MEMORIES OF THE 1937 CONSTITUTIONAL REVOLUTION

PART II

Warner W. Gardner

OUR CIRCLE OF COURT PACKERS was somewhat widened a week or so before Christmas. My own experience reached to three occasions. I was once, unaccountably, dispatched alone to the White House to explain the detail to the President. I met Sam Rosenman on the lower floor, and we went to the President's bedroom[1] where for something less than an hour I answered questions about the provisions and probable operation of the bill. I was struck by the small size and the austerity of the bedroom, and by the complete ease shown by the bed-ridden President, but remember no specifics of the conversation. My words must, however, have been satisfactory since a day or two later I was called to lunch at the White House with a group of aides led by James Roosevelt, then his father's chief assistant, again explaining the bill. At about the

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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. Part I of the memoir of which this is Part II is available at 22 Green Bag 2d 219 (2019).

[1] Rosenman explained that the President often conducted the morning's work in the comfort of his bed rather than in his wheelchair.

same time Ben Cohen and Tom Corcoran visited Cummings, to whom we also explained the provisions and expected operation of the bill.[2]

I cannot now trace the causal lines, but Cummings in roughly the last week of the year widened the Department of Justice group to include Assistant Attorney General McFarland, an able but not thoughtful administrator, and Alexander Holtzoff, an assistant without portfolio to the Attorney General, whom I considered neither thoughtful nor able, who had been active in this area both before and after my own assignment. At this time, Cummings, apparently on December 22[3] was led to an extravagantly bad decision. If the bill were justified as necessary to relieve aged men of a crushing burden, this sleight of hand might produce an enlarged Court without attention being directed to an effort to change "the law." This plunge into trickery I found deplorable; the Court was *not* overburdened and was known to all concerned to be current with their work. Permanent expansion of its numbers would seriously injure the Court, but the initially planned fall-back to nine as the overage justices retired was dropped; the fall-back must have been seen as inconsistent with the professed need to lighten the burdens on the justices. I have not known whom to blame, but for a half century have suspected Carl McFarland. Recently retrieved memoranda indicate that by January Cummings was using Holtzoff as his primary assistant on the job, and the paternity of the concept in any case seems better fitted to Holtzoff than to McFarland.

I dropped out of regular contact with the project at the end of December. I know (and now harbor a romantic regret) that I did not take an aggressively principled stand and say that I would not work on a bill that was a sleazy trick. Perhaps Cummings wanted a helper who was more enthusiastic; perhaps the Solicitor General's Office could no longer afford the distraction to one of its five attorneys; perhaps Cummings found Holtzoff more useful. In any case my active role came to an end at the end of December.[4]

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[2] As noted below, there is some doubt as to whether they knew of the bill at this time. My memory is entirely clear that one day toward the end of December, while I was still active as Cummings' assistant in this area, we discussed the bill at some length in the Attorney General's small office, he seated at his desk, Cohen and Corcoran on a sofa to the right of the desk, and I on the chair in front of the desk.

[3] Leuchtenburg (II, p. 394) relates that Cummings on this date advised the President that he had "found an answer."

[4] I apparently remained in favor. Beyond the memoranda noted in the next paragraph,

Chief Justice Charles Evans Hughes administering the oath of office to President Franklin Delano Roosevelt on the East Portico of the U.S. Capitol (January 20, 1937).

A recently located file contains 15 memoranda that I sent the Attorney General (January 15-February 22) or the Solicitor General for transmittal (apparently through Holtzoff) to the Attorney General (March 3-July 16) answering briefly his supplemental inquiries relating to the project,[5] but it

Cummings and I a year later had a prolonged joint effort in the difficult literary challenge presented by his eulogy to Justice Cardozo. See 305 U.S. xiv (Dec. 10, 1938).

