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American public opinion relating to the Roosevelt court proposal of 1937

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AMERICAN PUBLIC OPINION RELATING TO THE ROOSEVELT COURT PROPOSAL OF 1937

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by

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INTRODUCTION

I. THE PROBLEM

Following his election to the office of President of the United States, in 1932, Franklin D. Roosevelt began his attempt to overcome the economic difficulties caused by the depression of 1929. His program for recovery included the enactment by Congress of many new pieces of legislation. A great amount of this legislation was ruled out by the Supreme Court as unconstitutional. Subsequently, the President on February 5, 1937, presented a proposal to alter the court system of the United States. This proposal brought forth a surge of public opinion throughout the nation. Sharp divisions of opinion occurred concerning the merits of the President's suggested reform.

The purpose of this study was to determine: (1) the reactions of the electorate to the proposal; (2) the reactions of the various agencies of public opinion; (3) whether these agency reactions were causes or effects of public feeling; (4) the importance of public opinion in such a matter.

II. METHODOLOGY

In making this study the investigator attempted to obtain the opinions of a cross section of magazines, newspapers and radio speeches which dealt with the issue of court reform. Magazines of various political, economic and social beliefs were consulted. Newspapers representing large chains as well as influential independent newspapers were surveyed. Efforts were made to determine what such special groups as business, the working classes, the Socialists, and the Communists said about the President's proposal. Polls of the people conducted by well known agencies were sought to determine to what extent the people reacted, and what these reactions were.

CHAPTER I

THE SUPREME COURT AND THE NEW DEAL

I. THE COURT'S HANDLING OF NEW DEAL LEGISLATION

From 1932 to 1936 Congress enacted a list of drastic and far reaching New Deal measures with a speed unprecedented in American history. Favorable sentiment prevailed in regard to this legislation, which was aimed at overcoming the economic ills caused by the depression.

As the vast program of reform got under way not much was heard about the Supreme Court, though some doubts were expressed concerning the constitutionality of various parts of the program. Enforcement of New Deal regulations was carried on largely by propaganda methods during the early months of 1933. Public opinion compelled the people to abide by the New Deal provisions. Scattered judicial decisions during 1932 and 1933 suggested that the courts had moved along with the prevailing sentiments. The Court upheld a Minnesota law severely limiting the rights of creditors and abandoned its hitherto rigid doctrine on the subject of price fixing in a New York milk case, in an attempt to meet what Justice Brandeis termed "an emergency more serious than war." Chief Justice Hughes held the acts constitutional, stating that "while emergency

does not create power, emergency may furnish the occasion for the exercise of power."

The New Dealers were optimistic over the outcome of the cases in Minnesota and New York, though such decisions were arrived at by a vote of five to four, the narrowest of possible margins.

As economic conditions gradually improved it became impossible to maintain indefinitely the emotional pitch which made possible the easy enforcement of the program. People began to wonder if all the activities of the government were necessary; and with this growth of doubt came a relaxation of the sentiment which made enforcement of New Deal legislation possible without resort to the courts. Once such cases began to reach the courts it spelled disaster for a great amount of New Deal legislation.

The cases involved in the petroleum litigation, the so-called "hot oil" cases, are remembered for the decisions with respect to a provision in the National Industrial Recovery Act giving certain powers to the President. The provision authorized the President to prohibit the transportation in interstate and foreign commerce of petroleum produced in excess of the amount permitted by any state law. The Court held as

unconstitutional the conferring of such legislative power upon the President. The damage done to the administration by this particular decision was easily curable by new legislation, but the step taken by the Court was an ominous forewarning of what was to come.

The next New Deal cases to be decided were the so-called gold clause cases. All gold and gold certificates had been ordered turned in to the United States Treasury. The government further provided that payments of gold in private and public contracts were contrary to public policy and unenforceable in the courts of the United States. For the purpose of reviving business, the President exercised powers given him by Congress to reduce the gold content of the dollar. This affected private and public contracts to the amount of several billion dollars. It was widely contended that persons who had to forego their right to gold, had property contracts which could not be destroyed by legislation. The question was argued in terms of morals as well as law. In rendering its decision, the Court decided in favor of the government, pointing out that the Congress had acted within its powers and that private contracts could not be enforced insofar as they were inconsistent with that policy. However, the Court did find the repudiation of gold-clause contracts in United States bonds

illegal, which finding gave Chief Justice Hughes an opportunity to scold the administration for its conduct.

Though the government had won a technical victory in the gold-clause cases, administration leaders deemed it necessary to bring about the enactment of legislation to cut off additional suits in the near future.

On May 27, 1935 the case known as the Schechter case was decided. Speaking for a unanimous Court, Chief Justice Hughes held that the third section of the National Recovery Act was unconstitutional because of the sweeping delegation of legislative power. Hughes believed that Section Three provided no standards for any trade, industry, or activity. Instead of prescribing rules, the Chief Justice felt it authorized the making of codes to prescribe them, which authorization was deemed unconstitutional. Justice Cardozo, the only dissenting member of the Court in the "hot oil" cases, felt that such a delegation of government by means of codes of fair competition, was delegation of power running riot. Such powers the government, in Cardozo's opinion, could not transfer. The devestating result of the Schechter decision was that the basis of control under the National Recovery Act, the codes of competition, could no longer remain in effect.

The New Deal continued to suffer at the hands of the Supreme Court during the term beginning in October,

1935. In the case of Butler versus the United States, the processing-tax provisions of the Agricultural Adjustment Act, on which a major portion of the farm program was based, were held unconstitutional by a vote of six to three. Justice Roberts, speaking for the Court, stated that the processing tax involved the expropriation of money from one group for the benefit of another, which Roberts termed unconstitutional.

Another important decision by the Court turned on the constitutionality of the Bituminous Coal Conservation Act of 1935, a statute providing for the control of working conditions in the mining industry and for the fixing of prices for the sale of coal. The Congress had passed the bill despite doubts as to its constitutionality. The Supreme Court dividing on different points within the measure, by votes of six to three and five to four, held the act unconstitutional. The majority opinion, written by Justice Sutherland, reflected throughout a narrow conception of the powers of the federal government. He stated that the Court had never accepted the notion that Congress, apart from the powers delegated by the Constitution, could enact laws to promote the general welfare. The excise tax, which the Bituminous Coal Act levied in alleged accordance with the commerce power, was ruled out

by the Court, because the judiciary felt that mining workers could not be taxed under the provisions of interstate commerce laws.

Other federal statutes suffered a similar fate at the hands of the Court. The Municipal Bankruptcy Act of 1934 was declared invalid by a five to four vote. An adverse decision having to do with the establishment of minimum wages for women, although it concerned a state statute, was regarded also as a New Deal defeat. The Court held that Congress had no power to prescribe minimum wages for women in the District of Columbia. This reasoning stood in the way of any new federal legislation that might attempt to eliminate the evil of substandard wages.

The administration achieved only one important victory during the Supreme Court term being discussed. With only Justice McReynolds dissenting, the Court upheld the constitutional power of the federal government to dispose of electric power generated at Wilson Dam in the Tennessee Valley. Chief Justice Hughes, in connection with this case, emphasized the power of the government to improve the navigability of streams as an incident to the regulation of commerce.

Thus, the Court ruled against the questions concerning New Deal legislation in all cases save the gold-clause

act and the Tennessee Valley case. By these adverse rulings, which not only outlawed administration reforms previously in practice, but curtailed any further attempt by the government to legislate along the same lines, the New Deal was seriously hampered. According to Swisher, public opinion made resort to the courts necessary, for when public opinion no longer demanded strict adherence to the New Deal, its provisions were taken to the courts. Commenting further in the book, American Constitutional Development, Swisher states that the decision rendered in the Tennessee Valley case left the administration embarrassed, for it tended to prove that the Court had not set out maliciously to batter every major feature of the New Deal program. The Court by this action suggested that if the legislation in question were brought within the constitutional limits it would be approved.[1]

II. THE PRESIDENT'S REACTION TO THE COURT'S ACTIONS

On May 31, 1935, President Roosevelt expressed his reactions to the Supreme Court decisions which had struck at his program. Speaking to a press conference, Roosevelt commented on the letters he had received from various

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[1] Carl B. Swisher, American Constitutional Development, (New York: Houghton Mifflin Company, 1943) pp. 920-938.

citizens urging him to do something to control the Court. Faith was expressed by the people in their government, Mr. Roosevelt stated.

Referring to the Schechter case, the President exclaimed that the implications of the decision were much more important than almost any decision in his lifetime, if not any decision since the Dred Scott case. He denied resenting the Court decision, he rather deplored it. It was pointed out to the press that the Court had declared the National Recovery Act unconstitutional because no definite language was used in regard to the powers bestowed. Further, Roosevelt stated that he could remember much legislation passed during the First World War which, in his opinion, was more violative of the Constitution than any legislation passed since 1933.

Concerning the definition of interstate commerce, the President alleged that since 1885 the Court had consistently enlarged on the definition of interstate commerce to include railroad cases, coal cases and so forth. The President took exception to the adverse decision handed down in the Bituminous Coal Act, which decision said the interstate commerce clause could not be applied to the mining industry. It was his contention that the interstate commerce clause should have been viewed in the light

of present-day civilization. The implication here made by the President, was that the Court had by its strict interpretation of the clause, failed to progress in its findings to meet the country's needs. Since 1787, the New Deal leader pointed out, "because of the improvement in transportation, because of the fact that, as we know what happens in one State has a good deal of influence on the people in another State, we have developed an entirely different philosophy," of which the Supreme Court, according to Roosevelt, had not taken cognizance. Queried Mr. Roosevelt, "Does this decision mean that the United States Government has no control over any national economic problem?" He asserted that if the federal government were to completely abandon crop control, thus allowing each and every farmer to grow and raise anything he wanted, the growers would soon be growing five-cent cotton.

Regarding manufacturing, the President affirmed that the government had intended to protect the small owner against nationwide concerns. However, with the advent of the Court rulings on New Deal legislation, Roosevelt predicted many bankruptcies would ensue. The theory that business should be allowed to do as it wanted, which was the Chief Executive's appraisal of the Court's thinking, was impossible to support in the President's opinion.

It was asserted that the nation had to decide whether or not the federal government was to assume the powers all other national governments had, in regard to laws having a bearing on, and general control over, national economic and social problems. To the President, this was the biggest question that had ever come before the country outside of war. "We are the only nation in the world that has not solved the problem of control," Roosevelt asserted, "as we have been relegated to the horse-and-buggy definition of interstate commerce." Roosevelt promised further action on his part in regard to the Court's decisions, though he stated he did not know what course he would pursue.[2]

In a later conference Roosevelt affirmed his intention of continuing the National Recovery Act by other means than the Court had ruled against.[3]

III. THE PROPOSED BILL

The President's action on the court issue took the form of a bill introduced in the Senate by Mr. Amhurst. The reasons for presenting the bill are embodied in the

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[2] The Public Addresses and Papers of Franklin D. Roosevelt, (New York: Random House, Inc., 1938), Vol. IV, pp. 200-22.

[3] Ibid., p. 228.

President's addresses on February 5th and March 9th, presented in Chapter II.[4]

The bill provided for the retirement of any judge of a court of the United States after he had reached the age of seventy and had held a commission for ten years in the courts. If the judge failed to resign, the proposal allowed for the addition of another member to the court. However, as the document was presented, it stated that no more than fifteen judges could occupy seats on the Supreme Court bench, nor could any lower court receive appointments more than doubling the number existing at the time of the proposal. This provision therefore did not force the retirement of justices in any case, it merely stated that where judges over seventy with ten years service opposed retirement, an addition was to be made. Such a provision can be viewed two different ways. One might argue that the President was merely trying to facilitate the work of the courts, in making such an addition. On the other hand, it would be possible to assume that such a proposal was an attempt to force the retirement of judges who opposed the New Deal.

A second point of controversy concerning the

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[4] Cf. post, pp. 15-23.

proposal was the provision creating the power of the Chief Justice to appoint a justice to any district desirous of gaining additional help. One could argue that such help would alleviate the crowded dockets with which the courts found themselves confronted. However, exception could be taken to this provision on the point that it would be illogical to appoint justices to handle cases outside the district to which they were originally appointed.

A third major point in the bill concerned the creation of a proctor, who would publish information as to the volume and status of litigation in the district courts; recommend methods to the Chief Justice by which litigation could be handled more quickly; and investigate the needs of assigning district and circuit judges to courts in need of them. One who opposed the assignment of extra judges, would naturally disagree with the provision creating a proctor.[5]

The brief summary of the Court's handling of New Deal legislation presents evidence that the Court did not consider the emergency of the country sufficient

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5 "Senate Adverse Report Number 711," Reorganization of the Federal Judiciary, (75th Congress, 1st Session), pp. 31-3.

reason to allow legislation allegedly in violation of the Constitution. The arguments of the Court were allegedly based upon proper interpretation of the Constitution, which its defenders held to be the proper function of the judiciary.

Clearly then, one of the two had to give way. Either the President and Congress had to prepare legislation acceptable to the Court or curb the Court's powers to destroy such legislation as the President deemed necessary. The only other possibility would be a change in policy by the Court. There is little doubt that the chief purpose of Roosevelt's court proposal was to promote such a change.

CHAPTER II

THE THREE BRANCHES OF GOVERNMENT ADJUDGE THE PROPOSAL

Each of the three branches of the government was involved in the Court proposal. The President, who had initiated the proposal; the Supreme Court, which was to be altered by the measure; and the legislature, which was to decide the fate of the President's bill, were all vitally interested.

The President's views concerning the Court proposal were best embodied in his message to Congress on February 5th and his address to the nation on March 9th.

Though Supreme Court judges are traditionally loathe to comment on legislation pending in Congress, Chief Justice Hughes addressed a letter to Senator Burton K. Wheeler of Montana, which contained a defense of the Court's actions.

A brief summary of the various views presented in Congress, has been presented to show the attitudes prevailing in the legislature. In addition, the Report of the Senate Judiciary Committee, to whom the bill was referred for consideration, has been placed herein, since it was the climax of the long struggle over the bill which ensued in Congress.

I. THE CHIEF EXECUTIVE'S VIEWS

President Roosevelt firmly believed that there was need for a comprehensive program to reorganize the judicial branch of the government, in order that it might function in accord with modern necessities.

In his messageof February 5th, 1937, to the Congress of the United States, the President stated that the Constitution was the basis for his recommendation. Mr. Roosevelt stated that the Constitution provides that the President "shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient."[1]

The President further impressed on the legislature the fact that the Constitution vests in the Congress direct responsibility to maintain the effective functioning of the judiciary. Mr. Roosevelt pointed out that in almost every decade since 1789 changes have been made by the Congress, whereby the number of judges and the duties of judges in Federal courts have been altered in order that new problems could be met. In the President's mind the growing number of citizens who complained of the complexities,

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[1] Ibid., pp. 25-28.

the delays and the expense of litigation seemed to be sufficient cause for changing the court system.

Congress' attention was called to many facts which the President considered sufficient to warrant a court bill. A letter from the Attorney General was submitted, which alleged that the Federal dockets were overcrowded.

Delay in any court results in injustice, and the Chief Executive proposed that the processes of law should be speeded up, so that the impression of courts as "a haven for the well-to-do would not arise." Justices must be added to both the lower and higher Federal courts, Roosevelt stated, in order to remedy the situation.

The argument that the age and infirmity of judges impedes progress was advanced as further reason for change. The message pointed to the fact that modern complexities called for a constant infusion of new blood in the courts, by reason of the fact that a lowered mental or physical vigor leads men to avoid examination of complicated and changed conditions. Older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.

The President averred that if judges of an elderly age were aided by younger men it would facilitate procedure,

and in the cases of impaired capacity among the aged court members, such addition would indeed be indispensable.

It was felt that some automatic procedure should be adopted whereby the work of older judges would be accelerated and supplemented. Mention was made of the congestion in the lower courts and the suggested solution was the appointment of a proctor, who would be charged with the duty of watching the calendars and business of all the Federal courts. The Chief Justice, under such a plan, would be authorized to make a temporary assignment of any circuit or district judge to serve in the congested courts.

In regard to the question of constitutionality, Roosevelt could perceive no conflict. He commented that such a proposal did not in any form suggest compulsory retirement of incumbent judges. It would, in his mind, merely allow men of eminence and great ability whose services the government would be loathe to lose, to continue their duties under less physical and mental strain. The President expressed complete approval of the proposal then pending which would extend to the Justices of the Supreme Court the same retirement privileges available to other Federal judges.

The President made mention of a "welter of uncomposed differences of judicial opinion," which in his mind

had brought the courts dangerously near to disrepute. Cited was the example of a Federal statute held legal by one judge in one district and held simultaneously illegal by another judge in another district. Thus rights fully accorded to one group of citizens might be denied others, which situation, said Roosevelt, allows for long periods of uncertainty and embarrassment.

Finally it was argued that the processes of government are interrupted by injunctions issued sometimes without notice to the government, and not infrequently in violation of the principle that injunctions should be granted only in those rare cases of manifest illegality and irreparable damage against which the ordinary course of the law offers no protection.

Further, Roosevelt expressed the belief that the judiciary, by postponing the effective date of acts of the Congress, was assuming an additional function and coming more and more to constitute a scattered, loosely organized, and slowly operating third house of the National Legislature.

Two recommendations were made in an attempt to strengthen the administration of justice and to make it a more effective servant of the public need. First, no decision, injunction, judgment or decree on any constitutional question should be promulgated by any Federal court

without previous notice to the Attorney General and an opportunity for the United States to present evidence and be heard; second, that in cases where courts of the first instance determine questions of constitutionality, the Congress should provide that there shall be a direct and immediate appeal to the Supreme Court and that such cases shall take precedence over all other matters pending in that court.

On March 9th, 1937, President Roosevelt delivered his first radio address during his second term.[2] Recounted were the steps toward recovery taken during his first four years, which program the Chief Executive justified in view of its success. Citing the instance when the nation was asked to turn over all of its privately held gold to the government, Roosevelt pointed to the great harm the courts could inflict. This measure, upheld by only a five to four vote could have easily been held unconstitutional, and thereby the nation would have been thrown back into helpless chaos. He expressed dissatisfaction with the courts which "have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions."

