

HARLAN FISKE STONE AND FDR's COURT PLAN*

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IN 1936 five willful Supreme Court Justices had established well-nigh complete absence of the power to govern. "The general purpose of the court conservatives is plain," one pro-Roosevelt newspaper said. "It is to create the largest possible vacuum in government authority between the powers of the states and the powers of the nation."¹ In working toward this objective they had evoked heated protest from other Justices, especially Harlan Fiske Stone, who saw judicial preeminence as "placing in jeopardy a great and useful institution of government."² By June 1936, with popular pressure mounting to the point of exasperation, the constitutional crisis reached the explosive stage. "The way out will be found shortly," the *St. Louis Star-Times* predicted, "because it must be found."³

As early as January 1936, the President had begun to fear that corrective moves would not occur in the ordinary course of events.⁴ But in this instance he preferred to delay action until "forced" by public opinion. "He wants to be pushed," one commentator observed. "It is better strategy, politically, to let a universal popular exasperation set the forces of reform in motion."⁵

Contrary to popular opinion, Congress, not the White House, took the first step toward revamping the federal judiciary. A legislative ground swell mounted perilously after the *AAA* case. "This detached group," Oregon's Representative Walter M. Pierce said of the Court majority, "did not hold the Triple A Act was in contravention of the rights of man or the laws of God, but it did say that by its passage the Congress had interfered with the rights of the states. What an arbitrary, unjust, and reactionary opinion it seems to those of us who hold that the minority opinion is more logical, more legally sound, more just, and helpfully constructive in a changing social

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1. *No Man's Land*, *St. Louis Star-Times*, June 4, 1936.
2. Communication from Harlan Fiske Stone (hereinafter cited HFS) to Irving Brant, dated August 25, 1945.
3. Note 1 *supra*.
4. Irving Brant to HFS, April 15, 1936. See also, F.D.R., *The Three Hundred and Thirty-fourth Press Conference in [1937] PUBLIC PAPERS AND ADDRESSES 75 (1941)*.
5. *St. Louis Star-Times*, June 4, 1936.

order."⁶ Legislators suggested various nostrums for the constitutional malaise. One such innovator, reproached for suggesting a remedy that meant "putting the Court on the spot," heatedly replied: "Exactly, . . . the Court ought to be put on the spot when it subscribes to such labored and far-fetched opinions as that of the Chief Justice in the poultry case."⁷

At any time up to June 1, 1936, the Court might have retreated and thus avoided a showdown. The *Tipaldo* opinion, handed down that day, convinced even the most reverent that five stubborn old men had planted themselves squarely in the path of progress.⁸ "How much longer," Pennsylvania's Senator Guffey wanted to know, "will we let the Supreme Court sanctify the sweatshop and pervert democratic processes?"⁹ "Nine black-robed fates," exclaimed Texas Representative Oliver H. Cross, "smash into constitutional fragments every law of Congress tending to establish economic and social justice. . . . Truly the alias for this country's Nemesis is the Supreme Court." The Texas legislator anticipated that Congress, "aroused to a sense of its patriotic duty," would "dethrone this judicial oligarchy and issue another proclamation of emancipation that will wipe out this 'no man's land' of sweatshop slavery."¹⁰

Nor were the militant law makers wholly without press support. A small, but remarkably vocal group of newspapers took up the cry: "Curb this Court before it destroys the nation."¹¹ We must bring the Justices down from "the pedestal of fetish and deal with them as men and not supermen," the *Philadelphia Record* clamored.¹² In the same vein the obscure Danville, Pennsylvania, *Morning News* editorialized: "Everybody knows there will be nothing the Court can do about it when elected officials finally say to it: 'Your ruling is stupid and doesn't make sense, according to our opinion and according to the bristling protests of four of your number. Therefore we shall ignore you.'"¹³ "By their own admission," the *Philadelphia Record* observed, drawing on Stone's outraged dissents, "they read their personal bias, their individual economic predilections into our fundamental law. Instead of utilizing their unequalled independence to serve the Constitution, they twist the Constitution to serve their notions. And today the document dedicated to the general welfare is employed to destroy the general welfare. . . . The Supreme Court's usurpation of power is the issue of the hour."¹⁴

6. 80 CONG. REC. 1660 (1936).

7. Senator Harry Moore, *id.* at 872.

8. Marquis Childs, *The Supreme Court Today*, 176 HARPERS MAGAZINE 581 (1938).

9. 80 CONG. REC. 8968 (1936).

10. *Id.* at 9827, 9831, *passim*.

11. *The King Can Do No Wrong*, *Philadelphia Record*, June 4, 1936; 80 CONG. REC. 9252 (1936).

12. *Chiseling is Constitutional*, *Philadelphia Record*, June 3, 1936.

13. The *Morning News*, Danville, Pa., undated, accompanying letter from Felix Frankfurter to HFS, June 8, 1936; editorial as a whole deals with *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

14. *Philadelphia Record*, June 3, 1936.

Various correctives were open. The President and Congress might limit the jurisdiction of the Supreme Court, increase the number of judges to override the present arrogant majority, or compel judicial retirements, or sponsor constitutional amendments limiting the Court's power. Though many Congressmen urged that something be done, they were uncertain what to do, not sure whether the trouble was traceable to the Constitution or to judges "callously insensible to the needs and demands of our people."¹⁵ The President and his party were uncertain, too, at least as to the politically feasible remedy. "If these problems (social and economic) cannot be effectively solved by legislation within the Constitution," the 1936 party platform said, "we shall seek such clarifying amendments as (we) . . . shall find necessary, in order adequately to regulate commerce, protect public health and safety and safeguard economic liberty. Thus we propose to maintain the letter and spirit of the Constitution."¹⁶ Throughout the campaign democratic orators muted the discord between the Court and New Deal, giving no hint that President Roosevelt would, if re-elected, wage war on the judiciary.

Of course, the Justices themselves were responsible for the crisis, in overstepping their judicial function, in rushing out to declare law unconstitutional where they might have confined themselves to construction of a minor point of law or procedure. For ten years Stone had seen the Court "steadily aiming to get itself in the fix in which it now finds itself."¹⁷ The block against Government power was not in the Constitution, it was rather in the minds of the Justices. "With a competent, detached and courageous judiciary," he said, "most of the problems of adequate administration would disappear." In case after case, the Justice had warned his colleagues of the perils of "self-inflicted" wounds. Time and again writers and speakers alluded to or quoted from his dissents to prove from the mouth of this "most highly respected Justice" how the majority had perverted the judicial function. In his opinions, as nowhere else, New Dealers, including the President himself, found authoritative support for their charges. Apart from his own insights, however, Stone had no inkling that the President would attempt to alter the course of decision by resort to politics. Irving Brant's hint of October 15, 1936, that "immediately after the election attention is going to focus upon the Supreme Court as never before," did not reach him, as Justice Stone was stricken seriously ill October 12, 1936.

Gravely weakened by a bacillus of the Flexner¹⁸ type, picked up shortly after returning from a fine vacation, the aroused dissenter lay ill at his Washington home for nine weeks. "It laid me low," the Justice wrote Dr. Joel T.

15. Senator Elmer A. Benson, 80 CONG. REC. 9161-2 (1936).

16. *Democratic Platform of 1936*, New York Times, June 26, 1936, p. 13, col. 3.

17. HFS to Irving Brant, May 31, 1937.

18. Working in close touch with the Justice's personal physician, Dr. Daniels, was the well-known medical authority, Dr. Simon Flexner, who had isolated and identified the bacillus which struck Stone. Thereafter the germ was known as the Flexner bacillus.

Boone, January 1, 1937. The experience was especially "hard work for one who," as Stone said, "is accustomed to always being well and working at top-speed."¹⁹

During these trying weeks, none of Stone's colleagues were more attentive than Chief Justice Hughes. One day as he was leaving, Hughes talked to Mrs. Stone of the heavy drain of her husband's long and serious illness on their financial resources, and bespoke his readiness, if necessary, to come to their assistance. "I shall not try to see you today," the Chief Justice wrote December 20, "but I want you to have this word of rejoicing in your steady and satisfactory progress toward recovery and in the prospect of your enjoyment of the warm sunshine of the South. Don't try to come back too soon—we need you—but we need you in full vigor."²⁰

On December 20, Stone was moved in a wheel chair to the train for Sea Island, the initial mode of conveyance being almost as insufferable to him as the illness itself. There, in the warm Georgia sun, under the watchful ministrations of Mrs. Stone, his health improved rapidly. Medical and nursing care of the first order was lavished on him of course, but Stone himself credited his recovery "above all to the good judgment, resourcefulness and eternal vigilance of Mrs. Stone as Commander-in-chief."²¹ During convalescence a daily tonic of egg yolk and brandy became a favorite medicine, but as he grew stronger, he also grew more alert. One day after draining the prescribed remedy, he suspected that his wife might be using his "best brandy." This discovery upset him. Fine liquor, he protested, was "just wasted" on his insensitive palate. Soon he began to take walks, and by easy stages went back to his regime of two miles a day. In late January 1937, he was back in Washington, completely restored, "to my usual good health, and so far as I can see, with many years of hard work ahead of me."²²

Meanwhile, the Court had reached the first significant cases of the term.²³ With a third round of New Deal cases pending, many liberals had feared the consequences. Stone's absence, Raymond Clapper observed, "creates an unexpected situation of utmost concern."²⁴ "The Lord is sardonic in distributing illnesses among the members of your august tribunal," Irving Brant wrote on November 24, 1936. "It would move you, I think, if you knew how many people are looking for your return to health with anxiety and hope."

