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## Shall the Supreme Court Have New Blood?

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The President's message to Congress on February 5th was not simply a proposal to enlarge the Supreme Court as some of the newspaper headlines implied. It recommended legislation to accomplish four purposes: (1) the appointment of additional judges in all federal courts, including the Supreme Court of the United States; (2) the temporary assignment of circuit and district judges to relieve congested dockets in the trial courts; (3) assistance to the Supreme Court in supervising the conduct of business in the lower courts by the appointment of a Proctor; and (4) permitting direct and immediate appeals from the district courts to the Supreme Court in cases in which the trial court determines a question of constitutionality of an act of Congress.<sup>1</sup>

The federal system of courts consists of the Supreme Court, Circuit Courts of Appeals, District Courts, and some special courts in Washington, e.g., the Court of Customs and Patent Appeals, the Customs Court, and the Court of Claims. There is one Circuit Court of Appeals with three or more judges for each of the ten circuits into which the country is divided. Each circuit consists of several districts, there being 85 districts altogether. Some districts cover an entire state; others, a part

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<sup>1</sup> U. S. Law Week, Feb. 9, 1937. (Vol. 4, Index 669).

of a state. The more populous districts are subdivided into divisions with one or more district judges in each division.

The report of the last conference of Senior Circuit Judges which met in October, 1936, stated that in 51 out of a total of 85 judicial districts the business of the district courts is current. In 34 or more than one-third the dockets are in a state which requires delay for the trial of cases at issue.<sup>2</sup> In such a state of affairs, with more than one-third the districts behind their dockets, it seems to be the plainest kind of common sense to utilize, wherever possible, the services of judges whose dockets are cleared, and such mobile judges as may be appointed if this legislation is adopted. This is largely an acceptance for the federal system of a scheme which has been in effect in Ohio for many years. Without it the Cuyahoga County Court of Appeals and Common Pleas Court would have been much further behind their dockets than is the case, or the number of judges elected in the county would have been doubled, or nearly so.

The creation of the position of Proctor for the Supreme Court is merely a device to make this scheme for assigning circuit and district judges function efficiently. The proposal for direct appeals from districts courts to the Supreme Court is merely an extension of the rule which now permits such direct appeals from the statutory three judge courts. These are specially assembled district courts called together to determine certain questions under the Anti-Trust<sup>3</sup> and Interstate Commerce Laws<sup>4</sup> and applications for temporary or interlocutory injunctions against the enforcement of state statutes, or administrative orders claimed to violate the federal constitution.<sup>5</sup> A bill extending the direct appeal from district court orders prohibiting compliance with federal laws was considered by the last Congress. Chief Justice Hughes and Justices Van Devanter and

<sup>2</sup> U. S. Law Week, Feb. 9, 1937, p. 2 (Vol. 4, Index 670).

<sup>3</sup> 15 U.S.C.A. sec. 28, 29.

<sup>4</sup> 49 U.S.C.A. sec. 44, 45.

<sup>5</sup> 28 U.S.C.A. sec. 380.

Brandeis appeared before the Judiciary Committee of the Senate at the invitation of the chairman. The Chief Justice expressed the opinion that the bill was unnecessary because the Supreme Court, under existing law, could bring up any such case on certiorari in advance of decision by the Circuit Court of Appeals, and cited cases in which it had been done.<sup>6</sup> He might, also, have cited many more cases in which it has not been done with the result that months or years of delay have taken place. The T.V.A.<sup>7</sup> and Duke Power Company<sup>8</sup> cases are two which suggest themselves as examples of the long and expensive delays made necessary by the present procedure. Two objections made by the Chief Justice to the bill then under consideration could easily be eliminated in carrying out the President's proposals. One of the objections to the former bill was that only a preliminary matter would be involved in the appeal to the Supreme Court. The present proposal calls for a direct and immediate appeal on the merits with precedence over all matters pending in the Supreme Court. This would also remove a second objection to the former bill—that it would increase the number of cases in which the court would be required to grant or deny review. It is to be presumed that the President contemplates a law which will save the Court that trouble and require a consideration on the merits of the appeal. As a part of this proposal it is suggested that no decision or injunction be issued on a constitutional question without previous and ample notice to the Attorney General and an opportunity for the United States to present evidence and be heard. This again seems to be entirely reasonable. For the machinery of government to be stalled by an injunction issued without notice to its chief law officer seems an unwarranted failure to recognize the coordinate character of the other two branches of government.

