The President's Supreme Court Proposal

A Detailed and Simple Discussion of the Issues Involved for the Benefit of Laymen

BY

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This address of Mr. Dunbar, a Past President of the Louisiana State Bar Association, and a member of the Faculty of the Tulane Law School, is printed and distributed by the Louisiana State Bar Association Committee on the President's Supreme Court Proposal.
Mr. Chairman and Gentlemen:—

The so-called arguments in connection with the President's proposal have been so numerous and varied that there is little wonder that laymen, unfamiliar with constitutional history and the fundamental theory and purpose of our constitutional, democratic system of government, find difficulty in properly analyzing these arguments and considerations and in determining the real issues involved. There is little real justification, however, for one who believes in and understands thoroughly the meaning, purpose and history of our constitutional system of checks and balances, based as it is on a separation of executive, legislative and judicial functions and departments, and the historical and sacred principle of an independent judiciary, to be confused as to the real issues involved.

Why the President's Proposal is Anti-Constitutional

In the first place, a great deal of confusion can be avoided if we start off our discussion of this vital and revolutionary controversy with a clear and simple understanding of what is meant, in connection with the Federal Judiciary, by the letter, and what is meant by the spirit and purpose of the Constitution. It is frequently said that Congress admittedly has the power, under the Constitution, to fix the number of the members of the Supreme Court, as well as of the Courts of Appeals and the various District Courts throughout the country, and, therefore, it is perfectly legal and constitutional for Congress to increase the number of Federal judges throughout the country, including the number of the justices of the Supreme Court. This statement is based solely on the permission implied in the letter of the Constitution. What are the meaning and purpose of the Constitution in this connection, as understood and taught to us in our schools and universities, and as understood and universally admitted by lawyers, scholars and learned writers and students in the field of political science and American constitutional government for over a hundred years? As a matter of meaning and purpose, this privilege to increase the number of judges throughout the country and to create, regulate and redistrict Federal Judicial Districts, was given to Congress because it was considered that the growth of the country, increasing litigation, and changing local conditions might require the appointment of more judges and the redistricting and rearrangement of our Federal Judicial Districts throughout the country from time to time. This has always been understood and accepted
as the purpose and the only legitimate purpose, for which Congress was given the power to increase the number of judges.

It is difficult and at times impossible to write constitutions or laws creating a proper and essential power, and, at the same time, prevent the human beings entrusted with the power from improperly using or perverting it. In writing some laws we are compelled to trust, to a certain extent, to the public officials solemnly sworn to exercise a legal power honestly and properly to use the power given to them for the legitimate and particular purpose for which it was created and granted. If public officials, either deliberately or ignorantly, violate their oaths and the public trust by perverting or misusing the power entrusted to them, the only remaining reliance or safeguard in a democracy is the expectation that a vigilant and indignant electorate whose members gave the power will mete out a swift and certain punishment at the polls for the abuse of that power. For example, the Constitution gives Congress the right to make appropriations for the various functions and purposes of the Federal government. Congress, either through spite or for other sinister purposes, has the technical power to refuse to make any appropriations whatever. Although such arbitrary and improper action would be within the technical, legal power contained in the Constitution, and as a result of its improper use the entire machinery of our Federal government could be paralyzed and destroyed, no one could reasonably contend that the exercise of power for such a purpose by Congress would be within the spirit, meaning or purpose of our Constitution or in accord with the traditions of American democratic government.

In spite of occasional recent statements to the contrary, the early history of the Federal Judiciary demonstrates that Congress, in the past, has always used its power, in connection with the regulation of the Federal Judiciary, consistently with both the letter and the spirit of the Constitution. Mr. Charles Warren, an outstanding and accepted authority on the subject, in his book "The Supreme Court in United States History", discusses all the instances when the number of the judges constituting the Supreme Court has been changed by Congress and the reasons in each instance for the increase or change. We find that a new Circuit was created by Congress during the administration of President Jefferson, because of "the increase of business and population in the Western Districts of Kentucky, Tennessee and Ohio." The Supreme Court Justices sat in the Circuits in the early days of our history and an extra Associate Justiceship was created to take care of the burden on the Supreme Court resulting from these
duties. The court was enlarged during the administration of President Jackson by the creation of two new Circuits. The reason for the increase, as explained by Mr. Warren was because "the crowded conditions of our Federal Courts in states of the West and Southwest had become such as to make relief absolutely necessary, and its refusal a scandalous denial of justice". Two additional justices were provided to take care of the two additional Circuits. The subsequent changes in the court, down to the time of President Grant, need not be described in detail, it being sufficient to say that these changes were all based on the proper and necessary enlargement of the court to take care of the growing needs of the country. It cannot be contended that at any time was any attempt made by Congress or the President to change the personnel of the court for the avowed purpose of influencing or changing the decisions of the court. During the present controversy, it has been stated publicly in newspaper editorials and by some speakers that the Supreme Court was "packed" by President Grant in order to bring about a reversal of the decisions in the Legal Tender Cases. Even if it were true that this great wrong took place, and the spirit and purpose of the Constitution were openly and admittedly violated by President Grant with public approval, it would be no justification for a repetition of the wrong. As a matter of fact, however, a reference to the actual facts of history discloses that these charges are entirely unjustified. Mr. Warren points out that the court was reduced to eight justices by an Act of 1866, which he explains was done by Congress to deprive President Johnson of the opportunity of filling anticipated vacancies. On April 10, 1869, the court, by Act of Congress, was increased to nine, thus reinstating the situation as it had previously existed in 1866. It should be noted that the Act of Congress creating an additional judgeship was passed almost a year before the Legal Tender Case was decided, and that Congress created the new judgeship for legitimate purposes, and at the time of its creation there was no controversy whatever about the decisions of the court. The Act gave the President a new appointment and because of the resignation of Justice Grier there was an additional vacancy to be filled, thus permitting two new appointments. As I have stated, it was nearly a year later when the Legal Tender Case was decided. It so happened that President Grant appointed the two new judges on the same day that the decision in the Legal Tender Case was rendered, and since the decision was later reversed as a result of the vote of the new judges, it was charged publicly by some that President Grant deliberately selected judges for appointment who could be counted upon
to overrule those cases. President Grant and his Attorney General, Mr. Hoar, heatedly denied this charge. Mr. Warren, in discussing the charges that Grant used his power in appointing men sympathetic with his views in order to influence a decision of the Supreme Court, says:

"The charge has been conclusively answered many times, but still occasionally crops out in attacks on the Court. The facts themselves disprove the accusation. Both judges were nominated on the recommendation of Hoar (Attorney General) who later formally stated that their views on the Legal Tender Issue had nothing to do with his recommendation. Strong’s appointment had been decided on fully a month before February 7, and Bradley’s had been urged on the President and favorably considered before Hoar’s own appointment in the previous December. The President himself formally stated that he had no advance knowledge as to the decision of the Court, and members of his cabinet later stated the same thing. The newspapers of the time clearly show that there was no leak as to the decision, for their published forecasts were inaccurate."

