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The American Constitutional Experience: Remarks of the Chief Justice

*William H. Rehnquist**

It is with great pleasure that I have the opportunity to address you, the Louisiana law classes of 1994 and 1995, this afternoon. During your time in law school, you have been immersed—or at least you are supposed to be immersed—in the decisions of various courts in different areas of the law. Louisiana law students, because Louisiana still follows the civil law system in so many respects, get a unique perspective on the law because you learn both the civil law system and, I trust, to some extent the common law system prevailing in other jurisdictions. But the courts in this country—whether in Louisiana or in common law states—differ in one notable respect from courts in most other countries. They have the power of judicial review: the authority to declare a legislative act invalid if they find it contrary to the Constitution. This is one of the unique contributions of the framers of our Constitution to the art or science of jurisprudence, and although it has been copied by other countries since the Second World War, it does not turn out to work quite the way ours does in most of them.

Courts that exercise this authority have something of a political cast to them that other courts of last resort lack. I use the term “political” not in the sense of partisan politics, but in the sense of having a share in the large questions which determine the governance of a nation. Because they have this authority, they quite understandably attract public attention and public controversy. I shall talk to you this afternoon about three incidents in American history where such public attention and controversy centered on the Supreme Court of the United States.

Robert Jackson, one of my predecessors on the Supreme Court, wrote a book about the Supreme Court and controversy half a century ago in which he said:

As created, the Supreme Court seemed too anemic to endure a long contest for power Yet in spite of its apparent vulnerable position, this Court has repeatedly overruled and thwarted both the Congress and the Executive. It has been in angry collision with the most dynamic and popular Presidents in our history¹

This description may have been slightly shaded to get the attention of the reader, but there is a great deal of truth in it. The doctrine of judicial review did not spring full blown from the heads of the framers of our Constitution in 1787, but was only implicit in their draft. The Supreme Court got off to a very slow

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* Chief Justice, United States Supreme Court. This article is taken from a lecture delivered on November 18, 1993, by Chief Justice Rehnquist, Inaugural Alvin B. Rubin Visiting Professor at the Paul M. Hebert Law Center, Louisiana State University.

1. Robert H. Jackson, *The Struggle for Judicial Supremacy* ix-x (1941).

start, deciding only about sixty cases in the first ten years of its existence. Its first Chief Justice, John Jay, was appointed a special ambassador to England by President George Washington to negotiate the Jay Treaty. He left the United States in the spring of 1794 and did not return until the summer of 1795; there is no evidence that his absence in any way handicapped the Supreme Court from discharging its business. When Jay did return, he discovered that he had been elected Governor of the state of New York *in absentia*—imagine something like that happening now!—and he resigned from the Supreme Court to accept the governorship.

Jay's successor, Oliver Ellsworth, had a remarkably similar experience as Chief Justice. John Adams, who succeeded Washington as President, sent Ellsworth on a mission to France to bring about an end to the undeclared war between our two countries. Ellsworth became ill while in Paris, and in December 1800 sent his resignation to President John Adams. Adams offered the Chief Justiceship once more to John Jay, but Jay responded by letter:

I left the Bench perfectly convinced that under a system so defective, it would not obtain the energy, weight or dignity which are essential to its affording due support to the National Government, nor acquire the public confidence in the respect which as the last resort of the Justice of the nation, it should possess.²

At this point, Adams had become the first "lame-duck" President of the United States; that is, in the Presidential election of 1800 he had been defeated for re-election by Thomas Jefferson in November, but would remain in office until March 1801. The election of 1800 is referred to by many Americans as the Second American Revolution. The Federalists, led by George Washington, Alexander Hamilton and John Adams, had governed the nation for the first twelve years of its existence. They believed, as Hamilton put it, that the country should be governed by the "rich, the able, and the well born"; they preferred England to France as an ally of the United States. Thomas Jefferson and his party, on the other hand, believed in an agrarian democracy, and favored France as an ally over England. In the election of 1800, Jefferson and his party took control of the Presidency and both Houses of Congress from the Federalists.

