a letter to Stone, Homer Cummings congratulated the justice for his impressive dissent: “It may not be the law now [Cummings’s emphasis]—but it will be the law later... You spoke at a great moment and in a great way.” “When one finds himself outvoted two to one he should be humble and perhaps skeptical of his own judgment. But I have a sincere faith that history and long time perspective will see the function of our court in a different light,” Stone answered.<sup>66</sup> While he might have anticipated the defeat, the Attorney General was nonetheless furious about the ruling. “In a popular Government the power to determine what is for the general welfare is much safer in the hands of the representatives of the people than in the hands of a permanent body having no direct responsibility to the public and serving for life. The

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<sup>63</sup> Quoted in McKenna, *Constitutional War*, 133.

<sup>64</sup> 297 U.S. 1: 85-87; Leuchtenburg, *FDR and the New Deal*, 170-171; Pearson and Allen, *Nine Old Men*, 291-293.

<sup>65</sup> 297 U.S. 1: 78-79, 87; Solomon, *FDR v. the Constitution*, 78-79.

<sup>66</sup> Cummings Diary, January 10, 1936, SSCL.

logical tendency of the majority is to set up a judicial autocracy,” he wrote in his diary.<sup>67</sup>

Cummings repeated this refrain to Harold Ickes at a Cabinet meeting on January 17. “As we left the Cabinet meeting,” Ickes recalled, “Cummings said that we were rapidly approaching a state of judicial autocracy in this country, and I told him that we had already arrived there and that we ought to fight it out on those lines.”<sup>68</sup>

Unlike *Schechter*, public opinion was largely against the Court’s ruling in *Butler*.

Farmers held an appeal that differed vastly from that of the big business magnates that the public associated with the NRA. Additionally, many farmers truly liked the AAA and benefited from it.

In the farm country of Ames, Iowa, someone gave vent to their anger by hanging six life-sized, black-robed cardboard figures in effigy.<sup>69</sup> Law reviews and constitutional scholars ridiculed

Roberts’s opinion, particularly what became known as the “slot-machine theory” of judicial review—his implication “that the Constitution was no more challenging to decipher than determining if three lemons had lined up side by side.”<sup>70</sup> According to Princeton professor

Edward Corwin, thirty-nine out of every forty words in the Constitution “are totally irrelevant to the vast majority, as well as to the most important, of the problems which the Court handles each term in the field of constitutional interpretation.” Words and phrases like *liberty*, *general welfare*, and *due process* are “simple enough for a child to understand, but artfully—and evocatively—indefinite.”<sup>71</sup>

Drew Pearson and Robert Allen claimed that the *Butler* ruling would have been 5-4, but Hughes, always concerned with the image of the Court, changed his vote to avoid a close split

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<sup>67</sup> Ibid.

<sup>68</sup> Ickes, *Secret Diary*, 1:515.

<sup>69</sup> McKenna, *Constitutional War*, 138-139; Solomon, *FDR v. the Constitution*, 80.

<sup>70</sup> Solomon, *FDR v. the Constitution*, 79-80.

<sup>71</sup> Corwin, *Revolution*, 13.

decision that would impact thirty million of the farm population. Some historians have disputed this but the outcome made little difference, as public opinion began swinging to Roosevelt. Farmers, who were all of a sudden out of nearly two billion dollars in AAA benefits, joined railroad labor unions and defenders of the NRA on the list of those the Court had angered.<sup>72</sup> For his part, the president seemed content to let the Supreme Court continue to pile up its self-inflicted wounds. When informed of the Court's ruling in *Butler*, Roosevelt was reported to simply have smiled. He would not commit another public relations blunder like the "horse-and-buggy" comment. According to one historian, the *Butler* case was the point of no return; Roosevelt believed the situation had gone beyond talk. His wry smile when receiving the news "was that of a fighter ready for the struggle ahead, perhaps too of a tactician watching his opponent overextend himself."<sup>73</sup>

Following a January 24 Cabinet meeting, Harold Ickes noted in his diary that Roosevelt believed that "people are beginning to show a great deal of interest in the constitutional questions that have been raised by recent Supreme Court decisions...It is plain to see, from what the President said today...that he is not at all adverse to the Supreme Court declaring one New Deal statute after another unconstitutional. I think he believes that the Court will find itself pretty far out on a limb before it is through."<sup>74</sup> Still, Roosevelt expressed an understanding that the timing was not right to make a move on the Court issue; public opinion had still not come fully around to his side. "There isn't any doubt at all that the President is really hoping that the Supreme Court will continue to make a clean sweep on all New Deal legislation," remarked Ickes on January 29. "He thinks the country is beginning to sense this issue but that enough people have

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<sup>72</sup> Pearson and Allen, *Nine Old Men*, 286; Leuchtenburg, *Supreme Court Reborn*, 96-98.

<sup>73</sup> Burns, *Lion and the Fox*, 232-233.

<sup>74</sup> Ickes, *Secret Diary*, 1:524.

not yet been affected by adverse decisions so as to make a sufficient feeling on a Supreme Court issue.” Two days later Ickes added, “It is clear that [Roosevelt] is willing to go to the country on this issue but he wants the issue to be as strong and clear as possible.”<sup>75</sup>

Amidst the rising furor against the Court, the justices issued quite the surprise on February 17, 1936. In a lopsided 8-1 ruling, with only Justice McReynolds in dissent, the Court upheld the Tennessee Valley Authority (TVA). “I had completely resigned myself to a bad decision,” wrote the TVA’s director. “The decision...makes me feel very humble. We are given an almost incredible grant of power.”<sup>76</sup> Cummings duly expressed satisfaction that the Court accepted all of the government’s major arguments in the case. “The majority opinion, as read by the Chief Justice, was eminently satisfying...It was naturally a day of considerable rejoicing in administration circles,” wrote the Attorney General.<sup>77</sup>

Roosevelt also celebrated the win despite the fact that the ruling served to slow the rush of public opinion against the Court. Indeed, some historians have argued that the TVA ruling actually did more damage than good to the administration. The ruling was narrowly defined. Hughes had not issued any indication about the overall constitutionality of the TVA, instead only agreeing that the program had the authority to sell power generated at one dam in Alabama. Also, the case had been brought forward by a minority of Alabama Power Company stockholders. The liberal wing of the Court wanted to dismiss the case on the grounds that a minority of a company’s shareholders should not have the right to contest the TVA. The conservative justices disagreed and thus, by even accepting the case, the Court was opening the

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<sup>75</sup> Ibid.: 530-531.

<sup>76</sup> Quoted in Leuchtenburg, *Supreme Court Reborn*, 104.

<sup>77</sup> Cummings Diary, February 17, 1936, SSCL.

door to far more future challenges to the New Deal.<sup>78</sup> Additionally, constitutional scholar Carl Brent Swisher believed that the lopsided ruling was an embarrassment to the administration. “It indicated that the Court had not set out maliciously to batter every major feature of the New-Deal program,” he wrote, “and that, if New-Deal legislation could be brought within the traditional lines of constitutional interpretation, it might be upheld by the Court.”<sup>79</sup>

The next major act to come before the Court was the Guffey Coal Bill. While observers waited to see whether or not the Court would resume the offensive, the President was busy putting his foot in his mouth with his public pronouncements on the bill’s constitutionality. The bill regulated wages, work hours, and labor rights for coal miners, as well as introduced price-fixing measures to stabilize the industry. It was in effect a miniature NRA relating specifically to the coal industry, and many firmly believed it unconstitutional. In 1935, Roosevelt rather weakly offered nominal support for the bill in a press conference, ambivalently claiming that “a great many people think that it is constitutional.” He later hurt his case even more when he sent a letter to Congressman Samuel Hill, whose subcommittee was holding up passage of the bill. “I hope your committee will not permit doubts as to its constitutionality, however reasonable, to block the suggested legislation,” read the last sentence of the message.<sup>80</sup> This sentence ignited a firestorm amongst Roosevelt’s opponents, as it appeared that the administration was urging Congress to ignore the Constitution in its role as a legislative body. However, the sentence was largely taken out of context. Roosevelt was actually urging passage of the bill to avoid a pending coal strike and was imploring the committee to allow the courts to rule upon the bill’s

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<sup>78</sup> Shesol, *Supreme Power*, 210-211; Schlesinger, *Politics of Upheaval*, 474-475.

<sup>79</sup> Swisher, *American Constitutional Development*, 938.

<sup>80</sup> *PPA*, 4: 233, 297-298.

constitutionality. “The expression was unquestionably maladroit,” notes Arthur Schlesinger, who adds that Roosevelt actually meant “doubts as to unconstitutionality.”<sup>81</sup>

Regardless of what Roosevelt meant, the Court sent the Guffey Coal Bill packing by an unusual 5-1-3 decision. Hughes issued a separate opinion agreeing with the majority that the labor provisions of the bill were invalid but arguing that the price-fixing provisions should be upheld. The four conservatives and Roberts invalidated the entire bill, refusing to consider the provisions separately. Notes historian Jeff Shesol: “This nimble act of avoidance kept Roberts on board—for it was Roberts who, in *Nebbia* [*v. New York*], had upheld the power of Congress to do exactly what it had done in the Guffey Act, that is, to regulate prices.”<sup>82</sup> Nor was Roberts the only one who seemed hypocritical. The majority contended that mining was a local activity and thus out of the reach of federal regulation despite the fact that the Carter Coal Company, which had brought the suit against the bill, shipped 97 percent of its coal out of state.<sup>83</sup>

As the 1935-1936 Supreme Court term came to an end, the tension between the liberal and conservative wings of the Court had reached a breaking point. The justices had become so upset with one another that their anger spilled out of the conference room and into their opinions. Perhaps no case demonstrated as much vitriol as the last major decision of the term—*Morehead v. New York ex rel Tipaldo*. The case centered on a New York minimum wage law for women. Joseph Tipaldo, a Brooklyn laundry manager, was charged with refusing to pay his female employees the required wage.<sup>84</sup> Justice Butler issued a narrow preliminary ruling that invalidated the New York law, citing the 1923 *Adkins v. Children’s Hospital* case as precedent despite the fact that the earlier case involved a federal statute. However, Justice Stone responded

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<sup>81</sup> Schlesinger, *Politics of Upheaval*, 335-336.

<sup>82</sup> Shesol, *Supreme Power*, 213.

<sup>83</sup> *Ibid.*, 212-214.

<sup>84</sup> Shesol, *Supreme Power*, 219-224; Solomon, *FDR v. the Constitution*, 81-82.

with a draft of a dissent so incendiary that Butler revised his opinion so as to broadly deny the right to infringe upon freedom of contract. “The right to make contracts about one’s affairs is part of the liberty protected by the due process clause...Parties have equal rights to obtain from each other the best terms they can by private bargaining,” Butler wrote for the majority. Because it violated the Fourteenth Amendment’s due process clause, the New York law was ruled unconstitutional. Both Hughes and Stone entered dissenting opinions, but Stone’s dissent barely concealed his fury at the conservatives. Claiming the majority was issuing rulings based on their “own personal economic predilections,” Stone mocked the idea that employers and female employees were on equal footing when negotiating wages. “There is grim irony,” he wrote, “in speaking of the freedom of contract of those who, because of economic necessity, give their services for less than is needful to keep body and soul together...Because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the nation.”<sup>85</sup>

If the Court had begun to overextend itself with the *Butler* ruling, as James MacGregor Burns argues, it truly overreached with *Tipaldo*. Ruling after ruling from the conservatives had stressed the importance of states’ rights and now the Court had even invalidated a state attempt at social legislation. As two journalists put it, “even the reactionaries held their hands up in horror” at the Court’s “spasm of insanity.”<sup>86</sup> The press was very much shocked by the extent of the ruling. In a study of 344 editorials on the *Tipaldo* ruling, Arthur Schlesinger found only 10 that actually supported the decision. The *Herald Tribune*, a New York paper as fiercely anti-New Deal as any in the nation, withheld comment on the ruling while other conservative papers called for a constitutional amendment to put a halt to the Court’s lunacy. Perhaps more than any other

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<sup>85</sup> 298 U.S. 587, 632-635; McKenna, *Constitutional War*, 211-213; Solomon, *FDR v. the Constitution*, 81-83.