It is to be noted, in the first place, that Congress did not create a new judgeship for the purpose of enabling the President to “pack” the court, nor to change its decisions, and, in the second place, it should be noted that President Grant and his Attorney General felt that the charges urged against them involved grave questions of impropriety and constitutional morality, and that they denied vigorously and indignantly that the judges had been appointed for the purpose of influencing or changing the decisions of the Supreme Court. Today, as astounding as it may seem, in the light of the history of our constitutional government, we find the President of the United States and some of the members of his Cabinet and other advisors publicly and seriously recommending to Congress an increase in the number of the Supreme Court for the admitted purpose of influencing and changing the decisions of the court. (See also Political Science quarterly September, 1935, pp 348-350.)

It follows clearly from what has been said, that to increase the number of judges of either the lower Federal courts or of the Supreme Court, for the purpose of supplying additional judges to take care of a congested docket and increased litigation and legal business, is both within the letter and the spirit of the Constitution. On the other hand, to increase the court in a “wholesale” manner for the deliberate and admitted purpose of changing its decisions in order to avoid the necessity of submitting specific constitutional amendments to the people,
is plainly contrary to the spirit and purpose of the Constitution. The oath of public officials to uphold the Constitution applies as well to the spirit and purpose as to the letter of the Constitution. The use by Congress and the President of the power to increase the number of judges of the Supreme Court, not for the legitimate purpose of taking care of an increase in the business of the court, but for the admitted purpose of "packing" it to influence and change the decisions of the court, is not only an abuse of authority and contrary to the spirit and purpose of the power given to Congress to regulate the courts, but is also contrary to the meaning and purpose of the Constitution, which was designed and intended to create and establish three coordinate, separate and independent branches of government, namely: the executive, the legislative and the judicial departments. If the President and Congress can thus, by the indirect method of "packing" the court, control or change its decisions, the fundamental principal of an independent judiciary, contemplated and intended by the Constitution, is in fact destroyed. Finally, above all, to increase by wholesale the number of Supreme Court justices for the admitted and deliberate purpose of changing the legal and practical interpretation of the Constitution through a "packed" court amounts, in substance and in fact, to an amendment of the Constitution by the President with the aid of Congress. Therefore, a proposal by the President and Congress to accomplish this object by indirection and the abuse by Congress of its power to increase the number of members of the Judiciary, are not only contrary to the spirit and purpose of the Constitution, but also to the plain letter of the Constitution, which expressly provides that it can be amended and changed only by the vote and consent of the sovereign people of the United States.

The real and legitimate purpose for which Congress was given the power to increase the number of Federal judges was evidently recognized and well understood by the President and his advisers. This is clearly shown by the reason given by the President in his first message to Congress, proposing an increase in the number of Federal judges, including the Supreme Court. His message indicated, both directly and by inference, that because of the age of their members, as well as because of an inadequate number of judges all of the Federal Courts, including the Supreme Court, were behind in their dockets, and consequently the work of the Federal Courts, including the Supreme Court, was not being effectively and efficiently done in the interest of litigants. If these charges had been justified by the facts, they were proper matters to be considered by Congress in connection with the
proposal to increase the number of Federal judges, and an increase for these reasons would be within both the letter and the purpose of the Constitution. It was soon revealed, however, that these reasons were merely "red herrings drawn across the trail". Although many of the statements in the President's message with reference to congestion and delay in the lower Federal courts were supported by the facts and have been a matter of concern to the American Bar for years, these facts were not applicable to the Supreme Court, which has a very limited jurisdiction, and which has, for many years, been fully abreast of its docket. In fact, the Supreme Court is generally regarded among lawyers as outstanding among the courts of our country, for its promptness and efficiency in the dispatch of its work.

The President was evidently misinformed, and he and his advisers must have been embarrassed to discover that his own Attorney General, in his annual report rendered not long before the President's message to Congress, praised the promptness and efficiency of the Supreme Court. In this report, the Solicitor General, on page 9, says: "The work of the court is current, and cases are heard as soon after records are printed as briefs can be prepared." This was the President's own witness,—his own Attorney General and Solicitor General speaking. With regard to the President's complaint about the inadequate consideration of writs of certiorari, the Solicitor General, in the same report, page 13, says: "A very large majority of the cases on the appellate docket do not possess sufficient merit to warrant consideration on the merits * * * *. Many petitions for writs of certiorari (i.e., appeals) are filed, which in the light of settled practice must be regarded as entirely without merit." Certainly if the petitions are without merit, they should be denied. Therefore, the President's complaint that the court without proper consideration declined to allow petitions in many cases is contrary to the explanation and facts stated by his own Solicitor General. If any further evidence were needed to answer the unwarranted contention that the Supreme Court is behind in its work, we need only refer to the very exhaustive statement of Chief Justice Hughes, speaking for the entire court, presented to the Judiciary Committee.

When the original reasons given for the proposal by the President were demonstrated to be without foundation in fact, the President then cast aside all pretext and admitted the real purpose and reasons for his proposal. In a "fireside chat" he frankly announced that he did not agree with some of the recent decisions of the Supreme Court, and stated that in order to accomplish his legislative objectives, he de-
sired authority to "pack" the court, so that his individual and personal interpretation of the Constitution could be substituted for the interpretation and decisions of the present court. The excuse for this unprecedented and revolutionary proposal was that his objectives were worthy and essential, and that the remedy and procedure provided in the Constitution for submitting specific constitutional amendments to the people for adoption involved unnecessary delay.

