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Cover Page Footnote

Dean, Fordham University, School of Law. Statement made before the Judiciary Committee of the United States Senate at Washington, April 7, 1937, with some additional footnote material.

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THE PRESIDENT'S PLAN RESPECTING THE SUPREME COURT

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AT THE outset I want to thank this Committee for the opportunity of expressing my opinion on the subject of the President's proposal affecting the courts. Let me also state that the Committee is to be commended for the real public service it is rendering in offering both those who favor, and those who oppose the plan, a full opportunity to express their views.

I am opposed to the President's plan insofar as it relates to the Supreme Court of the United States. My reasons are as follows:

(1) The evidence at hand indicates that the addition of justices is unnecessary to enable the Court to keep up with its work.

(2) The proposed plan in its ultimate effects will tend to undermine the independence of the Supreme Court and indirectly of all courts.

(3) The precedent necessarily set by adoption of the plan may be used at some time in the future to subvert the rights of the individual and the protection of minorities.

(4) The plan as proposed is not wholly free from doubt as to its constitutionality.

So far as my first objection is concerned, the letter of the Chief Justice of the United States, read before this Committee by Senator Wheeler, disposes of any contention that the Supreme Court as now constituted is unable either to keep up with its work or to give that work proper attention. It disposes likewise of the contention that an increase in the number of justices would expedite the work of the Court. Actually an increase would retard it. It is obvious that as the numbers on a Court increase, viewpoints multiply also; and experience teaches that it takes not only patience but time to evolve a majority opinion out of originally divergent views. It seems evident likewise from the more recent discussion of the proposal that age, originally stressed as the basis for the plan, *per se*, has little if anything to do with the matter under

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consideration. The discussion of my next point will make this evident.

My second objection to the plan is that its ultimate effects will tend to undermine the independence of the Supreme Court and indirectly of all courts. It seems obvious at this time that the difference between the President and the Court has arisen principally out of the Court's decisions over the last several years on legislation advocated by the President and passed during his first term. The Court in its decisions has adhered to the view that the Federal Government is a sovereignty of limited powers; that as the Tenth Amendment provides, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." The President contends that the Court's construction of the powers conferred on the Federal Government is too narrow; and that the powers granted are much broader than conceded by the Court in recent decisions to which the President takes exception.

To understand the objectives which the President apparently has in mind in his desire for Court reorganization, and the interpretation of the Constitution which he upholds, it will be useful to refer to his "Fireside" address delivered over the radio on March 9, 1937, and printed in the "Congressional Record" on the following day at pages 2650-2652. There he is reported to have spoken as follows:

"In its preamble, the Constitution states that it was intended to form a more perfect union and promote the general welfare; and the powers given to the Congress to carry out those purposes can best be described by saying that they were all the powers needed to meet each and every problem which then had a national character and which could not be met by merely local action.

"But the framers went further. Having in mind that in succeeding generations many other problems then undreamed of would become national problems, they gave to the Congress the ample broad powers 'to levy taxes . . . and provide for the common defense and general welfare of the United States'."

If we refer to the Constitution itself, however, we find that Article I, Section 8, Clause 1, reads as follows:

"The Congress shall have Power.—1. To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

It will be noted at once that the President construes the reference to the general welfare in this clause as if it were a specific grant of power separable from the grant of taxing power to the Congress in which it is contained. Under this construction the Federal Government ceases to be a government of limited powers and becomes a sovereignty, possessing any and all powers embraced under the broad term "general

welfare." The President's interpretation becomes evident also from the next paragraph in his "Fireside" address which, as reported in the "Congressional Record" reads as follows:

"That, my friends, is what I honestly believe to have been the clear and underlying purpose of the patriots who wrote a Federal Constitution to create a National Government with national power, intended as they said, 'to form a more perfect union . . . for ourselves and our posterity'."

To obtain the construction for which he contends,¹ the President's proposal reduced to its simplest terms seeks to create vacancies in the Court in sufficient number to enable the appointment by him of justices who will be more responsive to his views on the constitutionality of social legislation which he may have in mind; legislation moreover which it seems fair to assume will follow broadly the lines of some of that previously held unconstitutional by the Court. Thus understood, the President's proposal becomes undesirable because dangerous to the continuance of constitutional democracy in America. Certainly if the President does not intend to appoint justices to the Court whose views are antagonistic to those of the present justices, there is no reason for the proposal. If, on the other hand, he does intend to secure the appointment of justices who will be inclined to his construction of the Constitution, then a long step in the direction of destroying the independence of the Court will have been taken.

