
In Defence of the Court's Integrity:

The Role of Chief Justice
Charles Evans Hughes in the
Defeat of the Court-Packing
Plan of 1937

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'No greater mistake can be made than to think that our institutions are fixed or may not be changed for the worse. We are a young nation and nothing can be taken for granted. If our institutions are maintained in their integrity, and if change shall mean improvement, it will be because the intelligent and the worthy constantly generate the motive power which, distributed over a thousand lines of communication, develops that appreciation of the standards of decency and justice which we have delighted to call the common sense of the American people.'

Hughes in 1909

'Our institutions were not designed to bring about uniformity of opinion; if they had been, we might well abandon hope.'

Hughes in 1925

'While what I am about to say would ordinarily be held in confidence, I feel that I am justified in revealing it in defence of the Court's integrity.'

Hughes in the 1940s

In early 1927, ten years before his intervention against the court-packing plan, Charles Evans Hughes, former Governor of New York, former Republican presidential candidate, former Secretary of State, and most significantly, former Associate Justice of the Supreme Court, delivered a series

of lectures at his alma mater, Columbia University, on the subject of the Supreme Court.¹ These lectures were published the following year as *The Supreme Court: Its Foundation, Methods and Achievements* (New York: Columbia University Press, 1928). Over the course of these lectures, Hughes traced the seemingly irresistible historical tendency for omnipotent occupants of the Oval Office to attempt to alter the numerical composition of the Court. Hughes identified two possible presidential motives for such reforms: ‘Proposals for changes in the organisation and the exercise of the jurisdiction of the Supreme Court have been of two sorts; those suggested for the purpose of promoting its efficiency and those which have been sought to curb the exertion of the judicial power. . .’² Although John Adams, Thomas Jefferson, Andrew Jackson, Abraham Lincoln and Ulysses Grant had all successfully enlarged membership of the Court, nine had been the statutory number of justices since the Judiciary Act of 1869 and had increasingly become the customary composition of the Court. Hughes commented that ‘the consensus of competent opinion is that it is now large enough’, and that ‘Happily, suggestions for an increased number. . . have not been favoured because of their impracticality. . .’³ In support of this statement, Hughes cited the testimony of Justice Story:

You may ask how the Judges got along together? We made very slow progress, and did less in the same time than I ever knew. The addition to our numbers has most sensibly affected our facility as well as rapidity of doing business. ‘Many men of many minds’ require a great deal of discussion to compel them to come to definite results; and we found ourselves often involved in long and very tedious debates. I verily believe, if there were twelve Judges, we should do no business at all, or at least very little.⁴

Hughes gratefully concluded that ‘Efforts further to increase the number of judges have failed.’⁵ His intervention in opposition to President Franklin Roosevelt’s Court-packing plan of 1937, almost a decade later, ensured that such schemes would continue to fail. Hughes’ biographer Merlo Pusey concluded that his ‘unwavering courage and cool restraint contributed powerfully to saving the Supreme Court from the most formidable attack ever launched against its independence.’⁶ Due to the intervention of the Chief Justice, which took the form of a factual letter addressed to Senator Burton Wheeler, attempts to alter the composition of the Court have been avoided ever since, even by the most powerful of presidents.

Earlier in these lectures, Hughes had inadvertently identified the cause for such presidential proposals: to overcome anti-democratic decisions made by an unelected body out of step with public opinion. In the opinion of one recent reviewer, Hughes ‘contributed a term of art to public law’⁷ in his reference to the ‘self-inflicted wounds’ from which the Supreme Court had,

1 The six lectures were delivered by Hughes between 25 January and 11 February 1927. See ‘Hughes To Speak Before Institute,’ *Columbia Daily Spectator*, Vol. 50, No. 76, January 21 1927, 1.

2 Charles Evans Hughes, *The Supreme Court: Its Foundation, Methods and Achievements*, (New York: Columbia University Press, 1928), 237.

3 *Ibid.*, 237.

4 Joseph Story, *Life and Letters of Joseph Story*, (Boston: Little and Brown, 1851), Vol. 2, 296.

5 Hughes, *The Supreme Court*, 237.

6 Pusey, *Charles Evans Hughes*, (New York: Macmillan, 1951), vol. 2, 766.

7 Donald Grier Stephenson, Jr., ‘The Chief Justiceship of Charles Evans Hughes, 1930-1941 by William G. Ross,’ *Law and Politics Book Review*, Vol. 17, No. 8, (2007), 639-643 (<<http://www.gvpt.umd.edu/lpbr/subpages/reviews/ross0807.htm>>, viewed 29 October 2013).

on occasion, 'suffered severely.'⁸ Such wounds, Hughes observed, had been sustained on three separate occasions. Firstly, following *Dred Scott v. Sandford* (1857); secondly, following the Legal Tender cases (1870-1884); and thirdly, following the Income Tax cases (1895). Briefly summarising the circumstances surrounding these cases, Hughes concluded that the Court 'has come out of its conflicts with its wounds healed, with its integrity universally recognised', to the extent, he claimed, 'that today no institution of our government stands higher in public confidence.'⁹ Hughes attributed the continued strength and stability of the Court to the skilfulness with which it had been marshalled through testing times by successive Chief Justices. Hughes' conception of the institutional integrity of the Court as contingent upon the evasion of such self-inflicted wounds revealed his preparedness for promotion, two years later, to the chief justiceship.