<sup>86</sup> Burns, *Lion and the Fox*, 233; Alsop and Catledge, *The 168 Days*, 9.

group, the Court's ruling was a blow to the Republican Party, which had set itself up as the defender of the Court, the Constitution, and states' rights. As a result, the GOP found itself in the unenviable position of distancing itself from the *Tipaldo* ruling while still maintaining its stance on the inviolability of the Supreme Court. Even former President Herbert Hoover denounced the ruling, arguing that "something should be done to give back to the states the powers they thought they already had."<sup>87</sup>

In a June 2 press conference, reporters asked the president if New Deal objectives could even conform to the Constitution as defined by the Court's rulings. Roosevelt refused to take the bait. "It seems to be fairly clear," he mused, "as a result of this decision and former decisions, using this question of minimum wage as an example, that the 'no-man's-land' where no Government—State or Federal—can function is being more clearly defined. A State cannot do it, and the Federal Government cannot do it." "How can you meet that situation?" asked a reporter. "I think that is about all there is to say on it," Roosevelt replied.<sup>88</sup> In private, Justice Stone was just as frustrated and dismayed as Roosevelt over the direction that the Court had taken throughout the course of the term. In a letter to Cummings, Stone let the Attorney General know that the Justice Department's arguments before the Court were "excellent." "You need have no regret as to the manner of presentations," the Justice wrote, clearly indicating that he found the Court's conservatives to blame for the adverse rulings. Writing to his sister, Stone was even more adamant that the Court was finishing "one of the most disastrous [terms] in its history."<sup>89</sup>

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<sup>87</sup> Schlesinger, *Politics of Upheaval*, 489; McKenna, *Constitutional War*, 213-214; William Leuchtenburg, "When the People Spoke, What Did They Say? The Election of 1936 and the Ackerman Thesis," *The Yale Law Journal* 108, no. 8 (June 1999): 2091.

<sup>88</sup> *PPA*, 5: 191-192.

<sup>89</sup> Stone to Cummings, July 2, 1936, President's Secretary's File, Box 56, FDRL; Shesol, *Supreme Power*, 221.

The president's measured response placed a veil on the administration's intentions regarding the Court issue. It was clear that public opinion had swung to his side, but no one knew what the president planned to do with the newfound interest in curbing the Court. Before the Court's term was even out, a flood of ideas came forward from the public and their representatives in Congress ranging from abolition of the Court to somehow limiting its ability to overturn congressional legislation. Those hoping for the president to lead the charge against judicial obstinacy found themselves sorely disappointed, as Roosevelt maintained a calculated silence on the matter. Silence, however, does not necessarily imply inaction. Behind the scenes Roosevelt asked his attorney general to begin exploring avenues around the Court. Unbeknownst to the public and even to his fellow Cabinet members, Cummings secretly set about his new task, one he considered "a project of great importance."<sup>90</sup>

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<sup>90</sup> Shesol, *Supreme Power*, 203.

### Chapter Three: “The Answer to a Maiden’s Prayer”

As Justice McReynolds and his conservative brethren rigidly obstructed the growth of federal power, New Dealers were forced to take on the question of just what to do about the Court issue. It hardly seemed right to allow five unelected public officials to block the will of the people as expressed in their votes for Roosevelt and an overwhelming Democratic majority in Congress. Yet, the Roosevelt administration and its congressional allies were at a loss for how to stop them. This chapter will examine the avenues that both the legislative and executive branches explored to solve the Court issue, including legislation, constitutional amendment, and eventually Court-packing. This chapter will argue that early Court-curbing proposals had merit, but President Roosevelt and Attorney General Cummings believed they all suffered from inexorable drawbacks. It will address key decisions including keeping the Court out of the 1936 campaign, settling on Cummings as Roosevelt’s primary adviser on the Court issue, and selecting Court-packing as the quickest and most feasible method of circumventing the Court. Additionally, this chapter will trace Cummings’s efforts in developing the eventual Court-packing bill to show that, while Roosevelt was involved in its formation, Homer Cummings was the primary architect of and driving force behind the bill.

As both the legislative and executive branches began to mull over the Court issue, a constitutional amendment seemed like the only option with any chance of success. The justices appeared well entrenched against New Deal legislation and, with the Black Monday defeats coming at the hands of a unanimous Court, the idea of packing the Court seemed ludicrous.

Indeed, Roosevelt would have to expand the Court to nineteen justices to overcome such a roadblock. Expressly writing new powers into the Constitution looked to be the best way to ensure that the Court could not thwart the will of the people.<sup>1</sup> Merlo Pusey, a contemporary journalist and later biographer of Chief Justice Hughes, strongly favored the amendment route, arguing that “the President could accomplish everything he seeks by the simple device of consulting the people—providing the people consent.” Pusey pointed to a number of potential amendments that would provide an avenue around the Court, including setting a mandatory retirement age, requiring a six vote minimum to overturn an act of Congress, and providing Congress a veto over Court rulings.<sup>2</sup> Tacit advocacy for an amendment also appeared to come from the Court itself. Chief Justice Hughes hinted in his concurring opinion in *Carter v. Carter Coal Company* that if the people wanted to grant Congress radical new powers, “they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.”<sup>3</sup>

While Roosevelt maintained a calculated public silence on the Court issue, Congress took up the challenge of finding a solution. “The years 1935-1937 saw more ‘Court-curbing’ bills introduced in Congress than in any three-year (or thirty-five year) period in history,” notes Michael Nelson. Indeed, over one hundred measures were introduced by Congressmen and senators in 1936 alone.<sup>4</sup> Ideas included removing the Court’s jurisdiction over certain types of cases, limiting or eliminating judicial review, mandating retirement at the age of 65 or 70, and Senator George Norris’s proposal requiring seven votes to overturn an act of Congress (he later submitted a bill that would require unanimity). Other ideas, such as an amendment supported by

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<sup>1</sup> Shesol, *Supreme Power*, 153.

<sup>2</sup> Pusey, *Supreme Court Crisis*, 88-90.

<sup>3</sup> 298 U.S. 238, 318; Pusey, *Supreme Court Crisis*, 4-5.

<sup>4</sup> Nelson, “President and the Court”: 273; Leuchtenburg, “Spoke”: 2099.

Vice President John Nance Garner and Senators James Byrnes and Robert La Follette, were directed at more expansively defining Congress's powers.<sup>5</sup>

Yet, perhaps the best proposal introduced by a member of Congress was Hatton Sumners's 1935 bill guaranteeing retirement pay for justices over the age of 70 who served for at least ten years (a privilege extended to all federal judges except Supreme Court justices). Sumners firmly believed that Justices Van Devanter and Sutherland wanted to retire. Yet, learning from Justice Holmes's experience of seeing Congress slash his retirement pay in half, the two conservatives were staying on the bench rather than trusting Congress to uphold their pensions. Sumners hoped to remedy the matter with his bill and thereby open up two seats for Roosevelt to fill.<sup>6</sup> Attorney General Homer Cummings expressed his ardent approval of the measure and sent a memorandum discussing the details of the legislation to assist Sumners in getting it passed. Yet, as with every other congressional Court-curbing proposal, the bill never made it out of the legislature. Sumners's bill was blocked on the floor of the House by Congressmen who were unwilling to offer higher pensions to members of an obstructionist Court.<sup>7</sup>

Although the executive branch maintained public silence on the Court issue, Roosevelt and Cummings were actively seeking ways around the Court as early as late 1934, when both men anticipated an adverse ruling in the Gold Clause cases. In December of that year, the president began his practice of sending memos regarding the Court issue back and forth with Cummings. "Will you speak to me...about percentage of cercerari [sic] applications by the

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<sup>5</sup> Nelson, "President and the Court": 273; Solomon, *FDR v. the Constitution*, 88.

<sup>6</sup> Nelson, "President and the Court": 274; For further discussion of Congress's cutting of Holmes's retirement pay, see chapter 1, pages 16-17.

<sup>7</sup> Cummings to Sumners, February 4, 1935, Box 199, Cummings Papers, SSCL; Shogan, *Backlash*, 83-84.

Government being denied by the Supreme Court?” asked Roosevelt.<sup>8</sup> Cummings contributed his own version of an amendment requiring the votes of seven justices to overturn an act of Congress. Additionally, Roosevelt and Cummings both made offhand comments suggesting that they should increase the membership of the Court if it ruled against the government in the Gold Clause cases. While it is rather unlikely that Court-packing was seriously considered in early 1935, this nonetheless shows that the option was on the table.<sup>9</sup>

Another tactic that Cummings began to explore before the Court upheld the government in its Gold Clause ruling was removing or limiting the Court’s appellate jurisdiction. In February 1935, Alexander Holtzoff, a Cummings aide who would play an important role in researching potential paths around the Court, sent his boss a memo discussing such an option. The Constitution establishes a small number of cases of original jurisdiction for the Supreme Court, but largely leaves Congress the power to define the scope of the Court’s appellate jurisdiction. Holtzoff concluded that any amendment removing the Court’s appellate jurisdiction would “closely approach an entire abolition of the Supreme Court, because the few original cases that would be left to it, would result in rendering it a somewhat insignificant tribunal with very little business to transact. Such a proposal would encounter great opposition on the part of a majority of the members of the bar, as well as many laymen and I greatly doubt its wisdom.” He added that it would fail to achieve its intended purpose anyway, since lower courts would still have the ability to rule on the constitutionality of legislation. A better proposal, Holtzoff suggested, would be to amend the Constitution to restrict lower courts from ruling on

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<sup>8</sup> Roosevelt to Cummings, December 19, 1934, Box, 169, Cummings Papers, SSCL.

<sup>9</sup> Shesol, *Supreme Power*, 120; Ickes, *Secret Diary*, 1: 274.

constitutionality and require a two-thirds vote of the Supreme Court to overturn an act of Congress.<sup>10</sup>

Cummings accepted Holtzoff's analysis, but throughout 1935 retained an interest in limiting the Court's ability to overturn legislation. Historian Jeff Shesol argues that the Court's May 1935 ruling in *Railroad Retirement Board v. Alton*, which overturned the Railroad Retirement Act, really kicked Cummings's efforts into high gear. Five days after the ruling, the attorney general shifted his focus and instructed Angus MacLean to examine "the right of the Congress, by legislation, to limit the terms and conditions upon which the Supreme Court can pass on constitutional questions." Cummings was clear that he was not talking about eliminating appellate jurisdiction anymore, but instead seeking "legislation which would not cut off the right of the Supreme Court to pass on constitutional questions, but which would limit it somewhere with a view to avoiding 5 to 4 decisions."<sup>11</sup>

Throughout the summer of 1935, President Roosevelt remained actively involved with the search for a solution. He frequently traded newspaper articles, suggestions, and ideas with both Homer Cummings and Felix Frankfurter. Cummings would then direct his aides to research the president's suggestions. One proposal that Roosevelt was particularly fond of in 1935 was an "intervening election" amendment.<sup>12</sup> Roosevelt described the amendment in a meeting with Interior Secretary Harold Ickes:

[Roosevelt] believed that the way to mend the situation was to adopt a constitutional amendment which would give the Attorney General the right, if he has any doubt of the constitutionality of a legislative act, to apply to the Supreme Court for a ruling, that ruling to state specifically in which respects the act is unconstitutional. Then, if the next succeeding Congress, with the opinion of the

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<sup>10</sup> Holtzoff to Cummings, February 6, 1935, Box 199, Cummings Papers, SSCL.

<sup>11</sup> Leuchtenburg, *Supreme Court Reborn*, 93; Shesol, *Supreme Power*, 121; Cummings to MacLean, May 11, 1935, Box 199, Cummings Papers, SSCL.

<sup>12</sup> Shesol, *Supreme Power*, 155; Solomon, *FDR v. the Constitution*, 87.