It is said by some who favor the President's plan, that the Constitution authorizes the President, with the consent of the Congress, to appoint judges from time to time when Supreme Court vacancies occur as a result of death or resignation, and consequently, although the Constitution contemplates that men of character, learning and independence will be selected for appointment, a President can appoint and Presidents in the past often have appointed men with views as to constitutional interpretation consistent with their own. Our forefathers, in establishing the Constitution, contemplated, of course, that the power of appointment would be properly exercised, but, in any event, that the continuity and independence of the court would be reasonably protected, because vacancies would occur only from time to time, in view of the fact that no one President, in the normal course of events, would have an opportunity to appoint a sufficient number of judges at any one time to influence substantially or seriously the decisions of the Court. Moreover, it was considered that the court would, through the process of appointments from time to time by different Presidents, and during changing economic and political periods, represent a balanced and versatile personnel, removed from the passions and prejudices of temporary majorities, and transient political and economic controversies. The present proposal of the President, on the other hand, is in fact a coup d'etat, because it constitutes a wholesale addition to the membership of the court for the deliberate and admitted purpose of influencing and changing its decisions.

I have attempted thus far to state what I consider is the real and vital issue in this controversy. The question as to whether judges should be compelled to retire at 70 or 75, the question as to whether one believes the majority or the minority of the Supreme Court has announced a better and sounder interpretation of the Constitution in certain recent decisions, the question as to whether specific amendments should or should not be submitted to the people modifying the due process clause, and enlarging the scope of the interstate commerce clause of the Constitution, and further providing for surrender of additional states' rights, are all important ques-
tions. I submit, however, that they are not relevant questions, or questions which are logically involved in the separate and more important problem, as to whether the President shall be permitted to "pack" the court for the purpose of changing its decisions as to the meaning and interpretation of the Constitution.

"Mandate"

The argument that is occasionally urged in connection with the present controversy that a President or public official, by virtue of his election by a majority of the people, is thereby given a **general mandate** to bring about by indirection a change of the Constitution to suit his individual views, has never before been suggested, so far as I know, by any responsible person in American history. Such an argument may confuse many well-meaning people. If the real facts and theory of our government are revealed and understood, however, I believe the people who are confused will immediately recognize the fact that the argument is totally without foundation. For example, any citizen who gives a limited and restricted power of attorney to an agent or employee to exercise discretion and act for him and in his behalf within certain defined limits would be astounded if he were told by the agent or employee or anyone else that the restricted and limited power of attorney gave the agent and employee the authority and "mandate" to disregard or change the specific limitations or restrictions in the power of attorney without the further consent and approval of the principal. The Constitution of the United States, however, is in practical effect the limited and restricted power of attorney of the people of this country defining and restricting the scope of the authority of the President and the Congress as trustees and agents of the people. When an official is elected by the people, he is given authority merely to use his discretion and to act for the people within the limitations and restrictions prescribed by the people in the Constitution. It is elementary, and has always been recognized during the entire period of our constitutional history and government, that a public official is not given any so-called "mandate" to exceed the authority or change the limitations or restrictions in the Constitution without referring the question back to his principal, the American people, for their specific consent and approval.

"Emergency"

It is argued in justification of the "packing" of the Supreme Court that an "emergency" exists, that legislation must be adopted immediately, and that too much delay will be involved in submitting to the people specific amendments to the Constitution. It is difficult to take this argument serious-
ly in view of the fact that the business statistics of the government itself reveal that conditions have greatly improved during the years since the depression, and are rapidly continuing to improve. It is also impossible to ignore the many unqualified statements of the President and other speakers during the recent campaign vigorously and joyously proclaiming the improvement in business and economic conditions. Moreover, the theme song "Happy Days are Here Again," repeated over and over again at the political rallies, must have had, to say the least, semi-official approval. Unfortunately, we are not taken into the confidence of the President as to exactly what particular crisis exists and what specific legislation is immediately required. The N. R. A. and A. A. A. decisions had been announced long before the election, and no suggestion was made during the campaign that the court would be "packed" or raided. We were, in effect, told in the Democratic platform that, if future legislation could not be drawn in such a way as to conform to the Constitution as interpreted by the Court, "clarifying amendments" would be submitted to the public. Certainly, there was, therefore, neither a general nor a specific mandate (so-called) from the people specifically authorizing the President to change the interpretation of the Constitution to suit his individual and personal views without submitting the specific change or changes to the people.

Even if, for the purpose of argument, an emergency is assumed to exist, the proposal of the President, stripped bare of all irrelevant issues can be justified only on the theory that the end justifies the means. Our Constitution and governmental institutions embody the wisdom of hundreds of years of social, economic and political experience, and were brought about only after years of struggle and bloodshed. Some of our most priceless heritages, in the way of laws and political ideals and institutions existing today, were won for us in the past by the righteous indignation and leadership of honest and unselfish martyrs, who were willing to fight and make sacrifices of life and property for principles which they held dear, and which, in their opinion, were vital to the peace, self-respect and happiness of themselves and posterity. Shall we treat these institutions, which have been bequeathed to us, lightly? These priceless heritages, in the form of political and constitutional institutions, are so vital to the well-being of our people in the future that temporary emergencies should not tempt us to abandon them. Our duty is to preserve them for posterity, not to break them down or destroy them on the occasion of a temporary storm of heated political and economic controversy, or on any occasion when it may
suit the whim of political leaders, however sincere they may be, supported for the moment by a temporary and transient majority in Congress.

Until now I had thought—erroneously perhaps—that the ancient social philosophy that "the end justifies the means" had been everywhere discarded and repudiated by modern liberals and idealistic citizens and scholars. The pages of history have been written in blood almost every time this doctrine in matters of large concern has been invoked. Every tyrant and every despotic political and economic institution, whether they have been egotistically and fanatically sincere, or sinister and self-seeking, have justified their methods and procedure by such a doctrine. Most of the social, political, religious and economic wrongs of history have been excused by those responsible for them by a resort to the philosophy that the "end justifies the means." One does not have to be a careful student of history to know that, among the multitude of other evils, religious persecution throughout the ages has been based on the theory that to rob and murder those who are not of the initiated was justifiable because the spoils and destruction were for the greater glorification of the particular god or religion they promoted and served.

