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## WASHINGTON LAW REVIEW LECTURE SERIES\*

### POLITICAL BATTLES FOR JUDICIAL INDEPENDENCE

William H. Rehnquist\*\*

Most of us who are familiar with our constitutional system of government would agree that one of the touchstones of that system is judicial independence. I like to think that belief in the wisdom of an independent judiciary is not confined to judges alone, but is shared by other members of the legal profession and by the public at large. Be that as it may, it is surely a fact of political life in this nation that the federal judiciary comprises a separate branch of the national government, independent of the executive and legislative branches.

Yet, more than one observer of our national government has noted the paradox, at least on the surface, which exists when the independence of the judiciary is coupled with the doctrine of judicial review espoused by John Marshall in the celebrated case, *Marbury v. Madison*.<sup>1</sup> If judges, who themselves have life tenure, may nullify a law enacted by the popularly elected branches of the federal government, can it truly be said that we have rule by the majority and that government is ultimately responsive to public opinion? In the words of Robert H. Jackson, writing shortly before he began his distinguished career on the Supreme Court:<sup>2</sup>

The seeds of a struggle for power were planted in the Constitution itself. That instrument set up a legislative and an executive branch.

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1. 5 U.S. (1 Cranch) 137 (1803).

2. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* at viii (1941) [hereinafter cited as JACKSON].

each in a large degree representative of popular will. It created on the other hand an appointive Court, whose Justices are chosen for life, and thus set up an overriding legal authority completely independent of popular will. These differently constituted institutions characteristically respond to the interests of different factions of society, as the founders foresaw they would. A struggle for power between these "equal" branches was inevitable.

While the Founders undoubtedly intended to create an independent judiciary, and while they likewise undoubtedly foresaw that there would be tension between the judicial and the other branches of the federal government, in their wisdom they made no attempt to do more than sketch in the broadest outline the attributes of the judicial branch.<sup>3</sup>

There is a tendency among present and former law students to think that the development of the nature and extent of the authority of the federal judiciary, and of the Supreme Court of the United States in particular, may be found in the celebrated cases decided by that Court. To an extent this is undoubtedly true. However, at least two major political struggles in this nation have had as much to do with defining the nature of the judicial power in the federal system as any but a handful of the major decisions of the Supreme Court. No reported judicial decision of these political struggles exists, because each was conducted in its entirety within or between the other branches of the federal government.

Yet, both struggles are nonetheless precedents in the unwritten constitutional law dealing with Article III of the United States Constitution and the power of the federal courts. These events are first, the impeachment of Justice Samuel Chase by the House of Representatives and his subsequent acquittal by the Senate in the first decade of the 19th century; and, second, the proposal by President Franklin Roosevelt referred to by its supporters as the "Court Reorganization Plan" and by its opponents as the "Court Packing Plan."

## I. THE IMPEACHMENT OF JUSTICE CHASE

Samuel Chase was a Maryland man, and a signer of the Declaration of Independence. He was appointed to the Supreme Court in

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3. See I C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 7 (1947) [hereinafter cited as WARREN].

1796 by George Washington. Not unlike many Associate Justices who served in the early days of the Court, he is not known for any major contributions to our jurisprudence. Indeed, the only reason his name is known to any but legal or political historians is that his political partisanship while a judge so outraged the followers of Thomas Jefferson that they sought to remove him from office by the process of impeachment.

Samuel Chase was unable to abandon partisan political activity when he donned the judicial robe. The commencement of the Supreme Court Term beginning in August 1800 was delayed in part because Justice Chase was speaking to political gatherings in Maryland on behalf of John Adams' candidacy for President.<sup>4</sup> During the same year, Chase presided as Circuit Judge in Richmond, Virginia, at the trial of James Callender who was charged with publishing a pamphlet criticizing the Adams Administration in a manner prohibited by the Sedition Act of 1798.<sup>5</sup> He likewise presided at the trial of John Fries in the same year for treason.<sup>6</sup> In both cases the evidence we have indicates that he conducted himself on the bench in the manner of a "hanging judge."<sup>7</sup> Erroneous rulings and biased conduct of the presiding judge at the trial of a criminal defendant in these times was far more devastating to the defendant than it would be now, since appellate review of criminal convictions was not provided in the federal system until the latter part of the 19th century.<sup>8</sup>

When the Federalists were ousted from national office by the election of Thomas Jefferson in 1800, storm signals began to appear

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4. *Id.* at 156.

