THE SUPREME COURT IN CRISIS: FOUR SELECTED CASES

APPROVED:

[Signatures]

Major Professor

Minor Professor

Director of the Department of History

Dean of the Graduate School
THE SUPREME COURT IN CRISIS: FOUR SELECTED CASES

THESIS

Presented to the Graduate Council of the
North Texas State College in Partial
Fulfillment of the Requirements

For the Degree of

MASTER OF ARTS

By

Robert A. Calvert, B. A.

Denton, Texas
August, 1960
# Table of Contents

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>PREFACE</td>
<td>iv</td>
</tr>
<tr>
<td></td>
<td>Chapter</td>
<td></td>
</tr>
<tr>
<td>I.</td>
<td>DEFINITION OF FUNCTIONS</td>
<td>1</td>
</tr>
<tr>
<td>II.</td>
<td>CRISIS OVER SLAVERY</td>
<td>49</td>
</tr>
<tr>
<td>III.</td>
<td>THE NEW DEAL CHALLENGES THE COURT</td>
<td>79</td>
</tr>
<tr>
<td>IV.</td>
<td>SEPARATE BUT UNEQUAL</td>
<td>138</td>
</tr>
<tr>
<td>V.</td>
<td>THE COURT SURVIVES</td>
<td>167</td>
</tr>
<tr>
<td></td>
<td>BIBLIOGRAPHY</td>
<td>176</td>
</tr>
</tbody>
</table>
When the separate but equal doctrine was overturned by the Supreme Court in 1954, the South was plunged into an era characterized by protest, criticism, and threatened curtailment of the Court. The arguments in opposition to this decision, which held that state education could not be segregated and also offer equal opportunity for individual development, were neither wholly original nor sound. However, such criticisms as had appeared earlier were revived to urge citizens to defy or restrict a Court because of an unfavorable verdict on a particular issue.

Past history demonstrates that this was only the most recent of several crises faced by the Court; consequently, a study of past periods of crisis faced by the Court should give some indication of the nature and depth of the present challenge to its authority. On this assumption, four select periods of crisis in the Court's history have been investigated, culminating with the controversy emerging from the decision of 1954 which declared segregated schools unconstitutional. Two of these crises were precipitated by presidential administrations seeking to limit or control court decisions: the first, by Jefferson in the early 1800's; and the second, by Franklin Roosevelt in the 1930's.
The other two critical periods studied were initiated by sectional opposition to a Court decision: the Dred Scott Decision of 1857; and Brown v. Board of Education, et al., in 1954.

In all of these critical periods in the Court's history, similar techniques and arguments were used by the Court's opponents, but in all cases the Supreme Court managed to weather the storm and advance steadily in prestige. In view of the ability of the Court to retain and increase its power in the face of criticism, a study of past historical precedents should furnish some guide to an assessment of the position of this branch of the government today.
CHAPTER I

DEFINITION OF FUNCTIONS

In the early formative years of the United States under the Constitution, perhaps the least clearly defined branch of the new government was the judiciary. Provision had been made for a Supreme Court and for selection of justices, but the duties and responsibilities of the Court were defined in only the most general of terms. During the early administrations of Washington and Adams, with judicial appointments reflecting prevailing Federalist sentiment, the vagueness as to the Court's function caused little difficulty. In like manner, however, the role of the Court in this period contributed little to its prestige. Only after the development of well-defined political parties and the victory of the opposition party in 1800 was the Court put to test and faced with its first political crisis.

The Supreme Court had attained neither honor nor importance during these early years. When the new government site was chosen in Washington, there was no provision made to house the judiciary.\(^1\) Finally, on January 23, 1801, it was decided

\(^1\)American State Papers, 38 vols., "Miscellaneous" (Washington, 1832-1861), I, 132, 142.
that the High Tribunal could use one of the rooms on the
first floor of the Capitol building to hold sessions.²

The office of Chief Justice had less stature in the pub-
lic eye than the Court itself. The man who was ultimately
to enable the judiciary to begin its rise to equal status in
the United States governmental system was not even President
John Adams' first choice as Chief Justice. Before the first
session of the newly located court began, Chief Justice
Oliver Ellsworth resigned. Adams first requested John Jay
to return to the Supreme Court in the position of Chief
Justice. Jay had often been bitterly assailed by the Repub-
lican press for his political leanings, but few papers paid
more than scant notice to his proposed return to the Court.³
Jay refused the appointment, because of both the relative
unimportance of the position and the dual responsibility of
serving both on the High Tribunal and as a circuit court
judge.⁴

Refused his first choice, Adams sent to the Senate the
name of his Secretary of State, John Marshall. The Federalist

²Annals of Congress: The Debates and Proceedings in the
Congress of the United States, 6th Congress, 1st Session,
pp. 914, 954.

³National Intelligencer, January 8, 1801.

⁴John Adams to John Jay, February 3, 1801, Charles Fran-
(Boston, 1854), X, 90-91; Charles Warren, The Supreme Court
in the United States, 3 vols. (Boston, 1924), I, 175; Louis
Boudin, Government by the Judiciary, 2 vols. (New York, 1932),
I, 196.
party was not overjoyed with the nomination. Preferring instead an eminent jurist from Virginia, Judge Patterson, Federalist leaders attempted to avoid a rapid confirmation in hope that the President would modify his choice. Finally, when it became obvious Adams would not succumb to their demands, they ratified the appointment of Marshall.5 Thus, the man who was to strengthen the judiciary to an almost unbelievable point, considering contemporary surroundings, became the Chief Justice without being the primary choice of either of the other branches of government. Marshall did not appear disturbed by his secondary role, and he accepted the position gratefully, informing the President that he hoped "never to give you occasion to regret having made this appointment."6

One of the last acts of the administration of Adams further alienated the Republican party toward the judiciary. The Federalists attempted in February, 1801, to correct certain apparent weaknesses in the federal court system. The six justices of the Supreme Court had to hold circuit court sessions twice yearly. They also were to conduct the Supreme Court twice annually in Washington.7 The trip back

5Boudin, I, 196; Warren, I, 176.
and forth between the Supreme Court and circuit court duties was both long and tiring. Often, delay due to inclement weather, unfavorable roads, missed connections, or numerous other reasons forced either one court or the other to come to a virtual standstill. The waiting period produced crowded dockets, unnecessary expense, and poor justice.  

It was obvious that the deplorable condition of overworked judges needed to be corrected, and at any other time the Jeffersonians might not have protested if a reform of the judicial system had been proposed. However, the judiciary was not particularly favored in these formative years by the Republicans who had suffered severe penalties under the judiciary's interpretation of the laws. The Republicans were not at all sure that the revision of the court system was not just an attempt to pack an already anti-Jefferson branch of government. As Senator James Jackson of Georgia asserted:

We have been asked if we are afraid of having an army of judges. For myself, I am more afraid of having an army of judges under the patronage of the President than an army of soldiers. The former can do us more harm. ... Have we not heard the judges crying out through the land, Sedition! And asking those whose duties it was to inquire, is there no sedition here.  

---


9For example see Annals of Congress, 6th Congress, 1st Session, pp. 405-423.

10Ibid., 7th Congress, 1st Session, p. 47.
On January 20, 1801, the proposed bill was sent to Congress. In reality a needed reform, the Judicial Act of 1801 reduced the membership of the Supreme Court to five upon the occurrence of another vacancy. The act established six new circuit courts with sixteen separate judges. The circuit judge and a district judge were to conduct circuit court, hence ending the double duties of Supreme Court justices.\footnote{For an accurate account of Court conditions, the Judiciary Act, and needed reform, see Max Farrand, "The Judiciary Act of 1801," \textit{The American Historical Review}, V (July, 1900), 682-687.}

The bill was enacted on February 13, 1801, and Adams proceeded to nominate members of his own party to fill the newly created positions. This action led to charges that the president was attempting to entrench his party's power despite the will of the people. Because of Jefferson's recent election, the Republicans believed that unfair advantage was being taken by the Federalists in attempting to thwart democracy through the use of the judiciary.\footnote{\textit{Annals of Congress}, 7th Congress, 1st Session, pp. 31-32, 33, 40-41; Jefferson to Joel Barlow, March 14, 1801, Jefferson to Giles, March 23, 1801, Albert Bergh, editor, \textit{The Writings of Thomas Jefferson}, 20 vols. (Washington, 1904), X, 222-223, 233-240.} The opinion was widespread that the Federalists would continue to attempt control of the country by the judiciary. The Jeffersonian press warned of the "midnight judges" and
bitterly condemned Adams, not only for his late appointments, but for increasing the number of an already dangerous group.13

Thus Jefferson determined to alleviate the ills that he thought the Federalists had unleashed in passing an act designed to strengthen the "Judiciary system . . . and especially that portion of it recently enacted will, of course, present itself to the contemplation of Congress."14 The Federalists were not deceived, however, by the seemingly nonchalant attitude toward repeal of the Judiciary Act. They knew that the President had mentioned earlier the need for correcting the appointment of the judges, and they waited, perhaps not too expectantly, for the new session of Congress to begin.15

The new session began as expected. On January 6, 1802, the Republicans began their attack on the Judiciary Act in the Senate chambers. The strategy chosen by the Jeffersonians was to point out the unnecessary cost of the new judges and urge a reappraisal of the Judicial Act. The Republicans pointed out that the new cost of supporting added judges was $137,000, maintaining that the added expense was too much and would not improve the problem of poor justice.16

---

13The National Intelligencer, June 12, November 18, 1801.
15Jefferson to A. Stewart, April 5, 1801, Bergh, Jefferson's Writings, X, 256-258.
Their argument was that, at a time when federal court cases were decreasing, the Federalists wanted to increase the number of judges; and they asserted that this type of reasoning was illogical. The only obvious answer was to allow the state courts to assume some burden of justice, thus paying their own way. Since federal court cases were in a process of declining, state courts were not assuming enough responsibility, and the cost was prohibitive under the act. The answer was simply that the act was not a reform but an attempt to issue patronage; it was politically motivated and should be overturned.

The Federalists challenged this argument of the Republicans and attempted to answer these charges by pointing out that higher salaries insured better judges. Adams' supporters maintained that, after all, expense was not as important as the quality of justice. It was a necessity that all the people receive the opportunity to press for equality before the law; and, in some instances, the only true justice was in the federal courts. Besides, the Federalists maintained, it would not always be true that suits before the federal courts would diminish. With the natural increase in size

\[17\text{Ibid., pp. 31-34.}\]
\[18\text{Ibid., pp. 103-104.}\]
\[19\text{Ibid., pp. 47-48, 50-51, 66-67.}\]
\[20\text{Ibid., pp. 64-65.}\]
\[21\text{Ibid., p. 54.}\]
and wealth of the nation, the government should be prepared to accept the added courts, judges, and costs. They believed the new appointees were not patronage assignments but needed recruits to the army of justice.

The advocates of the Judiciary Act also warned that, not only were the Republicans attempting to impose unfair duties on Supreme Court justices, but they were contemplating unconstitutional action. The Federalists pointed out that the legislature had the right to establish new courts; but, once created, they had no right to eliminate courts or judges. They asserted that the Constitution stated life tenure for judges except in cases of their not performing the duties of their office. The Federalists questioned the right of the legislature to remove the new appointees by simply repealing an act without the betrayal of public trust by the judges. The Adams supporters asked if eliminating the judges would not only violate life tenure but create a dangerous precedent, and they warned that the proposed repeal would shake the very foundation of the court system. The problem was that the Republicans were proposing direct control of the judiciary,

---

22 Ibid., pp. 114, 117-118.  
23 Ibid., pp. 52-54.  
24 Ibid., pp. 38, 57-58.  
25 Ibid., pp. 31, 33-34, 39.  
26 Ibid., pp. 78-82, 77-78, 71-74.
and this type of action not only violated the separation of powers doctrine, but limited the efficiency of courts.\textsuperscript{27}

To attempt to repeal an act in order to control a branch of government, according to one Federalist supporter, was a measure more "pernicious in its nature and more fatal than any doctrine yet announced in the young country."\textsuperscript{28} The Federalists frequently cited the obvious danger of violating the historical checks and balances system of the Constitution, and alleged that the ability of the judicial branch to limit the power of a rampant legislature would be useless if the repeal of the act was allowed to be completed and the Judiciary intimidated.\textsuperscript{29} The loss of a court's power to protect the people by judicial review would be disastrous for the nation, maintained the Federalists. The only opportunity for freedom and equality, they argued, was a free and impartial court system, and an impartial judge would not exist if the Judicial Act of 1801 were repealed.\textsuperscript{30}

The argument based on the need for protection of the people was carried to the extreme by Governor Robert Morris of New York. In reasoning typical of the extreme conservative thought of the era, he pointed out that the only protection against the tyranny of one branch was the right of the judiciary to review all laws; "... the moment the Legislature

\begin{flushright}
\textsuperscript{27}\textit{Ibid.}, pp. 56, 142-143, 165-166. \quad \textsuperscript{28}\textit{Ibid.}, p. 161. \\
\textsuperscript{29}\textit{Ibid.}, pp. 76-78, 83, 87-90. \quad \textsuperscript{30}\textit{Ibid.}, p. 56.
\end{flushright}
... declare themselves supreme, they become so ... and the Constitution is whatever they choose to make it."\textsuperscript{31}
Not willing to allow the argument to end on such a quiet note, he expressed a common Federalist view by warning that all that protected man from himself was the judiciary. He shocked and horrified the Republicans by exclaiming: "Governments are made to provide against the follies and vices of men. ... Why are we here? To save the people from their most dangerous enemy; to save them from themselves."\textsuperscript{32}

Such statements offered ample material for a Republican attack on the Federalist party as anti-democratic.\textsuperscript{33} They criticized the Judiciary Act as a dying party's attempt to limit the people's control of the government.\textsuperscript{34} As far as the constitutional right to repeal the act was concerned, they pointed out that what was created by a legislature could be eliminated by the same.\textsuperscript{35} After all, the Jeffersonians said, some states had already challenged the Judicial Act of 1801 by simply repealing it in their own legislatures.\textsuperscript{36} As one curious Senator wondered, where was the Federalist respect for the Constitution when they altered the High Tribunal to five in order to avoid Jefferson's appointing

\begin{itemize}
\item \textsuperscript{31}Ibid., p. 81.
\item \textsuperscript{32}Ibid., p. 38.
\item \textsuperscript{33}Ibid., pp. 38-40.
\item \textsuperscript{34}Ibid., pp. 47-48, 50.
\item \textsuperscript{35}Ibid., p. 27.
\item \textsuperscript{36}Ibid., pp. 26, 36.
\end{itemize}
a Republican? If the Federalists could reduce the Supreme Court, he asserted, the Democrats had the right to initiate a reform by voiding a law.\textsuperscript{37}

The Republicans also attacked the judiciary by challenging its power to place itself above the rest of the branches of the government. They contended that the Constitution established all three branches with equal powers within the framework of United States law, and they said that they had the obligation to restrict the power of the courts. They maintained that, as it then existed, no one could control the rampant power of the judges. A constitutional amendment was not feasible, the Republicans asserted, because it would be impossible ever to achieve a three-fourths majority vote of the states. If all branches were equal, the Republicans pointed out, the president could declare a law constitutionally valid, and it would be so. Hence, if Jefferson felt the legislature could repeal the Judiciary Act of 1801, they had the power to do so.\textsuperscript{38}

As for the Supreme Court justices being forced to carry on circuit court duties, this was only fair, contended the Republicans. They were not overburdened with work, and it was necessary for the justices to travel to learn the diversified experiences necessary to be a qualified judge. It was

\textsuperscript{37}Ibid., p. 35.

\textsuperscript{38}Ibid., pp. 49-50, 99, 110, 113.
also pointed out that the only way for the territories to receive equality before the law was for the wisest judges—the Supreme Court justices—to rule on the frontiers' problems.  

The only time that a legislator questioned the right of the Supreme Court to rule upon the validity of the proposed repeal, or any other act, was early in the debate. Evidently, judicial review was an accepted doctrine, because the National Intelligencer printed John Breckenridge's denunciation of the doctrine in full, but without endorsement. The administration paper pointed out this was not standard practice; but, because of the "views in some measure new and certainly interesting," it felt that the use of the space was warranted.

Perhaps one of the most important aspects of the debate was the Republican view of the Marbury v. Madison decision. Marshall had ruled that the case would be argued at the next session of the Court. Many of the legislators felt that the Chief Justice was violating the separations of power doctrine by even considering the case. Other assumptions said, in essence, "that we are under the patronage of judges is

---

39 Ibid., pp. 49-50, 54, 81-82, 125.
40 National Intelligencer, February 12, 1802.
41 Ibid., December 21, 1801.
manifest from their attack on the Secretary of State."\textsuperscript{42}

There were numerous other references to the pending case, and they all were concerned with the audacity of judicial interference with a separate branch of government.\textsuperscript{43}

The debate apparently did not influence one vote on either side of the Senate floor. The act was repealed on February 3, 1802, by a sixteen-to-fifteen party vote.\textsuperscript{44}

The Federalists were embittered and warned of grave results; the Republican press was jubilant, referring to the measure as "... a triumph of Republican principles ... economy ... and reform."\textsuperscript{45}

The debate in the House of Representatives utilized the same general arguments as in the upper body. The only actual difference was that the words and warnings were harsher than before. Such statements as "... the moment is not far when this fair Country is to be desolated by war" were sprinkled among the fiery statements.\textsuperscript{46} If these were idle words to Representatives, others appeared to be impressed enough to repeat the forebodings. The administration organ glorified in the quiet dignity of the Republican debaters versus the

\begin{itemize}
\item \textsuperscript{42} Annals of Congress, 7th Congress, 1st Session, p. 49.
\item \textsuperscript{43} Ibid., pp. 579-581, 632. \hspace{1cm} \textsuperscript{44} Ibid., p. 133.
\item \textsuperscript{45} National Intelligencer, February 12, 1802.
\item \textsuperscript{46} Annals of Congress, 7th Congress, 2nd Session, p. 650.
\end{itemize}
harsh statements of the Federalists. The pro-Jefferson papers were particularly impressed with the idea that a party supposed to stand for a strong central government and union would cry secession when in the minority.\footnote{National Intelligencer, January 20, July 19, 1802.} Although the Republicans were not as serene as the National Intelligencer intimated, they were more temperate during the debate. On the other hand, the conservative newspapers were rabid in warning about the dangers the passage of the bill would entail for the country. For example, one Federalist journal charged, "by this vote the Constitution has received a wound it cannot long survive. The Jacobins exult; the Federalists mourn; our Country will weep, perhaps bleed."\footnote{Gazette of the United States (no date), as cited by National Intelligencer, February 17, 1802.} Other journals of like political views expressed the same warnings. They predicted lawlessness, division, and civil war as the result of the Judicial Act's repeal.\footnote{New England Palladium (no date), as cited by National Intelligencer, February 12, 1802.}

The warnings had little, if any, adverse effects upon the determination of the Jeffersonians to alter the newly created circuit courts. Exactly one month after the upper house had approved the repeal, the lower house did likewise. The vote was also along party lines; fifty-nine Republicans
voted for, and thirty-two Federalists voted against the measure. The new bill not only returned the Supreme Court judges to circuit duties, but it abolished the June session of the High Tribunal. The method chosen to eliminate the forthcoming session was to direct that henceforth there would be but one session per year, and it should begin the second Monday of February.\(^{50}\) The reasoning behind the cancellation of the session was obvious; the Republicans took away the immediate right of judicial review until the judges' wrath would be tempered with time.

The political scene was indeed explosive when time came for the Court to render the now famous *Marbury v. Madison* decision. Marshall must have witnessed with apprehension the many attempts to limit the judiciary by the repeal of the Judiciary Act of 1801. He had seen the judges of the Court make only a weak protest when he had encouraged them to refuse the demand that they return to circuit court duties.\(^{51}\) He had witnessed the elimination of a whole session of the Supreme Court, and now the time had come to decide a mandamus case one year later than originally intended.

The series of events leading up to the now historic decision are well known. In the last days of his administration, 

\(^{50}\)Annals of Congress, 7th Congress, 1st Session, pp. 1223-1229.

Adams was given the right to appoint justices of the peace for the counties of Washington and Alexandria in the District of Columbia. On March 2, he appointed a total of forty-two justices in the two counties. The Federalist Senate quickly ratified the appointments, but there was not time for all of the commissions to be issued before the inauguration of Jefferson. As soon as Jefferson became President, he ordered James Madison, Secretary of State, not to deliver the remaining appointments. William Marbury was one of those disappointed, and he immediately requested the Supreme Court to issue a writ of mandamus forcing the administration to verify his office.

Jefferson was particularly embittered about Adams' late appointments. Besides considering the ex-President's actions a personal affront, he noted with distaste that not only were the new appointees all Federalists, but many were his personal enemies. He later told Mrs. John Adams:

I can say with truth that one act of Mr. Adams' life, and one only, ever gave me a moment's displeasure.

I did consider his last appointments to office as personally unkind. They were from my most ardent political enemies . . . and laid me from embarrass-ment of acting through men whose views were to defeat mine or to encounter the odium of putting others in their place.56

When Marbury's request was first placed before the Court, Marshall had to decide if the High Tribunal could consider the issue. He pondered the question one day and then requested the parties concerned to reappear on the fourth day of the next session to show cause for the issuance of a mandamus.57 The case was not argued at the time originally established because of the aforementioned postponement of the Supreme Court session.

The issue was already established which caused the conflict between the two branches of government, however. Once Marshall decided the case had enough merit to appear before the Court, the struggle was simply who had the authority to give or withhold the appointments. The Republicans believed the right to verify the late appointees was a presidential function. Since the executive branch had the right of confirming all unissued commissions, the Supreme Court had violated presidential authority. As one Republican paper stated:

56 Jefferson to Mrs. John Adams, June 3, 1804, ibid., XI, 28.

57 National Intelligencer, December 21, 1801.
Those whom he neglected to appoint, fired with party vengeance, immediately made application to the Supreme Court (that paramount Tribunali) to issue them a mandamus to the Secretary of State to deliver to them their commissions. The Supreme Court ought to have refused any instrumentality into this meditated and, we may add, party invasion of Executive functions.58

The case of Marbury v. Madison was as turbulent as the issue. Madison refused to answer any inquiry as to the nature of the signing and sealing of Marbury's commission. Benjamin Lincoln, a co-worker with Madison, pointed out that he objected to the answering of any questions because it might violate the propriety of the executive branch of government. He asked that the questions be submitted in writing, and that he be allowed another day to ponder the issues. His wish was granted, but the next day he pointed out that, because of a lapse in memory, he was not sure that Madison received the commissions or what had happened to them.59

On the 24th of February, the Chief Justice delivered his famous decision. He said the case presented consisted of three issues. The first issue was simply, did Marbury have a right to the commission? Secondly, if he had such a right, and it had been violated, did United States laws solve the situation? Lastly, if he was afforded a remedy

58Ibid., February 2, 1802.
59Marbury v. Madison, 1 Cranch, 137 (1803), 370-371.
by his country's laws, was it in the form of the Supreme Court's issuance of a mandamus? 60

The Chief Justice, discussing the points in order, first ruled that Marbury had a right to the commission because it had been signed by the President of the United States. 61 He then asked if a mandamus forcing Madison to issue the commission was the correct procedure. Pointing out that this was a delicate subject because some would say he was violating executive propriety, he wanted to disclaim any such intentions. Marshall said: "... an extravagance, so absurd and excessive" was not "entertained for a moment." 62 The Chief Justice, having made it a point to disavow political tendencies, delivered what appeared to be a moral lecture to the executive branch. He pointed out that all men, regardless of their position, were responsible to the laws of the land. Since no one was above the law, Marbury should have received the commission that was due him. 63

The Supreme Court concluded that Marbury had a right to the commission and the need for redress under the laws, but it still had not ruled on the important issue—did the Court have the power to grant him his mandamus? Marshall said that the Court did not, because of constitutional limitations.

60 Ibid., p. 371.  
61 Ibid., pp. 373-381.  
63 Ibid.
even though the Ellsworth Judiciary Act conferred this power. Hence, the Ellsworth Judiciary Act was invalid, since it apparently violated the Constitution by according powers to the Court which were denied by the Constitution.64 Thus, the Supreme Court first used its right of judicial review.