Professor E. M. Borchard's mind went back twenty years when typhoid nearly won its battle. "Had fortune then turned against you," Borchard observed, "the history of public affairs in this country might have been quite different. . . . You have made your permanent contribution to the develop-

19. HFS to Edmund A. Burnham, February 1, 1937.

20. C. E. Hughes to HFS, Dec. 20, 1936.

21. HFS to J. B. Moore, January 3, 1937.

22. HFS to Henry W. Anderson, Feb. 1, 1937.

23. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (the Washington Minimum Wage Case) was argued December 16 and 17, 1936.

24. *New York World*, Nov. 28, 1936.

ment of Constitutional law—at a time when many others lost their balance in emotional waves to which we have been continually exposed.”²⁵ Wm. G. McAdoo struck a less somber note. “If I were a wizard, I would restore you completely with one wave of the hand and make you good for at least a hundred years so that you might continue to render the high quality of distinguished service which you have always given to your country.”²⁶ The same sentiments came from Harold Laski in London: “There are not a half dozen people in America today more important to the victory of social justice than you. The decisions of Stone, J., in the last 3 years have been worthy of the greatest tradition of the Court. Please do not jeopardize their continuance.”²⁷

Those who had worked closely with him were not unaware of the influence of his vote in the calculus of judicial decision. “You took your vacation just at the right time,” an irreverent law clerk, tongue in cheek, commented December 3, 1936. “When you aren’t scowling from the bench that leaves an even number.” This meant, said the former law clerk, the newspapers could now “speculate ad infinitum about what whiskers might do, and where the Pennsylvania attorney is going to line up. And this puts those lads on the spot, for they get a foretaste of what the rabble may say about them when there are nine gentlemen throwing votes at each other with the impartiality of an even split impossible. And since the rabble is pretty firmly convinced that the great Stone is going to be a sound man, the consequence is that there is a public mandate that whiskers and Pennsylvania should make darn sure they support Stone, J., when he comes back and give the people a break.” In several months, the writer suggested, “it will be time enough to consider going back to relieve the tension.”

But in late January, the Justice was ready to test his mental powers. Fearing that they, too, had been sapped by long illness, he plunged, February 1, into the usual routine. “I am busy writing opinions for the first time during the present term,” he reported happily. “It is like learning to walk again, but I think I shall manage it.”²⁸ “Now that I have got it going,” he wrote a week later, “I think my intellectual apparatus will work as well as usual, and ought to keep running for sometime past seventy.”²⁹

New Dealers, who had feared that Stone’s illness might contribute to further reaction, hailed his recovery as calculated to reinforce their program. “I hope that your return may help in the avoidance of that crisis in government which you saw in the future, a year ago,” Irving Brant commented, February 2, 1937. Brant was concerned, “merely because I see values in the Court that are in danger of being lost if the issue becomes catastrophic.”³⁰

25. E. M. Borchard to HFS, Dec. 4, 1936.

26. Wm. G. McAdoo to HFS, Dec. 29, 1936.

27. Harold Laski to HFS, Jan. 20, 1937.

28. HFS to Felix Frankfurter, Feb. 17, 1937.

29. HFS to Felix Frankfurter, Feb. 25, 1937.

30. Irving Brant to HFS, Feb. 2, 1937.

What this well-informed editor meant by "danger" was revealed three days later, when President Roosevelt, fresh from his second triumphal inauguration, and at the very peak of personal prestige, sent to Congress his message proposing a drastic shake-up in the judiciary. In a word, the President's solution was to give a Supreme Court Justice past seventy six months in which to retire. If he failed to do so he could continue in office, but the Chief Executive would appoint an additional Justice—presumably younger and better able to carry the heavy load. As there were six Justices in this category, FDR would have at once six appointments to make.

The fact that the Supreme Court stood ready as ever, despite his electoral triumph, to strike down the powers of government whenever they interfered with the privileges of great corporations, could not have been absent from his mind. Nevertheless, in presenting his proposal the President gave no hint of wishing to save the Constitution from "hardening of the judicial arteries," or stem the tide of the anti-New Deal decisions. He tendered the hemlock cup to the elderly jurists on the elevated ground that they slowed the efficient dispatch of judicial business. "Can it be said," the President observed, "that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87% of the cases presented to it by private litigants?"⁸¹

Since 1932, Stone had "heard much talk about increasing the membership of the Court if it didn't do 'right.'"⁸² Nothing had come of it, partly for want of a "popular slogan which would pungently express grievances and aspirations." Stone had filled this need in timely fashion with the war-cry "economic predilections." "As soon as you made that crack in your dissent it became evident that it was just what was needed," Howard Westwood wrote, April 13, 1937. "It was far superior, from the standpoint of a slogan, to anything Justice Holmes ever said; his remark about Herbert Spencer's social statics was too high-falutin'. Despite the syllables in 'economic predilections' the words themselves have a splendid sound and they are sufficiently esoteric to belie argument."

Thus favored by the gods, FDR had awaited the propitious moment. Early February 1937, seemed well-nigh perfect. The election had yielded "a roar in which cheers for the Supreme Court were drowned out."⁸³ Congressional opinion appeared overtly hostile. "The boys on Capitol Hill have their knives out, and how they do ache to use them," one news commentator reported, January 1936. Yet, from the very start the President's Reorganization Proposal ran into overwhelming public opposition. Overnight Supreme Court Justices were pictured as demigods far above the sweaty crowd, weighing public policy in the delicate scales of the law. The same Congressmen who, prior to FDR's message, had demanded the scalps of reactionary Justices, were "shocked beyond measure" and turned upon Roosevelt in an attitude

31. F.D.R. *op. cit. supra* note 4, at 53.

32. HFS to Edward L. Tinker, Oct. 31, 1934.

33. Thomas Reed Powell, *The Next Four Years of the Constitution*, The New Republic, January 13, 1937, p. 319.

of anguished surprise. Closing ranks with Bar Associations, the newspapers lined up as solidly against Court-packing as they had been against FDR's reelection. To the conventional legal mind the idea implicit in Roosevelt's scheme, that the Court may change its interpretation so as to sustain legislative power to meet national needs, was as "false in theory, as it would be ruinous in practice."³⁴ The press and bar had hit a responsive chord. Said Walter Lippman: "No issue so great or so deep has been raised in America since secession."³⁵

Everyone who could read knew that the Justices were not the vestal virgins of the Constitution. Yet, through the years, and despite increasing evidence that judicial interpretation, not Fundamental Law, had entrenched economic privilege, the American people had come to regard the Court as the symbol of their freedom. Tarnished though the symbol was, it, like the English monarchy, made for national stability and poise in crisis and, like its English counterpart, commanded loyalty of the citizenry, providing perhaps an impregnable barrier against dictatorship and personal government. "The President wants to control the Supreme Court"³⁶ was hammered home incessantly. If the plan were accepted, the anti-New Deal press stressed, "not a thing would stand between the ambitions of an unscrupulous man in such a position in becoming absolute dictator of this country."³⁷

Roosevelt's disingenuous argument for Court reform lent credence to the charge. "Because he is adroit and not forthright, he arouses irritating suspicions, probably needless, about his ultimate intentions as the leader of his party and the head of the Government," William Allen White charged.³⁸ Even the President's warmest supporters resented his shiftiness. "Too clever, too damned clever," remarked the pro-New Deal *World Telegram*.³⁹ "I do not entirely favor the President's plan," Professor Ralph Fuchs of the Washington University Law School explained. "It is tricky, and perhaps dishonest. I should greatly have preferred to see him propose an amendment to the Constitution, or, if that is impractical, to say honestly that he wanted more justices to give the Court a liberal balance."⁴⁰

Roosevelt, quick to sense that his initial approach had been a major blunder,⁴¹ moved closer to the real issue on March 4, when he likened the

34. *The Bar Association*, St. Louis Star-Times, Feb. 19, 1937, quoting from a resolution of the St. Louis Bar Association on the plan.

35. *The Lines of Defense*, New York Herald Tribune, February 9, 1937, p. 18, col. 1.

36. *Mrs. O'Day Rushes In*, New York Herald Tribune, Feb. 25, 1937, p. 18, col. 2.

37. *Arouse and Beware*, American Agriculturist, Feb. 27, 1937, p. 1.

