BILL FOR "REFORMING" THE SUPREME COURT

Issues Raised by the Measure—What Woodrow Wilson Said and Thought of Exercise of Congressional Power to Manipulate the Courts—Early Instances of Legislative and Judicial Action Well within Constitutional Power but Arousing General Indignation — Supreme Court Proposal Conforms to Letter but Violates Spirit of the Constitution—Jefferson's Moderation—Keep Federal Judicial System out of Political Vortex—The President's Constitutional Theory—"The Judicial Veto"—"Psychic Coercion"—Increasing Number of Judges as a Means of Punishment—Suggested Alternatives

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IT will be my effort in these comments to be mindful of the admonition of Senator Robinson that "while earnestness is the path of immortality, vindictiveness and denunciation are indications of weakness in argument." I will endeavor to travel the "path of immortality" and will be watchful to avoid giving indications of weakness in argument through vindictiveness or denunciation.

Since, with Emerson, I believe that "you cannot unlock the door of truth with the rusty key of prejudice," I will attempt to lay prejudice aside as far as is possible for mere man.

Candor compels me to say that my life work has been primarily concerned with consideration of the powers of the States, and with furthering exertion by the States of powers relating to social and economic problems; with adapting the governments and laws of the States to the needs of changing social and economic conditions; with the States as laboratories of social and economic experimentation. The narrow field of my life work may color my views.

Finally, in these preliminary remarks, I unreservedly grant that the President, who frankly assumes responsibility for the plan embodied in the bill on which I comment, and that those who press for its enactment, believe as sincerely in, and are as devoted to, the ideals of free government, as are we who oppose its enactment. The differences between us are in concepts of ideals of free government and the bearing of the bill on these ideals.

The Issues raised by the bill, as I see them, are:

Does the bill square with the letter of the Constitution?

If it does, does it do violence to the spirit of the Constitution?

If it squares with the letter but violates the spirit of the Constitution, can it be successfully attacked in the Court?

If not, should it be enacted? Are there considerations of policy which should stay the enacting power of Congress?

This involves question whether the bill strikes at, or potentially threatens, the independence of the Court—whether it is likely to create widespread suspicion of, and violently shake public confidence in, the disinterestedness and impartiality of the judgments of the Court.

These questions, and these alone, will have my consideration. To build a sound foundation for answer to them requires that we look not solely to the present and the future, but that we also look back to the experience of the past. As Maitland said: "We must today study the day before yesterday in order that yesterday may not paralyze today and today may not paralyze tomorrow."

THE BILL CONFORMS TO THE LETTER OF THE CONSTITUTION

The Constitution, for reasons of practical necessity left with Congress power to determine from time to time the number of judges who should constitute the Supreme Court. The Constitution delimited the extent of the judicial jurisdiction of the Federal government. It divided the jurisdiction into "original" and "appellate." It vested original jurisdiction in the Supreme Court in all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State is a party. With respect to all other cases to which the judicial jurisdiction extends it provided that the Supreme Court should have appellate jurisdiction, both as to Law and Fact, *"with such exceptions and under such regulations as the Congress shall make."* Until Congress set up, as it was empowered to do, a system of inferior federal courts, and prescribed their jurisdiction and until Congress exercised its power to regulate and make exceptions to the appellate jurisdiction of the Supreme Court, no one could forecast the extent of the work of that court; no one could foretell the number of judges required to the prompt and effective performance of that work.

No one could foresee what changes might be effected from time to time in the future in the exercise by Congress of its power to establish and to delimit the

jurisdiction of inferior federal courts and the power to regulate and make exceptions to the appellate jurisdiction of the Supreme Court.

The Constitution therefore left the way open to Congress to adapt the number of judges of the Court to the necessities of the business before the court as these necessities developed. This power was left with the Congress for this purpose and to this end alone. To employ it for any other purpose or to any other end may with reason be contended to be an abuse of the power granted.