The "Time Element" or the Suggestion that Delay is Involved in the Adoption of Amendments to the Constitution by the People

The "emergency" argument of the President and of those who support his proposal is coupled with and supplemented by the suggestion that the submission to the people of specific amendments to the Constitution, although normally desirable, requires too much time for their adoption. In this connection, Dean Young B. Smith, of the Columbia University Law School has stated that investigation disclosed that an average of only one and one-half years each had been required for the adoption of the various previous amendments to the Constitution.

Those who emphasize the delay involved in having a constitutional amendment or amendments adopted, sometimes refer to the fact that many state legislatures meet only every two years. Moreover, they argue, some legislatures may not truly represent the real sentiment of the people of their state at the time the amendment is acted upon, and other legislatures may be susceptible to ulterior influence and may block amendments. The simple answer to this argument is that the amendment to be proposed by the President need not be submitted to state legislature. Amendments can be submitted to state conventions, which is the alternative procedure pro-
vided in the Constitution. Conventions can be called immediately, and representatives can be elected and sent to the convention, pledged to carry out the people's views as to the amendment in question. This expeditious procedure was used recently (for the first time in our history) in the case of the Twenty-first Amendment, which repealed the Eighteenth Amendment, known as the Prohibition Amendment. The question was submitted to conventions, and the repealing amendment was ratified and became effective in less than ten months after its submission.

If the President has, for his proposal to change the interpretation of the Constitution the popular support that he claims, he should encounter no difficulty in having an amendment to the Constitution adopted by the people, easily and promptly.

A further question has arisen in the last few days as to whether, in the light of the recent decisions of the Supreme Court, it is not now possible for the President to accomplish his objectives without "packing" the court. Most of the legislative reforms he has been discussing would in all likelihood be upheld by the Supreme Court as it is now constituted, based on the narrower concept of "due process" and the broader theory of "interstate commerce" the court has recently adopted. Therefore, the reasons for the President's proposal to "pack" the Court seem no longer to exist, unless he has in mind more revolutionary and drastic legislation than has yet been revealed to the public.

The Imminent Peril of Dictatorship and the Threat and Danger of the Future Destruction of Constitutional Democracy and an Independent Judiciary involved in the Adoption of the President's Proposal

Those of us who are devoted to the theory and traditions of constitutional democratic government, and who are familiar with both the English and the American history of the long and bloody struggle of our forefathers for an independent judiciary and its proper and essential place in our constitutional system, should feel that it is our solemn duty and responsibility as citizens to oppose as strongly as we can, the President's proposal to "pack" the Supreme Court. If the President succeeds in having his proposal adopted, it will establish a precedent that will, in my opinion, be repeated, and that will eventually destroy the limitations, restrictions and principles of our written constitution. More than this, it will irreparably damage, if not destroy, the prestige of an independent judiciary, and the confidence of the public in our courts, which are the final safeguard of liberty to all individ-
uals, irrespective of race or creed, and whether they be rich or poor. This is certainly a result reasonably to be expected and feared in the light of ancient and modern governmental experience and the political history of the world.

I have no quarrel with regard to method or principle with those who desire to bring about specific amendments of various kinds to the Constitution. The procedure, through the orderly process of specific amendments, is the fair and legal method of change provided by our forefathers in the Constitution, and no one who believes in constitutional democratic government can properly object to such procedure. On the other hand, for the Executive, supported by a temporary majority of his party in Congress, to seek to accomplish even an admittedly worthy purpose by indirection through “packing” the Supreme Court, in order to obtain a change of its honest and independent legal interpretation of the Constitution, and substitute therefor his personal and individual interpretation so that he may avoid submitting specific amendments embodying his views and wishes to the people, is not only executive usurpation of power contrary to the spirit and purpose of the Constitution, but affords also an improper example and a dangerous precedent that is almost certain to be repeated in the future with disastrous results to real liberty and constitutional government.

If the precedent of the “court packing” procedure is once adopted and established as fair and proper and consistent with the theory and spirit of the Constitution, then no one now supporting this principle and proposal can, in the future, fairly or logically oppose or deny a similar right and justification to any succeeding President to exercise a similar power, when he may have a temporary majority of his party in Congress under his political control or sympathetic with him.

The history of our democracy in America shows that the leaders and bosses of local political and party machines, controlling and enjoying the expenditure of large amounts of federal funds and the distribution of countless federal jobs and patronage, are subservient to and worship only temporarily at the shrine of their benevolent political leadership in Washington. They follow blindly and obediently a president and his Washington hierarchy of political lieutenants only so long as it is profitable and politically expedient for themselves and their local machines to do so. This subserviency and support are also true in the case of the various pressure groups and “blocs” including the “bonus army,” farm and labor organizations, and the masses of our people, as long as they are the beneficiaries of the political leadership at Washington and are obtaining the material benefits they
demand. Our history shows that local political machines, pressure groups, farm organizations, labor unions, and the masses of our people are extremely fickle, and change their leaders on very short notice when it is politically expedient or economically advisable to do so. A panic—a severe economic depression, accompanied by widespread unemployment and deflation—the exhaustion and collapse of federal credit—or a sudden wave of inflamed religious and racial prejudice under the skillful direction and inspiration of demagogues—can change public sentiment almost overnight. Let us not forget that only a few years ago during a period of great peace and prosperity, a few comparatively unknown men, most of them apparently interested in selling white robes at a profit, obtained millions of members throughout the country for the Ku Klux Klan, based primarily on religious bigotry, racial hatred and an enticing program of persecution of Jews, Catholics, Negroes, and our foreign-born citizens. With able, unscrupulous and fanatical leadership, it is not difficult to contemplate the possibility of a successful presidential campaign as a climax to a grand orgy of patriotic fervor, under the banner of so-called "liberalism," and with such a seductive and enticing slogan as "America for the Americans." Those of us who have been life-long Democrats cannot easily forget that after one or two Republican landslides not many years ago, it was freely predicted and often admitted that the Democratic Party was dead and would never again return to power. This experience may be repeated, and the apparently discredited and divided Republican Party of today may, in the future, suddenly be launched into power, either as a result of a disastrous financial panic, or the Democratic Party's failure to satisfy the infinite variety of conflicting interests, problems and objectives of the American people. History is said to repeat itself, and when any of these various events happen that I have suggested, the local political leaders and bosses, as well as the different pressure groups and the masses of our people, will be quick to desert a president and a political hierarchy in Washington. They immediately look for a new leader to restore their shattered spoils, to satisfy the clamoring and distressed masses, and to rehabilitate their political machines and refill their empty purses. The political leaders and bosses may, if the reaction and revolt of the public result from an economic and financial panic and the collapse of public credit, select another Harding with reactionary sympathies and corrupt political lieutenants, because they may feel that they have gone too far under the previous leader, and that reaction is the popular and successful order of the day, and that such leadership will restore their fallen fortunes. They may, if public opinion is inflamed by racial
or religious hatred, select an American Hitler; or if the conservatives and the business interests have convinced the political bosses that democracy has failed, these same political leaders may select an American Mussolini for President. Likewise, if communistic sentiment rules the day, an American Stalin may become the president.