38. *Adroit*, Emporia (Kansas) Gazette, Feb. 6, 1937.

39. Quoted in *The Lines of Defense*, *supra* note 35.

40. Quoted in *What Professor Fuchs Finds Wrong with Lawyer's Report*, St. Louis Star-Times, February 19, 1937.

41. "I made one major mistake when I first presented the plan," FDR later commented. "I did not place enough emphasis upon the real mischief—the kind of decisions which, as a studied and continued policy, had been coming down from the Supreme Court. I soon corrected that mistake—in the speeches which I later made about the plan." F.D.R., *op. cit. supra* note 4, at lxxv.

judiciary to an unruly horse on the government gang plough, unwilling to pull with its team-mates, the executive and Congress.⁴² As he saw it now, the crucial question was not whether the Court had kept up with its calendar, but whether the Court had kept up with the country. The President's false assertion that the judges lagged in their work blurred the issue, diverting public attention so completely that his later effort to face the difficulty squarely never quite succeeded. The "big lie" he promulgated on February 5 dogged his path to the very end.

Though Stone's position throughout remained somewhat equivocal, he opposed Court-packing. First of all, he scored the approach. "You can rest assured," he told Grosvenor Backus, February 12, 1937, "that those who assert that age has affected the work of the Supreme Court, or that it does not do its work with the highest degree of efficiency of any Court in the world, cannot get to first base." The Justice deplored the President's recklessness in dragging the Court into politics. "Between ourselves," he said, "the recent proposals about the Supreme Court are about the limit. To see it become the football of politics fills me with apprehension."⁴³ "Granting all the faults that are attributed to the Court," he wrote February 6, 1937, "it still embodies in its traditions and habits of work, and in the performance of its functions essential to our form of government, values which are inestimable. I fear that in the emotional stress of the moment these may be sacrificed." Despite the unpardonable excess of his colleagues, his faith in judicial review as "essential to our form of government" remained unshaken. Since he did not wish the Court to relinquish or lose power, wanting only to eliminate abuses, he saw "no satisfactory solution for our problem except in the character of the judges appointed to our Court."⁴⁴

Roosevelt's proposal had still other shortcomings: it would hamper the Court's work. "If the change should be made," the Justice commented, "I fear that there would be a loss of efficiency. The intimate conference, which ought to be carried on in the decision of the important questions which come to the Court, would be increasingly difficult with increasing size. It would be a serious loss to the continuity and thoroughness of the work if every member of the Court did not participate in a case, as has been the practice of the Court throughout its life."⁴⁵ Finally, Stone believed such drastic reform unnecessary. For him a point not sufficiently emphasized in the debate was summed up in Lincoln's aphorism: "Nothing valuable can be lost by taking time." Mistakes in the development of the law have a way of "rubbing themselves out in time, and if we have made mistakes . . . as most institutions do, I have no doubt that time will correct them long before the country will come to any major disaster."⁴⁶ "Time irons out a great many difficulties," he reiterated, "and

42. *Id.* at 113, 116.

43. HFS to G. H. Backus, February 12, 1937.

44. HFS to Irving Brant, July 19, 1936.

45. HFS to Irving Brant, Feb. 26, 1937.

46. HFS to G. H. Backus, March 3, 1937.

I have no doubt that the Court situation would have righted itself if the President could have possessed himself in patience for a reasonable time."⁴⁷ Worse still, adding to the number of justices by political maneuver would "decrease faith in the Constitutional decisions of the Court just at the moment when they become worthy of faith."⁴⁸

Decline of judicial prestige was already evident in the testimony of those opposing as well as of those favorable to the plan. Stone was much chagrined that "those, who by training and experience, are qualified to speak," should need the reminder to "act like scholars and not like politicians."⁴⁹ The testimony of Court-packing professors simply boiled down to the proposition that they did not "believe in a Constitution, or in those orderly processes through which alone a Constitution can function."⁵⁰ He was especially distressed over the "antics of men who ought to know better, men who seem to think that because the Court has made some mistakes that they ought to be corrected by another and graver one. I am beginning to think that all my life I have greatly overestimated the capacity of the human mind to deal with novel problems."⁵¹ "It almost makes you wonder, whether the democratic form of government can permanently endure, and whether we will not ultimately go the way that so many European countries seem to be going now."⁵²

Despite all misgivings and objections, Stone's own experience convinced him that something must be done to break the constitutional log-jam. He scored Court-packing, but did not oppose all correctives. "The real issue," he told a friend, "is one of methods of correcting an evil, and what price we are willing to pay to do it in a hurry. Those who know their history and the course of events in the life of this Republic will, I think, reach the conclusion that the price is too high to pay merely to gain a solution in a hurry, which ultimately may prove to be no solution at all."⁵³ He was certain

47. HFS to C. C. Burlingham, Mar. 10, 1937.

48. HFS to Irving Brant, Feb. 18, 1937.

49. HFS to C. C. Burlingham, March 14, 1937.

50. HFS to G. H. Backus, March 20, 1937. "Recent discussion of the Court and Constitution," he wrote J. B. Moore, "has revealed abysmal depths of ignorance in quarters where it would seem that we are entitled to look for knowledge and intelligence. The new Dean of the Harvard Law School (James M. Landis) in a widely quoted speech gave the impression that the proposal to give the Court power to declare laws unconstitutional was twice rejected by the Constitutional Convention. I doubt whether he really intended to give such an impression, but his language was not well-chosen to describe the proposal to give the Court revisory power over legislatures acting in a legislative capacity, which was the only such proposal. In the numerous speeches dealing with the power of the Court to declare laws unconstitutional I have seen no reference to the judiciary article which gives the Court appellate jurisdiction in cases 'arising under the laws and Constitution' of the United States, or any adequate reference to the historical background of the judicial power or to the numerous discussions of the subject penned by competent hands." HFS to John Bassett Moore, Sept. 8, 1937.

51. HFS to Youngsters, March 30, 1937.

52. HFS to Young B. Smith, April 12, 1937.

53. HFS to C. C. Burlingham, Mar. 10, 1937.

that an amendment compelling retirement at 75 could be "promptly passed, and would solve all our troubles."⁵⁴

The discussion itself was welcome. On March 12, three days after the President's Fireside Chat stating more forthrightly his case, Stone commented: "We are certainly getting a thorough airing and if we can come through all this discussion without serious loss of the prestige of the Court the result may be good. I think the popular impression—certainly among intelligent people in the eastern part of the country—is that the Court has misused its powers. Assistant Attorney General Jackson yesterday gave a powerful exposition of this view before the Senate Judiciary Committee,⁵⁵ and there is too much truth in it for the comfort of those responsible for the Court's action in recent years. But I think there is also a strong popular feeling that correction ought to be secured in some other way which would not look so much like expecting the Supreme Court to get its law from Presidential messages."⁵⁶

To illumine the issue one enterprising newspaper editor⁵⁷ disinterred and reprinted the Justice's address of 1928 before the American Bar Association. Herein Stone had attributed the preeminent position of the Court to its "steadfast adherence to the best tradition of judicial independence." Even the unjust and unreasonable attacks had, he said, left "no scars," concluding that "the only wounds from which it has suffered have been . . . 'self-inflicted.'"⁵⁸ When Professor Frankfurter suggested that he, like Cassandra, could enjoy no sense of "elation"⁵⁹ in having dire prophecies fulfilled, the Justice replied with an air of detachment: "It is an interesting debate, and rarely have we had a subject so capable of public debate as the present one. The real question seems to be one of relative values. What precious thing will we sacrifice in order to effect changes in the meaning of the Constitution, which very many people think desirable?"⁶⁰

At times Stone gave some evidence of enjoying the ruckus. "Roosevelt is giving the court a lively time," he wrote his sister, April 7, 1937, "but for the most part I am sitting pretty. I have said nothing which I have to unsay, and nothing which has drawn serious criticism from either camp in the fight."⁶¹ "Justice Stone," the *Washington Merry-Go-Round* said, "is pleased and openly defiant."⁶² It may be that he considered FDR's assault "just

54. HFS to Irving Brant, April 20, 1937.

55. *Reorganization of The Federal Judiciary, Hearings before the Committee on the Judiciary, United States Senate, 75th Cong., 1st Sess. pt. 1, pp. 37-64 (1937).*

56. HFS to Youngsters, Mar. 12, 1937

57. United States News, February 15, 1937, p. 6.

58. *Fifty Years Work of the United States Supreme Court*, 14 A.B.A.J. 428, 436 (1928) (address delivered at the semi-centennial meeting of The American Bar Association, Seattle, Washington).