That this was the view of Woodrow Wilson, in admiration for whose greatness of mind and heart and clear vision of the American plan of government I give way to no one, is evidenced by these, his words:

"The Constitution provides, indeed, that all judges of the United States shall hold their offices during good behavior, but Congress could readily overcome a hostile majority in any court or in any set of courts, even the Supreme Court itself, by a sufficient increase in the number of judges and an adroit manipulation of jurisdiction and could with the assistance of the President make them up to suit its own purposes. The two "coordinate" branches of the government, to which the court speaks in such authoritative fashion with regard to the powers they may and may not exercise under the Constitution—namely, Congress and the Executive—may in fact, if they choose, manipulate the courts to their own ends without formal violation of any provision of the fundamental law of the land. *There has never been any serious fear that they would do anything of the kind,* though an occasional appointment to the Supreme Court has made the country uneasy and suspicious. But it is well to keep the matter clearly before us."

Woodrow Wilson here wrote of the past. He could not foresee this day.

SINCE BILL IS TECHNICALLY WITHIN THE CONSTITUTION IT CANNOT BE SUCCESSFULLY CHALLENGED IN THE COURT

Though the exercise by Congress of this power for a purpose or end other than that for which the power was left with Congress would constitute an abuse of power, it could not be successfully challenged in the Supreme Court. This result flows from a self restraining principle which that Court has declared, namely, that where constitutional power for a Congressional enactment is found to exist, the Court will not venture on inquiry as to the motives leading to the exercise of the power.

A sound view of the constitutional provision now considered would interpret it as nothing more nor less than a command to Congress to organize the Supreme Court in such force as to provide for the transaction of the business before it. But upon this subject Congress is, under the decisions of the Court, the sole interpreter of the Constitution.

The exercise by Congress of this power for a purpose or to an end other than that for which the power was bestowed, while conforming to the letter, would violate the spirit of the Constitution.

CONSTITUTIONAL POWER IS ONE THING—WHETHER IT SHALL BE ASSERTED IS ANOTHER

Constitutional power is one thing. The policy of its assertion in specific instances is quite another.

Action, legislative and judicial, well within constitutional power, that nevertheless aroused general indignation and effective disapproval comes readily to mind.

EARLY SECRET SESSIONS OF SENATE

The Senate, making no distinction between legislative and executive sessions, shrouded itself in secrecy and from 1789 until 1793 held its sessions behind closed doors, barring the public. In 1790, in 1791, and again in 1792, the Senate voted down a proposal to open its legislative sessions to the people. In 1793 it defeated a resolution which in substance declared "that publishing the proceedings of the Senate in the newspapers is the best means of diffusing information concerning the motives and conduct of its members, and that without such information given to the people, the sense of responsibility on the part of the Senators to their constituents is in great measure annihilated, and the best security against the abuse of power is abandoned." It was not until February 1793, after sitting behind closed doors for four years that the Senate voted to open them during legislative sessions with the beginning of the following session. The procedure of the Senate was within its constitutional power, but would anyone now question that it repudiated the principles of official responsibility and of publicity; principles that the Constitution bulwarked by establishing freedom of the press? Aroused public opinion alone compelled the Senate to conform to the spirit of the Constitution.

CHIEF JUSTICES FILLING JUDICIAL AND POLITICAL OFFICES

Again, in the early days under the Constitution, the Chief Justices of the Supreme Court at times concurrently filled political office; exercised at the same time judicial and political functions. John Jay while holding the office of Chief Justice spent a year abroad as Envoy Extraordinary to Great Britain. John Marshall was both Chief Justice and Secretary of State for five weeks during which he held one term of the Supreme Court. Oliver Ellsworth was both Chief Justice and minister to France at one time for more than a year during which he held one term of court. Though these incidents involved no violation of the letter of the Constitution they evoked wide adverse comment. Though no constitutional prohibition expressly precludes the so investing the Chief Justice with purely political functions, yet would it not now be deemed con-

trary to the spirit of the Constitution or the proprieties of judicial office?