<sup>6</sup> U. S. Law Week, Feb. 9, 1937, p. 2 (Vol. 4, Index 670).

<sup>7</sup> *Ashwander v. Tennessee Valley Authority*, 297 U. S. 341, 56 Sup. Ct. 466 (1936).

<sup>8</sup> *Greenwood Co. S. C. v. Duke Power Co.* (C.C.A. 4th Cir.) 81 F. (2d) 986, In Supreme Ct. 81 L.Ed. 149, 57 S. Ct. 202 (1936).

To permit cases, which may decide large questions of policy and power, to get off to a bad start, which later handicaps the government, seems useless and improper. One of the most respected members of our faculty has performed a service in pointing out the necessity of having a proper record of facts in constitutional cases.<sup>9</sup> Time after time such cases have been disposed of, in a certain way, because of defects in the record. Giving the government a fair chance to avoid such an unfortunate result is only practical justice.

The specific provision for additional judges is as follows:

“Sec. 1. (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 10 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 in

“(1) more than fifteen members of the Supreme Court of the United States,

“(2) more than two additional members so appointed to the circuit court of appeals, the Court of Claims, the United

<sup>9</sup>Professor C. D. Laylin, unpublished paper read at legal institutes at St. Clairsville and Canton.

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.”

It would seem that there is no real objection to this proposal in so far as the lower courts are concerned. As has been indicated, many of these courts are behind their dockets.<sup>10</sup> Where judges eligible to retire by reason of reaching seventy years and having served 10 years or more do not care to retire at full pay or resign, additional judges are to be appointed. One can well believe that such a plan would give us a more efficient administration of justice in the lower courts. To a certain extent it is susceptible of the charge of “packing,” which is used particularly with reference to the Supreme Court. It is unquestionably an advantage to the government to win lawsuits in the lower courts, even if an appeal to the Supreme Court is necessary. This proposal for additional district and circuit judges to supplement and possibly, in effect, to cancel the older judges who have been on the bench for many years, would probably improve the chance of favorable court action

<sup>10</sup> This is true of both the Circuit Court of Appeals of the Sixth Circuit and the District Court for the Southern District of Ohio.

on congressional legislation. The effect in that direction is not sufficiently obvious and inevitable that it needs to be viewed with alarm.

Adding Supreme Court Justices is one of many suggestions for dealing with the problem of judicial supremacy. Before any progress can be made in discussing such a proposal a preliminary question must be asked and answered: Is any tampering with the present balance of power desirable? There are many people who sincerely hold the view that the power now lodged in the Supreme Court is not too great and that the Court as now constituted is well suited to exercise such power.

It is undoubtedly true that many of those who object most vehemently to any proposal to tamper with the Supreme Court are actuated by motives of self interest or of party politics. These gentlemen piously, and many others sincerely, declare that we live under a government of laws and not of men, and that the Supreme Court must be supreme. If much repeating makes a thing so, then it is true that we have a government of laws and not of men. However, there are many who regard the statement as a catch phrase which has had little significance since 1780 when it was incorporated into the Massachusetts constitution. The words of the present Chief Justice of the United States Supreme Court spoken when he was Governor of New York express the truth in a straight-forward language: "We are under a Constitution, but the Constitution is what the judges say it is." Mr. Justice Stone, in his dissenting opinion in the *A. A. A. Case* uttered a statement which expresses the same idea in other words. He said, "The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that, while unconstitutional exercise of power by the executive and legislative branches of the government is subject

to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint.”<sup>11</sup>

Those who take issue with these pronouncements by the two honored members of the Supreme Court will have difficulty accounting for the many reversals of position which will be found in the record of any court of last resort. When the *Legal Tender* cases were decided, the first one holding the *Legal Tender Act* of Civil War days unconstitutional by a 4 to 3 decision,<sup>12</sup> and the second, a short time later, holding the same act constitutional by a 5 to 4 decision,<sup>13</sup> was it the Constitution speaking, or some very human men? The question as to whether President Grant packed the Supreme Court to cause this reversal has never been satisfactorily answered. It is a fact that two additional judges were appointed by him on the very day that the first decision was announced. It is also a fact that these two Justices Strong and Bradley voted with the former minority to make a new majority of 5. It is claimed that this was a pure coincidence and it may well have been.<sup>14</sup> Be that as it may, it is difficult, in view of such an occurrence, to preserve the childlike faith in the inexorability of constitutional law and its remoteness from the thoughts and desires of the men who pronounce it.