59. Felix Frankfurter to HFS, Feb. 25, 1937.

60. HFS to Felix Frankfurter, March 1, 1937.

61. HFS to Helen Willard, April 7, 1937.

62. Pearson & Allen, *Washington Post*, Feb. 17, 1937.

retribution for recent Supreme Court waywardness." In any event, he indicated sympathy with Erwin N. Griswold's sentiments: "I think I am against it, but it is terribly close. . . . In spite of my opposition to the particular plan, I find myself not displeased that the President has raised the issue. Perhaps I take a sort of sadistic delight in just retribution. But more particularly, I hope some people may see the seriousness of what has been done by courts, and that the public may have some understanding that the task is not to lay the statute beside the Constitution and see if one squares with the other."⁶³

Above all else, Stone wanted to avoid personal entanglement in this explosive political struggle. Whenever as the battle waxed hotter, his own blast against "judicial fiat" proved useful to the major antagonist, he followed events with concern bordering on alarm. The President's evolving strategy threatened to catapult the Justice himself into the battle. Contemplation of the invaluable support he had unwittingly given the plan became increasingly painful. "Naturally, these are very unhappy days for me," he remarked, "but I don't see that there is much I can do about it except to keep sawing wood, although I can say that I do now have regrets that I did not yield, some years ago, to my inclination to seek other occupation."⁶⁴

On March 9, 1937, the crusading New Deal President sharply denounced the Justices' abuse of power, using as "his best ammunition" Justice Stone's *AAA* dissent to show how inadequately the Court had met its obligation to keep the Constitution functioning. In a nation-wide Fireside Chat, the President threw off the cloak of sophistry and frankly explained: "The Court has been acting not as a judicial body, but as a policy-making body. . . . That is not only my accusation. It is the accusation of most distinguished Justices of the present Supreme Court. . . . In holding the *AAA* unconstitutional, Justice Stone said of the majority opinion that it was a 'tortured construction of the Constitution,' and two other Justices agreed with him. In the case holding the New York Minimum Wage Law unconstitutional, Justice Stone said that the majority were actually reading into the Constitution their own 'personal economic predilections,' and that if the legislative power is not left free to choose the methods of solving the problems of poverty, subsistence and health of large numbers in the community, then 'government is to be rendered impotent.' . . . In the face of these dissenting opinions, there is no basis for the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people."⁶⁵

The President's speech evoked Stone's prompt reaction: "The place to which we have come is very distressing to me," he lamented March 10, 1937.⁶⁶ "The

63. Erwin N. Griswold to HFS, March 11, 1937.

64. HFS to Felix Frankfurter, March 6, 1937.

65. *Fireside Chat* (Washington, D.C., March 9, 1937) in F.D.R., *op. cit. supra* note 4, at 122-6.

66. HFS to Felix Frankfurter, March 10, 1937.

notion that this thing must be done or we bust is all nonsense."⁶⁷ To console him, Professor Frankfurter told how "the whole country now recognizes you as the voice of the Court's conscience and reason, and as the representative of what we want the Court and the Constitution to be."⁶⁸ But the turn of events had made this fine achievement highly disturbing. Deeply moving words uttered in dissent, and sincerely devoted to the noble purpose of keeping judges out of politics, were now being utilized by a politically astute President in support of a scheme calculated to keep the Court in politics. The Justice had, it is true, exposed the real reasons behind the New Deal's judicial defeat, but he deeply resented the intrusion of a national controversy into the sanctity of his own judicial life. Somewhat petulantly, he demanded the right to be let alone: "After all, one cannot take much satisfaction in saying I told you so when the initial folly he tried to avoid is overtaken by another."⁶⁹ Nevertheless, suggestions pouring in from friends that he make his position clear had loosened his resolve not to become involved. "If it is a proper question for a citizen to ask, and for a member of the Supreme Court to answer," Professor Douglas W. Johnson wrote, probing circumspectly for Stone's opinion, "I should like to know to what extent, if any, the refusal of the Supreme Court in the last fiscal year to hear 717 petitions for review out of 867 presented, was due to lack of time because of a crowded calendar."⁷⁰ "I am very glad to answer your question," Stone promptly responded, "on the understanding that I am not to be quoted. The reason for my wish not to be quoted at this time is not because I have any objection to the facts becoming known, but because I do not wish to be put in the light of participating in the present controversy."⁷¹

After thus making clear his opposition to the President's plan, Stone supplied Johnson with four closely reasoned pages of facts leading to the conclusion that "rejection of *certiorari* applications is not for lack of time to deal with them."⁷² Indeed, in denying numerous petitions for review, the Justices were but carrying out the mandate of Congress in the Judiciary Act of 1925 "that the Supreme Court ought to devote itself to the consideration of cases involving important public issues, that its time and energy ought not to be absorbed in hearing and deciding cases merely to provide an unsuccessful litigant with further opportunity for delay, or to give him another chance, or where the issue is not doubtful or has plainly been considered and adequately dealt with by a competent appellate tribunal." "In my opinion," the Justice declared, "it has made the mistake of being overgenerous . . . but it is of course better to err in that direction than in the other."⁷³

67. HFS to C. C. Burlingham, March 10, 1931.

68. Felix Frankfurter to HFS, March 16, 1937.

69. HFS to Felix Frankfurter, March 19, 1937.

70. Douglas W. Johnson to HFS, February 28, 1937.

71. HFS to Douglas W. Johnson, March 3, 1937.

72. *Ibid.*

73. HFS to Douglas W. Johnson, March 3, 1937.

Johnson appreciated Stone's "more than generous response," but was unwilling to let the matter rest. "It seems to me," he wrote the Justice, March 12, "that the President, whether misinformed or misinterpreting data given him, has painted a most misleading picture."⁷⁴ The Attorney General had stressed, among other things, the enormous number of pages the Justices must read before refusing *certiorari*. "Is it true," Johnson wanted to know, "that the justices must read all of every application and supporting papers? Cannot a justice, like Walter Hines Page, tell an egg is rotten without eating all of it?"⁷⁵ The Justice agreed the case had been misrepresented: "With the skill that comes from knowledge and experience it is possible to come to a satisfactory conclusion without the enormous amount of reading which has been suggested."⁷⁶ To reinforce the point, Stone enclosed excerpts from Congressional reports and debates, quoting the most "authoritative" source, Senator Albert B. Cummins, Chairman of the Judiciary Committee, to show that the Supreme Court, in rejecting the vast majority of applications for *certiorari*, was doing no more than was expected by the sponsors of the 1925 Judiciary Act.⁷⁷ "I can see no objection to making any use of the facts which you see fit," the Justice told Johnson, March 15.

Ammunition was not enough; Johnson wanted to have Stone as an avowed opponent of Court-packing. "The strong language you have used in certain dissenting opinions has naturally led some of your friends, and me among them," the correspondent suggested, "to surmise that you might be sympathetic with the President's action."⁷⁸ It seemed only fair that the authoritative source of facts, having direct bearing on this important public issue, be made known.

Having generously fed the flame, the Justice now tried to bank it. "I do not care to engage in any public discussion," he replied, "or to have my views quoted for the purpose of influencing current discussion. But I have no hesitation in saying, for your own personal information, that I think the present proposal is too high a price to pay for the correction of some decisions of the Court, which I, in common with a great many others, think unfortunate. In any case, I see no urgent need for haste. Our resources for dealing with pressing problems of government by constitutional methods are by no means exhausted. Time irons out many of the difficulties of constitutional construction. If we are not willing to wait for that, the Constitution itself points the way for their removal."⁷⁹

74. Douglas W. Johnson to HFS, March 12, 1937.

75. *Ibid.*

76. HFS to Douglas W. Johnson, March 15, 1937.

77. See H.R. REP. Nos. 1031-1653, 68th Cong., 2d Sess. (1924-1925); H.R. REP. No. 1075, 68th Cong., Sess. 2-3 (1925); statements by Senator A. B. Cummins, 66 CONG. REC. 2752 (1925); colloquy among Senators J. W. Harreld, Cummins, G. W. Pepper and E. Copeland, *id.* at 2753; Senator Heflin's remarks upon its passage, *id.* at 2928.