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[2] Ibid., pp. 41-45.

In connection with this, he referred to his speech of March 4th, in which the American form of government was described as a three-horse team provided by the Constitution to the American people, so that "their field might be plowed." Answering those who intimated that the President was trying to control the entire government himself, Roosevelt said, "They overlook the simple fact that the President, as Chief Executive, is himself one of the three horses."

Further attack was made on the Supreme Court for failing to give statutes the benefit of all reasonable doubt. To support this accusation, the President quoted Justices of the Supreme Court, particularly Hughes' statement in the Railroad Retirement Act that the Court had placed "an unwarranted limitation upon the commerce clause," and Justice Stone's opinion that the decision in the Agricultural Adjustment Act was"a tortured construction of the Constitution."

The President declared that, in reality, the Court had set itself up as a third house of the Congress, reading into the Constitution words and implications which are not there, and which were never intended to be there. The purpose of the reform, as set forth in this address, was to save the Constitution from the Court and the Court from itself, and give the United States a government of laws and not of men.

Reference was made to the statement in the preceding year's Democratic platform that "If these problems cannot be effectively solved within the Constitution, we shall seek clarifying amendment as will assure the power to enact those laws, adequate to regulate commerce, protect public health and safety, and safeguard economic security." This was interpreted to mean that an amendment would be sought only if every other possible means of legislation were to fail, for the mandate was clearly given by the people.

Roosevelt concluded that the only means of carrying out such reform was to infuse the court with new blood by retiring the judges at the age of seventy years. He pointed out that in forty-five of the forty-eight states, justices are chosen for a period of years, not for life.

Retirement at age seventy was proposed because the laws of many states, the practice of the civil service, the regulations of the Army and Navy, and the rules of many universities and private business enterprises commonly fix the retirement age at seventy years or less.

In answer to those who cried that Roosevelt was seeking to "pack" the Court, he replied:

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

It was asserted that the purpose was rather to appoint justices who understood modern conditions and who would not undertake to override the judgment of the Congress on legislative policy. Referring to the question of precedent, Roosevelt stated that if such a law as he proposed did establish a new precedent, it would be a most desirable one.

Roosevelt further noted that up to his first term practically every President of the United States had appointed at least one member of the Supreme Court. This succession of appointments should have provided a court well balanced as to age. Actually, five of the justices would be over seventy-five years of age before June, 1938 and one over seventy years, which fact prompted the President to offer his solution assuring against any such ill-balanced Court in the future.

The hope was expressed that the difficult process of constitutional amendment would be rendered unnecessary by the proposed legislation. The amendment process was looked upon with disfavor not only because of the long time necessarily involved in such a proceeding, but because of the difficulty of agreement on the kind of amendment as well.

In answer to those who opposed the Court plan on the ground that they favored a constitutional amendment, Roosevelt replied:

Two groups oppose my plan on the ground that they favor a constitutional amendment. The first includes those who fundamentally object to social and economic legislation along modern lines. This is the same group who during the campaign last fall tried to block the mandate of the people.

To them I say: I do not think you will be able long to fool the American people as to your purposes.

The other group is composed of those who honestly believe the amendment process is the best and who would be willing to support a reasonable amendment if they could agree on one.

To them I say: We cannot rely on an amendment as the immediate or only answer to our present difficulties. When the time comes for action, you will find that many of those who pretend to support you will sabotage any constructive amendment which is proposed. Look at these strange bedfellows of yours. When before have you found them really at your side in your fights for progress?

The President pointed to his record as Governor and Chief Executive as proof of his devotion to civil liberties, in answer to those who shouted that his proposal would infringe on their rights.

In summary, the message stated that the purpose of the proposed reform was to restore the balance between the three great branches of the Federal government and thereby make American democracy succeed.

II. THE COURT'S DEFENSE

Typical of the attitude of the Supreme Court members was the statement of Justice McReynolds, made at an annual

banquet of his fraternity. In the course of an extemporaneous speech he referred to attorneys who complain of the Court's unfairness when they lose a case.

> The evidence of good sportsmanship is that a man who has had a fair chance to present a fair case to a fair tribunal must be a good sport and accept the outcome. Courts decide only things that are submitted to them, and only things that are in dispute come before them. Thousands and thousands of things that come before them are settled to the general satisfaction of all. If things come out that are not settled to the general satisfaction of all, put yourself in theplace of the Court and see if you could have done better.[3]

Chief Justice Hughes' opinion was expressed in a letter addressed to Senator Burton K. Wheeler of Montana, on March 21st, 1937.[4]

In answer to Wheeler's inquiries, Hughes presented seven points in defense of the work of the Supreme Court.

1. The Supreme Court was alleged to be fully abreast of its work. On March 15th, the Court heard argument in cases in which certiorari had been granted only four weeks before. During the October term of 1936, argument was heard on the merits in 150 cases, and the remaining twenty-eight and such others as might come up would be heard before adjournment.

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[3] "Big Debate," Time, 29:14-15, March 29th, 1937.

[4] Reorganization of the Federal Judiciary, op. cit., pp. 38-40.

2. Statistics were presented which showed that during the term of 1935, 990 out of a possible 1,092 cases were disposed of, leaving only 102 cases on the dockets at the close of the session.

3. Reference was made to the statute relating to the Court's appellate jurisdiction, enacted on February 13th, 1925. The statute provided that where the appeal purports to lie as a matter of right, the rules of the Supreme Court require the appellant to submit a jurisdictional statement showing that the case falls within that class of appeals and that a substantial question is involved. As a result, many appeals considered frivolous by the Court are dismissed.

4. In order to allow the Supreme Court to perform its proper function, the Congress had been forced to adopt the act of 1925, limiting the Court's jurisdiction. Hughes stated that no single court of last resort, whatever the number of judges, could dispose of all the cases which arise in this vast country, for hosts of litigants will take appeals so long as there is a tribunal accessible.

5. A review on writ of certiorari[5] is not a matter

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[5] Certiorari comes from the Latin certiorari volumnus, meaning "we wish to be certified." It refers to a writ issuing out of a superior court, to call up the records of an inferior court in order that more speedy justice may be effected.

of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. Petitions for certiorari are granted if four justices think they should be, and frequently a strong opinion on the part of two or three of the judges is sufficient to grant petition.

6. The Court is adequately accomplishing its work of passing upon the applications for certiorari. About sixty percent of the applications for certiorari are wholly without merit, about twenty percent fail to survive critical examination, while the remaining twenty percent show substantial grounds and are granted. These facts, the members of the Court felt, showed applications were dealt with liberally.

7. Hughes concluded that an increase in the number of justices would not promote the efficiency of the Court. This would involve more conferring, and the plan of hearing cases in divisions was regarded as equally impractical, because of the fact that it would be unsatisfactory if important cases were heard by only a portion of the Court.

Hughes also called attention to the provisions of Article III, Section I, of the Constitution, which states that the judicial power of the United States shall be

vested in "one Supreme Court." From this he concluded that the Constitution 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.

The Chief Justice stated that he had not been able to consult with all the members of the Court on his statements, but Justice Van Devanter and Justice Brandeis had concurred.

III. CONGRESSIONAL VIEWS ON THE PROPOSED REFORM

During the period of the court struggle, the members of Congress readily made their views on the issue known. Debates in Congress, radio addresses and open forums frequently dealt with the subject. A brief summary of congressional views has been presented, therefore, in order to ascertain the reasons why the members of the legislature favored or opposed the bill.

Senator William G. McAdoo of California announced his approval of the bill, stating that the judicial organization the President had in mind was merely a part of the necessary enlargement that had to take place to meet the needs of the country. McAdoo felt that unless some reorganization of the judiciary was effected, the entire force of the New Deal would be curtailed. Congress has

a duty to provide the needed number of judges to handle the situation, added the Senator, for the Constitution instructs them to do so.

Asserting that the law's delay was causing frightful injustices day by day, McAdoo listed examples of allegedly needless time delays. For example, the Senator commented, if a merchant seeks from the government a refund of taxes unjustly imposed and meets with undue delay, he is being unjustly treated. It was pointed out that the merchant's solvency might depend on a prompt decision.

No one can contend that such a reasonable increase is not justified, commented McAdoo, in view of the congestion on the dockets. He further averred that nine was not a sacred number and the size of the Court had been changed many times before.[6]

The Honorable Lewis B. Schwellenbach of Washington agreed with the President's purpose in seeking judicial reform. Schwellenbach averred that such reform was necessary in order to cure the evils which the courts had caused. The Congressman stated, "The President has been made aware of this need by the harmful decisions of the Supreme Court." Justices Holmes, Day, Moody, Fuller and Taft have denounced

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[6] Congressional Record, "5th Congress, 1st Session," 81:253.

their colleagues for using a veto power. The present Supreme Court, Schwellenbach observed, acts in such a way as to cause a judicial oligarchy. Four men should not be able to negate the will of the people. As for amendment, the Senator stated that it would take too long. The trouble, in Schwellenbach's opinion, was not with the Constitution, but with the Court.[7]

Representative Izac of California said that the results of the election in November of 1936 clearly showed that the people had favored the New Deal program. It had, Izac stated, helped the nation to overcome the depression. To reform the Court which has stood in the way of desired legislation, Izac added, should therefore not be regarded as an evil. In answer to those who shouted that the President was a dictator, it was pointed out that Jefferson and Jackson had sought court reform and were not regarded as dictators. Izac could detect nothing unconstitutional in the proposal, he rather accused the Court of acting in an unconstitutional manner. While he believed in the system of checks and balances, Izac contended that the Court should not have the sole check. It was predicted that the Senate would pass the bill.

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[7] Ibid., p. 436.

[8] Ibid., p. 890.

Representative Bernerd of New Jersey claimed that thousands of people throughout the nation were clamoring for court reform. The issue to Bernerd, revolved around the question of whether the people or the Court should control the country. The Court, it was pointed out, had obstructed the things which the people had voted for in the 1936 campaign. That the Court upheld the Wagner Act, Bernerd noted, should not be regarded as a show of its liberal tendencies. He regarded this decision as a trick of the judiciary to fool the people and lull them into a sense of false security. Thus, it was argued that President Roosevelt's proposal was the only answer.[9]

Representative Peter DeMuth of Pennsylvania observed that the Court had flaunted its power for two years and the time had come when it had to be curbed. It was asserted that Presidents Jefferson, Washington, Madison, Lincoln, Grant and Roosevelt had met the same problem during their administrations. DeMuth contended that such a proposal was clearly within the constitution, which specified that Congress should have the power to regulate the number of justices on the Supreme Court.[10]

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[9] Ibid., p. 905.

[10] Ibid., p. 373.

Representative Eberharter of Pennsylvania contended that new problems in the country made judicial change necessary. The present number of justices could not handle the tremendous volume of cases presented to the Supreme Court, Eberharter alleged. Further, he pointed out that the Court had not upheld human rights in ruling against the Minimum Wage law. The Representative said that the executive, legislative and judicial branches were intended to be equal, and the Court should therefore be restricted.

It was further argued that the justices who were over seventy years of age could not perform their duties capably. Eberharter queried, "Who rules the country, the Court or the people?"[11]

Turning to the opposition, Representative Celler of New York declared that two issues were involved in the court proposal: first, "Should the Constitution be amended in order to increase or extend the Federal power?"; and second, "Do we wish to avoid extending or increasing the Federal Government's powers?"

Celler averred that to amend the Constitution in order to strike at the judiciary would be a telling blow at fundamental rights. It would make every American subject

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[11] Ibid., p. 653.

to every phrase of law enacted by Congress. Further, stated the Congressman, legislative supremacy might be feasible in in England where there is a homogenous population and Parliament is governed by tradition, but in the United States it would be impossible. Celler stated that an independent judiciary must be maintained in order to assure the people's rights.[12]

Representative Burdick of Massachusetts stated that the gist of the whole thing lay in the fact that the President had a scheme to get his whole New Deal through without trouble or interference. Burdick averred that it was unconstitutional for the executive branch of the government to infringe on the rights of the judiciary. It was noted that the President had protested because the Agricultural Adjustment Act was declare unconstitutional. Yet, alleged the Representative, the Agricultural Adjustment Act did not help the small farmer or the renter. The whole agricultural program of the President was allegedly based on forced scarcity. In effect, Burdick stated, the President has forced the farmers to sign a contract which attempted to prevent the production of normal crops. The Court's rulings, declared Burdick, have been perfectly constitutional.[13]

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[12] Ibid., p. 1123.

[13] Ibid., p. 963.

Senator Joseph O'Mahoney of Wyoming stated that he had always been an advocate of the President's policies, but he was unable to agree with the Chief Executive on the question of court reform. O'Mahoney said that he had made a public address to the people of Wyoming, concerning his stand against court reform. The Wyoming Congressman averred that the President's bill was an utterly futile gesture, which could accomplish no sure reform. Referring to the age of the justices, O'Mahoney stated that their age did not render them incapable of performing their duty. The President's proposal was alleged to be the first instance, since Grant's regime, of enlarging the Court for political purposes.[14]

Senator David Walsh of Massachusetts stated that if there is one principle more fundamental than any other in the Constitution, it is that the three branches of the government should be equal and independent. If the President's bill were passed, observed Walsh, it would violate this principle. Wisely did the framers of the government, it was pointed out, provide for a Court to protect the people from the despotic advances of the central government.[15]

Representative Fred Van Nuys of Indiana stated that in accord with the idea of the President to make justice

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[14] Ibid., p. 1077.

[15] Ibid., p. 562.

more efficient, a devious measure had been introduced into the Congress of the United States. Van Nuys alleged that as far as he was concerned the Court was not congested. He said that the independence of the judiciary had to be maintained.[16]

Senator Tom Connally of Texas affirmed that during the last four years he had with two exceptions voted in favor of the President's policies. However, in such a matter as judicial reorganization, the Senator said he could not admit of partisan politics. As an impartial tribunal, the Court must be independent, Connally said. He pointed to the probability of some reactionary President using the bill to put Tory measures into practice. Such a possibility, observed Connally, should be enough reason to vote against such a proposal.[17]

The views of the majority in Congress are perhaps best summarized in the report of the Senate Judiciary Committee on June 14th, 1937. The recommendation that the bill not pass was based on the following primary reasons:

1. The bill does not accomplish any one of the objectives for which it was originally offered.

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[16] Ibid., p. 249.

[17] Ibid., p. 489.

2. It applies force to the judiciary and in its initial and ultimate effect would undermine the independence of the court.

3. It violates all precedents in the history of our government and would in itself be a dangerous precedent for the future.

4. The theory of the bill is in direct violation of the spirit of the American Constitution and its employment would permit alteration of the Constitution without the people's consent or approval; it undermines the protection our constitutional system gives to minorities and is subversive of the rights of individuals.

5. It tends to centralize the Federal district judiciary by the power of assigning judges from one district to another at will.

6. It tends to expand political control over the judicial department by adding to the powers of the legislative and executive departments respecting the judiciary.

The text of the report attacked the bill on several points.

It was remarked that the bill did not provide for any increase of personnel, unless judges of retirement age failed to resign or retire. Therefore, in the eyes of the Committee, the increase would be dependent upon the judges themselves and not upon the accumulation of litigation in any court. Further, since the facts indicated that the courts with the oldest judges presented the best records in the disposition of business, age could not be advanced as a reason for the appointment of new judges.

The appointment of a judge to the district of his residence and assignment in an altogether different jurisdiction, was regarded as a violation of the salutary American custom that all public officials should be citizens of the jurisdiction in which they serve or represent.

The Committee was of the belief that the litigants would gain no advantage from the measure, but rather a greater delay would result.

They further averred that there is no guarantee for a constant infusion of young blood, since the President would be at liberty to appoint a man aged sixty-nine years and eleven months, who would be eligible to serve for ten years. Nor is there any guarantee of infusion of new blood, the report added, for the provisions of the bill state that there shall be a maximum of fifteem judges on the Supreme Court. Therefore, if six Court members failed to resign, after reaching the retirement age and six additional men were appointed by the President, the Court would be at maximum capacity and those in office would be eligible to serve, regardless of age, for life.

Summarizing its attack, the Committee stated:

> It thus appears that the bill before us does not with certainty provide for increasing the personnel of the Federal judiciary, does not remedy the law's delay, does not serve the interest of the "poorer litigant" and does not provide for the "constant" or "persistent" infusion of new blood into the judiciary.

In answer to the question as to what the bill actually represented, and what effect it would have, the Committee presented a summary of their opinion which said:

> We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle.
>
> It was presented to the Congress in a most intricate form and for reasons that obscured its real purpose.
>
> It would not banish age from the bench nor abolish divided decisions.
>
> It would not affect the power of any court to hold laws unconstitutional nor withdraw from any judge the authority to issue injunctions.
>
> It would not reduce the expense of litigation nor speed the decision of cases.
>
> It is a proposal without precedent and without justification.
>
> It would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights.
>
> It contains the germ of a system of centralized administration of law that would enable an executive so minded to send his judges into every judicial district in the land to sit in judgment on controversies between the Government and the citizen.
>
> It points the way to the evasion of the Constitution and established the method whereby the people may be deprived of their right to pass upon all amendments of the fundamental law.
>
> It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy.

> Under the form of the Constitution it seeks to do that which is unconstitutional.
>
> Its ultimate operation would be to make this government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the government choose to say it is--an interpretation to be changed with each change of administration.
>
> It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.

Such was the majority opinion of the Senate Judiciary Committee which was approved by ten of the eighteen members. The eight members who did not sign this adverse report failed to express a minority opinion.

Senator Hatch, who signed the majority report, filed a separate brief statement in which he expressed his complete agreement with the committee recommendation, but further stated that it was his belief that the principal objections set forth in the report could be met by proper amendments. Said Hatch:

> Such a plan, intended to aid in the better administration of justice and to enable the courts to discharge their judicial function more efficiently, but so safeguarded that it cannot be used to change or control judicial opinions, is within both the spirit and letter of the Constitution.[18]

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[18] Reorganization of the Federal Judiciary, Op. cit., pp. 3-23.