Constitutional power may exist. There always remains the question of the policy of exerting it. Congress possesses power under the Constitution to completely disestablish the inferior federal courts and to completely withdraw the right to appeal from the judgments of the courts of last resort of the several States to the Supreme Court. Yet would anyone advocate exercise of this power as a means of withdrawing acts of the Congress and of the legislatures of the several States from the power of the Supreme Court to deny them effect on the ground of their unconstitutionality? Congress possesses constitutional power to fail to appropriate moneys for the salaries of the Judges of the Court. Would anyone approve the exercise of this power in an effort to bring the Court to knee and to the conforming of its judgments to the will of Congress?

The Constitution vests the treaty-making power in the President with the advice and consent of two thirds of the Senators present. The power is not defined. It extends to "every proper subject of international arrangement." Labor conditions and relations are now recognized to be matters of international concern. We have taken account of this international concern by participating in the International Labor Office which the League of Nations established. Labor conditions and relations being matters of international concern might, with reason, be contended to be proper subjects of international arrangement and so within the treaty-making power. Is it not, however, unthinkable that through such power any President and Senate would limit the power of the several States to deal with labor conditions and relations, and fasten upon the several States a policy treaty-created?

One of the perils inhering in the pending bill is this: When once the door is opened to attaining by technically constitutional indirection, ends for which the Constitution has provided a direct way of accomplishment, no one can tell how soon the body will follow the nose of the usurping camel into the tent of constitutional order. This is the sort of reform—reform by circuitous indirection—that grows by what it feeds upon.

THE BILL DOES VIOLENCE TO THE SPIRIT OF THE CONSTITUTION

Does the bill merely adapt the number of judges constituting the court to the number needed for the prompt and effective performance of the work of the court and so square in letter and in spirit with the Constitution? In other words, is its purpose and is its end that for which the power to prescribe the number of judges was left with Congress?

Uncontradicted testimony requires the answer—No!

According to the report for the last fiscal year made by the Solicitor-General (independently appointed by the President) "the work of the Court is current and cases are heard as soon after records have been printed as briefs can be prepared. Prompt hearing and decisions were had in all cases of large public interest." To the testimony of the Solicitor-General is now added that of the Chief Justice, who speaks for himself and his associates, saying that the court is well up in its work. The testimony of the Chief Justice is now reinforced by the testimony of the Clerk of the Court.

The answer made is justified. It follows that though the bill is formally constitutional it does violence to the end and the purpose for which the power thereby exercised was left with Congress.

If the parts of the bill relating exclusively to the inferior federal courts are enacted and result in speeding cases to the Supreme Court to such extent as to outrun the capacity of the Court as now constituted, to continue to dispatch the business of the Court promptly, adequately, and effectively, a situation will then exist, that does not now exist, that will lay a basis on which Congress may determine, consistently with the letter *and* spirit of the Constitution, whether the situation may best be met by further contracting the appellate jurisdiction of the Court or by increasing the number of its members.

The procedure of the Court in exercising its discretionary appellate jurisdiction as explained by the Chief Justice cannot justly be criticized. On the basis of my own experience the explanation made accords with the facts.

The procedure is that generally prevailing on applications for writs of *certiorari*. The procedure follows and gives full effect to the will of Congress which body, with complete control over the appellate jurisdiction of the Court, lodged discretionary jurisdiction in the Court. So far as I know, no bill is pending to convert reviews now resting in the Court's discretion into reviews of right. If and when in the future, Congress effects such change, and if and when in consequence, the burden of the Court is increased beyond its capacity as now constituted, then a basis for Congressional action will exist that will meet the requirements of both the letter *and* spirit of the Constitution for increasing the membership of the Court. But not until then will there be such basis. The then conditions will furnish a yardstick by means of which the need for augmenting the membership of the Court may be measured.

What need for Congress to play the part of seer and now design judicial machinery to meet conditions that may never arise, and the demands of which conditions when, if ever, they arise cannot now be known?

Uncontradicted testimony is further to the effect that increasing the number of the justices in the Court will not further prompt, adequate, and effective disposition of the work of the Court but will on the contrary retard disposition.

The Chief Justice voicing his own judgment and that of his associates asserts that: "An increase in the number of the justices of the Supreme Court, . . .

would not promote the efficiency of the court. It is believed that it would impair that efficiency. . . . There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. 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."