78. Douglas W. Johnson to HFS, March 12, 1937.

79. HFS to Douglas W. Johnson, March 15, 1937.

But sensing a repressed desire to spike the embattled project, Johnson continued to play on Stone's resentment at FDR's devastatingly effective use of his dissents, pressing him "to let the American people know the views of one whose opinions have been cited repeatedly in support of the President's proposal."⁸⁰ The Justice finally gave tentative permission to the drafting of a letter asking Senator Burton K. Wheeler to call the Justices, especially Mr. Justice Stone, to testify, reserving "judgment as to the wisdom of our participating in controversy." "That will depend," he said, "on views expressed in conference with associates and our joint decision as to what is the advisable course."⁸¹ "I can state with assurance," the Johnson letter read, "that while Justice Stone feels very keenly that some decisions of the Supreme Court have been unfortunate, he regards any proposal to alter the membership of the Court with a view to affecting its decisions as both unnecessary and dangerous."⁸²

"Cannot approve,"⁸³ the alarmed justice wired. "I wish, quite as much as you," he wrote in explanation of his seeming about-face, "that my views on this question could be known without the kind of embarrassments to the Court, and the storm of public debate and criticism which would inevitably follow their publication, but in which I could take no part. Fairness to my associates, also, I think, requires that I should not do anything either directly or indirectly which would put on them the onus of entering a field of debate which up to now they have refused to enter." "If I were to make any statement," he went on, "it should be done directly, by making a public statement. . . . Approval by me of any method by which my views were brought before the public by indirection would be subject to possible criticisms which the more direct method would not merit—all of which proves that the job of being a Supreme Court Justice is not free from its difficulties and embarrassments. One must remain silent under unfair and unjust criticism and various types and degrees of misrepresentation, relying only on his published opinions as giving the measure of his views and of his intelligence and character."⁸⁴

A week later the Justice seemed more relaxed, and inclined to minimize his involvement in this unseemly controversy: "I go my way, doing the day's task, and render unto Caesar the things that are Caesar's, by letting the political arm of the Government decide whether they want six new judges or are content with nine."⁸⁵

Apparently Chief Justice Hughes did not completely share Stone's aversion to public participation in the struggle. In any event, Senator Burton K. Wheeler, spearhead of the opposition, had procured from Hughes a letter

80. Douglas W. Johnson to HFS, March 31, 1937.

81. HFS to Douglas W. Johnson, March 20, 1937.

82. Draft of letter from Douglas W. Johnson to Senator B. K. Wheeler, March 31, 1937.

83. Wire, HFS to Douglas W. Johnson, April 2, 1937.

84. HFS to Douglas W. Johnson, April 2, 1937.

85. HFS to George Biddle, April 8, 1937.

commenting on the President's accusation that the Court was not abreast of its work.⁸⁶ Furthermore, Hughes' letter on March 21 had revealed the Chief as a peculiarly canny adversary. Though carefully refraining from open opposition to the plan, the letter indicated his profound dislike of it to all but the most obtuse. Cold statistical analysis alone demolished Roosevelt's contention that the Court was far behind its docket. With equal forthrightness the Chief Justice put the question of denying certioraris in true perspective. Having thus exposed the purported justification of the proposal, he could well refrain from direct comment on its merits. Hughes did not stop there, however. The remainder of his statement trod the line between fact and opinion, between procedure and substance, with such delicacy that the distinction became strangely obscure. "An increase in the number of Justices of the Supreme Court apart from any questions of policy, which I do not discuss," Hughes said, "would not promote the efficiency of the Court." Lest anyone fail to see that there was a "question of policy," the Chief Justice repeated his disclaimer of interest in such matters. Going on to the suggestion that the enlarged Court hear cases in divisions, the Chief Justice ventured the opinion that such a course might run afoul the constitutional provision for "one Supreme Court." "The Constitution," Hughes observed, "does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts."⁸⁷

Finally, the Chief managed to convey the impression that the entire Court sanctioned his statement. Ignoring the customary disavowal of authority to speak for members of a body not consulted, he was "confident that it is in accord with the views of the Justices," although he admitted, "on account of the shortness of time, I have not been able to consult with members of the court generally." He had, however, talked with Justices Van Devanter and Brandeis who he knew were willing to rush out a statement to be used as the opening gun in the legislative campaign against FDR's bill.

"I was not consulted in connection with its [the Hughes letter's] preparation," Stone commented later on. "Justice Cardozo told me that he was not. . . . There was no reason of which I am aware why all the members of the Court should not have been consulted in connection with the preparation of a document which purported to state 'the views of the Justices,' or for expressing

86. The story is told in the author's *BRANDEIS: A FREE MAN'S LIFE* 626 (1946).

87. The Chief Justice seems not to have been dissuaded by his own earlier condemnation of advisory opinions from the Court. Discussing Justice Johnson's favorable response, on behalf of a unanimous bench, to a request from President Monroe for an extra-judicial opinion on internal improvements, Hughes remarked in his book on the Supreme Court: "This, of course, was extra-official, but it is safe to say that nothing of the sort could happen today. The Court has rejected the overtures of the Congress for opinions on constitutional questions in the absence of a real case or controversy to be decided." CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 30-1 (1928). See also 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 595-6 (2d ed. 1926).

the views of Justices who for any reason could not be consulted. Although the Court was then in recess, all its members were in the city. They could have been brought together for a conference on an hour's telephone notice, or less. Throughout the recess Justices Sutherland, Cardozo and myself were in our homes, which are within five minutes walk of the residence of the Chief Justice."⁸⁸

Court-packing opponents, working to bring the full weight of the Court's prestige to bear against Roosevelt, lost no time capitalizing upon the Chief Justice's letter. Read by Senator Wheeler before the Senate Judiciary Committee's first public session on the Court bill, March 22, 1937, the Hughes statement heaped fuel on the fires of controversy raging in the press. Wheeler and others⁸⁹ immediately drew the inference that "although the members of the Supreme Court may have differed on a great many things, they are unanimous with reference to the letter of the Chief Justice. . . ."⁹⁰

But not everyone was taken in by Wheeler's gloss on the Chief Justice's language. Frankfurter, for one, hazarded the opinion that "on the face of the letter there certainly seems no warrant for giving it the authority of the whole Court."⁹¹ "I simply cannot believe that you, for instance, would have concurred in giving the advisory opinion that Article III precludes the possibility of sitting in divisions."⁹² "You are right!" Stone replied emphatically. "I did not see the C.J.'s letter, or know of it until I read it in the papers. I certainly would not have joined in that part of it which undertakes to suggest what is and what is not constitutional."⁹³

Despite the false use to which the Hughes letter was put, Stone kept silent. After the furor died down, however, he stood ready to dispute any implication that he had approved it. "I should perhaps have put the matter in its proper light at the time," he told Justice Frankfurter in 1939,⁹⁴ "but it did not occur to me that such an expression of opinion would, in the circumstances, be attributed to members of the Court who were not consulted, and it seemed

88. HFS to Felix Frankfurter, December 21, 1939.

89. Cf. Catledge, *New York Times*, March 23, 1937 p. 1, col. 8.

90. 81 CONG. REC. 3608 (1937).

91. Felix Frankfurter to HFS, April 8, 1937.

92. *Ibid.*

93. HFS to Felix Frankfurter, April 8, 1937.

94. When Frankfurter and Shulman's revised casebook on *Federal Jurisdiction and Procedure* appeared in 1939, it contained a note on the Hughes' letter implying that it represented the position of all the Justices. Stone immediately wrote his colleague, reiterating his objections: "In the interest of accuracy, and to avoid the perpetuation of a mistaken impression may I say that I think the footnote should have stated, and in any revision of it should state that the Justices other than those named in the letter did not join in the expression of the opinion to which I have referred. The fact is that I did not then, and do not now approve of such extra-official expression on a constitutional question by the Court or its members. Justice Cardozo, with whom I discussed the matter, was of the same view." "I have," he added, "never formed any opinion on the constitutional point in question." HFS to Felix Frankfurter, Dec. 21, 1939.

to me undesirable that the Court or its members should, at that stage of the Supreme Court controversy, be subjected to any additional publicity."⁹⁵

But Stone had, in various ways, allowed himself to be drawn into the fight. At a Sunday evening conference on Supreme Court appointments,⁹⁶ the Justice told the President that the crying need was for more Justices who not only shared the philosophy of Holmes, Brandeis and Cardozo but for men able to express it in written opinions, and thus bear their share of the Court's work and help educate the people and especially the lawyers of the country. Nor was Stone's interest confined to Supreme Court appointments. He talked and wrote to friends with customary candor on other phases of the conflict. The cool reception he accorded the Chief Justice's letter soon leaked out and this, too, indirectly implicated him.

On Sunday morning, March 21 (the day Hughes' letter was drafted) Irving Brant had called at 2340 Wyoming Avenue, while Alfred Lief was "sounding out" the Justice's willingness to sign a protest against the President's bill. After he refused to do so on the general ground that he did not think it proper for members of the Court to take part in a political controversy, there was no reason for Lief to bring up a specific matter such as the Hughes letter. It was not until he read his newspaper the following morning that Stone learned the purpose of Lief's call.⁹⁷ "As it was a three-cornered conversation," Brant wrote later on, "I relayed word of his errand to the White House. It made a nice commentary on Mr. Hughes' statement that he had not had time to submit his letter to all his colleagues."⁹⁸ "I, too, was amused when Lief's errand became manifest," the Justice replied. "I had supposed that he came in just for a social call. Later he wrote to ask whether it was true that I had been asked to sign the Chief Justice's letter. I replied by saying merely that I did not know of it until I read about it in the papers."⁹⁹

Wheeler later denied acquaintance with Lief and suggested to Brant that the Chief Justice must have sent him to see Stone.¹⁰⁰ "Absurd," Stone snorted,

95. HFS to Felix Frankfurter, December 21, 1939.

96. Irving Brant to the author, July 22, 1951.

97. Years later Brant recalled the incident and remembered Stone's remark, "I really couldn't make out what that young man came here for." "My impression is," the newspaper man suggested, "that Senator Wheeler sent him here to ask you to join in a statement against the Court." "It was very strange," Brant commented in a letter to the author, July 22, 1951, "that Stone did not know that he had been asked to sign something of the sort."