Had the Chief Justice remained with the issues of the case and not veered from judgments to ethical lectures, the decision would probably have inspired little if any attention.65 Jefferson did not criticize Marshall on the right of the Court to declare laws unconstitutional, but on the Chief Justice's refusal to confine himself to the law.66 The Republicans, in general, delivered no condemnation of judicial review, but of judicial propriety only. The case received only perfunctory coverage in the newspapers, and the editorial comments were not of a bold, new interpretation of the law, but only of a breach of executive duties by an ill-mannered court.67

64 Ibid., pp. 385-389.


67 National Intelligencer, February 23, 1803.
In reality, the right to declare legislation unconstitutional was an accepted fact. One constitutional authority maintains the issue of judicial review was not even challenged until the Circuit Court Repeal Act debate. It was fairly obvious that all states recognized this right of the judiciary from the beginning of the Constitution. Jefferson had admitted the right of judicial review much earlier than Marshall's now famous decision by telling a friend that "the laws of the land administered by upright judges would protect you from any exercise of power unauthorized by the Constitution." And in both later and earlier letters the President condemned Marshall for his lecture, but he did not challenge him on the right of a court to declare a law invalid.

The issue was not whether or not the court had the right of judicial review, but what powers did the executive branch have. Jefferson had explained, concerning the Alien and Sedition Acts, that both branches of government had the power to pass on the validity of an act of Congress. In a purely

---

68 Charles Warren, *The United States Supreme Court*, I, 256.


71 Jefferson to George Hay, June 2, 1807; Jefferson to William Johnson, June 12, 1823; *ibid.*, XL, 213-216; *W*, 447-448.
executive function, Jefferson believed that the president had the same prerogative to rule upon the constitutionality of acts as the Supreme Court. 72

Probably for two reasons Jefferson determined not to challenge Marshall's breach of etiquette. First, there was an election to be held shortly; and Jefferson, as a politician, did not want to insert a new issue into the campaign. Equally important, the president was now contemplating the Louisiana Purchase and was worried about his constitutional right to add new territory, about legislative reaction to his announcement, and about numerous other administrative problems. 73 Hence, Marbury v. Madison came at an opportune time for the Federalists.

Jefferson, in his preoccupation, did not challenge the Marbury v. Madison decision. His opposition to the judiciary system, however, did not end with acquiescence to a breach of power. In issuing pardons to people convicted of the Sedition Act, Jefferson told Mrs. John Adams that "the Executive believing the law unconstitutional was bound to remit the execution of it because the power had been confided


73 Jefferson to William Nichols, September 7, 1803; Jefferson to John Breckenridge, August 12, 1803; Jefferson to James Madison, August 18, 1803; Bergh, Jefferson's Writings, X, 413, 409-411, 414.
to him by the Constitution."74 His theory of co-equal powers had one defect: who was to control the judiciary's power? The President sought the answer to this dilemma by urging impeachment of those judges who opposed his philosophy of government. He believed that impeachment was a political weapon to control a branch of government, the Supreme Court, which had made an overt attempt to publicly chastise two members of a separate branch of government. It appeared as if the ultimate goal of the Republicans was to establish the judiciary under direct control or recall of the people.75 These intentions were recognized by the Federalists, and they knew that impeachment would be the next step in the court struggle.76

The Republicans first tested their philosophy by deposing Judge John Pickering of the United States Court from the District of New Hampshire. Jefferson sent a message to Congress on February 4, 1803, requesting the House of Representatives to begin impeachment of the federal judge for his conduct in the government seizure of a ship named "Eliza."

74 Jefferson to Mrs. John Adams, September 11, 1804; Bergh, Jefferson's Writings, XI, 51.

75 Aurora, January 28, 1805, as cited by Beveridge, John Marshall, III, 159.

transporting illegal contraband. The judge was not reliable; he had been hopelessly insane for a number of years and, as a result of mental illness, was an incurable alcoholic. In an intoxicated state, he had refused to accept government witnesses' testimony of the necessity of impounding the "Eliza" for violation of revenue laws. Besides numerous diatribes in opposition to the administration, Pickering had screamed curses and murmured incoherent phrases throughout the proceedings. Upon these charges, the judge was brought to trial. His son presented a petition requesting that Pickering be allowed to resign because of his mental condition, but it was refused. During a rather short debate, more emphasis was placed upon the obvious derangement of the judge and the propriety of allowing a simple resignation in opposition to disgrace than upon the right of a legislature to recall judges. However, all debate was immaterial, as he was ousted by a Senate party vote of nineteen to seven.

Thus, the Jeffersonians had their precedent. The opportunity for using this precedent to depose a Supreme

---

Court justice had occurred earlier because of intemperate action by Judge Samuel Chase, one of the most hated of all federal judges, Supreme Court or otherwise. He had been particularly active in his prosecution of those deemed guilty of the Sedition Acts. In the recent presidential election, he had campaigned against Jefferson. His actions, although not particularly unusual, were irritating to the Republicans. The final action that brought on his impeachment occurred in May, 1803. He delivered a long charge to a Federal Grand Jury in Baltimore; and in his address he attacked an act abolishing circuit judges, warned that the new state constitution of Maryland was dangerous because it granted universal suffrage which would lead to "mobocracy," and said that the Jefferson administration was not only weak, but that they were seeking a "continuance in unfairly acquired power."

The Republicans were determined to punish this rash outburst by a member of the High Tribunal. They immediately began to mold public opinion to support them in their next step—impeachment. The Jeffersonians collected the charges

---

82 National Intelligencer, April 26, 1803.
83 Warren, I, 274.
84 National Intelligencer, May 20, 1803.
and evidence that were to be presented in the coming trial, and this material was distributed in a pamphlet and also printed in the administration newspaper to insure wide circulation.\textsuperscript{36}

Eight charges were arrayed against Chase. All were concerned with minor accusations except the political address before the grand jury in Baltimore. The other alleged violations concerned his conduct in the trial of John Fries and John Callender, and his unbecoming action in addressing a Grand Jury in Delaware. Fries, while being tried for treason, April to May, 1800, was supposedly denied his constitutional rights by Chase's refusal to allow a proper address of a jury, giving a written opinion before the defense was completed, and the general conduct of the trial. The administration maintained that the trial of Callender was one of "manifest injustice, partiality, and intemperance."\textsuperscript{37} Callender was charged with the libel of Adams in a political book entitled \textit{Prospect Before Us}.\textsuperscript{38}

When Chase was first ordered to appear for the trial, he asked for a recess until he had an opportunity to gather evidence in his behalf. Chase pointed out that some of the

\textsuperscript{36}\textit{National Intelligencer}, December, 1804; January, 1805.
\textsuperscript{37}\textit{Annals of Congress}, 8th Congress, 2nd Session, p. 36.
\textsuperscript{38}\textit{Ibid.}, pp. 35-39.
actions of which he was accused had happened over four years before. Besides, Chase maintained, they had occurred in different geographic regions, and he needed time to gather material to conduct an adequate defense. He was allowed his request and was ordered to report before the Senate on February 4, 1805.  

The Republicans apparently were not elated over the opening of the trial. The charges that were prepared to indict Chase were too vague; Federalists warned that accusations so general were not directed toward Chase, but could be levied against any member of the judiciary. Although Jefferson evidently believed Chase would be convicted, other Republicans seemed to have doubts. They thought that vagueness of charges, as well as superior counsels, might prevent Chase’s being convicted. Actually, it was fairly obvious that the judge had not always brought patience and temperance to his high position, and he was guilty of frequent outbursts of pro-Federalism. His strong political bias encouraged him to prosecute victims of the Sedition Act more readily than necessary, but party hues were—and are—frequent attachments to federal judgeships. The Republicans

---

89Ibid., p. 98.


91National Intelligencer, March 1, 1805.
seemed to realize that Chase's outbursts, no matter how unpleasant, did not warrant his eviction from the High Tribunal for violating judicial integrity. Their answer was a new proposal of the doctrine of impeachment.

The new theory was that impeachment was not a criminal proceeding but only a method of removal. The basis for this eviction was not malfeasance, but simply disagreement with the existing political party. Thus, the right to impeach judges was a method of assuring that the judiciary remain in harmony with popular government.92

The real issue of the trial—whether or not judges could be forced to bend to majority will—underlay all beginning and final arguments of the trial. In his opening address, John Randolph attacked the idea of an independent judiciary, warning that judges presented a problem the county must solve. He pointed out, using Callender as an example, that certain officials appeared at trials with a prejudged opinion of guilt or innocence; and he said the time had come to eliminate such a "specimen of judicial tyranny" which was imposed upon the will of the people.93

The actual testimony of witnesses concerning the trials was a mass of rumor, misinformation, insinuation, and

92 The only person who violated the doctrine was Chester A. Rodney of Delaware, who stated it was a criminal prosecution, Annals of Congress, 8th Congress, 2nd Session, pp. 583-641. For an excellent review of the Republican doctrine, see Warren, I, 292-297.

countercharges. Fifty-two witnesses were called in the complete investigation of the trials. Their testimony was relatively unimportant because the actual issues were not discussed until the closing arguments. One witness testified that Chase was prejudiced, pointing out that the judge had ordered all Republicans to be eliminated from the jury. Another asserted, however, that the Justice requested that Republicans be placed in the position of judging the accused to insure him a fair trial.\textsuperscript{94} The clash with George Hay, the counsel for the defense, was not altogether caused by an ill-tempered judge. Hay, according to testimony, wanted to debate the constitutionality of the Sedition Act, and Chase maintained that his arguments were irrelevant toward the progress of the trial.\textsuperscript{95} The other conflict between the judge and the defense had been concerned with remarks that appeared to be timed to irritate and humiliate the counsel. Chase interrupted addresses by Hay three times, and the judge did seem to revel in the audience's appreciation of his somewhat sarcastic humor.\textsuperscript{96} One witness testified to another example of the judge's prejudice when, in a private conversation in a stagecoach, he remarked that he was going to Virginia to hang a villain. Referring to Callender, the

\textsuperscript{94}ibid., pp. 179-181, 251-252.

\textsuperscript{95}ibid., pp. 247, 262-267.

\textsuperscript{96}ibid., pp. 200, 207-208, 213-218.
judge allegedly asserted that "it's a pity they have not hanged the rascal." This statement was accepted by the witness as inferring that such an action would have saved the judge the trouble of being forced to do so. However, later testimony pointed out that Chase was only jesting to ease the boredom of the ride.

The testimony concerning the trial of Fries was in much the same vein. Chase had appeared with a prewritten definition of treason, probably to save time, and issued three copies—one to the court recorder, one to the defense, and the remaining one to the jury. Alexander J. Dallas, the defender of Fries, objected to what he considered a violation of judicial propriety. Chase, to encourage Fries' attorneys to remain in Court, withdrew the paper. Another controversy concerned the issue of English common law, with the defense wanting to enter examples of common law as a part of their case. The judge first refused to accept such examples; but, to pacify the defense's objections, withdrew his ruling. William Lewis, the chief counsel for Fries, and Dallas withdrew from the Court because of what they considered a breach of judicial ethics. Chase asked them to continue, but they refused, leaving Fries without an attorney. Fries was convicted of treason and sentenced to hang.

---

97 Ibid., pp. 216-217.  
98 Ibid., pp. 246-247.  
99 Ibid., pp. 233-240.  
100 Ibid., pp. 174-176.  
101 Ibid., pp. 174-177, 236-241.
Adams later pardoned him, but by this time he had become a political issue with each political party condemning or condoning the trial. The Federalists were extremely angry with the president for issuing a pardon which they considered not only unwarranted, but also unethical. 102

Testimony was given also concerning Chase's actions before a grand jury at Newcastle, Delaware. Chase urged this body to investigate further the seditious activities in the Newcastle area, and when the jurors reported that there was no such activity, the Justice condemned their action. He pointed out that they could find such activities if they were so inclined, and even insinuated that a certain printer in town, unnamed but well known, could furnish valuable information. 103

Frequent testimony pointed to Chase's ill-advised actions in Baltimore. These statements only verified what was already known; the judge did make rash statements in a political type of charge to the grand jury. But the Federalist defense was best exemplified in the testimony of George Harper when he explained that Chase's statements were "ill tempered," but that they did not entail reason for impeachment. 104

---

102 Beveridge, John Marshall, 1, 35-36.
104 Ibid., p. 205.
One strange development in the trial was the ability of the witnesses to remember—after five years—the almost exact words, the facial expressions, the angry gestures, and the voice inflections of the judge.\textsuperscript{105} The accurate memories of the witnesses must have cast doubt on what testimony was fact, what was hearsay, and what was influenced by the previous coverage of newspapers.

The actual issue of the impeachment proceeding, however, appeared in the closing arguments. Did a legislature have the right to expel a judicial member because of a difference in political philosophy? Each attorney attempted to refute the reliability of the other's witnesses, but the major and recurring theme was the interpretation of the doctrine of impeachment.

The Federalists warned that to allow a branch of government the right to expel all those who opposed them was tyranny. They pointed out that, if one could impeach a judge for minor offenses, a president might be eliminated for the same variety of mistakes.\textsuperscript{106} The Chase supporters admitted that the Justice had made rash statements and committed intemperate actions, but they maintained that "treason, bribery, or other crimes" were the only actions monstrous enough to lead to expulsion from the Supreme Court.\textsuperscript{107} The judge, the Federalists

\textsuperscript{105}\textit{Ibid.}, pp. 166, 178, 185, 217, 247, 284, 298.
\textsuperscript{106}\textit{Ibid.}, pp. 361, 431-432. \textsuperscript{107}\textit{Ibid.}, p. 357.
believed, should not be impeached for such actions as holding a political opinion, using the standard English practice of saving time by offering a written opinion, making errors in judgment, or simple jesting.\textsuperscript{108} None of these were prosecutable by law; and to be impeached, they argued, one should have violated a law of the nation.\textsuperscript{109} They asserted that the actions of the Republicans constituted the unconstitutional measure of originating impeachable crimes. They pointed out that the Constitution had not meant that the judicial branch be forced to submit to an elected body, because it did not state that a turnover of justices should occur with each election. The Federalists asserted that the Senate was violating the Constitution by impeaching a judge for minor actions, depriving him of the right of trial by jury, and using political expediency to establish a tyranny of the legislative branch of government.\textsuperscript{110} The Federalists ended their assertions by warning of the necessity of an independent judiciary and contending that Chase's expulsion would not only be extra-legal, but it would end the power of the Court forever.\textsuperscript{111}

\textsuperscript{108}Ibid., pp. 360, 363-369, 373-374, 499, 411-413, 427, 454, 461, 475.

\textsuperscript{109}Ibid., pp. 355-357, 360, 413, 427, 433.

\textsuperscript{110}Ibid., pp. 316-317, 429-430, 436, 461, 487, 504-505, 519, 557-558.

\textsuperscript{111}Ibid., pp. 415, 443, 447, 506-509, 557-558.
The Republicans interpreted the impeachment doctrine in a different light, asserting that impeachment was the only way to recall officers.\textsuperscript{112} Pointing out that they were only attempting to protect the rights of the citizen, they maintained that impeachment was neither a criminal proceeding nor a method of punishing an individual, but simply a declaration that a man was not qualified to hold office.\textsuperscript{113} Ignorance and intemperance, explained the Republicans, were all the reasons needed to expel someone who was not capable of representing the country.\textsuperscript{114} The Jeffersonians claimed that the Federalists were attempting to control the country by the judiciary. They argued for the necessity of impartial justice, using Chase as an example of bias, and said that the only answer was to impeach the judge. They further maintained that other officials had been impeached for misbehavior rather than high crimes. Misbehavior, they warned, could connote many things—rash statements, patronage, or bias; and they asserted that Chase had been guilty of all these actions.\textsuperscript{115} Warning that, without accepting the Republican doctrine of impeachment, the judges would be free to act as they pleased and establish a tyranny of judiciary, the Republicans outlined their constitutional argument.\textsuperscript{116} The reasoning asserted that the House

\begin{itemize}
\item \textsuperscript{112}Ibid., pp. 329-331.
\item \textsuperscript{113}Ibid., pp. 333-335.
\item \textsuperscript{114}Ibid., pp. 335-342.
\item \textsuperscript{115}Ibid., pp. 560-562.
\item \textsuperscript{116}Ibid., pp. 563-567.
\end{itemize}
of Representatives was given the power to impeach; the Senate, to try to expel. If the founders had not wanted a way to control judges, the Republicans explained, they would have omitted these processes from the Constitution, or they would have said that no offenses were impeachable.\textsuperscript{117} The founders of the Constitution did neither of these; hence, an official could be expelled for other than criminal actions. After all, asked the Republicans, was Pickering not expelled for drunkenness and obscene language? Were these high crimes?\textsuperscript{118} The Republicans ended their case by asserting that impeachment was simply a method to restore purity to office; it was not an indictment of a high crime.\textsuperscript{119} Warning of the danger of biased judiciary, the Jeffersonians requested that Chase be expelled for bias and intemperate actions.\textsuperscript{120}

The voting of the Senators did not verify the Jeffersonian doctrine of impeachment. On the first article, sixteen Senators were all the votes mustered by the Jeffersonians. Nine Republicans broke ranks to support the Federalists; voting on the remaining articles varied. Upon the eighth article, Chase's political tirade in Baltimore, the Republicans garnered the most votes; and on the fifth article, no one voted to condemn

\textsuperscript{117}\textit{Ibid.}, pp. 565-567, 582, 590-591.
\textsuperscript{118}\textit{Ibid.}, pp. 592-593, 595-596, 605-607.
\textsuperscript{119}\textit{Ibid.}, pp. 641-642.
\textsuperscript{120}\textit{Ibid.}, pp. 642-643.
the Supreme Court justice. Thus, because there was never a constitutional majority on any issue, Chase was acquitted. 121

The Federalists, of course, were jubilant; the Republican leaders were perturbed. Randolph immediately went to the House of Representatives, where he offered an amendment to the Constitution providing that the President could remove federal judges by a request to Congress and a favorable vote of both houses. 122 Jefferson, however, expressed the opinion of most leaders when he pointed out that impeachment was "a bungling way of removing judges" and would never be tried by him again. 123

The clash between Jefferson and Marshall's Court was brought to a climax with the decisions of the Chief Justice in the Aaron Burr conspiracy. Burr and the President had been enemies ever since the controversial election of 1800. After 1804, Burr, with no political party to which to turn, chose the West to recoup his fortune. The administration became perturbed concerning his mysterious action in the still unsettled section where Jefferson believed that Burr was planning an expedition against Spain to establish a separate country of Western America. He had heard of the purported plot in the early summer of 1806, but it was only in 1807

121 Ibid., pp. 665-669.  
122 Ibid., p. 121.  
123 Jefferson to Spencer Roane, September 6, 1819, Bergh, Jefferson's Writings, XV, 212-216.
that he became concerned enough to take some action against the reported move.\textsuperscript{124}

In January, Jefferson received a letter from General James Wilkerson, the commander of the Mississippi area, telling of a secret document written by Burr, urging treason. The letter was reprinted in the press, thus inflaming public opinion.\textsuperscript{125}

In his annual message as President, Jefferson warned that there were a number of Americans involved in a plot with Spain that constituted treasonable activity.\textsuperscript{126} Randolph introduced a resolution on the floor of the House of Representatives demanding that Jefferson tell Congress all that he knew of the plot.\textsuperscript{127} The resolution was passed, and a week later the President told Congress that, although he had no concrete evidence at that time, he would offer proof in the near future. He named Burr as the perpetrator of the plot, and he asserted that the ex-Vice-President's "guilt is placed beyond question."

Meanwhile, Wilkerson had declared martial law in New Orleans. He had arrested two accomplices of Burr and was


\textsuperscript{125}\textit{National Intelligencer}, January 23, 1807.

\textsuperscript{126}\textit{Annals of Congress}, 9th Congress, 2nd Session, p. 12.

\textsuperscript{127}\textit{Ibid.}, p. 336.

\textsuperscript{128}\textit{Ibid.}, p. 40.
holding them without either producing evidence or setting bail. These men were Erick Bollman and Samuel Swartwout. A writ of habeas corpus issued by the Supreme Court at New Orleans was disregarded by the General. The prisoners were sent under military guard to Charleston and forwarded on to Washington. En route, another writ, issued by the United States District Court, was ignored. Jefferson approved Wilkerson's actions, assuring him that he would be "cordially supported in the line of your duties." 129

Jefferson kept his word, forwarding a resolution to Congress asking a suspension of the writ of habeas corpus in cases of treason. The Senate approved the resolution, and it was sent to the House of Representatives with a note urging them not to delay its enactment. 130 It was reported to the House, stipulating a three-months' suspension of such a writ in cases of treason. 131 The Representatives were horrified, and the resolution was condemned by Republicans and Federalists alike. In an overwhelmingly anti-Jefferson vote, the measure was defeated 113 to 19. 132

The Supreme Court had also consented to rule upon the treasonable activities of Burr's cohorts. 133 The executive

129 Jefferson to Wilkerson, February 3, 1807, Bergh, Jefferson's Writings, XI, 150.
130 Annals of Congress, 9th Congress, 2nd Session, p. 44.
131 Ibid., p. 402.
132 Ibid., p. 416.
133 National Intelligencer, February 16-17, 1807.
branch was alarmed at what it considered another breach of the doctrine of separation of powers by the judiciary, and Jefferson felt that Marshall intended to release the prisoners. Hence, the Republicans introduced a resolution to curb the power of the Supreme Court to issue a writ of habeas corpus. The new measure was defeated, also.\textsuperscript{134}

Two days later, February 21, 1807, the Chief Justice rendered the majority opinion of the Court. Upholding the right of the defendants to be granted a writ of habeas corpus, he pointed out that treason was an overt act limiting anyone in a conspiracy to wage war on the United States. Marshall maintained that Wilkerson's letter and the remaining evidence was too vague to warrant any such conclusions.\textsuperscript{135} However, the Chief Justice declared that it was not his intention to say that one had to be in the actual group assembled or bear arms against the country to be guilty of treason. But, if one were linked with a group that was assembled for a treasonable purpose, no matter how minute the association, he was also guilty of treason.\textsuperscript{136} Swartwout and Bollman were adjudged not guilty because there was not enough proof to justify the prosecution's contention that the group was assembled to wage

\textsuperscript{134} Ibid., February 20, 1807.

\textsuperscript{135} Ex Parte Bollman and Ex Parte Swartwout, 4 Cranch 75 (1807), 23–47.

\textsuperscript{136} Ibid., p. 43.
war on the United States. Marshall maintained that the assem-
blage might have been made to seize the banks in New Orleans;
hence robbery, not treason. 137 Furthermore, the Chief Justice
again deviated from the case at hand to deliver a moral lec-
ture to Jefferson. He had, earlier in the decision, rebuked
the President by warning of the danger of a suspension of a
writ of habeas corpus, and later he condemned the administration
for not allowing the trial to be held in New Orleans. 138 He
asserted that the government's right to shift trials at its
own discretion was a danger to civil liberties. 139

The Republicans were furious. They wanted to take "away
all jurisdiction of the Supreme Court in criminal cases,"
and a rumor again circulated of possible impeachment of the
High Tribunal. 140 Jefferson was enraged at what he considered
another breach of executive power by the judicial branch of
government. The President charged that Marshall had seized
Burr's cause as his own to further disrupt separation of
powers. Jefferson expressed the Republican sentiment when
he explained, "... and it is unfortunate that federalism
is still predominant in our judiciary department, which is

137Ibid., p. 45. 138Ibid., p. 37.
139Ibid., p. 44.
140Memoirs of John Adams, I, 49, as cited by Beveridge,
John Marshall, III, 357.
consequently in opposition to the legislative and executive branches..."\textsuperscript{141}

Meanwhile, Burr had been arrested at Wakefield, Alabama, on February 19, 1807. In spite of the outcome of the Swartwout decision, the Chief Justice seemed to have ruled that assembling a group of men from different parts of the United States was treason; even those who were not present at the rendezvous were equally guilty as those who were, if they had performed any part in bringing about such an assemblage.\textsuperscript{142} Thus, it was on this point that the Jeffersonians wanted to prosecute the ex-Vice-President.

