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Richard D. Friedman

University of Michigan Law School, rdfrdman@umich.edu

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Chief Justice Hughes' Letter on Court-Packing

Richard D. Friedman

After one of the great landslides in American presidential history, Franklin D. Roosevelt took the oath of office for the second time on January 20, 1937. As he had four years before, Chief Justice Charles Evans Hughes, like Roosevelt a former governor of New York, administered the oath. Torrents of rain drenched the inauguration, and Hughes' damp whiskers waved in the biting wind.¹ When the skullcapped Chief Justice reached the promise to defend the Constitution, he "spoke slowly and with special emphasis."² The President responded in kind, though he felt like saying, as he later told his aide Sam Rosenman:³

Yes, but it's the Constitution as *I* understand it, flexible enough to meet any new problem of democracy—not the kind of Constitution your Court has raised up as barrier to progress and democracy.

Roosevelt's emphasis in pronouncing the oath was not lost on the crowd; some thought he repeated it "as if it had been an accusation." Nor, Rosenman was sure, was there any doubt that Hughes, sitting just behind the rostrum, understood the President's emphasis when he declared in his address that the

people "will insist that *every* agency of popular government use effective instruments to carry out their will."⁴ Though the Supreme Court had upheld some of the responses to the Depression attempted by the New Deal and the states, several of its decisions, particularly those invalidating New Deal programs, had frustrated the President immensely.

The atmosphere was warmer, as well as dryer, as the Roosevelts hosted members of the Court for dinner and a musical program on February 2. Hughes was in a jovial mood, and when he and Justice Willis Van Devanter sat down next to the President after the ladies retired, they seemed very convivial. Roosevelt appeared to be having so fine a time that Senator William Borah of Idaho was reminded of the "Roman Emperor who looked around his dinner table and began to laugh when he thought of how many of those heads would be rolling on the morrow."⁵ Borah could not know how close to the truth he was. Attorney General Homer Cummings, indeed, whispered uncomfortably to Rosenman that he felt too much "like a conspirator." Rosenman agreed, for they were keepers of the best guarded secret in Washington.⁶

Roosevelt himself lacked the gall to reveal the secret before the judiciary dinner, but he wanted it



Charles Evans Hughes swore in Franklin D. Roosevelt when the President (addressing the public) took the oath of office for the second time on January 20, 1937. As the skullcapped Chief Justice (seated at center) reached the promise to defend the Constitution, he “spoke slowly and with special emphasis,” and the President responded in kind.

known before the following week, when arguments were scheduled for the cases testing the validity of the National Labor Relations Act. Therefore, he made his announcement on Friday, February 5, 1937, first to a meeting of Cabinet and congressional leaders and then in a press conference to the world at large.⁷ Tom Corcoran, predicting that Justice Louis D. Brandeis “sure won’t like it,” got Roosevelt’s permission to break the news earlier that morning to “old Isaiah.” The Justice’s reaction when “Tommy the Cork” caught up to him in the robing room was as forecast.⁸ His Brethren received the news on the Bench about an hour later. The lawyer appearing before them paused for a moment, disconcerted, when he realized his argument was no longer receiving the Court’s full attention.⁹

The message read by the Justices was a copy of the one Roosevelt had just sent Congress. Claiming the need for a more efficient judiciary, Roosevelt proposed a sweeping plan to reform the entire federal judicial system—including the Supreme Court. Purportedly aimed at ridding the Court of superannuated members, the bill would allow the

President to appoint an extra Justice, up to a maximum of six, for each one who remained on the Court six months past his seventieth birthday. “Several weeks,” recorded Merlo Pusey soon afterwards, “were required to strip. . . the bill of its camouflage.” This seems not to have been entirely the case. “Too clever, too damned clever,” remarked a pro-Administration newspaper immediately after the message, and *The New York Times* reported that “Congress instantly recognized its outstanding feature and purpose.”¹⁰

The purpose of that feature, of course, was very simply to pack the Court, to add enough new members to force it into submission. The supposed reform purpose appealed to Roosevelt’s sense of misdirection. The ironic fact that it was the application to the Supreme Court of a plan proposed two decades earlier for the lower courts by the then-Attorney General, James C. McReynolds, appealed to his puckish sense of humor. That its impact was on the stature of the Court, rather than on the substance of the Constitution, very likely appealed to the jealousy and distrust he had long borne against

the legal profession. When Cummings presented him with the result of the Justice Department's research, Roosevelt regarded it as "the answer to a maiden's prayer."¹¹

In this case the maiden went into battle heavily armed, with the largest majorities in Congress ever enjoyed by any President. "Yes, I will fight it," said Carter Glass of Virginia. "But what's the use? I think Congress will do anything in the world the President tells them to do."¹² At the start, indeed, this strength alone seemed sufficient to carry Roosevelt through; the balance of initial congressional response was decidedly in favor of the plan, and the leadership expressed confidence that it would pass.¹³ For weeks after the President's message, many even thought his scheme would be enacted before the end of March.¹⁴