Summing up the congressional debates, those who favored the plan regarded the President as the champion of a great cause, and pledged themselves to support the Chief Executive in his attempt to curb the judiciary. By this faction, the proposal was regarded as a valid measure entirely within the provisions of the Constitution. The President's record seemed sufficient assurance to many that there was no dictatorial intent in the proposal.

On the other hand, those Congressmen who opposed the issue were suspicious of the President's purposes. A frequent argument advanced against the proposal was that it would break the spirit of the Constitution and make the judiciary subservient to the executive and legislative branches of the government. Still another faction advocated the only allegedly legal way of changing the courts, by amendment to the Constitution. The report of the Senate Judiciary Committee best summarized the reasons for disapproval of the plan.

A last point of interest to be noted is the fact that party lines were broken in the court struggle. Many who had consistently supported the President since his election in 1932, opposed the reorganization bill.

CHAPTER III

THE PERIODICALS EXPRESS OPINION ON THE COURT ISSUE

Before the Court controversy had ended, there were few periodicals commenting without bias. Frequently, pages devoted to presentation of readers' views dealt entirely with this single issue. During the height of the dispute, the magazine Vital Speeches devoted three-fourths of a month's issue to what many felt was the greatest domestic issue that had confronted the nation since the Civil War period.

The purpose of this chapter is to present a survey of the periodicals which opined on the court issue. Why the periodicals approved or disapproved and whether their policy was a cause or effect of public opinion is of special interest. The presentation has been based on a division of viewpoint as to attitude toward the proposed reform.

I. OPINION FAVORING THE COURT PLAN

One of the most energetic supporters of the President's program was Nation magazine. Throughout its 1937 issues, emphatic approval of the plan appeared frequently.

Commenting on February 20th, 1937, Nation asserted that the mob hysteria of the Roosevelt plan surpassed even

the memorable hysteria of Mark Sullivan during the preceding campaign. Lining up the enemies of the proposal, it was noted that the conservatives of the country had been quick to take advantage of the chance to renew their attacks on the New Deal administration. Such factions as the Liberty Leaguers, the public utility barons, the hirers of spies, the big industrialists and those who run the large newspaper chains drew condemnation from this publication.

Nation noted with some misgiving the fact that many liberals were opposing the President's proposal. On the radical extreme there was the argument that the proposal did not go far enough and did not really remove the obstruction of judicial power. Nation pointed out that such an "all or nothing" position played into the hands of the Tories. It was suggested that such liberals would do well to tie in their support with the President before all was lost.

As for the liberals who felt that the President's proposal went too far in an assault on the judiciary by seeking to attack judicial independence, insult the justices' age and "pack" the Court, Nation answered that, "Most of these notions are based on a wrong notion, which is utterly untrue, that the President is adopting an unconstitutional method."

Here it is apparent that Nation was attempting to bring the opposition liberals into line. Nation reasoned that the Roosevelt cause was the liberal cause, and therefore it was to the better interest of all liberals to cast away their allegedly insignificant protests and support the President.

One of the charges hurled against the plan, the publication noted, was that it was a step toward fascism. In answering this charge, the magazine asserted that the people's will had been thwarted by the Court during the years of 1935 and 1936. To Nation, the real philosophy of fascism was the philosophy breathed through the opinions of Justices McReynolds and Roberts.[1] Such an opinion, of course, depended upon whether or not one viewed the Court's decisions as justifiable and in keeping with the purposes of the judicial branch of the government.

Heywood Broun, writing in Nation, called upon the members of the Supreme Court to testify. Stating that the Supreme Court had adopted a decidedly "horse-and-buggy" attitude toward publicity, Broun declared that in legal matters they should have no private life at all. The writer recounted how, during the early part of 1937, correspondents had undertaken to seek the justices' viewpoints. But, Broun, in com-

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1 "The Court and Fascism," Nation, 144:200-1, February 20th, 1937.

menting upon their failure to get beyond secretaries and office boys before being excluded by the Court's private police, said that if Justice McReynolds, admittedly not the most liberal of the group, could voice his opinions to members of his fraternity, then the entire country had a right to hear his views.[2]

Speaking before the Lawyers' Guild in Washington, D.C., Broun endorsed the President's plan, even though he doubted whether it solved the fundamental issues. The writer expressed the belief that the President would win, if only because such people as Bishop Manning and A. Lawrence Lowell supported the Court. Once again an appeal was made to the opposing liberals, who in Broun's estimation wouldddecide the outcome of the issue.

Repudiating those who preferred amendment, Broun disclosed the results of his conversations with newspapermen. In answer to the query, "What chance will an amendment have if the President's proposals are licked?", he stated that without a dissenting vote, everybody answered, "If Roosevelt is licked in this fight, or if he is forced to compromise deeply, any man in politics who has an amendment can take it up an alley and whistle."

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[2] Heywood Broun, "Expert Testimony," Nation, 144:353, March 27th, 1937.

Unless one's sentiments lay with those who would maintain the status quo, the address advised people to vote for Roosevelt, whether they believed his proposal went too far or not far enough.[3] With such arguments, Broun evidently hoped to win over those people who were opposed to the proposition on some minor point, as well as those who preferred the amendment process. In an interview granted to Arthur Krock, Roosevelt stated he did not wish to leave the country in the same state as Lincoln left it to Buchanan.[4] This was cause for another appeal, in Nation, to the liberals to give their support.

New Republic magazine was equally convinced of the plan's justification. In taking their stand the editors stated that in their opinion neither the President nor any one else had marked enthusiasm for the device under consideration. It was pointed out in a news summary that newspapers opposed to the President's plan for reconstruction of the Supreme Court had continued to give the impression, by every means possible, that there was a rising tide of protests against the plan, a tide that was almost unanimous throughout the country. New Republic cautioned such readers to note

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[3] Heywood Broun, "Those Liberals Again," Nation, 144:269-70, March 6th, 1937.

[4] "Is It to Be Buchanan?", Nation, 144:255, March 6th, 1937.

that a statewise election in Michigan during the week of April 14th, 1937, had given the Democrats six victories and the Republicans three, with five of the Democratic winners taking places formerly occupied by Republicans, and secondly the article called attention to the Texas victory of a Roosevelt supporter in the Court fight, over his Democratic opponent who was not backing the reform.[5]

The renowned political authority, Harold Laski, commented that the exact constitutional significance of the far reaching proposal made by the President was difficult to judge. Laski noted, however, that some means short of the cumbrous process of amendment should be sought to save the New Deal. In Laski's opinion, the Court had for the past thirty years substituted its own views for dominant opinion.[6]

The editors of New Republic compared the Supreme Court proposal to an incident which occurred some years previous at a Washington reception. A Supreme Court justice on being introduced to a young law dean, said, "I understand at your law school you teach the young men that the Court doesn't know the law," to which the dean replied,

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[5] "The Week," New Republic, 90:306, April 21st, 1937.

[6] Harold Laski, "Englishman Looks at the Court," New Republic, 90:104-5, March 3rd, 1937.

"Oh, no, we let them find out that for themselves." In New Republic's judgment, the whole country was beginning to find out what the experts had long known.[7]

The column "Washington Notes," while not in full agreement with the President, was devoted to arousing public opinion in his favor. Stating that many New Dealers regarded the offering of aid to the justices with dismay, it was observed that the typical administration backer had dug in for a great constitutional "tug of war," and the suave and beguiling message given by the President left them fully armed with no chance to fight. The commentator felt that many of the President's supporters regarded his message as unworthy of the New Deal's high objectives.

Conceding that such criticism was justifiable on moral grounds, the liberal New Republic upheld the political realism of the President's proposal. Continuing, the news analysis commented that the straightforward way of accomplishing the desired end would be through a constitutional amendment, but doubt of ratification disqualified this means. In further defense, it was pointed out that Mr. Roosevelt, being responsible for the day by day carrying on of the government, was probably somewhat justified in carrying out

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[7] "Experts on the Court," New Republic, 90:226, March 31st, 1937.

his plan of avoiding quixotic fights wherever possible. A survey in the New England, Southern and Rocky Mountain States evidenced the difficulty of an amendment's passage.[8]

In a later article this same column agreed with the accusation made by opponents that Roosevelt's failure to place the issue before the voters violated the people's rights. However, it was asserted, those conservatives who accuse the President of being a rabble rouser might reflect what a real demagogue like Huey Long might have done in Roosevelt's case. Since the several justices were well-to-do and had wealthy relatives, Long would have been quick to attack their corporate connections and business dealings.[9]

The authors added that the situation did not admit of any compromise, though one might have been morally justified.[10]

An interesting opinion concerning the Court fight was expressed by Leon Green, Northwestern University law dean. Green felt the matter was a political issue, and this fact, he asserted, was a virtue, not a fault. To

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8 "Washington Notes," New Republic, 90:44, February 17th, 1937.

9 "Washington Notes," New Republic, 90:137, March 10th, 1937.

10 "Washington Notes," New Republic, 91:305, July 21st, 1937.

him, the President's proposal was a means of giving the federal judiciary the opportunity to develop into the great flexible court system that the country needed.[11]

New Republic therefore, while not wholly in favor of the President's proposal, was convinced of the necessity of court reform, and put forth its efforts to influence the magazine's readers.

Commonweal, the Catholic periodical, declared its belief that the President would accomplish a much needed reform with his bill. The Catholic periodical visualized the Supreme Court members as a small group of men standing in the way of legislation intended to improve the people's conditions.[12]

In appreciation of their firm stand, the editors received commendation from Senators Wagner, Pope, Ashurst, Logan, Hatch, Minton and others, who in effect stated that Commonweal's editorials were the most clarifying and fair discussions they had seen.

However, the editors disclosed a stoppage of

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[11] Leon Green, "Unpacking the Court," New Republic 90:67-8, February 24th, 1937.

[12] "Revivifying the Supreme Court," Commonweal, 25:593-4, March 26th, 1937.

subscriptions by many of their readers who strongly opposed the periodical's policy.[13] Nevertheless, Commonweal persisted throughout the entire fight to maintain its policy of agreement with the President.

A lively discussion on the subject was contained in the April 30th issue of this magazine. Andrew Burke defended the Supreme Court[14] while Joseph O'Meara said that the Court had not upheld its functions in recent years.[15]

John Crabites, writing in Commonweal, presented an interesting discussion. Stating that his mind was aghast at the thought of "packing" the Supreme Court, Crabites noted that the only alternative was obviously a constitutional amendment. In answer to opponents of the plan who were holding out for an amendment, the author expressed doubt as to whether a constitutional amendment could be drafted which would afford the relief desired by its proponents, without shocking our constitutional form of government to its very foundation. Admitting that such an amendment would be

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[13] "Our Views on the Supreme Court," Commonweal, 26:651, April 30th, 1937.

[14] Andrew J. Burke, "The Court and the People," Commonweal, 26:5, April 30th, 1937.

[15] Joseph O'Meara, "The Court and Democracy," Commonweal, 26:10, April 30th, 1937.

perfectly constitutional, Crabites cautioned that it would completely alter the essence of our constitution.[16]

It is interesting that Mr. Crabites predicated his entire argument for the President's plan on the theory that those who were talking amendment, envisaged one that would get away from specific proposals and boldly attack the authority of the Court to invalidate Congressional legislation. The implication here was that an amendment would mean scrapping the entire Constitution. Mr. Crabites thus presented a rather unique argument against those who were holding out for an amendment.

The editors of Scholastic magazine pointed out that nothing had been done about soil conservation, crop control, housing, farm tenancy, flood control, taxation reform and other measures necessary to the national welfare. Noting that the "New Deal" pace was noticeably slower, the periodical voiced concern as to whether Roosevelt's reform program would be completely stopped.[17] The Court plan did receive unfavorable comment with regard to its proposed means of

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[16] John Crabites, "The Lesser of Two Evils," Commonweal, 26:63, May 14th, 1937.

[17] "New Deal Pace is Slower," Scholastic, 123:5-8, February 13th, 1937.

accomplishing reform in the February issue of Scholastic.[18]

Scholastic, while not acknowledging approval of the President's plan, conceded that such a step should be taken if it would bring about the reforms needed. The opinion advanced by Scholastic was favorable to the President, therefore, on the basis that the proposed plan constituted a lesser evil than the existing Court.

Scribner's Magazine presented one of the most unique articles, well written and filled with thought provoking statements concerning the great issue. A dialogue between Socrates and an Old Reactionary summed up the periodical's opinion. In the course of the discussion, Socrates states that the Court should keep in mind the fact that Roosevelt had won the election in 1936. This, averred Socrates, should be sufficient proof that in invalidating legislation, the Court is really invalidating the will of the people. The article also contained the thought that Congress should not be regarded as a pliant tool of the executive, as many opponents of the bill argued. Socrates was quoted as saying, "The Senate is never a tool, it is a jealous body." In reply to those who cried dictatorship, Socrates stated, "If Democracy survived the Federalist Court in the days of

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[18] "Roosevelt Court Plan Sharply Attacked," Scholastic, 30:14, February 27th, 1937.

John Adams, it will in all probability survive any Roosevelt tampering."[19]

Scribner's Magazine did not often acknowledge the issue. The article cited above was the sole expression of opinion. Written in April, during the height of the controversy, it was an answer to some of the Court proponents' biggest arguments against the plan.

Forum magazine supported the President out of utter contempt for the Supreme Court. To the editors of this publication it was only a matter of time before the judicial branch of the government had to give up all claim of authority. The continued activity of such a body, Forum asserted, could be on no more than a sentimental basis. The real solution an advanced by Forum would lie in an amendment to the outworn Constitution, though for the immediate present, the President's proposal seemed worthy of support.[20]

II. OPINION AGAINST THE COURT PLAN

Raymond Moley, Newsweek editor, was against the plan for many reasons. Editorializing in bold black type,

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[19] "Socrates and the Old Reactionary," Scribner's Magazine, 101:78, April, 1937.

[20] "The Supreme Court," Forum, 90:321, June, 1937.

Mr. Moley asked what the President had hoped to gain if he succeeded in "jamming" the Court. Acknowledging that the President was reluctant to wait for an amendment, the ex-braintruster, in refutation, stated that the best judges of congressional temper believed that he could not pass the bill before the summer. Moley averred that the Senate was in no hurry to confirm his appointment, for the Congress of the United States was not a body prone to hurt people's feelings. Since the President's closest advisors were opposed to the economic principles in the National Recovery Act and the Agricultural Adjustment Act, even the new Court would possibly have been opposed to this type of legislation, Moley noted. The editorial predicted that the President was apt to reach 1939 facing the realization that he hadn't accomplished what he wanted. Moley concluded, "by that time the business man, the farmer, the worker and the President may have come to the conclusion that the shortest way 'round is not always the shortest way home."[21]

Writing in Commonweal against the outspoken policy of the magazine, Michael Collins presented what he termed a logical outline for the people to consider. In summary,

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[21] Raymond Moley, "Today in America," Newsweek, 9:5, March 6th, 1937.

he stated:

1. No one can question the United States Government is one of delegated powers. Though it may need revision, it is the present system.

2. In the Constitution, the people determined the form of the federal government. Though it is reasonable to contend that the system needs alteration, it must be remembered that the people and the people alone can change the form.

3. The fact that the will of the people in 1937 is different from those who made the Constitution, should not be construed as a mandate to change the Court.

4. If the Court has curtailed the executive and the judiciary more than the people have intended, then the people should exercise their reserved power of amendment as a corrective procedure.

5. That the people cannot promptly assert themselves is true to some extent, though of the eleven amendments adopted since the Bill of Rights, only two required more than fifteen months to ratify.

6. The President's proposal does not offer a sure way out, because the appointees would represent only a minimum of the Court's number.

Collins therefore was one who argued that some change might be advantageous, but not under the form advocated by

the President. His treatment was a thorough refutation of the bill.[22]

James Truslow Adams, noted historian, wrote two articles admitting the Court's defects, but stating that the main issue at the time was to save the Constitution from the President. It was alleged that the proposed bill would eventually lead to a policy of rule without regard for law.[23] Further, this same author condemned the President for having submitted the plan to the people in a dishonest way.[24]

Survey Graphic contained a well written article advocating amendment instead of the President's proposal.[25] A similar stand was taken by Christian Century, which devoted a large amount of space to the Supreme Court question. "The early stages of the debate have been marked by vehemence rather than calm thinking," Christian Century complained, "and the Senators and others who have spoken over the radio have been more inclined to rabble rousing tactics and

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[22] Michael Collins, "To the Roots of Court Reform," Commonweal, 26:122, May 28th, 1937.

[23] James T. Adams, "How Can Democracy be Saved?," Reader's Digest, 30:1, April, 1937.

[24] James T. Adams, "Constitutional Crisis," Contemporary Review, 151:399, May, 1937.

[25] K. N. Lewellyn, "Proposed Amendment," Survey Graphic, 26:88-91, February, 1937.

derogatory adjectives than a presentation of the issue."

The editors then observed that most of the press were convinced that a constitutional amendment was the answer to the problem, for it would have been more satisfactory and honest. The President's plan was referred to as "an unsatisfactory makeshift."[26]

Business Week took up the cause of the Supreme Court, constantly urging the people at home to write their Senators. Because of the sturdy protests from the people back home, many Senators of the President's own party found courage to oppose him, a Business Week article observed.[27]

In answer to Nation magazine, Maurice Wertheim, a member of the Foundation which owned the magazine, wrote an enlightening letter concerning the editorial policy being pursued in 1937. The letter quoted in part stated:

> Those who control the Foundation which owns the Nation believe in the principle of editorial freedom. To insure it further, they have, as you know for a period, complete control of the paper in legal form.
>
> The Nation has lost itself in unjudicial partisanship at a moment when I, for one, should like to see it come out, like Senator Wheeler and many

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[26] Editorial, Christian Century, 54:311, March 10th, 1937.

[27] "Crisis in the Court Fight," Business Week, p. 72, May 15th, 1937.