Indictment proceedings began in Richmond, Virginia, on March 30. George Hay, United States Attorney-General for Virginia, moved that the defendant be held for treason, having assembled an armed force to seize New Orleans; and for a misdemeanor, having sent an expedition of armed men against Spain.\textsuperscript{143} For two days, the arguments continued, and on the third the Chief Justice gave his opinion. He quoted Blackstone to the effect that prisoners could not be released.

\textsuperscript{141}Jefferson to Monsieur Le Comte Diodati, March 29, 1807, Bergh, :Jefferson's Writings, XI, 186.


\textsuperscript{143}William W. Hening and William Munford, editors, The Examination of Col. Aaron Burr Before the Chief Justice of the United States Upon the Charges of High Misdemeanor and of Treason Against the United States, Together With the Agreement of Counsel and Opinion of the Judge (Richmond, 1807), p. 3.
unless the charge was shown to be groundless; however, he contended that neither could the prosecution force the accused to prove his innocence. Therefore, he concluded, the charge of treason would not be placed in the indictment, but the Attorney-General could re-enter the charge if he could find necessary proof. Thus, Burr was to appear for trial on May 22 on a charge of misdemeanor, and Jefferson had but six weeks to garner proof of Burr's treason and re-submit such proof at the next term of the United States circuit court.

The President was outraged at Marshall's decision, stating that it was just another example of the Court's political orientation. He asserted that he did not have enough time to collect evidence before the trial would begin. He had requested more time from the Supreme Court, but was refused. He warned Giles that no help could be expected from federal courts in attempting to collect evidence, but that all would have to be garnered by the administration. He concluded by asserting that the Burr trial would show the people the error of the judiciary's ways, and that they would be anxious to amend the Constitution to eliminate any independent branch of government.


When the circuit court for the District of Virginia began its second term in May, the Burr case was the first to be considered. Hay again introduced a resolution that Burr be indicted for treason. Thus, after a tedious process granting Burr the unusual privilege of challenging grand jurors, sixteen jurors were selected; and Burr once again was forced to defend himself against a charge of treason. The proceedings were noted by the interference of both the Chief Justice and the President. Jefferson was soundly criticized by his contemporaries for his attempts to gather evidence. Supposedly, Jefferson spent $11,721.11 of federal funds to indict Burr. He offered mass pardons; after promising Bollman he would not reveal any confidential information given him, he proposed this statement be used for evidence; he promised Wilkerson full support, and indulged in many more moves unusual for a President.

Marshall was as partial as Jefferson; he allowed Burr's counsel to insult the President. The defense charged that Burr had to be convicted because Jefferson demanded it. The outburst was so ill-tempered that Marshall apologized to Hay after the trial. Hay told Jefferson that even the President's

---

146 Abernathy, pp. 234-235.
enemies were angry at Marshall's ill-timed actions, and the Chief Justice actually blushed when he apologized. 149

One of the outstanding events, and most misinterpreted by later historians, occurred at the very beginning of the trial. Wilkerson was supposed to testify but was not present. Burr arose and demanded that the President be subpoenaed to testify. Hay notified Jefferson; and he told the prosecutor to deliver the Wilkerson letter, the needed evidence, to the Court. 150 The prosecution asserted that they would deliver the letter; Jefferson could appear, but he did not have to testify. Marshall held otherwise, saying the President had the same responsibilities as any other American. 151. It should be noted, however, that when the subpoena was delivered, it said to transmit Wilkerson's letter to the Court "without the personal attendance of either party." 152 Thus, Marshall did not offer the challenge to the President that he indicated he might in his original discussion.

The indictment proceedings ended on June 24, when the grand jury charged Burr with treason. The trial began on August 3 and lasted into the fall. Hay based his case on

149 Abernathy, pp. 233-235.
150 Jefferson to Hay, June 12, 1807, Bergh, Jefferson's Writings, XI, 228.
152 Ibid., p. 388.
the previous Swartwout ruling. The Jeffersonians understood the Chief Justice to have ruled that an armed force, assembled for treasonable purpose, was guilty of an act of treason; and anyone who helped bring about such an assemblage, present in person or not, was also guilty of treason. Hay was not sure that the administration would succeed; while the jury was being selected, he warned Jefferson:

There is but one chance for the accused, and that is a good one because it rests with the Chief Justice. It is already hinted, but not by himself /that/ the decision of the Supreme Court /in the Boltman-Swartwout case/ will not /be/ deemed binding. If the assembly of men on /Blennerhassett's is/ land can /be pronounced "not an overt act" /it will/ be so pronounced.153

Giles' prediction was correct. The administration witnesses were called, but to no avail, because Marshall reversed his earlier decision.

On August 31, Marshall rendered his momentous decision. It rested upon two separate conclusions. First, he ruled that war could not be levied without force. He agreed that force was present at Blennerhassett's Island, but he said that intentions were not enough to prove guilt of treason, and there was no proof to show what the men on Blennerhassett's Island were intending to do. In the second place, he ruled that Burr had to be at the place where the crime was committed, and his presence corroborated by two additional witnesses. The Chief

153 Giles to Jefferson, June 10, 1807, as cited by Beveridge, Marshall, III, 460.
Justice completely reversed the previous decision, when he 
intimated that it was only necessary to prove identification 
with the assemblage. Since Burr's presence could not be 
established by even one witness, no overt act of treason had 
been established and no collateral testimony was admissible. 154

Next day, Hay said that the prosecution had no further 
testimony to submit; and, after a jury deliberation of only 
twenty-five minutes, Burr was declared not guilty. The 
National Intelligencer, commenting on the decision, expressed 
the opinion of many Republicans when it pointed out that 
Marshall's conduct, the charge to the jury, and the freeing 
of an obviously guilty man, were a prime example of the bias 
of the judiciary. 155 Jefferson was also embittered with the 
decision. He condemned Marshall's actions, pointing out that 
the trial at Richmond was only another example of Federalist 
influence in the judiciary. He warned that soon a constitu-
tional amendment would be offered that would assure the judges' 
independence from the President, but not from the people. 156

This idea of Jefferson's took concrete form when, in 
1808, a resolution was offered to amend the Constitution so 
that federal judges could be removed from office after

155 National Intelligencer, September 7, 1807.
156 Jefferson to General James Wilkerson, September 20, 
a three-year term or by a majority vote of both Houses of Congress. The resolution was defeated, and the struggle between the executive and judicial branches was soon pushed to the background when a new menace began to loom on the horizon, growing conflict with England.

Thus, the first great Supreme Court crisis ended. Perhaps, the High Tribunal had not won the war, but it laid a successful foundation in the first battle. Evidence warrants the conclusion that Adams did attempt to entrench the Federalist party through the judicial system. It was obvious, also, that Marshall was politically biased in the Burr trial. However, these assumptions would not be important except in the light of the Federalist-Republican struggle for immediate supremacy. The importance of the clash between Jefferson and Marshall was that it established the Supreme Court as equal in the early formative period of constitutional history.

Jefferson entertained two doctrines that would have overturned the judicial system, as recognized today, before it was ever begun. The first idea was that the President had co-equal power of constitutional review with the Supreme Court. The second doctrine, the right of impeachment to keep the judiciary in political harmony with the major party, would have ended any separate or independent judicial system. Few,

---

if any, judges would have challenged the constitutional validity of a law if removal would follow an adverse decision.

Marshall is perhaps best remembered for his establishment of the right of judicial review. Oddly enough, the contemporaries of the Chief Justice accepted the doctrine made so important by later court decisions. However, had he not successfully defeated the two challenges in Jeffersonian theory, the right of judicial review would have been immaterial. Another clash would have been inevitable, because a question would have emerged sooner or later, testing which branch was the more equal in finding laws constitutionally sound. It would be safe to say that, if Jefferson's followers had been successful, time or conflicts would have eliminated the Court from its position of later historical importance.
CHAPTER II

CRISIS OVER SLAVERY

The Supreme Court had faced many conflicts during the formative years of the Constitution. It was to be challenged not only by Jefferson, but also by later presidents. Other influences attempted to shape opinions of the Court besides the executive branch, among them the force of public opinion. An example of an outraged public in opposition to what was considered an unfair decision was the reaction of the North to the *Dred Scott v. Sanford* verdict in 1857. The opponents of the Court reacted to this decision with contempt, derision, and denunciation. Perhaps an ex-Senator from Missouri, Thomas Hart Benton, best expressed the majority view when he passed judgment on the High Tribunal's decision:

It had no right to decide—no means to enforce the decision—no machinery to carry it into effect—no penalties of fines or jails to enforce it, and the event has corresponded with these failures. Far from settling the question, the opinion itself has become more virulent than the former! Has become the very watchword of parties! Has gone into party creeds and platforms—bringing the court itself into the political field.¹

The accusation that the Court was composed of politically orientated judges would be heard often in 1857 and after.

However, the actual proceedings of the case that led to a charge of politics began in the autumn of 1846. A Negro, Dred Scott, instituted a suit against the widow of his former master, Dr. John Emerson. Scott was petitioning for his freedom on the grounds that Emerson had transported him into Illinois as a slave. On entering a free state and subsequently being transported to Fort Snelling in upper Louisiana territory, under the Northwest territory ordinance of 1787 and the Missouri Compromise, he had become a free man, it was contended. Scott maintained he still occupied this status when he was returned to the slave state of Missouri.²

Through a lengthy legal process the case reached the docket of the Supreme Court. After hearing the data of both parties concerned, and pondering the question of Scott's legal status, the Court reached a decision on February 15, 1857, not to rule on the constitutionality of the Missouri Compromise. They were to decide the case upon the grounds that Scott had returned to Missouri; thus, he was subject to the jurisdiction of the laws of that state. Because the Supreme Court of Missouri regarded him as a slave, the judges decided to rule Scott was incapable of maintaining a suit in the Federal Circuit Court. Judge Samuel Nelson was to write the opinion.³

If the Court had ruled upon Scott's status in this manner, the storm of derision directed toward the Court in later months would have been avoided. Unfortunately, the methods employed by the various political factions in the immediate decade before the Civil War prevented Nelson from writing the Court's decision.

The political factions of the era gave rise to two factors of importance in the subsequent alteration of the proposed ruling of the High Tribunal. The first element, and the immediate catalyst, was that the remaining members of the Court discovered that two Justices, John McLean and Benjamin Curtis, were going to write dissenting opinions declaring that the Missouri Compromise was legal. Thus, Congress could restrict the further spread of slavery in the territories. The rest of the Court, excepting Nelson, felt obligated to express their opinion on the subject.\textsuperscript{4} The decisions of Justices McLean and Curtis were apparently governed mainly if not wholly by political and personal motives.\textsuperscript{5}

McLean was a quadrennial presidential aspirant, having long aspired to the highest office in the land. McLean's friends reasoned that the opportunity presented by the Scott


\textsuperscript{5} E. I. McCormick, "Justice Gambell and the Dred Scott Decision," \textit{Mississippi Valley Historical Review}, XIX (March, 1933), 566.
case would not only be a ready-made occasion to bolster the Republican struggle to halt the spread of slavery into the territories, but that a positive stand would present him in an advantageous light before the Republican party and the public. The reasoning of McLean demonstrated an abundance of political insight; not only would he be able to present his name before the northern electorate without violating judicial propriety, but the individual who proved the legality of the Missouri Compromise should be high on the list of proposed candidates for the presidential nomination in the Republican party's convention of 1859. McLean, indeed, was not adverse to using devious means to present his name before the Republican populace and political leaders. He had written to a newspaper in Ohio, stating the position he intended to pursue in the Scott decision. He had also written a letter to Alexander C. M. Pennington a year previously, declaring: "... my views have been already publicly avowed to the constitutional power of the general government over the subject of slavery in the territories." Thus, McLean aspired to use a judiciary position as a lever to attain the presidency.

---

7 Hodder, p. 13.
8 McLean to Alexander C. M. Pennington, June 6, 1856, as cited by Arthur J. Beveridge, Abraham Lincoln, 2 vols. (New York, 1929), II, 461.
On the other hand, Curtis had always been discouraged about the insufficient financial remuneration of a Supreme Court justice.\(^9\) He wished to return to private practice; but, because of previous decisions of the Court, his status had been declining in the views of his contemporaries in his home state of Massachusetts. It is impossible to definitely establish the fact that he chose to differ with the majority of the Court for financial reward, but if he decided to re-enter private practice in Boston, he had to alleviate the local criticism of his reputation. Curtis' decision to dissent from the opinion to be given by Nelson ultimately had the desired effect. Within a week after his resignation from the Supreme Court, he received several retainers for important cases, and he amassed total receipts from succeeding cases amounting to $650,000.\(^10\)

The issue of the Missouri Compromise was thus forced upon the Court by the determination of two judges to verify its legality. However, another political element further contributed to the dilemma of the Court. That item was the assumption of moderate Democrats that the verdict of the High Tribunal would have enough prestige to forever quiet the sectional rumblings of a confused nation. The moderate

---


\(^{10}\) Hodder, p. 4.
Democrats reasoned that if the Missouri Compromise was illegal, no longer would the parties align sectionally on the question of slavery in the territories, and peace would again return to a troubled nation.\textsuperscript{11}

Again, it is doubtful if Chief Justice Roger Taney and the remaining judges would have decided to consider the Missouri Compromise if McLean and Curtis had not been determined to express their opinion. However, there was a politically motivated move, led by James Buchanan, the President-elect, and the majority of moderate Democrats, directed toward urging the Supreme Court to rule on the Missouri Compromise. Buchanan's efforts were to spur Lincoln to say in 1858:

\begin{quote}
I said that though I could not open the bosoms of men and find out their secret motives, yet when I found the framework for a barn or bridge, or any other structure, built by a member of carpenters--Stephens and Franklin and Roger and James--and so built that each tenon had its proper mortice, and the whole forming a symmetrical piece of workmanship, I should say that these carpenters all worked on an intelligent plan and understood each other from the beginning.\textsuperscript{12}
\end{quote}

The cry of a conspiracy between the Democrats and the Supreme Court would subsequently become a political rallying point for Republicans.

\textsuperscript{11}Nevins, II, 474.

Although conspiracy is a harsh word, undoubtedly the Supreme Court was influenced by the moderate Democrats. For example, Alexander H. Stephens of Georgia wrote to his brother on December 15, 1856:

I have been urging all the influences I could bring to bear upon the Supreme Court to get them to postpone no longer the case on the Missouri restriction before them, but to decide it. They take it up today. If they decide it as I have reason to believe they will, that the restriction was unconstitutional, that Congress had no power to pass it, the question—the political functions—as I think will be ended as to the power of people in their territorial Legislatures. It will be in effect a re-adjudicator.  

Another example of moderate Democratic influence in the solution of the question of slavery extension could be seen in the actions of the incoming administration. Caleb Cushing, the Attorney-General, had given official opinions covering many of the points of the case about to be decided as they arose in other connections, and Taney consulted with him in preparation of the Dred Scott opinion. Cushing was certainly not the only member of the newly elected administration to urge the Court to consider the Missouri Compromise. The President-elect corresponded with the members of the Tribunal on aspects of the Scott case. John Catron, associate justice, wrote to Buchanan, "Drop Grier a line saying how necessary

---


14 Swisher, p. 500.
it is and how good the opportunity is to settle the agitation by an affirmative decision of the Supreme Court, the one way or the other!" Buchanan did write to Grier, who answered the letter on the same day he received it, saying he had shown the letter "in confidence to our mutual friends, Judge Wayne and the Chief Justice," and all three had agreed "as to the desirableness of having an expression of the opinion of the Court on this troublesome question." In this manner, the President-elect was fully informed as to the essentials of the Dred Scott case well before his inauguration and the day of the actual decision.

Perhaps if the moderate Democrats and McLean and Curtis had paid heed to the political editorials in the various papers, or if they had been more astute in grasping the gravity of the sectional struggle, they could have avoided the political repercussions and the diminishing of the Supreme Court's prestige. The New York Courier on December 18, 1856, had issued a grave warning: "Never has the Supreme Court had a case before it so deeply affecting its own standing before the nation. It is whether the Supreme Court is a political Court made up of political judges."

---

15 Charles Warren, The Supreme Court in the United States, 3 vols. (Boston, 1924), III, 16.

16 Grier to Buchanan, February 23, 1857, cited in ibid., p. 16.

17 New York Courier, January 7, 1857, as cited in ibid., p. 3.
The Washington Union had correctly predicted the decision and even how the individual judges were to rule. This newspaper and the Court were criticized by the New York Times for allowing the decisions of individual judges to leak out in advance.

It would be unfair to say that all the judges were unaware of the political implications that might follow. Grier, for one, was anxious that no geographic line should mark the division of the opinion of the Court so sharply that the decision would lose much of its effect, because the majority of the judges were from south of the Mason-Dixon Line.

Despite the symbols of discord now obviously existing, Buchanan continued with the zeal of a crusader toward the ultimate goal; the Republican party would find itself battling constitutional restrictions and the Democratic party would once again be united. Knowing beforehand of the pending decision, he spoke with glibness in his inaugural address of the forthcoming Dred Scott verdict: "To their decision, in common with all good citizens, I shall cheerfully submit."

Unknowingly, a prophecy was written in the editorial page of the New York Tribune the day following Buchanan's address:


19 Ibid.

20 Hopkins, p. 157.

... you may cheerfully submit, of course you will, to whatever the five slaveholders and two or three doughfaces on the Supreme Court may be ready to utter on this subject. But not one man who really desires the triumph of Freedom over slavery in the territories will do so.22

Three days after Buchanan's inaugural address and two days after the dire forecast by the New York Tribune, the Supreme Court announced the Dred Scott decision. Chief Justice Taney wrote and read the major report stating three points. First, Negroes were not capable of maintaining suit in the federal courts, having been regarded not as citizens, but as persons of an inferior order at the time the Constitution was adopted; they were not included in the Constitution when it gave to citizens the right to sue in federal courts. Secondly, apart from any question of Negro citizenship, it was obvious that no slave could be a citizen; thus, Dred Scott had no claim to freedom.23 Finally, Taney said:

It is the opinion of the court that the Act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned is not warranted, and is therefore void.24

Justice James Wayne, Catron, Peter Daniel, Grier, and Mason Campbell concurred with Taney; Justice Nelson held to the original plan and avoided the Missouri Compromise in his

24Ibid., p. 452.
decision. Justices McLean and Curtis dissented on all three points.25

No one on the Court comprehended the intensity of abuse that was to follow the decision. The idea that the Supreme Court, in the words of Justice Wayne, could "settle by Judicial decisions the peace and harmony of the nation" would not only be invalid, but the verdict, rather than silencing the fires of sectionalism, was to heap more fuel upon the flames.26

The radical Republican papers were the first to begin the bitter condemnation of the Court. The New York Tribune, leading spokesman of the Republican press, said on March 7:

The Court has rushed into politics, voluntarily and without other purpose than to subserve the cause of slavery. . . . The vote stood seven to two, five slaveholders and two doughfaces making up the seven. . . . The long trumpeted decision—having been held over from last year in order not to flagrantly alarm and exasperate the free states on the eve of an important presidential election. . . . It is entitled to just so much moral weight as should be the judgment of the majority of those congregated in any Washington barroom. . . . It was a mere dictum prescribed by the stump to the bench—the Bowie knife sticking in the stump ready for instant use if needed. . . . The decision and Buchanan's inaugural were parts of one whole.27

25 Ibid., pp. 531-633.


The Tribune continued its tirade on March 9, stating: "Until that remote period when different judges sitting in this same Court shall reverse this wicked and false judgment, the Constitution of the United States is nothing better than the bulwark of inhumanity and oppression." On May 12, the Court was again assailed by the Tribune, which said, "The black gowns have come to artful dodgers." The newspaper continued to characterize the decision as a political one agitated for by pro-slavery elements.

Other New York journals expressed like opinions. The New York Herald stated on March 13 that there would be "a reformation of the Supreme Court so as to reverse the majority." The New York Independent was even more radical, proclaiming on March 7, "If there be not aroused a spirit of resistance and indignation that shall wipe out their decision . . . then indeed are the days of our Republic numbered, and the patriot shall see light only beyond the storm of Revolution and blood." The Independent thought itself to have

---

29 New York Tribune, May 12, 1857, as cited by ibid., p. 7.
32 New York Independent, March 7, 1857, as cited by ibid., p. 28.
the solution to the question of limitation of the power of
the Supreme Court by urging that the judges be elected.
"The moment the Supreme Judicial Court becomes a Court of
injustice," the Independent asserted on March 12, 1857,
"that moment its claim to obedience ceases. If the people
obey it, they obey God." On May 12, 1857, the New
York Courier reproved the Supreme Court for "rushing into
the strife of politicians and the squabbles of demagogues." The New York Evening Post warned America that "the moral
authority and consequential usefulness of that tribunal,
under the present organization, is seriously impaired."

The criticism was not limited to New York. For example,
the Aurora Daily Beacon protested on March 6 that the decision
was "infamous," and it had "aroused the whole North." "Let
the Judges of the Supreme Court be elected by the people,"
cried an Illinois country editor. The Urbana Union urged
on April 16, 1857, "... every living thing in the sixteen
free states to be draped in mourning." The Rockford

33New York Independent, March 12, 1857, as cited by
George F. Milton, Eve of Conflict, Stephen A. Douglas and the

34New York Courier, May 12, 1857, as cited by Warren,
II, 7.

35New York Evening Post, March 7, 10, 11, 13, 14, 26,
1857, as cited by ibid., p. 29.

36Aurora Daily Beacon, March 6, 1857, as cited by
Beveridge, Lincoln, II, 439.

37Urbana Union, April 16, 1857, as cited by ibid.
Register on March 21, 1857, accused Taney and his "brother slaveholders and the two Northern dough-faces" on the Supreme bench as being "the abject tools of slavery." The Chicago Tribune went even further, saying Chicago might become a "slave-market, and the men and women and children may be sold off the block in our street." The Quincy Whig and Bellaire Advocate, on April 8, 1857, wanted a convention of the northwestern states to be called and the people to "take their government into their own hands." If the derogatory comments toward the Supreme Court had been restricted to radical Republican newspapers, one might question the validity of the opinion that the Supreme Court's reputation was diminished by political straying; but, unfortunately, some relatively conservative papers also saw fit to be critical of the United States' highest tribunal. The New York Times said on March 8 that, while all looked with respect and some degree of reverence on the Court, the decision divested it of much moral authority and placed the court into politics by its attempt to solve a political question. The New York Times, although it differed in opinion with the Supreme Court, reminded the

---

38 Rockford Register, March 21, 1857, as cited by ibid.
39 Chicago Tribune, March 14, 1857, as cited by ibid.,
40 Quincy Whig and Advocate, April 8, 1857, as cited by ibid., p. 439.
41 New York Times, March 8, 1837.
populace that the Dred Scott decision was still binding. It urged the general population to remember that "what it has decided must stand, all the arguments and remonstrances in the world to the country not withstanding." The newspaper, although it did not agree with the decision, carried its roundabout support of the Court even further by saying it could not agree with some of its correspondents who denounced the Court and tried to arouse popular hostility by proclaiming: "We cannot second these endeavors, for we consider them unsafe and unsound." 