But the reaction in the country at large, numerous surveys showed, was generally hostile. A poll of newspapers that had supported Roosevelt against Alf Landon in 1936 indicated that most opposed the Court plan. Similarly, a Gallup poll showed that one-third of those who had voted for Roosevelt opposed the plan, while only one Landon voter in ten supported it. The legal profession in particular reacted strongly, a majority of American Bar Association members polled opposing the plan in every state and by a six to one vote overall. Soon congressional opponents drew on this reservoir of hostility, and before February was over Democratic defections led them to believe that they had "some chance" of stopping the bill. Roosevelt seemed to have the numbers to win a vote, but his opponents seemed to have enough, at least in the Senate, to put off that vote for many weeks.¹⁵

Roosevelt's subterfuge about the age of the Justices was a major factor in arousing public suspicion.¹⁶ He himself later admitted his error in presentation of the plan and quickly took a more direct approach.¹⁷ On March 4, sensing that his campaign was bogging down, he took advantage of a Democratic victory dinner at the Mayflower Hotel to shift the battle to firmer ground. Unabashedly he laid his first emphasis on party loyalty. Then, reciting a litany of national problems, he urged that each one must be confronted "NOW," and that only with a favorable Court could the New Deal do so successfully. "It will take courage," he concluded, adapting a line from Brandeis' dissent in *New State Ice Co. v. Liebmann*, "to let our minds be bold." The "NOW" speech was one of Roosevelt's most famous—Secretary of the Interior Harold Ickes thought it "by all odds, the greatest he has ever made."

Administration operatives, however, were disappointed in their search for a change in the nature of the battle; reaction to the speech in Congress was divided along the lines already laid. And indeed, it could hardly be otherwise. The spurious concern about age and the state of the Court's docket had drawn some attention, but from the start the focus of the debate was on the basic question of whether it was wise to pack the Court for ideological reasons.¹⁸ The Administration might still cling to its first ground, but no message from Olympus was necessary to clarify the true nature of the debate.

Confirmation, if any were needed, was given strikingly to Roosevelt himself on March 9, when he told the nation in a fireside chat, "We have . . . reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself." As a clincher, he quoted a passage that was found "most arresting" by both newspaper columnists and the public at large.¹⁹ "We are under a Constitution, but the Constitution is what the judges say it is," was the line, uttered first in a 1907 speech by the then-governor of New York, Charles Evans Hughes.

Three decades later, however, that former governor had not yet entered the fray. His inactivity was not due to indifference; the bill, he said privately a few weeks later, "would destroy the Court as an institution." Nor was it due to a lack of opportunities. NBC and Edward R. Murrow of CBS both offered Hughes facilities for responding to Roosevelt, but he rejected them. Herbert Hoover—an outspoken opponent of the plan, unlike the majority of Republicans, who thought they would be most effective if "meek as skimmed milk"—sent an emissary to Hughes asking him to suggest that Brandeis retire and speak out against the plan. The Chief Justice proved unwilling to discuss the proposal with his colleague. What Hoover suggested, he said, was "comparable to talking with a man regarding the woman he proposed to marry." And when, before the crisis was resolved, Brandeis actually offered to retire, Hughes, though fully aware of the potential blow to Roosevelt's scheme, urged him to stay. Very simply, Hughes did not regard his role as that of a general leading one of the opposing armies in a great political battle; rather, he was Chief Justice and thus, in his own words, "as disinterested in this matter—from a political standpoint—as anyone in the United States." He would only concern himself with his official function, and as to that he merely said, "If they want me to preside over a convention, I can do

it."²⁰

Soon Hughes had an opportunity to play a part in the battle consistent with his sense of judicial propriety. The day after Roosevelt's fireside chat, the Senate Judiciary Committee began hearings on the bill. The Administration was anxious that the hearings be finished quickly, but with Henry Fountain Ashurst of Arizona presiding that hope was doomed. Not only did Ashurst love the limelight,²¹ but he was the Senate's chief apostle of inconsistency as "one of life's great virtues." Praised by a constituent for his stand on the President's bill, he replied, "Which stand?" The question was not purely rhetorical. Having condemned Court-packing the previous year, he turned face after February 5 and introduced the President's bill. His enthusiasm was suspect, however, for he resisted all pressure for speed, leisurely conducting the committee through seven weeks of hearings before beginning an extended executive session.²²

The Administration took less than two weeks to present its case, and then it was the turn of the opposition forces. Senator Burton K. Wheeler, the liberal Democrat from Montana, was scheduled to lead off their testimony on Monday, March 22. For some time he and his allies had been trying to bring the Court in on their side of the fight. On March 18 Wheeler, accompanied by Senators Warren Austin, a Republican on the Judiciary Committee, and William King, one of the panel's senior Democrats, called on Hughes to ask him to testify against the bill. The Chief Justice received the delegation "with his usual Jovian affability"²³ and expressed willingness to appear. He would not do so, however, unless accompanied by Brandeis, the senior and most revered member of the Court's liberal wing. The Senators left in jubilation, assuming that Hughes would testify with Brandeis and Van Devanter, as he had two years before against a bill aimed at changing the Court's appellate procedure. This time, however, Hughes found that Brandeis stood fast against an appearance in which the Justices would "testify on a matter affecting their own integrity."²⁴ Hughes thereupon suggested that he might, in response to a request from the committee, write a letter stating the facts of the court's work. That idea Brandeis accepted and so, Hughes found, did Van Devanter.²⁵