> other liberals, and say to the President: "Enough of this camouflage, enough of these attempts to discredit your adversaries as defeatist lawyers; we like your objectives, but we don't like your methods. And if that be treason, make the most of it."

Law and Labor took exception to the argument that the 1936 Presidential elections had been a mandate for court reform. In answer, the periodical stated that the number of Congresses which have been defeated for reelection on their record would indicate that in a great number of cases their enactments were not an expression of the will of the people.

In fact, this periodical was of the opinion that a legislative enactment is at best a mere expression of temporary public opinion, having the force of law. The magazine averred that the Constitution represented more accurately the will of the people. The framers of the Constitution had constantly before them the people's jealousy of the power of government, for history had taught them that governments tend to increase their power over their citizens or subjects.[28]

Thus, Law and Labor implied that the Court proposal would change the Constitution and thereby constitute a

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[28] From Law and Labor, cited in Literary Digest, "Pro and Con," 123:19, July 31st, 1937.

greater infringement on the people's rights than any Court rulings could.

Albert Shaw, writing in Review of Reviews, averred that public opinion on the Supreme Court issue was overwhelmingly opposed to the President. He pointed out that Congress would decide the issue and that Democratic members of the Lower House were aware that they had little or no chance of renomination unless they supported the President's scheme. Mr. Shaw suggested that the President would do well to do his own work, allowing Congress on the one hand and the courts on the other to make decisions, without bending to his strong will.[29]

In an article entitled, "Liberalism versus the Court," it was adjudged that Roosevelt's message of February 5th, 1937, could best be summarized by the statement, "There are men on the Supreme Court who block my policies by misinterpreting the Constitution. As I cannot remove them, kindly enact my legislation to force them out."

The charge was made that every man who wished to become a dictator, begins by attacking the court system. The article contended that it did not intimate the President wished to be a dictator, but he would be preparing the way

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[29] Albert Shaw, "Progress of the World," Review of Reviews, 95:9, April, 1937.

for someone else, if he secured the reform under consideration.

The author looked with disfavor on those writers who ignored the possibility of amendment, or who characterized the judges as mentally and physically incapable of carrying out their duties. As for the President's argument concerning age, Review of Reviews commented that wisdom does not necessarily walk with youth and leave age forlorn.

In conclusion, the author stated that "the plan is the most dangerous attack in all our history upon the Government established by the Constitution."[30]

The Consumer's and Financial Chronicle entered the fray on the Supreme Court's side. The periodical called for prayers from the people for a nation-wide awakening and arousal of the citizenry before it was too late.[31] In another issue this same publication contended that the question at stake was personal government and personal government alone. A Republican periodical, the Chronicle even attacked the Court plan on the basis that it would cause a rupture in the Democratic party and thereby break down our

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[30] R. Blakely, "Liberalism versus the Court," Review of Reviews, 95:54, April, 1937.

[31] Editorial, Consumer's and Financial Chronicle, 144:1495, March 6th, 1937.

two party system of government.[32]

In an address to the Union League Club, reprinted in Vital Speeches, ex-President Hoover expounded on the Supreme Court problem. He declared that the problem belonged to the people, not to any small group of men attempting to suppress constitutional rights.

Intimating that the President's motives were not without political motivation, Hoover told the group that once the politicians take hold of the Court, the last safeguard against coercion would be gone.

The former President argued further that the Constitution was not a shackle on progress, for the vast majority of problems which arise under the Constitution are solvable within it.

Looking back into history, Hoover noted that when such problems arose, which of necessity required constitutional amendment, the people were willing to grant it. If this were one of these problems, Hoover stated, there would be an open and honest method of change.

Hoover ended his address with the statement, "Ladies and gentlemen, I offer you a watchword, 'Hands off the Supreme Court.'"[33]

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32 "Confessions and Avoidance," Consumer's and Financial Chronicle, 144:1663, March 20th, 1937.

33 Herbert Hoover, "This is no Lawyer's Dispute over Legalisms," Vital Speeches, 3:315, March 1st, 1937.

The Saturday Evening Post wrote several short editorials against the Court change. In the editors' opinion, ever since the Supreme Court had saved the country from the folly of the National Recovery Act, it had been under false attack. The publication averred that if it were not for the high degree of sincerity and intelligence displayed by the Court, our Constitution might have long been an unused instrument.[34]

Referring to a Texas newspaper which had reported that a country-side meeting had been called to demonstrate the real feeling toward the Court, the Post quoted from the newspaper report, "Farmers are wrought up over opposition to the plan. They believe that President Roosevelt is right about everything he does and wants, for they are now farming at a profit." Commented the weekly in reply, "The farmers don't write us that they approve of everything the President does. But what of it if they do? What if the Government's silver-buying program was right? What has any of this to do with the Supreme Court?" Virtually nothing, the magazine asserted, unless one could assume that because cotton was then worth fifteen cents in Texas, Roosevelt had been mandated to abolish constitutional government.[35]

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34 "The Great Promiser," Saturday Evening Post, 209:24 May 29th, 1937.

35 The President had never made this inference. He merely asked if the Federal Government was to have no voice in controlling the nation's economy.

The popular journal commented that thousands of liberals who believed Roosevelt to be more right than wrong, and the courts more wrong than right were still against the proposal. Further it was argued that the Constitution provided for three branches of the Government to act as a system of checks and balances. The same Americans who framed the Constitution also provided, the article pointed out, that future generations could change the Constitution, but only by the actions of all the people. Today the people can take away the powers of the states and make the executive supreme, the editors concluded.[36] No one has the right to change the government of the Americans of today and tomorrow by an act so devious that it conceals from the people the very impact of a change.[37]

Collier's adjudged the President to be in "Contempt of Court," with regard to his proposal. It was reasoned that each of the three branches of the government should be entirely separate and any infringement of one upon the other was not to be condoned.[38] Collier's concluded that the

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[36] The States received their powers from the people, therefore they have the right to take them away, or effect a change.

[37] "How Right is Might," Saturday Evening Post, 209:26, May 15th, 1937.

[38] "Contempt of Court," Colliers, 99:102, March 20th, 1937.

matter was an issue of the people.[39]

The Catholic World presented both sides of the question. However, it severely objected to the devious manner in which the President proposed his legislation. The periodical contended that the Court had acted in good faith, and therefore the other branches of the government should accord it consideration.[40]

It was found that most of the magazines maintained a consistent editorial policy throughout the period of the court struggle. Further, in many instances appeals were made with reference to the type of reader most likely to subscribe to a particular publication. Nation and New Republic were especially interested in reaching the liberals who opposed the President because they weren't satisfied with the form of his proposal. These publications alleged that such liberals who failed to back the court reform would cause themselves a greater harm by casting lot with the conservatives. Commonweal, which drew its following largely from members of the Roman Catholic faith, naturally had among its subscribers people of varied reactions to the

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39 "Freemen's Courts," Collier's, 100:54, August 28th, 1937.

40 "President Slips One Over," Catholic World, 145:129-36, May, 1937.

Court bill. As has been pointed out, many of its readers suspended subscription, in protest against the favorable attitude the editors took toward the proposal. Business Week attempted to appeal to the business people in terms of the great harm that New Deal legislation would cause the country. Saturday Evening Post and Collier's, mass magazines, distorted the facts in their emotional editorials, written against the court plan. Therefore, upon the evidence found, it seems reasonable to conclude that the periodicals were attempting to influence public opinion.

In addition to the periodicals which took a definite stand for or against the court proposal, there existed opinions which contained definite reservations. Thus, some regarded the proposed bill as a poor draft, but being utterly disgusted with the Supreme Court's decisions, were willing to accept it; while others, although not satisfied with the Court's findings, objected to the bill since they regarded it as a greater evil. Another group desired the amendment of the Constitution. Among those advocating amendment were two categories. The first division would include opinion which honestly thought amendment to be the correct process; the second would include those who advanced the idea of amendment because they believed it would be the best means of preventing the passage of the bill.

CHAPTER IV

NEWSPAPER OPINION

The introduction of the Reorganization Bill on February 6th, the President's message on March 9th, and the Senate Judiciary Committee report on June 14th, each represented a high point in the press controversy over the President's court plan. Therefore, in making this survey an attempt has been made to gain the newspapers' reactions to these three statements of policy. As in the previous section, the material has been presented on the basis of each publication's viewpoint toward the issue.

I. OPINION IN FAVOR OF THE COURT PLAN

Arthur Krock, Washington correspondent for the New York Times, wrote that the President had been the leader in the national protest against lines of reasoning destined to exert a harmful influence on the nation's recovery attempt. As "useful achievements," Krock listed the facts that the President had exposed close majority opinions to sharp public criticism and also had stimulated an educational process among the American people with respect to the history of the Constitution and the Court. As a great achievement, Krock pointed to the possibility that the stimulating of public

opinion might cause the justices to alter their reasoning.[1] If it is true that public opinion did cause the justices to alter their interpretation, Mr. Krock should be given great credit for his insight.

The Milwaukee Leader presented an interesting editorial policy concerning the court issue. While this publication declared that the President had been in error in his contention that age had hampered the justices' work, and further stated that the problem of crowded dockets could not be solved with such a plan; the Leader agreed to support Mr. Roosevelt. Its policy was best embodied in a quotation appearing on February 7th, 1937. "For the sake of getting New Deal legislation through this is a good plan, but the real solution in the form of an amendment will have to come later."[2]

The first page of the Leader often featured an editorial across the top of the sheet. Such a makeup appeared on February 12th. In this issue the editors expressed indigation at the Republican Women's Club's use of the term "United Front." The basis for the paper's charge was the

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[1] "Court Plan Dead but not Buried," Literary Digest, 123:3-4, May 29th, 1937.

[2] The Milwaukee Leader, February 7th, 1937.

alleged borrowing of the phrase "United Front" in order to mislead the people.

The Leader, in referring to those who opposed all liberal tendencies, stated that such opposition arose from this group's desire to protect itself from change rather than the Court. However, the editorial lamented, "American tories were blind to peaceful evolution."[3]

Concerning the approach of public opinion, it was observed that most of the people who oppose changes do not think, they emote. Yet when the cry of those who claim the Court to be the highest branch of the government is raised, it is an appeal to emotions, a Milwaukee editorial stated. The framers of the Constitution, continued the article, never intended the Court to be a dictatorial body. The Congress was placed first in the Constitution, and nearly three times as much space was devoted to it as to the judiciary, which fact was proof enough for the Leader that the Court was never intended to be the most important branch of government.[4]

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[3] Ibid., February 12th, 1937.

[4] Ibid., February 12th, 1937. Merely because more space was devoted to Congress and the President in the Constitution does not give rise to the conclusion that they are to be placed above the judiciary. All three branches were considered equal by the framers of the Constitution.

The Milwaukee paper further accused the press of altering the facts in presenting the issue to the public.[5]

Following the President's speech of March 9th, 1937, the Leader answered the charge of those who cried that the President was trying to control the Court with a statement from Mr. Roosevelt's address. The Chief Executive had declared that he didn't intend to appoint "spineless puppets" to the bench.[6]

Commenting on the Senate Judiciary Committee's report, this publication asserted that the proposal might have gotten through if the President"hadn't messed the plan up from the outset." Under the conditions in June of 1937, the paper couldn't foresee even a weak compromise, unless the fear of the House and Senate was strong enough to cause an ignoring of public opinion. Despite the alleged fear of the President by the legislature, the Leader predicted outright defeat in any immediate congressional vote.[7]

It would appear that the editors of the Milwaukee paper were indignant at having supported a losing issue.

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[5] Ibid., February 16th, 1937.

[6] Ibid., March 11th, 1937.

[7] Ibid., June 14th, 1937.

It must be remembered that the issue was supported only because the publication had hoped it would lead to an amendment. When the plan was defeated by the Senate Judiciary Committee, blame was laid to the President.

The Progressive, in Madison, Wisconsin, asked how much longer the American people were to be held in chains by five old men of ultra-conservative views. Pointing to the fact that the reactionary press was opposed to the President, the LaFollette paper stated that some were opposed because they were afraid of losing their special privileges. These groups, The Progressive alleged, know that the bench has been "packed" for decades. Roosevelt's bill was acclaimed as a mild proposal, seeking only to modernize the Court.[8]

Senator LaFollette, writing in The Progressive, supported the President with the statement that the Court must be a people's Court, not an unbalanced body protecting one class, as Mr. LaFollette alleged it was in 1937.[9]

Another press publication supporting the bill was the Sacramento Bee. The Bee noted that there was no suggestion

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[8] The Progressive, February 13th, 1937.

[9] Ibid., May 29th, 1937.

in the President's message which called for a curb of power. What is aimed at, the McClatchey publication asserted, is more effective determination of cases, concerning all questions arising before the Court. The Sacramento paper showed surprise that such a common sense proposal had not been put into practice long before. Declaring that all of the objectives introduced by the President were worthwhile, the Bee advised Congress to enact such worthwhile legislation. Concluding, the editors asserted that the Court was too crowded to handle all the cases, therefore the addition of judges was imperative.[10]

In reference to the President's address of March 9th, the Bee observed that the President had presented a convincing exposition of his side of the issue. Noting the President's simple approach, the paper said that the Supreme Court had passed beyond the sphere of a judicial body and assumed quasi-legislative powers.

"The present majority of the Court on the cold record stands indicted before the country of refusing to understand modern conceptions and of stubbornly adhering to concepts no longer applicable," the Sacramento editors stated.

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[10] The Sacramento Bee, February 6th, 1937.

In the opinion of the Bee, the proposal of the President was not radical, not even revolutionary, but constructive and conservative in the best sense. Further, the proposal was adjudged to be constructive and revolutionary in the best sense. There can be no cry of dictatorship, the Bee commented, in referring to the President's March address.[11]

The New Leader, published in Indianapolis, alleged that the proposal had been enthusiastically received by all of labor. The proposal impressed the editors of this paper as being a method of avoiding long, tedious and uncertain agitation.[12]

Writing in the New Leader, Louis Waldman called the measure a move to uphold democracy, since it would reduce the obstacles in the way of legislation. Waldman pointed out the necessity of restoring the judiciary as an equal, not a controlling branch of the government. This author contended that the courts had set up their own conceptions of law and followed these conceptions rather than the Constitution.[13]

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[11] Ibid., March 11th, 1937.

[12] The New Leader, February 13th, 1937.

[13] Ibid., March 13th, 1937.

William Bohn asked how 27,000,000 voters could get what they wanted if Roosevelt's proposal failed to pass.[14]

The leftist New Leader, a workers' organ, in answer to the Congressional action of June 14th, concerning the Court bill, stated that there should be a law forbidding the judges to delcare laws invalid. Charles Russell, writing in the same paper, averred that to add judges would not solve the problem. The Court has exercised unconstitutional powers, the writer observed, and it has become necessary to rescue the Constitution from the Court. This columnist wished that the President would take even more drastic steps to curb the Court.[15]

Algernon Lee urged that the Court should be "unpacked," instead of "packed." As for amendment, this writer viewed it as a slow process.[16]

Eliot Harris, writing in the same paper as Russell and Lee, commented that the Senate Judiciary Committee's report reminded him of the shrieks of anguish emitted by the National Association of Manufacturers during the preceding elections. Taking exception to the report's statement

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[14] Ibid., March 14th, 1937.

[15] Ibid., June 15th, 1937.

[16] Ibid., June 16th, 1937.

concerning sacred traditions, Harris asked if the Senate Committee considered the Dred Scott decision a sacred tradition.[17]

In a survey conducted by the United States News, several papers voiced their approval of the plan.

The Atlanta Journal noted that a few, hasty partisans had denounced the President's proposal as radical, subversive and a blow against the judiciary. However, the Journal continued, the needs of the country make the President's plan a must, for higher efficiency is a necessity. Thus, this publication was willing to overlook its distaste for the plan in order to promote what it considered a greater efficiency.

The Charleston News and Courier termed the plan humanitarian, pious and splendid.

Observing that "the aged old men" have no right to block the path of progress, the Hartford Times called for an immediate enactment of the President's plan.

In the opinion of the New York Daily News, the people had voted for such a judiciary change. "Such a plan lays siege to the citadel of special reform," alleged the Philadelphia Record, which encouraged the enactment of the proposed legislation.

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[17] Summary of opinion taken from the United States News, February 8th, 1937.

Answering the cries of reactionaries, the Raleigh News and Observer called the President's proposal a moderate measure.

The Wheeling News Register pointed out that the President's plan, in its opinion, would aid in relieving overcrowded dockets.[17]

The New York Times surveyed papers listed as Democratic and Independent Democratic publications, as to their reactions to the President's address of March 9th. The survey showed the Boston Post, the Wilmington Journal, Raleigh Observer, Little Rock Gazette, Butte Standard and Davenport Times, to be in favor of the objectives listed in the President's speech.[18]

II. OPINION AGAINST THE COURT PROPOSAL

An article entitled "The President's Plan," appeared in the New York Times on February 14th, 1937. It recognized three main arguments for the plan: namely, that the Court was obstructing justice; that in the 1936 election the President had received a virtual mandate; and lastly that the

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[17] Summary of opinion taken from the United States News, February 8th, 1937.

[18] Summary of opinion taken from the New York Times, March 18th, 1937.

President had chosen the wisest course open to him.

In the opinion of the Times, the proposal did not represent the best work of the Roosevelt administration. Further, the article expressed great difficulty on the part of the Times' writers to locate proof for the statement that the social progress of the country had been blocked by the Court. As to the question of mandate, the editorial observed that if the election had really been a mandate, the people would of necessity have had to know about the issue. But the people did not know, the column continues, for any such plan would have drawn attack from the Republicans during the period of campaign. The third point on which the Times dissented in this editorial, concerned the choice of method. This paper suggested that it would have been better for the President to perfect the many reforms and innovations already introduced, before rushing new adventures. All in all, the Times concluded that the President had chosen the worst possible course of action, since it was a resort to political cleverness.[19]

The Times, editorializing on February 23rd, contended that in a government of delegated powers it was necessary for impartial courts to decide when such powers had been overstepped. If something must be changed, the editors

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[19] The New York Times, February 14th, 1937.

stated, let it be the Constitution.[20]

Reacting to the President's speech of March 9th, the Times, already suspicious of the President's adroitness and cleverness, now stated that it felt the whole structure of the President's argument rested upon the premise that the country was faced with a crisis so acute that it could not wait upon the adoption of a constitutional amendment. But the Times added, "If the country now faces a crisis, it is a constitutional crisis, and it is one of the Presidentis own making."