[5] The answers included: Jan. 15 – Sumners retirement bill [see p. 306 below] had no harmful impact on "our proposal" but if retirements were encouraged, which seemed doubtful, the bill would lessen the need; Jan. 28 – not much gained by stripping seniority privileges from over-70 judges; Feb. 3 – list of the changes in membership of Supreme Court 1789-1869; Feb. 3 – no real question as to power to make recess appointments to a newly created office but power doubtful if vacancy arose during session of Senate; Feb. 6 – conceivable but unlikely that an over-age Chief Justice not covered; Feb. 6 – ambiguities

is plain that I was otherwise *emeritus*. Thus, on May 24 Cummings summarized for Reed still another suggestion from Professor Corwin and concluded "Perhaps Mr. Gardner might be willing to toy with it for a while." These isolated inquiries were my only contact with "court-packing" after 1936.

The shift from a direct confrontation with the Court's tyranny to the trickster claim of relief to the aged, which was so important to me, has been largely ignored by the many subsequent historians.[6] It does, however, permit an explanation of otherwise inexplicable disavowals. I have noted Rosenman's company in our visit to the Roosevelt bedside in mid-December; yet he has said he first heard of the bill when a draft was shown him on January 30.[7] Ben Cohen is reported to have written Brandeis that "neither I nor Tom was consulted in the formulation of the Court proposals."[8] I have as to all three recorded their presence at a time when the bill and its proposed justification were in the form of a forthright attack on the Court's decisions, and have no doubt that they were unpleasantly surprised when they saw instead a bill to lighten the burdens of aged judges. That surprise could readily be converted in their minds into a surprise at the whole bill, especially when that larger ignorance was the more comfortable to explain.[9]

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of Sumners retirement bill probably cured by clarity of committee report; Feb. 24 – only litigation can decide whether Sumners bill covers Court of Claims judges; Apr. 9 – no doubt as to power to appoint successor to retiring justice; Apr. 7 and July 16 – compilation of state provisions for judicial retirements; Apr. 12 – whether U.S. could after intervention appeal constitutional issue if private party did not [partial memorandum and Gardner authorship doubtful]; Apr. 17 – drafts of 5 constitutional amendments limiting judicial terms; Aug. 13 – validity of Black appointment in light of emoluments clause; Oct. 14 – no significant gain from legislation requiring senior circuit judge to be under 70.

[6] Jackson (pp. 190-191) says Roosevelt would have won with "an honest explanation" of the bill. Mason (pp. 443-444), and Brogan (p. 155) note that the deceitful nature of the bill seriously weakened it legislative prospects. Leuchtenburg reports that Cummings on December 26 explained to Roosevelt his newfound "answer" to their problem. I have found no other note of this major deviation in the court-packing path.

[7] Leuchtenburg I, p. 125.

[8] Rauh II, p. 93.

[9] Joe Rauh and I had for several years differed as to the knowledge of Cohen and Corcoran of the bill. He seems by 1990 to have found this a possible reconciliation of our recollections. Rauh II, p. 96. I, in turn, cannot be sure that my earlier recollection of their strong support is correct. See Gardner, p. 100.

III

I had no part in the legislative activity, nor in the supporting justifications offered the Congress. I briefly record the principal milestones at second-hand and only for the sake of continuity.

The President on February 5, 1937, sent to the Congress a proposal "to Reorganize the Judicial Branch of the Federal Government," accompanied by a letter from the Attorney General and a draft bill. Neither the President's message nor the Attorney General's letter contained a word of complaint about judicial tyranny; each was directed exclusively to the humanitarian goal of relieving aged men of their too heavy burdens.[10]

The Attorney General adhered to this unfortunate justification when on March 10 he made the Administration's opening statement to the Senate Committee on the Judiciary. On the next day, Assistant Attorney General Jackson, never one to play follow-the-leader, made an impressive attack on the Court's constitutional decisions without mention of burdens cast upon the aged.[11] Roosevelt himself quickly realized his mistake. In his press conference of February 12, and "Fireside Chat" of March 5, he spoke only of the Court's crippling decisions and in neither mentioned the burdens of the aged justices.[12]

Chief Justice Hughes, whose remarkable abilities included street-fighting, on March 21 sent Senator Wheeler a letter, noting the concurrence of Justices Brandeis and Van Devanter, which demolished the claim that the Court was either overburdened or behind on its work. On March 29 the Court, as will be developed below, overruled its invalidation of the women's minimum wage law and on April 12 sustained the Labor Board cases. On May 18, just 90 minutes before the vote of the Senate Committee on the Judiciary,[13] Justice Van Devanter announced that he would retire on June 1. The President had promised Senator Robinson, the powerful Leader of the Senate, the first appointment to the Court; Robinson had accordingly

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[10] H. Doc. No. 142, 75th Cong., 1st Session, pp. 1-9.