Existing explanations of this crucial episode in American constitutional history have conformed to either the externalist or internalist explanation.¹⁰ The externalist explanation maintains that the defeat of the plan was caused by events beyond the Court's control, such as congressional and public opposition and Roosevelt's retreat. The internalist interpretation argues that the defeat of the plan was caused by factors within the Court, especially the 'switch in time that saved nine', whereby Justice Owen Roberts seemed to suddenly switch his vote to support the New Deal, and the resignation of Justice Willis Van Devanter presented the President with a vacancy on the Court. This reassessment adopts the internalist argument, agreeing that the reason for the defeat of the court packing plan resided within the Court itself, but emphasises the leadership role of Hughes rather than the jurisprudential shift of Roberts. Using Hughes' own account of the episode contained in his posthumously published *Autobiographical Notes*, which have been overlooked by historians, it will be argued that only Hughes, given his powerful position as Chief Justice, his reputation with the American public and politicians and extensive experience in law and politics could have so skilfully intervened and saved the institutional integrity of the Supreme Court.

The Chief

Ever since his arrival of the political scene in 1907, and even more so since his spell on the Supreme Court between 1910 and 1916, Hughes had been constantly considered a leading candidate for the chief justiceship. Indeed, it seemed to be his destiny. After having appointed Hughes an Associate Justice in 1910, President Taft all but promised the prodigious politician the central seat on the Court should the opportunity arise. He had written to a relative earlier that year, 'I don't know the man I admire more than Hughes. If ever I have the chance I shall offer him the chief justiceship.'¹¹ When the long serving Melville Fuller died later the same year, Taft overlooked elevating the newly appointed justice, for Hughes' youthfulness and likely longevity would have all but ended Taft's own pursuit of the coveted chief justiceship. Instead he elevated the elderly Edward Douglass White, which presented Taft the opportunity to succeed to the Supreme Court as Chief. Whilst Taft was Chief, Hughes was subsequently sounded out for the position by President Harding in 1921 and President Coolidge in 1925. Ironically, by the time President Hoover offered Hughes the centre seat

⁸ Hughes, *The Supreme Court*, 50.

⁹ *Ibid.*, 55.

¹⁰ For a summary of these two positions, see G. Edward White, 'Constitutional Change and the New Deal,' *American Historical Review*, Vol. 110, No. 4, (2005), 1094-1115.

¹¹ Quoted in David J. Danelski and Joseph S. Tulchin, eds., *The Autobiographical Notes of Charles Evans Hughes*, (Cambridge: Harvard University Press, 1973), 168.

on the Court in 1930, he was widely expected to refuse the position once more, given his advancing age and his son's position as Solicitor General.

Hughes, however, reluctantly accepted. Despite an unexpectedly difficult confirmation battle, Hughes was confirmed by a vote of fifty-two to twenty-six by the Senate. One of Hughes' law clerks, Edwin McElwain, described the incoming Chief:

The Senate opposition was voted down, and on February 20, 1930, Hughes was sworn in as Chief Justice. He was then at the height of his powers, and as has been indicated he combined the greatest possible experience as a practicing lawyer, judge, and legal scholar with an equally extensive experience in high public office. This combination would seem to have qualified him perhaps more than any preceding Chief Justice for the high duties of the office.¹²

To claim that the sixty-seven year old Hughes was at the peak of his powers in 1930 was an audacious assertion. Although still vigorous and in good health, his best days seemed behind him as he moved inexorably towards conclusion of his career. The chief justiceship seemingly promised to be a slow burnout for Hughes rather than a blaze of glory.

The Career

The confirmation of Hughes to the chief justiceship capped the career of one of the most sustained, successful and storied spells of public service in American history. His wide and varied experience as a teacher and professor, lawyer and judge, diplomat and politician prompted one commentator to remark that he had nine successful careers, rather than one.¹³ Hughes had powered to prominence as counsel to the Stevens Gas Commission and Armstrong Insurance Commission, charged with conducting an investigation into allegations of corruption and price fixing within the aforementioned industries in New York. The young lawyer impressed with his command of the complex industry and mastery of the material and acquired immense popularity in associating himself with a cause at once populist and progressive. Throughout 1905, Hughes repeatedly resisted Republican overtures to become Mayor of New York City. However, he relented in 1906, running successfully for Governor of New York and throughout three years in office, reinforced his reputation as a reformer, earning the plaudits of political progressives including President Theodore Roosevelt. However, Hughes' constitutional conservatism had also ensured his endearment with the Republican establishment, to the extent that Roosevelt's successor and conservative counterweight, President Taft, appointed him to an Associate Justiceship.

In his short spell on the Supreme Court, described as 'six stunningly liberal years'¹⁴, Hughes earned a reputation as a stylish opinion writer and capable builder of coalitions, inclined to simultaneously support social reforms, champion civil liberties and bolster big business.¹⁵ Hughes reluctantly resigned from the Court and resumed his political career by campaigning for the presidency, serving as a classic compromise candidate as one of the few figures who could earn

12 Edwin McElwain, 'The Business of the Supreme Court as Conducted by Chief Justice Hughes,' *Harvard Law Review*, Vol. 63, No. 1, (1949), 11.

13 Herbert Elliston, 'The Integrity of Justice Hughes,' *Atlantic Monthly*, Vol. 189, No. 4, (1952), 73-74.

14 Fred Rodell, *Nine Men: A Political History of the Supreme Court from 1790 to 1955*, (New York: Random House, 1955), 223.

15 'Governor on the Bench: Charles Evans Hughes as Associate Justice,' *Harvard Law Review*, Vol. 89, No. 5, (1976), 961-997.

the endorsement of both the conservative and progressive wings of the Republican Party. Eternally applicable to Hughes' reserved pursuit of political office was Plato's aphorism that those who seek power are not worthy of that power. One observer remarked that Hughes conducted himself during his 1916 presidential campaign as though 'he seemed not to really want to be elected.'¹⁶ Hughes was narrowly defeated by incumbent Woodrow Wilson. He soon returned to political prominence and reinvented himself as the elder statesman of the Republican Party as President Harding's Secretary of State, credited as a committed internationalist who masterfully presided over the Washington Naval Conference. In 1928, he joined the Permanent Court of International Justice, simultaneously securing his standing as a statesman and internationalist and providing the perfect platform for promotion to the chief justiceship. The result was that, in the words of former Hughes critic Felix Frankfurter, 'He took his seat at the centre of the Court with a mastery, I suspect, unparalleled in the history of the Court, a mastery that derived from his experience, as diversified, as intense, as extensive, as any man ever brought to a seat on the Court, combined with a very powerful and acute mind that could mobilise these vast resources in the conduct of the business of the Court.'¹⁷

The Man

Hughes the man was universally admired for his integrity, intellect, poise and politics. He had few detractors, which made his subjection to a bruising confirmation battle particularly painful for him. One of them, Felix Frankfurter, had commented in 1937 at the conclusion of the court packing plan on Hughes' high standing that: 'When I see how a synthetic halo is being fitted upon the head of one of the most politically calculating of men it makes me in the sanctified language of the old gentleman "puke".'¹⁸ However, Hughes rapidly regained the masterful manner which had initially earned him his flawless reputation. Brought face to face with Hughes' brilliance first hand as his colleague on the Court, Frankfurter's criticisms wilted. 'In open court,' he explained, 'he exerted authority by the artistic mastery with which he presided. He radiated authority in the conference room.'¹⁹ Hughes stood a slight six feet tall and cut an impressive and imposing figure. He was most commonly described as Jovian. 'Charles Evans Hughes was above medium height, with gray hair and a beard best described as Jovian. Central casting could not have produced a better image of a chief justice, and his presence matched his appearance.'²⁰ The result, Paul Freund explained, was that Hughes' 'Jovian figure seemed to occupy the central seat by natural right.'²¹ Another future associate justice, Robert Jackson, urged FDR to appoint to the Court an intellectual heavyweight capable of competing with the Chief, since 'Any man you would likely to appoint from the west would be possessed of an inferiority complex in the presence of the Chief Justice, who looks like God and talks like God.'²² Jackson was soon to serve as an 'able advocate'²³ of the court packing plan.

16 Quoted in Alpheus T. Mason, *The Supreme Court from Taft to Burger*, (Baton Rouge: Louisiana State University Press, 1979), 84.

17 Felix Frankfurter, 'Chief Justices I Have Known,' *Virginia Law Review*, Vol. 39, No. 7, (1953), 901.

18 Frankfurter to Harlan Fiske Stone, 2 June 1937, Box 13, Stone Papers.

19 Frankfurter, "The Administrative Side" of Chief Justice Hughes,' *Harvard Law Review*, Vol. 63, No. 1, (1949), 4.

20 William H. Rehnquist, *The Supreme Court*, (New York: Vintage, 2001), 122.

21 Paul A. Freund, 'Charles Evans Hughes as Chief Justice,' *Harvard Law Review*, Vol. 81, No. 1, (1967), 13.

22 Quoted in Danelski and Tulchin, eds., *The Autobiographical Notes*, xxviii.

23 Stephen R. Alton, 'Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D Roosevelt's Battle with the Supreme Court,' *William & Mary Bill of Rights Journal*, Vol. 5, No. 2, (1997), 527-618.

Such religious imagery was repeatedly invoked in the rhetoric surrounding the Court packing plan. Burton Wheeler contended that ‘the Court was like a religion to the American people.’²⁴ He similarly scolded FDR that ‘The Supreme Court and the Constitution are a religion with a great many people in this country,’ and I told him, ‘and you can’t keep bitterness out of a religious fight.’²⁵ There is much truth in the comparison. The Supreme Court’s standing with the public has been traditionally protected by a reverential attitude greater than that enjoyed by the two political branches of government. The reverence of the American people towards the Constitution transferred through the Court and onto its Chief. And in many ways, the towering Jovian figure of Chief Justice Charles Evans Hughes was as close to a political deity as the American people had experienced since Washington or Lincoln.

The Hughes Court

When Charles Evans Hughes ascended to the centre seat on the Court in 1930, the United States was still suffering the depths of the depression. In 1933, President Franklin Delano Roosevelt had swept into the Oval Office in a messianic manner and begun to implement the ‘New Deal’, his legislative programme which promised economic recovery through a series of publicly funded ‘alphabet agencies.’ Cases concerning the constitutionality of these ambitious and adventurist agencies began appearing on the Court’s docket in 1934. Hughes was conscious that he inherited a Court which was deeply divided over its interpretation of the Constitution, especially those clauses concerning commerce and contract. ‘When I became Chief Justice, I was well aware of the cleavage in the Court.’²⁶ For the five years between 1932 and 1937, the membership of the Court went unchanged. On the one hand were the Four Horsemen, Pierce Butler, James Clark McReynolds, George Sutherland and Willis Van Devanter, conservatives committed to a strict constructionist interpretation of constitutional clauses concerning commerce and contract. On the other were the Three Musketeers, Louis Brandeis, Benjamin Cardozo and Harlan Fiske Stone, liberal souls prepared to plead deference and concede greater economic control to the federal government. Caught in the middle of the Court’s ideological infighting were Hughes and Owen Roberts. Hughes’ positioning at the centre of the Court was the result of a deliberate decision to disassociate himself from both ideological encampments. He stated: ‘I paid no attention to labels and was careful not to identify myself with any group in the Court.’²⁷ Hughes conceived of the Chief Justice as an impartial intermediary between ideologically impulsive and independent colleagues, who in the words of William Rehnquist, were as ‘independent as hogs on ice.’²⁸

For Hughes, this ideological impartiality demonstrated the constraining influence of the chief justiceship. His moderate jurisprudence led to his characterisation by muckraking journalists Drew Pearson and Robert Allen in *The Nine Old Men* as ‘the man on the flying trapeze’ for his ideological flexibility.

He has swung back and forth from liberalism to economic stultification with greater ease than the daring young man on the flying trapeze; and it is only now, at the zenith of his

²⁴ Burton K. Wheeler with Paul F. Healy, *Yankee From the West*, (Garden City: Doubleday, 1962), 320.

²⁵ *Ibid.*, 335.

²⁶ Quoted in Danelski and Tulchin, eds., *The Autobiographical Notes*, 300.

²⁷ *Ibid.*, 301.

²⁸ Rehnquist, ‘Chief Justices I Never Knew,’ *Hastings Constitutional Law Quarterly*, Vol. 3, No. 3, (1975), 637.

career, that he shows signs of losing his nerve and his balance. . . As chief justice, Mr Hughes has run back and forth so frantically between the liberals on one side and the reactionaries on the other in an effort to preserve harmony that he has lost the respect of both.²⁹

These accusations overlooked and obscured the essential consistency with which Hughes had considered cases concerning the constitutionality of the New Deal, the significance of which has been overlooked in previous interpretations of Hughes' jurisprudence. Central to Hughes' judicial philosophy was the conservative principle that although the country was in crisis, the Constitution itself had been crafted in a time of crisis and therefore did not extend any existing powers, nor grant the government any new emergency powers, but instead remained static. In his majority opinion maintaining Minnesota's suspension of creditors' remedies in *Home Building & Loan Association v. Blaisdell*, Hughes elaborated upon this principle in one of the most prominent passages in American constitutional history:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.³⁰

In authoring another majority opinion, that of *A.L.A. Schechter Poultry Corp. v. United States*, the decision which invalidated the National Industrial Recovery Act, Hughes similarly stated:

Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.³¹

Such reasoning meant that FDR found his efforts to extend the economic authority of the federal government frustrated, as several of his agencies were abolished altogether. He lashed out at the Court in the aftermath of the *Schechter* decision which invalidated the National Industrial Recovery Act: 'We have been relegated to the horse-and-buggy definition of interstate commerce.'³² The following year, Roosevelt won an equally emphatic electoral landslide, and found himself in perhaps at the pinnacle of modern presidential power, occupying the Oval Office and marshalling large majorities in both Houses of Congress. Operating beyond Roosevelt's reach, however, was the Supreme Court, which by 1936, had declared unconstitutional and invalidated the Railway Retirement Act of 1934,³³ the Frazier-Lemke Farm Bankruptcy Act of 1934,³⁴ the National

29 Drew Pearson and Robert S. Allen, *The Nine Old Men*, (Garden City: Doubleday, 1937), 75-6.

30 *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

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

32 'The Two Hundred and Ninth Press Conference,' 31 May 1935, *The Public Papers and Addresses of Franklin D. Roosevelt, 1935*, vol. 4, *The Court Disapproves*, (New York: Random House, 1938), 221. Hereafter cited as *FDR Public Papers*.

33 *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935).

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

Industrial Recovery Act of 1933,³⁵ the Agricultural Adjustment Act of 1933,³⁶ the Bituminous Coal Conservation Act of 1935³⁷ and the Municipal Bankruptcy Act of 1934.³⁸ Insult was added to injury by several accompanying cases, including *Humphrey's Executor v. United States* (1935), which rebuked Roosevelt for his removal of a Federal Trade Commissioner. Throughout the 1936 election, Roosevelt recalled, 'The opposition pointed to the Court as the only obstacle which had stood in our way.'³⁹ These cases were to provide examples of the 'self-inflicted wounds' which Hughes had described in 1927.

The Plan

Emboldened by an emphatic electoral victory, Roosevelt resolved to confront the Court. He hatched a plan which promised to ensure the future compliance of the Court. Formulated in secrecy by a small number of officials since early 1936, Roosevelt, with his sense of political invincibility heightened, decided to unveil the plan at a press conference on 5 February 1937. He came straight from the Cabinet, where he had unveiled, rather than discussed the bill. Formally entitled as the Judicial Procedures Reform Bill of 1937, it soon became known as the 'court-packing plan' due to its core provision, which allowed the President to appoint an additional six Justices to the Court and thus address its alleged ideological imbalance. The proposed bill boldly began:

When any judge of a court of the United States, appointed to hold his office during good behaviour, has heretofore or hereafter attained the age of seventy years and has held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and within six months thereafter has neither resigned nor retired, the President, for each such judge who has not so resigned or retired, shall nominate, and by and with the advice and consent of the Senate, shall appoint one additional judge to the court to which the former is commissioned.⁴⁰

Roosevelt used this promptly convened press conference to attempt to hastily establish a historical precedent for his proposal. He contended that the composition of the Court had been constantly changed prior to the passage of the Judiciary Act of 1869. Using evidence gathered by Homer Cummings, Roosevelt contended that the federal judiciary was sinking under the weight of proceedings and that the Supreme Court was suffocating from a combination of an overcrowded docket and an ensemble of overworked elderly justices. The President also observed the apparent reluctance of aged judges to accept the privileges of retirement. In support of this statement, he cheekily quoted Hughes: 'They seem to be tenacious of the appearance of adequacy.'⁴¹ 'That is a quotation from a very important justice,' the mischievous President told his audience, teasing them, 'You will have to find out who said it. I am not going to tell you.'⁴²

35 Section 9(c) of the National Industrial Recovery Act was invalidated by *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). The remainder of the Act was invalidated by *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

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

37 *Carter v. Carter Coal Company*, 298 U.S. 238 (1936).

38 *Ashton v. Cameron County Water Imp. Dist. No. 1*, 298 U.S. 513 (1936).

39 'Introduction,' *FDR Public Papers*, 1937, vol. 6, *The Constitution Prevails*, (New York: Macmillan, 1941), lviii.

40 'The Three Hundred and Forty-second Press Conference,' 5 February 1937, *FDR Public Papers*, 1937, 49.

41 Hughes, *The Supreme Court*, 75.

42 'The Three Hundred and Forty-second Press Conference,' 42-43.

Roosevelt, eager to establish a precedent for a proposal which seemed unprecedented, recalled that the Attorney General had in 1913 recommended an almost identical measure for the federal judiciary but excluded the Supreme Court:

I suggest an act providing when any judge of a Federal court below the Supreme Court fails to avail himself of the privilege of retiring now granted by law, that the President be required, with the advice and consent of the Senate, to appoint another judge, who shall preside over the affairs of the court and have precedence over the older one. This will insure at all times the presence of a judge sufficiently active to discharge promptly and adequately the duties of the court.⁴³

The Attorney General in 1913 was James McReynolds, the aging Justice now ensconced on the Supreme Court and one of the conservative Four Horsemen determined to destroy Roosevelt's legislative achievements. Unable to contain his excitement at the provenance of the proposal, Roosevelt revealed the Attorney General's identity: 'I will end the suspense by saying it was McReynolds.'⁴⁴ It has been suggested that Roosevelt opted for an updated version of this proposal simply because of the irony of its origin. One can imagine Roosevelt's satisfaction at having turned one of McReynolds' past policy suggestions against the abrasive Justice. Had he searched further, he may well have found Hughes' own reaction to this proposal helpful:

Under present conditions of living, and in view of the increased facility of maintaining health and vigour, the age of seventy may well be thought too early for compulsory retirement. Such retirement is too often the community's loss. A compulsory retirement at seventy-five could more easily be defended.⁴⁵

Arthur Krock, reporting for the *New York Times*, aptly summarised the situation: 'Roosevelt Asks Power to Reform Courts, Increasing Supreme Bench to 15 Judges; Congress Startled, But Expected to Approve.'⁴⁶ Although the case for reform made by Roosevelt and supported by Cummings was presented in the progressive vocabulary of efficiency, the real intention of the bill proved all too recognisable to the onetime reform Governor of New York and the one man who possessed the political power to prevent Roosevelt acquiring an imperial presidency which consumed all three branches of government: the Chief Justice of the United States, Charles Evans Hughes.

The Counter

There is ample evidence to conclude that the authors and advocates of the plan within the administration considered the Court packing plan a personal attack upon individual members of the Court, especially the Chief Justice. A breathless Harold Ickes gleefully contemplated the prospect of harming Hughes' reputation in his diary:

What a blow this will be to the prestige of Chief Justice Hughes, who has had a chance during the last four years to make a high place for himself as one of the great Chief Justices in American history but who has not shown either the strength or the adroitness

43 James Clark McReynolds, *Report of the Attorney General for the Fiscal Year Ending June 30, 1913*, (Washington DC: U. S. Government Printing Office, 1914), 5.

44 'The Three Hundred and Forty-second Press Conference,' 43.

45 Hughes, *The Supreme Court*, 76.

46 Arthur Krock, 'Roosevelt Asks Power to Reform Courts, Increasing Supreme Bench to 15 Judges; Congress Startled, But Expected to Approve,' *New York Times*, February 6 1937, 1.

to control his court and make it an instrument for social and political progress! Of course, the proposal of the President is a distinct slap in his face and in those of Van Devanter, McReynolds, Roberts, and Sutherland, who have constituted the irreconcilable old guard majority. The President's message is especially a joke on Justice McReynolds because, as Attorney General in the first Wilson Administration, it was he who advocated the matching of every Federal judge of seventy below the Supreme Court bench with a younger man.⁴⁷

Hughes, however, did not regard the plan as a personal attack, but recognised the reform as an assault upon the institutional integrity of the Court, in contrast to Roosevelt's unpersuasive and retrospective plea to the contrary: 'I knew the Constitution was not to blame, and that the Supreme Court as an institution was not to blame. The only trouble was with some of the human beings then on the Court.'⁴⁸ To Hughes, to assault an institution was a far greater crime than to assault an individual. Nonetheless, Hughes initially remained reluctant to resist the reform and was typically aloof and independent. He pledged with characteristically defiant indifference that 'If they want me to preside over a convention, I can do it.'⁴⁹ At this early stage in proceedings, it appeared extremely unlikely that the Chief Justice would re-enter the political arena to protect the composition of the Court. However, his intervention appears to have been prompted by Senator Burton Wheeler, who convinced Hughes he was the only one who could save the Court. Wheeler interestingly portrayed the proposal of the president in terms likely to provoke Hughes into acting. 'Here was an unsubtle and anti-Constitution grab for power which would destroy the Court as an institution. I felt I would have to do everything I could to fight the plan.'⁵⁰

Over the course of his career, Hughes had amassed an enormous amount of political capital. He had now convinced himself it was necessary to cash it in to defend the Court. He had reached the same stage as Representative Hatton Sumners, the Democratic Chairman of the House Judiciary Committee, who upon hearing of the bill told his colleagues: 'Boys, here's where I cash in my chips.'⁵¹ Hughes restated to Wheeler his apathetic attitude towards the bill, but indicated his intention to defend the Court's institutional independence: 'I think I am as disinterested in this matter – from a political standpoint – as anyone in the United States, because the people of the United States have been far more generous to me than I deserve. I am not interested in who are to be the members of the Court. I am interested in the Court as an institution. And this proposed bill would destroy the Court as an institution.'⁵² This would provide the *raison d'être* for Hughes' intervention as he later acknowledged:

This proposal – viewed in the light of its chief purpose with respect to the Supreme Court – was justly regarded as an assault upon the independence of the Court and evoked strong opposition, regardless of party, in Congress and throughout the nation. The Justices of the Supreme Court took no part in the discussion of the measure, save as I dealt with the state of the business of the Court in the letter about to be mentioned.⁵³

47 Harold L. Ickes, *The Secret Diary of Harold L. Ickes*, vol. 2, *The Inside Struggle, 1936-1939*, (New York: Simon and Schuster, 1954), 66-67.

48 'Introduction,' *FDR Public Papers*, 1937, lxiii.

49 Quoted in Pusey, *Charles Evans Hughes*, vol. 2, 753.

50 Wheeler, *Yankee From the West*, 319.

51 Quoted in Joseph Alsop and Turner Catledge, *The 168 Days*, (Garden City: Doubleday, 1938), 67.

52 Wheeler, *Yankee From the West*, 329.

53 Danelski and Tulchin, eds., *The Autobiographical Notes*, 304.

The Letter

Felix Frankfurter has written retrospectively that Hughes was a 'master of timing.'⁵⁴ So he proved with the letter. The chain of events which led to the composition of Hughes' letter to Senator Wheeler were dictated by the latter's impending appearance before the Senate Judiciary Committee on Monday 22 March. On Thursday 18 March several lawmakers opposing the plan, led by Senators Wheeler, William King and Warren Austin, urged Hughes to testify before the Judiciary Committee. Hughes recorded that 'I was entirely willing to do so for the purpose of giving the facts as to the work of the Court.'⁵⁵ Despite the narrowness of the remit Hughes handed himself, he resolved not to appear alone and sought the company of his colleague Justice Brandeis before the committee, thus pre-empting any allegations of bias. Upon consulting both Brandeis and Van Devanter, the informal leaders of the two ideological camps of the Court, he found both were opposed to him, or any other justice, appearing in person before the panel, even for the limited purpose of testifying on the Court's caseload. The following day, Hughes placed calls to both King and Wheeler, informing them that his colleagues had not consented to his appearance before the committee, 'but that if the Committee desired particular information on any matters relating to the actual work of the Court, I should be glad to answer in writing giving the facts.'⁵⁶ Taking the hint, Wheeler broached the subject with Brandeis on Saturday. The Senator was reluctant to call upon the Chief in person, having voted against his appointment six years earlier to the chief justiceship. Brandeis, knowing Hughes wished to present Wheeler with the letter, telephoned the Chief and handed the receiver to the Senator, who requested such a letter. Hughes immediately invited Wheeler to his home. Having completed the letter on Sunday, Hughes acquired the approval of both Brandeis and Van Devanter and informed Wheeler the letter was prepared. Handing over the letter, Hughes dramatically declared: 'The baby is born.'⁵⁷ He repeated his belief that 'if this bill should pass, it would destroy the court as an institution.'⁵⁸ As Wheeler departed, Hughes humorously remarked, 'I hope you'll see that this gets wide publicity.'⁵⁹

Despite Hughes' claim that it had been cobbled together over the weekend, the letter was sharp and factual, and when combined with the dramatic delivery of Wheeler, was deliberately designed to deliver maximum impact when read by Wheeler. 'I have a statement from a man who knows more about the Court than the President of the United States, than the Attorney General, than I do or any member of this committee. . . I have a letter by the Chief Justice of the Supreme Court, Mr. Charles Evans Hughes, dated March 21, 1937, written by him and approved by Mr. Justice Brandeis and Mr. Justice Van Devanter. Let us see what these gentlemen say about it.'⁶⁰ The letter started with a simple statement of the facts concerning the caseload of the Court: 'The Supreme Court is fully abreast of its work,' Hughes wrote. 'There is no congestion of cases upon our calendar.'⁶¹ Having established this, Hughes debunked the myth that more justices would speed justice:

An increase in the number of justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the court. It is believed

⁵⁴ Frankfurter, "The Administrative Side" of Chief Justice Hughes, 3.

⁵⁵ Danelski and Tulchin, eds., *The Autobiographical Notes*, 304.

⁵⁶ *Ibid.*, 305.

⁵⁷ Quoted in Wheeler, *Yankee From the West*, 329.

⁵⁸ Quoted in Pusey, *Charles Evans Hughes*, vol. 2, 755.

⁵⁹ Quoted in Wheeler, *Yankee From the West*, 330.

⁶⁰ Wheeler, *Yankee From the West*, 332.

⁶¹ Quoted in Pusey, *Charles Evans Hughes*, vol. 2, 756.

that it would impair that efficiency so long as the court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to deride. The present number of justices is thought to be large enough so far as the prompt, adequate and efficient conduct of the work of the court is concerned. . .⁶²

An image of consensus was conferred upon the letter by Hughes' carefully crafted closing statement which implied that he had the backing of his colleagues. Concluding his practical case against the plan, Hughes highlighted the concurrence of Brandeis and Van Devanter, the two de facto leaders of the two ideological camps on the Court.