No one supporting the "court packing" method and procedure today, merely because he sincerely thinks Mr. Roosevelt is a good man, that his ultimate objectives are worthy, and that, therefore, "the end justifies improper means," can logically complain if a reactionary President is elected and he "packs" the court to change and destroy the legal interpretation which Mr. Roosevelt's court may have put on the Constitution. No one can consistently and fairly complain if such a President, by "packing" the Court, goes so far as to even arrange for a so-called interpretation of the Constitution, that admittedly and designedly serves the selfish interests and purposes of his business supporters and the political henchmen who worship at his shrine. No one now supporting the President's proposal can consistently and conscientiously complain, insofar as the method of procedure is concerned, if an American with Hitler's ideals is elected President as a result of a sudden and overwhelming wave of fanatical religious and racial hatred, and such a President, with an inflamed and intolerant temporary majority in Congress, "packs" the court with men sympathetic with his views to bring about a "liberal and legal interpretation" of the Constitution, permitting the so-called sentiment of the majority of the people speedily and immediately to function in the way of validating congressional acts banishing from the country Jews, Catholics, and all foreign-born citizens of the United States, and probably confiscating their property. Such a president would, no doubt, seek to justify his outrages on the theory that the "general welfare" would thereby be promoted and "America preserved for Americans." Any one with a wide acquaintance and even a passing knowledge of the events of current history will have to admit it would not be difficult then, and it would not be difficult even today, for the President to find many sincere, although bigoted and intolerant lawyers with whom he could "pack the court." Such lawyers (and unfortunately there are many of them having these un-American views who sincerely consider themselves true "liberals" and patriotic Americans) would find little difficulty in announcing an interpretation of the Constitution destroying religious liberty and modifying freedom of speech and of the press, and other equally sacred rights guaranteed by the Constitution. They would be able to
rationalize and justify their interpretation, at least to their own satisfaction, by referring to and relying on the much discussed and **infinitely elastic** "general welfare" clause of the Constitution.

If a President does not want to rely on the continued loyalty and subservience of the judges with whom he "packs" the court, there are other so-called **technical legal and constitutional devices** to accomplish the purpose, already in vogue in state politics. It is not unlikely that we may have in the future a President with cunning and ingenuity, who, inflamed with the desire for dictatorial powers, may use many of the so-called technical, legal methods used by some of our state and municipal executives, supported by temporary majorities in the legislature or City Council, to perfect his dictatorship, and all under the guise of democracy, and without apparently repealing or destroying the outward semblance of an independent legislature and judiciary. Among other things, a future President may use the apparently "legal device" of obtaining at the time, and as a condition of the appointment, secretly signed, undated resignations from the judges he appoints to "pack" the court, in order that he may be certain that their continued subservience and obedience to his future will and desires will be complete. The use of this device could be excused, explained and defended on the same grounds as the "packing" procedure. It could be plausibly argued that the undated resignation device (if it is discovered) is a legal and speedy means of accomplishing ultimate objectives and purposes which the President may publicly proclaim as being worthy, and in perfect keeping with his idea of modern economic conditions, his understanding of the aspirations and desires of his people, and the fulfillment of his notion of his "mandate" from the people. The device of undated resignations has already been used successfully in state politics in connection with the control of administrative commissions. Since it is a secret device, we actually do not know how widespread its use has become. The use by a President of the device of obtaining undated resignations in order to control a court is certainly contrary to the spirit and purpose of our Constitution and the **principle and tradition** of an independent judiciary as contemplated by the Constitution. The device, however, is not contrary to the **letter** of the Constitution, and from a technical, legal standpoint, is as permissible as a sudden **wholesale** increase in the number of judges of the Supreme Court, brought about not for the legitimate purpose of relieving a congested docket and giving relief to an inadequate and overworked court, as contemplated by the Constitution, but for the admitted and im-
proper purpose of "packing" a court in order to control and change its decisions to suit the temporary whims and views of the President as the leader of the dominant political faction or party in control of our government. It cannot be denied that the device of the undated resignation is only a single step forward in the way of facilitating and perfecting the "court-packing" procedure.

Those who favor the proposal today should consider solemnly that if the contingencies arise which I have described, they are committed to the principle, and they cannot honestly and consistently complain if the same methods and means are used by any future President for the "speedy" accomplishment of his purposes. If those who favor the proposal are willing today, in the interest of speed, to disregard the spirit, as well as the letter, of the American Constitution, requiring specific amendments to be submitted to the people, they cannot complain in the future when another President "packs" the court for the purpose of speedily bringing about his personal idea of what should be done and how the Constitution should be interpreted immediately, simply because they violently disagree with the ultimate purpose the President intends to accomplish. Those who are in favor of the adoption of the President’s proposal today and the establishment of this precedent, which opens wide the door to dictatorship, cannot fairly and consistently complain when a future President and a temporary majority in Congress, fully justified by the precedent that has been established, desire to and actually do take advantage of the opportunity that is presented to complete the wreck of constitutional government and establish in its place either a despotism or a pure democracy, which history and past experience show eventually and inevitably result in dictatorship. If the President’s proposal is adopted, those persons who have sincerely encouraged and assisted in the consummation of the plan must remember that in substance they have practically abandoned the Constitution as a solemn and sacred contract, and have nullified the right of the people alone to change it, and have vested by indirection in the executive the source of all ultimate power. This is true because under the guise of interpretation through a "packed" court, rather than by amendment, the Constitution can always be changed.

When the members of the judiciary as an independent and coordinate branch of government differ as to interpretations of the Constitution, as learned and scholarly men may differ about difficult and complicated problems, it was contemplated by our forefathers that the people could, by clarifying amendments, decide the ultimate issue and always should decide
such issues. The President's proposal will, in the future, entitle the executive and legislative departments finally to decide these matters; thus destroying the Constitution, the authority of an independent judiciary, as well as the authority of the people themselves.