In the Ohio Supreme Court Reports there are many instances of the overruling of earlier cases upon the faith of which men had acted. In a recent case having to do with the mentioning of insurance in the voir dire examination of jurors in automobile accident cases, the Chief Justice concurred with the majority of the Court “with the regret that by this decision this court reverses its position on this highly controversial question for the second time within the brief period of approxi-

<sup>11</sup>*United States v. Butler*, 297 U. S. 1, 56 Sup. Ct. 312, 80 L. Ed. 477 (1936).

<sup>12</sup>*Hepburn v. Griswold*, 8 Wall. 603 (U.S.), 19 L. Ed. 513 (1869).

<sup>13</sup>*Legal Tender Cases*, 79 U. S. 457, 20 L. Ed. 287 (1870).

<sup>14</sup>Warren, *The Supreme Court in United States History*, Vol. 3, p. 239.

mately a year and a half.”<sup>15</sup> How is this accounted for? Simply by the fact that changes in the personnel of the Court bring about changes in the belief as to what the law is or should be. How else could it be with honest self-respecting men placed in a position in which they are required to deal out justice as they see it?

However, it does not follow that, because one shares the view that the Supreme Court has the power to impose its own views of social and economic matters upon the country, the President's proposal will be accepted as the most desirable step to take. One may be entirely satisfied to admit frankly that the majority of the nine members holds the power of staying reform and be quite willing to allow the power to remain just there. Again, one may feel that the power is not fortunately so placed and yet disapprove of the President's method of removing it. There are 25 or 30 proposed bills now pending in Congress, each attempting to deal with this problem in a fashion somewhat different from the others. Such proposals have run the gamut from depriving the Supreme Court of all power to declare federal laws unconstitutional, to the President's measure, which, it is submitted, is the mildest and least revolutionary of the entire lot.

It is not the first time that unpopular decisions by the Supreme Court have caused a clamor for some means of curbing the power of the Court. In our own time it is easily recalled how urgently Theodore Roosevelt advocated a reform in this direction. It is probable that many eminent members of his party shared his enthusiasm for such a proposal. He appeared before the Ohio Constitutional Convention of 1912 and gave the members the benefit of his views upon reforms in government. After discussing the recall of judges as a last resort and preferable to impeachment he proceeded as follows: “Therefore, we should be cautious about recalling the judge,

<sup>15</sup> *Dowd-Feder, Inc. v. Truesdell*, 130 Ohio St. 530, 536, 200 N.E. 762, 765 (1936).

and we should be cautious about interfering in any way with the judge in decisions which he makes in the ordinary course as between individuals. But when a judge decides a constitutional question, when he decides what the people as a whole can or cannot do, the people should have the right to recall that decision—not the judge—if they think it wrong. We should hold the judiciary in all respect; but it is both absurd and degrading to make a fetish of a judge or of anyone else. Abraham Lincoln said in his first inaugural: ‘If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, \* \* \* the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the courts or judges.’ Lincoln actually applied in successful fashion the principle of the recall in the Dred Scott Case. He denounced the Supreme Court for that iniquitous decision in language much stronger than I have ever used in criticizing any court, and appealed to the people to recall that decision—the word ‘recall’ in this connection was not then known, but the phrase exactly describes what he advocated. He was successful, the people took his view, and the decision was practically recalled.”<sup>16</sup>

The convention wrote into the Ohio constitution the following provision: “No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void.”<sup>17</sup> It is somewhat surprising to discover how little opposition there was in the convention to this proposal when made. It was originally proposed to require the unanimous concurrence of the seven members of the court before a law could be held unconstitutional. The present form was as far as the

<sup>16</sup> Proceedings and Debates, Ohio Constitutional Convention, 1912, Vol. 1, p. 383.

<sup>17</sup> Article IV, sec. 2.

convention could be moved in compromise and there has been little criticism of the measure from the viewpoint of encroachment upon judicial power in the twenty-four years of its existence.<sup>18</sup>

This form of curb upon the power of the United States Supreme Court has been frequently suggested. It is possible that the power given by the constitution to Congress in connection with the appellate jurisdiction of the Supreme Court is broad enough to permit Congress to require more than a majority of the court to concur before a law should be declared unconstitutional. This provision is found in Art. III, Sec. 2: "In all other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Perhaps this would permit such a change as just suggested, or another which more closely resembles the recall advocated by Theodore Roosevelt, namely, that any law declared unconstitutional by the Supreme Court, if passed again by both houses of Congress with a two-thirds vote in each, shall be put into effect and regarded as valid.

