



# MEMORIES OF THE 1937 CONSTITUTIONAL REVOLUTION

## PART I

*Warner W. Gardner*

I HAVE RECENTLY READ a good many books and papers which undertake to explain the constitutional crises which arose and were resolved in the years 1935-1938. They are listed in the *Annex* on pages 232-233 below (to which citations will be directed.) They range from the foolish to the speculative to the wise. But virtually all have in common at least a flavor of artificiality. The actors move across the stage on waves of footnotes, not on human feet. Words put into diaries or letters two-thirds of a century ago, when taken out of the context of their times, can mislead as well as enlighten. Inferences drawn from silence are more hazardous. As Felix Frankfurter put it,<sup>1</sup>

The dictum that history cannot be written without documents is less than a half-truth if it implies that it can be written from them [alone].

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*Warner Gardner (1909-2003) led an extraordinary life in the law, beginning with study at Columbia Law School and then a clerkship with Justice Harlan Fiske Stone (1934-35), followed by more than a dozen years in various departments of the federal government (including decorated military service during World War II), and then more than a half-century at Shea & Gardner, the Washington, DC law firm he co-founded in 1947. Thanks to the Gardner family, and especially Hannah Gardner, for letting us publish his work.*

<sup>1</sup> Frankfurter, p. 311.

In this view it seems worth relating what a participant remembers of those days.<sup>2</sup> My participation was at the working level, not in a policy position, but was rather well-rounded.<sup>3</sup> An additional impetus to record my memories is found in my belief that no other participant now lives to give a first-hand account of any of the events.

My experience may show that I am entitled to speak. It does not demonstrate that I speak truly. I have, at an advanced age, been presented with ample evidence that my memory is often quite unreliable. However, the historians' careful work with the documents, disparaged only a paragraph ago, has proved most helpful to me in checking and ordering my own recollections.<sup>4</sup> They follow:

## I

I do not believe it possible to understand the constitutional issues of the 1930's without a lively appreciation of the perilous state of the national economy at that time. On Roosevelt's inauguration day on March 4, 1933, every bank in the country was closed, some of their own necessities and others because of Roosevelt's immediate and wise exercise of a wholly non-existent power. They were reopened a week later, on the gamble that a Government guaranty would stem the hemorrhaging. The gamble succeeded

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<sup>2</sup> The Journal of Supreme Court History in 1990 excerpted a brief and informal account of the court-packing episode from an unpublished 1989 memoir of mine. I believe a more careful account to be indicated.

<sup>3</sup> In the October Term, 1934, when the first of the New Deal statutes were invalidated, I was clerk to Justice Stone. I was a junior in the Office of the Solicitor General in the 1935 Term, lending minor assistance in the defense of the next round of doomed statutes. In the early months of the 1936 Term, under the direction of Attorney General Cummings, I did the research and drafting which produced the early versions of the "court-packing bill." I continued in the Office of the Solicitor General for the next four Terms (serving as First Assistant in the last three), luxuriating in the presentation of argument to a thoroughly sympathetic tribunal, as I continued on infrequent occasion to do in 1941-1943 as Solicitor of Labor, then of Interior.

<sup>4</sup> The work of Professor William E. Leuchtenburg has proved extremely helpful. This piece has benefitted more directly from a sizeable body of careful and knowledgeable comment graciously offered by Professor Richard C. Friedman in respect of an earlier draft. He bears no responsibility for the opinions which, making no gesture toward objectivity, are scattered through this piece.

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*Warner Gardner left (early 1940s) and right (late 1990s).*

*Photos courtesy of Hannah Gardner.*

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and by 1935, with the help of the early New Deal measures, there had come a very modest improvement in employment, production, wages and prices. The improvement was seen, at least by the Roosevelt Administration, as problematic and dependent upon successful operation of the agricultural, industrial, financial, and public works measures of the New Deal, those already in precarious place and those yet to be developed.