The President's own assertion that "substantially the same elements" oppose his plan as opposed all his liberal programs, moved the Times to state, "this statement is not in accord with demonstrated facts."[21]

The Christian Science Monitor made the Supreme Court issue the subject of many editorials.

Frank Perrin, writing the column "North, West, South, East," pointed to the Constitution, which states that the people of the several states reserved the right to amend the Constitution as they saw fit. "The way had been made plain and practical," the Boston paper commented. To

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[20] Ibid., February 23rd, 1937.

[21] Ibid., March 11th, 1937. The Times' statement concurs with the findings of the public opinion polls.

create a subservient balance of power within the Court itself, would be to prostitute and destroy American methods and ideals, the author averred.[22]

William Elliott writing in the Christian Science paper contended that the unwritten law of the Constitution was at stake. Further, Elliott considered that there was little logic in the plan to retire ages at seventy, since not all men become unfit on their seventieth birthday. For this writer the proposal was too much a matter of finesse.[23]

Surveying public opinion, the Monitor concluded that in view of the wave of opposition sweeping through the country, even the most ardent administration supporters shouldn't mind dropping the issue. The article insisted that "the people are serious in their attempt that their system won't be broken, and this challenge they determine not to lose."[24]

The Monitor pointed out on June 16th what it considered to be the most important accomplishment of the Senate Judiciary Committee's report. An editorial averred that there would never have to be fear in the future that

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[22] The Christian Science Monitor, February 5th, 1937.

[23] Ibid., February 11th, 1937.

[24] Ibid., February 12th, 1937.

the Court will be overridden. To future generations the editors advised, "Let the precedent be unmistakably recorded."[25]

Contending that integrity, not age, was the important factor to be considered, the Minnesota Union Advocate, official organ of the St. Paul Trades and Labor Assembly, went on record against the plan, pointing out that the majority of the Court had been devoted to the rights of the American citizens.[26]

The Scripps-Howard chain, which had supported the President in 1932 and 1936, for the first time opposed a New Deal policy.

Rodney Dutcher, writing under the Scripps-Howard banner, observed that no one was completely satisfied with the President's plan, and only a quick application of his personal power could bring victory.[27] Further, this columnist noted that the administration's choice of judges had been singularly poor. Dutcher cited the "political deal" involved in the replacement of Senator George McGill of

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[25] Ibid., June 16th, 1937.

[26] The Minnesota Union Advocate, February 19th, 1937.

[27] The San Francisco News, February 6th, 1937. Dutcher's statement is obviously false in view of the many favorable newspaper and magazine opinions cited.

Kansas by Guy Herring, the political boss of Kansas. It was pointed out that McGill was later made a Circuit Court of Appeals judge, allegedly as a reward for stepping out of Congress.[28]

A San Francisco News editorial stated that the laws which the President had intended to pass were enacted to foster a national system of labor unions.[29] The News observed that the President, in seeking the easiest route to judicial reform, had probably chosen the most difficult. "He has chosen to cure unbalance with unbalance," the News asserted, "and thus pass the power from the courts to himself. There will exist the means for a later President to alter the courts to his own liking, the editorial continued, which would be sufficient reason for disallowing the proposal.[30]

Referring to the President's address of March 9th, the Scripps-Howard publication noted the President's statement that his plan would be good and lasting. In disagreement with this, the News contended that their polls indicated the electorate was not of the same opinion.[31] However, the News pointed out that although the President

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[28] Ibid., February 7th, 1937.

[29] Ibid., February 6th, 1937.

[30] Ibid., February 19th, 1937.

[31] Ibid., March 10th, 1937.

was wrong in wanting to add judges, the Court hadn't always been right.[32] The paper noted that Chief Justice Hughes hadn't answered the question of congestion.[33]

The Washington Post opined that the Roosevelt speech dealt with two issues, the Supreme Court and judicial reform, and there was no reason to combine the two as the bill had done. This was a unique criticism. Yet the President has attached the Supreme Court proposal to the bill, in an attempt to make it appear as a natural supplement to other minor proposals. It was further averred that in this way, a change of great magnitude could be effected without a realization of what was involved. Such a piece of legislation would have paralyzed the judicial arm of the government and made Roosevelt a dictator, the Washington paper contended. In conclusion it was stated "so dangerous and so really indefensible is the plan we wonder if the whole scheme isn't a long range plan to discredit the Court."[34]

In a column entitled "Revolutionary and Subversive," the Post averred that the President's address of March 9th would greatly assist the Senate Judiciary Committee in de-

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[32] Ibid., March 19th, 1937.

[33] Ibid., March 23rd, 1937. Hughes answered this question in a letter to Senator Burton K. Wheeler.

[34] The Washington Post, February 6th, 1937.

termining what the President's plan was. Mr. Roosevelt, the page continued, clearly showed that he does not admit of the right of judicial restraint, which right is necessary for the preservation of our government. Refuting Roosevelt's statement that precedent had been set, the Washington paper pointed out that no President had ever suggested undermining the judiciary.[35] "Apparently he wants the Court to be a rubber stamp," the editorial stated, " and in this desire he clearly shows that he is not a student of American government for he shows concern only for the present welfare of the country. Mr. Roosevelt is in deeper water than he thinks."[36]

A column entitled, "No Doubt Can Remain," described the Washington Post's attitude to the findings of the Senate Judiciary Committee. Stating that just as the Supreme Court had assumed an important place in our history, the Post averred that the Senate report submitted by Senator King for the Judiciary Committee must be accorded a place among the great Congressional papers. Further, the publication failed to detect one note of partisanship in the report. The committee was not content to show that the President's bill was an unprecedented attack on the Courts, the Post continued, it further stated that such a bill would not

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[35] The term "undermining" is misleadingly used here. Other Court changes had been effected.

[36] Ibid., March 11th, 1937.

provide for a constant infusion of new blood, but would merely succeed in removing the more experienced judges.[37]

To a great deal of the President's proposal no exception was taken by the Los Angeles Times. But the motive which had prompted the President to wish the addition of six judges troubled the editors, who opined that he desired to amend the Constitution by an act of Congress without consent of the people of the states; in other words, to legalize the illegal. The Times' editors stated that it would have been difficult to attack the proposal if it had been offered in good faith. The fact that the President had not mentioned the issue in the 1936 election caused the Los Angeles paper to question the President's motive, however.[38]

The speech of President Roosevelt's on March 9th contained accusations toward the Supreme Court, stated a Los Angeles Times editorial, which the President himself had committed. The Times thought Roosevelt's failure to seek amendment belied the fact that he didn't know what extra powers Congress should have.[39]

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[37] Ibid., June 16th, 1937.

[38] The Los Angeles Times, February 6th, 1937.

[39] Ibid., March 10th, 1937.

The Senate Judiciary Committee report on June 14th caused the Los Angeles paper to conclude that the Democratic party leader had been let down without even the excuse that he meant well. Further, the editorial indicated its anxiousness to watch the reactions of a "quick ill-tempered President."[40]

The Chicago Tribune commented, "Now Mr. Roosevelt, by means which are within the Constitution, undertakes to accomplish a purpose which is outside of it." It was stated that because the means may be valid, it does not necessarily follow that it would be just to subject an independent branch of the government. Admittedly, the editorial stated, it is within the power of Congress to increase the number of judges, and it is within the power of Mr. Roosevelt to appoint them, but such a policy would destroy the judiciary.

If the Court is once filled, it was pointed out, with men appointed solely to say "Yes," its independence would be forever lost. The Tribune stated that in effect, Roosevelt was proposing to appoint a commission of six justices to redraft and set up a changed constitution without the consent of the people themselves. Then, predicted the

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[40] Ibid., June 15th, 1937. The President, according to press representatives and opposing Senators, appeared most calm and objective in his discussions concerning the court issue.

McCormick publication, no one would know what the Constitution would be.[41]

A later Tribune editorial observed that the essence of dictatorship in Germany, Russia, Italy or anywhere else was in the placing of all powers of government in one man, which it was alleged Roosevelt was seeking to accomplish.[42]

In regard to Senator Johnson, who stated that he would go the limit against the President's proposal, even though he had not fought the other New Deal reforms, the Tribune asserted that most Congressmen, realizing the critical situation, were ready to vote in opposition to any transgression against the charter of rights. The Tribune predicted that the people would have something to say before destructive hands were laid on the Court.[43]

To the McCormick paper the address of the President on March 9th was fallacious from start to end, and clearly showed that his motives were not honest.[44]

The Chicago Tribune referred to the Adverse Report of the Senate Committee as the "Second Declaration of Independence." Cartoons emphasizing this belief were displayed

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[41] Chicago Tribune, February 6th, 1937.

[42] Ibid., March 6th, 1937.

[43] Ibid., February 10th, 1937.

[44] Ibid., March 9th, 1937.

on the paper's editorial pages. Overjoyed at the defeat handed the President, the McCormick paper thanked the responsible Congressmen profusely for their foresight. The Tribune further alleged that the document was in exact agreement with its editorial policy.[45]

To the Wall Street Journal, the bill appeared as a measure intended to put back such things as the National Recovery Act, which would cripple the country's economy.[46]

The President's messages concerning the bill provoked the Wall Street publication's editors to comment that the President had intended to extend his control all along the line, even to the judiciary.[47]

Frank R. Kent, writing on June 15th in the Journal, stated that the Senate Judiciary report clearly showed that the administration had overplayed its hand. Even the staunchest administration supporters failed to give it support. Kent averred that such an omission would make it plain that the issue was not a mandate of the people, as the President had claimed it was in the last election.[48]

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[45] Ibid., June 16th, 1937. The Senate Judiciary report failed to attack the President's motives on the harsh basis found in the Tribune's editorials. Further, the Tribune was not as objective in its editorials as was the Senate Judiciary Committee in its report.

[46] The Wall Street Journal, Pacific Coast Edition, February 8th, 1937.

[47] Ibid., March 11th, 1937.

[48] Ibid., June 15th, 1937.

The San Francisco Examiner predicted that there would be many indignant protests and well founded fears and misgivings, but the proposal would pass.

Said the Examiner:

> Congress has never, in its whole history, had much patriotic devotion, nor even much ordinary courage.
>
> It will have less since the recent election, where the only remaining vestige of American ideals was evidenced in Maine and Vermont.
>
> The people voted for a Roosevelt program which is not different from a socialist program.
>
> This then is what the people voted for and apparently what the people want.
>
> Of course the program means that democracy is dead as a door nail and that we are living under dictatorship.
>
> The concepts of the Fathers of our country have been dissipated.
>
> Soon the Republic will have disappeared.
>
> Soon, we may have no United States of America, but one Federal State with one totalitarian ruler.
>
> Howerver, America will be in the fashion.
>
> The world is ruled by dictators today.
>
> Therefore, democracy throughout the world will be dead and buried.
>
> Toll the knell!
>
> Perhaps democracy deserved to die. Perhaps it sold its birthright for a mess of pottage.
>
> None could save the situation now, except the people themselves, and they are drugged with dole.[49]

[49] The San Francisco Examiner, February 8th, 1937.

This editorial, a typical product of the Hearst press, reached the high point of the appeal to emotions instead of intellect, which the newspapers presented.

On March 11th, the Examiner presented a discussion entitled "The Fate of the Court." In the article the question was asked, "Is the Supreme Court to be made the instrument of an autocratic President's arbitrary will or of any kind of a President's arbitrary will?" The Hearst paper considered it a waste of time to talk about age of the justices and crowded calendars. Even the President has stated, the paper noted, that his sole purpose was to appoint justices who would not undertake to override the judgment of the Congress on legislative policy.[50] It was predicted that the Supreme Court would survive the issue as an independent agency or not at all.[51]

George Rothwell Brown in his column "On the Spot," concluded after the report of the Senate Judiciary Committee was issued, that it was psychologically impossible to attack the Court. The Hearst paper in San Francisco noted that the failure of the minority group to even submit a report would stand virtually alone as the first instance of a Congressional

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[50] This statement is misleading. The President, in his speech of March 9th, listed other objectives which he hoped to obtain. He further asserted he did not wish to appoint "spineless puppets."

[51] The San Francisco Examiner, March 11th, 1937.

bill failing to get even minority endorsement.[52]

The United States News' survey showed that seventy-three percent of the Democratic newspapers had voiced disapproval of the February 6th proposal.

Among the papers voicing their disapproval were the Chattanooga Times, the Macon Telegraph, the Altoona Times, the Cleveland Plain Dealer, the Richmond News Leader, the Newport Virginia News and the Buffalo Times.[53]

The Weekly People, socialist organ, and the Communist Daily Worker also commented on the President's proposal. The Weekly People thought that the President's plan proved nothing "except for the moment." However, it was contended that the Court should have been curbed. Arnold Petersen, writing in the Weekly People, averred that the President desired to use the Court for "his own purposes, exactly as it had in the past been used for the purposes of plutocracy."[54] In a later editorial, the Weekly People reaffirmed its stand, stating that it would be necessary to pass a constitutional amendment in order to solve the problem.[55]

To the Senate Committee's report, the Weekly People

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[52] Ibid., June 17th, 1937.

[53] The United States News, op. cit., February 8th, 1937.

[54] The Weekly People, February 20th, 1937.

[55] Ibid., February 20th, 1937.

expressed the reaction that it was only another document of reactionary ideas. The paper predicted that capitalism could not long hold sway over the legitimate wishes of the people.

The Daily Worker branded the Senate Judiciary Committee's report as another document in the struggle constantly being fought between rivals interested in making the people pawns of their monetary advancement. It was of little concern to the Communist faction who won the dispute.

The Daily Worker and The Weekly People both refused to compromise on the issue of Court reform, and as neither could wholeheartedly support the President or the Court, refrained from influencing public opinion. Their columns usually ended with the reminder that whatever was the outcome of this dispute, capitalism could not long prevail.

The United States News survey, which showed seventy-three percent of the Democratic newspapers to be in opposition to the President's plan, coupled with the overwhelming opposition found among the Republican publications would indicate that the Chief Executive received little support from the press during the court fight. Certainly he received less support from the newspapers than he did from the magazines.

Like the periodicals, the newspapers attempted to sway public opinion, through their consistent policies.

Some, like the Chicago Tribune, were openly biased, while others like the San Francisco News presented articles by columnists representing both sides of the issues, presentation of readers' views, and results of street interviews; though the Scripps-Howard publication itself maintained a consistently anti-Roosevelt attitude in its editorial columns. The newspapers' arguments were not as objective as those found in the magazines, sentiment and emotion being almost the sole type of appeal made in such organs as the San Francisco Examiner and the Chicago Tribune. Notable exceptions to the above were the New York Times and Christian Science Monitor. These publications contained well written expressions of opinion, showing logical reasoning. Many papers voicing protests against the plan regarded the report of the Senate Judiciary Committee as one of the truly great accomplishments of Congress. The Chicago Tribune, as an example, called the Committee's report a second declaration of independence. The reasons for the general approval of the Senate Judiciary Committee's report by papers which had consistently opposed New Deal policies resulted from various factors. It must be remembered that the Court proposal was the first issue on which the President had suffered defeat. Further, not a few of Mr. Roosevelt's enemies in the press visualized the Senate Committee's report as the beginning of the end for the New Deal.

Among the newspapers a group of opinion was evident which advocated amendment. This opinion was predominant among the Democratic press which had turned against the President for the first time.

CHAPTER V

RADIO OPINION ON THE REORGANIZATION BILL

Leading moulders of opinion took advantage of the radio as a medium of bringing the issue before the public. The purpose of this chapter is to present a survey of opinion for and against the proposal, expressed on the air.

The steam of debate throughout the nation had risen to such a pitch by March, 1937, that Senator King of Utah called for a Senate investigation of charges that the large radio chains, under administrative pressure, were discriminating against the clamor of Presidential opposition.

In reply, the Columbia Broadcasting System reported that it had broadcast approximately seventeen speeches on each side of the controversy. They further stated that such notables as Alfred E. Smith, Chief Justice Hughes and Alfred M. Landon had declined to speak on the air against the President's plan.[1]

New Republic answered Senator King by writing that even a little bit of reflection should have reminded the Senator that the broadcasting chains were directly dependent upon public favor for their existence and from purely selfish interest, if for no other reason, they would not

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[1] "Quiet Crisis," Time, 29:16, March 22nd, 1937.

have dared show a bias concerning a question on which a sharp cleavage existed.

The League for Political Education stated that there was a plentiful supply of speakers available to advance a new political endeavor, but week after week it took endless searching to find conservative speakers. The program, Town Meeting of the Air, broadcast over a National Broadcasting Company network, presented discussion on the court issue during 1937.[2]

I. RADIO OPINION IN FAVOR OF THE PRESIDENT'S PLAN

Senator Alben Barkley of Kentucky, speaking on April 10th, 1937, said he was glad to see that people were taking an interest in the President's proposal, which had brought the court system before the public eye. The Kentuckian attributed this rapid growth of interest to the legislative and judicial developments of the four years from 1932 to 1936.

During that time, the Supreme Court slaughtered a great part of Roosevelt's program, the address pointed out. Barkley asserted that such a gathering would not have been possible two years earlier, for it would have been impossible

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[2] "The Week," New Republic, 90:222, March 31st, 1937.

to bring together so cosmopolitan and intelligent an assembly to discuss what was wrong with the Supreme Court, and what should be done to remedy the wrong. The Senator noted that before the New Deal the Court was above question, and no one had the hardihood to suggest it was anything less than perfect. Barkley concluded that neither the Supreme Court nor any other agency should be the master of the people.[3]

During the month of February, 1937, the National Broadcasting Company decided that there was sufficient interest in the Supreme Court issue to justify a national debate on the subject. In Washington, Senator Hugo L. Black of Alabama, supporting the President, debated William H. King of Utah, and in New York Representative Maury Maverick of Texas opposed Frederick H. Wood of Connecticut, backing the Court. In Chicago, an assortment of two judges and three lawyers joined the oratorical scramble. An elaborate hookup both enabled the speakers to answer each other from city to city, and a New York audience to question all nine of the debators.[4]

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[3] Radio address by Senator Alben Barkley, extension of remarks by the Honorable H. M. Logan of Kentucky, Thursday, April 15th, 1937, Congressional Record, (75th Congress, 1st Session, p. 919.)