On Friday morning, therefore, Hughes called Senator King at his home to tell him that there was a strong feeling that the Court should not enter the controversy "in any direct or even indirect way." But, he continued, with a characteristic emphasis, if the

committee should desire information on the work of the Court, "of course we will be glad to give the facts." He would give them "in writing an answer to specific inquiries, if the committee desires facts." "The material is all there," he added, indicating that it was a matter of public record anyway.²⁶

After his conversation with King, Hughes reached Wheeler at his office and gave him the same message. Either the Senator did not understand or he lost his nerve—perhaps because he had vociferously opposed Hughes' confirmation²⁷—and he did not act on the Chief Justice's offer. But the next day, responding to what he hopefully regarded as a tip-off from his friend Brandeis, he called on the aged Justice. Brandeis prodded the reluctant Wheeler to ring Hughes, leading the Senator by the hand to the phone and holding him there while he made the call himself. Told that Wheeler would like to see him, Hughes responded cordially and suggested that the Senator come over immediately.²⁸

And so, late that afternoon Wheeler called on the Chief Justice at his large house on R Street. Once more Hughes gave him a warm reception. When was the letter needed, he asked. Monday morning, replied Wheeler. Why so soon? "They've circulated a story that I will not testify after all," Wheeler explained. "If I put it off Monday, they'll say I never will take the stand."²⁹ Wheeler might, of course, have begun his testimony without the letter, as he had planned. It would have the most impact, though, if presented at the beginning of the opposition testimony; besides, he "wanted the drama of the moment of presenting the letter to be his."³⁰

Hughes comprehended. Gone was his insistence that the request for information be from the committee itself and that it be in the form of specific written questions. Looking at his watch, he said, "It is now five-thirty. The library is closed, my secretary is gone. . . . Can you come by early Monday morning?" Certainly, answered Wheeler, but then Hughes asked whether he was free Sunday afternoon. Wheeler was, and so the next day Hughes called him up and asked him to drop over.³¹

"The baby is born," the Chief Justice said with apparent solemnity, handing Wheeler a long typewritten letter as his visitor walked in. "Does that answer your question?" Hughes asked after the Senator read through it. "Yes, it does," responded Wheeler happily. "It certainly does."³²

And it certainly did. The letter, thought two veteran journalists, was "a masterpiece of exposition."³³ Roosevelt's original line of attack, the

alleged inefficiency of the Court, had struck a chord on which Hughes, the exemplar of efficiency, was particularly sensitive. He responded with his favorite weapon, the facts.³⁴ When the Court rose for the current recess, he pointed out, it had heard cases for which *certiorari* was granted only four weeks before; for several Terms the Court had been able to adjourn after disposing of all cases ready to be heard. Of course, the Court itself through exercise of the *certiorari* power determined just how heavy its docket

would be, but Hughes thought his Brethren believed “that if any error is being made in dealing with these applications it is on the side of liberality.” This view was not universally held, but even Attorney General Cummings had admitted before February that many cases reaching the Supreme Court did not possess sufficient merit to warrant substantive consideration. Moreover, Stone, the Justice who most vigorously criticized Hughes’ emphasis on efficiency in the conduct of the Court, wrote at about the time of



Senator Burton K. Wheeler, a liberal Democrat from Montana (above, left), led the opposition to the Court-packing bill. He was accompanied by Senator Warren Austin (left), a Vermont Republican, and William King (above), a senior Democrat from Utah, both members of the Judiciary Committee, on his visit to persuade Chief Justice Hughes to testify against FDR’s proposal. Hughes initially accepted, but after consulting Justice Brandeis, he decided that it was improper for the Court to publicly testify on a subject concerning its integrity. A second visit by Wheeler, this time to Hughes’ home, persuaded the Chief Justice to write a letter to the committee expressing his views on the lack of necessity for additional Justices.

Hughes' letter that the Court had "made the mistake of being over-generous" in granting the applications.³⁵

Not only was the addition of new Justices unnecessary for efficiency, wrote Hughes, it would positively hamper the Court's operation. Despite his confidence that he could "preside over a convention," he had made clear, in lectures on the Court that he delivered before becoming Chief Justice, his belief that the Court should not be expanded:

Everyone who has worked in a group knows the necessity of limiting size to obtain efficiency. And this is peculiarly true of a judicial body. It is too much to say that the Supreme Court could not do its work if two more members were added, but I think that the consensus of competent opinion is that it is now large enough.³⁶

Now, in the letter to Wheeler, Hughes merely confirmed this earlier view: "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide."