Our forefathers who wrote our Constitution were students of and familiar with the ancient and changeless fundamental lessons of human nature and the actual experience of the world with reference to different forms of government, as illustrated and demonstrated by thousands of years of history. They were determined to avoid, in working out our system of government, the tyranny and despotism of a temporary and inflamed majority, without the opportunity of properly informing itself or knowing the nature and consequence of its action. They were also determined to avoid the strangling and soul-killing power, and the other manifold evils and dangers, of an enslaving dictatorship. In order to accomplish these purposes, they wrote into the Constitution, among other things, provisions which did, and were intended by them to, establish a "check and balance" system providing, among other things, for the separation of executive, legislative and judicial powers, in order to create an orderly and regulated democratic government that would protect and safeguard the people against the evils and tyranny of either a temporary uninformed majority or a dictatorship. Naturally, the framers of our Constitution recognized that this new system of constitutional democracy involved a compromise between the extremes of both forms of ancient government. They recognized the fact that the American people could not be safeguarded and protected against the evils of the two extreme forms of government, namely, pure democracy, functioning through the immediate action of temporary, uninformed and inflamed majorities at one extreme, and dictatorship at the other, without sacrificing some of the benefits of both systems. Naturally, those who believe in the speed and "effectiveness" of a despotism, and distrust both the honesty and the intelligence of the ultimate and informed will of the people, and who are indifferent to the liberties, contentment, happiness and other advantages that come to those who live in a free country and participate in a democratic government, will not be likely to approve of our constitutional form of government. They naturally prefer the speed, certainty and efficiency of a dictatorship and are willing to risk and endure all of the admitted evils and perils of this form of government. Likewise, there are those who, in a moment of inflamed and restless zeal for the accomplishment of some immediate objective that they sincerely con-
sider essential and imperative for their welfare or the future welfare of the country, believe that a temporary majority is at the moment the "voice of God", so to speak, and refuse to consider the wisdom of any constitutional system involving checks and balances that delay democratic action until a majority of our people have had an opportunity to calm down, and, free from the emotion and crisis of the moment, inform themselves as to the merits of the particular issue to be acted upon. Our American constitutional way is, of course, a slower and a more cumbersome way for democracy to function. Experience has shown, however, that it is a much more intelligent and just way for it to function. Those of us, therefore, who take the middle ground and who sincerely and profoundly believe in the principles of our American constitutional democracy, based, as they are, on the experience of history and human nature, still teach our children that the United States Constitution is the solemn contract and charter of the people, defining and limiting the rights of the Executive, the Congress, and the Courts; that this constitutional contract and charter contains the "rules of the game" for the American people, as approved by them, and is the only safeguard of their liberties and freedom. Although this Constitution, approved and established by the people, may be honestly, learnedly and impartially interpreted and applied by our courts in their capacity as "umpires", and as an independent department of our government, their interpretation is always subject to change by the people, but only by the people. The meaning and interpretation of the Constitution cannot, within its spirit, intendment and real purpose, and those of our American traditions of government, be indirectly changed by the executive or legislative branches of our government through court "packing," or any other so-called legal device, because these two departments of our government have only a limited authority from the people to act as their agents, as defined in the Constitution, which, in final analysis, is the power of attorney given by the people specifically setting out the limitations of the authority and power of the President and the Congress.

It seems to me that in the stress and controversy of conflicting views as to the wisdom of various economic and social reforms, many people have forgotten, or they are willing to disregard, these simple truths and principles of our constitutional system and the real and traditional purpose and function of our courts. Whether a person is a communist, a socialist, a republican, or a democrat, or merely a plain independent citizen, we are bound to admit that there must be "rules of the game", and there must be umpires or courts,
free from political, personal, or any other kind of control, to interpret and apply those rules, if we are not to have confusion and anarchy. It is impossible, as a matter of human nature, training and differences of mental approach and function, to have honest and learned men, over a long period of time, apply legal analogies and principles of law, and interpret rules of law, without honest and reasonably argued and supported differences of opinion. We are not surprised nor are we critical, when scientists, theologians, economists, financiers and engineers, of recognized integrity and enjoying the highest standing as trained learned experts, differ in connection with many of the specialized problems of today. Lawyers and judges of unquestioned honesty and learning likewise should be expected and permitted to have sincere and reasonably and logically justified differences of opinion in connection with the interpretation and application of many of our difficult constitutional and legal problems. Certainly, in an orderly society, and under a constitutional government, the remedy of those who become suddenly violent partisans and are excited and alarmed about these differences of opinion, is not to adopt blindly a "court-packing" device that permits them to substitute judges of their selection and sympathetic with their views. Truth, justice and public harmony, and the future stability and independence of the judiciary are not served or promoted by this violent and partisan method. They will succeed only in temporarily "fixing" the court to suit themselves. At the same time they will destroy the independence of the judiciary and the respect of the people for our courts. The remedy, in simple fairness and within the spirit of our Constitution and the solemn agreement of the American people, is to amend or change the law, and not to "fix" the umpire or "pack" the court.

It is certainly true, that the speediest and most effective way to win any game in life is to "fix the umpire" rather than to change the rules of the game. Curiously enough, however, some of us still teach our children that such a method is both dishonorable and unsportsmanlike. Senator Bailey recently said, and I think correctly, that: "A stacked jury, a stacked court, and a stacked deck of cards are in the same moral category—one has no more confidence in one than in the other of them."

Recently, Senator Wheeler very properly said that: "If it is morally wrong for a litigant or a person under indictment to 'pack' a jury; if it is morally wrong for a litigant to 'pack' a court to win his case, it is just as wrong for the President, as a litigant, to 'pack' the court."

George Washington gave future generations a solemn
warning against short cuts and anti-constitutional methods when he said: "If in the opinion of the people the distribution or modification of the constitutional power be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates." (italics mine)

Woodrow Wilson, a great Democratic President, and, before that, a profound scholar and student of American political history and constitutional law, said that an increase in the size of the Supreme Court, in order to change the decisions of the Court, would be a "violation of the spirit of the Constitution and an outrage on constitutional morality."