Another example of a conservative newspaper that chastised the Supreme Court for political leaning was the **National Intelligencer**. On March 7, it declined to comment on the Scott decision because it had received no official copy of Taney's decision and the editors felt that they "would be gratifying human curiosity at the expense and propriety of justice to the Supreme Court." With this attitude of fairness in mind, the **National Intelligencer** received an official copy of the opinion and stated on May 29:

That the Supreme Court should have been called at all to pronounce upon questions involved in political controversy must be a matter of regret to all who would desire to preserve that High Tribunals, not only from

---


43 Ibid.

the influence of partisan bias in pronouncing its
decisions, but from even the suspicion of it, on
the part of any considerable portion of the com-
munity.45

Another severe blow was dealt to the prestige of the Court
by the National Intelligencer at a later date. In late
October and early November, a former Chief Justice of Ken-
tucky, who had served as a Congressman when the Compromise
was passed, wrote three articles rebuking the Supreme Court.
George Robertson argued that such a Tribunal could retain
public esteem only by being completely impartial "and by
never tampering with political questions or any others which
its duty does not require it to decide."46

Contemporary journal criticism was less emotional, but
contained the same warnings. These warnings varied with
individual editors. The North American Review predicted
that the danger to the country resulted from the destruction
of the Court's reputation. It also wondered if the doctrine
of separation of powers could survive such a blow.47 Other
periodicals advised citizens to be calm and allow time to
solve the difficulties.48 One interesting comment was made

45 National Intelligencer, May 29, 1857.
46 National Intelligencer, October 24, 29, and November 3,
1857.
47 North American Review, LXXXV (October, 1857), 415.
by the Brownson's Quarterly Review, a Roman Catholic periodical that condemned Taney for violating the Church's concept of caring for the meek and pure in heart.\footnote{Brownson's Quarterly Review, I (January, 1860), 378.} In general, the periodicals reflected northern opinion that the Supreme Court had violated a public trust by leaving the judiciary and entering the political arena.\footnote{Frank Rodell, "Dred Scott a Century After," Atlantic Monthly, CC (October, 1957), 61.}

The reaction to the Scott verdict and the furor of the northern press by the moderate Democratic press in the North was as might be expected. They met the assaults with countercharges, praised Taney, and admonished the Republicans as rabble rousers. The individual newspaper spearheading the countercharges was the administration supporter, the Washington Daily Union. It proclaimed on the day after the decision that it would "exert the most powerful and salutary influence throughout the United States." On March 11, it said, "Sectionalism will cease to be a dangerous element in our political contest. . . of course it is to be expected that fanaticism will rave and clamor against the decision of the Supreme Court." On March 12, it proclaimed that the decision was pronounced at the right time to restore "harmony and fraternal concord throughout the country." On March 21, it condemned
the Republican press for its "shameful" attacks on Taney. Other moderate Democratic papers in the North expressed the same general views as the Washington Union. The Pennsylvanian chastised the Republican press on March 14, 1857, by informing the public that it was the Constitution that the "Black Republicans" were assailing. The New York Journal of Commerce attacked the "indecent and contemptible calumnies" of the abolition press and deplored the impugnation of the "honesty and purity of the great Constitutional lawyers on the bench." It carried its argument even further by announcing that the problem of sectional issues was settled by all except "the demagogues who wished to kindle flames of discord and fanaticism." The Ottawa (Illinois) Free Trader alleged that the Republican's scorn of the Scott decision was born in political circumstances. The Illinois State Register on March 19, 1857, heralded the Scott decision "as the greatest political boon since the founding of the Republic." The highly conservative Alexandria Gazette first cited former

51 Washington Daily Union, March 11, 12, 21, 1857, as cited by Beveridge, Lincoln, II, 493.

52 The Pennsylvanian, March 14, 1857, as cited by ibid., p. 492.


54 Ottawa (Illinois) Free Trader, March 12, 1857, as cited by Beveridge, II, 596.

55 Illinois State Register, March 19, 1857, as cited by ibid., p. 492.
decisions, then remarked that the question was an old one, and "the same opinion (as the Court) was held throughout the country until the era of Negro worship commenced."\footnote{56} The \textit{Pennsylvanian}, from Buchanan's own state, said, "Sectionalism has been rebuked," and now "whoever seeks to revise sectionalism arrays himself against the constitution and consequently against the Nation."\footnote{57}

The southern press and the South as a section generally received the Scott verdict enthusiastically but without undue emotion. The southerners' conviction had always been that Congress could not restrict property in the territories; and, since slaves were property, Congress must protect slavery. Therefore, at first they were not overly concerned with the verdict.\footnote{58} Naturally, the southern press lauded the conclusion. However, the southern newspapers were not convinced that the sectional struggle was forever stilled as the moderate northern Democratic press interpreted the decision. Instead, they issued a grave warning. The \textit{Richmond Enquirer} warned the sectional partisans who "regardless of the laws of God or man, would now assail the Judiciary and the constitution, even to the destruction, if necessary, of the Union

\footnote{56} \textit{Alexandria Gazette}, March 14, 1857, as cited by \textit{ibid.}, p. 493.  

\footnote{57} \textit{Pennsylvanian}, March 12, 1857, as cited by \textit{ibid.}.  

\footnote{58} \textit{New Orleans Times Picayune}, March 10, 1857; \textit{Arkansas Gazette Weekly}, March 14, 1857.
itself. The Galveston Tri-Weekly News, on March 31, expressed itself in even stronger phrases: "... can we expect them [the Republican party] to take a decision of the Supreme Court. ... The truth is, they will respect the rights of the South just as far as they are compelled to do so." The Arkansas Gazette and De Bow's Review expressed like opinions. They discussed the verdict of the Court with the conclusion that the South might accept the verdict of the Supreme Court as final, but the North would probably dissolve the Union rather than obey the decision.

It is true, however, that some of the previously mentioned periodicals were secession papers or journals. These same papers would subsequently encourage the South to secede. However, they displayed more insight into the impossibility of solving the sectional conflict by judicial decision than the northern Democratic press. What the northern Democrats failed to realize was that the Republican party could never be persuaded to sacrifice a basic conviction which formed the framework of their political organization. Men may have abandoned a political theory to the court, but never one that

59 Richmond Enquirer, March 10, 13, 1857, as cited by Beveridge, II, 497.


would have destroyed the very substance of their political and ideological goal.\textsuperscript{62}

Even if for their own devices the southern journals warned against accepting the Supreme Court's decision as a panacea, they still were able to either consciously or subconsciously anticipate the reaction of the northern Republicans. Perhaps, what northern Democrats did not realize, and what certainly the administration did not realize, was that the Republican party, before the decision, was in an extremely poor condition. Despite its recent triumphs at polls throughout the North, the Republican speakers and press had nothing to campaign for.\textsuperscript{63} The issue of "Bleeding Kansas" had been expounded upon until it was no longer an issue, and total abolition of slaves or restricting slavery from the territories could win votes only in strong, abolitionist counties. Now, not only did the Republicans have a new issue with which to construct a more unified wall of defense against slavery and the Democrats, but they were forced to unify within their own ranks. If the High Tribunal's decision was to stand, the Republican party's platform was unconstitutional and doomed to failure before it began.

To meet the threat, they unified. The Republican press alleged that the judges were avoiding decisions of law and

\textsuperscript{62}Nevins, I, 113.

tampering with politics. The South was trying to extend slavery by a judicial decision, and this line of reasoning was used to rally and breathe new life into their party. The Republicans printed thousands of copies of the dissenting opinions and distributed them as campaign documents. 64 Various leaders of the party began to echo the cry of "conspiracy" that was to be heard across the nation. William H. Seward proclaimed, "The day of the inauguration . . . was to be desecrated by a coalition between the executive and judicial department to undermine the national legislatures and the liberties of the people." 65 Seward assailed the Supreme Court so vigorously that Taney told his biographer, Samuel Tyler, that if Seward had been nominated and elected President, instead of Lincoln, he would have refused to administer the official oath. 66 Lincoln carried the charge of an executive and judicial alliance even further, warning in a speech delivered on June 16, 1858, that the Supreme Court and the Democrats would not halt with just outlawing the prohibition of slavery in the territories, but that the Supreme Court would add decisions to the Scott verdict until

---

64 Beveridge, Lincoln, II, 448.
65 Schlesinger, p. 157.
they could declare that a state could not exclude slavery within its own limits.\textsuperscript{67}

Perhaps neither the Supreme Court nor the Democratic spokesmen anticipated the monumental effect that this attempt to erase political sectional issues by court decree would have upon the Republican party. The \textit{New York Times}, however, had forecast that "... it has laid the only solid foundation which has yet existed for an abolition party."\textsuperscript{68} Even if the decision had not strengthened the Republican party, it would have another effect that the Court did not expect. The ridicule and abuse, published, republished, and quoted by Republican leaders, ministers, and other respected men, could not have failed to weaken the Court's status with the people. Some of the manifestations of criticism took the form of an effort to limit the High Tribunal. New York, Pennsylvania, and seven other states appointed committees to review the case of Dred Scott. Their purpose was to see what measures the legislatures could take to avoid what they considered an outrage. The resolutions brought forth by the committees were usually a simple attack upon the Court and a repudiation of the decision.\textsuperscript{69} However, one state, Massachusetts, not


\textsuperscript{68}\textit{New York Times}, March 9, 1857.

only appointed a special committee to study the decision, but instructed their representatives to Congress to propose an amendment to the Federal Constitution providing for the election of judges to superior and inferior courts for a given number of years.\textsuperscript{70}

Wisconsin was another state attempting a more direct solution to what the North considered an unjust decision. She refused to return a runaway slave on March 19, 1859. Her Supreme Court ordered the state legislature to disobey a writ of error from the Supreme Court of the United States. The State Court declared the writ "void and of no force . . . and that a positive defiance of all acts of the Federal Government which it may deem unauthorized is the rightful remedy" to the unjust decision. Wisconsin's action represented a high point in audacity in opposition to the Federal Government, and exemplified the loss of prestige by the High Court.\textsuperscript{71}

The scorn heaped upon the Court did not end in 1857, but continued. Republicans carried their criticism to Congress also, charging on the floors of both houses that the decision was an incorrect political decision.\textsuperscript{72}

\textsuperscript{70} National Intelligencer, March 17, 1857.

\textsuperscript{71} Tyler, pp. 398-399.

\textsuperscript{72} E. L. Shettle Collection, "James Buchanan Miscellaneous Pamphlets, Lecompton Constitution, and Dred Scott Decision," unpublished collection, Southern Methodist University, Dallas, Texas, pp. 2-5.
In 1869, James M. Ashley charged that the real reason for postponing the final decision was to prevent McLean, by a dissenting opinion, from making political capital for the support of his candidacy for the presidential nomination during the approaching Republican Convention. Charles Sumner had said in the United States Senate four years earlier: "... the name of Taney is to be hooted down the pages of history."  

The decision in Congress also took the form of concrete action to limit the power of the court. A bill was recommended to recall judges and appoint them for a specified length of time. The debate on the issue in Congress also took a strong new party twist. The Democrats who, since the time of Jefferson, had traditionally defended nullification, asked for recall of judges, and wanted general limitations of the judiciary, now were defending the Supreme Court. The Republicans, usually nationalist, were being forced to cry "state's rights." Newspapers on both sides heaped criticism on their particular political enemy for violating its previous doctrine.

---

73 Congressional Globe, 40th Congress, 3rd Session, p. 41.
74 Congressional Globe, 39th Congress, 2nd Session, p. 353.
76 National Intelligencer, December 10, 1858; New York Times, April 11, 1859.
Thus, the Dred Scott controversy did not soon subside from the public's attention. The irony of the Scott decision is that it produced the exact opposite reactions from those desired. The verdict united the Republicans, strengthened the reformers, damaged the prestige of the administration and the Supreme Court, heightened the sectional conflict, and dismembered the Democratic party.

The dismembering effect of the Scott verdict on the Democratic party was a gradual process. Northern Democrats accepted the Scott decision with mental reservations, because Douglas and his followers realized that the doctrine of the decision ran counter to, if it did not outlaw, the theory of popular sovereignty.77 Jefferson Davis had expressed the views of the South when he said that, if the Supreme Court ruled slavery could not be restricted by Congress in the territories, local legislation could not restrict it.78 Knowing the South's opinion of the Dred Scott decision, and realizing that he had to protect his popularity in the South if he were to be president, Douglas was called forth to defend his seat in the United States Senate against Abraham Lincoln.

77 Hopkins, p. 170.
78 D. Roland, editor, Jefferson Davis, Constitutionalist, His Letters, Papers, and Speeches (Jackson, 1923), pp. 266-271.
From the beginning of the campaign and throughout the debates, probably in an attempt to protect his southern popularity, Douglas stated that he believed in the validity of the Dred Scott decision. For example, he stated on June 26, 1857:

The Courts are the tribunals proscribed by the Constitution, and created by the authority of the people to determine, expound, enforce the law. Hence, whoever resists the final decision of the Highest Judicial Tribunal aims a deadly blow to our whole republican system of government; a blow which if successful would place all our rights and liberties at the mercy of passion, anarchy, and violence. 79

Reiterating the stand of the Republican party, Lincoln began to warn the populace of the evils of the decision. He spoke of the possibility of the Supreme Court's ruling that slaves would have to be allowed in all states. 80

He repeated the charge of politically motivated judges of the Supreme Court. 81 And he reminded the voters that Douglas had not always held the reverence he now felt for the Tribunal. 82 Lincoln also questioned Douglas on the validity of popular sovereignty. If the Supreme Court ruling was valid, Lincoln argued, "Judge Douglas says that a thing may be lawfully driven away from a place where it has a lawful right to be." 83

79 Basler, II, 401. 80 Ibid., III, 95.
81 Ibid., II, 539. 82 Ibid., II, 402.
83 Ibid., III, 544.
Douglas realized that Lincoln had damaged his status to the extent he might not be re-elected. Hence, Douglas had a choice. He could re-affirm popular sovereignty, be re-elected, and rob the Supreme Court of much of its vitality. This choice entailed losing southern support for the Democratic presidential nomination in 1860. On the other hand, he could confess that popular sovereignty conflicted with the Court's ruling, and be defeated.\textsuperscript{34}

On August 27, 1858, at Freeport, he announced his choice. The path chosen was the Freeport Doctrine, or as southerners called it, "The Freeport Heresy." His doctrine was that, in theory, slavery could exist throughout the public domain; but, if local laws were not enacted to support it, then slaveholders would not dare to bring valuable slaves into unprotected areas. The final result of his doctrine would be that no one would enact slave codes and slavery would be banished in the territories forever.\textsuperscript{35}

The South deserted Douglas because of the Freeport Doctrine, and the Democratic party divided. The Dred Scott decision had revived the Republicans, a party that was nearly bankrupt for lack of an issue; and, using the Dred Scott

\textsuperscript{34}Schlesinger, p. 158.

\textsuperscript{35}Speech at Freeport, Illinois, August 27, 1858, E. L. Shettles Collection, "Stephen A. Douglas, Miscellaneous Pamphlets On and By Him," unpublished collection, Southern Methodist University, Dallas, Texas.
decision, Lincoln split the Democrats into two factions. The Democratic split enabled Lincoln to be elected President in 1860, and the South seceded. The Civil War might not have been averted if Douglas, rather than Lincoln, had been elected President; but one chance of avoiding the war may have lain in the election of Douglas by a united national party. By electing a Democratic party, the sections might have accepted compromises until the time of crises had passed, and a better understanding between the opponents might have rendered a peaceable solution of the problem of slavery.\textsuperscript{86}

In conclusion, it is doubtful that McLean and Curtis were guided by a completely moral goal, but they probably believed the Missouri Compromise to be legal; and they undoubtedly did not realize that their decision to rule on the Compromise would force the other judges to consider the question, also. On the other hand, Taney and his associates only desired to end the sectional struggle of their troubled era. They evidently believed that they could effect, through the Court's prestige, a settlement of the sectional issue. One could have been critical of their logic but not of the goal they had in mind. Taney's argument against the Missouri Compromise, although not necessarily unconstitutional, was politically mistaken in veering from the choice not to

\textsuperscript{86}Hodder, p. 21.
consider the Compromise, and allowing the court to enter the political arena.

The Court again survived the prestige loss and stood firm in the face of immense criticism. Nothing was done to render the decisions invalid until the Thirteenth and Fourteenth Amendments after the Civil War. The resolutions offered before Congress to limit the Court could not be passed, because of the power of the Tribunal's southern support. The Supreme Court did not change its decision which it was convinced was the law of the land, and the decision stood as such until constitutional amendments were passed. By the time the Civil War was over and slaves were freed, the debate was ended. People's memories were short, and in a few years the prestige of the Court rose again.
CHAPTER III

THE NEW DEAL CHALLENGES THE COURT

Franklin Roosevelt, like Jefferson, was re-elected to office in 1936 with a mandate from the people against conservatism. Both men considered the judiciary to be opposing their reform measures for democracy. The conflict between the Court and Roosevelt became apparent on inaugural day. Roosevelt, who had just gained the largest number of electoral votes in history, was receiving the oath of office from Chief Justice Charles Hughes. As one cabinet member observed, a significant pause occurred when the Chief Justice requested the President to swear to uphold the Constitution. Roosevelt appeared to pause even longer before he made the customary answer.¹ He later told Judge Samuel Rosenman:

When Hughes read the oath and came to the statement, "Support the Constitution of the United States," I felt like saying, yes, but it's the Constitution as I understand it, flexible enough to meet any new problems of democracy . . . not the kind of Constitution your court has raised up as a barrier to progress and democracy.²

The incident on inaugural day was only an example of the split between New Deal and Supreme Court ideology, a chasm difficult and dangerous to bridge. Perhaps the split within the Court itself represented a key to the problem. The judges' political philosophy was as varied as the average citizen's opinion of the New Deal. The extreme right was composed of William Van Devanter, James Clark McReynolds, George Sutherland, and Pierce Butler. The left consisted of Louis D. Brandeis, Harlan F. Stone, and Benjamin Cardozo. Two swing men, Hughes and Owen Roberts, could give either side a temporary ascendancy. None of these judges were appointees of Roosevelt, and he never had been completely convinced that the Supreme Court viewed his social legislation favorably. He attempted, in his first term, to achieve a working order with the High Tribunal similar to the technique he had found profitable in New York State. However, Roosevelt was not only refused advice on constitutional matters by the Court, but Cardozo was miffed at what he considered a violation of judicial propriety.

The judiciary-executive struggle remained below the surface in Roosevelt's first term. The President suspected that


the Court was Republican, but the tribunal was at first sympathetic to proposed social legislation. Indeed, Attorney General Homer S. Cummings believed that the New Deal had judicial support until the summer of 1934. Roosevelt and the liberal publication, New Republic, remarked that judicial support of social reform was encouraging. But doubt still remained, and the Justice Department made "a conscious and conscientious effort" to draft all measures to be constitutionally sound.

After a blissful start, New Deal legislation began to fall quickly under the Court's critical scrutiny. The first law was struck down on January 7, 1935, in Panama Refining Company v. Ryan. The provision of the National Industry Recovery Act that declared oil could not be shipped across state lines if the mineral had not been produced according to state proration allotment regulations, was declared unconstitutional. Although the Secretary of the Interior, Harold Ickes, pointed out that the Court implied the remaining parts

---


6FDR Papers, IV, 6; New Republic, LXXXVII (November 24, 1934), 131.


of N.I.R.A. to be constitutional, liberals still feared the conservative Court.9

The New Dealers' fears were not unfounded. Close on the heels of the "Hot Oil" decision followed the famous "Gold Clause" ruling. The Chief Justice wrote that, although the plaintiff could not collect interest because there had been no actual damage, the act was unconstitutional because of the federal attempt to destroy its obligation by simply passing restrictive laws.10

The President was so concerned with the possibility of being forced to redeem bonds with interest that he had written a radio speech refusing to obey the Court ruling.11 An appeal to the people at this time might have changed the course of history. Also in 1935, the administration saw its plan for a mandatory pension and compulsory retirement for railway employees declared unconstitutional in a five-to-four decision.12

Meanwhile, the Brain Trust had been contemplating a test of the National Recovery Act, which was on the verge of collapsing. At approximately the same time, a poultry dealer forced the Justice Department to defend the N.R.A. on one


of its vulnerable points, the live poultry code. In a unanimous decision, the Court stipulated that transportation of poultry, all within New York, had no influence on interstate commerce. Roosevelt called the Schecter case a "horse-and-buggy" idea of commerce that delayed needed social legislation, but the President was bitterly criticized by some members of the press and Congress for his charge. The collapse of N.R.A. was coupled with rulings striking down the Frazier Lempke Farm Act, and the President's removal of powers from the Federal Trade Commission. These three unanimous decisions constituted the so-called Black Monday in New Deal history.

The next two years were to bring the contest between the Court and the administration to its historic climax. The Home Owners Act of 1933 was declared invalid on the grounds that it violated the due process clause of the Constitution. However, the most troublesome case of the era concerned the

---


Agriculture Adjustment Act. In the A.A.A. decision, Cardozo, speaking for the Court, ruled that the act violated the taxing powers of Congress. This ruling concealed the mounting wave of militant congressional opinion that the Court should be curbed, and a whole host of bills were initiated into Congress to restrict the powers of the High Tribunal.

Before the Court recessed for the summer, it revoked two more New Deal measures. The first, a five-to-four decision, asserted that the Municipal Banking Act of 1934 was invalid because it invaded state sovereignty. The second of the two cases was the repudiation of the Guffey Coal Act. In this decision the Court divided three ways with Hughes choosing a middle course. The extreme right branch of the Supreme Court, led by Sutherland, asserted the majority opinion that the law was unconstitutional because the Federal Government had no control over local social problems.

Thus the stage was prepared for one of the few open conflicts between the executive and judicial branches of government. Twelve decisions had upset major New Deal legislation; six were unanimous, two were eight to one. The President was


19Congressional Record, 75th Congress, 1st Session, pp. 198-198, 298, 500, 745.


angry at a Court that he considered was halting progress, and he was determined to bring the wayward sheep back to the fold. Particularly concerned was the President over the fact that four justices apparently placed property rights above personal rights, and these four were determined to remain on the bench "until death." The President's position was given moral justification with his tremendous victory of 1936. The overwhelming tide of public support represented to him a mandate from the people to carry on his fight for desperately needed social legislation. To the New Dealers it appeared that Roosevelt had a blank check from the people to fulfill the need for restoration and reform.

Actually, however, the campaign that produced the President's tremendous victory was conspicuous by the lack of mention of the Supreme Court. The Democratic Party ignored what appeared to be an obvious problem. The only two parties to mention a curtailment of the Supreme Court were the Communist and Socialist parties. The proposal of both of these parties was to initiate a constitutional amendment. Roosevelt informed a friend that the reason the Democrats

22Rosenman, FDR Papers, VI, lxi.


failed to mention the Supreme Court in their platform was that they did not want to interject the question of a constitutional amendment into the 1936 campaign.\(^{26}\)

Even though the Court was not an issue in the campaign, it became apparent that the administration had neither forgotten nor forgiven the Tribunal's real or imaginary offenses. The very first day of the new congressional session saw a bill introduced to limit the judiciary. In addition, accusations were made concerning the conservative nature of the Supreme Court in the field of social reform.\(^{27}\)

The major issue, however, was how would the President seek to curb the Court with the landslide victory behind him? Some felt that Roosevelt would not pack the Tribunal because, in 1933, he had warned of the dangers in increasing the number of justices.\(^{28}\) However, the *New York Times* was forced to restate its position in February, 1937, when it admitted that not only did the President think that an amendment would take too long, but the election gave him an "ample mandate" to attempt a more direct method.\(^{29}\) The problem of the administration was that not only could thirteen states block the


\(^{27}\)Congressional Record, 81st Congress, 1st Session, pp. 31, 306-307.


\(^{29}\)New York Times, January 27, February 8, 1937.
amendment, or as Roosevelt said, ten thousand dollars defeat any proposed constitutional change, but that the Liberty League was already collecting money to defeat ratification if proposed to the states.  

The President later told Harold Ickes that he had considered legislation requiring a two-thirds majority of justices to declare any law of Congress unconstitutional, but he feared that it would be declared invalid by the Court.  

Hence, he could choose but one route with an accepted precedent: add justices to the Supreme Court.

Most of the responsibility for the plan appeared to lie with Homer Cummings. It was Cummings who first pointed out to the President that he had one of two choices, either pack the court or amend the Constitution, and the latter was the more advisable.  

When Roosevelt left for a South American cruise in December, 1936, he instructed Cummings to compile data on possible ways to avoid the adverse Court decisions.  

Roosevelt not only kept in constant touch with the Attorney

---

30Ickes, Diary, II, 33-34, 65-66.

31Ibid., p. 65.