The suggestion had been made that this problem could be solved by dividing the Court into panels for most cases, but Hughes responded to such a suggestion in the Supreme Court lectures, when he had said, "Happily, suggestions for an increased number and for two divisions of the Court have not been favored because of their impracticality in view of the character of the Court's most important function."³⁷

But the letter to Wheeler went a step beyond. "The Constitution," he added, "does not appear to authorize" a division of the Supreme Court into panels. The passage is mystifying, because it was arguably, as *The New Republic* claimed, blatantly improper as "an advisory opinion run riot."³⁸

From the beginning of the Republic the Supreme Court had held it improper to advise on constitutional questions outside the context of a properly presented case. If Hughes' comment seemed tame because it clearly could not be authoritative, it also appeared to be a more flagrant impropriety because it was written by one Justice outside the ordinary procedures of the Court. Commenting in his Supreme Court lectures on an advisory opinion given by the Justices in response to a question propounded by President James Monroe, Hughes had said

This, of course, was extra-official, but it is safe to say that nothing of the sort could happen today. . . . [I]t is only with the light afforded by a real contest that opinions on questions of the highest importance can safely be rendered.³⁹

Not only did Hughes, it seems, offer an advisory opinion in his letter to Wheeler, but Brandeis and Van Devanter, both of whom were extremely meticulous about judicial procedure,⁴⁰ both approved the message after going over it carefully.⁴¹ One Justice, perhaps, might not notice that in the haste of composition a single sentence inadvertently seemed to offer a constitutional opinion, but not all three. One Justice, perhaps, might not mind breaching the bounds of judicial propriety to protect the Court, but probably not all three.

Compounding the mystery is the consideration that the apparent advisory opinion was not in fact necessary for the letter. The practical problem raised by Hughes—that "a decision by a part of the court would be unsatisfactory"—was enough to dispose of the divided-Court proposal. If more weight were needed, it could have been given by a passing—and perfectly appropriate—reference to the serious constitutional question posed by the suggestion. The impact of the letter, one can be virtually certain, would not have been diminished.

Perhaps, however, this all takes the matter too seriously. It may well be that Hughes was, in fact, trying only to express the point that the constitutionality of separate panels was in serious doubt. By saying that the Constitution "does not appear to authorize" the suggestion, he may simply have been pointing to the fact that no textual authority appears in the document; an unresolved question was therefore presented. Instead of elaborating on the point or making it stand alone, either of which he might have done had the constitutional point been clear, he also pointed out the practical objections. Perhaps, then, the explanation of the mysterious passage is simply that Hughes' words seemed more definite than his intention.

This mystery makes more intriguing another one associated with the letter. "On account of the shortness of time," Hughes said before closing,

I have not been able to consult with the members of the Court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the

justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

The apology is intriguing, for the shortness of time arose from no necessity but from the political considerations stated by Wheeler. Hughes was Chief Justice and, if propriety demanded that the other Justices be consulted, it was for him and not the Senator to determine the timing of the message. Moreover, his plea that time was lacking is belied by the fact that he prepared the letter for Sunday afternoon rather than for the Monday morning deadline set by Wheeler. And, finally, it is clear that Hughes simply overstated the difficulty of contacting his colleagues. All could have been reached by telephone; as Stone later pointed out, all were in town and several lived within a few minutes' walk of Hughes' house. "[T]he Chief Justice," said Stone a few weeks later, "knows well that he can find out what I think any time by asking—sometimes he finds out without asking."⁴²

Perhaps it was Hughes' confidence that he did in fact know what the other Justices were thinking that led him to write the letter without consulting them. At least he was correct on the major issues, for all the Justices were hostile to the packing plan. Nevertheless, Hughes expressed more confidence than he was entitled to, for the Brethren certainly were not unanimous in approving his statement on the constitutionality of separate panels. When Hughes brought up the letter at the next conference of the Court, several Justices expressed approval and no dissent was heard.⁴³ But Justice Stone, for one, held his tongue only because with the message already public he saw no reason to make a fight. And Benjamin N. Cardozo, at least, felt the same way.⁴⁴ That this portion of the letter was of so little significance to the whole, however, precludes the supposition that Hughes disingenuously withheld the text from his colleagues so that he could sneak the controversial passage through.

More likely, it seems, Hughes declined to circulate the letter because he was afraid that, for the speed needed in this case, even nine Justices were too many. Hughes was always eager—and certainly more eager than Stone and Cardozo—to conclude a case and move on.⁴⁵ Very likely, he wanted simply to avoid the days of delay that might ensue if all the associates offered their specific suggestions.

Certainly he was right in believing that, since the letter was not the exercise of an official function, there was no technical requirement for the entire Court to approve it. Certainly, too, he had a point when he said, as he indicated to Wheeler the concurrence of Brandeis and Van Devanter, that "they are the Court";⁴⁶ though the agreement of Van Devanter might have been expected, that of the liberals' leader shook the President's forces badly.⁴⁷ Nevertheless, it was the "widespread impression of unanimity . . . that did so much to give the Hughes letter its force,"⁴⁸ and Hughes could not be confident—and indeed on the split-panel point was mistaken—in giving that impression. Merlo Pusey was incorrect in saying that Hughes committed "a tactical error" by releasing the letter without consulting all his colleagues.⁴⁹ The tactical criteria were speed and the impression of unanimity, and Hughes achieved both.