[4] "Court Plan Leaps over Party Lines," op. cit., p.5.

Quoting the Solicitor General, who said, "The work of the Court is current and cases are heard as soon after presentation as briefs can be prepared," Senator Joseph W. Bailey stated that the Constitution was not a device to block the people's progress. Bailey opined that the Constitution was a device of the people to preserve themselves, their States, their local government, and their inalienable rights. The Senator averred that the people made the Constitution and only they can change it.[5]

Senator Bulkley commented on station WJSV, New Jersey, that the Constitution was not an idol to be worshipped, but an instrument of the government to be worked. "If in the words of John Marshall it is to endure for all ages to come, it must be adopted to various crises in our history," the address continued.

Further, commented Bulkley, the Supreme Court has nullified important legislation of Congress because a majority of the judges, conscientiously differing with the economic and social theories underlying recent legislation have insisted on antagonistic approaches to the problems of constitutional interpretation.

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[5] Joseph W. Bailey, "The Supreme Court, Constitution and the People," Vital Speeches, 3:1, March 1st, 1937.

Bulkley asserted, "I reaffirm my faith in the Constitution, a living and growing instrument of government. I reaffirm my faith in Franklin D. Roosevelt as President, not as dictator. I reaffirm my faith in American democracy and the objectives it so plainly expressed last November."[6]

John H. Clarke, former Associate Justice of the Supreme Court, delivered an address on March 15th, 1937, stating that the Constitution had clearly granted to Congress the power to regulate the number of justices.[7]

Justice Black's address delivered over the Mutual Broadcasting System asserted that the Constitution had created the legislative and executive departments of the government and provided for one Supreme Court, which was created and organized by a legislative act of Congress at its first session. At the same time, the Congress created a system of inferior Courts, and by Act of Congress fixed the jurisdiction of the inferior courts, the Justice stated. In Black's mind, neither the people who wrote the Constitution nor the people who approved the Constitution ever contemplated that the Supreme Court should become all powerful and omnipotent.

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[6] R. J. Bulkley, "Precedents for the Court Plan," Vital Speeches, 3:345, March 15th, 1937.

[7] John H. Clarke, op. cit., p. 369.

With wise forethought, the framers of the Constitution carefully provided checks for use by Congress, Black continued, to prevent the courts from becoming too powerful, and to give assurance that the Congress would prevent judicial usurption. From this Black reasoned that the Constitution left to Congress, among other powers, the right to increase or decrease the number of Supreme and inferior Court judges and complete power to fix the appellate jurisdiction of the Supreme Court.

The address noted that John Marshall assured the Virginia convention considering the Constitution that this power was adequate for the Congress to use "as far as the legislature may think proper for the interest and liberty of the people."

It was opined that the power, like others given by the Constitution, was carefully planned and deliberately conferred. The framers of the Constitution believed with Jefferson, Black said, that "it is a misnomer to call a government republican, in which a branch of the supreme power is independent of the Nation." It was pointed out that the constitutional power to affix the number of judges was used by Congress on a number of occasions, therefore no one should question such power when the people's interest requires it to be done.

Justice Black referred to Chief Justice Hughes' statement that "the Constitution is what the courts say it is." Black asserted that the statement should read, "The Constitution is what five of the Supreme Court judges say it is and what four of the Supreme Court judges say it is not."

The dominant five judge philosophy, Black believed to be the exact philosophy of the political group that could obtain only eight votes in the preceding election. He noted that the philosophy was repudiated in 1932, 1934 and 1936.

In reference to Hoover's statement, "Hands off the Supreme Court," Black said that it was in keeping with his policy as President, when business was toppling all over.[8]

W. D. Lewis asked the people why a reasonably liberal interpretation of the powers given to the federal government should not be tried, before employing the method of amendment.

Lewis called the justices sincerely convinced conservatives, but advised all the people who were in sympathy with the President to vote for the issue.[9]

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[8] Hugo L. Black, radio address over Mutual Broadcasting System, Vital Speeches, 3-674, February 23rd, 1937.

[9] W. D. Lewis, "Controversial and Non-Controversial Aspects of the Court Proposal," Vital Speeches, 3:380, April 1st, 1937.

Senator Robert LaFollette commented that the greatest achievement of his many years would be the erection of an unbiased court, acting in the interests of the people. LaFollette thought that the President's motives were sincere and his policies sound.[10]

Attorney General Homer S. Cummings gave an address entitled, "Reasons for the President's Plan and the Remedy," in which he stated that the Constitution prescribes that the President shall appoint justices with the advice and consent of the Senate. In light of this, Cummings asked upon what ground opponents of his plan justified the claim that Roosevelt should not appoint as other Presidents had done.

Then, noted Cummings, there is the charge that the proposal would lead to dictatorship. But in reply, the Attorney General pointed out that President Jefferson had ignored a subpoena issued by Chief Justice Marshall and Lincoln had totally disregarded Chief Justice Taney on the habeas corpus question. The address asserted that none of these Presidents had ever been a dictator, but that their rejections had proven how powerless the courts were unless they issued just opinions. Cummings referred to amendment as the strategy of delay, calling the President's plan "reasonable, moderate, direct and constitutional."[11]

[10] Robert LaFollette, "Backing the President's Court Proposal," Vital Speeches, 3:311-14, March 1st, 1937.

[11] Homer S. Cummings, "Reasons for President's Plan and the Remedy," Vital Speeches, 3:295, March 15th, 1937.

II. RADIO OPINION AGAINST THE PRESIDENT'S PLAN

Under the auspices of the National Committee to Uphold Constitutional Government, James Truslow Adams delivered an address entitled, "What the Supreme Court Does for Us." Adams was reluctant to give up any powers to unknown men of future periods. He asked the people to remember that the Constitution was a single instrument, and therefore any change in part of the Constitution would effect the entire document. The same method could be used some day, the address pointed out, to destroy religious and political liberties. He further appealed to the populace to make themselves heard in Washington, and not let the independence of the courts be sacrificed, no matter how wise a man might be in control of the country.[12]

Raymond Moley, over station WABC, broadcast that some would have you believe that the opponents of Roosevelt were all enemies of progress. Moley considered himself one of the enemies of the plan, and at the same time a man who deplored all that "defeatist", "reactionary" and "lawyer" imply.

Moley stated that he believed the Court unduly conservative on some issues, but in others such as the National

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[12] James Truslow Adams, "What the Supreme Court Does for Us," Vital Speeches, 3:322, March 1st, 1937.

Recovery Act, the Court has merely told Congress to stop straining one or more points of the Constitution.

We are told that the Court has been "packed" in the past, continued the editor, but if we study closely, the only time that this was done was by the Reconstruction Congress.

Further, the proponents of the plan state that the problem of the farmer and business cannot wait, Moley noted. In reply, the address commented, "Let us not lose our sense of proportion. I do not think this administration can solve all the problems of our time. I do not want to teach future generations to fasten means to ends."[13]

Carter Glass, speaking from Washington, opened his address with the statement, "Never before have I ventured to debate before the public a measure pending in the Senate."

Confessedly, he stated that he was speaking from the depths of a soul filled with bitterness against a proposition which appeared to him to be utterly destructive of moral sensibility and without parallel since the country's foundation.

Glass commented that he was reflecting the indignant protests of thousands of citizens, and he challenged any

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[13] Raymond Moley, "President's Court Proposal," Vital Speeches, 3:341, March 15th, 1937.

proponent of the plan to read the mail he had received. He pointed out that he did not think the President incapable of selecting capable judges, but in his own words the Chief Executive announced that he wanted men to act in behalf of his legislation. Glass allegedly spoke in behalf of millions of alarmed citizens.[14]

Arthur Lamneck considered the Supreme Court issue the most important controversy since the Civil War. "I want it clearly understood that I am a Democrat; that I loyally supported Roosevelt in both his campaigns for President; that I will continue to aupport him when I think he is right," asserted Mr. Lamneck. However, he further announced that he would oppose any effort to rob the people of the liberties and rights they were granted.

Lamneck warned that if the Supreme Court was "packed" the people's liberties might be gone shortly after.

In conclusion, Lamneck stated that he wished to warn his fellow citizens again that eternal vigilance is the price of liberty, and therefore every citizen should make his wishes known on the court issue.[15]

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[14] Carter Glass, "Battle is On," Vital Speeches, 3:386, April 15th, 1937.

[15] Arthur Lamneck, "Reprosentative View of the Court Issue," Vital Speeches, 3:372-4, April 1st, 1937.

Yoncalla, Oregon," Neuberger stated. Some of the comments heard were printed in the article.

A youthful service station operator opined that he thought it a good idea to get rid of "those old fossils," in view of the fact that he had an uncle sixty-eight years old who certainly wasn't able to run the country. At sixty-eight, the gas station attendant noted his uncle was younger than most of the judges, and still he was never out of the doctor's office.

A young nurse who had shown indifference to the plan until she saw a picture in a magazine showing the Supreme Court dining room remarked, "All the judges had special dishes, different knives and forks and special salt and pepper shakers. That settled me; I've had enough experience with crotchety patients." Added the nurse, "If those judges can't use regular silverware and dishes, then they're too finicky and peculiar to run the country."

The wife of a successful business man commented that if the President had ever seen the justices in their dignified black robes, he would never have proposed such a plan. To her, it was "the most wonderful sight she had ever seen."

A worker on a WPA project averred that some big business men must be slipping the justices extra money on the side. He stated that he had seen a picture of one of the justices on his country estate, which in the worker's opinion took

considerably more than $20,000 to run. He called for an investigation of the court members' bank accounts, in view of their "Wall Street decisions."

An old man wearing a Townsend button exclaimed that the President had no respect for the aged citizens of the country. After making a political prisoner of Dr. Townsend, the man alleged, the President was now attempting to rule aged people off the Supreme Court. "Providence will punish the President for his treatment of the old and gray," the elderly gentleman stated.

A middle aged clerk thought that the Supreme Court had brought the issue upon themselves, since they turned loose a Communist in Oregon. Added the clerk, "I hope that the President gets rid of those two Jews and doesn't appoint any more to the Court."

Bitterly irate over the alleged tie-up of farm produce by the longshoremen's strike, a farmer remarked that the country's last defense was gone if Roosevelt took the Court over. "The only thing for the real Americans to do is to arm themselves to protect their homes. I'm teaching my boys to shoot straight and fast," the comment ended.

An elderly lady averred that the founders of the country knew what they were doing when they provided for nine judges, and if nine was enough for George Washington, they should be enough for President Roosevelt.

"I'll be for the bill if the President doesn't appoint any more lawyers to the Supreme Court," a young man with a union button said.

Neuberger remarked that not by any means were all the people as confused as those he had quoted. However, two fallacies gained considerable credence, he noted: First, many opponents of the President's plan claimed that the Court had always consisted of nine members, which number was specified in the Constitution; and that the demand for a constitutional amendment merely involved a demand for the President's plan.

The author commented that he frequently heard the sentiment that the Court was mean and spiteful to rule at all on the New Deal measures. This faction, the interviewer said, refused to believe that the Court passed only on laws brought before it in specific cases of appeal.

Shorthand reporters attending various forums throughout the country had taken down the interrogations most frequently asked, which Neuberger reprinted in his article.

Typical questions from persons against the plan were:

1. Why didn't the President say something about this during the campaign?

2. Is President Roosevelt sure the judges he appoints will be for the New Deal once they are on the Court?

3. If President Roosevelt could carry forty-eight states for re-election, why can't he carry thirty-six for a Constitutional amendment?

4. Do not the seventeen million people who voted against President Roosevelt have any rights?

5. Will not President Roosevelt set a precedent that some day may be followed by a dictatorial President like Huey Long?

Questions from persons for the plan were:

1. Justice Roberts seems to have more power than the President of the United States. Who elected him to be our dictator?

2. If it is true that Jefferson and Lincoln denounced the Court, isn't it all right for Roosevelt to do the same thing?

3. Why does the Supreme Court almost always throw out laws designed to help the little fellow?

4. There is a direct check on Congress and the President, but what check is there on the Supreme Court?

5. Does government mean anything when government is rendered powerless by a Court appointed for life or kept in bewilderment wondering on what side Justice Roberts will flop?

Neuberger found that many people reduced the issue to their own personal perspective.

The general objection that was heard most during the survey, was that the Court was a bulwark against hastily conceived tyrannical majorities. Among the President's adherents, thepoint advanced most frequently was the claim that the Court has thwarted the will of the people as expressed at the polls. Relatively few people, the author found, understood

the technical details, such as judicial review and the interpretation of the general welfare clause.

A survey conducted by the Christian Science Monitor showed that more than two-thirds of the pro-Roosevelt papers responding to the plan were withholding support. In a copyright article, the Monitor said that of seventy-four newspapers, twenty-nine were in outright opposition, twenty-two critical, nineteen in support, and four non-committal.

The Monitor showed 13,191,693 circulation of pro-Roosevelt papers opposed the plan, while 3,136,198 approved.[2]

The New York Times contained an item showing the results of a Bar Association poll, in which the members disapproved the plan by a six to one count. The specific questions asked and the results were:

Q. Should Congress enact the bill recommended on by Congress on February 5th, 1937?

The answers showed with respect to the Supreme Court that 2,563 were for the bill, 16,132 against. With respect to the Circuit Court of Appeals and other Federal Courts, 4,808 were for the plan, 14,401 against.

Q. Should Congress pass the bill as recommended by the President empowering Chief Justices of the Supreme Court

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[2] News item in The Christian Science Monitor, February 18th, 1937.

to assign circuit judges and district judges to duties outside their circuit or district as provided in the bill?

The survey showed 11,462 affirmative votes, 6,837 negative.

Q. Should the Congress authorize the Supreme Court of the United States to appoint an administrative assistant who may be known as the proctor, and who shall be charged with the duties of watching and reporting as to the calendars, as provided in tne bill?

To this question, 10,707 answered "Yes," while 7,414 replied "No."

Q. Should the Congress enact a bill requiring the courts to give notice to the Attorney General of the pendency of any action in which the constitutionality of any statute in the United States is drawn into question?

On this question 10,637 expressed approval, while 7,613 were against the requirement.

Q. Should the Congress enact a bill authorizing the Attorney General to appeal directly to a Court of the United States at his own discretion, and giving to these appeals precedence over other cases?

11,397 answered affirmatively, 6,852 negatively.

Q. Should the Congress enact the Sumners Bill (HR 2518), granting the justices of the Supreme Court the same rights and privileges with regard to retiring as granted

other justices?

14,482 lawyers expressed their approval of the bill, while 3,419 disapproved.[3]

On the basis of 4,767 ballots returned from 11,860 newspaper editors polled in every state, a survey showed the plan was supported by 1,135 editors, while 3, 498 opposed the issue. The remaining editors answered "don't know," or were indifferent.[4]

A more complete tabulation by the Bar Association showed that adverse opinion on the plan outnumbered Roosevelt proponents, six to one.

The vote by states follows.

State	Opposed	For	Ratio Against the Plan
Alabama	127	17	7-1
Arizona	99	16	6-1
Arkansas	110	27	4-1
California	1077	209	5-1
Colorado	215	24	10-1
Connecticut	305	30	10-1
Delaware	58	9	6-1
Washington, D. C.	573	137	4-1
Florida	262	92	3-1
Georgia	185	31	6-1
Idaho	49	10	5-1
Illinois	1427	209	7-1
Indiana	298	46	6-1
Iowa	346	32	10-1
Kansas	198	19	10-1
Kentucky	209	41	5-1

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[3] The New York Times, March 11th, 1937.

[4] The New York Times, March 11th, 1937.

Senator Burton K. Wheeler in a national broadcast cried: "Every labor leader, every farmer and every progressive minded citizen in the United States would have been shocked, and protested from the housetops if Presidents Harding, Coolidge or Hoover had even intimated such a plan." The progressives would have said, according to Wheeler, that it was a fundamentally unsound plan, and an attempt to set up a dictatorship.[16]

The addresses of David Lawrence on the radio appeared in part in the United States News. Lawrence, who rigorously protested the plan, had argued that the President's plan was clever, but obviously not of sincere intent, and in no way adapted to correcting the abuses of the system that had been alleged by reorganization adherents.[17]

Herbert Hoover demanded that hands be kept off the Supreme Court in an address over the radio. He stated that he could not visualize the Court as a group of intellectual nurses. New judges will be little thought of, the former President averred.[18]

Reverend Gerald B. Winrod, evangelist and editor of several religious publications, ordered millions of slips

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[16] Burton K. Wheeler, "First Member of the Senate to Back the President in 1932," Vital Speeches, 3:404, April 15th, 1937.

[17] David Lawrence, reprint in the United States News, March 21st, 1937.

[18] The New York Times, February 21st, 1937.

circulated with the warning, "Hands Off the Supreme Court," The evangelist, broadcasting over the Mexican radio station XEAW, stated, "I can get word to 20,000 pastors of churches of all denominations who are with me in this fight for democracy, and three-fourths of them will take the fight into the pulpit on Sunday."[19]

Senator William Borah, fiery Idaho Senator, delivered an address entitled, "First Member of the Senate to Back the President in 1932." Borah, denouncing the President's methods, called for an amendment, which the Senator alleged was the proper way specified in the Constitution.

If a mandate had been given the President in the preceding election, Borah observed that ratification by amendment would not be hard to obtain. However, the Senator added, if the people are against such a proposal, they have a right to be heard from.[20]

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[19] The New York Times, March 3rd, 1937.

[20] William E. Borah, "Supreme Court," Reader's Digest, 28:1-6, March, 1936.