General, but it appears that he knew before the information was even compiled, what his choice would be.34

The other decision to be made was how to announce to Congress the method the administration had chosen to circumvent the Court. Congressional leaders were never informed of the President's intentions on the Court plan until the day his opponents knew it.35 Rather than allow leaders in Congress to aid in the writing of the proposed bill, Roosevelt chose a brilliant Chicago lawyer, Donald Richberg, to aid the chief drafter, Cummings. Richberg not only showed "little enthusiasm" for his project, but he also doubted the chance of its success.36 The strategy chosen was for Roosevelt to deliver a presidential message that would cite the fundamental problems of delayed justice in the federal courts because of the incapabilities of aged justices. The increasing of the number of Supreme Court justices was to be incidental, and nothing was to be mentioned about the delay and death of needed New Deal legislation. Cummings was to attach a letter illustrating the delay due to crowded dockets and overworked judges.37 Rosenman warned the President that not


36 Rosenman, Working with Roosevelt, p. 147.

only were Cummings' figures incorrect, but that the plan should be to attack the Court on its weakness—desperately needed social legislation. In spite of the support of both Reed and Richberg, Rosenman failed to convince Roosevelt of the weakness of the method chosen to announce the proposed bill. He reported that the President seemed to enjoy the prospects of packing the Court without saying he was going to do so.38

By mid-January, Roosevelt had decided it was time to announce his proposal. It was rumored that Van Devanter and Sutherland were on the verge of retirement, and the President may have thought an incentive would expedite their early retirement.39 Thus, the administration decided to bring advisors and congressional leaders together on February 5 to advise them of the President's proposed law.

Ironically, the presidential proposal was based on an earlier recommendation of McReynolds, and to use the Justice's own proposal to defeat the Court appealed to Roosevelt's sense of humor.40 The bill provided for a maximum of fifty additional federal judges. It called for a proctor to investigate the needs of the Chief Justices and the creation of emergency judges to hasten to areas that were temporarily

---

39 Pussey, II, 760.
behind in their legal proceedings. The real core of the matter was that the President could appoint a new federal judge for every one that was over seventy years of age and had been on the bench for ten years. The appointive power was supposed to transfuse new blood into a tired and decadent judiciary. In reality, it meant that Roosevelt could increase the Supreme Court from nine to fifteen members.

On February 5, at ten o'clock, Roosevelt called together Senator Henry Ashurst, chairman of the Judiciary Committee; Joe T. Robinson, Senate Majority leader; Congressman Halton Summers, chairman of the House Judiciary Committee; William Bankhead, Speaker of the House; and the Cabinet. Roosevelt read the proposed bill to the group. Everyone seemed stunned, and none seemed enthusiastic about the plan.41 James Farley asked why he had not been warned in time to mobilize the support that would be needed, and the President answered that he could not afford the chance of information leaking out to the press and to the opposition.42

The President seemed to be very satisfied with the chosen method of announcing the proposed bill. He was in jovial spirits at the press conference. Some thought it was

41 Ickes, "My Twelve Years with FDR," Saturday Evening Post, CLXXI (July 3, 1933), 30; Bascom N. Timmons, "John N. Garner's Story," Collier's, LXXI (February 23, 1948), 22.

42 James A. Farley, Jim Farley's Own Story (New York, 1940), pp. 73-74.
the best mood he had portrayed in months. He joked, asked reporters to keep their confidence, and explained that the only reason he drew up a bill at all was to aid congressmen in their announced intention to reform the judiciary.43

The announcement of the proposal to Congress was not as jovial as the press conference. Resentment emerged among some congressional leaders over the failure of Roosevelt to "take them into confidence."44 Ashurst, who had denounced adding justices to the Supreme Court as a "prelude to tyranny," must have wondered how he could support the plan.45 Vice-President Garner walked around the Senate arena giving the old Roman sign of "thumbs down" as the proposal was being read.46 However, there were affirmative reactions, also. Representative Maury Maverick of Texas took the mimeographed copy of the President's message, pasted it on a House Bill form, and dropped it into the hopper to be introduced as a proposed bill.47

45Congressional Record, 81st Congress, 1st Session, p. 562.
46MacColl, p. 168.
The leadership of the opposing sides in the forthcoming fray were quick to establish strategy boards, but they found their respective opponents' positions were so hazy that it was difficult to ascertain who was the enemy and who was the friend. The Senate Republican leadership, Charles E. McNary, William E. Borah, and Arthur Vandenberg, decided to allow the plan to be defeated by a split in the Democratic party. Rather than take an active stand, the Republican leadership ordered their members to make no rash statements concerning the plan. Their intentions were obvious; they wanted the public to believe that the opposition to the proposal was from the left within the Democratic party. If the populace believed the opponents were liberal, it would prevent Roosevelt from convincing individuals that anti-proposal men were only a group of conservatives attempting to halt New Deal progress.48 The Republicans were very successful in these tactics, and in the final analysis the only important Republican speech was by ex-President Herbert Hoover, who accused Roosevelt's proposal of showing "communist" tendencies.49

On the administration side of the Court battle, the President conducted a personal campaign. His chief advisor


was Thomas Corcoran. However, his son, James Roosevelt, former Representative Charles West, publicity director Edward L. Rodden, and the two members of the Attorney General's office, Jackson and Cummings, were all important in formulating policy. In general, however, the campaign lacked cooperation between the President, the hypothetical political generals, and Congress. Roosevelt, inspired by early successes and a 1936 victory, made important decisions and expected complete obedience. His demands, plus Corcoran's haughty attitude, did not aid in cushioning the blow to congressional ego at being excluded from the initial drafting of the proposal. The administration's collective attitude only heightened some congressmen's distrust and resentment of the President's total reliance upon the Brain Trust.  

The President faced a momentous task in marshaling his forces. He, as usual, contended with the difficulty of an opposition press—an overwhelming 71 per cent of the nation's newspapers were anti-Democratic in the 1936 campaign. Much more important, however, was that 73 per cent of the pro-Roosevelt newspapers opposed the Court plan. The anti-plan number included such famous papers as the Scripps Howard  


51 New Republic, XC (March 17, 1937), 173.
press. In general, they gave the impression that all of America opposed the plan and, if one wanted to protect democracy, he had better join the struggle before it was too late.

In addition to an opposition press, many different organizations were formed for the sole purpose of defeating the Court plan. Town meetings were called, sometimes by steam-roller tactics, dedicated to but one cause—"save democracy." Hundreds of organizations representing the extreme right of United States politics chose inflammatory names; for example, Defenders of the Republic, The Lord's Day Alliance. These groups dedicated time, money, and political experience to defeating the proposed bill. The most effective of these rightest groups was Frank E. Gannett's National Committee to Replace Constitutional Government. This group collected $194,500 from twelve thousand contributions. Between April 1 and April 7, 1937, Gannett had distributed 1,100,000 copies of speeches by Carter Glass, Burton K. Wheeler, William Lemke, Louis Taber, and Dorothy Thomas, all of whom were recognized as vehemently opposed to the proposal. The National Committee also sent 600,000

---

53 New Republic, XC (April 21, 1937), 306.
54 MacColl, p. 222.
55 Ibid., p. 223.
petitions to groups to be forwarded to Congress, contacted 170,000 clergymen, mailed 250,000 letters to farmers, and sent 32,566 telegrams, at $1.27 each, to influential citizens. An example of the esteem the anti-Court congressmen felt for Gannett's group would best be shown by the adverse Judiciary Committee report. Gannett received the adverse report three days before its publication for use as propaganda to oppose the administration. 56

Groups such as Gannett's were joined by the traditional anti-liberal forces. The American Bar Association not only devoted three complete issues of their organization's magazine in opposition to the proposed bill, but also raised fifty thousand dollars to defeat the proposal. 57 Another traditional enemy of Roosevelt, the National Association of Manufacturers, worked diligently to defeat the Court proposal. Although the National Association of Manufacturers attacked labor in general and the Wagner Act in particular in 1937, a large portion of the $793,043 spent to oppose their enemies was for the purpose of defeating the administration plan. 58 Typical of the activities of the National Association of Manufacturers was


57 Ickes, Diary, II, 76.

the action of the Tennessee Manufacturing Association in sending a letter to all its members urging them to endorse an anti-Court proposal before the state legislature.\textsuperscript{59}

These were only two examples of conservative organization attempts to defeat the proposed Court bill. Although not as active from a monetary standpoint, the American Liberty League, the Southern States Industrial Council, the National Chamber of Commerce, and the Daughters of the American Revolution, all officially opposed the administration's plan.\textsuperscript{60}

It could be said that the conservatives used two broad general arguments to influence public opinion. The first argument stated that the forefathers of the United States included all the necessary ingredients for national unity and greatness in the Constitution. These principles should be protected if the United States were to remain strong. The only way to prevent a dictator from rising or seizing control was to guarantee the Supreme Court's power to interpret the Constitution and protect democracy. The second argument warned the people that Roosevelt's proposal was not a reform but simply a means of seizing control of the Court. Since it was the duty of all Americans to protect the sacred doctrine of separation of powers, it was necessary to defeat

\textsuperscript{59}\textit{Ibid.}, p. 47.

\textsuperscript{60}MacColl, pp. 377-381.
the administration proposal in order to be 100 per cent American.61

Roosevelt had expected concentrated efforts of the conservatives to attempt to defeat his measure; the surprise to the President was the default of liberal groups. The liberals' failure to fight for what Roosevelt considered a progressive cause was a major weakness. The President called Senator George W. Norris to the White House to organize the support of liberal groups and congressmen. Although Norris did support the plan as the lesser of two evils, he preferred a constitutional amendment, and he failed to display his usual reform style of campaigning throughout the struggle.62

The most formidable opponent of the President was an ex-supporter and liberal, Burton K. Wheeler of Montana. Not only was he a natural leader, but his denunciation of the plan was most devastating, since he could point out both his progressive record and his usual support of Roosevelt.63 He announced his opposition to the Court plan on February 13, 1937.64 Wheeler quickly became the accepted leader of the

61 For example, see Carter Glass, "The Battle Is On," Vital Speeches, III (April 15, 1937), 393-391; Young B. Smith, "I Voted for the President in '32 and '36," ibid., pp. 408-411.
62 Ickes, Diary, III, 70.
anti-administration liberals, and he eventually was able to weld all the diverse elements of the opposition into a formidable group. He recruited some Senate votes singlehandedly, but much more important was his ability to carry the banner and shield for all liberals who believed as he stated: "... the court plan was not liberal. ... The whole Court fight was one of reform versus control. What the proponents wanted was control. What the sincere liberal wanted was reform." 65

An excellent example of the moral dilemma of the liberal—to support a dangerous precedent, or to not limit the Court and watch more needed social legislation be nullified—was the controversy in the progressive magazine, The Nation. The Nation's editorial board severed partnership over the controversy. Oswald Garrison Villard and Maurice Wertheim were anti-Court proposal, while Heywood Brown was a Roosevelt supporter. Both factions wrote articles supporting their views in The Nation. The eventual outcome of the dispute was the selling of the magazine. 66

√ No liberal magazines rallied to the cause as expected. Some of the existing support was half-hearted; some, apologetic but firm. All liberals seemed to object to the plan

65 Ibid., August 8, 1937.
because it was not a basic reform. They wanted an open reform on the grounds that not only was the Court halting needed legislation, but checking majority opinion was an archaic idea. The liberals wanted this reform to stand the test of a referendum to the people in the form of a constitutional amendment. 67

The liberal factions who opposed Roosevelt were sincere, but the President had some progressive support, also. His liberal supporters argued that the Court was causing the virtual collapse of New Deal legislation. The only chance for liberal reform to survive was his plan, which was the quickest. The plan supporters pointed out that time was essential to social reform. As one liberal editor analyzed his progressive contemporaries, he "knew they were honest in their convictions, but to hell with their sincerity, damn their stupidity," because the time for New Deal reform was now. 68

Other traditional supporters of the New Deal did not rally to the call of reform. Some of the failures to heed the call were due to disagreement within their own ranks over the issues of packing the Court. Another reason for lack of support was internal conflicts within an organization

67 For example, see "Liberal and the Court," The New Republic, XC (March 3, 1937), 96-97.

68 The Nation, CXLIV (March 6, 1937), 269.
that consumed energy which might have been spent to support the President. The failure of organized labor to campaign for the plan was due to the latter reason. On the surface, it appeared as if labor were solidly behind the court proposal. The Gallup poll listed 71 per cent of the membership of Congress of Industrial Organizations as proponents of the plan in mid-March, and a later Gallup poll noted a 3 per cent rise in early June. Various labor periodicals editorialized the need for local and national support of the Court proposal. The official union journals seemed to be uniform in warning that the failure to support a reform of the Court would hamper much needed labor legislation, because the High Tribunal was delaying New Deal laws.

However, labor actually proved ineffective in supporting the administration proposal. The forfeit was not in the form of lack of verbose support of the proposal but, much more important, in failing to establish an effective lobby. The collapse of legislative pressure was due to pre-occupation of labor in attempting to heal a split in its own ranks. The division was caused by an attempt of the C.I.O. to gain recognition of their newly formed union from both business and the American Federation of Labor. Engrossed in this


devastating split, labor did not have the time nor inclination to attempt to pressure congressmen to support the Court proposal. 71 Roosevelt, realizing this weakness, devised his strategy to encourage labor lobbying. First, he ordered his congressional supporters to attempt to solidify the administration union support. A political unit called Labor's Non-Partisan League attempted to seize the reins and guide organized labor into the administration camp. 72 Because of the internal bickering, the League had little success in creating active labor pressure. The second strategy move of the President, concerning organized labor, was in a spirit of reprisal. The plan was to prove to the unions their folly by halting labor legislation. In this spirit of vindictiveness, the leaders of Congress were ordered on April 26, 1937, to halt all labor bills. 73 Roosevelt also gave in to public pressure and finally took a stand on the sit-down strike situation. He asserted that the general opinion of the citizens toward labor was coming to be "a plague on both your houses." 74 His statements only

---


74 Ibid., June 7, 1937.
accentuated the rift in union development and led to John L. Lewis' charging in a radio address that Roosevelt was unfriendly to organized labor.\textsuperscript{75} By mid-July, it was obvious there was no chance of organized pressure by labor in support of Roosevelt.

Another pressure group which failed to rally in support of the President was the farm lobby. One cabinet member stated that the failure of farm support was due to the Secretary of Agriculture, Henry Wallace, who was lukewarm to the administration plan.\textsuperscript{76} The Secretary's attitude was typical of not only farm leaders and farm organizations, but also the average farmer. Wallace issued a warning to Roosevelt a month after the campaign began that only about 40 per cent of the farmers approved the plan.\textsuperscript{77} As the campaign progressed, the administration proposal lost, rather than gained, rural support. In July, the \textit{Fortune} poll reported that 76.1 per cent of the rich farmers and 51.7 per cent of the poor farmers opposed the plan.\textsuperscript{78}

The President attempted to counter the lack of farm support by appealing to the traditional rural support of the New Deal. He sent out spokesmen to point up the obligation

\textsuperscript{75}Ibid., June 30, 1937. 
\textsuperscript{76}Ickes, \textit{Diary}, II, 242. 
\textsuperscript{77}\textit{New York Times}, March 6, 1937. 
\textsuperscript{78}"Fortune Poll," \textit{Fortune}, XVI (July, 1937), 96-98.
of farmers to support the New Deal, and he cited the example of the A.A.A. case as Republican control of the Court.\footnote{79} He supplemented his loyalty appeal by having direct pressure placed from Washington through the Farm Bureau on individual farmers.\footnote{80} Roosevelt also attempted to encourage favorable support of the plan by urging the state governments to pass supplementary legislation to aid State Conservation District laws.\footnote{81}

In the final analysis, all of the administration's maneuvers were unsuccessful, not only because of individual farmers' disinterest, but because of active opposition of farm leaders. The leaders of the farm unions almost unanimously opposed the plan. Some simply wrote to the President and informed him of the infeasibility of the plan.\footnote{82} Others organized well-planned farm demonstrations that marched on local capitolis, conducted fiery speeches, picketed local bureaus, and organized other activities.\footnote{83} The president of the eight hundred thousand members of the Grange, Louis Taber,


\footnote{80}Reduction of Non-Essential Federal Expenditures, Hearings Before the Joint Committee, 77th Congress, 2nd Session (Washington, 1942), part 3, pp. 727-919.

\footnote{81}Rosenman, \textit{FDR Papers}, VI, 102.


\footnote{83}\textit{Dallas Morning News}, May 11, 1937.
organized demonstrations and volunteered to testify to the Senate Judiciary Committee on the unfavorable aspects of Court packing in general, and opposition of the farmers in particular.\textsuperscript{84} The best example of leaders' opposition to the proposed bill was the lack of editorializing for the support of Roosevelt. The \textit{Congressional Record} asserted that of all the farm publications, farm bureau journals, and other influential farm periodicals, only the Mississippi Farm Bureau consistently supported the administration on the editorial page.\textsuperscript{85} The lack of farm support of the President's plan was to aid in the eventual defeat of the issue.

Other traditional supporters of the President were the minority groups, the most important of which was the Negro. The Negro's support appeared to be solidly behind Roosevelt's Court plan. In questioning the High Tribunal's stand on civil rights, some Negro leaders wondered why the Court did not challenge the poll tax, school segregation, bus codes, and other methods of refusing first-class citizenship.\textsuperscript{86} Most Negroes agreed with John Davis, the president of three hundred Negro clubs, who said the chance for his race's equality lay, not in the Supreme Court, but in the New Deal.

\textsuperscript{84} \textit{Hearings}, pp. 656-693.

\textsuperscript{85} \textit{Congressional Record}, 75th Congress, 1st Session, p. 1297.

\textsuperscript{86} \textit{Hearings}, pp. 1644-1647.
He pointed out that the only way to acquire social legislation was to support the President, and the method to use in such support was to curtail the Court.\textsuperscript{37}

Other minority groups had varied opinions. Some of these groups took no concrete stand. However, the Roman Catholic Church was almost unanimous in its opposition to the Court proposal.\textsuperscript{38} The only division within the Church was the degree of denunciation. \textit{Commonweal} opposed the plan as a dangerous precedent, asking instead for a constitutional amendment.\textsuperscript{39} \textit{Christian Century} opposed the proposed Court change, because it laid the basis for persecution of a religious minority. The periodical feared that one man might gain control of the government and suspend the Constitution. However, it should be noted that there were occasional letters written supporting Roosevelt, and one article expressing pro-Presidential sentiment.\textsuperscript{90} \textit{Catholic World} opposed the plan consistently, pointing out in September a composite listing of reasons why they supported the New Deal but were against Court packing.\textsuperscript{91} Indeed, inasmuch as the major Catholic

\textsuperscript{37}\textit{Dallas Morning News}, April 24, 1937.

\textsuperscript{38}Ickes, \textit{Diary}, II, 104.

\textsuperscript{39}Pierre Crabtree, "The Lesser of Two Evils," \textit{Commonweal}, XXVI (May 4, 1937), 63.

\textsuperscript{90}"The President and the Court," \textit{Christian Century}, LIV (February 7, 1937), 206-208.

\textsuperscript{91}\textit{Catholic World}, CXLV (September, 1937), 643-648.
publications almost always supported the New Deal, Roosevelt lost another usual editorial supporter in his proposal.

Although neither a minority group nor a constant supporter of the New Deal, official Protestant support was almost unanimous in its distaste for a Court change. Not only was the plan condemned by all major sect assemblies, but it was reported that 70 per cent of official Protestant church papers were in editorial opposition. The split in group opinion, again, was largely one of degree. The opposition varied from a simple censure by most church councils to the outright hysteria of Reverend James E. Wagner of the Greenberg Morning Review, who said he would "as soon debase the chastity of my Mother or sister" as support such a proposal. However, the Protestant groups were not effective because of the differences in sects, publications, and individuality of members. The only organized attempt of Protestant clergy from individuals who founded local organizations and mailed mimeographed letters to influence congressmen.

Roosevelt's problem of influencing Congress and mustering public opinion began long before the Senate Judiciary

---


93 "Keep the Court Out of This," *The New Republic*, XC (March 24, 1937), 93.

Committee met. He began by presenting his bill under the guise of reform rather than political expediency, a possible mistake in strategy which he continued to follow throughout the first month of the campaign. 95

When the struggle began, the papers predicted an administration victory. 96 However, only on the surface did affairs seem to be pro-administration; with more than a cursory investigation, both liberal and conservative periodicals would have discovered that all was not well with the Court battle. Toward the end of the first week, the Senate was divided into about three equal groups. The President attempted to sway the uncommitted and encourage the supporters by personal calls, sending letters to influential friends, and offering patronage to Governor A. B. Chandler of Kentucky and the usually reliable machines of Kansas City and Jersey City. 97 The President's efforts were not always successful. By the end of the first week, Truman Catledge reported that the proposal was causing extreme unhappiness in Congress "from the leadership to the quietest member." 98 Congress, before the end of the week, was

95Rosenman, FDR Papers, XI, lxv.


considering a compromise that would allow the President to appoint four judges—two would retire, and the Court would be enlarged to eleven. 99 Roosevelt, however, stated that there could be no compromise and that he would carry his appeal directly to the people. 100 Actually, as time progressed, the administration lost rather than gained congressional support. The New York Times reported thirty-four opposition senators on February 18; and, only five days later, the anti-administration forces had forty-two senators in their fold. 101

The attempt to start a grass-roots movement among the populace was also a failure. Most of the mail received by the President in the early weeks was opposed to the plan. 102 Although most liberal publications maintained that early opposition was not due to the objective, but to the method, of the proposal, the scheme never developed the popular approval Roosevelt desired. 103

By the latter part of February, the White House began to see the necessity of a change in strategy if their appeal was to find a sympathetic public ear. Roosevelt started the new

99 Ibid., February 10, 1937.
100 Ibid., February 13, 1937.
102 Ibid., February 15, 1937.
maneuver by telling his advisors to "think things over" and to give public opinion time to congeal in their favor.\textsuperscript{104} The delay was to give the President time to instruct his forces to change from Court reform and to re-enter the fray with a new method of attack. He had decided to drop the guise of court reform and to seize instead the threat to New Deal legislation. Roosevelt decided to launch his new campaign by sending Farley to the South on a speaking tour and ordering Reed, Jackson, Corcoran, and the remainder of the New Deal leadership to change the emphasis away from reform to New Dealism.\textsuperscript{105} The President initiated his own campaign before a Democratic Party dinner of thirteen hundred party members, where he devoted his entire speech to an attack on the Court and placed the demand for congressional support on a party loyalty basis.\textsuperscript{106}

The second part of the new maneuver was a direct appeal to the people. Roosevelt chose to follow the party rally speech with a "fireside chat" which pointed out the necessity of the New Deal, the thwarting of social legislation by a conservative tribunal, and the needed court plan to avoid such adverse action. Pointing out the precedents for Court


\textsuperscript{105} \textit{New York Times}, February 26, March 8, 1937.

\textsuperscript{106} Rosenman, \textit{FDR Papers}, VI, 113-121; Rosenman, \textit{Working with Roosevelt}, p. 158.
change, Roosevelt warned that the enemies of the proposal were the usual, monied conservative class. With an appeal for continued support and confidence, the President ended his speech and waited for public reaction.\textsuperscript{107} Thus, by mid-March, the public had not only heard over forty radio speeches dealing with the issue alone, but they were now to face a new line of administration reasoning—the necessity of saving the New Deal.\textsuperscript{108}

The reaction of the public and the press followed traditional lines. The liberal press was jubilant that the administration was now facing the issue—social needs. The conservative press accused Roosevelt of attempting to color the issue with absurd statements and maintained that the real issue was one of either constitutional government or one-man control.\textsuperscript{109} However, the Presidential strategy board was not content with the progress of the campaign. They advised the President to compromise, but he insisted that it was necessary to press forward for total victory.\textsuperscript{110}

In mid-March, as the Senate Judiciary Committee opened hearings on the proposed Court bill, the weakness of the


\textsuperscript{109}"The President Faces the Court," \textit{The New Republic}, XC (March 17, 1937), 11.