It is unquestionably within the power of the Supreme Court to declare unconstitutional any law such as either of these just mentioned<sup>19</sup> and, if this were done, the only recourse to make them operative would be by way of Constitutional amendment. Those good folks who urge that any change should be accomplished only through amendment of the Constitution are either unaware, or all too conscious, of the almost total impossibility of accomplishing reform by that means on a question where partisan politics will play a part. Witness the history of the Child Labor Amendment, which has never been made a strictly party issue and yet seems almost hopeless of adoption; thirteen years of effort and still eight states short of the goal.<sup>20</sup>

<sup>18</sup> The provision has been criticized for other reasons. See *Board of Education v. Columbus*, 118 Ohio St. 295, 160 N.E. 902 (1928).

<sup>19</sup> Hughes, "The Supreme Court of the United States," p. 241.

<sup>20</sup> The newspapers have recently carried the announcement that the Texas legislature has refused to ratify the amendment.

As one reviews the foregoing suggestions for curbing the power of the Supreme Court, (1) depriving it of all power to declare federal laws unconstitutional; (2) requiring more than a majority to concur in such a declaration; (3) referendum by the people or by the Congress to override the Judicial veto, it seems that one is forced to conclude that the President's proposal is the mildest of all. He would make it possible for the justices to retire at full pay at seventy and after ten years or more of service. He would have enacted the measure which was passed by the House in 1869, and eliminated from the Retirement Law in the Senate, which would make possible whenever any federal judge refused to retire at seventy to appoint an additional judge to assist in the work.

The six justices who are more than seventy at the present time are not all to be found on the side opposing the President's program of reform legislation. The oldest, Mr. Justice Brandeis, is as much a supporter of the New Deal as are his younger colleagues,<sup>21</sup> Justices Stone and Cardozo. The Chief Justice has not been unwavering in his opposition to this legislation and, in fact, has supported several of the laws.<sup>22</sup> These two, as well as the four justices who may be fairly labeled as conservatives, are subject to the application of the proposed bill. Should the six choose to remain rather than to retire, the President might appoint six others to bring the total to fifteen. No present member of the House or Senate would be eligible for such an appointment.<sup>23</sup> No man worthy of occupying a place on this, the most highly esteemed judicial body in the world, would commit himself in advance to decide any future case in a certain way.

Even if six men could be found whose past acts and utterances seem to commit them to a certain line of conduct, it does not follow that the legislation yet to be passed on will have any easier course through the judicial shoals than some of the

<sup>21</sup> See Table 3.

<sup>22</sup> See Table 3.

<sup>23</sup> United States Constitution, Art. I, sec. 6.

most cherished of the past. Another N.R.A. might muster the support of the six new justices, but it must not be forgotten that the execution of the old N.R.A. in the "Sick Chicken Case"<sup>24</sup> was the joint effort of the nine. It is quite reasonable to suppose that the nine, or possible eight, would join again to kill off a successor piece of legislation.

If Mr. Justice Brandeis, the oldest of the six, should be the only one to retire, a successor to fill his place as a judicial statesman of the very highest rank would be extremely hard to find. Should the Court, as then constituted of fourteen members, be asked to review the judgment of an inferior court holding a law unconstitutional, a majority of eight would be necessary to reverse and uphold the law.<sup>25</sup> It is by no means certain that three of the present members and five new appointees could be counted upon to favor the law.

By the mere force of adventitious circumstances President Harding, in his short term of two years, was permitted to appoint four members of the court. Two of them, Justices Sutherland and Butler, are among the conservatives who have passed the age of seventy. The others, Justice Sanford and former President Taft, appointed Chief Justice, were also fairly consistent conservatives.<sup>26</sup> If it were not somewhat sanctified and privileged by being published in a judicial opinion in the regular reports of the Federal Courts, one would hesitate to mention a little bit of Supreme Court gossip. District Judge Bourquin, until recently a federal judge in Montana, in the course of an opinion reported in 52 Fed. 2nd Series, 196, makes the following statement: "It is said \* \* \* that Chief Justice Taft declared that 'At a conference I announced I have been appointed to reverse a few decisions, and,' with his famous chuckle, 'I looked right at old man Holmes when I said it.'"