During this lame-duck period, Adams appointed John Marshall Chief Justice of the United States Supreme Court; Marshall would provide the vision, the energy, and the leadership for the Court that both Jay and Ellsworth lacked. He wrote the opinion of the Court in *Marbury v. Madison*,³ decided in 1803, which held that the Supreme Court had the authority to invalidate an act of Congress that exceeded the authority conferred upon Congress by the Constitution. He served as Chief Justice for thirty-four years, and in that time changed the Supreme Court from little more than a common law court of last resort to a

2. 4 The Correspondence and Public Papers of John Jay 285 (H. Johnston ed., 1970).

3. 5 U.S. (1 Cranch) 137 (1803).

powerful and respected partner in the three-part system of government contemplated by the United States Constitution. If it may be said that the Supreme Court is, in the familiar phrase, the lengthened shadow of any man, it is that of John Marshall.

Thomas Jefferson would have liked to appoint the new Chief Justice himself, and he would surely not have appointed his distant cousin—as most Virginians in those days were—and long time enemy, John Marshall. Jefferson had a much different idea of how the Constitution should be interpreted than Marshall did. Jefferson believed in a very limited central government, and in very strict construction of the powers granted it by the Constitution. One of the great ironies of his Presidency was that he had to swallow these principles in order to effectuate the Louisiana Purchase; had he stuck to his guns, the French tricolor might be floating over the capitol building in Baton Rouge today.

But the Jeffersonians were rankled even more by the action of the lame-duck Congress in passing the Judiciary Act of 1801,⁴ called by its detractors the “Midnight Judges Act.” This law created numerous new federal judgeships, and equally numerous minor magistrate positions. The Federalist Congress passed the law shortly before Adams was to leave office, and the Jeffersonians claimed that Adams stayed up until midnight the night before Jefferson’s Presidential inauguration signing commissions for these new judicial officials: all, of course, dyed-in-the-wool Federalists—hence the term Midnight Judges.

Thus, there was an atmosphere of bitterness between the parties when Thomas Jefferson took his oath of office as President on March 4, 1801. Jefferson wrote to a friend, “the Federalists have retired into the judiciary as a stronghold . . . and from that battery all the works of Republicanism are to be beaten down and erased.”⁵ The Jeffersonians lost little time in repealing the Judiciary Act of 1801,⁶ thereby turning out of office some of the “Midnight Judges.” They could do nothing, however, about John Marshall and the other Federalist Justices on the Supreme Court of the United States.

Shortly after this repeal, one of those Justices, Samuel Chase of Maryland, in giving a charge to the federal grand jury sitting in Baltimore, Maryland, sharply criticized Congress for repealing the Judiciary Act of 1801, and also criticized pending changes in the Maryland Constitution that would have enlarged the franchise. When Jefferson learned of Justice Chase’s jury charge, he was quick to write in complaint to one of his party leaders in the House of Representatives, Joseph Nicholson, the following letter:

Ought this seditious and official act on the principles of our Constitution, and on the proceedings of a State, to go unpunished? And to whom so pointedly as yourself will the public look for the necessary

4. 2 Stat. 89 (1801).

5. 10 *The Writings of Thomas Jefferson* 302 (Memorial ed. 1903) (letter to John Dickinson, dated Dec. 19, 1801).

6. 2 Stat. 132 (1802).

measures? I ask these questions for your consideration, for myself it is better that I should not interfere.⁷

With this letter, Jefferson set in motion the forces that would represent the first of several challenges to the Supreme Court which have occurred throughout American history. The United States Constitution provides that civil officers, including judges, may be impeached for "high Crimes and Misdemeanors."⁸ Impeachment is to be by the House of Representatives, and trial of the impeachment is to be before the United States Senate. A majority of two-thirds of the Senators present is required to convict, and upon conviction the official is removed from office.

The House of Representatives first investigated possible charges against Chase and then voted to impeach him. The articles of impeachment included not merely Chase's charge to the Baltimore grand jury, but also charges that he had shown a high degree of partiality in presiding over the trials of John Fries in Philadelphia and James Callender in Richmond during the year 1800.

Fries had been the leader of an uprising called Fries' Rebellion, in which farmers in northeastern Pennsylvania rose up against federal tax assessors and prevented them from carrying out their duties. Today he would probably be charged with obstruction of justice, but at that time he was charged with treason, tried before Chase, and sentenced to hang. John Adams, to his great credit and against the unanimous advice of his cabinet, pardoned Fries.