Radio opinion was evenly divided on the court issue owing to the necessarily impartial attitude which networks and stations must take on any controversial issue. However, the controversy over the court issue reached its most intelligent phase on the air. Through this medium of public opinion, Congressmen were able to review the attitude of their constituents. Thus, radio opinion was an effect of reaction as well as a cause. Since the members of Congress were to decide the fate of the court proposal, a great deal of attention was given to their radio addresses. Senator Carter Glass of Virginia, who had never debated a proposal before the public in his career, revealed the necessity of reaching the people, in his address on a subject which he deemed most important.

Therefore, the radio was the most enlightening and fair agency of public opinion which took part in the court issue.

CHAPTER VI

VARIOUS ORGANIZATIONS EXPRESS OPINION

Farm groups constituted a large bloc of support for the President throughout the court issue. The representatives of farm organizations such as the American Rice Growers, Northwest Farmer's Union and many others, announced their support in March of 1937.[1]

In large part, the opinion of the farmers was moulded by Henry Wallace, who said that the plan must be put into effect if the country was not to be stymied by a small autocratic group.[2]

The editor of the Farm Journal, Art Jenkins, voiced approval of the plan as did the Farmer's Holiday Association, whereas Ray Yarnell, editor of Capper's Farmer, opposed it,[3] as did the National Grange.[4]

A survey of clergymen commenting on the issue expressed diverse opinions.

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[1] "Borah Plan," Literary Digest, 123:8, March 6th, 1937.

[2] The New York Times, February 18th, 1937.

[3] "Senators Hold Fate of Court Plan," Literary Digest, 123:3-5, February 27th, 1937.

[4] "The Supreme Court Controversy," Congressional Digest, 16:66-96, June, 1937.

G. M. Bruce of Luther Theological Seminary said, "The alleged age is not the real issue; this is proven by the fact that one member of the President's cabinet is beyond retirement age and another had just reached it."

Bishop Hughes of Washington, the senior member of the Methodist Church at the time, testified against the bill, telling the committee in Congress that recent tours had taken him through various parts of the country and he had found no one willing to support the plan.[5]

Rabbi Rosenblaum said the Roosevelt bill was "impractical, impervious and importunate." The clergyman commented that the Supreme Court was less likely to be influenced by the frenzy of new matters than the other two branches of the government.

Louis B. Ward, former agent for Father Coughlin, urged that the Senate Judiciary Committee impress on Congress, the power that the legislature has to coin money and regulate the value thereof. "This is more important than usurping the Court," the Coughlin spokesman stated.[6]

The Presbyterian General Assembly adopted a resolution calling on the people to guard, cherish and maintain

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[5] The New York Times, April 14th, 1937.

[6] The New York Times, April 22nd, 1937.

the liberties that belong to the Church and the State.[7] Whether this was a statement in defense of the Court was not clarified.

Bishop McConnell of the Methodist Episcopal Church in New York, called the plan sound; Bishop James Freeman of the Protestant Episcopal Church in Washington, expressed opposition; Bishop W. Flint of the Methodist Episcopal Church in Atlanta referred to the bill as a "devious measure"; Bishop Clinton Quinn of the Protestant Episcopal Church thought the automatic retirement of judges a good proposition; Bishop Edward Parson of the Protestant Episcopal Church in San Francisco stated that the cry of dictatorship was unfounded; while Bishop A. H. Boaz of the Methodist Episcopal in Fort Worth called for an amendment.[8]

The lawyers of the nation were generally opposed to the plan. Business Week commented that lawyers are the most vocal of all the professional people, and more attention is paid to their resolutions because generally a bar association or any group of lawyers is given the benefit of the doubt.[9]

The Cleveland Bar Association opposed the plan,

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[7] The New York Times, June 1st, 1937.

[8] "Senators Hold Fate of Court Plan," loc. cit.

[9] "Court and Willful Men," Business Week, pp. 16-17, February 20th, 1937.

Stanley Orr, the President of the group, stated. He commented that such a policy was opposed to the well established principle of independence.[10]

President Frederick M. Stinchfield of the American Bar Association stated that a change in the courts would mean a change from a constitutional to a legislative form of government. William E. Donovan of the New York Bar Association held that in view of the Supreme Court's splendid record, any change was unnecessary.[11]

Many organizations blossomed forth during the issue to give aid to the Court. Impressive titles in the list included, "The Women's National Committee for Hands Off the Supreme Court," "The Committee of Safety," "The League Opposed to the Remaking of the Supreme Court," "The Vanguard of Liberty," "The Citizen's Supreme Court Protective Committee," and the "Keep the Court As It Is Committee."[12]

Business Week contended that the Roosevelt plan was producing a revolt among the Democrats in the south. The revolt was economic in nature, the weekly contended. The aftermath of Appomattox was a retarded and impoverished South, and for generations the ablest Southerners had been trying to

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[10] The New York Times, February 18th, 1937.

[11] The New York Times, April 10th, 1937.

[12] "Court Plea to Public," Literary Digest, 123:4-5, March 20th, 1937.

establish a more liberal policy, much of which was impaired by the increasing centralization of the New Deal.[13]

The American Institute of Public Opinion reported a steady, though small increase in support for the plan by some groups. Democrats, the Institute stated, favored the plan, seventy percent of the party lending its support, according to the poll. Other figures showed seventy percent of those on relief in favor, sixty-six percent of union labor, fifty percent of those polled in cities and fifty percent of youth.[14]

Labor's Non-Partisan League was the first independent group to endorse Mr. Roosevelt's bill. With firm determination, the League announced it would accept no compromises offered by opponents. The members of the League's executive committee were labor leaders, and about half had court injunctions against them, New Republic stated. For this reason they were anxious to gain a liberal court, whose policies would be more kindly to labor, it was stated by the liberal magazine.[15]

The Consumer's and Financial Chronicle predicted a split in the Democratic party because of the court issue.

[13] "Crisis in the Court Fight," op. cit., p. 72.

[14] "The Week," op. cit., p. 306.

[15] "All or Nothing," New Republic, 91:156, June 16th, 1937.

It added that this split would inevitably lead to a Republican victory in 1940. The magazine further predicted that a new alignment of parties could come about as a result of the constitutional issue. The American Labor Party, champions of the issue, was pointed to as the core of a new party in the United States by the Chronicle.[16]

The National Committee for Clarifying the Constitution went on record for an amendment, stating that the President's plan was merely a measure intended to meet the immediate present.[17]

Max Isaac, President of the New York League Opposed to the Remaking of the Supreme Court, considered any tampering with the Court unjustified.[18]

Homer Martin of the United Auto Workers of America, telegraphed Roosevelt on February 18th, 1937, assuring him of the support of the entire organization. Martin believed that the President had been given a mandate to replace judges appointed by repudiated Presidents.[19]

Frank E. Gannett, Chairman of the National Committee for Constitutional Government asserted that the battle must

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[16] "Confessions and Avoidance," op. cit., p. 163.

[17] The New York Times, February 18th, 1937.

[18] Ibid., February 18th, 1937.

[19] Ibid., February 19th, 1937.

be won by the opponents of the plan.[20]

The Economic Club of New York called upon Senator Burke, opponent of the plan, and Attorney General Jackson, a supporter, to speak to its members. Both speakers commented that the members were overwhelmingly in opposition.[21]

The American Labor Party said it had obtained 30,000 signatures endorsing the President's plan for reorganization. It claimed to bespeak the desire of a million New York State workers who had allegedly suffered from economic and political evils. Gustave Strebel, executive director of the labor party wrote the President a letter advising the initiator of the reorganization bill that the party stood behind him.[22]

Various college student bodies polled on the issue showed divergent opinions. Smith College students opposed the plan five to one, as did the members of the Harvard Law School.[23] Students of the University of Texas supported the issue by a three to two majority.[24]

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[20] The New York Times, March 23rd, 1937.

[21] Ibid., March 21st, 1937.

[22] Ibid., March 25th, 1937.

[23] Ibid., March 6th, 1937.

[24] Ibid., March 21st, 1937.

The Women's Trade Union League fully endorsed the court plan. Other women's organizations expression opinion were the General Federation of Women's Clubs and Women's Club of Illinois, both of which opposed the plan.[25]

The Board of Directors of the National Consumer's League adopted a resolution approving the court plan. They stated that while a minority of the Supreme Court had unequivocally declared that Congress and the Legislature had wide powers under the Constitution, nevertheless the record of the majority shows that the Court intends to challenge these powers in the future.[26]

George Sokolsky and Morris Ernst spoke to the League for Political Education on March 11th, 1937. Applause greeted Sokolsky when he said, "You have to have a principle, namely, that elected officials in this country must stand by their pledges and promises, and when they don't we should condemn them for their treason." The 3500 members of the League voiced resentment over Morris Ernst's advocacy of the plan.[27]

The Newspaper Guild advocated the passage of the President's plan, stating that it felt the people had given

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[25] Ibid., March 7th, 1937.

[26] Ibid., March 11th, 1937.

[27] Ibid., March 12th, 1937.

a mandate to the President, which he should carry out.[28]

The Teachers of the State of New York asked the Congress to curb the Supreme Court's power on Congressional legislation. They further advocated a Constitutional amendment allowing Congress to pass federal, social and labor legislation.[29]

There were two distinct classes of organizations commenting on the court issue during 1937. The first was comprised of groups organized solely for the purpose of creating opinion for or against the proposal. The great number of these was indicative of the extent to which the public became concerned with the proposed reform. The second was composed of organizations created before the court issue had been presented. In general, the latter group's comments were based upon the effect New Deal policies had upon a particular organization. The farmers were split, according to the evidence, probably because some had benefited from the New Deal, while others had not felt its effects.

Organizations not affected by the New Deal policies or the Court's decisions failed to show any trends. For example, clergymen were evenly divided in their opinions, presenting arguments based upon their personal viewpoints rather than

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[29] Ibid., August 28th, 1937.

as a part of the particular sect they represented.

The organizations proved to be both the cause of public opinion and the effect. However, because most of them were local in nature and reached only a select group, they did not exert as great an influence as the national magazines, or the chain newspapers.

CHAPTER VII

WHAT THE POLLS SAID

Many of the leading advocates and opponents of the reorganization bill believed that the issue should be decided by the people. Many Congressmen, realizing the wide interest shown by the people withheld their statements until the people's voice could be heard. Thus, the influence of public opinion had much to do with the eventual outcome of the proposal.

R. L. Neuberger, in the periodical Current History, presented the results of his interviews with the public on the court issue.[1]

A man in a diner opined, "Good Lord, our taxes are going up still more. This Supreme Court plan of Roosevelt's will cost a barrel of money. Six new justices at $20,000 a year." In addition to this, the person being interviewed added that he thought it just another scheme to spend more money like the many other ones.

To Neuberger, this was a fresh and novel viewpoint.

The discussion was found to be prevalent in bankers' offices and in the general store at "the crossroads in

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[1] R. L. Neuberger, "America Talks Court," Current History, 46:33-8, June, 1937.

State	Opposed	For	Ratio Against the Plan
Louisiana	217	37	6-1
Maine	103	7	15-1
Maryland	250	37	7-1
Massachusetts	728	73	10-1
Michigan	469	64	7-1
Minnesota	428	70	6-1
Mississippi	98	30	3-1
Missouri	648	115	6-1
Montana	50	7	7-1
Nebraska	235	15	16-1
Nevada	68	13	5-1
New Hampshire	75	11	7-1
New Jersey	488	98	5-1
New Mexico	43	9	5-1
New York	2196	338	7-1
North Carolina	147	28	5-1
North Dakota	45	7	7-1
Ohio	803	81	10-1
Oklahoma	279	59	5-1
Oregon	157	13	12-1
Pennsylvania	906	126	7-1
Rhode Island	120	11	11-1
South Carolina	97	21	5-1
South Dakota	87	6	14-1
Tennessee	149	36	4-1
Texas	442	93	4-1
Utah	113	19	6-1
Vermont	76	5	15-1
Virginia	254	57	5-1
Washington	224	30	8-1
Wisconsin	349	56	6-1
West Virginia	180	31	6-1
Wyoming	32	7	4-1
Territories	14	5	3-1
Foreign	1	-	-
Total	16,132	2,563	6-1

Thus, according to this poll, the lawyers of every state, territory and the District of Columbia disapproved the plan.[5]

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[5] The New York Times, March 14th, 1937.

Justice Fairchild of the Wisconsin Supreme Court and chairman of the Association's board, said that members of the National Junior Bar Association had voted four to one against the plan. This organization, Fairchild commented, was made up of lawyers under thirty-six years of age.[6]

The Newspaper Enterprise Association Service, conducted a Supreme Court poll in eighteen states. The results of 10,000 ballots showed 3,036 for the plan and 6,354 against it.[7]

A poll conducted by the Milwaukee Journal showed 533 ballots for the plan, 1,050 against the plan.[8]

J. T. Flynn, writing in New Republic, wrote an article on public opinion in the court issue after traveling over the nation and talking to a wide variety of Americans.

Flynn drew the following conclusions from his survey:

1. That the great majority of people were against the court proposal.

2. That while they were against it, their attitude was one of tolerance for the objectives of the plan, Flynn noted.

3. It was observed that each week since the plan was introduced, sentiment grew against it.

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[6] The New York Times, April 14th, 1937.

[7] The San Francisco News, February 23rd, 1937.

[8] The Milwaukee Journal, June 3rd, 1937.

In connection with this, Flynn commented that the argument for the plan which made the strongest impression was the one about "unpacking" the Court, whereas the one that makes the least impression is that, because of Roosevelt's popularity, the Court should render decisions in his favor. It was further seen by the writer that the argument to appoint justices to speed up court procedure was completely ignored by friends and enemies of the plan alike.

The writer found the feeling of confidence in President Roosevelt as a man whose heart is in the right place, to be widespread, despite disagreement by the public with his court plan.[9]

A survey conducted by the Newspaper Enterprise Association showed nearly 400,000 to be against the plan, and 250,000 to be for the court proposal. The Newspaper Association's polls showed a slightly better than two to one opposition early in February, and slightly less than two to one vote against the plan in late February.

Three Pacific Coast states, California, Oregon and Washington, supported the plan.

The vote by states follows:

State	For the plan	Opposed to plan
Alabama	2,493	2,693

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[9] J. T. Flynn, "Other People's Money," New Republic, 90:138, March 10th, 1937.

State	For the plan	Opposed to plan
Arizona	1,140	5,905
Arkansas	538	917
California	8,073	6,896
Colorado	636	4,302
Connecticut	4,096	1,572
Florida	1,067	4,882
Georgia	5,938	6,136
Idaho	2,004	1,550
Illinois	6,040	16,375
Indiana	1,880	6,205
Iowa	680	3,669
Kansas	2,147	11,559
Kentucky	151	954
Maine	382	7,621
Maryland	203	513
Massachusetts	5,775	2,239
Michigan	471	4,055
Minnesota	5,293	7,052
Missouri	13,736	3,361
Montana	69	121
Nebraska	387	167
New Jersey	2,985	5,698
New Mexico	173	257
New York	8,332	41,592
North Carolina	3,042	2,214
North Dakota	184	97
Ohio	2,224	10,768
Oklahoma	12,147	10,978
Oregon	1,979	1,904
Pennsylvania	4,230	23,049
South Carolina	3,215	2,004
South Dakota	562	1,912
Tennessee	2,906	1,962
Texas	7,066	5,872
Utah	288	305
Virginia	1,679	311
Washington	5,515	2,598
West Virginia	1,993	5,141
Wisconsin	9,112	15,089
Wyoming	315	866
Total	131,320	232,692

Rhode Island, Mississippi, Vermont, Delaware, New Hampshire and Louisiana returns were not shown in the

poll.[10]

Gallup polls showed the President to be supported by one out of every three persons who had voted for him in 1936, and by one out of every ten who had voted for Landon.[11]

The Gallup Polls conducted extensive surveys of public opinion through 1936 and 1937 concerning the court issue.

The following questions were asked in their surveys.

Q. Would you favor curbing the power of the Supreme Court to declare acts of Congress unconstitutional? (December, 1936)

No 59% Yes 41% No opinion 19%

Q. Should Congress pass the President's Supreme Court plan? (June, 1937)

No 59% Yes 41% No opinion 21%

Q. Would you favor a compromise on the court plan which would permit the President to appoint two new judges instead of six? (May, 1937)

No 62% Yes 38% No opinion 21%

Q. Would you favor a Constitutional amendment requiring Supreme Court justices to retire at some age between seventy and seventy-five? (September, 1937)

Yes 64% No 36% No opinion 10%

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[10] The San Francisco News, March 3rd, 1937.

[11] The New York Times, March 3rd, 1937.

Q. Would you like to have President Roosevelt continue his fight to enlarge the Supreme Court? (September, 1937).

Yes 68% No 32% No opinion 19%

Q. Do you believe the Roosevelt administration should try to defeat the re-election of Democratic Congressmen who opposed the Supreme Court plan? (September, 1937)

Democrats only

No 73% Yes 27% No opinion 26%

National total

No 80% Yes 20% No opinion 25% [12]

A poll by the American Institute of Public Opinion showed that although sixty-one percent voted for Roosevelt in November, 1936, fifty-three to sixty percent in various regions were opposed to his court plan.[13]

Elmo Roper, writing in the magazine Public Opinion Quarterly, noted that public opinion in the United States often divides itself into three groups. Those for an issue and those against an issue do not change their opinion, but the third group, those undecided in their opinion, are the ones who decide many issues.

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[12] George Gallup and Saul Roe, The Pulse of Democracy, (New York: Simon and Schuster Publishing Company, 1940), pp. 303-5.

[13] "Big Debate," Time, 29:10, March 1st, 1937.

Roper found that a survey conducted during the last week of March, 1937 and the first week of April, 1937, among all classes of people, showed twenty-eight percent to favor the enactment of the President's proposal. In this group he found a large number of the opinion that if Roosevelt wants it, it must be right, while some felt honestly that the Court's power should be curbed.