It is almost self-evident that it is essential to the continuance of a constitutional democracy for the judiciary to be completely independent of both the executive and legislative powers of the government. Indeed this thought is well expressed by the great John Marshall, who in the debates in the Virginia Convention, 1829-1831, page 616, is quoted as follows:

"Advert, Sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most

1. It is well to bear in mind that this interpretation of the Constitution is not authoritative. In *United States v. Butler*, 297 U. S. 1, 64 (1935) Justice Roberts in the majority opinion said: "The clause thought to authorize the [AAA] legislation . . . confers upon the Congress power 'to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States' It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The Government concedes that the phrase 'to provide for the general welfare' qualifies the power 'to lay and collect taxes.' The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice Story points out that if it were adopted 'it is obvious that under color of the generality of the words, to 'provide for the common defence and general welfare,' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers.' The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare."

powerful individual in the community and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The judicial department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?"

And we find in number 78 of "The Federalist" the following significant statement on judicial independence:

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

Independent courts, then, are the last bulwark of the citizen, where his rights reserved to him by the Constitution come in conflict with the power of governmental agencies.

In this connection, if we look abroad we find about us in the world today numerous examples of centralization of the powers of government in one man or in a small group of men. In every instance, if the situation in these countries is examined, it will be found that the courts are subservient to the executive power. The most significant result in all of these countries of the submersion of democratic rule has been the substantial disappearance in them of any rule by law and the advent of a rule by men. In fact out of all political movements of this kind we find that there appears a uniform phenomenon—the greater the degree of personal government the less the degree of supremacy of law. We are thankful that in America these conditions do not exist. Because we are thankful, however, we must be perpetually on our guard lest the beginning of a breakdown in the system of checks and balances designed by the Fathers of the Constitution may lead ultimately to just such conditions in this country. While it may be conceded that the legislation the President has in mind is intended entirely for the general welfare, and therefore valid under his construction of the Constitution, nevertheless his plan contemplates a material change in the personnel of the Supreme Court because of its disagreement with this construction. It is submitted that the precedent set, if the President's plan be adopted,

would be neither wise nor safe in a democracy. Certainly it would warrant a further increase in the size of the Supreme Court every time there arose a clash between the executive and the judiciary in the matter of interpreting the Constitution. The President himself invokes in his message the precedents established in the past, where for various reasons there have been changes in the number of justices composing the Court. Who can guarantee that a successor will not point to his example? Of course it has been argued that reactionaries would have no occasion to change the personnel of the Court. Mr. Robert H. Jackson, Assistant Attorney General of the United States, for example, called on behalf of the proponents of the President's plan, is quoted as having said, "If the conservatives have a President and a Congress, they have all they need, because their policy is to maintain the *status quo*."²

This clearly overlooks the fact that a really conservative or reactionary administration is likely to pass all kinds of restrictive laws interfering with the freedom of the citizen and the rights of minorities. Indeed such laws are typical of reactionary administrations of the extreme type. We should keep in mind also the fact which many people forget, that popular sentiment can change rapidly in a democracy. Just as the liberalism of Wilson was succeeded by the so-called reactionary tendencies of Harding, so in the future some other President may be elected with entirely changed ideas as to what the country's welfare demands.

Another bad effect of the plan is the subservient attitude of mind which it necessarily will tend to engender in all judges. Some of those supporting the plan discuss it as if it would affect only the so-called conservative members of the judiciary. This is not so. Its effects cannot be limited to any particular group. The attack really is against the Supreme Court as an independent institution. It seems to be of little moment that a unanimous decision was rendered by this body in a given case if the declaration of unconstitutionality held in check the full sweep of executive and legislative programs. The real objection to the attitude of the Supreme Court on the part of many people supporting the plan is not alone that the position of the Court is a departure from the true meaning of the Constitution in construing, for example, the general welfare clause, but rather that the judicial views in question are unpopular and out of step with the times. Here is found one of the latent but none the less real objections to the plan. If the Supreme Court is to be made to respond always to the prevalent sentiment of the moment, ultimately it must become wholly subservient to the pressure of public opinion. This is not to contend, of course, that the Supreme Court

2. N. Y. Times, March 12, 1937, p. 9, col. 6.

should take no account of social changes and economic disruptions. Far from it. To take these factors into account is one thing, however. To make them absolutely controlling is another. Mr. Justice Oliver Wendell Holmes, one of the great liberal jurists of all time, adverts to the danger of the popular clamor overawing the courts in the famous case of *Northern Securities Company v. United States*.³ He there wrote in his dissenting opinion:

“Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.”