5. 1 Stat. 596. Sedition trials were carried on during much of the election year of 1800, although disagreement over enforcement of the Sedition Act divided the nation. Callender had written and published a book, *Prospect Before Us*, allegedly containing criminally libelous statements against President John Adams. "Actually the particular comments of Callender about Adams which led to his trial and conviction could have been matched in the writings of Peter Porcupine [a Federalist] and others, not to speak of a letter Alexander Hamilton was to write 'ere long.'" 3 D. MALONE, *JEFFERSON AND HIS TIME* 471 (1970) [hereinafter cited as MALONE].

6. Justice Chase's conduct of the Fries trial resulted in the resignation of defense counsel. Fries refused further legal assistance, was convicted of treason and sentenced to death. Upon review of the trial proceedings, Federalist President John Adams was moved to pardon Fries. See R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 230 (1973) [hereinafter cited as BERGER].

7. Corwin, *Samuel Chase*, in *DICTIONARY OF AMERICAN BIOGRAPHY* 34, 36 (1930), cited in BERGER, *supra* note 6, at 229. For expanded treatment of the flagrant breaches of judicial etiquette which characterized Justice Chase's behavior during the Fries and Callender trials, see *id.* 232.

8. See 28 U.S.C. § 1291 (1970).

which foreshadowed a confrontation between the legislative and executive branches (controlled by Jefferson and the Republicans), and the judicial branch (which consisted almost entirely of Federalist appointees of Presidents Washington and Adams). Jefferson, in a private letter written late in 1801, described his Federalist opponents in these words:<sup>9</sup>

On their part, they have retired into the judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased.

There had been no suggestion, however, that any proceedings would be brought against Justice Chase until he gave a particularly opinionated charge to the grand jury in Baltimore in May 1803.<sup>10</sup> In this charge, he admittedly attacked the new state constitution of Maryland and its principle of universal male suffrage, saying that it would "certainly and rapidly destroy all protection to property and all security to personal liberty, and our republican Constitution will sink into a mobocracy."<sup>11</sup> It was claimed, but denied by Chase, that in the same charge he had also stated that "the present Administration is weak, relaxed, and not adequate to a discharge of their functions, and their acts flow, not from a wish for the happiness of the people, but for a continuance in unfairly acquired power."<sup>12</sup>

Shortly afterwards, President Jefferson wrote to one of his leaders in the House of Representatives:<sup>13</sup>

You must have heard of the extraordinary charge of Chace [*sic*] to the Grand Jury of Baltimore. Ought this seditious and official attack on the principles of our Constitution, and on the proceedings of a State, to go unpunished? And to whom so pointedly as yourself will the public look for the necessary measures? I ask these questions for your consideration. For myself, it is better that I should not interfere.

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9. 4 MALONE, *supra* note 5, at 458.

10. Justice Chase also challenged the abolition of circuit judgeships by the Act of 1802, which repealed the Judiciary Act of 1801, in stating that the "independence of the National Judiciary is shaken to its foundation." WARREN, *supra* note 3, at 276. His use of the grand jury session as a forum for partisan political speeches was not uncommon, however. BERGER, *supra* note 6, at 225.

11. WARREN, *supra* note 3, at 276.

12. *Id.*

13. 4 MALONE, *supra* note 5, at 467.

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In typical Jeffersonian fashion, the President had set matters in motion, but thereafter remained virtually silent. The House of Representatives voted to present Articles of Impeachment against Samuel Chase in the following year, 1804. Of the seven Articles, the two principal charges were based on his conduct as the presiding judge in the Callender trial and his charge to the grand jury in Baltimore. In response to these charges, Chase's defenders did not contend he was a good judge or that he had conducted himself properly; they took the position that whatever excesses he may have engaged in were not such as to warrant impeachment.<sup>14</sup>

The trial in the Senate began in earnest in the early part of February 1805. The presiding officer was Aaron Burr, Vice President of the United States, who had the preceding year killed Alexander Hamilton in a duel.<sup>15</sup> Chase appeared before the Senate accompanied by five counsel, led by Luther Martin of Maryland who was described in the partisan invective of those days by the opposition press as that "impudent Federalist bull dog."<sup>16</sup> Nearly a month was occupied in the presentation of evidence, and one of the witnesses was Chief Justice John Marshall. Since there were 25 Republicans and 9 Federalists in the Senate at this time, it was clear that if the Senate voted strictly on party lines, the Republicans could obtain the 23 votes required for the two-thirds majority necessary to convict.<sup>17</sup>