If the judgment of the Court so voiced is subject to the charge of being self-serving, the testimony of Felix Frankfurter and James M. Landis may be adduced. They recognize that "there are intrinsic limits to the size of a court" and apparently favor contracting appellate jurisdiction over increasing the membership of the Court. They have written: "Perhaps the decisive factor in the history of the Supreme Court is its progressive contraction of jurisdiction. This tendency has been particularly significant since the Civil War. In contrast with the vast expansion of the bounds of the inferior federal courts, the scope of review by the Supreme court has been steadily narrowed. *Familiar devices for dealing with the growth in business by adding to personnel have been eschewed.* The serious proposals made from time to time to increase the membership of the Court, to add temporary judges, to break up an enlarged Court into divisions, did not prevail. *There are intrinsic limits to the size of a court if it is to be a coherent instrument for the dispatch of business and at the same time to observe the needs of consultation and deliberation.* The effective conditions for insuring the quality of judicial output of the Supreme Court have been maintained. Human limitations have been respected. . . . Despite the country's phenomenal increase in population and wealth and the resulting extension of governmental activities, the duties of the Supreme Court have been kept within limits of nine judges who are not supermen."

Could witnesses more disinterested and of wider study than the authors of the *Business of the Supreme Court* be called?

It follows that the bill conforms to the letter of the Constitution. However, since the purpose of the bill is not, in fact, to adjust the number of the judges to the work of the Court, but is a wholly different purpose, not within the Constitution the bill violates the spirit of the Constitution.

The objection here made runs with equal force against a proposed modification of the bill by restricting the number of added appointments that may be made in any one year.

EARLIER ACTS CITED AS PRECEDENTS—SHAMEFUL

Prior acts of Congress are called up as precedents justifying enacting the pending bill—precedents of increases and decreases in the membership of the court. Some of these precedents should serve as cautionary signals.

THE "MIDNIGHT JUDGES" OF 1801

Even after the passing of one hundred and thirty-five years one of them must bring a blush of shame to the cheeks of the most brazen partisan of this day. Edward S. Corwin depicts the scene vividly. I use his account freely. Jefferson had been elected President. The Federalists about to lose control of Executive and of Congress proceeded to take steps to convert the Judiciary into a partisan stronghold. By act of February 13, 1801, the number of associate justiceships was reduced to four, in the hope that the new Administration might in this way be excluded from opportunity to make any appointments to the Supreme Bench; the number of district judgeships was enlarged by five; and six Circuit Courts were created. Thus places for sixteen new judges were provided. When John Adams, the retiring President, proceeded with the aid of the Federalist majority in the Senate, to fill the new posts with the so-called "midnight judges" the rage and consternation of the Republican leaders broke all bounds. Jefferson entered office determined that the act of February 13, 1801, should be repealed and that the judges holding by appointment thereunder, though entitled to hold their offices "during good behavior" under the Constitution, should be ousted. The repealing and ousting Act was voted by a strict party majority and was reenforced by a provision postponing the next session of the Supreme Court until the following February. The hope was that by that time all disposition to test the validity of the Repealing Act in the Court would have passed.

JEFFERSON'S MODERATION

I give Corwin's judgment upon the action of both Federalists and Republicans: "When it came to legislation concerning the Supreme Court the majority of the Republicans again displayed genuine moderation, for *thrusting aside an obvious temptation to swamp that tribunal with additional judges of their own creed, they merely restored it to its original size under the Act of* 1789.

"Nevertheless the most significant aspect in the repeal of the Act of February 13, 1801, was the fact itself. The Republicans had now shown a more flagrant partisanism in effecting this repeal than had the Federalists in enacting the measure which was now at an end. Though the Federalists had sinned first, the fact nevertheless remained that in realizing their purpose the Republican majority had established a precedent which threatened to make of the lower Federal Judiciary the merest cat's-paw of party convenience. The attitude of the Republican leaders was even more menacing for it touched the security of the Supreme Court itself in the enjoyment of its highest prerogative and so imperilled the unity of the nation."