98. Irving Brant to HFS, April 15, 1937.

99. HFS to Irving Brant, April 20, 1937.

100. Irving Brant to HFS, October 23, 1937. Evidently, Stone and Brant thought Lief came as Senator Wheeler's emissary. "The odd way Lief kept mixing questions to me about Wheeler with questions to Stone about joining in a protest left no doubt in my mind at the time that he had come at the request of the Senator." Irving Brant to the author, July 22, 1951. In a letter of August 4, 1951, Mr. Lief referred to his call as "social." For Lief's report on his interview with Justice Stone, see his book, *DEMOCRACY'S* NORRIS 499-500 (1939).

"I don't know Lief very well, but I don't think he would misrepresent the facts, and the Chief Justice knows well that he can find out what I think at any time by asking—sometimes," he added sharply, "he finds out without asking."¹⁰¹

Stone's ambivalent attitude toward Court reform, his opposition to packing, while admitting the need for some change, placed him in a peculiar position. His refusal to speak out publicly and his eagerness for private conversation left his stand so obscure as to make him useful to both sides. He explained at the outset that he did not wish to be quoted, "because I do not wish to be put in the light of participating in the present controversy."¹⁰² Yet he talked freely thereafter to Irving Brant,¹⁰³ and encouraged Brant's attempt to sell FDR a modified Court-reform bill compelling retirement by constitutional amendment.¹⁰⁴ Everything Stone told Brant, even on highly technical matters,¹⁰⁵ was immediately passed on to FDR himself, or to advisors such as Tommy Corcoran. The reporter, naturally, presented the information to further his own Court proposal, a project Stone warmly supported. Of course such material had obvious uses also in mapping strategy for the President's plan.¹⁰⁶

Stone's views also served the opposition. In certain quarters, he was even credited "with having a hand in knocking down some of the contentions which were raised in its (the Court plan's) favor."¹⁰⁷ "He counseled delay," Congressman Emmanuel Celler reported. "He said that time settles many things, that in due course the problem of the Court would settle itself. While he did

101. HFS to Irving Brant, October 29, 1937.

102. Memo from HFS to Irving Brant on Court's disposition of certioraris, March 4, 1937.

103. The Justice got a "great kick" out of reading Brant's peppery editorials and welcomed an opportunity for a "quiet evening so we can discuss the state of the nation in general and of the law in particular." HFS to Irving Brant, May 24, 1937.

104. Irving Brant to FDR, April 7, 1937—based on talk with Stone, denominated a "liberal" justice; HFS to Irving Brant, April 20, 1937, approving plan; Irving Brant to Thomas C. Corcoran, April 22, 1937, relaying Stone's sentiments.

105. Stone wrote Luther Ely Smith telling him to put Brant onto the Court's shenanigans in *Pacific Gas & Electric Co. v. Railroad Comm'n*, 301 U.S. 669 (1937); saying it was "more than the usual rate case." HFS to L. E. Smith, June 4, 1937. One week later, the Court's action in this case, a four-to-four stalemate affirming a very reactionary lower court valuation opinion, formed the basis of Brant's argument to FDR against appointing Senator Robinson, ex-utilities lawyer, to the Supreme Court. Irving Brant to FDR, June 12, 1947.

106. Stone's readiness for talk with Brant may be explained in terms of the newspaper man's grasp of the issues. "He writes," Stone said, "about the Constitution and court matters with more grasp and understanding than any other editorial writer in the country. While I am unable to follow him in his evident belief that the President's program is desirable, I would not deny that it could have been solved, and probably still could, without breaking up the household furniture." HFS to Luther Ely Smith, April 29, 1937.

107. Catledge, *The Honorable, The Chief Justice*, *The New York Times Magazine*, June 22, 1941, p. 12.

not indicate it in so many words, the fair implication of his language was plain—two, if not more, of the Justices would retire—if the retirement bill were passed; I asked ‘within what period?’ and he responded, ‘Six months to a year.’”¹⁰⁸

The Chief Justice's letter and the press campaign of education had put severe crimps in Roosevelt's ambition to overhaul the Court, but they had not erased the hard fact that many people considered a change necessary. Throughout Stone recognized the trouble as arising, not from want of efficient dispatch of judicial business, but, as he said, from “the application of so-called rules of law to social and economic problems—in short, the difficulties that are being so ruthlessly exposed in present-day discussion.”¹⁰⁹ “The troublesome thing to overcome,” he commented, April 1, 1931, “is that practically all the witnesses on both sides of the question concede that the Court has been very narrow in its interpretation of constitutional questions and that there is need of some kind of reform.”¹¹⁰ Senator Wheeler himself admitted judicial shortcomings.¹¹¹ As if to confess their “guilt,” penitent Justices began undermining their recent handiwork, even as the fight raged about them. The first tower to fall was the most recent, *Morchad v. Tipaldo*,¹¹² setting aside the New York Minimum Wage Law. “The most exciting case¹¹³ involved in the Washington State Minimum Wage law,” Stone wrote his sons, April 1, 1937. “In its main features it was like the New York law which was before the Court and held unconstitutional June first last. In that case a majority of five held the statute unconstitutional on the authority of the *Adkins* case,¹¹⁴ decided in 1923. They held broadly that it was beyond constitutional power to fix a minimum wage, even for women in circumstances which showed that they were receiving less than a subsistence wage.”

Justice Roberts' contribution to the sudden about-face has been immortalized by the somewhat scurrilous comment, “A switch in time saves nine,” while Chief Justice Hughes' part in this notorious upset has been praised

108. 81 CONG. REC. 1123 (1937). In a letter to the author, Aug. 6, 1951, Celler acknowledged that Stone was the jurist to whom he referred.

Stone, along with the other Justices, received scores of letters and testimonials begging him not to quit. “Do not retire under fire,” one correspondent urged. “We believe in you who stand between us and dictatorship.” Mrs. C. C. Ransom to HFS, March 6, 1937.

After the plan was defeated, Justice Sutherland wrote: “I should have gone nearly a year ago had it not been for the fight on the Court, which I am glad to say is now a thing of the past, and which I think will never be revived.” Geo. Sutherland to a Mr. Preston (initials unknown), Jan. 18, 1938; quoted in FRANCIS PASCHAL, *MR. JUSTICE SUTHERLAND* 200 n.125 (1951).

109. HFS to Felix Frankfurter, Mar. 30, 1937.

110. HFS to Sterling Carr, April 1, 1937.

111. “There is a wrong way and a right way to correct those evils. The wrong way is to pack the Court—the right way is to amend the Constitution.” *Reorganization of the Federal Judiciary* in 81 CONG. REC. Appendix Jan. 5-May 19, p. 531 (1937).

112. 298 U.S. 587 (1936).

113. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

114. 261 U.S. 525 (1923).

to the skies. "The Chief Justice read the opinion confessing error," Robert H. Jackson wrote in 1941. "But his voice was one of triumph. He was reversing his Court, but not himself. He was declaring in March the law as he would have declared it the previous June, had his dissent been heeded."¹¹⁵ It was not, however, quite that way, as Stone's letter to his sons made clear. In the *Tipaldo* case, he explained: "The Chief Justice wrote an opinion saying that the New York statute was distinguishable in some of its features from that one before the Court in the *Adkins* case, and that the *Adkins* case consequently was not controlling. I wrote an opinion stating that while I agreed that there were the distinctions pointed out by the Chief Justice, I nevertheless thought that it should be placed on broader grounds, namely that due process had nothing to do with wage regulation wherever at least there was a serious legislative problem presented. In October the Court denied a motion for reargument of the case. Monday the Chief Justice wrote the opinion, overruling the *Adkins* case and adopting the views expressed in my opinion of last June. Justice Roberts switched so the vote stood 5 to 4 in favor of validity."¹¹⁶

On the same day a chastened Court unanimously approved broad extensions of national power.¹¹⁷ A new Frazier-Lemke farm mortgage act found unwonted favor with the Justices,¹¹⁸ while Justice Stone upheld the National Firearms Act, a penalizing license tax so stiff that it made small weapons traffic prohibitive. "The Court will no longer undertake," Stone announced triumphantly, "to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution."¹¹⁹ Without a dissenting voice, he sanctioned the collective bargaining provisions of the Railway Labor Act, even as to so-called "backshop" employees, not directly engaged in interstate activities.¹²⁰

"This has been an exciting week," Stone reported to his sons, April 1, 1937. "On Monday the Court upheld the constitutionality of the collective bargaining provisions of the Railway Labor Act. I wrote the opinion. It was fairly

115. JACKSON, *THE STRUGGLE FOR JUDICIARY SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 208 (1941).

116. HFS to Youngsters, April 1, 1937.

Though the case was argued in Stone's absence, he participated in the decision. Otherwise the Justices would have divided four-to-four. "It is not uncommon," E. P. Cullinan, Assistant to the Clerk of the Supreme Court, wrote the author, July 14, 1951, "for a Justice who did not hear arguments to participate in the decision of the case."