On March 1, 1805, after the close of the evidence and final arguments, the Senate deliberated for approximately two hours and found Chase not guilty by an absolute majority on five of the Articles. On the principal Article in connection with the Callender trial, 18 Senators voted to find him guilty, and 16 not guilty. On the eighth Article, based on the charge to the grand jury in Baltimore, 19 Senators voted to find him guilty and 15 not guilty. Samuel Chase thus stood acquitted of all the Articles of Impeachment brought against him.<sup>18</sup>

The overwhelming verdict of history has been that although Justice Chase was intemperate in his language both on and off the bench,

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14. 14 ANNALS OF CONG. 357 (1805).

15. These circumstances prompted a contemporary wag to remark that while once "it was the practice in Courts of Justice to arraign the *murderer* before the *Judge*, [we] now . . . behold the *Judge* arraigned before the *murderer*." 4 MALONE, *supra* note 5, at 476.

16. 14 ANNALS OF CONG. 669 (1805).

17. 4 MALONE, *supra* note 5, at 479.

18. 14 ANNALS OF CONG. 669 (1805).

partial to the government in the Callender trial and unrestrained in his partisan political harangues after becoming a judge, the Senate was right to acquit him.<sup>19</sup> Professor Raoul Berger in his recent book on impeachment<sup>20</sup> has weighed in on the other side of the controversy, and takes the position that Chase should have been convicted by the Senate for his conduct as a "hanging judge" in the Callender trial.<sup>21</sup> The merits of the case against Chase are less important to the point I wish to make than are the consequences of the Senate's decision.

During the impeachment proceedings, many observers viewed the proceedings against Chase as part of an assault on the entire judicial branch. Such a conclusion was supported by the fact that the Articles of Impeachment against Chase were voted by the House on the very day the Senate convicted in an impeachment trial and removed from office another Federalist judge, John Pickering of New Hampshire.<sup>22</sup> Moreover, Jefferson, upon learning of the presentment of Articles of Impeachment against Chase, commented: "Now we have caught the whale, let us have an eye to the shoal."<sup>23</sup> Shortly before the Senate acquitted Chase, Chief Justice Marshall had proposed privately that Congress be granted authority to overrule judicial decisions on constitutional questions, a suggestion which one of his biographers attributes to his extreme fear of the Chase impeachment.<sup>24</sup>

Charles Warren, one of the leading historians of the Supreme Court, writing half a century ago, summarized his view of the Chase acquittal:<sup>25</sup>

The profound effect produced upon the course of American legal history by the failure of the Chase impeachment can hardly be overestimated; for it is an undoubted fact that, had the effort been successful, it was the intention of the Republicans to institute impeachment pro-

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19. WARREN, *supra* note 3, at 282, 293.

20. BERGER, *supra* note 6.

21. *Id.* at 229.

22. WARREN, *supra* note 3, at 295. Numerous complaints about the conduct of Judge Pickering had been received by President Jefferson. The complaints, which Jefferson forwarded to the House of Representatives, were based chiefly upon allegations of chronic intoxication and incompetence bordering on insanity. The impeachment proceedings instituted against Pickering were the first against a member of the federal judiciary. Most significantly for purposes of the present discussion, the conviction of Judge Pickering was viewed by many members of Congress as a method of removal rather than as a conviction for high crimes and misdemeanors. *See generally* 3 MALONE, *supra* note 5, at 460-64.

23. WARREN, *supra* note 3, at 293.

24. 2 A. BEVERIDGE, *LIFE OF JOHN MARSHALL 177-78* (1916).

25. WARREN, *supra* note 3, at 292-93.

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ceedings against all the Judges of the Court . . . . But the mere fact of an intention to impeach all the Judges was not the most serious feature of the situation. Its gravest aspect lay in the theory which the Republican leaders in the House had adopted . . . . They contended that impeachment must be considered a means of keeping the Courts in reasonable harmony with the will of the Nation, as expressed through Congress and the Executive, and that a judicial decision declaring an Act of Congress unconstitutional would support an impeachment and the removal of a Judge, who thus constituted himself an instrument of opposition to the course of government.