<sup>24</sup> *Schechter Poultry Corp. v. U. S.*, 295 U. S. 495, 79 L. Ed. 1570, 55 Sup. Ct. 837 (1935).

<sup>25</sup> Hughes, *op. cit.*, p. 60.

<sup>26</sup> Bates "Story of the Supreme Court," pp. 262, 263, 278, 280, 287.

What a pity were these illuminating incidents lost to history save in so far as the Court's reports will verify them."

No one would insist that the retirement age provided in the proposed law is the only one which could have been selected. If one were to squarely face the issue and make the test that of open-mindedness upon the validity of such legislation as has been before the court during the past four years, Table 3 makes a good showing for the age selected by the President. Upon this point the language of the present Chief Justice is of interest: "It is extraordinary how reluctant aged justices are to retire and to give up their accustomed work. They seem to be tenacious of the appearance of adequacy.<sup>27</sup> \* \* \* Under present conditions of living, and in view of the increased facility of maintaining health and vigor, the age of seventy may well be thought too early for compulsory retirement. Such retirement is too often the community's loss. A compulsory retirement at seventy-five could more easily be defended. I agree that the importance in the Supreme Court of avoiding the risk of having judges who are unable properly to do their work and yet insist upon remaining upon the bench, is too great to permit chances to be taken, and any age selected must be somewhat arbitrary, as the time of the failing in mental powers differs widely."<sup>28</sup> But it must not be forgotten that the President's proposal is not one of compulsory retirement, but rather, one of decreasing the proportion in the vote of the court of the justices over seventy.

It seems that if by mere force of circumstances President Harding should be allowed to appoint four conservatives to the court to make it more certain that Justices Holmes and Brandeis should be confined to the state of dissenters, it is not too much for a reform President to ask that during his two terms he be

<sup>27</sup> At no time since the Civil War has either the average or median tenure of the Judges of the Supreme Court been as great as it is today. Today the average tenure is  $15\frac{2}{9}$  years, the median tenure 15 years.

<sup>28</sup> Hughes, *op. cit.*, 75, 76.

allowed to name at least six members to a court that may number fifteen.<sup>29</sup>

If as many as six of the present members of the court had retired or left the bench for any reason, the President would have filled their places. The most bitter of his opponents would not have questioned his right to appoint as their successors men in whom he and the majority of the Senate had confidence, and whose attitude on broad questions of social policy were similar to those of the President. Had this power come into the President's hands fortuitously he would have exercised it, just as did President Harding and all other Presidents who have had the opportunity.<sup>30</sup>

It is not a questionable view of the essence of our scheme of democratic government that a course of procedure which would be taken for granted, if chance had made it necessary, is to be severely condemned if brought about by action of the people's elected representatives? It must be always borne in mind that there is no shred of constitutional objection to the Congress and the President doing that which he proposes.

This proposal does not insure a result in which the Administration's laws will be given a rubber stamp of approval. It cannot be supposed that the President does not realize that he will not be able to dominate the Supreme Court.<sup>31</sup> Those who

<sup>29</sup> This is upon the assumption that none of the present justices would leave the bench during his administration. If any should do so, the number of appointees would be thereby increased. To prevent the number of justices from being permanently fixed at 15, the following might be enacted as a part of the proposed law. In lieu of the first sentence of sec. 1 (b): "When an additional judge has been appointed hereunder by reason of the non-retirement of a judge eligible to retire, or his failure to resign, no vacancy shall be deemed to exist upon the subsequent retirement, resignation, or death of the latter." "Thereunder" in the second sentence would be changed to "under subsection a."

<sup>30</sup> Three Presidents, Jackson, Lincoln, and Taft were able to appoint a controlling number of the members of the court. See Hughes, "The Supreme Court of the United States," p. 43.