The resulting fear of unemployment and hunger, of deserted farms and bankrupt factories, haunted every New Deal participant. New programs were needed, and immediately. Legislation, and to a degree its defense, were not occasions for a leisured elegance. Yet of all the books and papers listed in the Annex, only those of Jackson (pp. 97, 156-57) and Brogan (pp. 12, 17, 31-34) so much as mention the pressing economic needs of the nation, or the resultant pressure for haste by its attorneys. One rather prolific author, indeed, makes tasteless sport of the urgencies felt by those who were working, night and day, with dedicated intensity some 60 years before he ventured his opinion that they should have realized that it was all unnecessary.<sup>5</sup>

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<sup>5</sup> Cushman II, pp. 201-202: "Once upon a time, in the dark days of the Great Depression,

It was not enough that the Roosevelt administration had set about with “endless energy and bold improvisation”<sup>6</sup> to find remedies for the imperiled economy. It was evident by the summer of 1936 that the federal courts did not favor economic experimentation.

The Court in the first week of 1935 invalidated the “hot oil” provision of the Petroleum Code by an 8-1 decision that Congress had delegated too much of its legislative power.<sup>7</sup> The case was encrusted with bizarre errors of administration. One, the inadvertent elimination of the criminal provision of the code which the suit sought to enjoin, was discovered only when the Government’s Supreme Court brief was being written. The other administrative error gripped the Court’s attention as the plaintiff’s attorney described, in the nasal drawl of hill-country Texas, a step-by-step search through local, state and national offices for a copy of the governing regulation, finally finding it “in the hip pocket of the federal agent in the next field to the east.” I like to consider that, although obviously not a familiar of the law books, he was the founding father of the Federal Register.

In February the Court decided the *Gold Clause Cases*.<sup>8</sup> I found its argument memorable chiefly because of the remarkable muscular coordination of the attorney for Bankers Trust. He was plump, white-haired and impeccably dressed. When the iniquities of the Congress led him to fling his arms to the sky, out sailed his false teeth. With a fluid, one-handed gesture, he caught them at knee-level, inserted them in his mouth, and continued his argument imperturbably and without perceptible pause. The Court upheld 5-4 the power under the currency clause to devalue the dollar and to invalidate the gold clauses in private contracts; it held 8-1 that Congress could not violate its own contracts, but that the plaintiff suffered no damages because, had he been paid in gold, the required surrender of the gold for devalued currency would have been valid under the currency clause. If one brushed aside the metaphysics as incomprehensible, or even indefensible,

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there was a great liberal President . . . who fought valiantly . . . to better the lot of the common man and save the country from economic ruin. . . . Thus was a new constitutional order born.”

<sup>6</sup> Brogan, p. 34.

<sup>7</sup> *Panama Refining Co v. Ryan*, 293 U.S. 388 (1935).

<sup>8</sup> *Norman v. B & O R. Co.*, 294 U.S. 240; *Nortz v. United States*, 298 U.S. 317; *Perry v. United States*, 294 U.S. 330 (1935).

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the Government had won, and had escaped the almost unimaginable chaos which would have resulted if two years of financial and commercial activity had left every major payee in the nation with a claim for 2/3 more.

Any benign confidence that arose in February was short-lived. In May the Court, by a startling 5-4 decision, invalidated the Railroad Retirement Act.<sup>9</sup> The opinion by Justice Roberts found distasteful a few provisions, such as allowing retirement after 30 years' service even though not 65, which was "clearly arbitrary imposition of liability to pay again for services long since rendered and fully compensated," while coverage of a former employee recently reemployed was "arbitrary in the last degree" and was "taking the property of one and bestowing it on another" (295 U.S. at 349-354). Not content with trashing the Act in the name of due process, the Court gratuitously went on to exclude social programs from the commerce clause. If aged employees were a hazard, they could be discharged without pension; fostering a contented mind is not regulation of transportation, it is "an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee." The conjoined commands of the commerce and due process clauses, as decreed by the Court, seemed to me to be close to a ruling that the Congress could fix a speed limit on interstate trains but nothing more.