Supreme Court before it, should re-enact that statute, it would, by that fact, be purged of its unconstitutionality and become the law of the land.<sup>13</sup>

Ickes expressed his approval of such a measure, noting that it “would give people a chance to study and discuss the act during the campaign and Congress would have a mandate from the people when it again voted upon the question.” Ickes also noted the president’s recollection of the “difficulty in England” in which Prime Minister David Lloyd George got an obstructive House of Lords to pass an Irish autonomy bill by threatening to create hundreds of new peers.<sup>14</sup> Roosevelt was not quite correct in his analogy—the showdown was between Herbert Asquith and the House of Lords over a proposed budget—but the sentiment of the analogy showed that Court-packing remained a possibility in the president’s mind.<sup>15</sup>

Nonetheless, it was a possibility that, by December 1935, remained anathema to Roosevelt. In a Cabinet meeting, he outlined three ways to deal with the Court issue. The first was Court-packing, which he considered “a distasteful idea.” The second was to pass amendments expanding Congress’s powers. The third was the intervening election amendment he had outlined to Ickes. Roosevelt added that the amendment should give the Court original jurisdiction on constitutional questions affecting legislation, which would effectively eliminate the appeals process through lower federal courts. Yet, Cummings found fault with this formula, noting that such a requirement would place a burden on the Court’s workload. He suggested instead allowing district courts to certify cases for the Supreme Court to hear without actually allowing the lower courts to rule on constitutionality. The meeting, and the year, ended on a note of futility, with Roosevelt simply asking the Cabinet to consider the third option very closely.<sup>16</sup>

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<sup>13</sup> Ickes, *Secret Diary*, 1: 467-468.

<sup>14</sup> *Ibid.*, 468.

<sup>15</sup> Shesol, *Supreme Power*, 172

<sup>16</sup> Ickes, *Secret Diary*, 1: 495-496.

The beginning of a new year marked a renewed and redirected effort on the part of both Roosevelt and Cummings. In January 1936, Roosevelt turned his attention to removing the Court's appellate jurisdiction. "What was the McCardle [sic] case? I am told that the Congress withdrew some act from the jurisdiction of the Supreme Court," he asked Cummings. The attorney general, who had already dismissed tinkering with the Court's appellate jurisdiction, dutifully had Alexander Holtzoff put together some information on the case. "The case of *ex parte McCardle*... is one of the classic cases to which we refer when considering the possibility of limiting the jurisdiction of Federal Courts," Cummings replied to Roosevelt.<sup>17</sup> The case involved William McCardle, a Mississippi newspaper editor who had been imprisoned by a military tribunal for publishing inflammatory attacks on Reconstruction policies. McCardle challenged his arrest, arguing that the tribunal denied him rights codified in the Habeas Corpus Act of 1867. Fearing that the Court might use the case to invalidate part or all of the Reconstruction Acts, Radical Republicans quickly passed the Habeas Corpus Act of 1868, which removed the Supreme Court's jurisdiction from all cases emerging from the 1867 act. Rather than challenging the validity of the new act, the Court chose to back down.<sup>18</sup>

In his reply to the president, Cummings included a memo from Holtzoff. Having already convinced his boss that removing appellate jurisdiction was a really poor idea, Cummings's aide set about to convince the president. The McCardle case, he warned, does "not support the inference that the Congress may circumscribe the manner in which the Supreme Court shall decide a case, after the case has been permitted to reach that tribunal. In other words, if the Supreme Court is given the power to review certain types of cases, it would hardly be valid for

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<sup>17</sup> Roosevelt to Cummings, January 14, 1936, Box 170, Cummings Papers, SSCL; Cummings to Roosevelt, January 16, 1936, President's Secretary's Files, Box 165, Roosevelt Papers, FDRL.

<sup>18</sup> McKenna, *Constitutional War*, 165-168; Ackerman, *Transformations*, 223-227.

the Congress to direct the manner in which the case shall be determined, for example as to whether or not a statute on which one of the parties relies, may be declared unconstitutional.”<sup>19</sup>

Frustrated to no end, Roosevelt returned to the drawing board. On January 29, 1936, he again discussed the Court issue with Harold Ickes. The president modified his previous idea about an intervening election amendment and now suggested that he could achieve his goals through legislation that would compel an advisory ruling from the Court on statutes of questionable constitutionality. Congress would then be allowed to modify the bill or to pass it over the Court’s objections. Ickes then commented that the Court would obviously rule such legislation unconstitutional. “He said that of course it would,” Ickes recalled in his diary. “To meet that situation his plan would be somewhat as follows: Congress would pass a law, the Supreme Court would declare it unconstitutional, the President would then go to Congress and ask it to instruct him whether he was to follow the mandate of Congress or the mandate of the Court. If the Congress should declare that its own mandate was to be followed, the President would carry out the will of Congress...and ignore the Court.”<sup>20</sup>

Roosevelt’s flippant dismissal of judicial review masked serious problems with any attempt to address the Court issue through legislation. While Cummings, the president, and members of Congress had produced numerous suggestions for limiting the Court’s power, the simple fact remained that the justices could, and almost certainly would, overturn any such proposal.<sup>21</sup> A statute limiting the Court’s appellate jurisdiction seemed to be the only way that Congress could hamper the Court through legislation, but Holtzoff effectively outlined to both Cummings and Roosevelt the dangers of such a plan. Constitutional scholar Carl Brent Swisher

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<sup>19</sup> Holtzoff memo, January 16, 1936, President’s Secretary’s Files, Box 165, Roosevelt Papers, FDRL.

<sup>20</sup> Ickes, *Secret Diary*, 1: 529-530.

<sup>21</sup> Shesol, *Supreme Power*, 195-196.

seconded Holtzoff's analysis, noting that it would be "practically impossible to withdraw all constitutional questions from judicial determination." Swisher added that "many of [the lower] courts showed a disapproval of the New-Deal program no less ardent than that of the Supreme Court. Furthermore, the disparity of decisions on constitutional questions, if not subject to the unifying influence of the Supreme Court, would result in chaos throughout the several judicial districts."<sup>22</sup>

On the surface, a constitutional amendment appeared to be the best way for New Dealers to get around the judicial roadblock. After all, the Court could hardly find New Deal programs unconstitutional if the basis for such programs was specifically written into the Constitution. Yet, part of Roosevelt's and others' frustrations stemmed from several inherent problems that arose from the amendment route. For one, the ratifying process was cumbersome and took a significant amount of time to complete. Roosevelt and Cummings knew all too well that in 1924 Congress passed an amendment banning child labor by wide margins in both the House and the Senate. Yet, a concerted state-level effort by opponents of the amendment stalled its ratification by the requisite number of states. Over a decade later, the amendment still lay unratified. Additionally, Roosevelt was fond of telling advisors that given the right amount of money, he could easily convince thirteen state legislatures to stall just about any proposed amendment.<sup>23</sup>

Some journalists and scholars have argued that New Dealers could have passed an amendment without taking several years to do it. Merlo Pusey considers it a "myth" that the amending process is too slow. He dismisses the issue of the child labor amendment by claiming that had it gone to state conventions rather than legislatures (a method that would have provided more of a direct referendum on the amendment), it would have easily passed. He also points out

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<sup>22</sup> Swisher, *American Constitutional Development*, 939.

<sup>23</sup> Bloomfield, *Peaceful Revolution*, 89-92; Burns, *Crosswinds of Freedom*, 91.

that on average the Seventeenth through the Twenty-First Amendments were each ratified in about a year.<sup>24</sup> Likewise, historian David Kyvig argues that a rapid amendment should not have posed a problem for Roosevelt. Part of his evidence consists of a comment from Donald Richberg, former head of the NRA, who claimed that in “periods of great national strain constitutional amendments have been rapidly effected by mass movements of irresistible force.”<sup>25</sup> Yet, Pusey and Kyvig too easily dismiss this problem. Roosevelt’s indication in his January meeting with Ickes that he would seek a quicker legislative solution shows that time had very much become an important factor in the president’s mind. The Court had already invalidated the NRA and the AAA; other important New Deal programs—most notably the Social Security Act—would soon find their way to the dockets. “When I retire to private life on January 20, 1941,” Roosevelt mused, “I do not want to leave the country in the condition Buchanan left it to Lincoln.”<sup>26</sup>

Another problem with the amendment route was that any amendment ratified and any law passed under the auspices of that amendment would still remain subject to judicial interpretation. The amendments under consideration involved complex matters of state and federal power, which left the door open for the Court to interpret them in any number of manners. As Louis Boudin warned, “Not only can amendments be interpreted away; they can also be made, by interpretation, a source of new and undreamed-of ills.”<sup>27</sup> Attempting to overcome this interpretational slant raised yet another inherent problem—wording. Justice Department lawyers were having a nightmare trying to formulate legal language for Roosevelt’s preferred intervening

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<sup>24</sup> Pusey, *Supreme Court Crisis*, 94-97.

<sup>25</sup> David Kyvig, “The Road Not Taken: FDR, the Supreme Court, and Constitutional Amendment,” *Political Science Quarterly* 104, No. 3 (1989): 467-474.

<sup>26</sup> Kennedy, *American People in the Great Depression*, 330-331.

<sup>27</sup> Leuchtenburg, *FDR and the New Deal*, 232; Boudin quoted in Shesol, *Supreme Power*, 154.

election amendment, which one historian saw as “a kind of indirect popular referendum, designed by Rube Goldberg.” Thus, according to New Deal historian James MacGregor Burns, an amendment seeking to nullify undesirable judicial interpretation would have to be so specific that it would likely raise serious objections in Congress.<sup>28</sup> Roosevelt struggled to find a formula that was broad enough to grant the powers he felt the federal government should have, but also narrow enough not to infringe upon the power of state governments. Perhaps more than any other reason, Roosevelt began to dislike the amendment route because amendments are fixed and rigid; as he proclaimed in his 1933 Inaugural Address, he firmly believed that the Constitution was already flexible enough to meet contemporary problems.<sup>29</sup>

Homer Cummings shared the president’s declining faith in the amendment route and advised Roosevelt to abandon it. Like Roosevelt, the attorney general believed that any attempt to tinker with the balance of state and federal power “implies a very delicate surgical operation.”<sup>30</sup> Coincidentally, on the same day that Roosevelt expressed to Ickes his belief that legislation could solve their problems, Cummings wrote to the president about the difficulties facing their search for an amendment. The attorney general’s hunt for a solution to the Court issue had intensified in the wake of the Court’s demolition of the Agricultural Adjustment Act in *U.S. v. Butler*, and it had become increasingly clear to him that the inherent problem did not lie with the Constitution.<sup>31</sup> On January 29, Cummings returned a newspaper clipping to Roosevelt in which the writer had strongly advocated “the need for the ample revision of the foundations of the Constitution.” “I do not believe we have quite reached that point yet,” Cummings replied. “The real difficulty is not with the Constitution,” he added, “but with the Judges who interpret

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<sup>28</sup> Kennedy, *American People in the Great Depression*, 330-331; Burns, *Crosswinds of Freedom*, 90-91.

<sup>29</sup> Pusey, *Supreme Court Crisis*, 99-101; Shesol, *Supreme Power*, 154-155, 204-205.

<sup>30</sup> Quoted in Solomon, *FDR v. the Constitution*, 88.

<sup>31</sup> Shesol, *Supreme Power*, 203-204; Leuchtenburg, *Supreme Court Reborn*, 100-101.

it...The hand has not been played out. If we come to the question of a constitutional amendment, enormous difficulties are presented. No one has yet suggested an amendment that does not do either too much or too little, or does not raise practical and political questions which it would be better to avoid.”<sup>32</sup>

Cumming’s January 29 letter would turn out to have an important ramification for the eventual Court-packing bill. Putting aside his dislike for amendment, Cummings informed Roosevelt that “we might well be giving some serious thought to an amendment to the Constitution (should we find we are forced to that point) which would require the retirement of all Federal Judges, or, at least, all Supreme Court Judges, who have reached or who hereafter reach the age of seventy years. It may very well be that life tenure lies at the heart of our difficulty.” Removing life tenure, Cummings concluded, would ensure “the exercise of the powers of Court by Judges less likely to be horrified by new ideas.” Cummings and William McAdoo had discussed just such a prospect three years prior, before Roosevelt had even taken office. Now the idea had come home to roost. The removal of aged justices would shape the remainder of Cummings’s research into the Court issue.<sup>33</sup>

A week after his initial memo, Cummings again reiterated his belief that mandatory retirement was the correct course to pursue. On February 7, he took satisfaction in passing to Roosevelt a quotation regarding aged justices from none other than William Howard Taft, whose conservative legacy as chief justice was largely responsible for the Court’s current obstructionism:

There is no doubt that there are judges at seventy who have ripe judgments, active minds and much physical vigor, and that they are able to perform their judicial duties in a very satisfactory way. Yet in a majority of cases when men come to be

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<sup>32</sup> Cummings to Roosevelt, January 29, 1936, Box 170, Cummings Papers, SSCL.