Nor will the effect of attacks on the independence of the judiciary be limited to our highest court. In their remote ramifications they will ultimately spend their force against all courts in America. At the moment the criticism may be centered on the Supreme Court, but ultimately the effect of this criticism may flare up in judicial chambers in New York, Chicago, Atlanta or San Francisco.

This brings me to my third point. Much of the discussion in support of the proposal seems to assume that the principal clauses of the Constitution affected by it are the commerce clause, the due process clauses as applied to social legislation, and the general welfare clauses. In fact, all of the Constitution from the preamble at the beginning to the Twenty-first Amendment at the end inevitably is affected by the President's plan. It is obvious that if new meanings and broader meanings may be read into some of the clauses of the Constitution the same process can be applied to every other part of that document. It may be granted that economic and social problems of the day may center attention on the commerce, due process and general welfare clauses, but the fact remains that there are other clauses equally important, where the protection of the liberties of the citizen and the rights of minorities are concerned. There are, for example, the first ten amendments to the Constitution adopted shortly after the Constitution itself was ratified and known commonly as the Bill of Rights, limiting Federal power over the citizen, and the provisions of the Fourteenth Amendment limiting State power. Herein are to be found the guarantees of the individual to freedom of religion; of speech; of the press; the right of petition; and that he shall not be deprived of his life, liberty or property without due process of law.

There are many decisions of the Supreme Court where we find it

3. 193 U. S. 197, 400 (1904).

standing as the sole guardian of persons, often poor and insignificant in themselves, whose natural rights enunciated in the Declaration of Independence and guaranteed them by the Constitution, were in danger of being destroyed because of an objective which was thought to be desirable by a majority. I need instance only a few of these as typical. There is the case of *Meyer v. Nebraska*.⁴ In that case the Supreme Court held unconstitutional a state statute passed in 1919 in a period of post-war hysteria, which made it a crime to teach any subject to any person in any language other than the English language. There is also *Pierce v. Society of Sisters*,⁵ in which a statute initiated by a majority of the voters in the State of Oregon, compelling parents to send their children between the ages of eight years and sixteen years only to public schools, was held unconstitutional. The reasons for this were the limitations provided by the Fourteenth Amendment on the police power and interference with the liberty of the parent to control within reasonable limits the education of his offspring. There is also the well-known case of *Powell v. Alabama*,⁶ popularly known as the Scottsboro case. Here action of the Supreme Court was necessary to set aside the conviction of a negro, charged with rape, which conviction was had in the courts of Alabama, because the Supreme Court found he had been denied his right to be represented by diligent counsel.

There is also *Grosjean v. American Press Company*⁷ where the Supreme Court held invalid a Louisiana statute passed in the Huey Long regime which was found to interfere with freedom of the press through misuse of the power of taxation. Indeed, as recently as January 4, 1937, there is the case of *De Jonge v. Oregon*.⁸ There the protection of the Supreme Court was extended to an avowed Communist because the Court found that his right to participate in a peaceable assembly had been infringed. These are the kind of cases which make it evident that the instances in which the rights of the individual are challenged by government, state or federal, are not as infrequent as might be supposed. Whenever they occur it is vital to the individual or the member of a particular minority whose rights guaranteed by the Constitution are infringed, that he be able to take his case to a court which will stand completely disinterested as between him on the one hand and the government on the other. The great liberal, Woodrow Wilson, once pleaded that we make the world safe for democracy. It is now in order to point out the importance not only of keeping America safe for democracy, but also of keeping America safe for minorities.

4. 262 U. S. 390 (1923).

5. 268 U. S. 510 (1925).

6. 287 U. S. 45 (1932).

7. 297 U. S. 233 (1936).