James Callender was tried in Richmond under the hated Sedition Act of 1798⁹—a law that many Jeffersonians believed was directed against them. Callender was indicted for publishing a book entitled "The Prospect Before Us," in which he allegedly brought President Adams into disrepute by accusing him of being a monarchist and a toady to British interests.

When Chase's trial before the Senate opened on February 4, 1805, in the raw new capital of Washington, D.C., interest naturally focused on the principals in the forthcoming drama. The Vice President of the United States and presiding officer of the Senate was Aaron Burr. Burr was a small, dapper man with piercing black eyes, and an elegant bearing which belied the fact that although he was the presiding officer of the impeachment court, he himself was a fugitive from justice. During the preceding summer in Weehawken, New Jersey, Burr had killed another one of the United States' founding fathers, Alexander Hamilton, in a duel. Indictments against him for murder were outstanding, leading one wag to remark that although in most courts the murderer was arraigned before the judge, in this court the judge was arraigned before the murderer!

7. 10 *The Writings of Thomas Jefferson* 390 (Memorial ed. 1903) (letter to Joseph H. Nicholson, dated May 13, 1803).

8. U.S. Const. art. II, § 4.

9. 1 Stat. 596 (1798).

It had been left to Aaron Burr as the presiding officer of the Senate to outfit the chamber in a manner befitting the occasion, and Burr spared nothing to accomplish this task. On each side of the President's chair at one end of the chamber were two rows of benches with desks, entirely covered with crimson cloth. Here would sit the thirty-four Senators who would pass judgment on Chase: two from each of the thirteen original states, and two each from Vermont, Tennessee, Kentucky and Ohio. All of this was done to recreate, as nearly as possible, the appearance of the House of Lords at the time of the impeachment trial of Warren Hastings in England at the end of the eighteenth century. Burr's decorating showed the continuing influence of English legal traditions on the United States, an influence that continues to this day. Thankfully, that does not extend to judges wearing wigs.

Samuel Chase, who stood to lose his office as an Associate Justice of the Supreme Court of the United States if convicted by the Senate, was more than six feet tall and correspondingly broad; his complexion was brownish-red in color, earning him the nickname of "Old Bacon Face." He was hearty, gruff, and sarcastic; one would rather have him as a dinner companion than as a judge in one's case.

Chase had a distinguished and successful career at the bar, and in 1791 became Chief Judge of the Maryland General Court. In 1796, George Washington appointed him to the Supreme Court of the United States. His legal ability was recognized by all, but his impetuous nature made him something of a stormy petrel. Joseph Story described him as the "living image" of Samuel Johnson, "in person, in manners, in unwieldy strength, and severity of reproof, in real tenderness of heart; and above all in intellect."¹⁰

Chase's principal counsel defending him against the charges brought by the House of Representatives was his long-time friend, Luther Martin. Martin was one of the great lawyers in American history, and also one of the great characters of the American bar. He was the first Attorney General of Maryland, and served in that office for more than twenty years. He was a member of the Continental Congress, the Constitutional Convention, and was for a while a state judge in Maryland. He had a marked weakness for the bottle, but at least in the short run intoxication did not seem to impair his performance in court. He was described by the American historian Henry Adams as "the rollicking, witty, audacious Attorney-General of Maryland, . . . drunken, generous, slovenly, grand; bull-dog of Federalism, . . . the notorious reprobate genius."¹¹

The last of the *rarae aves* in the cast of characters which assembled for the trial of Samuel Chase was the principal manager for the House of Representatives, John Randolph of Roanoke. He had been elected to Congress from his Virginia district while still in his twenties, and became, in effect, the administra-

10. 1 Life and Letters of Joseph Story, Associate Justice of the Supreme Court of the United States 166 (W. Story ed., 1851) (letter of Feb. 25, 1808).

11. Paul S. Clarkson & Samuel Jett, Luther Martin of Maryland 21 (1970).

tion's leader in the House of Representatives after the Jeffersonian victory in 1800. William Plumer described Randolph, not yet thirty-two at the time of the Chase trial, as a "pale, meagre, ghostly man."¹² The ultimate southern tobacco planter, he patrolled the House of Representatives in boots and spurs and with a whip in hand.