On account of the shortness of time I have not been able to consult with the members of the court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

The Impact

The typically modest Hughes reflected that 'This letter appears to have had a devastating effect by destroying the specious contention as to the need of additional justices to expedite the work of the Court. It had the effect of focusing attention on the real purpose of the bill.'⁶³ With his earlier statement in mind, 'Proposals for changes in the organisation and the exercise of the jurisdiction of the Supreme Court have been of two sorts; those suggested for the purpose of promoting its efficiency and those which have been sought to curb the exertion of the judicial power...'⁶⁴ Hughes, himself once the crown prince of progressivism, had demolished the premise that the bill was intended 'for the purpose of promoting its efficiency' and logically inferred that it had been introduced for the second motive. As the doyen of New Deal historians, William Leuchtenburg observed: 'Chief Justice Hughes struck another effective blow at the Court bill. In response to a letter from Senator Wheeler, Hughes composed a devastating reply to Roosevelt's charge of inefficiency.'⁶⁵

The recipient and reader of the letter, Senator Wheeler, thought similarly: 'My own feeling was that the Charles Evans Hughes letter had broken the back of the administration plan...'⁶⁶ Robert Jackson reflected that the 'letter to Senator Wheeler ... did more than any one thing to turn the tide of the Court struggle.'⁶⁷ Ickes confessed: 'The whole world knows that, while at first it appeared that the President would be strong enough to carry his reform through Congress, he was outmanoeuvred in the end, largely by Chief Justice Charles Evans Hughes.'⁶⁸ Other events unquestionably contributed to the demise of the bill, including the so called 'switch in time that saved nine' in *West Coast Hotel Co. v. Parrish* which upheld a Washington minimum wage law, and *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, which granted Congress the power to regulate labour relations. In these cases, Justice Owen Roberts allegedly underwent an ideological conversion and voted to

⁶² *Ibid.*, 756.

⁶³ Danelski and Tulchin, eds., *The Autobiographical Notes*, 306.

⁶⁴ Hughes, *The Supreme Court*, 237.

⁶⁵ William Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940*, (New York: Harper, 1963), 237.

⁶⁶ Wheeler, *Yankee From the West*, 340.

⁶⁷ Robert H. Jackson, 'The Law Is a Rule for Men to Live By: Basic Creed of a Modern Liberal,' *Vital Speeches of the Day*, Vol. 9, (1943), 665-666.

⁶⁸ Ickes, 'My Twelve Years With F.D.R,' *Saturday Evening Post*, July 3 1948.

join the liberal camp on the Court, thus removing the need for the court packing plan, since there was no longer any ideological imbalance against the administration. However, Hughes denied that any such jurisprudential shift had occurred: 'The notion that either of these cases, or any others, were influenced in the slightest degree by the President's attitude, or his proposal to reorganise the Court, is utterly baseless ... The President's proposal had not the slightest effect on our decision.'⁶⁹ The plan was further undermined by the resignation of Van Devanter in May, which presented Roosevelt with a vacancy on the Court, and the death of Senate Majority Leader Robinson in July, which reduced the chance of the plan's passage through Congress. When Robinson passed away, Burton Wheeler confessed that 'I was so emotionally upset by this development I urged that the President withdraw the bill 'lest he appear to be fighting God.'⁷⁰ Shortly after it was announced that the bill was to be withdrawn, Senator Hiram Johnson exclaimed in the Senate, 'Glory be to God!'⁷¹ It was a fitting end to a battle which had been fought with a restless religious zeal.

The letter has been heralded by historians as decisive in the defeat of the plan. Hughes' biographer Merlo Pusey concluded: 'In spite of its dispassionate tone, the letter blasted the court bill with bombshell effect.'⁷² William Rehnquist similarly stated that 'There seems to have been little doubt among contemporary observers that the Hughes letter had the effect of a bombshell in the debate over the Court-packing plan.'⁷³ The rather more critical Court commentator, Alpheus Mason admitted that 'The Chief Justice's letter, combined with the Court's dramatic about-face, put a fatal crimp in the President's project.'⁷⁴ Despite the importance attached to the letter, historians have often hedged against making Hughes' intervention the principal cause of the plan's demise, often emphasising external events, such as congressional and public opinion, without recognising the role of the letter in influencing these factors. Internal factors, especially Hughes' letter, were able to alter public and political opinion in opposition to the plan. One needs only to survey the plethora of political cartoons hailing Hughes' letter as having dealt a serious blow to Roosevelt's plan to see that this was the case.⁷⁵ For Hughes, the letter was a perfect medium through which to convey his opposition to the Court packing plan. It was, as Ickes confessed, 'good tactics.'⁷⁶ It simultaneously maintained the detachment from the debate of the Court and its Chief and reflected the apparent aloofness and pointed precision of the personality of its author. Hughes' restrained response to the Court packing plan constituted one of the most crucial acts of constitutional conservatism in American history.

Conclusion: A Supreme Act of Constitutional Conservatism

Almost two years after the commencement of the court packing controversy, a triumphant, if ailing Hughes addressed Congress on the one hundred and fiftieth anniversary of America's founding. For Hughes, the speech represented the culmination of a career-long commitment to the principle of institutional integrity. He marvelled that despite several potentially destabilising developments

69 Danelski and Tulchin, eds., *The Autobiographical Notes*, 311-312.

70 Wheeler, *Yankee From the West*, 337.

71 *Congressional Record*, 75th Congress, 1st Session, 22 July 1937, (Washington DC: U. S. Government Printing Office, 1937), 9572-9573.

72 *Ibid.*, 756.

73 Rehnquist, *The Supreme Court*, 128.

74 Alpheus T. Mason, 'Charles Evans Hughes: An Appeal to the Bar of History,' *Vanderbilt Law Review*, Vol. 6, No. 1, (1952), 12.

75 For the collection of these cartoons see: New Deal Network, *Political Cartoons and the Court Packing Episode*, <<http://newdeal.feri.org/court/toons.htm>>, viewed 15 September 2013.

76 Ickes, *Secret Diary*, vol. 2, 103.

including the ‘expansion of territory, enormous increase in population, and profound economic changes’, the Constitution had coped admirably and that ‘the vastly preponderant sentiment of the American people is that our form of government shall be preserved...’ However, Hughes cautioned against constitutional complacency, lecturing the legislature: ‘Forms of government, however well contrived, cannot assure their own permanence.’ Rarely in American history had this point had been proven more clearly than by the court packing plan, when the Supreme Court, unchanged since 1869, came perilously close to suffering from politically motivated interference.