Three weeks later the Court, sitting for almost the last time in the small, dark room which had long ago housed the Senate, buried the National Industrial Recovery Act, one of the major elements of the New Deal.<sup>10</sup> The opinion by Hughes held that extraordinary conditions could not enlarge powers not granted; that the delegation of legislative power (in most cases to trade associations) was invalid because subject to no standards; and that regulation of hours or wages after the interstate commerce was completed was not within the commerce clause. Justices Stone and Cardozo concurred specially, but none dissented. The NRA was not very popular among the New Deal attorneys, since its icon, the Blue Eagle, seemed to live in a trade association cage, but they were distressed that *Schechter*, along with *Alton*, blocked the way to any national regulation of the national economy.

The Court on the same day held that the President could not remove the Chairman of the Federal Trade Commission because of his dogged re-

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<sup>9</sup> *Retirement Board v. Alton Railroad*, 295 U.S. 330 (1935).

<sup>10</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

sistance to any vitalization of that agency.<sup>11</sup> One commentator finds this a major defeat for Roosevelt, equal to those enforcing the asserted constitutional limitations. This was simply not the case; the decision was an irritant but not a disaster.<sup>12</sup>

The fears of constitutional impotence were, early in the next Term, expanded to the Government's efforts to relieve the agricultural disaster. January brought the invalidation of the Agricultural Adjustment Act.<sup>13</sup> The Government had sought to raise the disastrously low prices of basic commodities by imposing a processing tax to finance payments to farmers for reducing their production. Solicitor General Stanley Reed's workmanlike argument seemed faded in comparison with the flamboyance of George Wharton Pepper, but Reed offered even higher drama when, overcome by strain and overwork, he fainted at the conclusion of his reply. Justice Roberts, writing for a 6-3 Court, held that Congress could not tax and spend to promote the general welfare when the activity was one left to the states. While the program of purchasing a reduced production, "killing little pigs," was not very attractive in a nation with several millions of hungry people, it was disheartening to have the whole area of agriculture removed from federal power. The Court in May reinforced its demolition of federal powers under the commerce clause by invalidating the Bituminous Coal Act, which had authorized fixing minimum wages and prices. Justice Sutherland, writing for the 5-man majority, declared comprehensively that neither manufacture nor production was "commerce," and that Congress'

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<sup>11</sup> *Humphrey's Executors v. United States*, 295 U.S. 602 (1935).

<sup>12</sup> See Devins I, pp. 239-242; see, also, Devins II, *passim*, deploring the Solicitor General's control of Supreme Court litigation as undue "centralization." This is theoretical speculation run riot. *Humphreys* left intact the almost unlimited supervisory power found in White House control of future appointments, annual budget determinations for the agency, and the intangible but powerful force emanating from the "imperial presidency." I recall not a word of complaint of *Humphreys* in the Department of Justice nor any distaste for the Solicitor General's supremacy when I was Solicitor at the Labor, then the Interior Departments. Indeed, Devins himself notes that both the agencies and the Solicitor General attorneys seem relatively content, "but contentment with the present arrangement disguises its shortcomings" (II, p. 257). I can only conclude that jurisdictional contentment is naughty unless ratified by a knowledgeable college professor.

<sup>13</sup> *United States v. Butler*, 297 U.S. 1 (1936).

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*Warner Gardner is standing just behind the left shoulder of Solicitor General Stanley F. Reed. Photo courtesy of Hannah Gardner.*

power was not enlarged merely because the states could not act.<sup>14</sup> Moreover, delegation of wage-fixing power to a private group was a plain violation of due process (pp. 310-312). While the price-fixing provisions might be valid,<sup>15</sup> they were so closely related to the wage provisions that they, too, fell, despite the statutory severance clause (pp. 315-316).

A week later a 5-4 majority (including Roberts but not the Chief Justice) mounted the pinnacle of judicial arrogance by invalidating the Municipal Bankruptcy Act.<sup>16</sup> The Act applied only upon request of the state municipality and, indeed, in *Ashton* Texas had specifically legislated to approve seeking relief under the Act. Fiscal affairs, wrote Justice McReynolds,

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<sup>14</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 291-294 (1936).