<sup>33</sup> Cummings to Roosevelt, January 29, 1936, Box 170, Cummings Papers, SSCL; Shesol, *Supreme Power*, 206-207.

seventy, they have lost vigor, their minds are not as active, their senses not as acute, and their willingness to undertake great labor is not so great as in younger men, and as we ought to have in judges who are to perform the enormous task which falls to the lot of Supreme Court justices. In the public interest, therefore, it is better that we lose the services of the exceptions who are good judges after they are seventy and avoid the presence on the Bench of men who are not able to keep up with the work, or to perform it satisfactorily.<sup>34</sup>

In March, unexpected support for Cummings's position again came from an unlikely source. In an article in which he proclaimed that the age of the justices was hindering the Court's performance, prominent journalist Arthur Krock of the *New York Times* cited an "eminent" source who in a 1928 lecture had suggested an age limit of seventy-five to prevent judges from serving for too long. Krock revealed his source to be none other than Chief Justice Hughes.<sup>35</sup>

As Cummings tasked his aides with furtively researching means to remove aged justices, the president and his advisers addressed the issue of whether or not to make Court reform a central issue in the upcoming campaign. For his part, Roosevelt was wary of making another public blunder like the "horse-and-buggy" remarks that caused public indignation in the wake of the Black Monday rulings. Indeed, historians have argued that his comments actually tilted public opinion towards the Court.<sup>36</sup> Roosevelt tested the waters again in September 1935. He had George Creel of *Collier's Weekly* write an article, parts of which were entirely composed by Roosevelt, arguing that if the Court continued its present path, then the administration "will have no other alternative than to go before the country with a constitutional amendment that will lift the dead hand." Expecting a raucous public response, Roosevelt told Creel, "Fire that as an opening gun." The article flopped badly; it failed to attract any noticeable attention.<sup>37</sup>

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<sup>34</sup> Cummings to Roosevelt, February 7, 1936, Box 170, Cummings Papers, SSCL.

<sup>35</sup> Shesol, *Supreme Power*, 209.

<sup>36</sup> Luechtenburg, "Spoke": 2080-2081; Shogan, *Backlash*, 20-21.

<sup>37</sup> McKenna, *Constitutional War*, 170-171; Shesol, *Supreme Power*, 156.

Further muddying the waters were a series of polls that gauged the public's opinion of the Court. In a Gallup poll conducted just after the *Collier's* article came out, only 31 percent of respondents said they would "favor limiting the power of the Supreme Court to declare acts of Congress unconstitutional." Fifty-three percent declared their opposition to such a proposal.<sup>38</sup> A poll taken in the wake of the January 1936 *Butler* ruling saw a swing towards the administration, as a slim majority of respondents supported requiring either a "supermajority" or unanimity in order for the Court to overturn an act of Congress. Yet, the pendulum again swung towards the Court in an April 1936 poll. Only 22 percent believed that the Court had "recently...[s]tood in the way of the people's will." In contrast, 39 percent responded that the Court had "recently...[p]rotected the people against rash legislation," while the remaining 39 percent expressed no opinion on the matter.<sup>39</sup> While the administration grappled with these numbers, a prophetic word of warning came from Arizona's Henry Ashurst, a powerful Democratic ally and chairman of the Senate Judiciary Committee. Arguing that the time was not right to move on the Court issue, Ashurst predicted, "It will fall to your lot to nominate more Justices of the Supreme Court than any other President since General Washington. You will nominate 4, possibly 5 supreme Court Justices."<sup>40</sup>

While Ashurst counseled patience, others urged Roosevelt to put the Court front and center during the upcoming campaign. "It seems to me a better campaign issue could not be devised," claimed Rex Tugwell. Shortly thereafter Tugwell again counseled Roosevelt to "draw the issue rather clearly now" in order to "settle this issue once [and] for all."<sup>41</sup> Perhaps no one more forcefully advocated decisive action in the campaign than Harold Ickes. Frustrated by the

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<sup>38</sup> Leuchtenburg, *Supreme Court Reborn*, 94.

<sup>39</sup> Shesol, *Supreme Power*, 197-198; Leuchtenburg, "Spoke": 2085-2086.

<sup>40</sup> Ashurst to Roosevelt, February 19, 1936, Box 170, Cummings Papers, SSCL.

<sup>41</sup> Shesol, *Supreme Power*, 120, 144-145.

president's public silence on the Court throughout 1935, Ickes could bite his tongue no more. "I bluntly asked him," he noted in his diary, "how much further we were going to retreat before standing to face the enemy. I told him that I believed in fighting and that I thought we ought to fight."<sup>42</sup> By January 1936 Ickes believed the president was gearing up for a public fight:

There isn't any doubt at all that the President is really hoping that the Supreme Court will continue to make a clean sweep of all New Deal legislation...He thinks the country is beginning to sense this issue but that enough people have not yet been affected by adverse decisions so as to make a sufficient feeling on a Supreme Court issue. I told the President that I hoped this would be the issue in the next campaign. I believe it will have to be fought out sooner or later, and I remarked to him that the President who faced this issue and drastically curbed the usurped power of the Supreme Court would go down through all the ages of history as one of the great Presidents.<sup>43</sup>

Two days later, Ickes added, "It is clear that [Roosevelt] is willing to go to the country on this issue but he wants the issue to be as strong and as clear as possible, which means that he hopes the Supreme Court will declare unconstitutional every New Deal case that comes before it. It happens that I am fully in accord with the President's view on this matter. I believe that this issue will have to be fought out sooner or later...I would like to be in this fight."<sup>44</sup>

Homer Cummings, on the other hand, advised Roosevelt to keep the Court out of the campaign. Meeting with the president in May 1936, Cummings was interrupted when an aide brought in a memo from Stanley High, another Roosevelt adviser. High described a number of ways in which the Republicans might bring the Court into the upcoming campaign in ways that would embarrass the administration. He recommended preempting the Republicans by taking a strong stance on the Court during the campaign.<sup>45</sup> When Roosevelt asked Cummings what he thought of the memo, Cummings tore it apart. Despite finding High's memo "so plausibly stated

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<sup>42</sup> Ickes, *Secret Diary*, 1: 498-499.

<sup>43</sup> *Ibid.*, 530.

<sup>44</sup> *Ibid.*, 531-532.

<sup>45</sup> McKenna, *Constitutional War*, 226; Cummings Diary, May 19, 1936, SSCL.

that it is quite impressive,” Cummings told Roosevelt that “the premises were wrong and the conclusion unwarranted.” The only real New Deal casualty, as Cummings saw it, was the NRA. Congress was working to reestablish parts of the AAA. The government won the Gold Clause and TVA cases. The Court had upheld the government’s spending power. Even the Guffey case, “disclosing as it did a strong minority for our position, could hardly be regarded as a complete reverse.” “There would be no political justification,” Cummings concluded, “for changing our tactics in view of the recovery that is constantly going on; and, in view of the disorganized state of the opposition, the chance of any disaster overtaking us in November, was exceedingly remote and that we could not lose the election except through our own mistakes.”<sup>46</sup>

As High predicted, the Republicans seized the initiative on Supreme Court reform. On June 9, 1936, they nominated Kansas governor Alf Landon on the first ballot. Landon caught Democrats, and many in his own party, off-guard by declaring that he favored an amendment allowing state governments to regulate wages, working hours, and labor conditions for women and children if, he carefully added, such protections proved unable to secure “within the Constitution as it now stands.” Noted columnist Charles Beard: “This was the bold, brave act which the Roosevelt administration had so far avoided by maintaining a painful silence.”<sup>47</sup> While numerous advisers pressed Roosevelt to add a similar statement in the Democratic platform, Cummings again urged him not to directly support an amendment. “If we attempt to deal specifically with this problem,” he wired Roosevelt, “we must go so much farther than the Republican Platform, or its candidate, that an entirely new situation is apt to be created which

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<sup>46</sup> Cummings Diary, May 19, 1936, SSCL.

<sup>47</sup> McKenna, *Constitutional War*, 229.

may shift the emphasis of the campaign.”<sup>48</sup> Roosevelt sided with Cummings, opting only to support a vague “clarifying amendment” should one become necessary.

By deciding to sidestep the Court in the Democratic platform, Roosevelt essentially accepted Cummings’s advice to keep the Court issue out of the campaign. New Deal historian William Leuchtenburg offers a number of reasons why the president ultimately decided to do so. For one, Roosevelt did not want to fall into the Republicans’ trap. Campaigning on Court reform would likely force him to take an untenable position given the recent poll numbers that supported the justices. Thus, Roosevelt’s second reason for leaving the issue out of the campaign was to allow public opinion to continue to build against the Court. Finally, argues Leuchtenburg, Roosevelt did not want to push for Court reform publicly until he actually had a plan.<sup>49</sup>

Journalists Joseph Alsop and Turner Catledge support the assertion that Roosevelt wanted to continue gathering public opinion. They cite a parable that Roosevelt supposedly told about a group of totem-worshipping Indians. One missionary tried to convert them by cutting the totem down. The Indians killed the missionary and rebuilt the totem. Another missionary slowly dug dirt from around the totem’s base until it toppled over by itself. Shocked by the turn of events, the Indians converted. Like the second missionary, Roosevelt hoped to slowly turn public opinion against the supposed inviolability of the Supreme Court.<sup>50</sup> Such explanations offer much to understand the rationale for leaving the Court out of the campaign, but they fail to address perhaps the primary reason that Roosevelt chose to do so, a reason he outlined to

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<sup>48</sup> Cummings to FDR, June 20, 1936, , Box 170, Cummings Papers, SSCL.

<sup>49</sup> Leuchtenburg, “Spoke”: 2082.

<sup>50</sup> Alsop and Catledge, *The 168 Days*, 19.

Raymond Moley in May 1936: “There’s one issue in this campaign. It’s myself, and people must either be for me or against me.”<sup>51</sup>

Roosevelt’s reliance on Cummings for advice on the platform and the campaign marked the culmination of a process in which the president lost numerous advisers who were willing to speak truth to power. Raymond Moley and Rexford Tugwell had both fallen out with the President and no longer served as advisers by the time the court fight came to a head. With Moley’s departure from the administration in June 1936, Roosevelt lost the last member of his original “Brain Trust” that had helped engineer both his election and the New Deal.<sup>52</sup> Yet, no loss was more devastating than that of Louis Howe. The president’s personal secretary and longtime confidant, Howe possessed an uncanny ability to talk Roosevelt out of politically damaging situations; no one else could get away with telling the president, “Goddammit, Franklin, you can’t do that!” It was Howe who had almost singlehandedly resurrected the president’s political fortunes when Roosevelt was diagnosed with polio in 1921.<sup>53</sup> In 1935, Harold Ickes described Howe, who was very sick at the time:

Louis Howe has a very keen judgment of men and of political trends. He is absolutely devoted to the President and he is the one man who is in a position to tell the President what the facts are, no matter how unpleasant they appear...His loss would be irreparable, especially at a time when the political situation is shifting to the extent that it seems to be.<sup>54</sup>

As Howe’s condition worsened, it became clear that he would likely not survive the campaign. “Franklin is on his own now,” Howe said shortly before passing away in April 1936.<sup>55</sup> Losing Howe impacted Roosevelt in ways that perhaps even he did not fully

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<sup>51</sup> McKenna, *Constitutional War*, 221.