Our institutions will not be preserved by veneration of what is old, if that is simply expressed in the formal ritual of a shrine. The American people are eager and responsive. They listen attentively to a vast multitude of appeals and, with this receptivity, it is only upon their sound judgment that we can base our hope for a wise conservatism with continued progress and appropriate adaptation to new needs.⁷⁷

It was the absence of such sensible, measured, moderate, reformist rhetoric during the debate over the Court packing plan which had prompted two contemporary commentators to observe:

It was easy to make fun of such public speaking as the country was treated to during the court fight. Turgid, repetitious, crammed with non-sequiturs, richly ornamented with appeals to prejudice and self-interest, couched in an English which would have made Edmund Burke weep for very horror at the fate of the language—most of it was all these things. But it gave the country a chance to think the issue over. By sheer force of its repetitions it dinned the arguments for and against into the ears of the electorate, and by so doing turned the wheels of that intricate, slow and occasionally inefficient piece of public machinery, the Democratic process.⁷⁸

Although Burke may well have recoiled in horror at the standard of the political rhetoric invoked throughout the Court packing episode, he would surely have hailed Hughes’ supreme act of constitutional conservatism in his successful preservation of one of a handful genuinely historic American institutions. Hughes possessed in abundance what Edmund Burke called ‘the cold neutrality of an impartial judge.’⁷⁹ Historians have acknowledged that there was an aspect of innate conservatism to Hughes’ persona. James Henretta observed, ‘By temperament, Hughes was a conservative, committed from his years of legal practice to the rationalistic procedures and precedents of the common law.’⁸⁰ Historians critical of Hughes have observed the conservatism which motivated his action. Alpheus Mason reflected that ‘In responding to it, even he (Hughes) may have been motivated by genuinely conservative impulses.’⁸¹ Meanwhile Peter Fish concludes that Hughes ‘fit into the classic conservative reformer mould.’⁸² Returning to the theme of religious imagery, Clinton Rossiter described Hughes as a ‘demigod of upright conservatism.’⁸³

77 Hughes, ‘Unity to Keep Our Democratic Form’, *World Affairs*, Vol. 102, No. 2, (1939), 86-87.

78 Alsop and Catledge, *The 168 Days*, 107.

79 Edmund Burke, ‘Translator’s Preface’, in J. P. Brissot, *Address to His Constituents*, (London: John Stockdale, 1794), iv.

80 James A. Henretta, ‘Charles Evans Hughes and the Strange Death of Liberal America’, *Law and History Review*, Vol. 24, No. 1, (2006), 148.

81 Mason, ‘Charles Evans Hughes’, 18.

82 Peter G. Fish, ‘William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers’, *Supreme Court Review*, Vol. 1975, No. 1, (1975), 130.

83 Clinton Rossiter, ‘The Anatomy of American Conservatism’, *Encounter*, Vol. 4, No. 3, (1955), 50.

Despite the obviously conservative grounds of Hughes' intervention, including the defence of institution, emphasis upon stability, and the acceptance of minor doctrinal change in order to preserve, historians have denied Hughes' his conservative credentials. Samuel Hendel prefaced his study of Hughes' judicial philosophy with the following observation: 'But it is obvious that his place in history as Chief Justice will depend primarily on the role he played with respect to the greatest constitutional issues that came before the Court...'⁸⁴ Hendel's subsequent classification of Hughes as an apostle of liberalism based upon the 'greatest constitutional issues that came before the Court,' is too wide ranging a measure. There was one major constitutional issue which mattered and it concerned the institutional integrity of the Court, not the assorted array of cases concerning the New Deal. When push came to shove, Hughes was a constitutional conservative committed to the defence of the institutional independence of the Supreme Court. Hughes emphasised this himself:

The controversy had the good effect of revealing the strength of public sentiment in support of the independence of the Court. That independence is not a vague, collective attribute; it means the actual independence of the Justices. They are supposed to have shown at the bar or on the bench the learning, integrity and stability which will assure the expert, independent, and conscientious discharge of the supreme duty of maintaining the provisions of the organic law against either executive or legislative departures.⁸⁵

In concluding his case that Charles Evans Hughes was not a great Chief Justice, Judge Charles Clark criticised the essentially conservative nature of his achievements: 'Consider the claims of his idolaters in this regard. All they claim in effect is that his was a holding operation, to keep the Court as it was, to 'save' it from the attack of the democratic leader elected by the people.'⁸⁶ This judgement aptly demonstrates how difficult it can be for conservatives to become historically heroic. Since such figures seek neither bold constitutional change nor social reform, it proves especially difficult to induct them into the political pantheon for what is often considered to be, in essence, maintenance work. However, as the chief chronicler of American conservatism, Russell Kirk, has written: 'Conservative thinkers, however, ought to be judged not simply by what they failed to avert, but more by what they preserved.'⁸⁷ Judged against this measure, if any action deserves the begrudging respect of American constitutional history, it is Chief Justice Charles Evans Hughes' principled preservation of the institutional integrity of the Supreme Court of the United States.

84 Samuel Hendel, 'The "Liberalism" of Chief Justice Hughes,' *Vanderbilt Law Review*, Vol. 10, No. 2, (1956), 259.

85 Danelski and Tulchin, eds., *The Autobiographical Notes*, 307.

86 Charles E. Clark, 'Review: Charles Evans Hughes by Merlo Pusey,' *Notre Dame Lawyer*, Vol. 27, No. 1, (1952), 484.

87 Russell Kirk, 'The Conservative Mind of Newman', *Sewanee Review*, Vol. 60, No. 4, (1952), 672.