FEDERAL JUDICIAL SYSTEM MUST NOT AGAIN BE DRAWN INTO POLITICAL VORTEX

Surely we cannot—we dare not—lightly pave the way to a return to the conditions of those days when the federal judicial system was so drawn into the vortex

of partisan politics—when the federal courts were regarded by a large proportion of the people to be a political adjunct of a political party. Yet that is what the bill may do.

The party now dominant, though the cross be heavy, would be wise to follow in the footsteps of the equally sorely tried Jefferson, give heed to counsels of moderation respecting action relating to the Supreme Court; put aside the temptation to swamp the court with additional judges of their own choosing and avoid imperilling, and, by moderation further the unity of the nation as it girds itself to squarely face and grapple with admittedly grave social and economic problems.

HATEFUL VENGEANCE THE BASIS OF THE ACT OF 1866

Folly only would dictate resting justification of the pending bill on the act of 1866 which provided for reducing the membership of the Supreme Court to seven. That act was born of the unbridled hatreds aroused by the war between the States. It was rooted in vengeful bitterness against rational reconstruction. It was wrathful fear that the conciliatory policies of Andrew Johnson might be furthered by his appointees that led Congress to provide that no vacancy on the Court should be filled "until the number of associate judges should be reduced to six."

Claude G. Bowers writing of the Tragic Era which produced this precedent said that the era was one in which the "Constitution was treated as a door-mat on which politicians and army officers wiped their feet after wading in the muck."

LEGAL TENDER ACT—APPOINTMENTS 1868

The controversy growing out of the added appointments to the Supreme Court in 1868 by means of which, whether so designed or not, reversal of the first decision on the Legal Tender Act was brought about on rehearing, still reverberates.

Precedents are of bad and good repute. The repute of these is evil.

Now during sixty-eight years the constitutent membership of the Supreme Court has stood unaltered. For sixty-eight years these precedents with the ill-consequences of the hatreds and suspicions which followed in their train have successfully flashed the warning: "Stop, look and listen." They still flash that warning. I am one of many who hope that the signals of danger which the past so sets may be heeded in the present.

The influence of legislative precedents persists though they be evil.

Are we to mount upon precedents of ill repute, another?

THE COMMERCE COURT REPEAL—1913

How short the memories of men; how powerful the influence of a precedent though of evil repute and though ill consequences follow in its train, appears in connection with the disestablishment of the Commerce Court when in 1913 one political party succeeded another in power. The House voted to abolish the Court. It also voted to abolish the judgeships. The vote on the latter proposal stood 80 to 40. The Senate voted to abolish the Court. It, however, by a narrow majority —25 to 23—voted to retain the judges of the Court as circuit judges. Then came conference. The House conferees refused to concur in retaining the judges. Finally the view of the Senate prevailed in the House. Repetition of the blow struck at the constitutional tenure of federal judges in 1801 was only averted by the narrowest of margins.

Though the court will not, if the bill is enacted, inquire into the motives leading to its enactment, we may and should make such inquiry when the question before us is—Shall the bill be enacted?

Now turn to the fundamental objections to the bill. The charge is made, not without a measure of justification, that the court has in certain cases departed from sound principles and distorted the Constitution by tortured construction. It is asserted that the purpose of the bill is to assure a return to sound principles and to correct the distortions such tortured construction has produced.

THE PRESIDENT'S CONSTITUTIONAL THEORY

The President's constitutional theory as to the powers of Congress, however, would if an augmented Court gave it effect, not only result in departure from sound principles in exceptional cases, but would make the departure universal. The theory if so given effect would correct distorted construction of particular provisions in a limited number of cases by means of radical and sweeping distortion of the Constitution as a whole.

The President expressed his theory in the "Fireside Chat." He said: "In its preamble the Constitution states that it was intended to form a more perfect union and promote the general welfare; and the powers given to the Congress to carry out those purposes can best be described by saying that they were all the powers needed to meet each and every problem which then had a national character and which could not be met by merely local action.