<sup>52</sup> McKenna, *Constitutional War*, 227-229; Davis, *FDR: Into the Storm*, 6-8.

<sup>53</sup> Shesol, *Supreme Power*, 249-250; Kenneth S. Davis, *FDR: The New Deal Years, 1933-1937* (New York: Random House, 1986), 599-603.

<sup>54</sup> Ickes, *Secret Diary*, 1: 319.

<sup>55</sup> Quoted in McKenna, *Constitutional War*, 227.

comprehend. According to historian Jeff Shesol, Howe was Roosevelt's "anchor," sometimes the only person that could "prevent FDR from indulging his worst instincts." Howe's death seriously impacted the president's ability to critically evaluate situations. "After Louis' death Franklin frequently made his decisions without canvassing all sides of a question," recalled Eleanor Roosevelt. Despite the abundance of advisers, "no one quite filled the void," concluded the First Lady.<sup>56</sup>

Roosevelt's decisions about the campaign indicated that of all the possible replacements for Louis Howe, he had settled on arguably the worst possible choice—Homer Cummings. In addition to Cummings's renowned eagerness to tell the president yes whenever possible, the attorney general was simply jealous of and vindictive towards other advisers. He especially directed his ire at Felix Frankfurter and his two protégés in the West Wing, Benjamin Cohen and Tommy Corcoran. Cummings strongly pushed Roosevelt to keep the search for a solution to the Court problem secret and was quite delighted when the president agreed to keep his other advisers out of the loop.<sup>57</sup> The bitter irony of Roosevelt's fateful decision to rely exclusively on Cummings to develop a Court plan was that Frankfurter, Cohen, and Corcoran actually agreed with Cummings that the Court, not the Constitution, was the problem. Yet, they also knew that Court-packing was the one unacceptable solution. Roosevelt's decision to isolate them from the search only compounded the attorney general's errors in devising the eventual plan.<sup>58</sup> Having essentially secured carte blanche to form a solution, Cummings set about his assignment, placing Justice Department researchers on tasks wholly independent of one another. Secrecy reigned at

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<sup>56</sup> Shesol, *Supreme Power*, 249-250; McKenna, *Constitutional War*, 227-229.

<sup>57</sup> Joseph P. Lash, *Dealers and Dreamers: A New Look at the New Deal* (New York: Doubleday, 1988), 292-293; Alsop and Catledge, *The 168 Days*, 27-28; Solomon, *FDR v. the Constitution*, 94.

<sup>58</sup> Lash, *Dealers and Dreamers*, 291; Davis, *FDR: Into the Storm*, 52-54.

Justice, with only Cummings, Solicitor General Stanley Reed, and Cummings's aide Alexander Holtzoff knowing the purpose of the attorney general's clandestine project.<sup>59</sup>

Having delegated the task to Cummings, Roosevelt pushed ahead with his reelection bid. True to his word, he made himself the centerpiece of the campaign. Landon initially showed promise, as Republicans painted the administration as against the interests of states' rights and big business. Yet, as Marian McKenna notes, "once the president began making hard-hitting speeches, Landon's momentum began to falter."<sup>60</sup> No speech in the entire campaign hit harder than Roosevelt's Madison Square Garden address on Halloween night. Responding to increasingly desperate and harsh Republican attacks, Roosevelt absolutely let loose on "the old enemies of peace—business and financial monopoly, speculation, reckless banking, class antagonism, sectionalism, war profiteering... They are unanimous in their hate for me—and I welcome their hatred." Building to a crescendo, Roosevelt declared to the roaring crowd, "I should like to have it said of my first Administration that in it the forces of selfishness and of lust for power met their match. I should like to have it said of my second Administration that in it these forces met their master."<sup>61</sup>

The results could hardly have been more decisive. Carrying every state but Maine and Vermont, Roosevelt claimed 61 percent of the popular vote and the largest Electoral College victory in over a hundred years (523 votes to only 8 for Landon). Adding insult to the Republicans' injuries, Democrats would enjoy even larger majorities in the House and Senate than they did in Roosevelt's first term. Because he had made himself the central issue of the campaign, Roosevelt interpreted the election returns as an open mandate from the people to do as

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<sup>59</sup> Alsop and Catledge, *The 168 Days*, 43.

<sup>60</sup> McKenna, *Constitutional War*, 239.

<sup>61</sup> *PPA*, 5: 568-569.

he chose. “I owe nothing,” the president told an aide, “I promised nothing.”<sup>62</sup> Harold Ickes recalled that in the first cabinet meeting after the election, Roosevelt “spoke of the fact that he has now an absolutely free hand without the danger of being charged with having broken campaign promises.” Roosevelt then addressed Solicitor General Stanley Reed, who was filling in for Cummings. Emboldened by his smashing victory, Roosevelt “instructed Reed to go ahead as rapidly as possible with the Government cases that are pending [before the Court], involving the constitutionality of New Deal legislation. He expects this legislation to be declared unconstitutional and evidently looks to that as a background for an appeal to the people over the head of the Court.”<sup>63</sup>

Cummings, meanwhile, had gotten nowhere in his search for a way around the Court. By November, Cummings had not been able to rule out an amendment as a potential solution, but he still firmly believed that “the path to an amendment...is a thorny one and would necessitate a delay of at least two years before anything tangible could be done.” He broached the subject in a meeting with the president on November 15. Roosevelt “thoroughly understands my attitude which is in substance that there is nothing the matter with the constitution but that the entire difficulty has grown out of a reactionary misinterpretation of it,” Cummings wrote afterwards. “We talked this over at great length,” recalled the attorney general, “weighing pro and con the question of constitutional amendments of one kind or another, or possibly changes in the Supreme Court or additions thereto.”<sup>64</sup>

The idea of packing the Court had been weighing on Cummings’s mind. Many considered it to be taboo, and yet there was a long political history to expanding the size of the

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<sup>62</sup> Shesol, *Supreme Power*, 239-241.

<sup>63</sup> Ickes, *Secret Diary*, 1: 703-705.

<sup>64</sup> Cummings Diary, November 15, 1936, SSCL.

Court. The Constitution leaves the composition of the Supreme Court to Congress, which originally set the number of justices at six. The Court had remained at nine justices since the Grant administration, but as historian Burt Solomon points out, Congress changed the number of justices eight times in the Constitution's first eighty-one years, often due to political motives.<sup>65</sup> When Cummings received a thorough sixty-five page memo from W.W. Gardner, one of his aides, in December 1936, it confirmed his line of reasoning. The memo outlined various proposals that had been suggested for circumventing the Court and detailed reasons why almost every one would fail its intended purpose. Gardner identified two methods for success—Court-packing and constitutional amendment. Apart from an amendment, the former method “is the only one which is certainly constitutional and...may be done quickly and with a fair assurance of success,” Gardner argued, while the latter method “would seem to offer a lasting solution to the problem.”<sup>66</sup>

Though Gardner raised several problems with increasing the size of the Court, including “the superficial character of the remedy” and the potential need to make up to nine or ten appointments in order to counter a potential backlash from the sitting justices, his memo convinced Cummings that Court-packing was a feasible solution. In late December, Roosevelt again floated the idea to George Creel of *Collier's*. Creel published an article titled “Roosevelt's Plans and Purposes” in which he (largely through the president's own phrases) described how, if other avenues to address the Court issue failed, “Congress *can enlarge the Supreme Court*, increasing the number of justices from nine to twelve or fifteen.” The emphasis came straight from Roosevelt. The president again expected a public outcry only to be met again with public apathy. The failure of yet another *Collier's* article to attract noticeable attention could have been

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<sup>65</sup> Solomon, *FDR v. the Constitution*, 14.

<sup>66</sup> Shesol, *Supreme Power*, 252-253.

interpreted in a number of ways, but Cummings and Roosevelt chose to see it as ambivalence towards Court-packing rather than opposition to it.<sup>67</sup>

Cummings was now firmly committed to finding a way to add justices to the Court; the problem of how to do it remained to be solved. For the attorney general, putting together the eventual Court-packing bill was similar in many ways to solving a puzzle. By late 1936, Cummings had all the key pieces on the table but was not sure of just how to put them together. Since January he had been convinced that legislation was preferable to amendment and that the age of the justices was hampering their interpretation of the Constitution. Another piece of the puzzle dealt with judicial efficiency. Cummings firmly believed the federal judiciary was poorly coordinated, legal avenues were too complicated, and lower court judgeships were occupied by “dead wood.” Accordingly, Cummings felt that corporation lawyers were taking advantage of the confusion to harass the New Deal in court.<sup>68</sup>

Cummings’s desire for wholesale judicial reform was no ruse. Many scholars argue that he truly was interested in streamlining judicial procedure, and there is ample evidence to support this conclusion. In June 1934, Cummings recommended that Congress pass a law simplifying court procedure with regards to actions at law. The bill empowered the Supreme Court to establish uniform national procedures instead of having to adhere to those from forty-eight different states. The outcome, lobbied Cummings, would be to simplify legal procedures and reduce delays in court. Supported by the American Bar Association, the bill had been introduced once before but failed to pass the Senate. When Cummings reintroduced it and put his weight

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<sup>67</sup> Ibid., 252-255.

<sup>68</sup> Swisher, *American Constitutional Development*, 942-943; Alsop and Catledge, *The 168 Days*, 31-32.

behind it, the bill sailed through both houses of Congress.<sup>69</sup> In February 1935, Cummings personally visited the backlogged Customs Court in New York City to “discuss more intimately the affairs of the Court.” In a letter to Roosevelt shortly thereafter, Cummings revealed that the purpose of the visit was to confer with the judges about ways to expedite their work and clear up their crowded docket. “The visit was extremely stimulating and helpful to the Court,” Cummings reported. “The Judges were delighted and they are prepared to cooperate to the fullest extent of their ability in clearing up and speeding up the work of the Court.”<sup>70</sup> Additionally, in writing his book *Federal Justice*, Cummings devoted nearly an entire chapter to outlining the history of judicial inefficiency in the United States. He argues that by the mid-1800s the Supreme Court “began to fall into serious arrears in its work.” Cummings saw a long history of attorneys general who urged judicial reform dating all the way back to Edmund Randolph, the first man to serve in the position. Paraphrasing Attorney General William Miller, Cummings argued that “judicial congestion was an evil which amounted to a complete denial of justice.”<sup>71</sup> By exposing that evil, Cummings undoubtedly saw himself as a worthy contributor to the long tradition of seeking reform begun and perpetuated by his predecessors.

As he did when gathering evidence on aged justices, Cummings again found support for his position on judicial efficiency from Chief Justices William Howard Taft and Charles Evan Hughes. When Taft, the only man to serve both as president and chief justice, took his spot on the bench, he found that the Court was over a year behind in its work. He worked tirelessly to promote judicial efficiency, advocating for more lower court judges and for legislation limiting

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<sup>69</sup> Cummings to Roosevelt, June 12, 1934, Box 169, Cummings Papers, SSCL; McKenna, *Constitutional War*, 22-23.

<sup>70</sup> Cummings Diary, February 25, 1935, SSCL; Cummings to Roosevelt, March 6, 1935, Box 170, Cummings Papers, SSCL.

<sup>71</sup> Homer Cummings and Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* (New York: Da Capo Press, 1970), 521-531.

the Court's workload and expanding its control over writs of certiorari.<sup>72</sup> Hughes, as recently as 1934, had recommended to Cummings and Roosevelt that they seek additional district court appointments in New York and southern California, where case delays on average ranged from eighteen to twenty-four months. Additionally, Hughes identified five other districts that needed more judges but whose needs were less pressing than New York and California.<sup>73</sup>

Perhaps no other person so tirelessly advocated for additional federal judges than William Denman. A member of San Francisco's Ninth Circuit Court, Denman had known Roosevelt since his youth and utilized his closeness with the president to plead his case. While his pleas had not really troubled Roosevelt or Cummings before, Denman's incessant calls for more judges—the jurist believed that fifty new judgeships were needed—began to stand out by late 1936.<sup>74</sup> Just after Roosevelt's reelection, Denman again telegraphed the president. After offering brief congratulations, Denman reiterated his familiar refrain of "More Judges." "I do hope you are to make the reform of the Federal courts a part of your inaugural," he added. A month later, he continued pleading his case with Cummings. Longing for the day when "it is no longer considered that a court is in a healthy condition because cases reaching issue in one term may, if you happen to be ready, [be] heard in the next," Denman urged the attorney general to expand the judiciary.<sup>75</sup> Had Denman known just how receptive Cummings was to the idea, he may not have felt the need to plead his case so adamantly.