[11] Hearings before the Senate Committee on the Judiciary on S. 1392, 75th Cong., 1st Sess., pp. 4, 37.

[12] Roosevelt, pp. 74-77, 122-129.

[13] Leuchtenburg II, p. 70.

Attorney General Homer S. Cummings (left) and Assistant Attorney General Robert H. Jackson (March 1936).

kept the bill alive, with at least fair prospects, but he died on July 13. One can debate which of these events was the fatal blow but none could doubt that in cumulative effect they put an end to "court-packing."

IV

The occasion for the court-packing bill seemed to have evaporated before the bill itself died. The 1937 and 1938 Terms of the Supreme Court produced an effective reconstruction of the Constitution as it had been understood in 1936 which exceeded in extent and importance any amendment in our history other than the Bill of Rights and the Civil War amendments.[14] While Chief Justice Hughes seemed appreciably more sympathetic to the Government's needs than he did in the 1936 Term, the revolution was essentially the work of a single man, Justice Roberts.

On June 1, 1936, Justice Roberts created the 5-4 majority which invalidated the New York minimum wage for women.[15] Just 10 months later he created the 5-4 majority which on March 29, 1937, upheld the indistinguishable Oregon law and reversed the June result.[16] His motivation has been much debated, but it could hardly have been a reaction to the court-packing bill. In 1955 Justice Frankfurter contributed a brief piece on Justice Roberts to the *University of Pennsylvania Law Review*, much of which was given over to a memorandum to Frankfurter from Roberts.[17] The account is flawed in respect of the earlier stages,[18] but seems conclusive that Roberts

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[14] Cushman, differing, offers the extraordinary analysis that the "Constitutional Revolution of 1937" occurred "when the field of constitutional commentary was dominated by New Deal partisans." I, pp. 204-205.

[15] *Moorhead v. N.Y. ex rel. Tipaldo*, 298 U.S. 587 (1936).

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

[17] I have no doubt that Frankfurter asked for the memorandum either to enlarge the reputation of his friend or to help demonstrate that the Court was above political concerns. It is even possible that he might have supplied a preliminary draft to Roberts. But the innuendo of one commentator that Frankfurter might have forged the document, see Ariens, p. 645, is both defamatory and preposterous. The charge was demolished in Friedman III.

[18] The claim that Roberts' *Tipaldo* vote reflected only the failure of New York counsel to seek a reversal of *Adkins* mirrors the unpersuasive explanation of the Chief Justice in *West Coast*; the Court has never felt so constrained by the argument of counsel, as vividly shown only a year later in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), reversing a century of precedent on an important issue not argued or mentioned by counsel. In any case New York counsel in *Tipaldo,* while not in terms asking reversal, argued grounds which if accepted would have required reversal of *Adkins*. 298 U.S. at 588-594.

The claim that the October 10 vote of the Court to grant the appeal shows an even earlier conversion by Roberts is strikingly careless; the appellant was not the State but the hotel

did not change his vote out of fear of court-packing. *West Coast* was argued on December 17 and the December 19 conference divided 4-4. Justice Stone was absent because of illness and the Court, or the Chief Justice, thought a 5-4 affirmance more seemly than 4-4 and so held the case until Stone's return.[19] By December 19, when Roberts cast his vote, the court-packing bill could not have progressed beyond its second or third draft and could be found only on the desks of Cummings and Gardner; a "leak" or even an intimation could hardly have reached Roberts by then.