Whether Hughes acted properly in failing to consult his colleagues is another matter. In my view, he did not, because his rush was determined by political factors.⁵⁰ In his eagerness to contribute to the defeat of the Court-packing plan consistently with his standards of judicial propriety, Hughes clouded those standards somewhat.

The transgression was relatively trivial, however. Even in the letter, the only public comment he made during the Court-packing battle that related more than tangentially to Roosevelt's plan,⁵¹ Hughes refrained from taking an active political role. "It was good tactics," thought Harold Ickes, for Hughes to concentrate on the inefficiency argument.⁵² But it was not tactics at all, Hughes indicated in the letter, only a fitting regard for "the appropriate attitude of the Court in relation to questions of policy." For Hughes it would have been a gross impropriety to enter a political debate deciding what should be the function of the Court in American government. No matter how strong his feelings were on that score, his proper role was limited to advice on how the Court might best exercise whatever function the people gave it.

Writing the letter must have given Hughes an emotional release, for as Wheeler began to leave Hughes asked him to sit down instead. According to Wheeler's later recollection, the Chief Justice was in a chatty mood. The bill would destroy the Court, he said. Moreover, the crisis might have been avoided had there been a better Attorney General, one in whom the President, the Court, and the people had more confidence. In comments more justly

applicable to ousted Solicitor General J. Crawford Biggs than to Homer Cummings, who was in fact one of Roosevelt's closest advisors, Hughes complained that not only were the laws badly drafted, but the government's cases were badly presented to the Court: "We've had to be not only the Court but we've had to do the work that should have been done by the Attorney General." He could have brought down Wall Street lawyers, Hughes continued, who would have been able to correct some of the abuses in the nation's business life in a professional manner. Rambling on, he told Wheeler about how Roosevelt had approached him to ask for a co-operative relationship with the Court. Finally seeing his guest off, the Chief Justice said, "I hope you'll see that this gets wide publicity." Stifling a laugh, Wheeler assured him, "You don't need to worry about that."⁵³

The rest, after all, was Wheeler's job. Hughes was home working as usual the next day when the Senator read the letter to the Judiciary Committee.⁵⁴ Given a grandiloquent introduction by Ashurst, who suspected from the smug look on Mrs. Wheeler's face that her husband was about to "blow us out of the water,"⁵⁵ Wheeler began very slowly, in a roundabout fashion. Finally warming up to the subject, he said that, after hearing the Administration testimony, "I went to the only source in the country that could know exactly what the facts were and that better than anyone else." Wheeler, milking the drama to the last drop, paused and glanced around the hearing room, and the buzzing stopped for the first time in weeks. Senators leaned forward silently, expectantly, as their colleague continued:

And I have here now a letter by the Chief Justice of the Supreme Court, Mr. Charles Evans Hughes, dated March 21, 1937, written by him and approved by Mr. Justice Brandeis and Mr. Justice Van Devanter. Let us see what these gentlemen say about it.⁵⁶

"You could have heard a comma drop in the caucus room while I read the letter aloud," wrote Wheeler later. The reporters all wanted copies when the session recessed, "and it was all I could do to keep it from being snatched from my hands."⁵⁷

The next morning, of course, those reporters made Hughes' letter the top news story of the day. The message, reported *The New York Times*, came with "an authority and suddenness which took administration forces by surprise and sent them scurrying to strengthen their defenses." There could

be no doubt of the letter's dramatic force, but beginning a few years later a myth grew up that, as even so acute an observer as Robert H. Jackson thought, it "turned the tide in the struggle." Hughes, not given to making boastful claims, himself thought that the letter "had a devastating effect," and others have taken a similar view.⁵⁸ In reality, however, the letter had little real impact on the Court-packing fight.

From simple reason, one would expect this to be so. True, Hughes' letter did "show up for good and all as utterly hollow the smooth propositions with which the President had offered his bill," for it demonstrated with force, clarity, and detail that the Court was keeping abreast of its work. But, as Hughes had told King, none of the facts were hard to find. Court aides had given reporters the basic information on the very day of the President's message. Even more significantly, Solicitor General Stanley F. Reed, in his annual report to Congress filed in January—before he knew what the President was planning—had affirmed that there was no congestion in the Supreme Court calendar.⁵⁹ Moreover, it was clear weeks before March 22, even to those who had not realized it on February 5, that the true point at issue was not the technical one of judicial efficiency. "We abandoned this ground some time ago," noted Ickes on March 26.⁶⁰ A letter, even one written by a Chief Justice, concentrating on the state of a Court's docket could not be expected to have a crucial effect on a monumental debate that had long since focused on ideological and constitutional issues.

This logical supposition is supported by assessing the strength of the Court-packing proposal through the course of the battle. No clear turning point in the struggle is discernible around the time of Hughes' letter. Well before March 22, mounting opposition had slowed down the President's drive; well after, that drive was still expected to reach eventual success. Nobody, reported Arthur Krock well along in the Judiciary Committee hearings, thought the testimony had changed any votes.⁶¹ After the first flurry of excitement, indeed, Hughes' letter was hardly ever mentioned.