John Quincy Adams, a member of the Senate and a Federalist, made an entry in his diary at this time setting forth his view of the theory on which Chase's opponents were proceeding:<sup>26</sup>

[The] impeachment was not a criminal prosecution. . . . And a removal by impeachment was nothing more than a declaration by Congress to this effect: you hold dangerous opinions, and if you are suffered to carry them into effect, you will work the destruction of the Union. We want your offices for the purpose of giving them to men who will fill them better.

Although he agrees that the utterances of some of Jefferson's supporters lent color to the claim, Dumas Malone, Jefferson's biographer, expresses doubt that the Republican leadership intended the Pickering and Chase impeachments to be the opening phase of a party move against the entire bench.<sup>27</sup>

But putting to one side speculation about what the Jeffersonians would have done had the Senate convicted Chase, the fact remains that one consequence of a Chase conviction would have been a broad view of the circumstances under which a judge could be removed by impeachment. Even Mr. Malone notes:<sup>28</sup>

The crucial question throughout these [proceedings], and the question of most enduring interest, was that of the nature and limitation of impeachment within the constitutional framework. Opinions ranged from the one most strikingly voiced by Senator Giles at the outset, that impeachment was a mere political inquest into which the question of criminality did not enter, to the Federalist contention that no offense was impeachable if not indictable.

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26. *Id.* at 294.

27. MALONE, *supra* note 5, at 469–70.

28. *Id.* at 478.

I think it fair to say that the Chase acquittal is of critical importance to the independence of the federal judiciary because it scotched the broad view of the impeachment power as applied to federal judges. Perhaps some of the leaders of the impeachment forces were unwise in basing a portion of their case on so broad a view of the impeachment power; perhaps Justice Chase could have properly been convicted upon a narrower view of that authority than expressed by Senator Giles. But had he been convicted, the conviction would have surely lent some support to Giles' theory; and conversely the acquittal limited the use of impeachment by the legislative branch as a means for removing members of the judiciary.<sup>29</sup>

If I am right about the significance of the acquittal of Justice Chase, that incident in our history is a significant portion of what might be called the unwritten constitutional law surrounding Article III. It established generally the proposition that the constitutional language conferring tenure on Article III judges "during good behavior" was to be read with a view to the protection of judicial independence even at the cost of enduring partisan judges. But the tenure of the individual judge is not the only point at which the independence of the judiciary may be assailed. A collegiate court such as the Supreme Court of the United States was also vulnerable because Article III said nothing about the number of Associate Justices, in addition to the Chief Justice, who should compose that Court. A second great political battle was fought on that point more than a century after the trial of Samuel Chase, at the beginning of President Franklin Roosevelt's second administration.

## II. ROOSEVELT'S COURT REORGANIZATION OR COURT PACKING PLAN

At various times in the first third of this century, "social legislation" received rough treatment at the hands of the Supreme Court of the

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29. A postscript to the Chase impeachment, occurring 5 years after the Senate's verdict, is related in P. CLARKSON & R. JETT, *LUTHER MARTIN OF MARYLAND* 280 (1970): In the summer of 1810 [Luther Martin, the principal defense counsel at Chase's impeachment trial, a heavy drinker, appeared as counsel in Chase's court in Baltimore] somewhat tighter than usual. . . . Chase [said to him], "I am surprised that you can so prostitute your talents." Martin, drawing himself up as straight as he could, replied to Chase, "Sir, I never prostituted my talents except when I defended you and Colonel Burr." at which turning to the jury, he added confidentially, "a

United States. In a series of decisions,<sup>30</sup> a majority of the Court read into the due process clauses of the fifth and fourteenth amendments to the United States Constitution notions of “freedom of contract” and other principles of laissez-faire individualism, with the result that the authority of the state and national governments to enact minimum wage laws was sharply restricted. The authority of Congress to deal with social and economic problems was further restricted by narrow constructions of its authority to legislate under the commerce clause of the Constitution.<sup>31</sup> Thus matters stood when Franklin Roosevelt was inaugurated as President in March 1933, during the depths of the Great Depression. President Roosevelt’s “New Deal” followed a pragmatic philosophy of trying almost any remedy that might cure or ameliorate the country’s economic woes. But towards the end of his first term, important pieces of legislation of this sort were held unconstitutional by the Supreme Court.<sup>32</sup>