Still, judicial inefficiency remained only a piece of the puzzle. It would take timely correspondence with Princeton professor Edward Corwin to bring all the pieces together. On

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<sup>72</sup> Swindler, *Old Legality*, 273-274; Swisher, *American Constitutional Development*, 781-782.

<sup>73</sup> McKenna, *Constitutional War*, 154.

<sup>74</sup> Leuchtenburg, *Supreme Court Reborn*, 112-114; Shesol, *Supreme Power*, 247-248.

<sup>75</sup> Denman to Roosevelt, November 7, 1936, Box 95, Cummings Papers, SSCL; Denman to Cummings, December 14, 1936, Box 95, Cummings Papers, SSCL.

December 16, 1936, Corwin wired Cummings with an “ingenious solution” that a friend had suggested: “that the President be authorized, whenever a majority of the justices, or half of the justices, are seventy or more years old, to nominate enough new justices of less than that age to make a majority. This...would require only an act of Congress.” Noting that Solicitor General Stanley Reed was not sold on an age limit, Corwin countered, “A 70 year age limit would serve to secure more rapid replacement of Justices.”<sup>76</sup> With this one suggestion the pieces of the puzzle began to fall into place for Cummings. Not only had the nation’s leading constitutional scholar argued that Court-packing was feasible, but his suggestion helped Cummings figure out just how to sell it. “By presenting ‘Court-packing’ in the guise of judicial reform,” argues historian William Leuchtenburg, Cummings “would make the plan more palatable.”<sup>77</sup> Practically thrilled that Corwin not only confirmed his belief that aged justices were at the heart of the Court issue, but also that the professor believed an age limit proposal could be enacted as legislation, Cummings quickly sent back a reply. “I was very glad indeed to have your letter,” Cummings wrote. “Of course,” he added, “I realize there is a good deal of prejudice against ‘packing the Court.’ I have been wondering to what extent we have been frightened by a phrase.”<sup>78</sup>

For the next few days, Cummings mulled over the idea. Thinking back over a year’s worth of clandestine research into somehow circumventing the justices’ constitutionally guaranteed life tenure, Cummings undoubtedly recalled the statements from Taft and Hughes that seemed to support an age limit for the Court. Then, in a revelation that almost certainly brought a mischievous smile to his face, Cummings remembered that in writing *Federal Justice*

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<sup>76</sup> Corwin to Cummings, December 16, 1936, Box 88, Cummings Papers, SSCL.

<sup>77</sup> Shesol, *Supreme Power*, 256-257; Leuchtenburg, *Supreme Court Reborn*, 118-124.

<sup>78</sup> Cummings to Corwin, December 17, 1936, Box 88, Cummings Papers, SSCL.

he came across a suggestion very similar to the one he was now considering. A previous attorney general had suggested that Congress pass a law stating that whenever a federal judge below the Supreme Court level reached the age of seventy and refused to retire, the president could appoint a younger judge to serve alongside the older one. Such a bill would “insure at all times the presence of a judge sufficiently active to discharge promptly and adequately the duties of the court,” argued this attorney general. Ironically, this member of Wilson’s Cabinet was himself promoted to the Supreme Court, where in 1936 he remained, seventy-four years old and a conservative thorn in the administration’s side. The author of the plan was none other than Justice James Clark McReynolds.<sup>79</sup>

Finally, after over a year of secretive research, Cummings believed he had found the solution both he and Roosevelt so desperately sought. On December 22, Cummings scribbled a note to Roosevelt letting him know that he was prepared to present the plan to the president. “I am ‘bursting’ with ideas about our constitutional problems,” wrote the attorney general, “and have a plan (of substance and approach) I would like to talk over with you when you have the time.”<sup>80</sup> In his diary two nights later, Cummings once more outlined the essential problems stemming from the Court issue. He reiterated his belief that amendments were too slow and also exceedingly difficult to frame around such delicate subjects as the commerce, due process, and general welfare clauses. Taking as a given that the administration had to take some action on the Court issue, he noted that “every plan I have yet seen presents difficulties and dangers.” “I have, however, been thinking out a plan which was taking shape in my mind, and it is somewhat novel...I cannot say that it is free from objections, but I am inclined to think it is the most

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<sup>79</sup> Shesol, *Supreme Power*, 253-254.

<sup>80</sup> Cummings to Roosevelt, December 22, 1936, President’s Secretary’s Files, Box 165, Roosevelt Papers, FDRL.

practical way of dealing with the matter and is less open to challenge than almost any scheme I can think of,” Cummings concluded.<sup>81</sup>

Cummings presented his idea to Roosevelt in the Oval Office on the day after Christmas. He began by asking the president not to laugh at him for believing that he had found the solution to the court issue, to which both men began to laugh. Cummings outlined the difficulties presented by the Court’s recent rulings and got on such a roll that when he paused, Roosevelt told him, “Go on, you are going good, I wish I had a stenographer present so that this could be taken down.” Cummings argued again against the amendment process, claiming that “it was wrong in principle to amend the Constitution when our best thought indicated there was nothing the matter with it.” He outlined Denman’s call for an enlarged judiciary, as well as the argument put forth by Chief Justice Taft for compulsory retirement at seventy. Cummings’s solution was to combine the two. He suggested passing legislation that allowed the president, whenever a federal judge had served ten years and had not resigned or retired by the age of seventy, to appoint an additional judge.<sup>82</sup> Despite the fact that Denman had not discussed the Supreme Court at all in his letters and that McReynolds’s suggestion expressly exempted the Supreme Court, Cummings simply extended their ideas to include the highest tribunal. Noting the general disdain for Court-packing, Cummings told Roosevelt that “we were probably unduly terrified by a phrase...if the Federal judiciary as a whole should grow in numbers, there was no particular reason the Supreme Court should not grow in numbers as well.” Cummings told Roosevelt that his plan “was not free from objection, but it was freer from objection than any alternative plan that had yet come to my attention.”<sup>83</sup>

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<sup>81</sup> Cummings Diary, December 24, 1936, SSCL.

<sup>82</sup> Cummings Diary, December 26, 1936, SSCL.

<sup>83</sup> Shesol, *Supreme Power*, 238-254; Cummings Diary, December 26, 1936, SSCL.

Roosevelt eagerly absorbed Cummings's solution before declaring it "the answer to a maiden's prayer." Naturally, he was "very much interested and amused" when he finally learned that the plan had been built around the suggestion of Justice McReynolds. Indeed, as James MacGregor Burns eloquently put it, the plan appealed so much to Roosevelt because it played into his "instinct for the dramatic and his instinct for the adroit and circuitous stratagem rather than the frontal assault."<sup>84</sup> Yet, this also caused both Cummings and Roosevelt to overlook the plan's most serious flaw. Despite Cummings's real desire to implement judicial reform, anyone could see that lower court reform was simply a ruse in the solution designed to detract attention from the intended target—the Supreme Court.<sup>85</sup>

As Cummings excitedly set to work drafting a bill for his plan, Roosevelt laid the groundwork for an assault on the Court. On January 6, 1937, Roosevelt delivered his State of the Union before a packed Congress. "During the past year there has been a growing belief that there is little fault to be found with the Constitution of the United States as it stands today. The vital need," Roosevelt informed the legislature, "is not an alteration of our fundamental law, but an increasingly enlightened view with reference to it. Difficulties have grown out of its interpretation; but rightly considered, it can be used as an instrument of progress, and not as a device for prevention of action." The president expressed confidence that the legislative and executive branches would "continue to meet the demands of democracy whether they relate to the curbing of abuses, the extension of help to those who need help, or the better balancing of our interdependent economies."<sup>86</sup> Roosevelt was less confident in the judiciary. In a direct shot at the Court, he declared:

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<sup>84</sup> Solomon, *FDR v. the Constitution*, 93; Cummings Diary, January 17, 1937; Burns, *Lion and the Fox*, 296-297.

<sup>85</sup> McKenna, *Constitutional War*, 253-258.

<sup>86</sup> *PPA*, 5: 639.

The Judicial branch also is asked by the people to do its part in making democracy successful. We do not ask the Courts to call non-existent powers into being, but we have a right to expect that conceded powers or those legitimately implied shall be made effective instruments for the common good. The process of our democracy must not be imperiled by the denial of essential powers of free government.<sup>87</sup>

Homer Cummings noted in his diary that the Supreme Court had been invited to the speech, but chose not to attend. “Perhaps they had seen an advanced copy of the speech,” he smugly wrote. “In any event, I am sure they were more comfortable where they were than they would have been had they been present.”<sup>88</sup>

Describing the scene, Interior Secretary Harold Ickes noted that “there was more enthusiasm shown during the delivery of the message than I have seen on any similar occasion. At two or three points there were actual cheers from the Members of Congress and the people in the galleries. I found myself yelling on one occasion, and that is something that I do not often do.” Ickes interpreted the positive reception to indicate that “those who heard it—and certainly this was a representative cross-section of the people—are in a mood to join issue with the Supreme Court on its arrogant assumption of the right to overrule both Congress and the President in matters of legislation.” Ickes’s one major concern was that he felt the speech had slammed the door on the amendment route. Roosevelt completely sidestepped the objection, telling Ickes “that his message didn’t close the door on any method that might be necessary to employ in order to put the Supreme Court in its place.”<sup>89</sup> Roosevelt was clearly being quite coy about the fact that he and Cummings had already decided on their course of action. In a diary entry that exhibits the kind of self-serving, legalistic rationale that would later be exposed in the Court-packing bill, Cummings rejected Ickes’s concern that they were too easily dismissing the

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<sup>87</sup> Ibid., 641-642.

<sup>88</sup> Cummings Diary, January 6, 1937, SSCL.

<sup>89</sup> Ickes, *Secret Diary*, 2: 31-32.

possibility of an amendment. A “careful reading of the document negatives this idea, although it is quite likely such will be the impression in some quarters” argued Cummings.<sup>90</sup> Demonstrating a tendency that would prove very costly when the Court-packing bill was introduced, Cummings was so focused on the fine print of the speech that he dismissed out of hand the potential repercussions of the broader message.

While Cummings tried to justify his own interpretation of the State of the Union, members of Congress indeed felt that Roosevelt was ruling out amendment. Both Senate Majority Leader Joseph Robinson and Speaker of the House William Bankhead publicly stated after the speech that amendment seemed to be the only way around the Court. Attempting to solve the Court issue before Roosevelt made a move, members of both houses of Congress introduced almost fifty Court-curbing amendments in the first ten days of the new session. Additionally, Hatton Sumners revived his bill fixing judicial pay in an effort to forestall any executive branch attack on the Court.<sup>91</sup>

Amidst this flurry of activity on the Hill, Roosevelt continued to soften the ground for Cummings’s secret bill. The first president to be inaugurated after the Twentieth Amendment moved inauguration day to January 20, Roosevelt stood before Chief Justice Hughes on a bitterly cold and rainy day to recite the oath of office. In a literal standoff between the nation’s chief executive and chief jurist, both men emphasized the words “preserve, protect, and defend the Constitution of the United States.” Later, Roosevelt told a confidant that he desperately wanted to add, “Yes, but it is the Constitution as I understand it, flexible enough to meet any new problem of democracy—not the kind of Constitution your Court has raised up as a barrier to

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<sup>90</sup> Cummings Diary, January 5, 1937, SSCL.