A long series of blows defeated Roosevelt's scheme. On March 29, exactly a week after Wheeler read the letter, the Court upheld a state minimum wage law by a 5-4 vote, though it had invalidated another one the previous year. In April it upheld the National Labor Relations Act, again by a 5-4 vote, and in May it turned back challenges to the Social Security Act, in part by another 5-4 margin. Though



Franklin D. Roosevelt and James A. Farley (left), Postmaster General and Chairman of the Democratic National Committee, shared a joke at the Jefferson Island Club on the Chesapeake Bay, where the President had invited all 407 Democratic Congressmen for a weekend of fun. The three-day event was successful in that FDR used his charm to rally support for a revised Court bill.

reality was more complex than appearance,⁶² these cases gave a definite impression of a politically motivated change in the Court's jurisprudence: "A switch in time saves nine" became the enduring quip. On May 18, Justice Van Devanter announced that he would retire when the Term ended, and so further undercut the argument that Court-packing was necessary to assure a liberal course of decisions. On the same day, the Senate Judiciary Committee voted against the proposal, and it followed the vote up on June 14 with a blisteringly hostile report against the plan.

But the President still had deep reservoirs of strength, loyalty, and affection to call on, and he replenished these by throwing a three-day picnic for congressional Democrats on Jefferson Island in the Chesapeake Bay. With Roosevelt using all his powers of charm and geniality, even upon the Democratic authors of the vituperative committee report, the event was a great success. Democrats' inclination to uphold their leader remained strong, as indicated by

the reaction when a compromise bill was introduced on July 2. Allowing the appointment of only one co-Justice a year, and making the trigger age seventy-five instead of seventy, the new bill was conceded to have enough support for a comfortable passage in the Senate if it ever reached a vote. That was a big if, however. By the time floor debate began on the new bill on July 6, its opponents had overcome their initial discouragement and decided that a filibuster rather than a frontal assault was their soundest strategy.⁶³

The tactic had some effect, and after a week of debate the bill had clearly lost several votes.⁶⁴ On July 14, however, occurred the critical event: exhausted by the battle and by a Washington heat wave, Senator Joseph Robinson, the Senate majority leader, died of a heart attack. Only later would opposition leaders concede that they had been beaten "right up to the time of Senator Robinson's death." Roosevelt had pledged Robinson the first open seat on the Court, and loyalty to him among his Senate

colleagues had enabled him to get pledges for the bill from a majority of them.⁶⁵ Moreover, the prospect of an appointment of Robinson, who would not have reliably entrenched a liberal majority on the Court, strengthened the attractiveness of Court-packing for liberals. As Robert Allen wrote some days later,

Had he lived, the chances are that Robinson could have put through the [compromise] bill. . . . It would have been a long and vicious fight, but the advantage was definitely with the Administration.⁶⁶

On Robinson's death, however, the situation changed "in a matter of hours." Several Senators who had given him personal pledges switched sides immediately.⁶⁷ Within days Roosevelt had to acknowledge that Court-packing was dead.

It seems to be only in later years, when simple explanations were sought for the death of Court-packing, that so much emphasis was put on Hughes' letter to Wheeler. It was significant that Republican Senator Arthur Vandenberg, in an article written shortly after the struggle was completed and listing the statements most crucial for victory, did not mention the letter at all.⁶⁸ The letter may be compared to a bolt of lightning that misses, or rather (to anthropomorphize it) shies away, from the mark; sharp, dramatic, and forceful, it could hardly be ignored and would certainly be remembered, but in truth it did not have a very profound effect.

Endnotes

¹ Joseph Alsop & Turner Catledge, *The 168 Days* (1938), p. 42.

² *The Secret Diary of Harold L. Ickes* (1955), p. 52.

³ Samuel I. Rosenman, *Working with Roosevelt* (1952), p. 144.

⁴ *The New York Times* Jan. 21, 1937, p. 15 (emphasis not lost); Rosenman, *Roosevelt*, p. 144 (Hughes understood); Alsop & Catledge, *168 Days* p. 42 (accusation).

⁵ William F. Swindler, *Court and Constitution in the Twentieth Century: The Old Legality, 1889-1932 & The New Legality, 1932-1968* (1969-70), p. 62, citing Donald R. Richberg, *My Hero* (1954), p. 222.

⁶ Rosenman, *Roosevelt*, p. 154.

⁷ Leonard Baker, *Back to Back: The Duel Between FDR and the Supreme Court* (1967), pp. 3-16, 34-35.

⁸ Swindler, *New Legality*, pp. 62-63; see also Baker, *Back to Back*, p. 135.

⁹ Alsop & Catledge, *168 Days*, p. 135.

¹⁰ Merlo J. Pusey, *The Supreme Court Crisis* (1937), p. 22 (several weeks); Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* (1956), p. 444 (too clever); *The New York Times*, Feb. 6, 1937, p. 1 (instantly recognized).