In the 129 years between *Marbury v. Madison* and the election of Franklin Roosevelt, the Supreme Court invalidated only 54 Acts of Congress, or one every 2½ years.<sup>33</sup> Between 1934 and 1936, however, the Court nullified 11 Acts of Congress, including the National Industrial Recovery Act (NIRA),<sup>34</sup> the Agricultural Adjustment Act,<sup>35</sup> the Railway Pension Act,<sup>36</sup> the Farm Mortgage Moratorium,<sup>37</sup> the Municipal Bankruptcy Act<sup>38</sup> and the Bituminous Coal Act.<sup>39</sup>

Following the Court’s decision in the so-called “Sick Chicken” case,

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couple of the greatest rascals in the world.” Chase angrily instructed the clerk to draw up a citation of Martin for contempt of court, but when it was presented for his signature, that choleric old man, recollecting their forty-year friendship and all that he owed Martin, put the quill pen back in its holder saying, “This hand could never sign a citation against Luther Martin.”

30. See, e.g., *Morehead v. Tipaldo*, 298 U.S. 587 (1936); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

31. See, e.g., *Adair v. United States*, 208 U.S. 161 (1908) (invalidating federal statute making it unlawful for railroad to discriminate against employee because of union membership); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating N.Y. law limiting bakery working hours).

32. CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, *THE CONSTITUTION OF THE UNITED STATES 1611–12* (1972).

33. *Id.* at 1597–1611.

34. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

35. *United States v. Butler*, 297 U.S. 1 (1936).

36. *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935).

37. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

38. *Ashton v. Cameron County Water Improvement Dist. No. One*, 298 U.S. 513 (1936).

39. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

*Schechter Poultry Corp. v. United States*,<sup>40</sup> on May 28, 1935,<sup>41</sup> in which major portions of the NIRA were held unconstitutional, President Roosevelt denounced the Court for taking the country back to "a horse-and-buggy definition of interstate commerce."<sup>42</sup> Thereafter he bided his time.

In November 1936, Roosevelt was re-elected to a second term with a sweeping popular and electoral majority. When the new Congress convened, it was apparent that the Democrats would have margins of four to one in the House and five to one in the Senate as a result of Roosevelt's sweeping electoral triumph.<sup>43</sup>

Shortly after the election, President Roosevelt and his Attorney General, Homer Cummings, worked out the details of what they called the Court Reorganization Plan. The plan was drafted in utmost secrecy, and many of the President's principal advisers had no knowledge of it until its public disclosure in early February 1937. On the morning of February 5, 1937, President Roosevelt summoned the members of his Cabinet and congressional leaders to the White House. They were provided copies of the bill, a presidential message urging passage and a short pep talk by the President.<sup>44</sup>

The proposal was to grant authority to the President to appoint an additional Justice of the Supreme Court for each sitting Justice over the age for pension. Since at that time 6 of the 9 Justices were over the age of 70,<sup>45</sup> if none of them chose to retire, President Roosevelt would be empowered to expand the membership of the Court to a total of 15 Justices. The President and Attorney General Cummings urged the plan in the name of judicial efficiency and docket congestion, and made no effort to face head-on the need or desirability of changing the philosophy of the Court.<sup>46</sup>

40. 295 U.S. 495 (1935).

41. The day became known to New Dealers as Black Monday, because on that day the Court struck down three acts of the New Deal, including a decision which narrowed the presidential power to remove employees of the executive branch. *Humphrey's Executor (Rathbun) v. United States*, 295 U.S. 602 (1935).

42. L. BAKER, *BACK TO BACK* 117 (1967) [hereinafter cited as BAKER].

43. Only 16 of the 96 Senators and 89 of the 435 Congressmen were Republicans. R. HOFSTADTER, W. MILLER & D. AARON, *THE UNITED STATES: HISTORY OF A REPUBLIC* 674 (1962).

44. *Id.* at 7.

45. The 6 Justices were Chief Justice Hughes, age 75; and Associate Justices Van Devanter, age 78; McReynolds, age 75; Brandeis, age 81; Sutherland, age 75; and Butler, age 71. 3 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND OPINIONS* (L. Friedman & F. Israel eds. 1969).