<sup>31</sup> Warren, "The Supreme Court in United States History," Vol. 1, p. 22, "Nothing is more striking in the history of the Court than the manner in which the hopes of those who expected a judge to follow the political views of the President appointing him have been disappointed."

suggest that he would appoint men who would merely carry out his desires do him a grave injustice. There has been no criticism of the members of the Supreme Court from any source which is so unfair as is this reflection upon the President. The liberal justices now on the court have amply demonstrated their independence. It is to be expected that new appointees will be of a caliber which would make the same course probable. If the President should endeavor, which the writer does not expect him to do, to appoint persons as to whose integrity, independence and capability there is question, the Senate should, and probably would, refuse to confirm the appointments. If, within the constitution, and hence without an amendment, a plan can be put into effect which gives the President and Congress a slightly better chance of working out a program of social betterment, who can say, "It shall not be done." With an unmistakable mandate from the people the Chief Executive and the Legislative branch are set to go. Here is a proposal to instill a small amount of new blood into the Judiciary in the hope that thereby more sympathy for the people's wishes may be engendered. It will take more by way of argument than epithets such as "Dictator," "Court Packer," "Destroyer of the Constitution," etc., to convince many that this mild experiment in governmental reform should not be tried.

## APPENDIX

### JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Source: Congressional Directory, January 1936, pp. 383-386. Compiled by Prof. W. M. Duffus, College of Commerce and Administration, Ohio State University

1. CHARLES EVANS HUGHES, Chief Justice. Age 74; will be 75 April 11, 1937. Elected Governor of New York for two terms (1907-08 and 1909-10); resigned October 6, 1910, appointed Associate Justice, United States Supreme Court [by President Taft] May 2, 1910, and assumed duties October 10, 1910; nominated for President of the United States by the Republican National Convention June 10, 1916, and resigned from the Supreme Court on the same day; appointed Secretary of State [by President Harding] March 5, 1921, resigned March 5, 1925, and resumed practice in New York. Member of Permanent Court of Arbitration, The Hague,

- 1926-1930; Judge of Permanent Court of International Justice, 1928-1930; appointed by President Hoover as Chief Justice of the United States February 3, 1930, confirmed by the Senate February 13, 1930, and took his seat February 24, 1930. Author of (among other books) *The Supreme Court of the United States* (Columbia University Lectures), 1927.
2. WILLIS VAN DEVANTER, of Cheyenne, Wyoming, Associate Justice. Age 77; will be 78 April 17, 1937. Born in Marion, Indiana. Delegate to Republican National Convention and member Republican National Committee in 1896; appointed Assistant Attorney-General of the United States by President McKinley in 1897, being assigned to the Department of the Interior; appointed United States circuit judge, eighth circuit, by President Roosevelt in 1903; appointed Associate Justice of the Supreme Court of the United States by President Taft December 16, 1910, and entered upon the duties of that office January 3 following.
  3. JAMES CLARK McREYNOLDS, Associate Justice. Age 75. February 3, 1937. Born Elkton, Kentucky; practiced law at Nashville, Tennessee; Assistant Attorney-General of the United States 1903-1907; thereafter removed to New York; appointed [by President Wilson] Attorney-General of the United States, March 5, 1913, and Associate Justice of the Supreme Court of the United States August 29, 1914; took his seat October 12, 1914.
  4. LOUIS DEMBITZ BRANDEIS, Associate Justice. Age 80; will be 81 November 13, 1937. Born Louisville, Kentucky; began practice of law in St. Louis, Missouri, 1878; removed to Boston, Massachusetts in 1879 and practiced law there until June 1916. Nominated an Associate Justice of the Supreme Court of the United States by President Wilson on January 28, 1916; confirmed by the Senate June 1, 1916, and took his seat June 5, 1916.
  5. GEORGE SUTHERLAND, of Salt Lake City, Associate Justice. Age 74, will be 75 March 25, 1937. Born in England; admitted to the practice of law in the supreme court of Michigan in 1883; thereafter followed the practice of law until his appointment as a member of the Supreme Court of the United States; member of the 57th Congress from Utah; elected to the United States Senate by the Utah Legislature for the term beginning March 4, 1905, and reelected in 1911. President American Bar Association, 1916-17. Author of *Constitutional Power and World Affairs* (Columbia University lectures) 1918. Nominated an Associate Justice of the Supreme Court by President Harding, September 5, 1922, immediately confirmed by the Senate, and entered upon the duties of the office October 2, 1922.
  6. PIERCE BUTLER, Associate Justice. Age 70, will be 71 March 17, 1937. Born Waterford, Minnesota; admitted to the bar at St. Paul in 1888 and practiced law there until January 1923. Nominated an Associate Member of the Supreme Court of the United States by President Harding November 23, 1922, confirmed by the Senate December 21, 1922, and took his seat January 2, 1923.