\textsuperscript{110}MacColl, p. 217.
President's strategy became more evident. The President's first mistake had been the choice of the Senate, rather than the House of Representatives, for the introduction of the bill. His reason for this choice was the belief that Representative Hatton W. Sumner of Texas was planning to kill the proposal in favor of his own compromise bill. Hence, Roosevelt decided not to trust the House Judiciary Committee, but to wage a personal campaign in the Senate.\footnote{111} Critics maintained that Sumner could have been convinced to support the proposal, and it would have had a much easier time passing the House of Representatives than the traditionally conservative Senate.\footnote{112}

The validity of this criticism became obvious as the hearings progressed. When the Judiciary Committee began its sessions on March 10, presidential advisors Corcoran and Cohen were faced with perplexing problems. Eight of the eighteen committee members had already committed themselves as opposed to the plan. They were William King of Utah, Frederick Van Nuys of Indiana, Burke of Nebraska, Tom Connally of Texas, Joseph O'Mahoney of Wyoming; and Republicans William Borah of Idaho, Warren Austin of Vermont, and Harry Stevens of

\footnote{111}{
}

\footnote{112}{
"Hughes Checkmates the President," \textit{The Nation}, CXLIV (May 29, 1937), 610.
}
Idaho. Promised supporters were Democrats Matthew Neely of
West Virginia, M. M. Logan of Kentucky, William Dieterich
of Illinois, Ley Pittman of Nevada, and James Hughes of
Delaware. George Norris and Henry Ashurst, although com-
mitted to the proposal, were not overenthusiastic concerning
the forthcoming battle. The balance of power seemed to lie
with uncommitted members Carl Hatch of New Mexico and Patrick
McCarren of Nevada. However, Borah warned that decisions had
already been arrived at concerning the proposed bill, and only
public opinion would be affected by the hearings.\footnote{113}

At this point the weaknesses of administration strategy
became apparent. Farley subsequently admitted that he could
have convinced O'Mahoney and McCarren to back the plan, but
he failed to do so. Both Senators were interested in politi-
cal favors at his disposal; and, in addition, O'Mahoney was
insulted by harsh words and ominous warnings.\footnote{114} However,
nothing was done by the administration to mollify their wishes.
Another initial error was the agreement by Corcoran to limit
government testimony to two weeks; this agreement allowed the
opposition forces to keep pro-Court arguments before the pub-
llic for months after the completion of the administration
case, a function performed by anti-Roosevelt newspapers every

\footnote{113} \textit{New York Times}, May 14, 1937; Anderson, p. 206;

\footnote{114} Farley, p. 85; "Hughes Checkmates the President,"
The Nation, CXLIV (May 29, 1937), 610.
time another reason was presented charging that the proposal was not feasible. 115 A third error resulted from the President's failure to achieve coordination between his chain of command and congressional leaders. The cleverest cross-examiner in the Senate was Hugo Black of Alabama. He had been removed from the Judiciary Committee in January to fill the chairmanship of the Education and Labor body. All through the Committee investigations, the administration forces were hampered by the lack of adequate cross-examination. Black, an avid Roosevelt supporter, would have been excellent for the position; and, had party spokesmen in Congress known in advance of Roosevelt's plans, the problem of inadequate cross-examination would have been avoided. 116

The strategy board's general tactical errors were matched by a presidential mistake. As soon as the hearings began, Roosevelt, over Corcoran's protest, went to Warm Springs. His action seemed to indicate that he was in no hurry to have his plan enacted. 117 Roosevelt erroneously believed that time would convince the confused populace and liberals that his plan was the only workable one. 118 The opposite was true;

115 The New Republic, CX (May 12, 1937), 237.
116 Alsop and Catledge, p. 120.
118 Roosevelt to Key Pittman, March 17, 1937, E. Roosevelt, FDR Letters, III, 668.
as time drew on, public opinion congealed against the plan rather than for it.

On the morning of March 10, Cummings led off for the administration. His tactics had not changed since the beginning of the Court struggle. He based his whole argument on the inability of nine judges to read and digest satisfactorily all the petitions of certiorari which came before the Supreme Court. 119

Assistant Attorney General Jackson was the next witness for the Court plan. He relied completely on political arguments, stating that the proper functions of the Court were within the regulatory powers of Congress. Jackson pointed out that the Court's size had been altered before, and stated that the only way to protect the New Deal, state rights, and the will of the people was to curtail Court power. Jackson maintained that the Supreme Court's prestige was no longer an issue, because the rash of five-to-four decisions had already impaired the present reputation. He ended his testimony by asserting that the Constitution was not a lawyers' document, but a tool to be wielded for the good of the people. The only way to present a workable Constitution, Jackson maintained, was to increase the power of the Court. 120

119 Hearings, pp. 1-8.
120 Ibid., pp. 43-51.
The cross-examination of the two administration witnesses was effective for anti-administration forces. The opposition members of the committee attempted to prove that not only was Cumming's testimony false, but also both he and Jackson were primarily concerned with the appointment of pro-New Deal judges. 121

After the representatives of the Attorney General's office testified, a whole host of administration experts followed. The majority of the remaining witnesses, such as Justin Miller, Dean of the University of Southern California Law School, Dean Leon Green of Northwestern University, Edward S. Corwin, Dean Thomas F. Knoph of Notre Dame Law School, William Draper Lewis of the University of America Law Institute, and other authorities on constitutional law, were called to verify earlier administration claims as to either the necessity of adding judges or the constitutionality of such a practice. 122 The opposition, on the other hand, devoted their cross-examination to attempting to discredit the witnesses. For example, Senator Connally had it written in the record that Corwin had been an advisor on the McGuffey Coal case, so his action was not altogether altruistic; and Senator Burke forced Green to admit that he favored political control of the Court. 123

121 ibid., pp. 9-35, 43-51, 54-62.
123 ibid., pp. 233, 233.
At the end of the first ten days, the Administration had called only about one half of its contemplated witnesses. The opposition, not being ready to perform, suggested that the President's forces should take another week. Corcoran refused on the grounds that the extra research time would allow the anti-proposal members to gather enough material for a filibuster. By closing their case so quickly, Corcoran and Keenan made an error, because the committee dragged out the hearings for four and one-half months, and the anti-proposal group thus gained headlines all to themselves for the next quarter year.\textsuperscript{124}

The \textit{New Yorker} asserted that the first week of testimony proved only that the Supreme Court, like the Republican Party, should be kept out of politics. But the average citizen's opinion had begun to turn away from the plan, as the anti-administration forces began to call their witnesses.\textsuperscript{125}

The high point of the opposition testimony came on the first day, when Wheeler testified. Wheeler began his testimony by pointing out that, although he was a liberal, he found it necessary to defeat the Court proposal. If for no other reason, declared Wheeler, it was the duty of progressives to defend the greatest of their number, Brandeis.

After this brief introduction, Wheeler began by questioning the validity of Cummings' assertion that the Supreme Court

\textsuperscript{124} Alsp and Catledge, p. 124; MacColl, p. 256.

\textsuperscript{125} \textit{New Yorker}, XIII (March 20, 1937), 40.
was behind in its work. After checking with the Solicitor General's office and Justice Frankfurter, and finding no evidence of difficulty in the Court's ability to keep abreast of its work, he had turned to the individual who was fully acquainted with the Court's efficiency, the Chief Justice.\textsuperscript{126} Wheeler drew from his notes a letter from Hughes questioning the plausibility of the proposal and defending the efficiency of the present High Tribunal. The Chief Justice's letter said that not only was the Supreme Court fully abreast of its work, but the appointment of new justices would only impair efficiency. Hughes admitted that the Supreme Court was slow, but he maintained that the delay was because of the liberal acceptance of all petitions, a necessity for protection of the common man. Without a liberal review of all requests, Hughes asserted, only a rich man would have the right of appellate courts. To increase the judges and divide the Court was not the answer, according to the letter, because these cases, in particular, were too important to be decided by only a part of the Supreme Court.\textsuperscript{127} After reading the letter, Wheeler continued his testimony by criticizing the administration for giving false information concerning the status of judicial efficiency. He ended his testimony by warning the Committee that an appointment of six judges

\textsuperscript{126} \textit{Hearings}, p. 437.

\textsuperscript{127} \textit{Ibid.}, p. 483-491.
after World War I would have meant "the Bill of Rights would have been suspended" because of the hysteria of a conservative administration.\textsuperscript{128}

As the March 22 testimony drew to a close, it became obvious that Wheeler had accomplished quite a feat. He had taken the administration by surprise, destroyed Cumming's testimony, and created fears concerning the danger of establishing a dangerous precedent. The real effect of Hughes' letter was tremendous. Indeed, later historians and contemporary observers felt that the turning point of the campaign was the Chief Justice's letter.\textsuperscript{129} Perhaps Ickes established the best point when he commented that the letter only proved a failure in administration tactics; the President should have rested his case on needed New Deal legislation and not on Court reform.\textsuperscript{130}

Realizing the implications, the liberal press was furious. Hughes was accused of violating the bounds of judicial propriety by hinting that the proposal was unconstitutional and by testifying in a political matter.\textsuperscript{131} Discontent was

\textsuperscript{128}\textit{Ibid.}, p. 499.


\textsuperscript{130}Ickes, \textit{Diary}, II, 103-104.

also evident among the ranks of the justices themselves concerning the propriety of the Chief Justice's letter. 132

The conservatives were jubilant over the outcome of Wheeler's testimony. They did intensive research into the accusation that the Court was behind in its work. Their findings proved, at least to the anti-proposal forces, that the plan was simply a devious way to pack the Court and inaugurate one-man control of the government. The conservatives seized every opportunity to point out the effects of one-man government, by petitions, speeches, and the press. 133

Following Wheeler's appearance, the opposition began to offer a whole array of experts to contradict like authorities supporting the administration. Edwin M. Griswold of Harvard University Law School charged the reason for the failure of the New Deal legislation was the emergency drafting technique used by the administration. 134 President Harold W. Dobbs of Princeton University condemned Roosevelt's plan as being too pragmatic, and announced that he preferred instead a constitutional amendment. 135 Dean Young B. Smith of Colgate maintained there was no guarantee that the President's plan would

132 George Creel, "If the Court Please," Collier's, XCVII (May 8, 1937), 22; Mason, Stone, pp. 805-806.

133 Congressional Record, 77th Congress, 2nd Session, p. 3330.

134 Ibid., pp. 585-605.

135 Ibid., pp. 611-628.
solve the problem of five-to-four decisions.136 John Knox, United States District Judge from New York City, defended the Court as a protector of civil rights.137 On religious and theological grounds, Reverend W. B. Harvey, pastor of the Trinity Baptist Church, Oklahoma City, attacked the proposal. He maintained that to limit the Supreme Court would limit Christ, because "millions of our citizens have a conviction that our Constitution comes from God."138

The other attacks on the proposal over the 140-odd days were varied. Generally, the strategy of the opposition was to offer a whole host of witnesses, not only to gain newspaper space, but to challenge the experts of the administration with authorities of their own on the same points. For example, to show the farmers supported the Court, the opposition called E. H. Evanston, president of the Farmers Union; Louis J. Taber, Master of the National Grange; and William Hirth, a prominent farm editor.139 The anti-administration forces called twelve witnesses on constitutional law to refute the intellectual proponents of the proposal. Besides the ones already mentioned, the committee called such famous political scientists

136 Ibd., pp. 717-748.
137 Ibd., pp. 1380-1385.
138 Ibd., p. 243.
139 Ibd., pp. 519-537, 656-679, 684-691.
and historians as James Truslow Adams, Dean Edwin Borchard, Dean Henry M. Bates, and Paul E. Andrews. To protest against Roosevelt's statement that liberals should support the proposal as a New Deal venture, the opposition called Raymond Moley, Oswald Garrison Villard, and William Lemke. Ending with an appeal from the Daughters of the American Revolution for preservation of the sacredness of the Court, the hearings drew to a close on April 23, 1937, with all but the most adamant of senators growing tired and bored. Most observers agreed that the volume of testimony might have had great value in educating the people, but they often asked if it had any influence at all on the committee's final vote.

Five days after the committee adjournment, Roosevelt went fishing in Mexico. The New York Times editorially wondered if the trip was a vacation trip or a strategic withdrawal. If the withdrawal was strategic, it was the wrong choice for a battle maneuver. Corcoran reported that twelve of fourteen senators who might have responded to the President's influence were not swayed. They could not be influenced to support the

---

140 For constitutional law testimony, see ibid., pp. 715-750, 885-915, 1009-1028, 1131-1158, 1233-1304, 1441-1452, 1717-1750, 1757-1776.

141 Ibid., pp. 539-656, 1028-1040.


143 Ibid., April 23, 1937.
administration without personal pressure by the President. The proposal was becoming critical, and Roosevelt was fishing in Mexico baiting the wrong hook.

On May 18, 1937, Roosevelt's plan received two major blows. On this day the Judiciary Committee issued an unfavorable report; seven Democrats joined three Republicans to defeat the proposal ten to eight. The committee pointed out that the plan would not really obtain its stated objective. The committee pointed out, also, that the plan meant, in effect, that Roosevelt was coercing the judiciary to force them to accept his political philosophy. The attempt of the administration to force the Court to agree to certain political views, according to the majority of the committee, was contrary to the spirit of the Constitution. For these reasons, the Judiciary Committee issued an unfavorable report.

On the same day that the administration received a setback in the form of an unfavorable report, they received a second blow to their hope for the Court bill, the resignation of Van Devanter from the Court. At the same time, Roosevelt received no support from a committee of which the majority were Democrats, and he was given the right to appoint one justice. Contemporary observers labeled the combination of

144 Ickes, Diary, II, 142.
145 Congressional Record, 75th Congress, 1st Session, p. 5639.
these two events as a paralyzing blow to the administration cause. The right of appointment of one justice could be construed as a partial victory for Roosevelt, which made the Court proposal now unnecessary. 146

The month of April saw other blows leveled against the President's plan. The first came with the upholding of the Wagner Act by the Supreme Court. In National Labor Relations Board v. Jones and Loughlin Steel Corporation, the Court not only quelled any labor support that Roosevelt might gain, but it seemed to warn of a switch in judges' opinions. 147 Other decisions following the Wagner opinion appeared to uphold the viewpoint of a liberal switch of the Court. The High Tribunal upheld the Social Security Act, a revised Frazier-Lemke Act, the Washington Minimum Wage Law, and other New Deal social legislation. 148

There were definite reactions to the rash of pro-New Deal decisions. Commentators argued that the new decisions proved that the Court had changed its political viewpoint. The change in the Court left the impression that Roosevelt now

146 Jackson, Judicial Supremacy, pp. 192-193; Farley, p. 83.


had a liberal court and, hence, there was no need to pack the Tribunal. The battle changed from Roosevelt versus an old guard Court to the President versus Congress.

On the other hand, the President was not satisfied. He, and most of the other administration forces, felt that the Supreme Court was still not reliable enough. The administration asserted that, after all, the Wagner decision was only a five-to-four decision, and the Tribunal's action proved what they had been asserting all along—that the judiciary was engaged in political maneuvers. The President agreed with the rest of his forces that a change was still needed. However, there was disagreement on the amount of change needed. Roosevelt still refused to compromise. At a press conference, he intimated that he still wanted the original proposal, and he informed Cabinet members that there was still a need for a complete bill.

In all probability, the Court proposal was not the complete reason the justices had a change of political views. Even though the Court is not divorced completely from politics, other factors might have led to the seeming change in the tenor

---


150 *Congressional Record*, 75th Congress, 1st Session, pp. 849, 2347, 2350.

of decisions. The moral victory of Roosevelt in the 1936 election, and the severe labor plight of 1936 and 1937, proved the necessity of social laws or strengthening, with better drafting, of ill-planned early laws of the New Deal. All may have contributed to the Court decision.\textsuperscript{152} Regardless of factors involved, however, the average person believed that there was a swing to a New Deal Tribunal. This belief hurt Roosevelt's plan for a continued effort for complete support of his proposal.

Despite mounting opposition strength, the President still refused to accept a compromise during the months of April and May. Corcoran offered several times to compromise for a lesser number of justices, and the President always refused.\textsuperscript{153} When he returned from his May fishing trip, he publicly announced that he intended to continue to carry the Court struggle for the complete proposal.\textsuperscript{154} By the end of April, the "handwriting was on the wall," unless Roosevelt were to compromise.\textsuperscript{155} The President's continued effort through May was to mean that the administration was to receive no justices at all.


\textsuperscript{153}Ickes, \textit{Diary}, II, 75.

\textsuperscript{154}\textit{The New Republic}, XCI (May 26, 1937), 1.

\textsuperscript{155}Farley, p. 84.
As the administration's attitude toward compromise hardened, the effect was not only to eliminate any chance for added judges, but also to injure the New Deal. Important social legislation in Congress needed to be passed, but the Court struggle absorbed all of the energy that might have been used to pressure its passage. Rather than New Deal legislation, Roosevelt still listed court reform as the major needed accomplishment of the administration.\textsuperscript{156} Although Corcoran wanted the court bill to be left dormant until a more favorable time, and more pressure applied for needed New Deal legislation, Roosevelt refused to agree. Ickes believed the President's move was a disastrous defeat for the social program.\textsuperscript{157}

After the Judiciary Committee's report, the President began a concentrated move to apply pressure on the senators who were not supporting the proposal as he thought they should.\textsuperscript{158} Thus, individual senators were caught between administration pressure and popular appeal. One senator pointed out that he could not change his vote after a personal conference with the President—"it would "kill him politically."\textsuperscript{159}

\textsuperscript{156}Commonweal, XXVI (July 16, 1937), 295; Rosenman, FDR Papers, VI, 213-220.

\textsuperscript{157}Ickes, Diary, II, 176.

\textsuperscript{158}Farley, p. 78.

\textsuperscript{159}Michelson, p. 174.
Congressional spokesmen were not in the mood to respond to presidential efforts. Corcoran's contempt for Congress, the failure to be notified beforehand of the impending proposal, the obvious lack of popular support, and the refusal of the President to allow congressmen to conduct the campaign—all militated against party loyalty.\footnote{160}{Collier's, XCIX (May 5, 1937), 30; Congressional Record, 77th Congress, 1st Session, p. 661; New York Times, July 23, 1937.} In spite of warnings of a party purge, Democratic senators failed to rally around Roosevelt's cause, and the defeat of Roosevelt was later described as one of the most disastrous defeats ever suffered by a great party leader.

In the early days of June, the President decided that a change in strategy was now due. The Gallup poll showed that 60 per cent of the people were against the proposal.\footnote{161}{New York Times, June 7, 1937.} The President decided that the answer to his problem was to turn the campaign over to Senator Robinson. He wanted the Senate leaders to try for a compromise on the court plan and to offer a full slate of New Deal legislation, farm, labor, taxation, and other needed reform. Roosevelt thought that with control in Congress, a request for a two-judge compromise, and needed social legislation, he could once more align his wayward supporters behind his banner.\footnote{162}{Ibid., June 5, 1937.}
On June 4, 1937, Robinson was requested to come to the White House, and Roosevelt placed the proposal on a personal basis. He explained to the Democratic leader what he was willing to accept as a compromise. Pointing out the need for a Court change, he asked that New Deal legislation be introduced into Congress for pressure. Using as a lever Robinson's desire for an appointment to the Court, the President told Robinson that if there was to be a "bride, there must be a bridesmaid." The general concensus, although Ickes said Roosevelt asked Robinson for four judges, was that he would be satisfied with the power to appoint two new justices. Roosevelt's insistence upon a compromise measure from Robinson was personal and demanding, because it was a well-known fact that the majority leader had ambitions to be appointed to the vacant seat. He had been promised an appointment as early as 1933, and most of the press speculated that it was just a matter of time until the White House announced him as the next justice. Robinson had been uneasy concerning the appointment, not only because it had not been forthcoming as was expected, but also because the President had promised that new liberal justices would be appointed to

163 Ickes, II, 153.
the Court, and the liberal press was charging that Robinson would not fulfill the administration's need.\textsuperscript{166}

At his press conference the next day, Roosevelt said that he was interested primarily in a "broad court reform," and the number of justices was a "mere detail." When Robinson was asked to elaborate, he said he "might" offer a compromise amendment. Thus, the stage was set for the final battle on the proposed Court change.\textsuperscript{167}

The amendment was not long in forthcoming. It fixed the size of the Supreme Court at nine, but it stipulated that for all judges over seventy who refused to retire, one new justice could be appointed as long as no more than one was appointed per year. The amendment also limited to six the number of justices that could be appointed to equal those over seventy years of age. Most of the less controversial material was allowed to remain.\textsuperscript{168}

The new attempt to gain some semblance of Court control resolved itself into a personal campaign by Robinson. Garner retreated to Texas, causing Roosevelt to wonder, "Why in the hell did Jack leave at this time?"\textsuperscript{169} Robinson, meanwhile,

\textsuperscript{166}The New Republic, XCI (June 7, 1937), 231; The Nation, CXLIV (May 29, 1937), 607-608.

\textsuperscript{167}New York Times, June 5, 1937.

\textsuperscript{168}Congressional Record, 75th Congress, 1st Session, pp. 6740-6741.

\textsuperscript{169}Farley, p. 85.
called on senators individually, asking for support for the amendment as a personal favor or as evidence of party loyalty. Most senators knew of his promised appointment and realized the importance to him of compromise support. Roosevelt backed Robinson with personal calls, patronage promises, and even individual contact with Wheeler, asking the opposition not to defeat the compromise measure.

Nevertheless, after Robinson introduced the compromise on July 2, 1937, the proceedings of the next several days were the stormiest in years. Robinson roared threats, swore vengeance on defaulting Democrats, attacked the Court, and defended the President. All through his speech, he was interrupted with numerous derogatory comments from the opposition. Once warning Wheeler that he could tolerate no more interruptions, he said: "You know you have not got the votes to defeat us; therefore, you are starting to filibuster." On another interruption by O'Mahoney accusing Robinson of attempting to throttle debate, the two almost came to blows.

170 Michelson, p. 177; Farley, p. 83.


172 Congressional Record, 75th Congress, 1st Session, p. 6796.

173 Ibid., pp. 7033-7034.
The opposition used the familiar arguments which had been prominent all through the campaign.\textsuperscript{174} There was a proposal to allow the plan to be put off until the next session, and there were threats of a filibuster.\textsuperscript{175} Probably, the amendment's opponents were wary of a filibuster, however, because Robinson warned of an extra session, should delaying tactics be used to prevent a vote.\textsuperscript{176}

On July 13, Robinson remained away from the Senate while Bailey continued speaking against the amendment. The next day he was found dead of a heart attack. Roosevelt told Farley that "Joe's death was a heavy loss," and maintained that for his efforts, "I was going to put him on the Supreme Court for it."\textsuperscript{177} The death of Robinson virtually ended any chance for the amendment; for, with his death, many senators who had given Robinson their word to support the proposal felt that their personal pledges had expired.\textsuperscript{178}

With the majority leader's death, pressure began to mount on Roosevelt to end the Court struggle. Wheeler said that to continue the fight would be to "fight against God."\textsuperscript{179}

\textsuperscript{174} For example, see \textit{ibid.}, pp. 7034-7054.

\textsuperscript{175} \textit{Ibid.}, pp. 7141-7147.

\textsuperscript{176} \textit{New York Times}, July 7, 1937.

\textsuperscript{177} Farley, p. 89.


\textsuperscript{179} \textit{Ibid.}, July 15, 1937.
Roosevelt was adamant, however. He called Alben Barkley, Democratic Senator from Kentucky, to his office, chided the opposition, and pointed out that it was the duty of Congress to limit the Court. He sent Corcoran to ask Jesse Jones, Secretary of the Treasury, to put political pressure on the senators. Jones pointed out that, by this time, Congress was too embittered with the White House to compromise, and it was too late to secure even two appointees. However, he maintained that he could have arranged for a compromise earlier in the campaign.