West Coast was the turning point, but once turned the new tide was encompassing. On the same day the Court unanimously upheld the railway labor act, ignoring the year-old *Alton* except for a passing citation that statutes cannot violate due process.[20]

Two weeks later came the decisive Labor Board cases, sustaining by 5-4 the power of Congress to regulate activities substantially affecting or burdening the free flow of interstate commerce; the effective control of interstate commerce, said Chief Justice Hughes for the Court, may require the regulation of intrastate activities, and it is not determinative that the activities are production rather than interstate trading or transportation.[21] The five cases called up almost 500 pages of Government briefs, which had occupied almost a half year of time by Wyzanski, assisted by Horsky, and working in day-by-day consultation with the Labor Board attorneys. The oral argument (by Reed and Wyzanski from the Solicitor General's Office, and by Madden and Fahy, the Chairman and General Counsel of the NLRB) occupied four

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company.

[19] Cushman I, p. 227.

[20] *Virginian Ry. v. Federation*, 300 U.S. 515 (1937).

[21] *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 33-41 (1937). The companion cases, reaching the same result in a variety of factual circumstances, were *Labor Board v. Fruehauf Co.*, 301 U.S. 49; *Labor Board v. Clothing Co.*, 301 U.S. 58; *Associated Press v. Labor Board*, 301 U.S. 103; *Washington Coach Co. v. Labor Board*, 301 U.S. 132. The transcripts of oral argument in these cases were reprinted in Sen. Doc. No. 52, 75th Cong., 1st Sess.

Four years later, in *United States v. Darby*, 312 U.S. 100 (1941), Justice Stone, writing broadly for a unanimous Court, sustained the federal wage and hour legislation as applied to a lumber mill which shipped its product in interstate commerce; *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918), was expressly overruled, as was *Carter v, Carter Coal Co.* so far as it was inconsistent. Justice McReynolds, the last survivor of the executioners of the '30s, had just retired.

days. The opinions by the Chief Justice, among the most important of the century, showed a brevity (38 pages in total) and an alacrity (56 days) not often seen in recent Terms.[22]

Two weeks later the Court, in 5-4 decisions with opinions by Justice Cardozo, sustained the imposition of taxes supporting unemployment compensation and old-age benefits. The Court rested its decision on the simple power to tax, without entering into general welfare discussion.[23]

The 1936 Term included, sandwiched between *Jones & Laughlin* and *Steward*, a gratifying, though little noted, decision sustaining the Government's efforts to retrieve something over a billion dollars of processing taxes invalidated by *Butler* but already recouped by the processors from their customers. I was detailed to work with Eugene Bogan, a young Treasury lawyer, to find a way to prevent this gigantic windfall. As the law then stood, only a retroactive income tax, and no retroactive excise tax, had been sustained.[24] We accordingly cobbled together a very elaborate statute which taxed the windfall income derived from the refund of processing taxes the burden of which had already been passed on to the customers. The tax was enacted and challenged quickly and reached the Supreme Court only 15 months after the *Butler* decision. The Court, rather to our surprise, was unanimous in sustaining the tax.[25]

Some unfinished business was tidied up during the next Term. The Congress had reenacted a municipal bankruptcy act, in every significant respect identical to that invalidated in *Ashton*. It was sustained by a 6-2 vote, Van Devanter and Sutherland having left the field of combat. Chief Justice Hughes distinguished *Ashton* on the ground of a few phrases in the

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[22] Hughes wrote the three principal opinions, while Roberts wrote the follow-on opinions in *Associated Press* and *Washington Coach*.

[23] *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

[24] *United States v. Hudson*, involving a briefly retroactive tax upon silver transactions, was pending Supreme Court decision but we did not dare gamble upon its outcome.