The presentation of evidence before the Senate took ten full days and more than fifty witnesses testified. The charges against Chase with respect to the trial of John Fries for treason, judged from the perspective of history, did not amount to much. The charges against him in connection with the trial of James Callender were a mishmash in which minor claims of error were mixed together with serious charges of bias and partisanship. Chase's charge to the Baltimore grand jury had been something of a political harangue, but other judges of that time similarly indulged themselves.

The closing arguments to the Senate began on February 20th, and in the oral tradition of that time, lasted several days. On March 1st, the Senate convened to vote on the counts against Chase; Senator Uriah Tracy of Connecticut was brought into the chamber on a stretcher in order to cast his vote.

Since the names of the Senators were called individually on each of the eight counts, the roll call took some time. At this time there were twenty-five Jeffersonian Republicans and nine Federalists in the Senate, and it was clear that if the Senators voted along party lines the necessary two-thirds vote to convict Chase could be had.

The first roll call was on the charges growing out of the Fries trial, and on this count the vote was sixteen to convict and eighteen to acquit. All nine Federalist Senators voted to acquit, and they were joined by nine of the twenty-five Jeffersonian Republicans. On the next series of counts, growing out of the Callender trial, there was a majority of eighteen to sixteen to convict, but the two-thirds rule was, of course, not satisfied. The final vote was on the charge to the Baltimore grand jury, and on this count the managers came the closest to success: nineteen Senators voted to convict and fifteen voted to acquit. But still a two-thirds majority was not had.

After the roll call, the Vice President rose and recited the votes on each count, and then recited the portentous words, "It, therefore, becomes my duty to declare that Samuel Chase, Esquire, stands acquitted of all Articles exhibited by the House of Representatives against him."¹³

The significance of the outcome of the Chase impeachment trial cannot be overstated. Although the Jeffersonian Republicans had expounded grandiose theories about impeachment being a method by which the judiciary could be brought into line with prevailing political views, the case against Chase was tried

12. William Cabell Bruce, *I John Randolph of Roanoke 1773-1833 at 175* (1970) (quoting letter from Plumer to Nicholas Emery, Jan. 1803).

13. William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson 105* (1992).

on specific allegations of judicial misconduct. Nearly every act charged against Justice Chase had occurred in the discharge of his judicial office. His behavior during the Callender trial was a good deal worse than most historians seem to realize, and the refusal of six of the Republican Senators to vote to convict even on this count surely cannot have been intended to condone Chase's acts. Instead, it represented a judgment that impeachment should not be used to remove a judge for conduct in the exercise of his judicial duties. The political precedent set by Chase's acquittal has governed the use of impeachment to remove federal judges from that day to this: a judge's *judicial* acts may not serve as the basis for impeachment.

The second time in American history in which the Supreme Court's authority was challenged occurred shortly after the Civil War. Four years before the Civil War, at a time when both the North and South were greatly agitated about issues concerning slavery, the Supreme Court handed down its decision in the ill-starred *Dred Scott*¹⁴ case. There, it held that Congress had no authority to prevent slaveholders from taking slaves into the unorganized territories. This was the second time in its history that the Supreme Court had held an act of Congress unconstitutional; the first was *Marbury v. Madison*, in which John Marshall had established the principle of judicial review. But the act of Congress held invalid in *Marbury v. Madison* in 1803 was one that nobody, except a very few lawyers, knew or cared about; it dealt with the authority of the Supreme Court to issue writs of mandamus. The act of Congress held unconstitutional in the *Dred Scott* decision was the so-called Missouri Compromise,¹⁵ which prohibited slavery in what were then the territories. People cared a great deal about this question—it was very much in the public mind at the time the decision came down—and most people in the North were outraged by the decision. Rightly referred to by a later Chief Justice as the Supreme Court's self-inflicted wound, the *Dred Scott* decision resulted in a noticeable decline in the prestige and authority of the Court. When the North was victorious in the Civil War, and the new Republican party gained control of both Houses of Congress, the radical wing of the party did not look kindly upon the Court. The Radical Republicans enacted a series of so-called Reconstruction Acts,¹⁶ which divided the previously seceded states of the South into military districts, the military governors of which had authority to supersede state legislation. The traditional trial by jury was replaced with trial before a military commission for a long list of offenses that were thought to threaten the "reconstruction" of the southern states. Many observers thought that these laws contained serious constitutional flaws.

14. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

15. 3 Stat. 548 (1820).

16. Act of March 2, 1867, 14 Stat. 428; Act of March 23, 1867, 15 Stat. 2; Act of July 19, 1867, 15 Stat. 14; Act of March 11, 1868, 15 Stat. 41.

In 1867, a newspaper editor in the State of Mississippi, William H. McCardle, used his publication to criticize the Reconstruction, as well as the military officers administering it throughout the South. His vituperative editorials understandably landed him in hot water with the military. Arrested and held for trial by a military tribunal, McCardle was charged with several crimes, including inciting insurrection and printing libelous statements. McCardle sought habeas corpus in the federal circuit court in Mississippi, claiming that his arrest and detention contravened the Constitution and laws of the United States.

The circuit court decided against McCardle, and under the law as it then existed he had an appeal as a matter of right to the Supreme Court of the United States, which he promptly took. Rumors abounded that the Supreme Court would use the *McCardle*¹⁷ case to declare the Reconstruction Acts unconstitutional, and, in fact, there is substantial evidence that sentiment on the Court favored such an outcome. But early in March 1868, after the case was argued before the Supreme Court, and prior to its decision, Congress moved swiftly to repeal the very legislation that gave the Court jurisdiction over the case.¹⁸ That repeal bill became law on March 27, 1868. Although the Court scheduled the *McCardle* case for conference six days earlier on March 21, it had postponed decision because of the pending repeal legislation. The Court then adjourned on April 6th and ordered the *McCardle* case to be put over until the next Term without any decision.

In an attempt to force the Justices to act, attorneys for McCardle asked that the effect of the repeal legislation on the case be argued before the Court. This request was granted. When the Court finally issued its opinion the following year in April 1869, it unanimously upheld the repeal measure and dismissed the case for lack of jurisdiction. In an opinion written by Chief Justice Salmon P. Chase (no relation to Samuel Chase), the Court held that Article III of the Constitution gave power to the Congress to make exceptions to the Supreme Court's appellate jurisdiction, and the Court could not inquire into the motive with which Congress enacted such exceptions.¹⁹

The prestige of the Supreme Court obviously did not fare well during its encounters with the Reconstruction Congress. Undoubtedly, it could have ruled differently in the *McCardle* case. What would have been the outcome then is a matter of speculation; it may be that the Court's apparent decision to live to fight another day was the best conceivable one under the circumstances. It is worthy of some note that the Senate was trying Andrew Johnson at the same time it passed the bill depriving the Supreme Court of jurisdiction.

Some sixty years elapsed between the acquittal of Samuel Chase, in 1805, and the decision in the *McCardle* case in 1869. Nearly seventy more years would elapse before the time of the third incident in American history when the

17. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

18. Act of March 27, 1868, 15 Stat. 44.

19. 74 U.S. (7 Wall.) at 514.

Supreme Court was again threatened, this time by the President. Franklin Delano Roosevelt was in the White House, at the beginning of the second of the four terms to which he was elected as President. He was perhaps emboldened by his overwhelming electoral victory in 1936 in which he carried all but two states of the Union against the Republican nominee, Alf Landon. The Supreme Court was not an issue in the 1936 Presidential election, but it proved to have been very much upon Franklin Roosevelt's mind because of some decisions it had rendered during his first term as President. He had been elected to his first term in 1932, in the depths of the Great Depression, and he and his advisers were determined to do something—whatever it took—to move the country back to prosperity. During a period known as the “Hundred Days” in 1933, Roosevelt sent to Congress a list of “must” legislation, as it was called, because he insisted that Congress pass it virtually as it was submitted by the Administration. First came the Agricultural Adjustment Act,²⁰ which was designed to provide relief for farmers: the federal government would support minimum prices for their products and they would be paid for agreeing to hold down farm production. Next came the National Industrial Recovery Act,²¹ which contemplated that each industry in the country would devise a code of price-setting and wage-setting which would restore price and wage levels, and finally the so-called “Hot Oil Act,”²² which forbade the shipment in interstate commerce of oil produced in violation of state production limitations. All of these measures, and more, were dutifully, nay subserviently, enacted by a Congress overwhelmingly controlled by Roosevelt's Democratic Party.

But just as in Jefferson's time in the early part of the nineteenth century, and at the time of the *McCordle* case after the Civil War, the members of the Supreme Court in the 1930s had been appointed by a series of Presidents holding a quite different philosophy than Franklin Roosevelt. For thirty years, the Court read into our Constitution a right of “freedom of contract” which was hostile to social legislation and adopted a very limited view of congressional authority under its power to regulate interstate commerce. During Roosevelt's first term, it declared unconstitutional first the “Hot Oil Act,”²³ second the National Industrial Recovery Act,²⁴ and finally the Agricultural Adjustment Act.²⁵ The Court also ruled against the government in several minor cases. Several of these decisions were handed down on the same day in 1935, which became known to New Dealers as “Black Monday.” The President was so outraged that he held an off-the-record press conference a few days later, in which he stated that the United States was the only nation in the world that was denied the authority to

20. Act of May 12, 1933, 48 Stat. 31.

21. Act of June 16, 1933, 48 Stat. 195, tit. I.

22. Act of June 16, 1933, 48 Stat. 195, tit. I, § 9(c).

23. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

24. *Schechter Corp. v. United States*, 295 U.S. 495 (1935).

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

solve the social and economic problems produced by the Great Depression. He went on to say:

We thought we were solving it, and now it has been thrown straight in our faces and we have been relegated to the horse-and-buggy definition of interstate commerce.²⁶

After that outburst, Roosevelt bided his time until after his re-election in November 1936. In February 1937, he summoned the members of his cabinet and the Democratic leadership of both Houses of Congress to an unusual meeting at the White House. He there unveiled before them a message he was sending to Congress that day, recommending that the Judicial Branch of the government be "reorganized," as he put it. The crux of his proposal was that for each member of the Supreme Court who was over seventy years of age—six of the nine were of that vintage—and did not elect to retire, the President would be empowered to appoint an additional Justice to the Court and thereby enlarge the Court's membership, up to a total of fifteen. The true reason for the proposal, of course, was to enable the President to "pack" the Court all at once, in such a way that it would no longer invalidate New Deal social legislation. But with a deviousness which was typical of him, the President based his public argument on the ground that the older judges were unable to carry a full share of the Court's workload and the Court was falling behind in its work. This reason was transparently false.

The proposal astounded the Democratic leadership in Congress and the nation as a whole. But the first reaction of political observers was that Roosevelt would undoubtedly get what he wanted, since the Democrats had a four to one margin in the House of Representatives, and of the ninety-six member Senate, only sixteen were Republicans.

The Chief Justice of the Supreme Court at that time was Charles Evans Hughes, who, like Roosevelt, was from New York. Hughes himself was no stranger to politics; he had been a reform Governor of New York in the first decade of the twentieth century, and was appointed to the Supreme Court as an Associate Justice in 1910. He resigned from that office in 1916 to accept the Republican nomination for President and run against Woodrow Wilson, narrowly losing to Wilson in the 1916 election. He then held other public offices, including Secretary of State, and developed a very lucrative private law practice until appointed Chief Justice by President Hoover in 1930.

Felix Frankfurter, who knew them both well, said that either of them became the dominant personality in any room they entered. Franklin Roosevelt, having made an amazing recovery from a crippling polio attack while a young adult, had massive shoulders, a jutting jaw, and an air of self-assurance symbolized by his

26. 4 *The Public Papers and Addresses of Franklin D. Roosevelt: The Court Disapproves 1935*, at 221 (1938) (press conference of May 31, 1935).

jaunty waving of a cigarette holder; he was a perfect subject for both friendly and hostile political cartoonists, and he was at the zenith of his powers.

Charles Evans Hughes was something 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. Here was a conflict that the press could relish, and it did.

Hughes and the Associate Justices of the Court were offered free time by the radio networks to speak about the President's plan, which Roosevelt insisted on calling a "reorganization" plan but opponents quickly dubbed a "Court-packing plan." The Justices wisely declined these offers and said nothing. But Hughes worked busily behind the scenes with Senator Burton Wheeler from Montana, a Democrat who agreed to lead the opposition to the bill.