7. HARLAN F. STONE, of New York City, Associate Justice. Age 64, will be 65 October 11, 1937. Born Chesterfield, New Hampshire; admitted to New York bar 1898; while practicing law lectured on law in Columbia Law School 1899-1902; 1910-1923; Kent professor of law and dean of Columbia Law School, 1910-1923; resigned 1923 and became member of a law firm. Appointed Attorney-General of the United States [by President Coolidge] April 7, 1924; nominated Associate Justice of the Supreme Court of the United States by President Coolidge January 5, 1925; confirmed by the Senate February 5, 1925, and entered upon the duties of that office March 2, 1925.
8. OWEN J. ROBERTS, of West Vincent Township, Chester County, Pennsylvania. Age 61, will be 62 May 2, 1937. Born in Philadelphia; began practice there in 1898 and continuously practiced there until June 1930. Fellow, instructor, assistant professor, and professor of law at the University of Pennsylvania, 1898-1918. Director Equitable Life Assurance Society of the United States, Franklin Fire Insurance Company of Philadelphia, Real Estate-Land Title and Trust Company of Philadelphia, Bell Telephone Company of Pennsylvania, and American Telephone and Telegraph Company; member Council of American Law Institute. Appointed by President Coolidge one of two attorneys to prosecute cases arising under leases of Government lands in California and Wyoming, in 1924; nominated Associate Justice of the Supreme Court of the United States by President Hoover May 9, 1930; confirmed by the Senate May 20, 1930, and entered upon the duties of that office June 2, 1930.
9. BENJAMIN N. CARDOZO, Associate Justice. Age 66, will be 67 May 24, 1937. Born at New York City; admitted to the bar, 1891; elected Justice of the Supreme Court of New York for term beginning January 1, 1914; designated by the Governor to act as Associate Judge of the Court of Appeals of New York, February 2, 1914; elected Associate Judge of the Court of Appeals for term beginning January 1, 1918; elected Chief Judge of the Court of Appeals for term beginning January 1, 1927; resigned as Chief Judge, March 7, 1932, having been nominated by President Hoover February 15, 1932, as an Associate Justice of the Supreme Court of the United States, and confirmed by the Senate, February 24, 1932; entered upon the duties of that office March 14, 1932; vice-president of the American Law Institute, 1923-1932. Author of (among other books) *The Nature of the Judicial Process* (Yale University lectures), 1921, *The Growth of the Law* (Yale University lectures), 1924; *the Paradoxes of Legal Science* (Columbia University lectures), 1928; *Law and Literature*, and other essays and addresses, 1930.

TABLE 1.—JUSTICES OF THE SUPREME COURT OF THE UNITED STATES  
FEBRUARY 5, 1937

Summary Statement: Political Affiliation; Appointing President; Date of Appointment; Length of Service; Age when Appointed; Present Age.

Justices	Political Affiliation <sup>1</sup>	Appointing President	Date of Appointment	Length of Service <sup>2</sup>	Age When Appointed <sup>3</sup>	Present Age <sup>4</sup>
1. Hughes.....	Rep.	Hoover	Feb. 3, 1930	7 years <sup>5</sup>	67	74
2. Van Devanter.....	Rep.	Taft	Dec. 16, 1910	26 years, 1 month	51	77
3. McReynolds.....	Dem.	Wilson	Aug. 29, 1914	22 years, 4 months	52	75
4. Brandeis.....	Dem.	Wilson	Jan. 28, 1916	20 years, 8 months	59	80
5. Sutherland.....	Rep.	Harding	Sept. 5, 1922	14 years, 4 months	60	74
6. Butler.....	Dem.	Harding	Nov. 23, 1922	14 years, 1 month	56	70
7. Stone.....	Rep.	Coolidge	Jan. 5, 1925	11 years, 11 months	52	64
8. Roberts.....	Rep.	Hoover	May 9, 1930	6 years, 7 months	55	61
9. Cardozo.....	Dem.	Hoover	Feb. 15, 1932	4 years, 11 months	61	66

<sup>1</sup> Five Republicans, four Democrats.

<sup>2</sup> Since entrance upon duties of the office, not since date of appointment. In some cases the difference in time is due to delay in confirmation of the appointment by the Senate. Mr. Brandeis was nominated January 28, 1916, was confirmed by the Senate after four months deliberation, on June 1, 1916, and took his seat June 5, 1915.

<sup>3</sup> Age at last birthday before appointment.