[25] *Anniston Mfg. Co. v. Davis*, 301 U.S. 337 (1937). We had expected a case pending before the highly conservative Chief Judge Chesnut, pending in the District of Maryland, might turn out to be the test case. I argued it against the formidable George Wharton Pepper and expected to lose. However, Pepper patronized "my good judge," and converted my pedestrian words into victorious gold. *Star Milling Co. v. Magruder*, 1937 CCH ¶1,115 (Dec. 15, 1937).

new Act which more explicitly enlisted the cooperation of the State.[26]

The 1937-1938 cases served to return the national economy to the control of the Congress, with the partial exception of agriculture. *Butler* was not reversed. Instead a number of decisions made piece-meal progress along the broad road of the commerce clause.[27] The Congress never paid much attention to the *Butler* opinion declaring that Congress could tax and spend only on matters within its specific powers, and not for the general welfare.[28] If it financed its "welfare" expenditures out of its general revenues it was not easy for an opponent to show injury sufficient to get into court.

I thought that I owed Justice Stone a confession of my authorship of the original versions of the court-packing bill and at some time during the 1936 Term called upon him for that purpose. He was not distressed, but responded in terms humiliating to one possessed of the maturity of 27 years. He chuckled and said, "After all, you *were* very young."

The twelve months that began in the spring of 1937 saw the Constitution remade. It is natural to ask "Why?" It was not due to Roosevelt appointments, for there had been none during the 1936 Term when the Labor Board and Social Security cases, the foundation blocks of the new edifice, were decided. I would like to believe the court-packing bill did it (as I thought at the time), both to enlarge the importance of my personal participation and to honor Leuchtenburg's charming reminder of Fielding: "He would have ravished her if she had not by a timely compliance prevented him."[29] But the 1937 revolution was the work of but one man, Justice Roberts, and as we have seen his dramatic reversal in *West Coast* came before he could have known of the bill.

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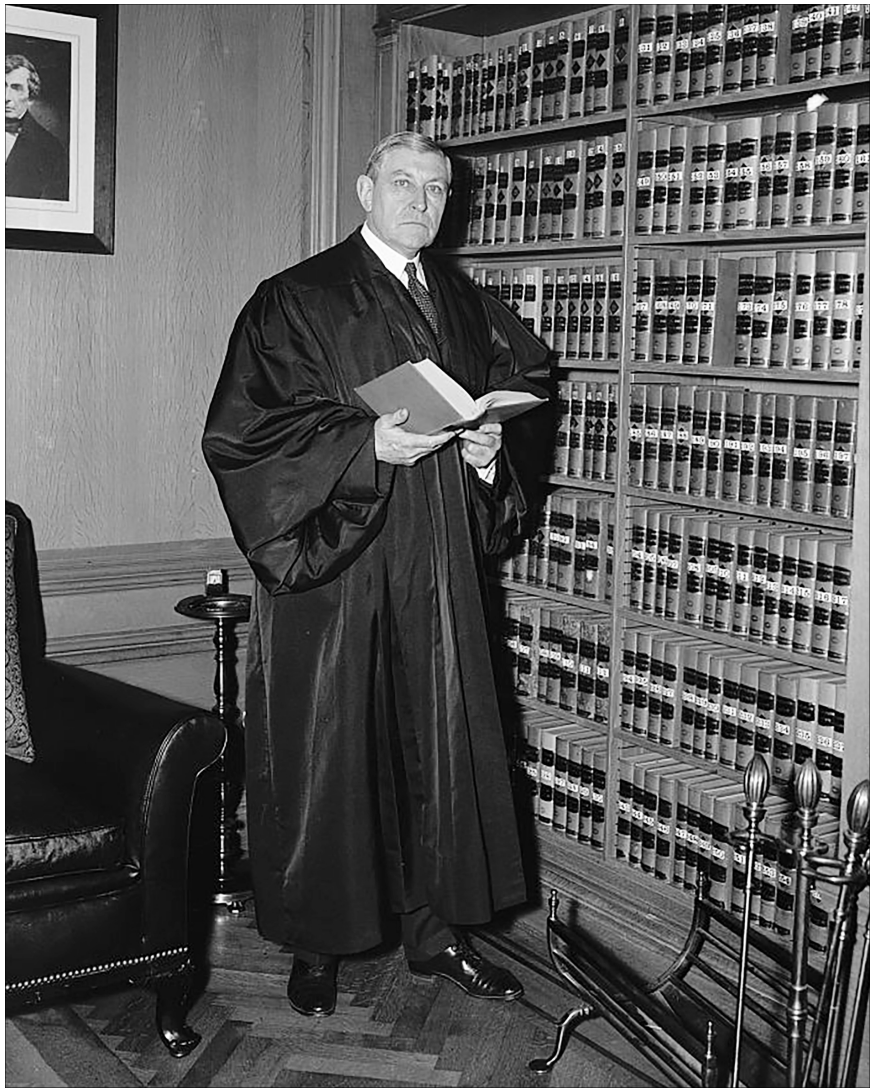
[26] *United States v. Bekins*, 304 U.S. 27 (1938).