Because of the overwhelming Democratic majority in the Senate, where the bill was first introduced, the original opponents in that body saw themselves as a corporal guard trying to buy time until public reaction to the bill could set in. Hughes wrote a letter to Wheeler pointing out with very telling statistics that the Supreme Court was entirely abreast of its workload and could not possibly decide cases any faster. This letter, presented to the Senate Judiciary Committee, demolished the original justification for the bill and caused President Roosevelt to switch to a franker justification: the Supreme Court as presently constituted was frustrating the popular will by invalidating needed social legislation.

The battle in the Senate lasted from March until July 1937. One event after another damaged the plan's chances of enactment. The Supreme Court handed down two decisions that spring that upheld, by a vote of five to four, important pieces of social legislation. Because the Court had only the previous year ruled the opposite way by a vote of five to four, these decisions were known as the "switch in time that saved nine." Then, one of the oldest and most conservative members of the Court, Willis Van Devanter, elected to retire, giving Roosevelt one appointment without any need for the passage of the Court-packing plan. And public opinion began to rally against the proposal. The opponents of the bill in the Senate, so badly outnumbered at first, must have felt the same sentiment which Arthur Hugh Clough expressed in the stanzas of his wonderful poem, "Say Not the Struggle Nought Availeth":

For while the tired waves, vainly breaking,
Seem here no painful inch to gain,
Far back, through creeks and inlets making
Came, silent, flooding in, the main,
And not by eastern windows only,
When daylight comes, comes in the light,
In front, the sun climbs slow, how slowly,
But westward, look, the land is bright.²⁷

27. *The New Oxford Book of English Verse* 681 (H. Gardner ed., 1972).

Finally, in the midst of one of the worst heat-waves in Washington history, it was brought home to the President that he did not have the votes to pass the bill in the Senate. Rather than being defeated in a floor vote, he agreed on a face-saving solution by which the bill would be recommitted with a tacit understanding that the provisions relating to the Supreme Court would never again see the light of day. Supporters of the bill hoped to effectuate this result by the use of such vague language that it would not be apparent to the casual observer what was happening. They had almost succeeded when Senator Hiram Johnson, a maverick Republican from the State of California who had opposed the President's plan, asked whether the portion dealing with the Supreme Court was dead. At first the floor leader tried to shunt his question aside, but the white-haired Californian would not accept this: "The Supreme Court is out of the way?," demanded Senator Johnson. "The Supreme Court is out of the way," finally acknowledged the floor leader. Hiram Johnson then exclaimed "Glory be to God!," and sat down.²⁸ After a momentary pause, as if by prearranged signal, the spectators' galleries broke into applause. The President's Court-packing plan was indeed dead.

Thus, three times in America's two hundred year history, assaults have been made on the Supreme Court as an institution because of dissatisfaction on the part of the politically dominant majority with the philosophical direction being taken by the Court. In the case of Samuel Chase, back in 1805, the effort was to remove a member of the Court from office because of his rulings from the bench. In 1868, the effort was to strip the Court of its jurisdiction to consider a particular case in which it was thought that the Supreme Court would rule against the constitutionality of a measure viewed as essential by the politically dominant forces in Congress. And in 1937, it was an effort by the President to enlarge the membership of the Court so that he could immediately place six of his own appointees on it and swing the balance in his favor. Two of these efforts—the move to remove Samuel Chase from the bench and the move to pack the Court—failed, each because some members of the dominant political party refused to go along with the leadership, feeling that the preservation of an independent judiciary and independent Supreme Court were more important than voting at their party's call. The third—the repealing of jurisdiction in the *McCardle* case—succeeded, with the Court apparently acquiescing in the notion that it was better to accede to the will of Congress at the time and live to fight another day. Who can say this was not the right decision, given the temper of the times.

I think these incidents illustrate the proposition that a court operating under a written constitution, and exercising the power of judicial review is sooner or later bound to be caught up in the political turmoil of the times in which it acts, and must hope that the public respect which it has accumulated over a period of years for its decisions will enable it to survive such attacks.

28. 81 Cong. Rec. 7381 (July 22, 1937).