8. 57 Sup. Ct. 255 (1937).

If today "open-minded justices," as they have been described by some proponents of the plan, are to be appointed through the process of enlarging the court, to interpret broadly those clauses of the Constitution involved in a program of social legislation; if the provisions of Article I, Section 8 of the Constitution authorizing the Congress to levy taxes, to pay the debts and provide for the common defence and general welfare of the United States are to be construed as a broad grant of power to do anything which promotes the general welfare, then in the years to come—mark you well—the same means can be used to take away freedom of the press, freedom of religious worship and the most sacred rights guaranteed to the individual.

This brings me to my fourth point, that the proposal in its present form, when it is considered in all its ramifications and objectives, is not wholly free from doubt as to its constitutionality. While there has been no affirmative statement that the plan proposed is unconstitutional, there have been commentators who have described it as unconstitutional politically. I do not state that the Supreme Court plan is unconstitutional, but I feel that the gravity of the issue warrants directing the attention of this Committee to the question which as it seems to me should be further explored. Let me read at this point Article III, Section 1, of the Constitution, the judicial Article of the Constitution, providing as follows:

"Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

It will be noted that there is no express provision in it conferring on the Congress the power to fix the numbers of justices composing the Supreme Court. It does expressly prohibit, however, any interference with the tenure or the compensation of a justice during his continuance in office. In considering this point it should be borne in mind that nothing exactly like the President's plan has been attempted in the past. It may be conceded at once that the Congress has the undoubted power to increase the number of justices composing the Supreme Court. In the past their number has been changed by Congress from time to time. But it must be conceded also that the *forced* retirement of a judge, whatever his age, during good behavior, is unquestionably unconstitutional without an amendment. The present bill pending before this committee does not provide for an outright increase in the number of justices composing

the Court. In fact, as the President has pointed out,⁹ it will not necessarily result in any increase in number at all. Herein it differs materially from past changes made in the number composing the Court. Briefly it may be said to provide that for every justice on the Court who has attained the age of seventy years and who does not elect to retire under the provisions of the bill within six months thereafter, the President shall appoint subject to confirmation in the usual way by the Senate an additional justice, provided that in no event shall the total number of justices on the Court exceed fifteen. This number seems to have been arrived at by reason of the fact that six justices of the present Court will come under the provisions of the bill. It is clear then that this is not an absolute and unconditional enlargement of the Court at all. It is rather an enlargement on a condition, and a condition which colors and characterizes and gives definite purpose to the whole plan. In other words, it is enlargement *unless*. . . ! The opportunity is given the justice over seventy to retire, and it may be said that such a retirement is voluntary in a certain sense. However, the condition provided for continuance on the Court is the appointment of a younger justice to sit with the older man during his service on the Court thereafter. Thus there will be set up a system of judicial "pairs" (if I may use an expression familiar to the members of this Committee) in which the new appointee would tend to offset the voting power of the older member. Senator Glass has referred to the new justices who would be appointed under the plan, as "wet nurses." Whether there be agreement in this characterization or not, it seems that it is an apt expression to epitomize the relationship between the new and the old justices. It seems clear, therefore, that fundamentally the operation of the plan aims to work an ouster by making uncomfortable, if not vexatious, the continuance on the Supreme Court of justices who—let it always be borne in mind—under the Constitution are given life tenure conditioned only upon good behavior. On the other hand, if a justice over seventy elects to remain on the bench, his right to hold office, which includes necessarily the right to vote effectively on matters coming before the Court, would tend to be offset by the vote of the younger man.

It seems that throughout the discussion of this bill, too much attention perhaps has been paid to the undoubted power of Congress to increase the number of justices, and hardly any consideration has been given to its lack of power to interfere with their tenure during good

9. "The number of judges to be appointed would depend wholly on the decision of present judges now over 70 or those who would subsequently reach the age of 70.