[27] *Currin v. Wallace*, 306 U.S. 1 (1938) (tobacco inspection and standards for tobacco shipped interstate); *Mulford v. Smith*, 307 U.S. 38 (1937) (Secretary to apportion annual tobacco marketing volume among states, who would apportion among growers); *U.S. v. Rock Royal Co-op.*, 307 U.S. 533 (1939) (milk marketing agreements and orders, since commingled with interstate sales and movements, validly applied to purely local sales by farmer to dairy); *Wickard v. Filburn*, 317 U.S. 111, 125-126 (1942) (agriculture definitively placed within the commerce clause).

[28] 297 U.S. at 69.

[29] Leuchtenburg I, p. 143.



Associate Justice Owen J. Roberts (May 1938).

My present belief is that Roberts, never a very predictable judge, changed course because of two factors: widespread academic and popular criticism of *Tipaldo* and the overwhelming support of the President and the New Deal shown by the election in November 1936. Chief Justice Hughes, a some-

what wavering supporter of the three-Justice liberal bloc[30] in any case, and foremost a politician (as governor of New York and a narrowly defeated candidate for President), would surely have been influenced by that election and may well have proselytized Roberts.

Once the Roosevelt appointees joined the Court, beginning in September 1937, there was for a half century firm assurance that a *laissez faire* economy was not a constitutional guaranty. In those circumstances, which I consider desirable, it seems very fortunate that the court-packing bill was not enacted, as it probably would have been had not Cummings persuaded Roosevelt that trickery, embodied in the concern for the burdens cast upon aged men, should replace confrontation.[31] The bill presented to Congress (in contrast to the early drafts) could have permanently increased the membership of the Court by the appointments to vacancies created by over-70 hold-outs, to a maximum of 15. This I believe too large a number for a court which should act as a single body rather than through panels. Perhaps more importantly, none could really want an overtly politicized Court, nor a tradition of expanding the Court with each electoral reversal. It was a sensible price to be paid if necessary to rescue the nation from McReynolds et al., as seemed to be the case at the close of 1936. It was not a development to be welcomed if it was unnecessary.

While enactment, as it developed, was undesirable, the effort in itself contributed important values. It has been, and I hope it continues to be, a forceful reminder that constitutional ambiguities should be resolved in favor of the current goals of the nation rather than the standards current when the Justices were young.

The Court itself has on occasion testified to the continuing force of the 1937 lesson. Justice Stone, as the 1936 Term closed, hoped "that the reformation that seems to have been accomplished proves to be a permanent one."[32] Justice White, writing for the Court in 1986, said:

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[30] Hughes had supported the Government in the Gold Clause cases, *Alton*, *Ashton*, and *Tipaldo* and partially in *Carter*. He had joined the four irreconcilables in *Panama Refining*, *Schechter*, *Butler*, and partly in *Carter*.

[31] Such is also the view of a leading participant in the legislative affray. Jackson, pp. 190-191.

[32] June 5, 1937, letter to Felix Frankfurter. Mason, pp. 464, 848.