The thought contained in the above quotations certainly represents the fundamental principle, the spirit and the traditional meaning of our Constitution, that you and I and all the men of our generation were consistently taught in the schools and universities. It may be that the spirit and meaning of the Constitution, as taught to us, are no longer recognized as being proper and applicable as principles of government and political science by some modern professors and political leaders. It seems to me, however, that if they are opposed to our form of government they should frankly advocate its change or abolition, and should not try, by indirection, to make it useless and meaningless, while the American people look on confused and bewildered by the present debate, and do not realize they are attending a constitutional funeral. Let us be frank and have the issues clearly presented to the American people. It may be that some of our professors and political leaders favor some of the European systems of government. Those who do, in accordance with our American traditions of free speech, have a perfect right to advocate directly the establishment of the totalitarian state, or any other form of government, and to suggest immediate changes in our Constitution by our people to bring about the results they desire. The issue, however, should be made plain and should not be camouflaged. Practical dictatorships have been established in some of the Latin American republics, which have constitutions modeled after our own, and without apparently removing or destroying the outward semblance of constitutional democratic government theoretically based on a "check and balance" system. Liberty, as we understand the term, is only a pleasant memory with these
people. Even in this liberty-loving country of ours, where we are supposed to be devoted to a political system of checks and balances in our municipal, state and federal governments, the withering and paralyzing hand of despotism and autocracy has, in substance and in practice, destroyed constitutional democracy in some of our municipal and state governments. Europe has also given us striking examples of how fast a dictatorship can be established on the cumulative wreck of one safeguard and principle of constitutional democracy after another. Among countless examples of this type of phenomenon in history, probably the most tragic and pitiful one was the continued but impotent existence of the formerly powerful and democratic Roman Senate permitted by the tolerance of the Emperors long after the Roman Republic had ceased to be, merely as a form of "window dressing" to lull into a sense of false security certain innocent, trustful and uninformed Roman citizens, who still believed in and thought they were enjoying the "liberty and blessings" of representative democratic government.

Let us not forget so soon the recital in the Declaration of Independence of the intolerable wrongs which brought about the American revolution and the subsequent adoption of our Constitution, one of the most important of which was "He has made Judges dependent on his will alone, for the tenure of their offices".

"Economic Predilections"

There has been a great deal said about "economic predilections" influencing the majority of the Supreme Court in some of its decisions. The fact is that all of us naturally have certain so-called economic predilections based on our reading of economic and political history, our individual experience, and our own views as to controversial problems of political science and economics. The reason for differences of opinion as to the very difficult problems involved in the interpretation and application of the "interstate commerce clause," the "due process clause," and the baffling question of fixing the twilight zone between Federal and States' rights, is that both the majority and the minority of the Supreme Court have economic predilections and views, just as all lawyers and all laymen have such predilection and views in connection with these very difficult and controversial problems. These fundamental questions are not new. They have fed the flame of controversy since the beginning of our Republic. The difficulty is that this controversy arises every time legislation or political institutions touch these problems. Certainly, because from time to time people are aroused to fever heat
over the proper solution of these problems is no reason for us to immediately scoff at the views of one side or the other, and in our excitement or partisanship strike down the ancient and historical principle of an independent judiciary. As tolerant and patriotic citizens we should feel that we can disagree with certain decisions of the court, and, at the same time, recognize and uphold the paramount principle of the vital necessity for honest umpires and independent and fearless courts.

**The Supreme Court**

No student of law or politics, familiar with the history of our courts can contend that the Supreme Court in its long history has never erred or will not err again. The court is a human institution like all other governmental institutions. It is not infallible. No one, no matter how much he reveres and holds dear our American institutions, would contend that the Court at times may not have been affected by the storms of passionate and intense controversy that have on many occasions in our history beaten about it. The remarkable tribute to this great institution, however, is that on the whole it has been so free from such criticism and such human shortcomings. The court, for the most part, has, throughout its long history, been the one department of our government effectively removed from political influence and protected from the transient passions and controversies of the American public, by the infinite wisdom and foresight of our forefathers, who expressly provided in the Constitution that judges should be appointed for life and their compensation could not be diminished during their tenure of office. (Article III, Section 1.)

Our presidents, in the past, let it be said to their credit, have recognized the paramount importance of the judicial department of our government, and throughout the years, with a few notable exceptions, have appointed to the Supreme Court men of outstanding learning, unimpeachable character and fearless independence, who had won nation-wide distinction in their profession. If one reads carefully the decisions of the Supreme Court and studies the character and ability of the great judges who have sat on its bench during its long history, I believe he would agree with what I think is the view of the vast majority of students of law and political science—that the Supreme Court of the United States has always stood among the foremost institutions of the world, and that the average of its membership, taken as a whole, during the history of American government has excelled in learning, high character, independence and unselfish devotion to duty, the membership of all other American political in-
stitutions and departments of our government. The court has, during the years, been a bulwark of freedom and the last refuge of the oppressed. It has been the constant guardian of the Constitution and the people's liberties, protecting them time and time again against arbitrary action on the part of the executive, and from the tyranny and passion of temporarily inflamed majorities.

Any one familiar with the history of Reconstruction days should not forget that during this dark period of sectional and post-war bitterness and hatred, the Supreme Court protected the personal and civil rights and liberties of the people of the South against a partisan and temporary majority in Congress, and in the face of an aroused and indignant public opinion in the North. For example, in Ex Parte Garland, 4 Wall. 333, the Supreme Court declared unconstitutional and invalid an act of Congress prohibiting lawyers from practicing in the Federal Courts unless they took an oath that they had not aided the Confederate States in the Civil War. In The Civil Rights Cases, 109 U.S. 3, The Civil Rights Act was held unconstitutional and violative of States' Rights when its criminal penalties were attempted to be enforced against Southerners for denying to negroes the accommodations and privileges of an inn, hotel or theater. In United States vs. Reese, 92 U.S. 214, the court held unconstitutional a Federal statute to the extent that it improperly attempted to regulate local elections and voting rights primarily within the jurisdiction of the states. Other equally important and impressive examples will be found in Cummings v. Missouri, 71 U.S. 277, and United States v. Cruikshank, 92 U.S. 542.