It was further shown that thirty-six percent of the people were strongly opposed to the proposal, and Roper averred that most of these would be against any proposal which strongly affected the Supreme Court. In this group could be found those who make a fetish of worshipping the Constitution, those who are against Roosevelt in anything he does, and those who say, "if you can't play ball, don't kill the umpire," plus a considerable group who say that while no part of the government has always been right the Supreme Court through the years has had a better record than the Congress or the President. Roper found the prosperous and middle class levels heavily represented in the pro-court group, but the poor were represented in quantities that would surprise anyone who contends that the poor are willing to back the President in anything he does.

Thus, the survey showed that sixty-four percent had expressed opinion on the plan, but twenty-two percent

were undecided. Some of the latter were disturbed and wished they knew more about the issue; others accepted their lack of opinion philosophically, contending it was too deep for them to worry about. Still others did not have enough confidence in the Supreme Court or the President to support either side, or felt that since it was a political question in their mind, Congress would decide the issue on that basis.

Fourteen percent were unaccounted for, and to Roper this group was the most interesting. These were firmly convinced that something should be done about the Court and just as firmly convinced that Roosevelt's plan was not good.

Roper stated in summarizing, "The thing of capital importance to know is that in April of 1937, thirty-six percent of the people were neither for nor against the plan."[14]

An American Institute of Public Opinion survey, made of opinion stated up to the time of the first speech on the court issue by the President, March 4th, 1937, was conducted. It showed eight of the twenty-one largest states favored the plan, while the rest were opposed.

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[14] Elmo B. Roper, "Neutral Opinion on the Court Proposal," Public Opinion Quarterly, 1:17, July, 1937.

The vote by states:

State	For a change	Against change
Texas	61%	39%
Georgia	60%	40%
California	59%	41%
Tennessee	54%	46%
Alabama	54%	46%
New Jersey	52%	48%
Kentucky	52%	48%
North Carolina	51%	49%
Pennsylvania	49%	51%
Wisconsin	49%	51%
Illinois	48%	52%
Missouri	48%	52%
Virginia	48%	52%
Iowa	47%	53%
Ohio	46%	54%
New York	45%	55%
Indiana	43%	57%
Massachusetts	41%	59%
Minnesota	40%	60%
Michigan	36%	64%
Oklahoma	36%	64% [15]

On March 12th, 1937, The San Francisco News published an American Institute of Public Opinion poll showing the results of expression in answer to the question, "What action should Congress take on Roosevelt's proposal to modify the Court?"

The opinion by areas follows:

Area	In favor of passage	In favor of modification of the plan	In favor of defeat
New England	32%	21%	47%
Middle Atlantic	38%	23%	39%

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[15] The San Francisco News, March 17th, 1937.

Area	In favor of passage	In favor of modification of the plan	In favor of defeat
East Central	34%	23%	43%
West Central	27%	25%	48%
South	48%	27%	25%
Mountain	37%	20%	43%
Pacific Coast	35%	28%	37% [16]

The Institute of Public Opinion polls showed that in February, 1937, fifty-three percent of the people were opposed to the plan. In the fall of 1935 and in December of 1937, the voters were against limiting the power of the Supreme Court to declare acts of Congress unconstitutional. On the first occasion they opposed the issue sixty-three percent to thirty-seven percent, while in December they opposed it, fifty-nine percent to forty-one percent.

Yet, the poll showed that the President had initiated his proposal at the height of his popularity. During the week before the court plan was introduced, the President had sixty-five and one-half percent of the country's support. Only in February of 1934, when he had sixty-nine percent of the people's support, was he more popular.[17]

In April of 1936, Fortune magazine published the results of a survey conducted nine months before.

The question asked was: "Do you think the Supreme

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[16] Ibid., March 12th, 1937.

[17] Ibid., February 18th, 1937.

Court has recently stood in the way of the people's will, or do you think it has protected rash legislation?"

The results showed that nearly forty percent answered "don't know" or "neither."

Returns were as follows:

In the way of the people	21.7%
Protected the people	39.2%
Neither	6.3%
Don't know	32.8%

Thus the people believing that the Court had protected the nation from rash legislation were found to be twice as numerous as those who concurred with President Roosevelt.

A correlation between the attitudes on Roosevelt and the attitudes toward the Supreme Court indicated that a majority of the people who were opposed to Roosevelt thought that the Supreme Court had not stood in the way of the people's will, but rather had protected them against rash legislation sponsored by President Roosevelt.

The comparison follows:

Attitude toward Roosevelt	Supreme Court in the way	Protected people	Neither or don't know
Re-election essential	30.4%	24.4%	45.2%
Best man despite mistakes	27.8%	31.2%	41.0%
Usefulness now over	10.9%	54.9%	34.2%

Attitude toward Roosevelt	Supreme Court in the way	Protected people	Neither or don't know
Re-election a calamity	8.8%	64.9%	26.3%
Uncertain	8.2%	40.6%	51.2%
Total	21.7%	39.2%	39.1%

If the President wished to know what effect the bringing of the court issue into a campaign would have, he could observe that by attacking the Court he might win over ten and nine-tenths of the people who thought his usefulness had past, and eight and eight-tenths percent of the people who thought his election would be a calamity. But he would not stand the chance of losing twenty-four percent of his now unqualified support and thirty-one percent of the people who thought he was the best man in sight. He would observe that the undecided already liked him better than those with an opinion, Fortune stated. "And by that time he would already have concluded," the summary stated, "that there is political dynamite in appealing to the nation to curtail the powers of the Supreme Court."[18]

In June of 1937 Fortune published another survey, noting that for the first time the President had brought up an issue that weighed more in the public mind than did his popularity.

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[18] "Fortune Survey: the Supreme Court," Fortune, 13:104-210, April, 1936.

The questions asked were: "What do you think about Roosevelt's plan to enlarge the Supreme Court? And about Roosevelt himself? And about the present Supreme Court itself?"

The last two questions were asked in substance in the Fortune survey of April, 1936.

The answers received in the 1937 poll showed the following opinion on the questions concerning the court issue:

"How do you feel about the President's proposal that he be allowed to appoint six new younger justices to the Supreme Court?"

"a) Believe the President is right and that Congress should pass the law he requests. 26.8%

"b) Don't know much about it, but if Roosevelt wants it, let him have it. 4.3%

"c) Don't know what should be done, but something should definitely be done to define the status of the Supreme Court. 2.5%

"d) All right under Roosevelt but afraid of what might happen under someone else. 2.6%

"e) Leave the number of justices at nine, but force retirement at age of seventy years. 8.9%

"f) Believe it would be better to submit to vote of people a Constitutional amendment enlarging the powers of Congress. 3.7%

"g) Believe that instead of enlarging the Court it would be better to pass a law requiring two-thirds or unanimous opinion of Court to override acts of Congress. 3.3%

"h) Let the Supreme Court alone. 32.1%

"i) Don't know. 15.8% "

Thus the poll showed that there are as many people, even a few more, who prefer the status quo of the Court to the President's proposal to increase it.

The extreme variations in opinion, that is, those who opposed the plan, (answers d, e, f, g, and h in the preceding poll), and those who approved the plan (answers a and b in the preceding poll), showed:

By class	For	Against
Prosperous	23.3%	76.7%
Poor	48.9%	51.1%
By occupation	**For**	**Against**
Professional people	22.6%	77.4%
Unemployed	52.9%	47.1%
By geography	**For**	**Against**
Northwest plains	25.9%	74.1%
Southwest	57.3%	42.7%

Fortune noted here that geographical differences are wider than class and occupational differences. The southwest is the only part of the country where the President's plan met with approval. The only other groups that agreed with him, and by smaller majorities were the unemployed and factory labor.

The poll next dealt with the issue in comparison with the President's personal appeal. As has been previously stated, this was the first time that the President had been confronted with a majority of opposition on any issue.

Fortune then compared the President's third term support with his support in the court issue.

	Favor third term	Oppose third term
Those approving the President's plan on the court	50.0%	17.2%
Those indeterminate on the court issue	2.9%	2.1%
For alternative or status quo	29.3%	71.8%
Don't know	17.8%	8.9%

Those who supported Roosevelt were for his court proposal, but those who did not want him returned to office were heavily against his court plan, and only half as much in doubt about their opinions.

The next question asked by the poll was, "Do you think the Supreme Court has stood in the people's way or protected the people against rash legislation?"

The answers showed:

	April, 1936	1937	Change
a) In the way of the people	21.7%	23.1%	1.4%
b) Protected the people	39.2%	43.1%	3.9%
c) Neither	6.3%	4.6%	-1.7%
d) Both		4.3%	
e) Don't know	32.8%	24.9%	-7.9%

Comparing the results of the court issue on the

President's popularity, we find the following trend:

	Thought Court stood in way	Thought Court protected
Poll taken in April, 1936		
Of those favorable to Roosevelt	54.8%	35.9%
Of those unfavorable to Roosevelt	15.2%	64.1%
Poll taken in 1937		
Of those favorable to Roosevelt	66.4%	23.6%
Of those unfavorable to Roosevelt	23.6%	76.4%

Thus the Fortune editors stated that from their results they felt that Roosevelt had espoused a cause more unpopular than he was popular, and perhaps this multitude of opposition opinion would cause the defeat of the issue in Congress.[19]

Court reform became the topic of many polls conducted throughout the nation in 1937. The reactions of the electorate were sought by those interested in effecting the outcome of the issue as well as disinterested agencies. The results of the various surveys revealed a remarkable degree of agreement. The people had shown themselves to be opposed to the proposed reform from the outset.

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[19] "Roosevelt and the Supreme Court," Fortune, 16:96-8, June, 1937.

That the newspapers which had continually opposed the President were quick to state their disapproval was not surprising, but that the people who had supported the President in the 1936 election showed themselves to be against the measure was worth noting. Democrats as well as Republicans, supporters of the New Deal as well as antagonists, showed their sympathies to be with the Court.

The intelligence of a great deal of the electorate on the matter was not high, which fact is evidenced in R. L. Neuberger's survey. The electorate readily grasped the significance of the reform, but were not in a position to weigh the merits of the bill. This was shown by their comments. Most of the people knew the principles involved in the issue, therefore, but were susceptible to the misleading statements advanced by the various agencies of public opinion. Personalities entered into the making of public opinion on the issue, the comments showed. Furthermore, the general tendency of the American public to choose one side of an issue without reservation was evident.

The fact that the courts had existed in the same form for a long period seemed to be the biggest argument against changing the system. Most of the people were concerned only with the reform of the Supreme Court, little comment being made on the rest of the bill.

In general, it can be concluded that the proposal was more unpopular than the President was popular.

During the height of the court controversy, Heywood Broun wrote that if the President lost out on his proposal or was forced to compromise deeply, no one would think of attacking the court system for another ten years. Further, he added that a negative reaction on the part of the people would indicate that there was political dynamite in attacking the court system. From the results of the polls, such facts were obviously true. Fortune concluded from its surveys that the President had espoused a cause more unpopular than he was popular.

The President, according to a Gallup survey, was at the second highest point of his popularity when he introduced the court bill. His legislation had proved effective in the struggle to overcome the economic insecurity of the period. However, the facts would indicate that in attacking the court system he met disaster because the people did not desire to change their government. It was not that they objected to the obscurity of his purposes, or the reasons advanced by the agencies of public opinion against the proposal. It was rather because the people evidently preferred laws by government rather than laws by men. The second great objection of the people lay in the fact that they felt a great change would

be effected without their consent. The comments of the populace would not indicate that they had been as greatly influenced by the magazines and newspapers, as by the two prime reasons referred to previously.

The agencies of public opinion attempted, with few exceptions, to influence public opinion. In one aspect they were successful. From the great interest among the electorate it would seem that these agencies had conveyed the importance of the matter to the people. In swaying the populace they were not as successful. It might be argued that the bulk of the newspapers were against the President as well as the mass magazines; but these agencies were against the President in 1936 and he won the election.

On the whole, the radio, because of its imposed partiality, was the fairest medium of public opinion. It was on the radio that the controversy received its most intelligent discussion. And it was to the Senators and Representatives who addressed their constituents over the air that the greatest amount of mail was addressed. Literary Digest showed that during May of 1937, thirty-five Senators were still undecided on the issue. They were close to favorable influence in Washington, and having not made up their minds on the issue by April would indicate that this neutral group had no deep rooted opinion on the matter. Public opinion

undoubtedly then caused a negative reaction to the bill among the undecided legislators.

The newspapers were prone to appeal to the people's emotions, more than their intellect. Notable exceptions to this were the New York Times and the Christian Science Monitor. The point of interest concerning the newspapers is that seventy-three percent of the Democratic publications were in opposition. And the Scripps-Howard chain, for the first time, took exception to a point of the President's program. A few publications withheld comment at the outset, awaiting public opinion's appraisal and a clarification of the bill, but once these agencies plunged into the issue, their policy was consistent.

The magazines made appeals to whatever group was most likely to subscribe. They too, by their consistent editorial policy, showed themselves to be causes of public opinion. However, from the material surveyed, it would indicate that the magazines kept the controversy on a higher plane than did the newspapers.

It was evident that among the agencies influencing public opinion as well as among the electorate there were many opinions admitting of compromise. Some were disgusted with the courts, but did not wish to see the President's bill passed; while others wished that the President had chosen a

different course of action. Amendment was the choice of many. Two factions advocated amendment: those who honestly believed it the best process, and those who hoped that the time delay necessarily involved in the passage of an amendment would prove disastrous to the President's cause.

The implications of the controversy are important. Public opinion was the most important factor contributing to the defeat of the proposal. Therefore, it would behoove any man in an elected office to take cognizance of public opinion before introducing an issue. Further, one could conclude that no matter what the circumstances, the people of the United States are against a change in their form of government.

Those who fear dictatorship in the United States would not find the court proposal an effective argument in their favor. The President was an extremely popular man, yet not so popular as the traditions of the government. It is unlikely, therefore, that the principle of separation of powers embodied in the Constitution will be changed.

It has been alleged that Germany succumbed to dictatorship because the articles of the Weimar Constitution were bypassed and the German courts made ineffective. Such a change would seem unlikely in this country, in view of the 1937 court proposal.

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APPENDIX

PROPOSED BILL[1]

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

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

(b) The number of judges of any court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. No more than fifty judges shall be appointed thereunder, nor shall any judge be so appointed if such appointment would result

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[1] "Senate Report Number 711," op. cit., pp. 31-32.

in (1) more than fifteen members of the Supreme Court of the United States, (2) more than two additional members so appointed to a circuit court of appeals, the Court of Claims, the United States Court of Customs and Patent Appeals, or the Customs Court, or (3) more than twice the number of judges now authorized to be appointed for any district or, in the case of judges appointed for more than one district, for any such group of districts.

(c) That number of judges which is at least two-thirds of the number of which the Supreme Court of the United States consists, or three-fifths of the number of which the United States Court of Appeals for the District of Columbia, the Court of Claims, or the United States Court of Customs and Patent Appeals consists, shall constitute a quorum of such court.

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

Sec. 2. (a) Any circuit judge hereafter appointed may be designated and assigned from time to time by the Chief Justice of the United States for service in the circuit court of appeals for any circuit. Any district judge hereafter appointed may be designated and assigned from time

to time by the Chief Justice of the United States for service in any district court, or, subject to the authority of the Chief Justice, by the senior circuit judge of his circuit for service in any district court within the circuit. A district judge designated and assigned to another district hereunder may hold court separately and at the same time as the district judge in such district. All designations and assignments made hereunder shall be filed in the office of the clerk and entered on the minutes of both the court from and to which a judge is designated and assigned, and thereafter the judge so designated and assigned shall be authorized to discharge all the judicial duties (except the power of appointment to a statutory position or of permanent designation of a newspaper or depository of funds) of a judge of the court to which he is designated and assigned. The designation and assignment of any judge may be terminated at any time by order of the Chief Justice or the senior circuit judge, as the case may be.

(b) After the designation and assignment of a judge by the Chief Justice, the senior circuit judge of the circuit in which such judge is commissioned may certify to the Chief Justice any consideration which such senior circuit judge believes to make advisable that the designated judge remain in or return for service in the court to which he

was commissioned. If the Chief Justice deems the reasons sufficient he shall revoke or designate the time of termination of such designation and assignment.

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

standing the expiration of any time limit in his designation, to participate in the decision of all matters submitted to the court while he was sitting and to perform or participate in any act appropriate to the disposition or review of matters submitted while he was sitting on such court, and his action thereon shall be as valid as if it had been taken while sitting on such court and within the period of his designation.

Sec. 3 (a) The Supreme Court shall have power to appoint a proctor. It shall be his duty (1) to obtain and, if deemed by the Court to be desirable, to publish information as to the volume, character, and status of litigation in the district courts and circuit courts of appeals, and such other information as the Supreme Court may from time to time require by order, and it shall be the duty of any judge, clerk, or marshal of any court of the United States promptly to furnish such information as may be required by the proctor; (2) to investigate the need of assigning district and circuit judges to other courts and to make recommendations thereon to the Chief Justice; (3) to recommend, with the approval of the Chief Justice, to any court of the United States methods for expediting cases pending on its dockets; and (4) to perform such other duties consistent with his office as the Court shall direct.

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

(c) The salary of the proctor shall be $10,000 per annum, payable out of the Treasury in monthly installments, which shall be in full compensation for the services required by law. He shall also be allowed, in the discretion of the Chief Justice, stationery, supplies, travel expenses, equipment, necessary professional and clerical assistance, and miscellaneous expenses appropriate for performing the duties imposed by this section. The expenses in connection with the maintenance of his office shall be paid from the appropriation of the Supreme Court of the United States.

Sec. 4. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000 for the salaries of additional judges and other purposes of this Act during the fiscal year 1937.

Sec. 5. When used in this Act -

(a) The term "judge of retirement age" means a judge of a court of the United States, appointed to hold his office during good behavior, who has attained the age of seventy years and has held a commission or commissions as judge of

any such court or courts at least ten years, continuously or otherwise, and within six months thereafter, whether or not he is eligible for retirement, has neither resigned nor retired.

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

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

(d) The term "judge" includes justice.

Sec. 6. This Act shall take effect on the thirtieth day after the date of its enactment.