> The court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or the design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process clause . . . .[33]

Justices O'Connor, Kennedy and Souter, writing for the fractured court in *Planned Parenthood v. Casey* said:

> The older world of *laissez faire* was recognized everywhere outside the Court to be dead. . . . of course, it was true that the Court lost something by its misperception, or lack of prescience, and the court-packing crisis only magnified the loss.[34]

Finally, Justice Souter has noted:

> The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of the Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive concept of judicial review in derogation of congressional commerce power.[35]

I do not know how long this salutary caution will continue. I am, in truth, apprehensive of the early years of the next century. Justice Thomas has explicitly stated his personal preference for a return to the pre-1937 commerce clause.[36] One may doubt that he would be alone if there were circumstances permitting this recidivism. There also seems to be a flowering of what I view as neo-conservative scholarship,[37] a phenomenon which might be anticipatory of judicial movement. But, even then, there should still be some residue of restraint that has survived the two-thirds of a century since the 1937 revolution.

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[33] *Bowers* v. *Hardwick,* 478 U.S. 186, 1194-1195 (1986).

[34] 505 U.S. 838, 862 (1992).

[35] *United States v. Lopez,* 514 U.S. 549, 608 (1995).

[36] *Id.*, at 601, fn. 8.

[37] See, in the sampling offered by the *Annex* to Part I of this memoir, Ariens, Arkes, Cushman, Currie, Devins, Lawson, and Moglen.

In final result, then, I cling to the sanguine view that it was very good to have tried to pack the Supreme Court and very good to have failed.

V

On March 1, 1937, the Congress enacted the wholly non-controversial Sumners retirement bill, which was read to give the retiring Justice protection against a legislative reduction in his pension, such as had occurred in 1932 and 1933.[38] Justice Van Devanter retired from active service on June 1. We thought at the time that this was because of the new protection understood to have been occasioned by the Sumners bill.

The Van Devanter retirement finally opened the gate for a Roosevelt appointee, but at the same time it brought, in bizarre circumstances, another constitutional controversy to the Court. The President nominated Senator Hugo Black to the vacancy. The Attorney General on August 13 asked the Solicitor General for memoranda to be used on the Senate floor if three Senators pursued their objections based on Article I, § 6, which forbids appointment of any member of Congress to a position created or in which the emoluments were increased during his term. There followed my 18-page opinion, rather elaborately researched and reasoned, that Van Devanter had left the Supreme Court and remained a circuit judge without mandatory duties and that probably, though not certainly, the vacant position of Justice had not had its "emoluments" increased by the constitutional protection made available to a Justice who retired from his Supreme Court position. No trouble arose in the Senate and we thought the issue over.

We were, however, ambushed by Virgin Island political battles. They had, I recall being told, led District Judge Levitt to order the Governor jailed for contempt.[39] The territorial judge was removed from office but left on

[38] The $20,000 salary of a Justice was traditionally continued in his pension but was reduced to $10,000 on June 30, 1932 and to $17,000 on June 30, 1933; these reductions expired in June 1936. See 28 U.S.C. § 260, as modified by c. 314, § 107(a)(5), 47 Stat. 382; c. 212, § 13, 47 Stat. 1489, 1513; c.l 02, § 21(c), 48 Stat. 509, 521. By 1936 a benumbed administration must have realized, with a rumored stimulus from within the Court, that this was a demented economy for those anxious to rid the Court of its aged antagonists.

[39] Here my memory is suspect. I checked Ickes' published diary and found no mention of the contempt order, although he was outraged that Cummings did not fire Levitt after he testified to the Senate Committee in opposition to the nomination of Lawrence Cramer as Governor of the Virgin Islands. 2 THE SECRET DIARY OF HAROLD L. ICKES, p. 94.

the federal payroll. Cummings asked around the Department for a position Judge Levitt could fill. None was offered. The combative ex-judge accordingly spent his hours on the Department of Justice payroll preparing a motion to require Justice Black to show cause why he should not be ousted on the "emoluments" ground. I prepared a fairly elaborate brief opposing, but Chief Justice Hughes, who could recognize a can of worms as readily as any judge in history, dismissed the petition before our brief could be filed, on the evident ground that the petitioner had no Article III standing.[40]

Such are my memories of an interesting period. "Of course, it was long ago, but at the time it seemed like the present."[41]

[40] *Ex parte Levitt*, 302 U.S. 633 (1937).

[41] P. Steiner, *The New Yorker*, Sept. 2, 1997, p. 72.