<sup>15</sup> The Court had sustained bituminous coal price-fixing agreements, designed to aid the mine operators, in *Appalachian Coals v. United States*, 288 U.S. 344 (1933).

<sup>16</sup> *Ashton v. Cameron County Dist.*, 298 U.S. 513 (1936).

were the concern of the State alone, and the powers of Congress could not be enlarged by the consent of the State.

The final trip of the tumbril to the new marble stand carried the New York law fixing minimum wages for women, which fell by the usual 5-4 majority.<sup>17</sup> Justice Butler's opinion rested in part on New York's asserted failure to request that the predecessor *Adkins* be overruled<sup>18</sup> and in part on the assertion that the due process clause forbade governmental interference with the freedom of women to contract.

A number of the commentators have suggested that these litigating disasters were at least in part due to the incompetence of the Government attorneys.<sup>19</sup> I would agree that Biggs' 1933 appointment as Solicitor General was a two-year disaster, that Assistant Attorney General Stevens was an indifferent advocate, and that Richberg and his NRA staff were ill-suited for thoughtful constitutional litigation.<sup>20</sup> But the commentators move much too easily from court defeat to lawyer incompetence. None, in explaining litigation strategy, notes the marked difference in strategic control between agencies (such as the Labor Board) who get into court only on their own enforcement initiative and those that are vulnerable to injunction by any threatened litigant. Most (properly) find a great improvement when Reed became Solicitor General, without noting that *Schechter*, *Butler* and *Ashton* were lost upon his arguments. Irons and Cushman applaud Fahy's role in the Labor Board cases without noting that he was also prominent among the lawyers whom they condemn for having lost *Panama Refining*. None recognizes, when apportioning praise or blame among the agency attorneys, that from mid-1935 on constitutional issues were developed by joint work between the agency attorneys and the Solicitor General's Office, with the latter in charge. Above all, it is hard to be-

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<sup>17</sup> *Morehead v. N.Y. ex rel. Tipaldo*, 298 U.S. 597 (1936).

<sup>18</sup> *Adkins v. Children's Hospital*, 261 U.S. 525 (1918). The State argument in *Tipaldo* did not expressly request the overruling, but urged grounds which would so require (pp. 588-592).

<sup>19</sup> E.g., Irons, *passim*; Devins, pp. 240-250; Cushman I, 249-254. Leuchtenburg notes the charge but considers that lawyer incompetence could not explain the 1935-1936 disasters, pp. 230-232.

<sup>20</sup> Biggs, I suspect because of Cummings, argued none of the significant constitutional issues. Stephens argued *Panama* and Richberg (along with Reed) argued *Schechter*.



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lieve that anyone could read the vehement text of the crippling decisions of 1935-1936 and believe that even Daniel Webster, coached by Demosthenes, could have changed a single vote.

Whatever may have caused the decisions, there they were. Almost any action by the federal government to advance or to control the national economy would require a different constitution than that being forged by five elderly men to whom the New Deal was abhorrent.

The problem was forecast and a simple solution offered in 1787: amend the constitution. But it was not a rational solution in 1936. First, it did not, then or now, seem possible to draft a sensible amendment which would loosen the due process constraints, expand the commerce powers of the Congress, and yet preserve state sovereignty. Second, state legislators were sometimes more responsive to generous lobbyists than to abstract principles of good government, and it would require only one house in only thirteen states to reject the amendment. Third, one could not expect final action within a decade. The Child Labor Amendment, surely what one would consider the least controversial social legislation which could be proposed, was languishing on its deathbed 18 years after *Hammer v. Dagenhart*<sup>21</sup> and 12 years after the Congress proposed the amendment.