"But the framers went further. Having in mind that in succeeding generations many other problems then undreamed of would become national problems, they gave to the Congress the ample broad powers 'to levy taxes . . . and provide for the common defense and general welfare of the United States.'

"That, my friends, is what I honestly believe to have been the clear and underlying purpose of the patriots who wrote the Federal Constitution."

Had the quoted provision of the Constitution been set out more fully the fundamental error would have been evident. The provisions reads: "The Congress shall have power to lay and collect Taxes, Duties, Imposts and excises *to* pay the debts and Provide for the common defence and general welfare of the United

States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

This theory, now presented dressed in carefully meditated words, was foreshadowed by an extemporaneous statement made in the "horse and buggy" interview. In that interview the President said: "If we accept the point of view that under the Constitution we cannot deal with matters left wholly to the States we go back automatically to the Government of 1789."

EFFECT OF PRESIDENT'S THEORY

Reading the opinions, both prevailing and dissenting in the A. A. A. case, and bringing into view the historic background of this provision, leaves the President's theory as to the "purpose of the patriots who wrote the Federal Constitution" in framing the quoted provision, without support. The purpose, in fact, was merely to grant to Congress the power to lay and collect taxes—a power necessarily involving the power to spend—and to provide through such power of spending for the general welfare of the United States. The provision does not confer on Congress power to legislate as to all matters which in its judgment concern the general welfare. It merely grants Congress power to use public money for any purpose that concerns the public welfare with incidental legislative power to make the spending effective. The President's theory would, in effect, exscind the Tenth Amendment from the Constitution. That Amendment provides: "The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The question whether power as broad and unlimited as that which would flow from the President's theory should be vested in Congress is not the question that now concerns me.

What does concern me is that the Constitution as it now stands neither vests such power, nor lays a basis for even tenuously reasonable claim that it was intended to be conferred, and that it is now purposed to pave the way to exercise of such power without taking the judgment of the people as to whether it should be vested.

That there are extensions of the meaning of constitutional provisions by interpretation I admit. Such extensions resulting from interpretation in the spirit of the Constitution do no violence to the Constitution. Extensions so resulting make the Constitution what it was designed to be—"a living instrument."

The extension, which the President's theory involves, would not be the production of interpretation in the spirit of the Constitution. It would flow from interpretation the product of sheer will; determination that what the interpreter would have it mean the Constitution shall mean, and that alone. Such interpretation whether by Court, Executive or Congress strikes at the constitutional structure as a whole.

THE INDEPENDENCE OF THE JUDICIARY ESTABLISHED

That it was the purpose through the Constitution to place the Federal Judiciary in a position of independence surely needs no demonstration. To that end they were given tenure "during good behavior"; and it was provided that they should at stated times receive for their services, a compensation, which should not be diminished "during their continuance in office." While they were left subject to removal through impeachment, the convention framing the constitution decisively rejected a proposal that they be subject to removal through "joint address to the two Houses." How deep-rooted the conviction was that it is vital that the Judiciary be independent and, in exercising the judicial power, free from influence by President and Congress, appears from an incident in the convention that, in this day, raises a smile. When the resolution relating to the salaries of the judges was first before the convention it provided that "*no increase* or diminution" should be made. It was moved to strike out the words "no increase."

Madison opposed saying: "The dependence will be less if the *increase alone* should be permitted; but it would be improper *even so far* to permit a dependence. Whenever an increase is wished by the Judges, or may be in agitation by the Legislature, an undue complaisance in the former may be felt by the latter. If at such a crisis there should be in court suits to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not to be suffered, if it can be prevented. The variations in the value of money may be guarded against by taking for a standard wheat or some other thing of permanent value. The increase of business will be provided for by an increase in the number of judges who are to do it. An increase of salaries may be easily so contrived as not to affect persons in office."

Gouveneur Morris, making the motion to strike out, said: "The Legislative ought to be at liberty to increase salaries, as circumstances might require; and that this would not create any improper dependence in the Judges."

The motion carried but not without dissent. Virginia and North Carolina voted, no; Georgia was absent.