It still appeared as if Roosevelt had hopes of securing some sort of compromise. Perhaps he might have had the necessary votes to gain the amendment, had he not intervened in a congressional struggle between Barkley and Harrison for majority leader. Both had about an equal number of supporters, but Corcoran decided that the Court plan had no chance of success if Harrison won the majority leadership. He and the President began to place pressure on various senators to vote for Barkley. Roosevelt publicly professed neutrality but asked Farley to call boss "Ed" Wynn to put pressure on

---

132 Ickes, *Diary*, II, 164-170.
Senator Dieterich of Illinois. The deciding issue came in a personal letter to Barkley, telling him to continue to fight for the Court reform. The now famous "Dear Alben" letter was almost an open endorsement of the Senator. Probably, the letter was the leading factor in favor of Barkley, because he won by a one-vote margin, thirty-eight to thirty-seven. However, the election of the majority leader, aided by administration pressure, alienated the rest of Harrison's followers and ended any chance for compromise.

Garner was disturbed by Roosevelt's intervention in behalf of Barkley, saying that any chance of a compromise was now ended. When Pittman, Barkley, and Harrison were called to the White House for a party conference, Roosevelt asked Garner how it was coming along, and Garner asked if the President wanted the bitter truth. Roosevelt said "yes," and Garner answered: "All right, you are beat; you haven't got the votes."

---

183Farley, p. 92.
184Roosevelt to Alben Barkley, July 15, 1937, Rosenman, FDR Papers, VI, 306-308.
186Farley, p. 92.
Thus ended any chance for the Court plan. Garner called Wheeler and said that the administration was ready to abandon the struggle. The two agreed that the plan should be re-committed to the committee, and the administration should agree not to attempt to limit the Court. On July 27, 1937, this was accomplished.188 Wheeler remarked a few days later that the compromise must have shown the President that he had to consult the senate if he planned to pass legislation.189

In retrospect, there was little doubt that the defeat of the Court plan was partially due to Roosevelt's inadequate management of the campaign. However, there were other factors equally as important. The President was defeated on some occasions by superior opposition maneuvers. A good example of shrewd opposition politics was the Chief Justice's letter that not only destroyed Cummings' testimony, intimating that it was unconstitutional, but took the administration with such surprise that they had no answer. Another excellent maneuver was the coincidence of the resignation of Van Devanter with the adverse Judiciary Committee report. These two newspaper releases on the same day probably pointed out to the common man that the President had no right to change the court; but, by a quirk of fate, he received one judge. The average man

188 Time, XXX (August 2, 1937), 11; Congressional Record, 75th Congress, 1st Session, p. 8515.
189 Ickes, Diary, II, 172.
might have thought Roosevelt should be satisfied with this one controlling appointment.

The Wagner Decision and the supposed switch in the Court to New Deal philosophy affected Roosevelt's proposal. The Wagner decision ended labor support and made it appear to the public as if the Court would now support liberal legislation. There was more than a Court proposal to cause the change. The Supreme Court might have seen the plight of the country, the sit-down strikes, or simply that laws were better written. From the beginning, it appeared to be obvious that the McGuffey coal decision and the defeat of the A.A.A. were simply because of poor drafting. The real effect, irregardless of the reasons for a change, was that the people believed that the Court had accepted the New Deal philosophy. The citizens began to believe that the Court had become liberal, thus defeating the administration proposal.

However, there were broader aspects than mistaken strategy and Hughes' political astuteness which defeated the proposal. Other strong Presidents have made almost as many battle errors and still won the war. The real reason for failure was the inability of the administration to stir public support. No matter how bitterly a senator detests an undesirable issue, if his constituents demand his support, it is usually forthcoming. The congressmen knew public support was not behind the proposal. Letters, newspapers, periodicals, personal
contacts, lack of popular enthusiasm, and polls—all showed the failure of Roosevelt to rally public opinion. The reason that a grass-roots movement supporting Roosevelt's plan failed to materialize was simply because the populace did not want a pressured Court change; people might criticize the Court, but the President did not have that right. The reason an administration proposal was doomed to fail was because of the mythical belief of the average man in separation of powers. America's veneration of the Constitution was violated by the thought of presidential control of the Court.

Why had earlier presidents been able to violate the sacredness of the separation of powers doctrine and not Roosevelt? The answer was that simply never before had the people a chance to have the violation of Americanism pointed out by so many people so many times. In other words, mass media—the press, radio, and other methods of communication—informed too many, too often, for Roosevelt's complete plan to have been successful. Roosevelt's only chance to control the Court was by compromise, and this he refused. Probably never again will a President even have an opportunity to bargain for judges, unless mores and circumstances change.

Thus, the Court stood firm in its decision. Hughes refused to bow to presidential pressure, and the effect of the attempted Court packing was on Roosevelt's prestige. He lost the Court battle. Five-to-four decisions, switch in Court
philosophy, and liberalized justices were all overemphasized. The President went to war girded with a proposal to change a High Tribunal, and was defeated. The best example of his defeat was his determination to purge those in 1938 that did not support him. He failed here, also.

Some thought Roosevelt entered the struggle with an advantage, but they overlooked the power of public opinion. Nevertheless, contemporary observers were right in one analysis: a master politician misused all the advantages at his disposal, while a judge not only wielded well those he had, but also invented others to win a complete victory.
CHAPTER IV

SEPARATE BUT UNEQUAL

The Court triumphed over Roosevelt's plan, and then it was forgotten during the furor of World War II. The early spring of 1954 found the order of supporters and opposition to the High Tribunal changed from the late thirties. The South, traditional supporters of the Court, became violent antagonists to the judges, and new supporters rose from the ranks of recently defaulted liberals.

The change in opposition occurred on May 17, 1954, when the Supreme Court of the United States issued a unanimous decision that struck at one of the foundations of the South's social system—segregation in public schools. In the case of *Brown v. Topeka Board of Education*, the Court ruled unanimously that segregation of pupils because of race was inherently unequal; hence, the segregation of Negroes was a violation of the Fourteenth Amendment. This judicial opinion affected seventeen states, and it was to be re-argued in the fall on the question of the mechanical process of desegregation in the individual areas.¹

Since the Supreme Court was to be criticized violently in the following years, the justices who were members of the

Court at the time of the decision assumed a new importance. On "Black Monday," as southern reactionaries were to call May 17, 1954, the Chief Justice was Earl Warren, an ex-
Republican governor and administrator from California.2

The Associate Justices, in order of their ascendancy to the bench, were Hugo Black, Alabama Democrat; Stanley Reed, Kansas Democrat; Felix Frankfurter, Massachusetts Democrat; William O. Douglas, Connecticut Democrat; Robert H. Jackson, New York Democrat; Harold H. Burton, Ohio Republican; Tom C. Clark, Texas Democrat; and Sherman Minton, Indiana Democrat. Thus, three judges were from the North, two from the South, three from the Midwest, and one from the Northwest. The political background of the Court appeared to be Black and Douglas, New Deal liberals; Warren, a moderate; Frankfurter, Jackson, and Clark, difficult to classify since they were both liberal and conservative about various issues; and Reed, Burton, and Minton, definitely the conservative wing of the Court. As a result, one may discern that all philosophies of government were present at the time of the unanimous ruling.3


3 Fred Rodell, Nine Men (New York, 1955), pp. 267, 307-
The first southern reaction to the Court was not as hostile as one might suppose. Most southern leaders felt that it might not be wise to prepare a known course of resistance until the Court ruled on the mechanics of desegregation the following October. The South was not yet certain how the decision would be enforced, if it were to be enforced. It appeared that the southern leaders did not want to jeopardize their position by radical statements until the Court issued its extending opinions on desegregation. The southern spokesmen pointed out that the Supreme Court's recognition that it would take time to alleviate the racial difficulties was good; and that, after all, enforced integration would solve no problems; the Negro would only be hampered by a new wave of racial prejudice.

The majority of southern politicians appeared to exhibit a mixture of both relief and defiance. The defiant attitude was particularly noticeable in the deep South. Governor Thomas of Virginia called for a meeting of the governors of segregation states at Richmond, Virginia, on July 10, 1954. The meeting was called, supposedly, to provide an opportunity for his colleagues to express their disapproval of integration. However, most of the governors had an observant

5Ibid., May 19, 1954. 6Ibid., May 26, 1954.
rather than a belligerent attitude; only some of the governors from the deep South were obviously perturbed. Governor Herman Talmadge of Georgia shouted that the decision "reduced the Constitution to a mere scrap of paper . . . the Court had lowered itself to the level of politics," but, as one contemporary pointed out, Talmadge was more depressed than defiant. The other governors seemed to be of the opinion expressed earlier by Governor Allan Shivers of Texas, that the problem was not insurmountable and that it would be wise to avoid any outburst of racial demagogy on the local level. Actually, the most noticeable feature of the meeting was inaction. There was no unified movement on the part of the governors to criticize or approve the Court, or to avoid integration. This lack of unification was primarily because they were waiting to learn how and when the Brown decision would be enforced.

The decision on how soon desegregation should begin was delayed both by an unfortunate quirk of fate and by southern politics. Justice Robert Jackson died late in 1954, and the Court postponed indefinitely the arguments on desegregation because the vacancy might lead to a four-four split on the method of compliance to the Court's order. The segregation

---

8Facts on File, XIV (July 13, 1954), 557.
issue began to enter politics when President Dwight Eisenhower announced that his choice to replace the deceased Jackson was John Marshall Harlan, a New Yorker who had served on the Court of Appeals. The southern senators immediately rallied against the appointment, an action on their part to delay the final ruling on integration as long as possible. Senator James O. Eastland of Mississippi questioned Harlan about his feeling toward the Supreme Court's legislative power. The Georgia Legislature called Harlan's proposed appointment an insult to the South, because he was reared in the geographic area that wanted to amend the Constitution by judicial decree.\textsuperscript{11} The southern senators were criticized vigorously for their delaying tactics. The stalemate ended after both protests by various liberal periodicals and presidential criticism of southern intentions. For further pressure, the Senate used its powers of approval of other patronage positions to gain Harlan's appointment to the Supreme Court bench.\textsuperscript{12}

A brief had been filed, previous to the Harlan debates, by the United States Justice Department. The Justice Department asserted that desegregation should be begun as soon as possible and there should be no local option, since the Supreme

\textsuperscript{11}Facts on File, XV (February 3-9, 1955), 445.

Court had ruled the institution of segregation unconstitutional.\(^{13}\) The National Association for the Advancement of Colored People had filed briefs nine days earlier, asking for total desegregation by 1955 or 1956.\(^{14}\) Thus, it was little wonder that southerners began to stir uneasily concerning the forthcoming decision.

The High Tribunal announced on April 11, 1955, that they would open hearings on methods for carrying out and enforcing racial integration. After a four-day argument by both sides and a long deliberation, the Court ruled that desegregation must begin with "all deliberate speed."

The Court had defined the desegregation deadline in the vaguest of terms, but to the South the intent was clear. The South must begin to integrate their school systems immediately. The small murmurs of isolated protest that began with a whisper now evolved into a roar from all the South until, as one modern critic of the Court so aptly stated: "Both sides have been shouting at each other so loudly that it is difficult to hear the facts through the din of name-calling."\(^{16}\)

\(^{13}\) *New York Times*, November 25, 1954.


Once the southerners decided that the original 1954 decision was not a nightmare but a ruling of the highest court in the land to be enforced, they began to criticize the Court and the justices severely. The criticism, spurred on by political demagogy, racial intolerance, and refusal to comply, took the form of definite but closely interwoven arguments.

The first set of arguments may be classified as those applied to the judges, alleging political bias and alliances. One of the major arguments of this particular classification was that the Court was a political instrument used by the North to subject that area's view on the South and to appeal not only to the Negro votes below, but also to those located in northern cities above, the Mason-Dixon Line. The segregationists pointed out that Eisenhower had made campaign pledges to abolish segregation in the District of Columbia; and he was not only accomplishing his goal, but also asserting his influence upon the Court to end segregation in the South for political gain.17 The segregationists pointed out further that Warren had been promised an appointment to the Supreme Court on the basis of his control of the large, electoral delegation to the 1952 Republican Convention from California. They further asserted that, when Chief Justice Vinson died, the President had asked Warren not to force the

17 Blaustein and Ferguson, pp. 13-14.
executive branch into bestowing upon the ex-governor the mantle of leadership of the Supreme Court, but to wait until an associate justice died or resigned. Warren refused, and he now voted with the liberals of the Court so that Negroes, left-wing intellectuals, and radicals would support him for the presidency in 1960.\textsuperscript{18} An important political figure, ex-Justice James F. Byrnes, asserted that these men had been politicians before they were judges, and they all had paid in political favors for their appointments. He further accused the Court of political bias. When they ruled that sociological conditions had changed in overthrowing \textit{Plessy v. Ferguson}, the Justices really meant that sociological factors had forced the Negro to migrate into northern cities, and the minority was controlling the political balance of important cities and, for that matter, states. Thus, the Supreme Court wanted to appeal to a block of minority voters for the Republican Party.\textsuperscript{19}

The rest of the arguments varied in detail, but they followed this general pattern. As Senator Sam T. Erwin, Jr., pointed out, the Supreme Court was an instrument of the North

\textsuperscript{18}Harold Lamb Varney, "Ike's Worst Appointment," \textit{American Mercury}, CXXXVII (August, 1953), 5-13.

\textsuperscript{19}"The Supreme Court Must Be Curbed," \textit{United States News and World Report}, XXXIX (May 18, 1956), 56.
searching for a way to subjugate the South to evergrowing big government. The blame for the decision of the Court to extend government into private state affairs and into the school system was either placed ungraciously upon President Eisenhower for the appointment of Chief Justice Warren, or it was delegated to ex-President Franklin Roosevelt for the appointment of what one senator termed as "Left Wing Brain-washing New Dealers on the High Bench." Whichever party was given the blame, the southern observers agreed that the Court had veered sharply to the left.

To substantiate the argument of a liberal plot to subjugate the South to leftist radical dogma, the opponents of the decision pointed out that Frankfurter, the prophet of centralized government, was on the bench. Southerners accused him of being the driving cog behind the attempt to establish the central government's authority over state rights. The segregationists charged that Frankfurter was the one who influenced Warren to make the original decision. They proclaimed the basic issue was not integration or

---


23 The Cross and the Flag, XVI (February, 1953), 15.
segregation, but the right of sovereign states versus the Federal Government. 24 One Federal Judge reflected that the whole decision was based on the idea of establishing a centralized bureaucracy in Washington. 25 Southern reactionaries alleged that a true bureaucracy in Washington had to be supported by a New Deal Court to enforce liberal ideology on the South.

The second group of arguments dealt not so much with the politics of the judges, but with the charge that the Supreme Court was trying to usurp the power of other branches of the government or to overthrow previous decisions in a move to force the Court's own ideology upon the South. The Court had overturned 105 years of judicial precedent and the Plessy v. Ferguson decision to rule in favor of integration, the reactionaries said. The segregationists pointed out that the Court itself had said that they were basing the Brown decision on a change of sociological factors since the separate but equal ruling. 26 The decision meant the Court was overthrowing constitutional law to write their own liberal ideology into the Constitution. Conservatives pointed out


26 Eugene Cook, "The South Views the Supreme Court," Look, XXII (January 15, 1956), 209-211.
that if one had to choose psychology and sociology to verify a constitutional ruling rather than law, the decision must be wrong. Hence, the invalid decision was a shock to governmental stability because it used the South for psychological experimentation with the Court's own false philosophy.  

As Senator Talmadge asserted, these "irresponsible men were wrecking the law" on the basis of sociological "depraved writings" of Communists to coerce the South into accepting their New Dealer's concept of sociology.  

What the conservatives were attempting to prove was that the Supreme Court, by voiding the separate but equal ruling on sociological premises, had legislated a law, rather than ruled on a constitutional principle. The South's next accusation was that the Court, by basing the decision on, as one federal judge said in criticism, modern psychological knowledge, had ceased to serve its function as designated by the Constitution and was usurping congressional power. The segregationists asserted that not only was the Court violating the Constitution by legislating false ideology, but that they knew what the decision would be before the arguments were

---

27 Alfred J. Schaweppe, "The Court Rewrites the Constitution in Its Own Image," American Mercury, LXXXVIII (February, 1959), 60-64.  
28 The Cross and the Crescent, XVII (March, 1957), 29.  
29 Dallas Morning News, December 20, 1956.
presented, because they had asked the United States Judicial Department to file briefs presenting cases on why the Supreme Court did not have to abide by the *Plessy v. Ferguson* decision.\(^\text{30}\)

The point that the Supreme Court violated the Constitution by legislating illegally and by being immoral in that they knew they were legislating before they ever considered the arguments led to the third type of criticism. The third order of criticism centered around the charge that the Supreme Court violated various articles of the Constitution or amended the Constitution in rendering the Brown decision or that certain amendments to the Constitution themselves were illegal.

The first amendment that the southern constitutional authorities accused the Supreme Court of misinterpreting was the Fourteenth, upon which the Court ruled segregation inherently unequal. The segregationists said that the framers of the Fourteenth Amendment had no intention of prohibiting segregation. As evidence, southern spokesmen pointed out that only five states abolished segregation in the public school system when they ratified the amendment.\(^\text{31}\) Southerners again argued that the Court admitted that nowhere in the Fourteenth Amendment was there any mention of segregation, and


they proclaimed that nowhere in it was there intended to be any discussion of desegregation of a state. It was further asserted that not only did the Court misinterpret the Fourteenth Amendment, but they also failed to realize that equal protection of the laws also meant the inherent right of one man to restrict his school system to whites as long as there were two of equal stature. Thus, the Court itself was violating the Fourteenth Amendment by not granting the South equal protection under the law. Segregationists asserted that the framers of the Constitution had recognized separate facilities for Negroes and whites, proving the original Constitution had no intention of integration. Hence, the Supreme Court was violating the Constitution itself.

Southern leaders further stipulated that even if grounds for integration could possibly be construed into the Fourteenth Amendment, it would make no difference because the Fourteenth Amendment and the Fifteenth Amendment were unconstitutional, anyway. They stated that if the ten southern states had not been coerced into ratifying these amendments, they would have failed. Furthermore, the Supreme Court should


34 Walter F. George, as quoted by The Cross and the Flag, XV (February, 1956), 31-32.
have realized that these amendments were founded on an "un-American coercive spirit," making the amendments invalid. It followed logically that, if the amendments were invalid, the decision must be unconstitutional. 35

The other protest revolved around two other articles of the Constitution, the Tenth and the Fifth. Southerners charged that the Tenth Article delegated all rights not reserved for the Federal Government to the states. This meant that it was illegal to rule upon segregation in the public school system, since the Constitution did not specify who should educate the citizens, and education must be a state prerogative. Southerners proclaimed that the High Tribunal was overstepping their constitutional authority by amending the original document as they saw fit. 36 If the argument that the Supreme Court amended the Constitution by illegal action was valid, the Court must also have violated the Fifth Article, which establishes methods and procedures for amending the Constitution. 37

The argument encompassing amending the Constitution became particularly vociferous after the Little Rock decision.


37 The Cross and the Flag, XVII (February, 1958), 7.
on September 29, 1958. The Court ruled that Negroes must be re-integrated into Little Rock public schools in compliance with the Brown decision. Furthermore, anyone who attempted to illegally avoid integration was liable to fines and/or imprisonment for contempt of court. Of course, this decision meant that the judiciary had the right to enforce integration with Court orders to protect the original Brown decision. Southerners charged that "reconstruction of rule by force had now returned from United States history." Congress had the right to provide for enforcement of the Fourteenth Amendment, but the Supreme Court had amended the Constitution to mean that the judiciary was the driving force behind the amendment, conservatives asserted. Segregationists charged that nowhere else was there a clearer example of a judicial decision violating the Federal Constitution by illegally amending the Fourteenth Amendment. The critics of the Court summed up the charges by saying that what the Supreme Court had done was to assume the legislative function of government to restrict illegally the power of states. They had also attempted to enforce their previous erroneous decision by seizing the right to amend the Constitution in

39 Lynn Landrum, "Reconstruction II," ibid.
40 Blaustein and Ferguson, p. 71.
violation of the Fifth Article and had backed this illegal seizure by taking police power away from Congress.⁴¹

Then, to further confuse matters, it was argued that the Supreme Court violated the Bill of Rights by doing away with trial by jury. This accusation grew from the decision of the Court to enforce integration by contempt actions. The southerners' charges seemed justified because in such action there was no jury to decide guilt or innocence, only a federal judge. The Supreme Court violated the very epitome of Anglo-Saxon Law—the right of a fair trial by a citizen's peers.⁴² To enforce these illegal actions and decisions of the Supreme Court, the President had spent taxpayers' money to send troops to enforce a decision of the judiciary, not the law. Hence, the critics asserted that the executive branch wrongly enforced an illegal decision that was accepted as law. They charged that only Congress could make a law, a function outside the province of the executive or judicial branches of the government.⁴³ What this meant, according to the critics,


was that the United States no longer had a government of law, but a government of men; nine old men who were "drugged with the lotus of socialism." These old men had illegally legislated and amended the Constitution and then enforced it, unjustly, with arms.

The final type of criticism directed toward the Supreme Court took the form of a challenge of the personal integrity and morals of the judges. It has already been pointed out that the Court was criticized for being composed of politicians. Southerners went even further by asserting that the Justices did not have the ability to rule on constitutional law because they had no previous experience in law. Critics alleged that the illegal action of the Court was a result of the fact that no Supreme Court Justice had ever served as a judge of a court of general jurisdiction, either state or federal, nor had they served on any appellate court of the state. Also, only two of the nine members had been a judge on a federal court before being elevated to their present status.

44 Blaustein and Ferguson, p. 7.

45 David Lawrence, "Is It a Constitution Or Is It a Sham?" United States News and World Report, XLIV (March 7, 1953), 127-128; David Lawrence, "Famous Judge Rebukes the Supreme Court," ibid., pp. 108-109.

46 The Cross and the Flag, XV (October, 1956), 30.
two of the nine had even practiced law for an occupation. They questioned how one could expect any other ruling from such inexperience.

Southerners also accused the Chief Justice of not having the experience to guide the Court, asserting that he followed the leadership of Frankfurter. Critics charged that the Chief Justice was not capable of writing the opinions, but that he used Frankfurter, young lawyers, and ghost writers, with these hypothetical sources making Warren's decisions. These "bright young men" were really the powers behind the throne, the southerners charged, and they controlled the destiny of a nation.

Critics pointed out that the reasoning of the Court indicated the inexperience of the young research lawyers who used psychological and sociological points for law in advising the justices. They asserted that the sources used by the justices, such as Gunnar Myrdal, were not only invalid; they were Communist. Lesser sources, such as Theodore Brandel,


48 The Cross and the Flag, XVI (December, 1957), 4.

49 David Lawrence, "Bright Young Men Behind the Bench," United States News and World Report, XLII (July 12, 1957), 45-47.