46. See BAKER, *supra* note 42, at 130-35.

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This approach could not mask the President's real objectives for long, however, and it ultimately proved to be a serious tactical error.<sup>47</sup> Shortly after the President dropped his bombshell, it appeared that he would succeed in his effort. The heavy Democratic majorities in both Houses of Congress, many of whom owed their election or re-election to the immensely popular President, were thought to be in no position to repudiate his leadership less than a year after he had been triumphantly re-elected. Senator Robinson of Arkansas, the Senate Majority Leader, immediately announced his approval of the plan and predicted passage. Senator Henry Ashurt of Arizona, the Chairman of the Senate Judiciary Committee, issued a terse endorsement of the bill. In the House, Representative Hatton Sumners of Texas, Chairman of the Judiciary Committee, advised the White House that he could not support the bill, but agreed to keep his opposition silent for the time being.<sup>48</sup> But even his silent opposition forced the hand of the Administration in one respect: it decided to press enactment of the bill first in the Senate.<sup>49</sup>

Almost immediately, there was an adverse public reaction to the bill, and many prominent supporters of the President's re-election the preceding year refused to support the proposal.<sup>50</sup> Nonetheless, President Roosevelt insisted to his advisers that the people were with him.

The small Republican minorities, at the urging of their leadership, wisely decided to remain silent about the bill so that Democrats might feel freer to oppose it. At the same time, Senator Burton K. Wheeler of Montana, boasting a long record of Democratic progressivism, became the leader of Senate opposition to the Court plan.<sup>51</sup> His leadership of the opposition attracted a wider spectrum of Senate Democrats to the opposition's colors than would have been the case had the cause been led by a conservative Southern Democrat.

In the weeks after the President's proposal was offered, it became clear that the Court plan was in for rougher sledding than had been anticipated when it was first announced. Many of the President's closest

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47. *Id.* at 47.

48. *Id.* at 65.

49. *Id.* at 66.

50. A particularly surprising member of the opposition ranks was Democratic liberal Herbert Lehman who wrote to Roosevelt: "I feel that the end which you desire to attain does not justify the means which you recommend." *Id.* at 28.

51. Wheeler's opposition had its basis in a political quarrel with Attorney General Cummings. *Id.* at 27.

advisers felt that the arguments being advanced in favor of the bill were hypocritical. They urged that the President lay his cards on the table, and admit in a nationwide speech that his purpose was to revamp the judicial philosophy of the Supreme Court. They prevailed. On March 4, 1937, President Roosevelt told 1,000 Democrats assembled at the Mayflower Hotel in Washington that the legislation was necessary to prevent the Supreme Court from interpreting the Constitution in such a way as to nullify key parts of the New Deal legislative program.<sup>52</sup> The President's speech, however, never fully dispelled the general impression that he had not been candid when he first proposed the plan, and it did nothing to quiet the objections of those who felt the Court should not be "packed."

Meanwhile, the Senate Judiciary Committee commenced hearings on the bill on March 10, 1937.<sup>53</sup> Homer Cummings, the leadoff witness in support of the bill, argued that it would promote overall judicial efficiency.<sup>54</sup> Assistant Attorney General Robert H. Jackson, the next witness, took the direct approach espoused by the President in his Mayflower Hotel speech.<sup>55</sup>

During the two weeks allotted to the Administration to present its case, leaders of the opposition privately called upon Chief Justice Hughes to suggest that he and Justice Brandeis appear as witnesses before the Committee.<sup>56</sup> This suggestion was turned down, but Chief Justice Hughes, with the consent of other members of the Court, agreed to write a letter to Senator Wheeler dealing with the "judicial efficiency" arguments of the bill. In his letter, Chief Justice Hughes utterly devastated the original arguments advanced for the bill based on judicial efficiency. He pointed out that the Supreme Court was then, and had been for a number of years, completely current in its docket; every case ready for disposition during the Court's term was

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52. *Id.* at 54-56. The speech was one of Roosevelt's most famous and included a recitation of the New Deal efforts to cure "one third of a nation ill-nourished, ill-clad, ill-housed—NOW!"

53. The bill, S. 1392, was entitled Reorganization of the Federal Judiciary.

54. *Hearings on S. 1392 Before the Senate Comm. on the Judiciary, 75th Cong., 1st Sess., ser. 25, pt. 1, at 4 (1937).*

55. *Id.* at 37. Assistant Attorney General Jackson particularly emphasized federal judicial interference with federal law and states' rights by declaring legislative enactments unconstitutional.

56. BAKER, *supra* note 42, at 154.

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in fact disposed of before the Court adjourned in the early summer.<sup>57</sup> He went on to state:<sup>58</sup>

An increase in the number of Justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the Court. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide.

Hughes' letter was a masterpiece of the lawyer's art, singling out the arguments originally advanced for the bill and demolishing them with unerring accuracy.<sup>59</sup> Had the Court plan been frankly advanced as a method by which the judicial philosophy of the Court could be changed, the propriety of the Chief Justice responding to it would have been questionable, and the arguments to be made against it necessarily more debatable and more apparently self-interested. But the original argument had been couched in terms of judicial management and procedural problems, and Chief Justice Hughes' letter left this argument in shreds upon the floor of the Hearing Room of the Senate Judiciary Committee.

The rest of this political battle may be shortly told. While the Court plan was pending in the Senate, the Supreme Court turned sharply away from some of the older precedents dealing with due process and commerce, and, in a series of decisions,<sup>60</sup> indicated a more hospitable attitude towards social legislation. In one of the cases,<sup>61</sup> the difference in result was later traced to Justice Owen Roberts whose newfound adherence to limited judicial review was described by a contemporaneous commentator as the theory that "a switch in time serves nine."<sup>62</sup>

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57. *See id.* 154-63.

58. *Id.* at 158.

59. Justice Jackson, again writing before his appointment to the bench, noted that "[t]he Supreme Court has, from the very nature of its functions, been deep in power politics from the opening of the Court, and some of its leadership has been superb, notably so under Marshall and Hughes." JACKSON, *supra* note 2, at viii. This passage was obviously penned by one who had felt the sting of Chief Justice Hughes in the fight over the Court plan; Jackson was an Assistant Attorney General at the time and testified in favor of the plan. *See* note 46 and accompanying text *supra*.

60. *See, e.g.,* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Townsend v. Yeomans*, 301 U.S. 441 (1937).

61. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

62. The remark is attributed to a young New Deal attorney named Abe Fortas. *N.Y. Times*, June 15, 1937, at p. 19, col. 8.

In May 1937, Justice Van Devanter announced his intention to retire at the close of the Court term. Thus, the President, who was already prevailing on some of the constitutional issues which concerned him, would also have the opportunity to fill a vacancy in a matter of months. Even to some of the supporters of the Court plan, much of the reason behind it seemed to have disappeared. The Senate ultimately voted overwhelmingly to recommit the bill to the Judiciary Committee with instructions to drop all provisions relating to the Supreme Court,<sup>63</sup> and the battle thus ended during the summer of 1937.

When President Roosevelt originally proposed his Court plan, he stated in the accompanying message that the size of the Supreme Court had been changed repeatedly during its history. He was quite right, but the other changes in size were, with one exception,<sup>64</sup> designed to keep the Court apace with an expanding nation which required the Justices of the Supreme Court to ride circuit as well as perform their appellate duties. The Roosevelt plan was different not merely in degree, but in kind, from other changes which had been legislated in the size of the Court. Had it been enacted, the plan would have been an important milestone on the road to approval of the device of legislatively enlarging the Court's membership in order to change its view of the Constitution. The defeat of the Court Packing Plan represents another important event in the development of the unwritten constitutional law surrounding Article III. The defeat of the Chase impeachment tended to preserve the independence of the individual judge or Justice; the defeat of the Court plan tended to preserve the independence of the Court as an institution.

### III. CONCLUSION

There are striking similarities between these two political battles, even though they were separated in time by more than 130 years. Each was begun by a tremendously popular Chief Executive whose party was in control of Congress and who felt that the judicial branch either was presently, or would eventually, frustrate the party's program. Had the dominant party in Congress been able to hold its own

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63. BAKER, *supra* note 42, at 271.

64. In 1862 the Court had 10 members. With the deaths of Chief Justice Taney (1864) and Justice Wayne (1867) the number was reduced to eight. Congress then increased the number to nine in the Judiciary Act of 1869, 16 Stat. 44 (1869). See generally 6 C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (1971).

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members in line, each proposal would have succeeded. In each case the proposed action failed because the ranks of the dominant party broke, some members evidently feeling that the claims of judicial independence were more important than those of party loyalty.

In my opinion, both these precedents in the unwritten law of Article III are sound, a view which I believe is shared by most thoughtful observers of the constitutional scene.<sup>65</sup> Even judges who perform badly, as Justice Chase did, should not be removed by impeachment simply because their judicial actions are out of keeping with the dominant political views in the nation. Nor should the size of the nation's highest Court be manipulated because the views of that Court are out of step with the dominant view in the nation.

I would like to add, however, that nothing in the teaching of either the events of 1805 or those of 1937 suggests that the Supreme Court of the United States, or the judicial branch of the federal government generally, should be hermetically sealed from trends of national opinion. Just because such currents of national opinion do not properly afford a basis for removal of a sitting judge, or arbitrary expansion of the membership of a constitutional court, does not mean that those who are vested by the Constitution with responsibility for the selection of federal judges—the President, by his authority to appoint, and the Senate, by its responsibility to confirm—are not entitled to consider such factors. No doubt most Presidents whom historians regard as “strong” Presidents considered what political, social and legal philosophy their Supreme Court nominees would follow after donning their judicial robes. The fact that Presidents have frequently been disappointed in their expectations does not detract from the fact that they properly considered the matter.

The role played by the Senate over the years has been a more varying one, depending on a multitude of factors. Not the least of these factors is the inevitable diversity, in a body consisting of 100 members, as to the standards which should be applied by the Senate in determining whether to confirm a Presidential nominee for judicial office. Senate debates in connection with the most recent nominees to the Supreme Court suggest that there is a substantial body of opinion

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65. See, e.g., 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 185 (1916). Berger concedes that “it has long been the accepted opinion that the acquittal of Justice Samuel Chase represents the triumph of justice over heated political partisanship.” BERGER, *supra* note 6, at 224.

that Senators, as well as the President, may inquire into the judicial philosophy of the nominees. Indeed, articulate statements of this view were made in connection with the Senate debates during the confirmation of President Hoover's nomination of Judge John J. Parker to be an Associate Justice of the Supreme Court of the United States. An editorial, appearing in the *New York World*, opposed to Parker's confirmation, stated:<sup>66</sup>

The Senate has every right, if it so chooses, to ask the President to maintain on the Supreme Court bench a balance between liberal and conservative opinion in the country as a whole, and every right on this premise to object that the presence of Judge Parker on the bench would increase, rather than lessen, the topheavily conservative bias of the Supreme Court as now constituted.

Judge Parker's confirmation was successfully opposed by most liberals in the Senate, as well as organized labor and the NAACP.<sup>67</sup> Interestingly enough, for those who are inclined to think that the holders of elective office are always unable to rise above principle, the opposition to Judge Parker's confirmation in the Senate was led by Senator William E. Borah of Idaho, who felt that Parker's appointment to the Supreme Court would reinforce what he considered the propensity of the Court to read into the Constitution its own economic view. But only seven years later, when President Roosevelt was urging his Court plan as a method for changing the Court's judicial philosophy, Senator Borah strongly opposed that measure.

During the debates on Parker's confirmation, Senator Borah made some observations with which I find it very difficult to disagree:<sup>68</sup>

[The Supreme Court of the United States passes] upon what we do. Therefore, it is exceedingly important that we pass upon them before they decide upon these matters. I say this in great sincerity. We declare national policy. They reject it. I feel I am well justified in inquiring of men on their way to the Supreme Bench something of their views on these questions.

At a later point in the debate, Borah stated:<sup>69</sup>

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66. *New York World*, April 23, 1930.

67. Rehnquist, *The Making of a Supreme Court Justice*, 29 HARV. L. RECORD 7, 8 (1959).

68. 72 CONG. REC. 7932 (1930) (remarks of Senator Borah).

69. *Id.* at 7939.

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Upon some judicial tribunals it is enough, perhaps, that there be men of integrity and of great learning in the law, but upon this tribunal [the Supreme Court] something more is needed, something more is called for, here the widest and broadest and deepest questions of government and governmental policies are involved.

It seems to me that Senator Borah was right, from his point of view, in taking the position he did as to the confirmation of Judge Parker, even though hindsight and observation of Judge Parker's subsequent distinguished career as Chief Judge of the United States Court of Appeals for the Fourth Circuit has suggested that he would not, if confirmed, have acted as his opponents thought he would. I believe Senator Borah was also right in opposing President Roosevelt's Court plan. He recognized that the normal responsiveness of the appointing and confirming authorities to tides of public opinion, as well as other factors, inevitably suggests that those who are, in the words of Senator Borah, "on their way to the Supreme Court," may be judged by broader standards than merely moral rectitude and legal learning. But he likewise saw how different this sort of responsiveness was from the enactment of legislation which would have arbitrarily enlarged the membership of the Supreme Court simply to revamp its judicial philosophy.