¹¹ Columbia University Oral History Collection, *Reminiscences of Joseph Proskauer*, p. 26 (jealousy & distrust); Alsop & Catledge, *168 Days*, pp. 35-36 (McReynolds' plan; puckish humour; maiden's prayer).

¹² *123 Lit. Dig.* (Feb. 13, 1937), p. 7.

¹³ *The New York Times*, Feb. 6, 1937, p. 1, Feb. 7, p. 1.

¹⁴ 'T.R.B.,' 'Washington Notes', 90 *New Repub.* (1937), p. 137.

¹⁵ *The New York Times*, Feb. 18, 1937, p. 2 (Roosevelt newspapers), Feb. 25, p. 1 (some chance), Mar. 3, p. 2 (Gallup poll), Mar. 15, p. 5 (ABA poll). For other survey results see 2 *Ickes Diary*, p. 74; 'The Fortune Quarterly Survey', 16 *Fortune* (Jul. 1937), pp. 96-97; 95 *Rev. of Revs.* (May 1937), p. 13; Baker, *Back to Back*, pp. 46-47.

¹⁶ Baker, *Back to Back*, p. 54.

¹⁷ Franklin D. Roosevelt, *Introduction*, to 6 Samuel Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt* (1941) lxx ("I made one major mistake when I first presented the plan. I did not place enough emphasis upon the real mischief—the kind of decisions which, as a studied and continued policy, had been coming down from the Supreme Court.")

¹⁸ 'T.R.B.,' 'Washington Notes,' 90 *New Repub.*, p. 137 (bogging down); Pusey, *Crisis*, pp. 22-23 (bogging down); *The New York Times*, Mar. 5, 1937, pp. 1 (party loyalty), 14 (courage to be bold), Mar. 6, p. 1 (division of reaction); 2 *Ickes Diary*, p. 89 (great speech); *Lit. Dig.*, Feb. 27, 1937, p. 3 (focus of debate).

¹⁹ Edward S. Corwin, *Constitutional Revolution, Ltd.* (1941), p. 64 (most arresting); *The New York Times*, Mar. 10, 1937, pp. 1, 15 (report of speech).

²⁰ Burton K. Wheeler, *Yankee From the West* (1962), p. 329 (bill would destroy Court; Hughes disinterested); Baker, *Back to Back*, pp. 36 (NBC, CBS), 93-94 (Hoover incident); 2 *Ickes Diary*, p. 93 (skimmed milk); Paul Freund, "Charles Evans Hughes as Chief Justice," 81 *Harvard L. R.* 4, 29 (1967) (Brandeis incident); Merlo J. Pusey, 2 *Charles Evans Hughes* (1951), p. 753.

²¹ 2 *Ickes Diary*, p. 135.

²² Alsop & Catledge, *168 Days*, p. 194.

²³ *Ibid.*, p. 125.

²⁴ Swindler, *New Legality*, p. 71.

²⁵ David J. Danelski & Joseph S. Tulchin, eds., *The Autobiographical Notes of Charles Evans Hughes* (1973), p. 305.

²⁶ Charles Evans Hughes Papers, Library of Congress, vol. 6: memoranda of telephone conversations with King and Wheeler, March 19, 1937 (apparently taken contemporaneously by Hughes' secretary); see also Hughes, *Notes*, p. 305. Hughes may already have directed one journalist to the public information on the Court's work; see Papers of Felix Frankfurter (Harvard Law School Library), vol. 91: Pusey to Frankfurter, July 23, 1939.

²⁷ Wheeler, *Yankee*, p. 328.

²⁸ Wheeler gave several different accounts of this incident. See *ibid.*, pp. 327-9; Baker, *Back to Back*, pp. 154-5; Alpheus T. Mason, *Brandeis: A Free Man's Life* (1946), p. 626, *Stone*, p. 450.

²⁹ Wheeler, *Yankee*, p. 329.

³⁰ Baker, *Back to Back*, p. 155.

³¹ Wheeler, *Yankee*, p. 329; see also Alsop & Catledge, *168 Days*, p. 126.

³² Wheeler, *Yankee*, p. 329; Baker, *Back to Back*, p. 156.

³³ Alsop & Catledge, *168 Days*, p. 127. The text of the letter is printed in *The New York Times*, March 23, 1937, pp. 1, 19.

³⁴ Mark Sullivan captured a good deal of Hughes' nature in his tart comment that Hughes "believed in God but believed equally that God was on the side of the facts." 3 *Our Times* (1930) p. 54.

³⁵ *The New York Times*, March 23, 1937, p. 22 (Cummings); Mason, *Stone*, p. 448.

³⁶ Charles E. Hughes, *The Supreme Court of the United States* (1928), p. 238.

³⁷ *Ibid.*

³⁸ "The Chief Justice's Letter," 90 *New Republic* (1937), p. 254.

³⁹ Hughes, *Supreme Court*, pp. 31-32.

⁴⁰ Freund, "Hughes," 16.

⁴¹ Hughes, *Notes*, p. 305.