The cautious approach to salvation would be to await the retirement of some of the five justices who were determined to preserve the 19th century world they had known in their youth. But the actuarial prospects of redemption by death were slight. In 1936 Van Devanter was 77, McReynolds and Sutherland 74, Butler 70 and Roberts 61. If these ages suggest some eventual vulnerability to ordinary mortality, one need only consider what Chief Justice Taft, fearful of liberal appointees by President *Hoover*, in late 1929 wrote his brother:<sup>22</sup>

I am older and slower and less acute and more confused. However, as long as things continue as they are, and I am able to answer in my place, I must stay on the court in order to prevent the Bolsheviks from getting control. . . . the only hope we have of keeping a consistent declaration of constitutional law is for us to live as long as we can.

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<sup>21</sup> 247 U.S. 251 (1918). Solicitor General John W. Davis lost the case by what was later to be the standard 5-4 vote.

<sup>22</sup> Pringle, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT*, p. 967.

If such was the fear of Hoover appointments, presumably shared by the four Justices who outlived Taft, consider how fierce must have been their determination to continue by longevity to block appointments by Roosevelt.

I was in hearty agreement with the conviction of the Roosevelt administration that the nation was in peril unless something was done to restore to Congress the power to govern. The difficult question was “What?”

## II

The November election produced an overwhelming victory for Roosevelt: 523-9 in electoral votes and 62% of the popular vote. Roosevelt had not attacked the Court in his campaign, but the Republicans had made much of his earlier criticisms.<sup>23</sup> In any case, the extraordinary endorsement of Roosevelt and the New Deal must necessarily have led the President and his aides (all the way down to me) to have believed that, one way or another, they could bring the Court’s excesses under control.

President Roosevelt, who would sometimes subject unvarnished fact to a romantic or utilitarian supervision, explained when the court-packing bill was introduced that many people had for a year been sorting out thousands of ideas by which to escape the barriers erected by the Court. Right after the election, he said he asked two people – the Attorney General and the Solicitor General – to distill the results of all these studies; when this had been done they, in company with the President, had worked out the bill which he had submitted to the Congress.<sup>24</sup> The commentators have accepted and elaborated on this account with some enthusiasm.<sup>25</sup> My recollection is rather different.

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<sup>23</sup> Jackson, pp. 176-177; Devins I, pp. 253-255.

<sup>24</sup> Roosevelt II, pp. 75-77.

<sup>25</sup> Leuchtenburg, who usually seems the most careful of the historians, has Roosevelt and Cummings spending nine days in early November going over a great variety of recommendations and relates that Cummings and Reed spent a whole afternoon together drafting the bill (I, p. 126; II, p. 387). Alsop & Catledge are even more vivid, telling (with Alsop’s usual certitude) of Justice Department experts who worked overtime examining all possibilities, and sent daily summaries to the White House; they also explain, not too consistently, that Cummings and Reed worked together in secrecy, farming out countless demands for memoranda on specific points (pp. 27-28, 43).

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In the last week of September (just after my 27th birthday) Solicitor General Reed told me to report to Attorney General Cummings for a special assignment. Cummings told me that the President was determined, if reelected, to find an escape from the Supreme Court's version of constitutional limitation. He told me to bring together all sensible suggestions and to evaluate each. He did *not* present me with a collection of the "countless memoranda" or the "two fat volumes" which later commentators put in his possession. It is my recollection, to which I could not take oath, that I started from scratch, with my horizons expanded only by an occasional conference with Cummings. There were undoubtedly many memoranda addressing the problem.<sup>26</sup> I can only suppose that Cummings did not present or mention them to me either because he had a low opinion of their quality or because he wished me to cover the same ground with an unsullied mind.

On December 10, I submitted a 65-page memorandum. The lapse of two and a half months reflected the circumstance that the memorandum was a part-time commitment.<sup>27</sup> It was addressed to the Solicitor General in response to a protocol either required or imagined. Reed in fact distanced himself as far as was feasible away from the project. I do not know whether his discomfort reflected a natural conservatism or an instinct that as the principal advocate before the Court he should not be plotting against it.