117. In the same spirit, two decisions written by Justice Cardozo indicated the Court's more liberal attitude toward state regulation and taxation. See *Highland Farms Dairy Co. v. Agnew*, 300 U.S. 608 (1937) (dismissing petition for injunction against state milk control law in advance of application to petitioner) and *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937) (sustaining a "use" tax levied by state on articles purchased beyond its borders).

118. *Wright v. Vinton Branch, etc.*, 300 U.S. 440 (1937).

119. *Sonzinsky v. United States*, 300 U.S. 506, 513-514 (1937).

120. *Virginian Ry. Co. v. System Federation*, No. 40, 300 U.S. 515, 556 (1937).

good as written, but it was mangled somewhat in order to meet the wishes of some of the other Judges. It finally won concurrence of the entire Court."¹²¹ Congress could now require railroads to bargain with their employees' chosen representatives without infringing "liberty." "The Fifth Amendment, like the Fourteenth," he was very glad to declare for the Court, "is not a guaranty of untrammelled freedom of action and of contract. In the exercise of its power to regulate commerce, Congress can subject both to restraints not shown to be unreasonable."¹²²

Stone rejoiced to see the Court on "more solid ground," although he felt "unhappy about the tortuous path which has been pursued to arrive there." Just what effect "all this will have on the President's pending proposal," Stone commented, April 1, 1937, "remains to be seen. I am fearful, though, that the dissent of the four so-called conservatives, expounding their views of a rigid and changeless Constitution, apparently to be applied always in the same way, no matter how much the subject matter to which it is applied may change, will stimulate the criticism of the Court and give emphasis to the demand that it be reformed."¹²³

The really big issue facing Court and country remained unresolved. What would be the fate of the Wagner Labor Relations Act? Would the Justices now permit the national government to substitute law for naked force in labor relations? Several cases were argued February 10 and 11, 1937. Condemnation of the Act by the Liberty League's Committee of 58 had stiffened employer resistance. Meanwhile, the famous sit-down strikes occurred in Detroit. Industrial peace—or war—seemed to hang in the balance when, on April 12, 1937, Chief Justice Hughes put forward a broad and encompassing definition of interstate commerce and claimed for Congress the power to protect the life-lines of national economy from private industrial warfare. On April 15, Stone sent off a full report to his sons:

"The most exciting news of the week is the Wagner Labor decisions. They seem popularly to be regarded as very revolutionary, and perhaps they are in view of the decision of the Court in the Guffey Coal Act case.¹²⁴ As a matter of fact, it has been well understood for many years that the power to regulate commerce not only involves the power to regulate the commerce itself, but to regulate things materially affecting commerce. The Sherman Act, which gets its only constitutional sanction from the Commerce clause, has been applied to manufacturers^{124a} and to their employees,^{124b} and to the employees in mines.^{124c} It has been applied to the employees of the building

121. HFS to Youngsters, April 1, 1937.

122. *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 558 (1937).

123. HFS to Youngsters, April 1, 1937.

124. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

124a. *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *United States v. Trenton Potteries*, 273 U.S. 392 (1927).

124b. *Loewe v. Laylor*, 208 U.S. 274 (1908).

124c. *Second Coronado Coal Co. Case*, 268 U.S. 310 (1925).

trades in San Francisco,^{124d} and of the lime stone quarries in Indiana.^{124e} The National Government has regulated transactions on the Chicago Grain Exchange^{124f} because of its effects on interstate commerce, and has authorized the regulation of intrastate rates of interstate carriers where the rates were so low as to threaten their successful operation in interstate commerce.^{124g}

"Of course," the letter continued, "in order to reach the result which was reached in these cases last Monday, it was necessary for six members of the Court either to be overruled or to take back some things they subscribed to in the Guffey Coal Act case. But as I did not join in those statements, I had nothing to take back."¹²⁵ Whether it is wise for the National Government to enter this field is a question with which I am not concerned, but it seems clear that under these decisions the National Government can exercise some control over the relations of employer and employee and hold both to a larger degree of responsibility in conducting their labor relations."

Chief Justice Hughes had agreed: "The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement' . . . to adopt measures 'to promote its growth and insure its safety' . . . 'to foster, protect, control and restrain.'"¹²⁶ Production was no longer local, beyond the reach of national power. Arguments that had proved so effective in the *Schechter*¹²⁷ and *Carter Coal* cases now availed nothing.

"We are asked," Hughes remarked, "to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?"¹²⁸ To all of which Justice McReynolds cogently replied: "Every consideration brought forward to uphold the Act before us was applicable to support the Acts held unconstitutional in cases decided within two years."¹²⁹

124d. *Industrial Assoc. of San Francisco v. United States*, 268 U.S. 64 (1925).

124e. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assoc.*, 274 U.S. 37 (1927).

124f. *Board of Trade v. Olsen*, 262 U.S. 1 (1923).

124g. *The Shreveport Case*, 234 U.S. 342 (1914).

125. Stone cited Arthur Krock's discussion, *New York Times*, April 14, 1937, p. 24 col. 5, as illuminating.

126. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-7 (1937).

127. 295 U.S. 495 (1935).

128. *NLRB v. Jones & Laughlin Steel Corp.*, *supra* note 126, at 41.

129. *Id.* at 77. On the same day, the Court applied the Act to the labor relations of two small manufacturers, *National Labor Relations Board v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937) and to the reporters and editorial workers of the *Associated Press*, far-flung newsgathering organization, *Associated Press v. NLRB*, 301 U.S. 103 (1937).

Stone was wary of rejoicing at the first sign of change; he had seen "sudden conversions" before.¹³⁰ He felt certain resentment, also, that Hughes, in choosing to assign the opinion to himself, should have taken a plum that belonged rightly to Cardozo, whose *Carter* case dissent had spelled out the basic ideas of the new majority. Others shared his feelings. "Hughes and Roberts," Irving Brant wrote, "bend with the *hurricane* of public opinion, but in *lesser* winds stand with the reactionary four."¹³¹ Their buildup as liberals continued as they read opinion after opinion overturning their own work, while Stone, Brandeis and Cardozo were virtually ignored. "The three liberals," one close observer noted, "are not being allowed to speak for the Court because the two liberals-by-compulsion fear what they might say, or begrudge them credit for their consistent stand. The Chief Justice controls this."¹³² The glory of announcing the extremely popular pro-New Deal decisions and the great public acclaim evoked went entirely to Hughes and Roberts. It was, someone has suggested, the psychological price of their conversion. Of the Chief Justice, a lifetime student of the Court said, June 2, 1937: "a synthetic halo is being fitted upon the head of one of the most politically calculating of men."

In the parade of cases, exhibiting the Constitution reinvigorated, Stone delivered the opinion in but one major case. Writing the companion piece to Cardozo's decisions sustaining the federal social security system, he upheld a related state law, and made the most of the opportunity.¹³³ Explaining his approach to Professor Noel T. Dowling, May 28, 1937, the Justice wrote: "One of the important puzzles (in the Alabama Unemployment Compensation case) was whether to treat it as a regulation and pursue lines followed in the Employers Liability Cases,¹³⁴ or to treat it as a tax. After going over the whole ground, it seemed to me there was a good opportunity to treat the whole problem purely as one of taxation, and in that connection develop some tax ideas a little further than they had been carried. A somewhat novel question was that of the relationship of burdens of the taxpayer to the benefits of the expenditure of proceeds of the tax. I found little on this until I happened to remember that I had dealt with it a couple of times in *Nashville, Chattanooga & St. Louis Ry. v. Wallace*¹³⁵ and *Carley & Hamilton v. Snook*."¹³⁶

Actually this was a question of policy, not power. Yet it formed the core of Sutherland's dissent. After the dissent came in, Stone added three paragraphs to his opinion, arguing that an effort to distribute the burden of the

130. HFS to Felix Frankfurter, May 28, 1937.

131. *Liberalized by 27,000,000 voters*, St. Louis Star-Times, April 13, 1937.

132. *Ibid.*

133. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937).

134. *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

135. 288 U.S. 249 (1933). "The constitutional power to levy taxes," Stone held, "does not depend upon the enjoyment by the taxpayer of any special benefit from the use of funds raised by taxation." *Id.* at 268.