Those of our people who still hold dear the constitutional guarantees of religious liberty, freedom of speech, freedom of the press and freedom from discriminatory legislation on account of race or religion, before striking down the independence of the judiciary and in substance vesting complete and unrestricted power in the President and the Congress, should read the historic decisions of our Supreme Court upholding these rights, when temporary majorities in Congress attempted, through unconstitutional legislation, to impair or destroy them. For example, in Society of Sisters vs. Pierce, 296 U.S. 927, the Supreme Court held unconstitutional and invalid a law of the State of Oregon requiring that all parents send their children to the public schools, the effect of which would have been to destroy private, parochial and other religious and denominational schools. In Near vs. Minnesota, 283 U.S. 697, the Supreme Court held invalid a Minnesota newspaper law which attempted to suppress by injunction the future publication by newspapers of charges against pub-
lic officials of corruption or serious neglect of duty. In Cum-
mings vs. Missouri, 71 U.S. 277, a Catholic priest was con-
icted under a state law for preaching and performing his
functions as a minister, because he had not, as a condition
precedent, taken the "test oath" required by the local law,
that among other things he had never manifested "by act or
deed" his allegiance to the cause of the enemies of the United
States. (Confederate States.) The Supreme Court held
that the law was unconstitutional and set aside the conviction.
If the statute had not been held invalid there would be noth-
ing to prevent a law being passed requiring as a condition
precedent to preaching, teaching, voting, or exercising any
other right of citizenship, that an oath be taken that one is
not a Catholic, a Protestant, or a Jew or a foreign-born citi-
zen, or something else then in disfavor. In Grosjean vs.
American Press Company, 297 U.S. 233, the Supreme Court
held unconstitutional, as a violation of the freedom of the
press, a statute of Louisiana designed to stamp out newspapers
which were criticising the activities and policies of the then
dominant political faction, by imposing a prohibitive tax
upon the advertising revenues of newspapers having a weekly
circulation of 20,000 copies or more. Other equally striking
examples of the protection of individual rights and liberties
may be found in Meyer vs. Nebraska, 262 U.S. 390; Strauder
vs. West Virginia, 100 U.S. 303; Nebraska District of Evan-
gelical Lutheran Synod vs. McKelvie, 262 U.S. 404; Powell
and Buchanan vs. Warley, 245 U.S. 60.

Those who are communists or socialists, or belong to any
other minority political group or faction often requiring pro-
tection from legislative abuse on the part of inflamed and
partisan majorities in Congress, or state legislatures, should
read at least two important decisions of the Supreme Court.
One is the case of DeJonge vs. State of Oregon, 81 L. Ed. 189,
where a communist was convicted under an Oregon statute for
assisting in the conduct of a meeting called by the communist
party. The Supreme Court set aside the conviction under the
statute as being violative of the accused's fundamental rights
of free speech and of peaceable assemblage protected by the
due process clause of the Constitution. In the other case,
Stromberg vs. California, 283 U.S. 359, the Supreme Court
declared unconstitutional the California Red Flag Law in so
far as it was attempted to be applied to a girl who displayed
a red flag at a school where liberal views were being taught.

Those of our people who are for the moment aroused be-
cause of their disagreement with certain decisions of the Su-
preme Court, dealing with violent controversies in the field
of economics and states' rights, should read the decisions of the Supreme Court referred to above, protecting the personal liberties and rights of individual citizens, irrespective of whether they are rich or poor, and irrespective of any question of race or religion, against Acts of Congress, acts of state legislatures, as well as ordinances of city governments. The following quotation from the decision of the Supreme Court of the U.S. in Yick Wo v. Hopkins, 118 U.S. 356, 366, 368, is typical of numerous other statements announcing the fundamental principles which have made our constitutional form of democracy so dear to us who love freedom, and who believe in a "government of laws and not of men":

"But the fundamental rights of life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men'. For, the very idea that one man may be compelled to hold his life, or the means of living or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolera - ble in any country where freedom prevails, as being the essence of slavery itself."

Conclusion

With the sinister and widespread growth of the "spoils system" and public patronage and their varied and allied evils, democracy is being gradually strangled, and our election machinery frequently controlled and prostituted. Closely connected with these evils is a growing tendency on the part of the executive departments, through the wholesale use of the "spoils system", to control many of our state legislatures, and the same tendency and seductive and strangling power are exerting more and more control over the Congress of the United States itself. When, through the "spoils system", multiplied patronage, and the rigid discipline of local and municipal political machines, our legislatures are controlled and finally made subservient to the executive, the next logical step is, of course, the control of the judiciary. When this is accomplished, our constitution and our representative and republican form of government, based on checks and balances, are finally and completely destroyed. People talk loudly today of their personal desires and of their rights, but very rarely of their civic duties and responsibilities. Con-
stitutional government and democracy are not built upon a group of self-operating principles. We must pay a price for them, and this price is "eternal vigilance", unselfish and patriotic service, and, above all, a willingness to oppose courageously and publicly any proposals which we feel may weaken or ultimately destroy these principles.

Those of us who are even superficially familiar with the history of the struggle for the ideal of an impartial and independent judiciary, as the only safeguard of liberty and justice for mankind against dictators, tyrants, or temporarily inflamed majorities, know that the struggle for the progress of the ideal has throughout the ages left in its pathway the corpses of countless noble men and women who loved mankind and died that the ideal might be fostered and strengthened. No one claims even now that the ideal of an independent judiciary has been completely achieved in this country. It is certainly fair to say, however, that the ideal of an independent judiciary and its growth to its present place in the hearts and minds of English speaking people, is probably one of the most priceless heritages we have received from our ancestors. To strike it down or weaken it now is not intelligent and true liberalism, but, in my opinion, reaction of the boldest and most tragic kind.

Nothing that I have said thus far is new or original on this subject. I have only attempted, so far as I have the ability to do so, to make clear and simple to laymen, who may be confused on the subject, the theory and practice of American constitutional government as understood by scholars and writers, and as taught in our school's and universities from the beginning of the Republic until the recent revolutionary proposal of the President was announced. The principles of government and political science which I have attempted to outline are likewise doctrines that, until very recently, had been accepted as embodying the wisdom of students of government and statesmen since the time of Plato, and as being firmly based on the experience of history. They have until recently been considered the very foundation stones and underlying genius of our American institutions. It has been my object merely to suggest that their utility has not diminished; to question seriously and solemnly the wisdom of ill-considered departures from them; and to urge that we reaffirm our faith in them as the bulwark of American Constitutional government and of the freedom and justice which that Government has always so nobly typified.