"If, for instance, any one of the six Justices of the Supreme Court now over the age of 70 should retire as provided under the plan, no additional place would be created. Consequently, although there never can be more than 15, there may be only 14, or 13, or 12, and there may be only 9." "Fireside" talk of President Roosevelt, March 9, 1937, reprinted in CONGRESSIONAL RECORD, Wednesday, March 10, 1937 at p. 2651.

behavior. It is submitted that Congress may not do indirectly what it cannot do directly.¹⁰ If Congress were to attempt to make the life tenure of justices so disagreeable and vexatious that any independent, honorable judge would be compelled as a practical matter in fairness to himself to retire or resign, I submit that such a measure would conflict with the provisions of the judiciary article of the Constitution. Does not the present proposal tend in that direction? Is the plan a constitutional attempt to "pack" the Court or is it possibly an unconstitutional measure to "push" the older justices of the Supreme Court into retirement? Is the constitutional guarantee of life tenure to be deemed alone invaded by an express enactment compelling a judge to retire at seventy? May it not be accomplished also by an indirect and concealed program?

As evidence of the real objective of this plan, suppose the proponents were asked two questions: "(1) Do you prefer to enlarge the Supreme Court to fifteen members; or (2) Do you prefer to have six of the nine justices now sitting retire?" There can be little doubt that the answer would be that retirement was the preferred alternative.

Assume the passage of this bill and that the justices now sitting remain on the bench. Bear in mind the background of personal attack which runs through this controversy. The new appointments are made in order to accomplish the desired "blood transfusion." Let us not consider the feelings of a temperamental jurist, but rather those of a sensible, normal, imperturbable judge over seventy. Can it be doubted that in all reasonable probability he would seek retirement rather than a continuance of judicial service under such surroundings?

Let us make a comparison out of recent constitutional law. One of the objectionable features of present day judicial construction up to the recent decision in the *Washington Minimum Wage* case, was the claim of alleged freedom of contract advanced by the so-called conservative group of judges. From the *Adkins* case on the dissenting justices insisted that there is no true freedom or liberty where no real bargaining power exists.

Is there not something of the same background developed in connection with the "liberty" of the justices of the Supreme Court to remain on the bench after seventy if the present plan be adopted? This "liberty" it is submitted hardly can be said to be a real liberty, when the position of the justices who remain on the bench after seventy, as a practical matter is likely to become so uncomfortable and vexatious, subjectively at least, as to impel them to retire. May there not be "psychological" pressure as well as economic? The question I should

10. "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted." *United States v. Butler*, 297 U. S. 1, 68 (1935).

like to submit to this Committee is whether such retirement can be said to be voluntary in the real sense rather than the result of Congressional enactment accomplished without constitutional amendment.¹¹

It seems therefore that if it be determined that there should be a change of policy to limit the tenure of the justices by providing for their retirement on reaching a designated age, the matter should be handled as Dean Smith has suggested, by adopting an amendment to the judiciary article rather than by the present bill. This would have the advantage, as the Dean pointed out, of putting the issue before the people where it properly belongs. If such an amendment be contemplated, the age specified for compulsory retirement in my opinion should be seventy-five, although voluntary retirement after seventy might be provided. Moreover, provision should be made for spacing the retirement of the present justices who would be affected by such an amendment over a period of several years to avoid the serious consequence of disruption of the Court which otherwise would result. In addition, to prevent a repetition of a proposal like the present one at some future time, the amendment should set the number of justices composing the Supreme Court at the permanent number of nine.

In conclusion let it be remembered that the country-wide interest in the proposed plan to remake the Supreme Court is spontaneous and non-partisan. The opposition to it is deep-rooted and *bona fide*, and springs from the realization by countless people throughout the nation that the proposal reaches down to and shakes the foundations of our constitutional structure. The strength and scope of this opposition is something which should, and I am sure will, merit the careful consideration of this Committee.

11. In *United States v. Butler*, *supra* note 10, at 70, discussing the question of whether the AAA plan was voluntary or compulsory, the majority opinion, written up by Justice Roberts and concurred in by all but three of the justices, contained the following language:

"The Government asserts that whatever might be said against the validity of the plan if compulsory, it is constitutionally sound because the end is accomplished by voluntary cooperation. There are two sufficient answers to the contention. The regulation is not in fact voluntary. The farmer, of course, may refuse to comply, but the price of such refusal is the loss of benefits. The amount offered is intended to be sufficient to exert pressure on him to agree to the proposed regulation. The power to confer or withhold unlimited benefits is the power to coerce or destroy. If the cotton grower elects not to accept the benefits, he will receive less for his crops; those who receive payments will be able to undersell him. The result may well be financial ruin. The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful."