FRANKLIN DELANO ROOSEVELT AND THE "COURT PACKING" CONTROVERSY OF 1937

. . . a two-day exercise

READ the following: "Court Packing" Controversy of 1937, a collection excerpts of primary source documents that will help you answer the question. MARK each document as you read it as generally favoring or opposing FDR's proposal for judicial reform. BRING your document to class, both for this session and the next, as you will be able to use it for the in-class essay.

BACKGROUND

On November 3, 1936, President Roosevelt was swept back into office by what was, at the time, the largest landslide victory of the twentieth century. Roosevelt carried all but two states and won 523 electoral votes to Landon's 8. Such an overwhelming victory was an obvious expression of approval of Roosevelt's first four years in office, a mandate for a continuation of his New Deal Policies. The outlook for new legislation was rosy, for the Democratic Party as a whole had done almost as well as Roosevelt. They controlled the House with 331 seats to the Republicans' 89, and they enjoyed over a three to one majority in the Senate. Under such circumstances it was expected that Roosevelt would be able to embark on a series of legislative initiatives that would make the "100 Days" of 1933 pale in retrospect. Yet, by the end of July 1937, Roosevelt had absorbed the worst political defeat of his years as President.

During Roosevelt's first term the main stumbling block to social reform had been the Supreme Court, which divided over the New Deal. Four of the justices were conservative: McReynolds, Butler, Sutherland, and Van Devanter. Three supported the New Deal: Brandeis, Cardozo, and Stone. In the middle were Justice Roberts and Chief Justice Hughes. As long as both Hughes and Roberts voted with the liberal minority, the New Deal was safe from judicial interference. But in 1935 they started to side with the four conservative justices. Thus on May 27, 1935, they declared the National Industrial Recovery Act unconstitutional and invalidated other New Deal measures. The crowning blow came in 1936 when the justices struck down both the Agricultural Adjustment Act and the New York Women's Minimum Wage Law. To FDR and many other liberals, the narrow interpretation of the Constitution by the Supreme Court was based more on the outdated economic and social philosophy of the conservative justices than on good law. Obviously something had to be done.

Roosevelt presented his solution to Congress on February 5, 1937, in the form of a bill to reorganize the judiciary. The bill, couched in terms of "efficiency," was not limited to the Supreme Court , but the critical clause was one that stipulated that for every justice over seventy years old who did not retire, the President could appoint and additional justice to the Court, potentially expanding the Court to a total of fifteen judges. Since the conservative justices were all over seventy, the bill would put Roosevelt in a position to appoint six new (liberal) judges unless the conservatives resigned. Much to Roosevelt's surprise, there was immediate and vocal opposition to the bill.

What was the fate of this plan to reform the judiciary branch, and what were the reasons for it?

DOCUMENTS

The following documents have been culled from memoirs, diaries, and speeches of the more prominent men (and Mrs. Roosevelt) involved in the fight over the Court bill. Since some of the documents were written after the fight, be aware that, on occasion, time softens memory. What you don't know? Look up any names, acronyms, terms etc. that you are not familiar with.

DOCUMENT #1

> Samuel Rosenman was a New Dealer often consulted by FDR. This is an excerpt from his book, *Working With Roosevelt*, (1952).

[Roosevelt] was convinced, he said, from re-reading the old debates in the original Constitutional Convention that those who framed the Constitution were fully aware that civilization would raise problems ... which they themselves could not even surmise... but that a liberal interpretation in the years to come would give to the Congress the same relative powers over new national problems as they themselves gave to the Congress over the national problems of the day,"

I know now that his mind was fairly well -- though not completely -- made up by then [Jan 6, 1937] that he and Attorney Homer Cummings had had several meetings to canvass the various proposals, and that the President was leaning very heavily towards the one he finally used. Even as we were working on his annual message [to Congress] the Department of Justice was preparing the legislation and message and compiling the statistics that were to form the basis of the Supreme Court Plan of the next month. But we knew nothing of this at the time...

By the end of January, 1937, the President's thoughts had completely crystallized on the steps concerning the Supreme Court. Many plans had been submitted to him for his consideration before and after the election. Some of them required a constitutional amendment; others merely required legislation. The overriding necessity was to get something done in a hurry to overcome the paralysis imposed by the Court upon the legislative branch of the Government... . "

DOCUMENT #2

> George Creel was a publicist, writer, and ad man who had handled all American war propaganda during World War I. In 1937 he was close to Roosevelt, who often used Creel's column in *Collier's* magazine to float trial balloons for ideas. Thus, Creel wrote several early articles on the Supreme Court and was privy to inside information before Roosevelt announced his Court bill. This excerpt is from Creel's *Rebel at Large*.

Our discussions about the Court plan, prior to its introduction in the Senate, were most revealing. It was not only his [FDR's] belief in himself -- a confidence in his decisions that was not shaken by a single doubt -- but the very evident assumption that he did not need to

support his wishes by argument or appeal. Enough for him just to state the wish or give the order. For example, when I asked him if he meant to discuss the Court bill with members of Congress and party leaders before its introduction, he shrugged off the question as if it dealt with an unimportance.

The President's failure to make the matter a subject of conference stirred resentments that were not abated by his subsequent course. Tommy Corcoran was designated as a "royal messenger" to whip recalcitrants into line and when this failed, the White House let it be known that "disloyal Senators" would not receive any patronage favors in the future.

DOCUMENT #3

> Raymond Moley was one of Roosevelt's original "braintrusters" in the early years of the New Deal. By 1937 he was drifting away from Roosevelt. When the Court bill was presented, Moley fought hard against it. In the following selection from his book *After Seven Years* (1939) he analyzes Roosevelt's personality.

Whether or not Roosevelt realized that the plan he championed that day was an assault upon a fundamental principle in American government is another question.... Neither Corcoran nor Cummings objected to it as the violation of a constitutional tradition as binding as a written provision of the Constitution... The simple principle that democracy exists only in so far as its objectives are attained in terms of its own institutions --- this is not necessarily known to the connoisseur of historical anecdotes.

But even if it had been, how much of an obstacle would it have been to a man who believed himself the personification of the will of the majority? Passionately convinced as Roosevelt was, of the essential purity and rectitude of his intentions, how could he have been expected to remember the injunction in the *Federalist*.... Completely assured as he was that he himself embodied the desire for progressivism -- that he was progressivism -- how could he have been expected to consult those men, many of them immediately within reach at the other end of Pennsylvania Avenue, who might have refreshed his memory?

And so came the second tactical blunder in the proceeding -- the failure to take counsel with the congressional leaders on the assumption that they would not dare to oppose his wishes....

DOCUMENT #4

> Harold Ickes was head of the P.W.A. and later became Secretary of the Interior. He kept a diary, a valuable tool for historians: *The Secret Diary*, Saturday, February 6, 1937.

The president had called up together to read to us the message that he was about to send to Congress calling for a drastic reorganization of the judiciary... My own feeling is that the reforms as to structure and procedure advocated by the President are fully justified. I do not believe that eventually we can work out our constitutional salvation without a far-reaching amendment. As a preliminary to reading us his message, the President said that he had considered and put aside the idea of amending the Constitution. As he put it: "Give me ten

million dollars and I can prevent any amendment to the Constitution from being ratified by the necessary number of states."

DOCUMENT #5

Samuel Rosenman, *Working with Roosevelt.*

The message [to Congress] placed great emphasis -- almost the major emphasis -- on the fact that all the federal justices were overworked, and that as a result calendars were clogged and decisions delayed. We had a lengthy discussion of the advisability of using that approach rather than the direct one that because of the age of the present justices, the Court needed and could be given a fresh and more resilient out-look by the addition of younger men. Richberg, Reed, and I thought that that should be the major approach. But Cummings was confident of his facts and of the reasons -- overworked judges. The whole plan appealed to Roosevelt as a subtle device for getting what he wanted without being charged with "packing" the Court because of disagreement with the trend of its decisions. It was hard to understand how he expected to make people believe that he was suddenly interested primarily in delayed justice rather than in ending tortured interpretation of the Constitution; but the cleverness, the too much cleverness, appealed to him.

DOCUMENT #6

Ickes, *Secret Diary*, Tuesday Feb. 16, 1937.

Discussion of the President's plan to reform the judiciary continues to rage. I do not recall any single issue affecting the Government that has caused the spilling of so much printer's ink or led to so many fervent discussions -- I had an hour with the President... He insisted that he would win his fight and I told him he simply had to. I said to him that unless he won he might as well resign, because he could not hope to realize the objectives that be had in mind or to accomplish what the people elected him to accomplish by such an overwhelming majority last November.

DOCUMENT #7

Letter from FDR to Charles Burlingham, a leading American lawyer who had written Roosevelt that although he agreed with retirement of older Justices, he felt it should be done by the process of Constitutional Amendment.

The White House
Feb. 23, 1937

Dear Charles:

I agree with Molly Dewson: Strictly between ourselves there are two difficulties with any amendment method, at this time. The first is that no two people can agree on the language of the amendment.

In general, four types of amendment have each of them substantial backing:

(a) The Wheeler type which gives to the Congress an overriding power on judicial decisions.

(b) The proposal to take away or curtail the right of the Supreme Court to pass on constitutionality.

(c) The type conferring specific or general powers over agriculture, mining and industry on the Congress. [To match that of commerce.]

(d) The type setting an age limit on judges or giving them terms instead of life appointments.

To get a two-thirds vote, this year or next year, on any type of amendment is next to impossible. Those people in the Nation who are opposed to the modern trend of social and economic legislation realize this and are, therefore, howling their heads off in favor of the amendment process. They are joined by many others who do not know the practical difficulties.

Finally, if an amendment were to be passed by a two-thirds vote of both houses, this year or next, you and I know perfectly well that the same forces which are now calling for an amendment process would turn around and fight ratification on the simple grounds that they do not like the particular amendment adopted by Congress. If you were not as scrupulous and ethical as you happen to be, you could make five million dollars as easy as rolling off a log by undertaking a campaign to prevent the ratification by one house of the Legislature, or even the summoning of a constitutional convention in thirteen states for the next four years. Easy money.

Therefore, my good old friend, by the process of *reductio ad absurdum*, or any other better-sounding name, you must join me in confining ourselves to the legislative method of saving the United States from what promises to be a situation of instability and serious unrest if we do not handle our social and economic problems by constructive action during the next four years. I am not willing to take that gamble and I do not think the Nation is either.

As Ever Yours,

F. D. R.

DOCUMENT #8

F. D. R. Fireside Chat, March 9, 1937.

The American people have learned from the depression. For in the last three national elections an overwhelming majority of them voted a mandate that the Congress and the President begin the task of providing that protection -- not after long years of debate, but now.

The Courts, however have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions.....

Last Thursday I described the American form of Government as a three-horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the Congress, the Executive, and the Courts. Two of the horses, the Congress and the Executive, are pulling in unison today; the third is not...

But since the rise of the modern movement for social and economic progress through legislation the Court has more and more often and more and more boldly asserted a power to veto laws passed by Congress and by State Legislatures....

In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as judicial body, but as a policy making body....

The Court, in. addition to the proper use of its judicial functions, has improperly set itself up as a third House of Congress -- a super-legislature, as one of the Justices has called it -- reading into the Constitution words and implications which are not there, and which were never intended to be there. We have therefore reached a point as a Nation where we must take action to save the Constitution from the Court and the Court from itself....

What is my proposal? Is it simply this: Whenever a Judge or Justice of any Federal Court had reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office, with the approval, as required by the Constitution of the Senate of the United States.

That plan has two chief purposes. By bringing into the Judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the administration of all Federal justice, from the bottom to the top, speedier and, therefore less costly; secondly, to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries....

Is it a dangerous precedent for the Congress to change the number of Justices? The Congress has always had, and will have, that power. The number of justices has been changed several times before -- in the Administrations of John Adams and Thomas Jefferson -- both of them signers of the Declaration of Independence -- in the Administrations of Andrew Johnson, Abraham Lincoln and Ulysses S. Grant....

This plan of mine is not attacking of the Court; it seeks to restore the Court to its rightful and historic place in our system of Constitutional Government and to have it resume its high task of building anew on the Constitution "a system of living law." The Court itself can best undo what the Court has done.

DOCUMENT #9

Time Magazine, Feb. 22, 1937.

Well aware that he had put his prestige to its greatest test, the President sent his congressional contact men charging up the Hill, did his own bit by summoning doubtful

Senators to the White House for heart-to-hearts in groups of two to six. They reported him affable, patient, conciliatory, uproarious at the suggestion that he wanted, to become a dictator -- and determined to gain his end... The election of 1936 made him surer than ever that the nation wanted the kind of legislation which the present Court was blocking.

DOCUMENT #10

> Tom Connally was a Democratic Senator from Texas. Although be had supported the New Deal and Roosevelt he drew the line at Roosevelt's Court bill. As one of the Senators on the Judiciary Committee, his opposition sorely hurt the bill's chances. From Connally's autobiography *My Name is Tom Connally* (1954):

With all this formidable army at work to push the bill through the Senate, the opponents of court packing decided that they needed a close knit organization too. So we organized a steering committee.... As for our strategy in the Judiciary Committee fight, we knew we had the advantage in a long drawn out fight. Since Roosevelt was so popular throughout the country, we assumed that the first reaction of the nation would be to favor his bill. Our job was to prolong the committee hearings until we could sell our case to the country and the Senate... According to plan, administration supporters were heard first. This took more than a week, because we opponents argued so insistently with witnesses. After that, only our supporters were heard....

We opponents of the bill made progress from the very beginning of the committee hearings. The longer the debate lasted in committee the more publicity we got, and the voters began to understand the fundamental issue...

DOCUMENT #11

> Jim Farley had worked for Roosevelt when he was Governor of New York. After the 1932 election, FDR appointed Farley Chairman of the Democratic Party. From *Jim Farley's Story*.

The Republican strategy, which was perfected by the wily, leonine Borah, was masterful: the only way to beat the program was to let the Democrats fight the issue among themselves. He was aware that opposition to the plan in Democratic ranks was strong and that even the party's leadership had grave doubts of its wisdom. Borah knew that if the Republicans, reduced to a corporal's guard in Congress by the 1936 landslide, were to make a party issue of the Court plan, the Democrats would unite and steam-roller the program through the House and Senate.

DOCUMENT #12

> Attorney General Cummings was the first witness called in the Senate Judiciary Committee hearings. The "writs of certiorari" that he refers to in his testimony were legal demands from the Supreme Court to lower courts for all records pertaining to a certain case. If the writ was not granted, it meant that the Court was not interested in hearing that particular case and had turned down the appeal. From the Committee *Hearings*, March 10, 1937.

Attorney General Cummings: The question of judicial reform is not a new one.... Surely all thoughtful citizens desire constantly to improve our institutions, to adapt them to our needs as time advances and to secure the best government that intelligence and wisdom can provide.... The President's plan rests upon four pillars, based upon the following propositions.

A. The impossible situation created by the reckless use of injunctions in restoring the operation of Federal laws.

B. The presence on the Federal Bench of aged or infirm judges.

C. The crowded condition of the Federal dockets, the delays in the lower courts, and the heavy burden imposed on the Supreme Court.

D. The need of an effective system for the infusion of new blood into the judiciary.

By limiting the number of cases heard, the Court has been able to keep abreast of its self-determined docket. By thus inverting, as it were, the usual situation, the Court hears and decides not what is presented but only what it can handle....

The proposed increase in the number of judges is not for the purpose of enslaving the judiciary; not for the purpose of making it an adjunct of the Executive. The purpose is to rejuvenate the judicial machinery, to speed justice, and to give the courts men of fresh outlook who will refrain from infringing upon the powers of the Congress...

Senator Burke: Could any evidence be offered by you or the Solicitor General, or anyone else, to indicate whether any of the writs for which applications were made, should, in the interests of justice, have been granted?

Attorney General Cummings: Well, Senator, I can only answer that by saying that sometimes we, in behalf of the Government, have asked for writs of certierari which we thought we should get, and which we did not get. Thirty percent of all the Government applications for writs of certierari have been denied. We did not make these applications frivolously.... We did not ask the Court for such writs except upon what we thought were excellent grounds. Yet we were denied to the extent of thirty percent.....

Senator Connally: You have referred to certain reforms desired by the people. Do you have any idea that, if we pass this bill, the N.R.A. Act would be revived, and the new court would uphold it as constitutional?

Attorney General Cummings: I have no idea whatever that any particular measure would be decided in any particular way. It is a question of dealing with subjects and not with certain acts or decisions. The questions involve minimum wages, maximum hours, sweat shops, conditions of child labor, social legislation, and other things in which the people are vitally concerned and which they have a right to deal with in the common interest.

Senator Connally: That is what I am trying to ascertain, whether you have any particular decision in mind.

Attorney General Cummings: I have not. I have only in mind a judiciary that will be open minded on those subjects... We want an independent judiciary, but we want a judiciary that will permit the country to move.

DOCUMENT #13

> After the proponents of the bill had been heard, the opponents were given the floor. Senator Wheeler led off the opposition. From the Committee *Hearings*.

Senator Wheeler:... I thought it was a reflection upon the Court when it was stated that the Court was behind in its work, and when it was very strongly intimated, If not stated in so many words, that such a condition resulted from the age of the members of the Court. I was not familiar with the details, but I went immediately, or had my office staff go immediately, to the Attorney General's report, and there I found in the Solicitor General's report a statement to the effect that the Court was not behind in its work and, in addition to that, that the disposition of cases and of writs of certierari was, in substance, in accordance with the best practices.....

And I have here now a letter by the Chief Justice of the Supreme Court, Mr. Charles Evan Hughes, dated March 20, 1937, written by him and approved by Mr. Justice Van Devanter.

The letter reads as follows:...

> 1. The Supreme Court is fully abreast of its work.... There is no congestion of cases upon our calendar....
>
> 5. A review on writ of certierari is not a matter of right, but of sound judicial discretion and will be granted only when there are special and important reasons therefor.... Even if two or three of the Justices are strongly of the opinion that certierari should be allowed, frequently the other Justices will acquiesce in their view, but the petition is always granted if four so vote.... I think that it is safe to say that about 60 percent of the applications for certierari are wholly without merit and ought never to have been made....
>
> 7. 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.... On account of the shortness of time I have not been able to consult with the members of the Court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the justices. I should say, however, that I have been able to consult with Mr. Justice Van Deventer and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

I have the honor to remain

Respectfully yours, Charles E. Hughes.

DOCUMENT #14

> Ickes, *Secret Diary*, Friday March 26, 1937**.**

The Court fight goes on apace. This week the witnesses before the Senate Judiciary Committee had been opponents of the plan. Senator Wheeler was the first witness and he started off by reading into the record a letter signed by Chief Justice Hughes and concurred in by Justice Van Devanter and Brandeis. This letter, without expressing itself as to the policy of the President's plan, sought to prove in great detail that the Court did not need any extra help to handle its work since it kept right up with its docket. It then went on to congress the opinion that more judges would make for inefficiency and delay. It was good tactics. This episode proves again the mistake in going to court with a weak case. I refer of course, to the fact that the President's special message on the question of judicial reform was almost entirely based on the proposition that we needed more Fedaral judges because, on account of old age and decreptitude, we haven't enough able bodied judges to keep up with the work of the Courts...

Not only Catholic church but other religious bodies are becoming interested in opposition side. Many of the farm organizations, or at least their accredited lobbyists in Washington, are against the plan.

DOCUMENT #15

> Senator Carter Glass was an old Wilsonian Democrat who delivered an impassioned speech in the Senate against the Court bill on March 29, 1937.

Confessedly I am speaking tonight from the depths of a soul filled with bitterness against a proposition which appears to me utterly destitude of moral sensibility... Political janizaries paid by the federal treasury are parading the states in a desperate effort to influence the public against the Supreme Court of the United States.... [They would] pick six judicial sycophants.... judicial marionettes to speak the ventriloquisms of the White House… The men and women of America who value liberties ... should exercise their constitutional right of petition and, with all the earnestness of their souls, protest to Congress against this attempt to replace representative government with autocracy...

There has been no mandate from the people to rape the Supreme Court or tamper with the Constitution....

DOCUMENT #16

> On April 12, 1937, the Supreme Court reversed earlier decisions and declared Wagner Act, which allowed the government to enforce collective bargaining, constitutional. This caught the White House off guard and took the wind out the sails of the Court bill.

Presidential Press Conference, April 13, 1937.

Q. Mr. President, in your Message to Congress of January fourth you asked the Judiciary to aid in making democracy successful. Have you any comment on the decision of the Supreme Court?

THE PRESIDENT: Not on the record.... Off the record, and really off the record and just in the family, I have been chortling all morning, ever since I picked up the papers. I have been

having a perfectly grand time.... these people who have been talking to me feel that the reversal.... applies only to those three specific cases affecting collective bargaining. How far the decision will be extended to other phases of interstate commerce...."The Lord only knows."

DOCUMENT #17

Charles Even Hughes from *Autobiographical Notes*

It has been insinuated, and some have made, I understand, a direct charge, that the Court during the pendency of the President's bill, and for the purpose of defeating it, changed front. The reference has been to two cases, that of *West Coast Hotel* sustaining the Minimum Wage Act of the State of Washington, and upholding the National Labor Relations Act.

These cases, both because of their intrinsic importance and because of their setting aroused public interest in an unusual degree. But the notion that either of these cases, or any others, were influenced in the slightest degree by the President's attitude, or his proposal to reorganize the Court, is utterly baseless... The President's proposal had not the slightest effect, on our decision.

Nor can it be supposed that the President's proposal had any effect upon the views of Justices Brandeis, Stone, and Cardozo in relation to the National Labor Relations Act. And as to Justice Roberts,

I feel that I am able to say with definiteness that his view in favor of these decisions of the Court would have been the same if the President's bill had never been proposed. The Court acted with complete independence.

DOCUMENT #18

Tom Connally, Speech in Texas, late April, 1937.

Let me make it clear that I am a devoted personal friend of the President of the United States. If this were a matter of personal friendship, I should be standing beside the President. But this question is so fundamental that it transcends personal friendship. To support it would violate my superior obligation to the Constitution of the United States.

Some of those who favor the proposal baldly declare that their real purpose is to put on six new judges with preconceived opinions about certain questions that now are pending before the court... If that be their purpose, they would absolutely undermine and destroy the independence of the court. I want a Supreme Court owing no hope of reward and feeling no threat from Congress, or falling under the control of the President. The court must not be under the control of anybody except its own conscience, integrity, and learning.

Let some reactionary administration come to power and it would immediately say: 'The Democrats stacked the court, and now we have as much right to restack as they had. We will thereby add enough judges so that we will have a responsive court, a court that will do the bidding of this reactionary administration and repeal all the liberal laws placed on the statute books by the Democrats.'

DOCUMENT #19

Ickes, *Secret Diary*

Sunday April 25, 1937

Yesterday morning I had a session with the President at the White House proper... I told him of my talk with Raymond Robbins and of what Robbins had said to me, namely that he had it from a confidential inside source within the Republican National Committee that the Republicans could count on only thirty-seven sure votes against the President's Court plan. The President said that was about right but the trouble was that he could count only on forty-two votes. This leaves seventeen doubtful votes, and it was clear the President does not know how these seventeen will divide finally... It looks like a pretty tight squeeze.

Sunday, May 2, 1937

Last Monday I had an appointment with the President to take up some matters that had accumulated while I was in Florida. He continues to think his Court bill is safe, although the final margin might be a narrow one. He also continues to fear that Robinson may compromise without consulting him ..... Early in the week Senators O'Mahoney, Hatch, and McCarran announced publicly that, while they were for judicial reform, they were not in favor of adding six judges to the Court. Hatch, of New Mexico, for instance, said that he would vote for two additional judges.

DOCUMENT #20

On May 6, 1937, Charles Evans Hughes made a speech before the American Law Institute. The following is from the conclusion of that speech.

The success of democratic institutions lies in the success of the processes of reason as opposed to the tyranny of force. Between these society must choose. If society chooses the process of reason, it must maintain the institutions which embody those processes.

Institutions for the exercise of the law-making power and for the execution of laws must have their fitting complement in institutions for the interpretation and application of laws....

DOCUMENT #21

Ickes, *Secret Diary,* Sunday, May 9, 1937.

I suggested a head-on attack on Chief Justice Hughes. He made what was undoubtedly a political speech before the American Law Institute on Thursday night. In substantiation of this statement, the *Chicago Daily News* gave this heading to its account of this speech: CHIEF JUSTICE HUGHES APPEALS: PROTECT COURTS FROM TYRANNY. This speech was a self-serving one from the point of view of the Supreme Court and how it can be judged as anything but purely political, in view of the court situation, I cannot understand.

DOCUMENT #22

Ickes, *Secret Diary*, Sunday May 9, 1937.

What is delaying the progress of the bill is the vanity of the Senator Ashurst, chairmen of the Senate Judiciary Committee. Ashurst is getting all kinds of publicity and will do nothing to hurry the bill through the committee. He loves the limelight too much. Tom Corcoran said that the bill could have been reported out long ago if it had not been for Ashurst...

DOCUMENT #23

Harpers Magazine, May, 1938, "The Supreme Court Today," Marquis W. Childs.

It was widely reported, and with some substantiation, that at least two of the "conservative" justices were prepared to resign at the time the Court bill was introduced. They were waiting only for Congress to pass an adequate retirement measure. Once the reform bill had been introduced they could not, or would not, withdraw under fire.

DOCUMENT #24

Tom Connally, *My Name is Tom Connally*.

Ashurst [Chairman of the Senate Judiciary Committee] set the Senate Judiciary Committee vote for May 18. Just as we were walking into the committee room, Senator Borah, the ranking Republican member, told us that Associate Justice Van Devanter had written a letter of resignation to President Roosevelt. Here was a chance for the President to make his own appointment to the Supreme Court. With the recent five to four decisions in his favor, he would now be assured of six of the nine justices. As a result, the Judiciary Committee lost little time reporting out the court-packing bill by the adverse vote of ten to eight.

DOCUMENT #25

Jim Farley, *Jim Farley's Story.*

It was on May 18, 1937, that Van Devanter sent his resignation to the White House. Despite denials, the move was widely interpreted as an adroit conservative maneuver calculated to weaken the President's wavering Senate ranks, by a voluntary breaking up of the bloc which had long troubled the President.

DOCUMENT #26

Letter from F.D.R. to Justice Willis Van Devanter.

The White House
May 18, 1937

My dear Mr. Justice Van Devanter:

I have received your letter of this morning telling me that you are retiring from regular active service on the bench on June 2, 1937.

May I as one who has had the privilege of knowing you for many years, extend, to you every good wish.

Before you leave Washington for the summer it would give me great personal pleasure if you would come in to see me.

Very sincerely yours,

F. D. R.

DOCUMENT #27

The Nation, "Hughes Checkmates the President," Robert S. Allen, May 23, 1937.

Few realize how important a part Mr. Hughes has played in the fight against the court bill. He has conducted his operations with consummate deftness and finesse -- and tremendous effectiveness. He alone is responsible for the three five-to-four decisions (Washington minimum-wage, Wagner labor-act, and Herndon civil-liberties cases) that have so heavily undermined public and Congressional support for the President's bill .... Mr. Hughes has played high politics these last three months and played it with boldness and agility. Not only did he reverse himself, but he accomplished the much more difficult feat of persuading Justice Roberts, to stop nesting with the four diehards and loop the loop with him.

In the inner White House circle, where the full significance of the Chief Justice's activities are thoroughly realized, there is bitterness and fury against him....

The unfavorable committee vote was a body blow to the President. It was the first time in his four years in office that a measure bearing his official blessing had been turned down by a committee.... He is making it clear he is willing to accept a compromise.... Behind this window dressing the stage is being set for a back-down. Already Administration mouthpieces are claiming a "moral" victory in the resignation of Van Devanter and the three liberal decisions.

DOCUMENT #28

Ickes, *Secret Diary,* Saturday, May 22, 1937.

The President's position is that it was he who was elected by an overwhelming vote, a vote so large that a lot of Representatives and Senators managed to ride through on his coat tails. He doesn't like it that men who owe their election to him should all of a sudden discover that they are statesmen in their own right. He told Garner, as he told us later at the Cabinet meeting, that on his trip to the Gulf of Mexico he had been talking with organization men lower down than national committeemen ... and that he believed sincerely that the people were with him in his Court fight.

Late today Tom Corcoran called me up after I had reached home. He has evolved a plan to put the Supreme Court on the spot again and it revolves about the suits that have been riled to restrain us from going ahead with our allocations for PWA municipal power projects. .. Writs of certiorari on behalf of the power companies are now pending before the Supreme Court, and it is the idea of the Solicitor General to move that these writs be dismissed before the Court adjourns on June 2.... The plea will be made that for the Court to fail to deny these writs would be further to delay unduly our PWA program. This looks like good tactics to me...

I asked Tom about the Court fight and he said that everything was in good shape. He admitted that Chief Justice Hughes has played a bad hand perfectly while we have played a good hand badly. He says that the President is doing some clever work now and that he is enjoying the fight. Of course, going ahead with the fight does not mean that the President in the end will accept a compromise.

DOCUMENT #29

> The Senate Judiciary Committee had reported the Court bill negatively out of Committee on May 18. The adverse report of the Committee took longer to write and was delivered to the Senate on June 7, 1937. From the adverse report of the Senate Judiciary Committee;

The Committee on the Judiciary hereby report the bill adversely with the recommendation that it do not pass....

The effect of this bill is not to provide for an increase in the number of Justices composing the Supreme Court. The effect is to provide a forced retirement or, failing in this, to take from the Justices affected a free exercise of their independent judgment...

The bill is an invasion of judicial power such as has never before been attempted in this country.... It is essential to the continuance of our constitutional democracy that the judiciary be completely independent of both the executive and legislative branches of the Government....

Summary:

We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle.

It was presented to the Congress in a most intricate form and for reasons that obscured its real purpose....

It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition in American democracy....

It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.

DOCUMENT #30

Ickes, *Secret Diary*, Thursday, June 17, 1937.

Recently the majority of the Judiciary Committee of the Senate brought in a report adverse to the President's plan that spared him not at all. In effect, the report, which was signed by seven Democrats and three Republicans, practically accused the President of trying to subvert our institutions and overturn our Constitution by questionable methods.....

When Tom Corcoran was in to see me, we talked about the Supreme Court vacancy caused by the resignation of Justice Van Devanter. Everyone in the Senate has been supporting Joe Robinson for this. The President had Robinson over to the White House one evening and, according to Tom, he told Joe that if there was to be a bride there must also be bridesmaids -- at least four of them. In other words, the President apparently put it up to Robinson to put through a compromise Court bill which would give him the right to appoint four justices on account of the superannuation of some of the sitting judges, as well as fill the Van Devanter vacancy. Tom also told me that the Van Devanter resignation had been engineered by Chief Justice Hughes, Senator Wheeler, and Van Devanter, with Justice Brandeis helping. It was a clever move.....

DOCUMENT #31

Donald Richberg was an insider in the White House. The following is from his autobiography, *My Hero.* (1954)

There was much uncertainty as to the outcome of the controversy in the Senate where it was most acute. It was generally assumed that a vote in the House would support the President, but the issue in the Senate was very doubtful. There the Administration forces were led by Senator Joseph Robinson of Arkansas, who was almost surely unsympathetic privately with the President's program, but who manfully maintained his responsibilities as the Administration leader.

That the President appreciated Robinson's support was made clear.... He referred to the fact that in the event of the retirement of Justice Brandeis, he would anticipate appointing Felix Frankfurter to that vacancy. But he indicated that in the first vacancy that might occur he felt a deep obligation to Senator Robinson. He knew that Senator Robinson would regard an appointment to the Supreme Court as a final crown of his public service and he felt he deserved it.

DOCUMENT #32

Jim Farley, *Jim Farley's Story*.

In the midst of the Court struggle, Vice President Garner packed up and went home to Uvalde, Texas. He had told me he was going to take a vacation so I thought nothing of it until newspaper stories attributed Garner's absence to a rift with the President, precipitated by the Court fight. At a White House luncheon on June 18, 1937, I found the President smoldering over the absence of the presiding officer of the, Senate.

"Why in the hell did Jack have to leave at this time for?" he fumed through a cloud of cigarette smoke. "I'm going to write and tell him about all these stories and suggest he comes back. This is a fine time to jump ship. What's eating him?"

DOCUMENT #33

Letter from F. D. R, to John Garner

The White House
July 7, 1937

Dear Jack:

.... Frankly I honestly think you ought to be coming back pretty soon, timing it so that it would not be said that you were rushing back to save the amended Court Bill by trying to call off a filibuster. Joe's [Robinson] best thought is that he has the votes with a comfortable margin and that he can prevent or defeat a long continued filibuster. He wants to give the opposition, of course, every right to make all the speeches they want to but to try to force matters when the problem degenerates into what the country will recognize as a flouting not only of that Bill but of the rest of the legislation. That is why I really think it would be fine if you would come back before the bill reaches that stage, i. e., in a week or ten days.

Then there is, as you know, the really continuing comment on your absence-criticism from papers like the editorial in the Scripps-Howard papers last night. I was sure there would be the usual deliberate misconstruction attached to your trip by the hostile press and I have consistently said that it was all nonsense and that you were coming back soon .....

So do come back very soon and make me and a whole lot of others, very happy.

Affectionately yours,

DOCUMENT #34

Ickes, *Secret Diary*, Sunday, July 11, 1937.

Senator Robinson several days ago introduced a substitute Court bill and the fight on it has been raging fast and furious ever since. This bill has precedence in the Senate over all other legislation. No other bill may be considered while it is pending ....

There seems to be a majority of the Senate for the compromise bill, but the opposition is well organized and aggressive.

Whether, it will be possible to put this bill through at this session, I do not know, although Robinson is making a hard fight for it.

Tom Corcoran came in the other day. He said that the Administration could count on fifty-four votes for the Court bill and that the opposition was claiming votes that it does not have. He thinks the bill will pass at this session but Tom is inclined to be over optimistic.

DOCUMENT #35

Donald Richberg, *My Hero.*

.... My host and I were returning from a morning of golf when Florence greeted me with the sad news that Senator Robinson had died of a heart attack.

His death signaled the collapse of the Court packing plan. With Senator Robinson gone, the anti-Administration members of the Senate took command and the Administration was compelled to accept a defeat of the President's program.

DOCUMENT #36

Ickes, *Secret Diary*, Friday, July 16, 1937.

Early Tuesday morning Senator Joe Robinson was discovered dead on the floor of the bathroom of his apartment. Apparently it was the result of an attack of coronary thrombosis.....

Tom told me that there was already a great stirring among the Senators to determine who was to be the next Majority Leader, to try to get control of the Senate, and to force an adjournment without action on the Court bill. He said that in his opinion the President would go right through with the fight....

Senator Harrison is a candidate for Majority Leader but the Administration wants [Senator Alben] Barkley. Not only would Harrison make a very poor leader in the best of circumstances, but at heart he himself is against all the President's program. Tom Corcoran thinks that if Harrison is made leader he will sink the Court reform program.

DOCUMENT #37

Jim Farley, *Jim Farley's Story*. At lunch with Roosevelt, late July.

"Jim, what I have in mind is this. Senator Pope was in the other day and indicated it might be well to try to pass some of the important legislation now pending and let the Court program ride along a while. Then, in October, Congress would come back to take it up. What do you think of it?"

"Sounds all right, except I think it might be a terrible mistake on your part to abandon the fight."

"But it wouldn't be abandoning the fight; it would be just a postponement."

In forty-eight hours the Court bill was dead. The Senate referred it back to the Judiciary Committee. In the final hours, it was widely recognized that Presidenta1 defeat was inevitable...

By the time the luncheon was ended he was in a happy frame of mind. As a matter of fact, after he had shut the Court fight surrender out of his mind he became quite gay. I did not gather, however, that he was prepared to let bygones be bygones, I knew he was disappointed, and even incensed at some Democrats. His attitude was that he had been double-crossed and let down by men who should have rallied loyalty to his support. It was certain he would not dismiss it all as part of the game, but would carry the scars of his defeat for some time.

DOCUMENT #38

Ickes, *Secret Diary*, Sunday, July 25, 1937.

Senator Barkley's victory as Majority Leader of the Senate was a close squeeze....

On Thursday the bill to reform the Supreme Court was recommitted to the Judiciary Committee with only twenty voting against it. That this was a terrific defeat for the President cannot be denied.... [Vice President] Garner went back to the hill for conferences and then returned to the President. He had a compromise to suggest. As I get it he offered to put through this compromise if the President would agree to terms that he [Garner] sought to impose with respect to labor and relief. The President refused and Garner went back and ditched the whole program. The result was the adoption of the resolution to recommit....

Following the adoption of this motion there was a meeting of the Judiciary committee which appointed a subcommittee, headed by Senator McCarran, to draft a bill for certain procedural reforms in the lower courts. Fundamentally this will amount to nothing. The President has been beaten badly on his Court proposal.

DOCUMENT #39

Ickes, *Secret Diary*, Tuesday, July 27, 1937.

Saturday night Tom Corcoran called me to ask if he could come out to spend the weekend. ....Tom told me how stubborn the President had been in the Court fight. There were one or two times when Tom felt that the President should compromise, and satisfactory compromises could have been made.. At one time Senator Wheeler was willing to agree to two new justices of the Supreme Court, and he said that he could also assure the resignation of Justice Sutherland through Senator Borah. These, with the VanDevanter vacancy, would have given the President four appointments. However, Joe Robinson would not stand for this because it meant a Court of eleven, one justice from each judicial circuit. Such a plan would have barred Robinson from consideration for the Supreme Court because Arkansas is in the same circuit with Minnesota, and Justice Butler is already on the bench from that circuit.

Then about the time of the Van Devanter resignation, Tom suggested to the President that he let the Court bill drop temporarily and push along his other legislation. The President could have done this without any difficulty and probably he could have gotten what he wanted in the way of reorganization and other legislation.....

In speaking of [Attorney General] Cummings, Tom and I went back over one or two phases of the Court bill. I had always been curious as to who really was responsible for the original plan suggested by the President.... He [Corcoran] told me that the whole thing was the brain child of Homer Cummings.... The foundations upon which Cummings had built his glittering device were composed of two equal parts. One was the question of age, and the other was the inability of the Supreme Court to handle its business promptly. These foundations were ruthlessly destroyed by the opposition in no time at all, with the result that in the end the whole structure fell.

DOCUMENT #40

Eleanor Roosevelt, *This I Remember*, 1949.

The defeat of the Supreme Court bill seemed to be a real blow to Franklin, but he spent no time in regrets and simply said: "Well, we'll see what will happen." Later he was able, little by little, to change the complexion of the court. He remarked one day that he thought the fight had been worthwhile in spite of the defeat, because it had focused the attention of the public on the Supreme Court and its decisions and he felt that aroused public interest was always helpful. He had a firm belief in the collective wisdom of the people when their interest was awakened and they really understood the issues at stake.