The profusely documented memorandum took this course: (a) The power of the courts to declare legislation unconstitutional was too clear to challenge. (b) The Court could not be forced to accept Congressional findings of fact as conclusive. (c) The Congress could not oust state courts of jurisdiction to decide constitutional questions unless it preserved such jurisdiction in the federal courts. (d) Congressional control of court procedure could not be stretched to cover a requirement for a supermajority to invalidate legislation. (e) A long exploration of the Congressional power to control the jurisdiction of the lower federal courts and of the appel-

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<sup>26</sup> Indeed, Leuchtenburg (I, p. 93) notes an August 15, 1936 memorandum of 14 pages prepared by me; it concluded that the Congress could not except constitutional questions from the Court's appellate jurisdiction.

<sup>27</sup> My collection of bound briefs indicates that I wrote or substantially edited half a dozen Supreme Court briefs in the fall of 1936. I was also rather active in the lower court defense of the windfall income tax, noted below.

late jurisdiction of the Supreme Court ended with a more or less evenly balanced result, resolved in favor of invalidity because of an assumed judicial hostility and because of the unpredictable circumstances in which the constitutional issue could be raised in a case of original jurisdiction. (f) There is undoubted Congressional power to change the number of justices on the Court, as it had done five times in the past, so long as no sitting justice was ousted. There were grave questions of policy which were enumerated but without any conclusion as to their resolution. (g) Somewhat less than a page was devoted to dismissing “the most cynical of the proposals,” to provide a reduction in retirement pension for each year by which retirement was deferred past 70, as unquestionably constitutional but unacceptable as a matter of policy and politics. (h) An undated supplement concluded, rather summarily, that the Congress could strip the Supreme Court of its appellate jurisdiction and create a new highest court which would have final jurisdiction to review federal and state court decisions, leaving the Supreme Court only its original jurisdiction, but that such a result was too distasteful to be acceptable.

A day or two after submission of this memorandum Cummings directed me to put together a draft bill for the enlargement of the Court. In April 1963 I gave a hasty and informal account of the drafting to a daughter who wanted vicariously to impress a history teacher. It said:

So far as I know, only Cummings, Reed and I were aware of the project. . . . the “working party” was generally down to Cummings and myself. He was a man who seemed to me to have a very high order of largely unrecognized professional talents and, as is not usual in such situations, the job was a joint product.<sup>28</sup>

More precisely defined, the first several drafts took this course: I would prepare, in the course of a day or two, the first or a new draft. At his next free time Cummings and I would sit down for an hour or two and work

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<sup>28</sup> The subsequent commentators seem close to unanimous in dismissing Cummings as a mere politician. This is a faulty judgment, but it is hard for me to form a correct one. He had a quick mind and a sensitive ear for language, and I saw no reason to doubt that he was an able lawyer. He was also a politician without discernible scruple. I here relate and deplore his major failure of judgment in promoting the court-packing bill as one to relieve the burdens on the aged, but this did not weaken my over-all admiration for his capacities.

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over the draft, word by word, with roughly equal contributions from each. The first four or five drafts must have been prepared in this manner.<sup>29</sup>

My initial drafting was confined to the Supreme Court but Cummings at an early stage asked that it be widened to include the lower courts (with provision for cross-assignment of judges and creation of a “proctor”<sup>30</sup> for supervision of judicial administration. The central provision of the bill during this early drafting seemed to me both ingenious and entirely sound. Cummings directed a provision that an additional justice be appointed for each Justice who did not retire after reaching the age of 70. That, Cummings had recently learned, was a proposal of Attorney General McReynolds, made in respect of the lower courts, during the Wilson administration, and it had, accordingly, a perverse charm. I remember a pleased recollection that I introduced what I considered to be a most important corollary, that no successor be appointed when the old codger who held on past 70 finally retired.<sup>31</sup> This avoided the undesirable permanent expansion of the Court and would almost surely have resulted in uniform retirements at age 70. We had in mid-December a bill which I found entirely satisfactory.

*To be continued in our next issue . . .*

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<sup>29</sup> My January 15 memorandum (see Part II of this paper) refers to “Draft No. 8.” If the first draft is estimated at December 12, they succeeded each other on the average every 4.2 days and 4 or 5 would have been produced by the end of the month.