<sup>4</sup> Age at last birthday.

<sup>5</sup> As Chief Justice; 6 years, 1 month as Associate Justice.

Source: Tables 1, 2, and 3 were compiled by Prof. W. M. Duffus, College of Commerce and Administration, Ohio State University, from the Congressional Directory, January 1936, Who's Who in America, 1934-1935, The New Republic, December 6, 1922, p. 27 (for the political affiliation of Justice Butler), The Traffic World, February 20, 1932, p. 385 (for the political affiliation of Justice Cardozo).

TABLE 2.—JUSTICES OF THE SUPREME COURT OF THE UNITED STATES  
FEBRUARY 5, 1937

Summary of Appointments by Presidents of the United States,  
December 16, 1910-February 5, 1937

President	Number of Justices	Names of Justices
Taft.....	1	Van Devanter
Wilson.....	2	McReynolds, Brandeis
Harding.....	2	Sutherland, Butler
Coolidge.....	1	Stone
Hoover.....	3	Hughes, Roberts, Cardozo
Roosevelt.....	0	

Source: Table 1.

TABLE 3.  
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES FEBRUARY 5, 1937  
"Box Score" of Votes on Major Constitutional Issues Raised During the Roosevelt Administration.

Justices	Present Age	1	2	3	4	5	6	7	8	9
1. Hughes	74	No	Yes	Yes	No	No	No	Yes	Yes	Yes
2. Van Devanter	77	No	No	No	No	No	No	Yes	(in part) No	No
3. McReynolds	75	No	No	No	No	No	No	No	No	No
4. Brandeis	80	No	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
5. Sutherland	74	No	No	No	No	No	No	Yes	No	No
6. Butler	70	No	No	No	No	No	No	Yes	No	No
7. Stone	64	No	Yes	Yes	No	No	Yes	Yes	Yes	Yes
8. Roberts	61	No	Yes	No	No	No	No	Yes	No	No
9. Cardozo	66	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Yes
<i>Summary</i>		Yes..... 1 No..... 8	Yes..... 5 No..... 4	Yes..... 4 No..... 5	Yes..... 0 No..... 9	Yes..... 0 No..... 9	Yes..... 3 No..... 6	Yes..... 8 No..... 1	Yes..... 1 (in part) Yes..... 3 No..... 5	Yes..... 4 No..... 5

Classification of 81 total votes on 9 cases by age of justices:  
Six Justice over 70 at last birthday—Yes, 14 (including 1 "yes" in part.); No, 40.  
Three Justices under at last birthday—Yes, 15; No, 12.

(SUPPLEMENT TO TABLE 3)  
CITATION OF CASES LISTED IN TABLE 3

1. "Hot Oil"—*Panama Refining v. Ryan*, 293 U.S. 388 (Decided Jan. 7, 1935).
2. Gold Clause—*Norman v. Baltimore & O. Ry. Co.*, 294 U.S. 240 (Decided Feb. 18, 1935).
3. Railroad Retirement—*Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (Decided May 6, 1935).
4. N.R.A.—*Schechter Poultry Corp. v. United States*, 295 U.S. 495 (Decided May 27, 1935).
5. Farm Moratorium—*Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (Decided May 27, 1935).
6. A.A.A.—*United States v. Butler*, 297 U.S. 1 (Decided Jan. 6, 1936).
7. T.V.A. Power—*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (Decided Feb. 17, 1936).
8. Guffey Coal Act—*Carter v. Carter Coal Co.*, 298 U.S. 238 (Decided May 18, 1936).
9. New York Minimum Wage Act—*Morehead v. New York ex. rel. Tipaldo*, 298 U.S. 587 (Decided June 1, 1936).

REASON FOR SELECTION OF CASES LISTED IN TABLE 3

There is disagreement as to the number of cases which register the individual opinions of the justices of the Supreme Court on issues which were raised by the Roosevelt administration and which would not have been raised by the Hoover administration if it had been continued in power on March 4, 1933. Fourteen and even sixteen cases, including two decided in January, 1937, have been cited by journalists as proper tests of the responsiveness of the Supreme Court to New Deal policies which are distinctively New Deal. The compiler of Table 3 does not believe that all of the fourteen or sixteen cases referred to should be included in the "box score" but he would be pleased to see the results of any scoring that anyone else has the time and the judgment to make. Table 3 is submitted as a representative sample of decisions on fundamental issues between conservatives and liberals.