<sup>91</sup> Shesol, *Supreme Power*, 267-270; Shogan, *Backlash*, 83-84.

progress and recovery.”<sup>92</sup> Stepping to the podium, Roosevelt’s words carried through the driving rain. Reiterating his belief that the Founders “created a strong government with powers of united action sufficient then and now to solve problems utterly beyond individual or local solution,” the president declared that the “essential democracy of our Nation and the safety of our people depend not upon the absence of power, but upon lodging it with those whom the people can change or continue at stated intervals through an honest and free system of elections.” Clearly insinuating that the unelected Court was blocking the will of the people, Roosevelt added that the American public consisted of “men and women of good will...who have cool heads and willing hands of practical purpose as well. They will insist that every agency of popular government use effective instruments to carry out their will.”<sup>93</sup>

Congressional leaders had every reason to believe that Roosevelt would include them in discussions involving any move on the Court. In his first term, the president had established a tradition of inclusion when debating contentious measures. He had recently brought leading Democrats to the White House to discuss and debate a pending executive branch reorganization bill.<sup>94</sup> Yet, the silence that they interpreted as hesitation to move on the Court issue actually masked frenzied action. Cummings had been working through multiple drafts of the Court-packing bill and, bolstered by apparent public and congressional support, he and Roosevelt addressed the questions of whom to inform about the bill and when to unveil their plan. The two men discussed as early as January 7, 1937 whether they should inform the Cabinet of their plans.<sup>95</sup> There is no indication in Cummings’s diary about how he advised Roosevelt in this matter, but based on his actions, it is fairly evident that he pushed for complete secrecy. Because

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<sup>92</sup> McKenna, *Constitutional War*, 270.

<sup>93</sup> *PPA*, 6: 2-5.

<sup>94</sup> Shesol, *Supreme Power*, 271.

<sup>95</sup> Cummings Diary, January 7, 1937, SSCL.

Cummings wanted to keep the number of advisers working on the plan small, the bill itself was debated and formed largely by only Roosevelt, Cummings, Solicitor General Stanley Reed, and staunch New Dealer Donald Richberg. Judge Samuel Rosenman, a close friend of the president, was brought in at the eleventh hour to assess the plan.

This small group of advisers worked up to the last minute tweaking the bill. Rosenman, Reed, and Richberg all expressed dismay over the disingenuous rationale behind the bill. They knew that others would see through the veil of improving judicial efficiency and reorganizing the entire federal judiciary. The real purpose of the bill was to pack the Court; why not just come out and say it? According to Marian McKenna, Richberg and Reed “saw the plan as a deliberate attempt to mislead or deceive the public about important constitutional and national issues.” When they took their concerns to the president, Roosevelt responded angrily that he had decided to act and directed them to Cummings.<sup>96</sup> The attorney general, satisfied with his role in forming the plan, was content with the president’s approval. He refused to adjust his position and claimed, either through intense naivety or (more likely) willful dishonesty, that there was no misdirection in the bill, that judicial reform was its true purpose. The other advisers unfortunately let the matter drop.

As late as February 2, the group was still debating whether the proposed additions to the Supreme Court would be permanent or temporary. Cummings pushed for making them permanent, and once again the attorney general had his way. Having decided to fundamentally alter the composition of the Court, Cummings and the others dressed up and played host to the justices at a White House dinner that evening honoring the judiciary. For most, it was an

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<sup>96</sup> McKenna, *Constitutional War*, 275-276

enjoyable evening. Cummings, however, told Rosenman that he was rather uncomfortable: “I feel too much like a conspirator.”<sup>97</sup>

Wanting to present his plan as soon as possible, Roosevelt chose to wait until after the judiciary dinner, but before the Court resumed its hearings on February 8. With the Senate in recess until February 5, Roosevelt chose it as the best date to announce the reform bill.<sup>98</sup>

Cummings continued to press for secrecy up until the last possible moment, so as to add to the element of surprise. On February 3, he advised Roosevelt to wait until just before his scheduled press conference on February 5 to inform the Cabinet of his plan. He also advised bringing in the leaders of both houses of Congress. Cummings “thought it very important that the leaders at least be taken into conference so that they would not be caught by surprise and that the whole affair might move off more smoothly.”<sup>99</sup>

The attorney general joined his fellow Cabinet members, Congressional leaders, and Roosevelt at 10:00 am on February 5 to hear the president unveil the plan which Cummings had labored on for so long. “It was interesting to watch the countenances of those about the table as the matter unfolded,” Cummings noted in his diary. What was far more interesting was Cummings’s interpretation of those countenances. Vice-President John Garner scrunched up his face as Roosevelt read the message, but seemed to relax as the plan was fully revealed; “I think there is no doubt about his wholehearted support,” concluded Cummings. Hatton Sumners, who as chairman of the House Judiciary Committee would play an important role in getting the bill passed, “did not say much, but on the whole he was well pleased,” Cummings believed.

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<sup>97</sup> Cummings Diary, February 2, 1937, SSCL; Shogan, *Backlash*, 90.

<sup>98</sup> Leuchtenburg, *Supreme Court Reborn*, 129.

<sup>99</sup> Cummings Diary, February 3, 1937, SSCL.

Likewise, the attorney general convinced himself that all of his Cabinet colleagues as well as Henry Ashurst, Sumners's counterpart in the Senate, were fully supportive of the bill.<sup>100</sup>

For over a year, Cummings toiled largely in secrecy to find a way to circumvent the Court. He actively sought to keep other advisers out of the loop, convinced the president that Court-packing was feasible, and cleverly devised a way to sell it as an attempt to reorganize and improve the entire federal judiciary. This bill was Cummings's masterstroke, his way of getting back at the Court's conservatives for daring to wreck the New Deal. It was only natural for the shrewd attorney general to bask in the seeming support for his brilliant solution to the Court issue. Time would soon show just how monumentally misguided Cummings had been about the entire episode.

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<sup>100</sup> Ibid., February 5, 1937.

## Conclusion

After President Roosevelt excused himself from the Cabinet meeting to break the news of the Judiciary Reorganization Act to a waiting White House press corps, stunned Cabinet members and congressional leaders quietly filed out of the room. While Cummings believed that all were firmly on-board with the Court-packing proposal, subsequent events would prove otherwise. Vice-President John Garner reportedly held his nose and gave a thumb down signal as the bill was read in the Senate; he quickly fled Washington to avoid having to support the bill. On the ride back to the Capitol, Hatton Sumners, chairman of the House Judiciary Committee, told his colleagues, “Boys, here’s where I cash in my chips.” Sumners remained ardently opposed to the bill throughout the fight over its passage.<sup>1</sup>

The bill’s announcement set off a firestorm of opposition in the press, public, and Congress. Conservative Democrats denounced the plan, as Roosevelt likely expected they would. Yet, the president was surprised to find stringent disapproval from loyal New Dealers as well, most notably Senator Burton Wheeler of Montana, who became the driving force behind the opposition. It was Wheeler who convinced Chief Justice Hughes to personally write a letter debunking the claim that the Court was behind in its work, a letter that Wheeler dramatically revealed in his testimony before the Senate Judiciary Committee on March 22, 1937. “The Supreme Court is fully abreast of its work,” Hughes’s letter began. The Chief Justice dismantled the bill’s rationale that a larger Court would be more efficient. “More judges to hear, more

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<sup>1</sup> McKenna, *Constitutional War*, 282-285.

judges to confer, more judges to discuss, more judges to convince and to decide,” Hughes concluded, adding his confidence that his letter was “in accord with the views of the justices.”<sup>2</sup>

Hughes’s letter devastated the administration’s case, exposing the bill’s thinly veiled justification for the sham that it was. As the fight over the bill dragged on, Roosevelt and his allies found themselves fighting an increasingly uphill battle. The impetus for the Court-packing bill took a further hit at the hands of the justices when Hughes read the Court’s ruling in *West Coast Hotel v. Parrish* (1937) on March 29. The case involved the constitutionality of a Washington state law establishing a minimum wage for women and was almost identical in substance to the 1936 *Tipaldo* case, in which the Court had invalidated a similar New York state law. Incredibly, the Court overturned *Tipaldo*, upholding the Washington law by the same 5-4 margin by which it had overturned the New York law. Slowly, the significance of the decision sank in for those in the Supreme Court chamber. Justice Owen Roberts had changed his vote and joined the Court’s liberal wing. If this sudden jurisprudential shift did not fatally weaken the administration’s case, then Justice Willis Van Devanter’s retirement announcement on May 18 certainly provided the coup de grace.<sup>3</sup>

The original bill steadily sank until June, when it was effectively killed by a negative report out of the Senate Judiciary Committee. Yet, Roosevelt was not ready to give up on Court-packing and invited all congressional Democrats to a retreat with him on the Chesapeake Bay. An “inspired idea” that “brought about an astonishing recovery that breathed new life into the apparently moribund idea of Court-packing,” the retreat raised hopes that a revised bill that had been worked out with administration allies on the Hill would pass.<sup>4</sup> The bill would allow

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<sup>2</sup> Leuchtenburg, *Supreme Court Reborn*, 137-141; Shesol, *Supreme Power*, 392-394.

<sup>3</sup> Kennedy, *American People in the Great Depression*, 334-336.

<sup>4</sup> Leuchtenburg, *Supreme Court Reborn*, 147-148.

Roosevelt to name four new justices at a rate of one per year. William Leuchtenburg argues that despite early antagonism against it, the revised bill's opponents even conceded that it had the votes to pass in late June. Senate Majority Leader Joe Robinson, who was hoping for an appointment to the Court, struggled to hold together a shaky coalition that supported the new bill. The combination of the strenuous legislative fight and the unbearable Washington heat proved too much for Robinson, who died in his apartment on July 14, 1937. The Court-packing episode came to an end with the death of its strongest congressional supporter; the Senate banished the revised bill back to committee.<sup>5</sup>

Scholars almost unanimously agree that the Judiciary Reorganization Act was a mistake on the part of the Roosevelt administration, yet they offer varying interpretations of that mistake. James MacGregor Burns argues that the Court-packing bill was a "miscalculated risk" while David Kennedy declares that the bill was "no wanton blunder, but a calculated risk and not an unreasonable one." Kennedy finds the plan actually rather mild, as it did not violate the Constitution, disturb the system of checks and balances, necessitate the removal of any sitting justices, or redefine the Court's constitutional role.<sup>6</sup> Historian Marian McKenna blasts Kennedy for this interpretation. "How he can deduce such a conclusion is beyond belief," she argues. "Obviously Kennedy knows nothing of the collusion between Cummings and Roosevelt that resulted in their subterfuge." In sharp contrast to Kennedy, McKenna makes the argument that the Court-packing bill was a clear violation of Article III's guarantee of life tenure for Supreme Court justices.<sup>7</sup> While McKenna is incorrect in arguing that the bill violated the letter of the

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<sup>5</sup> Ibid., 148-153.

<sup>6</sup> Burns, *Lion and the Fox*, 291; Kennedy, *American People in the Great Depression*, 331.

<sup>7</sup> McKenna, *Constitutional War*, xxi, 558 n4.

Constitution, she makes a valid point that it certainly violated the spirit of the government's charter.

Scholars also disagree about where President Roosevelt went wrong during the formation of the plan. As previously noted, some scholars have argued that Roosevelt's biggest mistake was in not allowing the people to express their will through the amendment process.<sup>8</sup> Other historians have argued that hubris was the cause of Roosevelt's phenomenal political mistake. As the argument goes, Roosevelt was so supremely confident that the American people were on his side following his smashing 1936 electoral victory that he didn't see how he could lose the Court fight. Opponents would rage about the bill, but in the end, the people would believe Roosevelt, not the conservatives.<sup>9</sup> James MacGregor Burns agrees that the election boosted Roosevelt's confidence and convinced him that the American people would be behind whatever plan he submitted. Burns has also argued that the election basically *forced* Roosevelt into action against the Court. He posits that following the election, Roosevelt was under so much pressure from various interest groups to do something about the Court that when he won such an impressive victory, the president couldn't afford to hold off any longer.<sup>10</sup> Indeed, one could hardly blame Roosevelt if he did feel such confidence; his victory over Alf Landon was one of the most lopsided in history. Roosevelt had made himself the central issue of the campaign and he had come out the overwhelming victor. Looking back at the court fight, it seems plausible that Roosevelt and Cummings kept waiting to confront the Court and it wasn't until after the election that they finally gathered the courage to actually do it.