<sup>30</sup> We had almost an hour’s debate over the appropriate title; I didn’t like “proctor” as too reminiscent of school-boy discipline. I lost.

<sup>31</sup> I had mentioned this possibility, in passing, in my December 10 memorandum (p. 56). Professor Corwin, in one of his recurrent offers of advice to government officials, described a roughly similar proposal in a letter to Cummings of December 16. By that time it would already have been put in our draft.

ANNEX

BOOKS AND PAPERS RELATING TO  
1937 CONSTITUTIONAL TURBULENCE

- Ackerman, *WE THE PEOPLE* (1991)
- Alsop & Catledge, *THE 168 DAYS* (1978)
- Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 Harv. L.R. 620 (1994)
- Brogan, *ROOSEVELT AND THE NEW DEAL* (1952)
- Burns, *ROOSEVELT: THE LION AND THE FOX* (1956)
- Currie, *The New Deal Court in the 1940's*, 1997 J. of S. Ct. Hist'y 87
- Cushman (I), *Rethinking the New Deal Court*, 80 Va. L.R. 201 (1994)
- Cushman (II), *Current of Commerce Doctrine*, 41 Fordham L.R. 1005 (1982)
- Devins (I), *Government Lawyers and New Deal*, 96 Col. L.R. 237 (1996)
- Devins (II), *Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation*, 82 Cal. L.R. 255 (1994)
- Frankfurter, *Mr. Justice Roberts*, 104 U. Pa. L.R. 311 (1955)
- Friedman (I), *Switching Time: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L.R. 1891 (1994)
- Friedman (II), *A Reaffirmation: The Authenticity of the Roberts Memorandum*, 142 U. Pa. L.R. 1985 (1994)
- Friedman (III), *Chief Justice Hughes' Letter on Court-Packing*, 1997 J. of S. Ct. Hist'y 76
- Funston, *The Supreme Court and Critical Elections*, 69 Am. Pol. Sci. Rev. 795 (1975)
- Gardner, *Court-Packing: The Drafting Recalled*, 1990 J. of S. Ct. Hist'y 99
- Irons, *THE NEW DEAL LAWYERS* (1982)
- Jackson, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941)
- Lawson, *The Rise of the Administrative State*, 107 Harv. L.R. 1231 (1994)
- Leuchtenburg (I), *THE SUPREME COURT REBORN* (1995)
- Leuchtenburg (II), *The Origin of FDR's "Court-Packing Plan"*, 1966 S. Ct. Rev. 347

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- Leuchtenburg (III), *The Nine Justices Respond to the 1937 Crisis*, 1997 J. of S. Ct. Hist'y 55
- Mason, HARLAN FISKE STONE (1956)
- Moglen, *Toward a New Deal Legal History*, 80 Va. L.R. 263 (1994)
- Polenberg, REORGANIZING ROOSEVELT'S GOVERNMENT (1966)
- Pritchett, THE ROOSEVELT COURT (1948)
- Purcell, *Rethinking Constitutional Changes*, 80 Va. L.R. 277 (1994)
- Rauh (I), *Lawyers and the Legislation of the Early New Deal*, 96 Harv. L.R. 947 (1983)
- Rauh (II), *A Personalized View of the Court-Packing Episode*, 1990 J. of S. Ct. Hist'y. 93
- Roberts, THE COURT AND THE CONSTITUTION (1951)
- Roosevelt, 6 Public Papers and Addresses
- I. *Plan for the Reorganization of the Judicial Branch of the Government*, 1937
- II. *Press Conference*, Feb. 12, 1937 (p. 74)
- III. *Fireside Chat*, Mar. 9, 1937 (p. 122)
- Stern, *The Commerce Clause and the National Economy*, 59 Harv. L.R. 695 (1946)
- Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L.R. 421 (1987)
- Swisher, *Federal Organization of Legal Functions*, 33 Am. Pol. Sci. Rev. 973 (1939)
- Taylor, *Politics, the Court and the Constitution*, 1997 J. of S. Ct. Hist'y 99