136. 281 U.S. 66 (1930). Stone could find "nothing in the Federal Constitution" to require a state to apply vehicle registration fees so as to benefit those who paid them. *Id.* at 72.

tax among employers according to their individual unemployment experience—in the same manner that workmen's compensation statutes decrease insurance premiums of employers with good safety records—would be "unjust." Responsibility for the business cycle, the chief cause of unemployment, "cannot be apportioned to individual employers in accordance with their employment experience."¹³⁷ While answering Sutherland's argument, he was careful to stress that "there is no warrant in the Constitution for setting the tax aside because a court thinks that it could have drawn a better statute or could have distributed the burden more wisely. Those are functions reserved for the legislature."¹³⁸

But perhaps the most significant portion of the opinion refuted the contention that Alabama had been "coerced" into the enactment of an unemployment scheme by the generous provisions of the Federal Social Security Act. "The coercion problem was a serious one," the Justice told Dowling, "or becomes so if we take seriously some of the things that were said in the *Butler* case."¹³⁹ At any rate, it requires plainer restriction than I could find in the Constitution to prevent the establishment of workmen's unemployment benefits involved in these acts, and that is enough for the present."¹⁴⁰

Stone viewed his accomplishment modestly, but actually he had drawn a moving picture of the state and national governments working together to solve problems national in scope: "The United States and the State of Alabama are not alien governments. They coexist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a cooperative legislative effort by state and national governments for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation."¹⁴¹

The New Deal's judicial field day wound up with Justice Cardozo's opinions upholding the social security taxes¹⁴² and the old age pension system.¹⁴³ These decisions threw into the shade, but did not expressly overrule, the *AAA* and *Railroaders' Pension* cases.¹⁴⁴ Nor had the Chief Justice's *Jones-Laughlin* opinion explicitly undermined the *NRA* and *Carter Coal* precedents. These reactionary pronouncements lay lifeless in the books; but their ghosts still walked. One suspects that Holmes' observation, "we are quiet there, but it is the quiet of a storm center," did not apply literally to the deliberations of the Supreme Court in the spring of 1937. The new trend, it may be inferred, came only after spirited argument and went hard with the grim

137. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 524 (1937).

138. *Id.* at 525.

139. *United States v. Butler*, 297 U.S. 1 (1936).

140. HFS to Noel T. Dowling, May 28, 1937.

141. *Carmichael v. Southern Coal & Coke Co.*, *supra* note 137, at 526.

142. *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

143. *Helvering v. Davis*, 301 U.S. 619 (1937).

144. *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935).

little battalion of death led by Sutherland.¹⁴⁵ On finding himself isolated in opposition to the *Sonzinsky* case, McReynolds got the impression that he was being forced to take positions some members did not fully sanction. "I do not think so," he noted sourly on the back of Stone's draft, "but if all others do, they must prevail though wrong."

All such pro-New Deal decisions struck at the very heart of FDR's Court-packing. Yet the fight wore on. Perhaps the prospect of defeat piqued the President's pride. He wondered, as one skeptical Congressman put it, whether Justice Roberts "will be with us after the heat is off?"¹⁴⁶ FDR's case was further undermined on May 18, 1937, the day the Judiciary Committee was to vote on the President's bill, by Justice Van Devanter's announcement that he would retire June 1.¹⁴⁷ One close observer suggested that "it was so perfectly timed as a strategic move that it seems unlikely to have been accidental."¹⁴⁸ Indeed Senator Borah had impressed upon Van Devanter "the great service he could render the cause by stepping down."¹⁴⁹ Stone was not privy to the conspiracy. "I did not know of it (Van Devanter's retirement) until the announcement, but it did not take me entirely by surprise."¹⁵⁰

The Justice's resignation evoked in Stone mixed feeling.¹⁵¹ He remembered this die-hard's helpful advice when he first came to the bench. "But I always felt," he wrote his children some years later, "that he conceived it his duty to declare unconstitutional any law he particularly disliked, which to my mind is a fatal way of interpreting an instrument of government which must envisage the possibility of difference of opinion about social and governmental questions."¹⁵² Nor was Stone certain that FDR could be relied on to make a wise choice of Van Devanter's successor. "I am fearful," he commented to Felix Frankfurter. "I have not much faith in appointing men because it is thought they will vote in a particular way. All that I would ask is that the appointee have integrity, intelligence, and sound legal knowledge, and that he have some appreciation of the world in which we live. How I wish," he added in pencil as an afterthought, "it would be you!"¹⁵³

All hope for the ill-fated plan faded in midsummer, when at the height of the battle, Senator Joseph T. Robinson, FDR's floor leader, collapsed in the Senate. For two years Stone had been "dreading Robinson's appointment

145. One should not, however, lose sight of Van Devanter's contribution to the reactionary campaign. Stone said that Van Devanter was the general-in-chief of the four horsemen, mapping their strategy instead of writing opinions. Irving Brant to the author, July 22, 1951.

146. Edward C. Eicher, 68 CONG. REC. 4793 (1937).

147. St. Louis Star-Times, May 19, 1937.

148. JACKSON, *op. cit. supra* note 115, at 192-3.

149. Z PUSEY, CHARLES EVANS HUGHES 761 (1951).

150. HFS to Felix Frankfurter, May 20, 1937.

151. HFS to Felix Frankfurter, May 28, 1937.

152. HFS to Children, February 13, 1941.

153. HFS to Felix Frankfurter, May 28, 1937.

more than anything else that might happen."¹⁵⁴ As the Arkansas Senator's death released the President from pressure to appoint a southern conservative to the Van Devanter vacancy, the need for drastic reform became less urgent. Yet, with strangely ironical results, the President had his way. As one writer expressed it: "In politics the black-robed reactionary Justices had won over the master liberal politician of our day. In law the President defeated the recalcitrant Justices in their own Court."¹⁵⁵ Whether moved by the 1936 election, or by fear of the President's attack, or by new insight into their own functions, the Court by rapid strides brought the Constitution up to date, thus effectively answering the criticisms of enemies and friends alike.

Before a single judge resigned, before any appointments were made, "the Court began to interpret the Constitution instead of torturing it."¹⁵⁶ This "clear-cut victory on the bench," the President believed, "did more than anything else to bring about the defeat of the plan in the halls of Congress."¹⁵⁷ That "great solvent, Time," had, as Stone predicted, done its work. It may be doubted, however, that time alone was the crucial factor. "It would be a little naive," FDR wrote later on, "to refuse to recognize some connection between these 1937 decisions and the Supreme Court fight."¹⁵⁸ One surveying the entire battle may find it difficult to conclude (despite Chief Justice Hughes' words to the contrary)¹⁵⁹ that these reversals and new interpretations were unrelated to the President's bold determination to reorganize the Judiciary. "We are told," a skeptical paragrapher noted, "that the Supreme Court's about-face was not due to outside clamor. It seems that the new building has a soundproof room, to which Justices may retire to change their minds."¹⁶⁰

Throughout Stone had watched developments with sober satisfaction, "enjoying the dismal comfort of realizing that ever since the latter part of the Taft Administration I have been warning the Court against the unrestrained exercise of its power, and now that the Brethren are seeing the error of their ways, I am not obliged to take anything back."¹⁶¹ For him the 1936 term was "perhaps one of the most exciting in the entire history of the Court."¹⁶² Still the slight record of production due to his long illness grieved him. "When I look at the thin volume which represents my judicial performance this term, I need comfort. Do you realize," he asked somewhat wistfully, "I haven't written a single dissenting opinion—which is the first of the kind in

154. Irving Brant to T. C. Corcoran, June 12, 1937.

155. JACKSON, *op. cit. supra* note 115, at 196.

156. F.D.R., *op. cit. supra* note 4, at lxvi.

157. *Ibid.*

158. *Id.* at lxix. See also Alfange, *The Supreme Court Battle in Retrospect*, 71 U.S.L. REV. 497, 501 (1937).

159. 2 PUSEY, *op. cit. supra* note 149, at 757.

160. Brubaker, *Of All Things*, *The New Yorker*, April 10, 1937, p. 34.

161. HFS to Children, April 29, 1937.

162. HFS to Sterling Carr, June 2, 1937.

some years?"¹⁶³ There were regrets, too, that the Justices should have become so deeply mired in politics. "What the Court needs just now is a period of quiet and obscurity but I am afraid we will get neither," he wrote his friend Backus.¹⁶⁴ Yet the receding political storm had left a subdued bench as a causeway to social advance, and not a few observers felt that Stone had played a significant role in achieving it. "Through all these momentous days" he had been, as Charles A. Beard said, June 5, 1937, "our pillar of fire in a murky night." "Seldom in all history," Beard's letter continues, "has a retribution, such as you forecast in your AAA opinion, come so swiftly upon men who have refused to recognize the first, primordial principle in government, that all human power has its limitations. Wise is the statesman, whether political or judicial, who can plot in advance the curve of those limitations."

The faith he had voiced in 1936 had now been vindicated. Judges could revise their habits of mind. Without change in personnel, the Court had made the Constitution function as a workable charter of government. But would the recent gains hold? Stone was not sure. "Let us hope," he commented as the term ended, "that when we get back to work next fall, the Court question will have subsided, and that the reformation that seems to have been accomplished proves to be a permanent one."¹⁶⁵

163. HFS to Felix Frankfurter, May 28, 1937.

164. HFS to G. H. Backus, October 13, 1937.

165. HFS to Felix Frankfurter, June 5, 1937.