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<sup>8</sup> For discussion of the arguments for and problems with the amendment route, see chapter 3, pages 8-10.

<sup>9</sup> Davis, *FDR: Into the Storm*, 61-62.

<sup>10</sup> Burns, *Packing*, 153-154; Burns, *Crosswinds of Freedom*, 87-89.

While historians who argue that the election caused Roosevelt to overestimate his own power seem to have a valid point, their explanation for the failure of the Court-packing bill is far too simplistic. It is a nice, clean argument to say that the election filled Roosevelt's head with hubris and he decided to attack the Court because of it. Yet, as this thesis demonstrates, the origins of Court-packing are far more complex. The conflict had its roots as far back as the 1932 campaign, and there was an intricate buildup to February 5, 1937. Even Burns's conclusion, which seems to offer significant support to the claim that the election was the driving force behind the bill, is too simplistic. The argument that Roosevelt was forced into action by the election or that he was overconfident because of it does more to explain why he felt he could win the Court fight in early 1937 than it does to explain the flaws and limitations embedded in the origins of the bill.

As soon as the Court handed down its decision in *Parrish*, contemporary observers immediately believed that the "switch in time" came about as a capitulation to Roosevelt's threat to pack the Court, and that argument became engrained in the traditional narrative of the Court-packing episode. In reality, Justice Roberts voted to reverse his previous stance on state minimum wage laws in December 1936, two months before Roosevelt even revealed the Court-packing bill. Accordingly, some scholars have argued that if the bill did not convince the Court to change course, then certainly Roosevelt's overwhelming victory in November 1936 did. Bruce Ackerman has most notably argued this point, claiming that the election of 1936 was a "transformative moment" in constitutional history wherein the people cast their votes for constitutional reform, not constitutional defense. Ackerman compares the election to the Founding and Reconstruction as moments in the nation's history in which the American people gave "deep, broad, and decisive popular support" for a fresh interpretation of the role of the

federal government. Through appeals to the people, politicians in these three transformative periods were able to change “the substance of fundamental values: from loose confederation to federal union, from slavery to freedom, from laissez-faire to the activist regulatory state.”<sup>11</sup>

Other historians have stringently disputed Ackerman’s claim, instead arguing that the Court-packing bill failed specifically because Roosevelt had not campaigned on it; the people had not expressed their approval for constitutional reform in the election of 1936, but rather their approval for Roosevelt himself. Legal scholar Barry Cushman flatly denies that the election had anything to do with the Court’s reversal. Democrats had dominated the 1934 midterm elections as well, but the Court had not changed course. Additionally, and perhaps most damaging to Ackerman’s claim, “Roosevelt assiduously avoided raising either Constitution or the Court as an issue in his campaign.”<sup>12</sup> James MacGregor Burns argues that Roosevelt made a critical mistake in failing to make the Court a campaign issue. “Doubtless his silence helped him roll up his great majority,” Burns concludes, “but it also meant that he gained no explicit mandate to act on the Court.”<sup>13</sup> Historian Michael Nelson firmly agrees that the president was acting on a mandate that he didn’t actually have. Nelson concludes that Roosevelt should have attacked the Court frontally during the campaign; not having done so, the president’s next best option was to wait for a vacancy.<sup>14</sup>

Cushman, Burns, and Nelson all make a valid point that Roosevelt did not have a mandate to act on the Court. However, their arguments fail to fully address the failure of the Court-packing bill. Despite the outcry against the bill, it very nearly passed, and may well have become law had the Court not preempted the need for new justices with the *Parrish* decision and

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<sup>11</sup> Ackerman, *Transformations*, 4-11, 311, 379-382.

<sup>12</sup> Cushman, *Rethinking the New Deal Court*, 25-32.

<sup>13</sup> Burns, *Lion and the Fox*, 296.

<sup>14</sup> Nelson, “President and the Court”: 278-288.

Van Devanter's retirement. Even after the original bill met its demise in early June 1937, Roosevelt's revised Court-packing bill had the votes to pass until Joe Robinson died. William Leuchtenburg points out another reason that Roosevelt's failure to campaign on the Court issue does not adequately explain the bill's failure—Roosevelt's silence cannot be equated with total silence. Alf Landon, the Republican presidential nominee, often referred to the Court in his campaign speeches, and voters heard numerous warnings that Roosevelt would attempt to pack the Court if reelected.<sup>15</sup> The president's supporters certainly campaigned on the Court issue and had introduced many Court-curbing bills in the expiring congressional term. Additionally, the New Deal's battles with the Court had been the subject of editorial coverage in newspapers across the nation.<sup>16</sup> While the voters may not have been ratifying Roosevelt and Cummings's Court-packing plan, they also were not oblivious to the fact that Roosevelt would likely make some sort of effort to circumvent the Court.

Roosevelt's greatest mistake in developing the Court-packing plan was not ignoring the amending process, succumbing to hubris, or failing to campaign on the Court issue. Rather, the president's biggest blunder came in relying almost exclusively on Homer Cummings to formulate the plan, particularly with regards to Cummings's advice to keep the plan secret and hide its true intention. As Merlo Pusey put it, the disingenuous rationale of improving the Court's efficiency was "a case built on sand" and "a chocolate fudge coating applied to a bitter legislative pill."<sup>17</sup> Indeed, the argument completely fails to hold up under scrutiny. In August 1934, Cummings publicly expressed confidence in the work of the Court. Apparently in just two years the Court had fallen into dire inefficiency. Additionally, just prior to the introduction of

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<sup>15</sup> Leuchtenburg, "Spoke": 2088-2103

<sup>16</sup> Ibid.: 2088-2103.

<sup>17</sup> Pusey, *Supreme Court Crisis*, 10-13.

the Court-packing bill both Cummings and Solicitor General Stanley Reed had submitted a report to Congress declaring that the federal courts, including the Supreme Court, were free of congestion. Even Drew Pearson and Robert Allen, authors of the famous diatribe *The Nine Old Men*, argued that the Court was at “the height of efficiency. Decisions have rolled sonorously from its bench almost with the precision of a Ford factory.”<sup>18</sup> Law Professor David Garrow has also debunked the myth that the age of the justices was hampering their performance. In a detailed study, Garrow concludes that mental decrepitude on the Supreme Court has been a persistent problem throughout the Court’s history. However, he finds irony in Cummings’s connection between age and efficiency since the New Deal Court “actually did not include a single Justice against whom a charge of mental decrepitude could accurately be lodged.”<sup>19</sup>

Why then would Roosevelt have gone along with Cummings’s suggestion to cloak the bill’s rationale in the guise of judicial inefficiency? The answer lay in Roosevelt’s personality. The president was no stranger to backhanded political maneuvering. Indeed, in January 1936, Harold Ickes noted in his diary his dissatisfaction with the way the President handled a recent bill regarding the Treasury. Leaving his advisors and congressional leaders in the dark as to whether or not he would veto the bill, Roosevelt sprang his decision to veto on Congress at the last minute. Ickes privately questioned Roosevelt’s actions, writing, “I cannot see either the politics or the statesmanship in a course of this sort...If the President was against it, he ought to have fought it and he should have allowed congressional leaders to know what his position was. I do

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<sup>18</sup> Swisher, “Supreme Court in Transition”: 356; Shesol, *Supreme Power*, 286-287; Pearson and Allen, *Nine Old Men*, 34-35.

<sup>19</sup> David J. Garrow, “Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28<sup>th</sup> Amendment,” *The University of Chicago Law Review* 67, no. 4 (2000): 995, 1018-1019.

not like this playful attitude on such an important measure.”<sup>20</sup> It was exactly that playful attitude that would blind Roosevelt to the mistake of relying on secrecy during the Court fight.

One historian notes that as early as the age of nine, Roosevelt displayed his penchant for misdirection when he and his mother worked to keep any bad news away from his sick father. Through his political maneuverings and his extra-marital affairs over the years, Roosevelt “had raised obliqueness almost to an art form. The gamesmanship seemed to amuse him, and it enabled him to get his way while avoiding the personal confrontations he abhorred.”<sup>21</sup> The secrecy and misdirection espoused by Cummings played right to Roosevelt’s “instinct for the adroit and circuitous stratagem rather than the frontal assault” and proved too enticing for the president to turn down.<sup>22</sup> It enabled him to slyly maneuver around constitutional issues and to position himself for a suspenseful showdown with the conservative bloc of the Supreme Court that was dismantling the New Deal. With such advisers as Louis Howe, Raymond Moley, and Rex Tugwell all removed from the picture, and with Cummings pushing to keep other advisers out of his ear, Roosevelt broke from his earlier practice of including diverse viewpoints in key policy discussions. As William Leuchtenburg aptly put it, “The Supreme Court bill reflected less the thinking of New Deal intellectuals than the narrow shrewdness of an Attorney General who had been a Democratic national chairman.”<sup>23</sup>

However, it was clear from the moment Roosevelt presented the plan that he and Cummings had made a major misstep in keeping the plan secret from the people and their representatives. Cummings and Roosevelt alienated key congressional leaders by not informing them of the plan ahead of introducing it. According to James Patterson, Roosevelt’s “love of

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<sup>20</sup> Ickes, *Secret Diary*, 1: 525.

<sup>21</sup> Solomon, *FDR v. the Constitution*, 94.

<sup>22</sup> Burns, *Lion and the Fox*, 297.

<sup>23</sup> Leuchtenburg, *FDR and the New Deal*, 234.

surprising, dramatic presidential action” was his “chief weakness in congressional relations.”<sup>24</sup> Speaker of the House William Bankhead, who had served as a campaign manager in 1932, complained bitterly about Roosevelt’s tactics. Roosevelt put Senators Henry Ashurst and Joseph Bailey in a difficult spot, as they had publicly denied in the 1936 campaign that Roosevelt planned to pack the Court. Perhaps Senator Alben Barkley summed it up best when he called Roosevelt a “poor quarterback. He didn’t give us the signals in advance of the play.”<sup>25</sup>

Some historians have tentatively defended Roosevelt’s reliance on secrecy. William Leuchtenburg clearly argues that it was a mistake, but adds that “too much can be made of Roosevelt’s tactical failings. He had little choice save to hand the opposition the one issue around which it could rally.”<sup>26</sup> Frustratingly, he does not expand on this statement. Robert Shogan takes this line of thinking farther, arguing that Roosevelt was in a classic catch-22. “Any move he made was bound to set off a firestorm of opposition” and would probably have been so beat up by those who either thought he had gone too far or not far enough that the bill would be dead before it ever got to Congress.<sup>27</sup>

This defense of the secrecy behind the plan is inadequate. The near success of the revised Court-packing bill effectively demonstrates that if Roosevelt had utilized his traditional approach and included a wider circle of advisers and congressional leaders during the formation of the plan, he would have had a greater understanding of the reservations of lawmakers and, accordingly, of what he needed to do to ensure the bill’s passage. As it was, relying solely on Homer Cummings only served to deprive Roosevelt of “advisers more detached from the plan’s

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<sup>24</sup> Patterson, *Congressional Conservatism and the New Deal*, 74.

<sup>25</sup> Leuchtenburg, *FDR and the New Deal*, 233-234; Nelson, “President and the Court”: 284; Bankhead quoted in Kennedy, *American People in the Great Depression*, 332.

<sup>26</sup> Leuchtenburg, *FDR and the New Deal*, 234.

<sup>27</sup> Shogan, *Backlash*, 85, 236-237.

cuteness” and turned out to be the president’s key mistake in the formation and presentation of the famous Court-packing bill.<sup>28</sup> Breaking from prior practice, Roosevelt consulted only with a small number of advisers. Those who saw the dangers of the plan and tried to dissuade him backed off when faced with a determined President. As Burt Solomon so rightly observed, “Sophistry and secrecy- these were the attorney general’s recommendations on how to proceed, and on both counts the president agreed. Louis Howe would never have allowed it.”<sup>29</sup>

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<sup>28</sup> Nelson, “President and the Court”: 280.

<sup>29</sup> Solomon, *FDR v. the Constitution*, 94.

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