E. Franklin Frazier, and W. E. Dubois, showed definite Communist tendencies.51 Southerners explained that the Court must have realized the invalidity of their sources, because they would not allow the opposing lawyers to cross-examine the authors.52 The end result, one southern Senator charged, was "irresponsible men wrecking the law" on the basis of "sociological, depraved writings."53

Southern reactionaries went even further by criticizing the justices' moral and religious beliefs. They accused the Supreme Court of being anti-Christian in that the decision violated the teachings of God in aiding the mixing of the races. They asserted that if God "had wanted mongrelized races, he would have placed them on this earth."54 They pointed out that the Supreme Court was anti-American and was playing into the hands of Russia by bringing about the United States' downfall in mongrelizing the races.55 They further stated that the Supreme Court was really anti-Negro, because they were hampering the Negro race. The Brown decision,


55 James F. Byrnes, as cited by Blaustein and Ferguson, p. 9.
the southerner charged, would cause the Negro, particularly the teacher, to lose employment.\textsuperscript{56} Naturally, the southerner assumed that the Negro did not want to integrate, and that outsiders would only hurt individuals and arouse new racial tensions by forcing integration.\textsuperscript{57}

Furthermore, demagogues charged that the Supreme Court was causing the collapse of education in the South by forcing the South to close the public schools to avoid illegal integration.\textsuperscript{58} In places where the South did not close the schools, but obeyed the illegal decision, the charge was that educational standards were still lowered by the mixing of inferior Negro students with superior white ones, thus limiting the capacity of the teacher to develop the superior student.\textsuperscript{59}

To the conservative, the answer was to limit the power of the judiciary. The proposals to limit the Supreme Court took five definite forms. The first of these called for impeachment of the judges. Since the Court had committed the abuse of amending the Constitution, legislating new laws,

\begin{itemize}
\item \textsuperscript{56} \textit{New York Times}, October 22, 1955.
\item \textsuperscript{57} \textit{Dallas Morning News} (Letter), May 23, 1954.
\item \textsuperscript{58} James F. Byrnes, as cited by \textit{Facts on File}, XVI (October 5, 1956), 437.
\item \textsuperscript{59} Harold Lord Varney, "Earl Warren, Ike's Worst Appointment," \textit{American Mercury}, LXXXVII (August, 1958), 12.
\end{itemize}
and being unqualified by either willfully or mistakenly misconstruing the Constitution, the charge was that it must be curbed. Critics of the Court proclaimed that, although the judges had been appointed for life, they could be impeached and convicted of malfeasance in office by a two-thirds vote of the Senate. The right of the Senate to oust the justice was rudimentary, Southerners asserted; if a body had power to bestow a duty, they also had the power to remove the judge. Besides speeches on the floor of Congress by southern senators crying for impeachment, there were two other half-hearted attempts. A lawyer's brief on the Senate's right of impeachment, written by a group of reactionaries, along with a thousand-name petition, was filed with the clerk of the House of Representatives. Another reaction came in the form of southern state legislatures' passing resolutions and mailing them to their Senators, asking for impeachment of the High Court. The resolution of Georgia was a typical


61David Lawrence, "Good Behavior of Judges--Who Defines It," ibid., XLIII (July, 1957), 103-104.

62The Nation, CLXXVII (June 8, 1953), 461.

63The Cross and the Flag, XVII (September, 1953), 16-20; ibid., XVIII (March, 1959), 5.

64Facts on File, XVII (April 18, 1957), 134.
example of these resolutions and briefs calling for the impeachment of five Associate Justices and the Chief Justice. The petition asked for impeachment on the grounds of "high" crimes and "misdemeanors" in favoring the National Association for the Advancement of Colored People, which was a "Communist Front organization" advocating overthrow of the government of the United States. The petition's charge against Black and Douglas was that they had accepted "money and things of value" from the Communist liberals.⁶⁵

Besides the cry for impeachment, other critics wanted a constitutional amendment to protect the southern populace from further encroachments of the Supreme Court. Governor Almond of Virginia first pointed out in a speech before the legislature that such an amendment was needed.⁶⁶ However, other southerners had offered similar resolutions in the Senate.⁶⁷ The general form of the amendment was that it would require the judges to have ten years of appellate experience, be retired when they were seventy, be native born, and be elected from special districts representing all the sections of the country for ten-year, rotating terms. Only the Chief Justice would be appointed for life; however, his appointment

---


⁶⁷ Facts on File, XVIII (September 13, 1958), 410.
would be reviewed by the Senate every ten years, and it would take a majority vote of the upper house to return him to the High Tribunal. The American Bar Association, as well as the Virginia General Assembly, proposed or supported such amendments. The only other type of constitutional amendment proposed was to give states and localities the right to segregate or integrate as they saw fit.

The third suggested method of limiting the Supreme Court may be traced back to John C. Calhoun's idea of nullification. This movement was called the doctrine of "interposition" or the right of a governor to interject his authority between state and national government and to call a ruling of the federal judiciary void. Examples of politicians or legislatures adopting this course of action were Senator Harry Byrd of Virginia; Governor Almond of Georgia; Governor Leroy Collins of Florida; Senator Eastman; and the legislatures of Georgia, Florida, Virginia, and Mississippi. The best example of simply calling the Brown Case void was the statement of the legislature of Mississippi, which pointed out that


the decisions of May 17, 1954, and May 31, 1955, were in violation of the Constitution and, therefore, void in the state of Mississippi. The statement said that, since the Supreme Court had legislated acts that were oppressive and threatened to destroy the constitutional process and substitute the Court's own ideologies, which were foreign "to the soil of our beloved land," the rulings would not be enforced in Mississippi. A copy was sent to Congress, the President, and the Supreme Court.\textsuperscript{71}

Two legislative attempts were made to limit the Supreme Court in Congress. The first of these was the so-called Jenner-Butler Bill. The Jenner Bill was introduced into the Senate to limit the Court in many of its powers. This bill was aimed at the federal attempt at pre-emption of state authority. In particular, the bill said that the Court could not receive appellate cases from state courts dealing with Communist subversion. A motion was made to re-commit the bill to the Judiciary Committee, and the motion passed, forty-one to forty, only after a threatened liberal filibuster.\textsuperscript{72} In the House, the drive to restrict the Supreme Court took the form of the Smith Act. Representative Howard W. Smith of Virginia proposed that no act of Congress could be construed

\textsuperscript{71}Ibid.

by the judiciary as nullifying state laws on the same subject, unless Congress so specified. It passed the House, 241 to 155, but was tabled in the Senate. The bill repassed the House in 1959 but was tabled, and lapsed with the Congress of 1960.73

The congressional move to limit the Supreme Court might reappear after the presidential election of 1960. The danger to the courts might appear in a coalition of Republican and Southern Democrats who could accuse the High Tribunal of being pro-Communist. Such a southern accusation might attract northern conservatives that would rebel against legislation to limit civil rights but would support an anti-Communist move.74

Perhaps, such attempts to curtail the Court were aided by the silence of federal judges; 42 per cent condemned the Brown decision; 34 per cent refused to judge the verdict; and only 24 per cent would actively support the decision.75 Thus it appeared that southern judges were either more vociferous or more rash in expressing opinions of the High Tribunal's verdict.

73 The New Republic, CXXXIX (September 22, 1958), 14.
74 The Nation, CLXXXII (June 3, 1960), 464.
The best single example of how far southern opinion had consolidated was the "Southern Manifesto." The Manifesto was signed on March 12, 1956, by nineteen senators and eighty-one representatives. All the southern senators signed except Lyndon Johnson of Texas, and Estes Kefauver and Albert Gore of Tennessee. The Manifesto, read before Congress, said that the Supreme Court decision was an illegal encroachment upon the rights of states and that the Supreme Court was attempting to implement the evergrowing power of the federal government. The politicians expressed "gravest concern for the explosive and dangerous situation created by outside meddlers," and the Manifesto pledged the signers to use "all lawful means to bring about a reversal of this decision which is contrary to the Constitution, and to prevent the use of force in its implement. . ."\(^7^6\)

Two more opinions were important in the South. These were the opinions of the liberal southerner and the moderate southerner. Liberal reaction is the hardest opinion to isolate. By viewing occasional liberal letters written to newspapers and liberal southern writers in political journals, it would appear that the southern liberal was jubilant in the decision, and he based his argument on the charge that there was never an excuse for second-class citizenship. On the other hand, the southern moderate did not express

many opinions. He appeared to believe that the decision was the law of the land; and, like it or not, it must be obeyed. However, the moderate pleaded for more time in integrating the public school system. He believed the extremists on both sides of the issue were wrong; consequently, if he made a choice, he chose the southern radical point of view. This was undoubtedly due both to the economic pressure of his neighbors and to the old-line racial prejudices of the South's chasing the specter of social prejudice--miscegenation.77

The moderate southerner was, and still is, supporting the southern extremist, as witnessed by the 1958 Gallup Poll, which reported 80 per cent of the South against integration and only 16 per cent for the desegregation of the school systems.78

The average northern reaction to the Brown verdict was much the same as his southern counterpart in the Dred Scott decision. The North, as a whole, had accepted second-class citizenship and segregated schools as unjust for a long period of time. Consequently, the northern periodicals--for example, the Luce publications--reviewed the decision as not only a correct verdict, but one long overdue. As the South protested, the North either came to the Court's defense or attempted an analysis of the southern social position. There were exceptions

78 New York Times (Gallup Poll), February 26, 1956.
in the North; however, the dissenters were magazines such as the *American Mercury* or the *United States News and World Report*, which represented the arch-conservatives of the political scene.

The Court reacted to the northern arch-conservatives just as they reacted to the southern reactionaries; they ignored them. Decisions enforcing the Brown verdict followed the 1954 decision. The Court reaffirmed its original decision of 1955 by pointing out that integration should begin as quickly as possible. In the Little Rock case, the judiciary maintained that it had the right of enforcement by pointing out that those who disobeyed an order to integrate a public school system could be held guilty of contempt charges. When the segregationists of Arkansas requested a stay in integration of Little Rock schools because of the danger of violence, the High Tribunal upheld a United States Court of Appeals ruling that the desegregation process should begin in September, as ordered in *John Aaron et al. v. William G. Cooper et al.* 79

The Court maintained one month later, in October, 1958, in *Board of Supervisors of Louisiana and Agricultural and Mechanical College et al. v. Arnesa Luley et al.*, that Louisiana could not use subterfuges to avoid integration. The Louisiana officials attempted to require a certificate of good moral

---

character to enter public and parish schools.\textsuperscript{30} Again, as in previous periods of crisis, the Court ignored the volume of criticism against its ruling and continued to implement it with supplementary verdicts.

\textsuperscript{30}\textit{Ibid.}, III (October, 1953), 367.
CHAPTER V

THE COURT SURVIVES

Through successive stages the Supreme Court rose from a rather ignoble beginning to its present status. The early prestige of the High Tribunal was largely a product of the ability of John Marshall. It was he, either by foresight or political expediency, who was responsible for the emergence of the Court to equal stature in the framework of United States government. If the Court were to be a subordinate branch, the opportunity was in the beginning. Jefferson probably had the support of both the majority of citizens and Congress in his attempts to limit Marshall's Court. However, his efforts failed, and the defeat of the attempt to impeach Chase taught the administration that expulsion was not the tool to control the Court.

With the triumph of Marshall, two more theories that would have changed governmental structure were discarded—the theories that the President had equal authority to judge constitutionality of laws, and that impeachment would only be a method to keep the judicial branch in harmony with the other two branches of government. Thus, Marshall established the Court as an equal branch of government to be obeyed because of prestige. Lacking control of both finances and the
military, the Supreme Court has remained powerful only as long as its decisions were respected. Marshall placed the Court in a position to earn respect by demanding equality in the United States governmental system.

The Court was challenged by another strong president in the twentieth century. Roosevelt, however, relied not on new theories or impeachment, but on a packing plan under the guise of reform. He did not have the support of the people as did Jefferson, which proved that the prestige of the Court had reached the status of equality in separate powers of the government. By 1937, the people had begun to believe that criticism of the judiciary was acceptable only so long as it was not from the President. The average man seemed to feel that for a President to wish to control the Court was a violation of the separation of powers doctrine; hence, dangerous to the Constitution. Thus, Roosevelt was defeated by a combination of public opinion and a veneration of the Constitution. As long as citizens maintain an almost mystical worship of the separation of powers doctrine, and mass media are able to warn of violations, it appears unlikely that any President will be able to control a Court. Hence, as a method of judicial control as long as mass media can be used by opponents to warn of constitutional dangers, the appointing of additional justices should be used less in the future than in the past.
As long as the President appoints politicians, however, there will be a certain amount of political pressure on the Court. However, in all four cases herein studied, the political motivation of the judges was overemphasized by contemporaries. The frequent charge that judicial decisions were born in the political arena was probably true. However, the political orientation of the judges was probably more because of politicians' grasp of the prevalent philosophy of the majority of the people than to pressure. There is no evidence that any Court overturned its decision because of a group's pressure. However, both a seeming switch in opinion of the Hughes Court toward New Dealism and a revision of the separate but equal dogma by the Warren court may have reflected the beliefs of the majority of citizens in this particular era of history.

In reality, the similarity of both the Dred Scott decision and the Brown verdict lay not only in the fact that their opponents were primarily from one particular section of the nation, but also in the Court's refusal to waver from its decisions. The Scott verdict was nullified only by both a Civil War and a constitutional amendment; as yet, the Warren Court has refused to bend to pressure of the South.

The Scott verdict also proved the invalidity of two of the South's current arguments against the Court. First, the idea that a state could nullify a decision of the Court was
ended by the Civil War. The doctrine of nullification, begun by Jefferson, vitalized by John C. Calhoun, and now prominent in southern arguments, was invalidated by a war that proved the Union to be indivisible; and a constitutional amendment, rather than a congressional act, was used to overturn the decision. Likewise, the southern assertion that the Fourteenth and Fifteenth Amendments were invalid because there was pressure to force their ratification, was irrelevant. Indeed, there may have been forced ratification to overturn the Scott decision; but the amendments were ratified, and they will be observed. All the discussion notwithstanding, there is little chance of a repeal.

Also, all four cases were similar in that they led to the accusation that the Court was a political instrument used either by the North to subject that area's views on the South; by the South, to force slavery on the North; by the Federalists, to control the country; or by the Republicans, to halt the New Deal. In each case, it seems unlikely that the Court was making a conscientious effort to seize the standard of one political cause. Although the judges may have had a certain political bias when they entered the High Tribunal, their prejudices have not been sufficient grounds for crippling the Supreme Court.

The accusation was prevalent in all four cases that the Court was violating constitutional government by rewriting
the law to suit their own standards or by usurping the powers of another branch of government. The charge of using the law to legislate has reappeared in the present conservative southern arguments, but it represents a charge that the majority of Americans reject. In like manner, attempts at changing the Court in the 1800's or in the 1900's have led to the accusation that the Supreme Court violated separation of powers by attempting to assume congressional prerogative.

The most prevalent current charge in the South is that the Supreme Court varied in 1954 by overturning the law to rule that equality means equal opportunity in education. The charge of rewriting the law was also prevalent in the other three cases. However, what each group of critics failed to realize was that, after Marshall reversed his own decision in the Swartwout ruling, rightly or wrongly, law could not be static. The law is everchanging to meet the challenges of a complex modern society. In reality, sociological rulings, although not an example in previously discussed cases, did not begin with the Warren Court. Brandeis relied upon sociological findings, and some authorities say that, even before that time, Oliver Holmes began the trend. Hence, the Warren Court in no way stumbled upon a new concept of law, but only used the method of their predecessors. Actually, in a complex society, outside sources were sometimes needed in
clarifying the laws. Thus, the principles were established, the sources were needed, and the choices were valid.

The charges were frequently made in all four judicial struggles that the judges had no precedent for their ruling. It was on this assumption, particularly, that the South based its condemnation of the Brown ruling. This assumption, however, ignored a steady trend in Court rulings which began shortly after the turn of the century. Hence, it was also a mistaken assumption that the Court overturned seventy-five years of judicial precedent. Since judges do attempt to use prior constitutional cases, and the Supreme Court did overturn the *Plessy v. Ferguson*, a few examples should be stressed to show precedent. There was a dissent in the Plessy ruling; John Marshall Harlan, who pointed out the Constitution, was color-blind. In *Berea v. Kentucky* (1903), the Court avoided ruling on separate but equal; however, Harlan still dissented, showing that there was discontent and doubt.\(^1\) The Court avoided the issue in three separate cases during the next forty years, and by this time it was becoming evident that the problem would continue until the Court squarely faced the issue. The case against segregation was developing step by step, not only because the schools were not physically equal, but only separate, but because the judges were beginning to

consider the question of the inherent inequality of the segregated school. In 1935, a Maryland Court of Appeals ruled that a Negro, Don Murrey, would have to be admitted to law school.² Lloyd Gaines was admitted by the Supreme Court to the University of Missouri Law School in 1938, because no other facilities were available; and the Gaines argument was used to admit a Negro into law school at Oklahoma fifteen years later.³ In 1952, the Supreme Court ruled that Herman Sweatt, in Sweatt v. Painter,⁴ must be admitted to the Law School at Texas University. The Court ruled that one school could be more valuable, because of reputation and library facilities, than another school. In other words, there was no such thing as equal but separate schools. The Court still avoided the basic issue of whether or not segregation was constitutionally valid. However, the South should have seen the trend in reasoning and realized that segregation was legally doomed.

Thus, there was actually but one new idea presented in the condemnation of the Brown verdict. The root of the idea was not new, but the implications were different. The new charge was that the Court was composed of judges with Communist tendencies. In this charge the danger to the Warren

²Blaustein, p. 106.
Court lay; other southern efforts to curtail the Court were too sectionalized to be effective. It has become obvious that as long as only one section or one particular type of political ideology favors a Court change by constitutional amendment, the process will be impossible. The requirement for a three-fourths majority of states to approve before ratification is so difficult to obtain that the Court would have to alienate the entire nation before passage. Since they will probably continue never to infuriate enough of the citizens long enough for passage of an amendment, this method of curtailment could be ruled out. A second way to curtail the Court would be a loss in prestige significant enough for its decisions to be ignored. Such an action appears unlikely in the Brown verdict, because the Court has enforced their ruling with Court orders and these have been obeyed, showing that the Court's prestige has not collapsed. Also, it is obviously seen that the Court has grown in prestige since the Jefferson-Marshall struggle. Because of America's almost mystical veneration of separation of powers, plus the influence of mass media, it will also probably not be a President who will curtail the Court by packing. The doctrine of interposition ended with Dred Scott and the Civil War. Hence, the danger to the Court lies not in the administration, but in Congress. Such a danger must be in the form of a coalition threat because, just as an amendment would have to be supported
by the majority of the entire nation, so must a limiting measure appeal to more than one section. Thus, the danger to the Supreme Court lies in the charge that the judges are pro-Communist. If a southern-northern conservative coalition could combine to defeat the Court on charges of Communist tendencies, a curtailment because of the Brown decision might occur. Since the 1954 decision, efforts at coalitions have been attempted, but have failed. The various amendments, bills, and statements against the Court, as in the regime of Jefferson, Buchanan, and Roosevelt, will probably fade into obscurity.
BIBLIOGRAPHY

Primary Sources

Unpublished Collections

"James Buchanan Miscellaneous Pamphlets, Lecompton Constitution, and Dred Scott Decision," E. L. Shattles Collection, Fondren Memorial Library, Southern Methodist University, Dallas, Texas.

"Stephen A. Douglas Miscellaneous Pamphlets On and By Him," E. L. Shattles Collection, Fondren Memorial Library, Southern Methodist University, Dallas, Texas.

Public Documents


BIBLIOGRAPHY--Continued

Dred Scott v. Sanford, 19 Howard, 393 (1857).

Ex parte Bollman and Ex parte Swartwout, 4 Cranch, 75 (1807).

The Examination of Col. Aaron Burr Before the Chief Justice of the United States, Upon the Charges of a High Misdemeanor, and of Treason Against the United States, Richmond, S. Grantham, 1807.


Marbury v. Madison, 1 Cranch, 137 (1803).


BIBLIOGRAPHY--Continued


Memoirs, Diaries, and Collected Works


BIBLIOGRAPHY—Continued


Vol. IV.


BIBLIOGRAPHY--Continued

Rowland, Dunbar, editor, Jefferson Davis' Constitutionalist, His Letters, Papers, and Speeches, 10 vols., Jackson, Mississippi, 1923. Vol. VII.

Books


Elliott, E. N., editor, Cotton Is King and Pro-Slavery Arguments, Atlanta, Georgia, Fritchard, Abbot and Lomis, 1860.


Articles


"Bright Young Men Behind the Bench," United States News and World Report, XLIII (July 12, 1957), 45-47.

Brownson's Quarterly Review, I (Spring Quarter, 1857), 390-392.

Byrnes, James F., "Guns and Bayonets Cannot Promote Education," United States News and World Report, XII (October 5, 1956), 100-104.

BIBLIOGRAPHY—Continued


Collins, Michael, "To the Roots of the Court Plan," Commonweal, XXVI (July 24, 1937), 122-123.

"Congress Plays Politics With the Judiciary," Christian Century, LXXII (March 9, 1955), 293.


"Court and the Press," Current History, XLIV (September, 1937), 19.


Creel, George, "The Supreme Court Issue," Collier's, XCIX (May 29, 1937), 34-55.

"Roosevelt's Plans and Purposes," Collier's, XCVIII (December 26, 1936), 407-409.

The Cross and the Flag, XVII (September, 1958), 16-20.

The Cross and the Flag, XVII (December, 1958), 3.

The Cross and the Flag, XVII (January, 1959), 5.

The Cross and the Flag, XVII (March, 1959), 5.

Cummings, Homer S., "Reasons for the President's Plan," Vital Speeches, Ill (February 14, 1937), 295-298.

"Curbing the Court," Nation, CLXXXII (June 8, 1958), 431-433.

BIBLIOGRAPHY--Continued

"Death and Politics," Nation, CXLV (July 24, 1937), 88.

DeBow's Review, XXII (April, 1857), 403-410.

Dillard, Irving, "Warren and the Supreme Court," Harper's, XLI (December, 1955), 60-64.


"Fortune Poll," The Fortune, XVI (July, 1937), 96-98.

"Frankfurter Commands the Court," The Cross and the Flag (February, 1958), 15.


High, Stanley, "Roosevelt: Democratic or Dictatorial," Harper's, CLXXV (November, 1937), 480-487.

---, "The White House Is Calling," Harper's, CLXXV (December, 1937), 581-590.

Hoover, Herbert, "This Is No Lawyers' Dispute Over Legalism," Vital Speeches, III (February 20, 1937), 315-317.


Ickes, Harold, "My Twelve Years with FDR," Saturday Evening Post, CCXX (June 5-July 24, 1943).

BIBLIOGRAPHY—Continued

"Is the Supreme Court Going Liberal?" Nation, CXLIV (April 3, 1937), 367-368.

"Keep the Court Out of This," New Republic, XC (March 24, 1937), 221.


United States News and World Report, XLIII (July 5, 1957), 103-104.

United States News and World Report, XLIV (September 19, 1958), 127-128.


United States News and World Report, XLI (October 5, 1935), 150-151.

"The Lesser of Two Evils," Commonweal, CXXVI (May 14, 1937), 63.

"A Limited Front on the Court," Nation, CXLIV (March 13, 1937), 238-239.


Morgenstern, Henry, "The Morgenthau Diaries," Collier's, CXX (September 27-November 1, 1947).


"The Nation Is Sold," Nation, CXLIV (June 12, 1937), 666-667.

BIBLIOGRAPHY—Continued

New Republic, XC (April 21, 1937), 90.

New Republic, XCI (May 26, 1937), 11-12.

New Republic, XCI (June 9, 1937), 121-123.


North American Review, LXXV (October, 1857), 415-430.


"Our Liberal Supreme Court," Christian Century, CLIV (June 6, 1937), 768-769.

Phelps, M. T., "Centralized Bureaucracy," The Cross and the Flag, XVI (December, 1957), 3-5.


"The President and the Court," Christian Century, CLIV (February 7, 1937), 206-208.

"Progressives and the Court," New Republic, XC (December, 1936), 96-97.

"Purging the Supreme Court," Nation, CXLIV (February 13, 1937), 173-174.


BIBLIOGRAPHY--Continued

Schuler, Bob, "Is the Supreme Court a Court?" The Cross and the Flag, XV (January, 1957), 27-23, 32.

Schwepppe, Alfred J., "The Court Rewrites the Constitution in Its Own Image," American Mercury, LXXXVIII (February, 1959), 60-64.


"Speak Up," Collier's, C (July 10, 1937), 64.


Taft, Robert A., "A Short Cut to Dictatorship," Literary Digest, CXXXIII (February 13, 1937), 5.


Time, XXV (August 2, 1937), 11.


BIBLIOGRAPHY--Continued


"What Was the Origin of the President's Supreme Court Proposal?" U. S. Law Review, LXXI (March, 1957), 188-493.

Newspapers


Galveston Tri-Weekly News, March 31, 1857-May 1, 1858.


Secondary Sources

Books


Auchampough, Phillip G., James Buchanan and His Cabinet, Privately printed, 1926.


BIBLIOGRAPHY--Continued


Hellman, George S., Benjamin Nether Cardozo, New York, Wittlesey House, 1940.


BIBLIOGRAPHY--Continued


Williams, Jerre S., The Supreme Court Speaks, Austin, University of Texas Press, 1956.

Articles


Unpublished Material