⁴² Baker, *Back to Back*, p. 159; Mason, *Stone*, pp. 452-3. See also Frankfurter to C.C. Burlingham, June 9, 1937, in M. Freedman, ed., *Roosevelt and Frankfurter: Their Correspondence, 1928-1945* (1967), p. 402.

⁴³ Hughes, *Notes*, p. 305.

⁴⁴ Frankfurter Papers, vol. 105: Stone to Frankfurter, Dec. 21, 1939; Baker, *Back to Back*, p. 160.

⁴⁵ Stone and Cardozo chafed at the speed of deliberation. So too did Felix Frankfurter when he first joined the Court in 1939.

⁴⁶ Freund, "Hughes," pp. 27-29.

⁴⁷ See "Chief Justice's Letter," 90 *New Republic* (1937), p. 254 ("It is deeply regrettable, we feel, to see Mr. Justice Brandeis concurring with him."); Frankfurter Papers, vol. 28: draft of letter by Frankfurter to Brandeis, not sent.

⁴⁸ Baker, *Back to Back*, p. 159.

⁴⁹ Pusey, 2 *Hughes*, p. 756.

⁵⁰ Frankfurter wrote to Roosevelt on March 30 that Hughes' letter was a "pretended withdrawal from considerations of policy while trying to shape them." Freedman, ed., *Roosevelt-Frankfurter Correspondence*, p. 392.

⁵¹ In his annual informal address to the American Law Institute on May 6, he reported as usual on the state of the Court's business, emphasizing some points that had been in the letter to Wheeler—that the Court was up to date, that it was liberal in the grant of *certiorari*, and that the unitary method of deciding cases was optimal—but did not specifically refer to the Court plan. When, in a different vein, he delivered an address at his grandson's graduation from Amherst College in June, listeners regarded some of his remarks as thinly veiled comments on the plan. "We come to you with youthful hearts," he declared, "with spiritual arteries not yet hardened. . . . Sometimes crusaders have more fervor than wisdom."

⁵² 2 *Ickes Diary*, p. 103.

⁵³ Wheeler, *Yankee*, pp. 329-330.

⁵⁴ *The New York Times*, March 23, 1937, p. 19.

⁵⁵ Wheeler, *Yankee*, p. 330.

⁵⁶ Baker, *Back to Back*, pp. 157-8.

⁵⁷ Wheeler, *Yankee*, pp. 332-3.

⁵⁸ *The New York Times*, March 23, 1937, p. 14 (authority and suddenness); Jackson, Book Review, 1B (turned tide); Hughes, *Notes*, p. 306 (devastating effect). See also *The New York Times*, June 3, 1941, p. 19; Pusey, 2 *Hughes*, p. 766; Mason, *Brandeis*, p. 627; Freund, "Hughes," 28. cf. William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 141 (1995) ("Hughes's unanticipated contribution not only effectively rebutted the President's crowded dockets argument, but also suggested that henceforth Roosevelt, in pushing his proposal, would encounter not just the wily Wheeler but the formidable figure of the Chief Justice.").

⁵⁹ Alsop & Catledge, *168 Days*, p. 127 (hollow propositions); *The New York Times*, Feb. 6, 1937, p. 1 (Court aides); Pusey, *Crisis*, p. 13 (Reed). After the President's message, however, Reed wrote a letter to Ashurst supporting it. "I wrote that?" Reed asked cheerily when reminded of this letter four decades later. "I must have been trying to get on." Reed interview. Reed, in the witty words of one intimate, adapting the jargon of American law schools, "didn't spot the moral issue" in 1937. Confidential interview.

⁶⁰ 2 *Ickes Diary*, pp. 1-3.

⁶¹ *The New York Times*, Apr. 8, 1937, p. 22. See also the assessments at *ibid.*, March 28, § IV, p. 3, Apr. 13, p. 1, by Krock and Turner Catledge, two of the most respected *Times* reporters.

⁶² See my article, "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," 142 *U. Penn. L. Rev.* 1891 (1994).

⁶³ Alsop & Catledge, *168 Days*, p. 216; *The New York Times*, July 3, 1937, p. 1, July 4, p. 1. For a vivid description of the Jefferson Island picnic, see William E. Leuchtenburg, "FDR's Court Packing Plan: A Second Life, A Second Death," 1985 *Duke L.J.* 673, 677-80.

⁶⁴ *The New York Times*, July 14, 1937, p. 1, July 15, p. 13.

⁶⁵ *Ibid.*, July 23, 1937, p. 2.

⁶⁶ Robert Allen, "Roosevelt's Defeat," 145 *Nation*, at 123. Alsop and Catledge took a somewhat different view: "Whether or not the fight would have been lost anyway will never be decided. . . . [I]t appears by hindsight that even Robinson could not have held his majority together, but without Robinson all hope was certainly gone." *168 Days*, at 267-68.

⁶⁷ *The New York Times*, July 23, 1937, p. 2; see also Baker, *Back to Back*, p. 254.

⁶⁸ Arthur Vandenberg, "The Biography of an Undelivered Speech," 210 *Saturday Evening Post* (October 9, 1937), 32.