PRESIDENT'S RECOGNITION OF PURPOSE TO ESTABLISH AN INDEPENDENT JUDICIARY

The President recognizes the constitutional purpose to establish an independent judiciary, saying: "I want —as all Americans want—an independent judiciary as proposed by the framers of the Constitution." He submits that the bill carries no threat to independency. There issue is joined.

Woodrow Wilson recognized the purpose to establish, and the imperative necessity under our constitu-

tional system for, a judiciary "with substantial and independent powers, secure against all corrupting or perverting influences; *secure also against the arbitrary power of government itself.*"

Recognition that an independent judiciary is numbered among the essential elements and institutions of any constitutional government has even been accorded by enlightened monarchs.

Louis XII of France, in his Edict of 1499, concerning high courts of justice, ordained that the law should always be followed *in spite of royal orders, which, as the edict says, importunity may have wrung from the monarch.*

Frederick II of Prussia in a letter to the Supreme Court of his kingdom enjoined its members to be faithful to their oaths and to do justice *in spite of royal demand.*

"THE JUDICIAL VETO"

One of the "substantial and independent powers" which the Court claims and exercises is that of denying effect to an act of Congress if it transcend the powers given by the Constitution. This power, that is viewed as a usurped power by some—a view from which I dissent—is in my judgment the cornerstone of the American constitutional concept of liberty under law, and as formidable a barrier as was ever devised against the tyrannies of political assembles and executives.

The President tacitly puts in question the constitutional legitimacy of this power in his "Fireside Chat."

How firm the conviction is that this power is generally regarded to be an essential power is evidenced by the fact that the State of Georgia has included in the Bills of Rights set up in its Constitution this declaration: "Legislative acts in violation of this Constitution, or the Constitution of the United States are void, *and the Judiciary shall so declare them.*" This power now exercised for almost one hundred and thirty-five years might have been withdrawn at any time through the process of Amendment. It has not been so withdrawn. Failure to so withdraw it may reasonably be urged to evidence recognition by the people that it was granted, as claimed, by the Constitution. The bill strikes at independence in the exercise of this power. It is based upon resentment at the exercise of this power. The bill is admittedly primarily directed at the present membership of a Court that, sometimes unanimously, and again in division, has in the exercise of this power denied effect to acts of Congress running counter to the Constitution as interpreted by the Court, even though such acts might have found justification under the theory of the Constitution and its purposes formulated by the President. The bill strikes directly at those of them who have reached the prescribed retiring age and period of service and who fail to retire, by providing for the appointment of added judges.

The added appointees will in the nature of things be men whose minds are at the time of appointment believed to run along with that of the President. They again, in the nature of things, will be looked to, to offset and cancel the votes of such non-retiring judges in cases in which the minds of the latter do not run along with that of the President or give effect to his theory.

If the six judges now of retiring age and years of service or any of them accept the "invitation" to retire the same factor of according views will influence the appointments of their successors and the same result of conforming judgments to the President's theory will be looked for.

"PSYCHIC COERCION"

The taking into account by a President of the views of his appointees cannot, where appointment comes in ordinary course, be fairly criticized. It has always been so. It will probably always be so. Utopia and the perfect State and perfect man still lie in the future. Under ordinary conditions, of gradual changes in the Court over the years through death, resignation, retirement or impeachment, the factor of taking into account by the appointing power of the views of appointees will in general be without significant baneful effect. What is now proposed—quite a different thing—is that Congress by deliberate affirmative action seek to effect through an "invitation" having the characteristic of "psychic coercion," the retirement at one fell swoop of two-thirds of the judges now constituting the court and the appointment of successors or, in case of their failure to retire, to add a new appointee for each one failing to retire, with the declared purpose to bring the judgments of the court into harmony with "a present day sense of the Constitution" to use the words of the President, which words can only be interpreted as requiring harmony with the President's wide-flung theory of constitutional Congressional power.

In this situation the factor of conforming views in the appointees raises a threat, not ordinarily involved, to judicial independence in interpretation and application of the Constitution.

INCREASING NUMBER OF JUDGES AS A MEANS OF PUNISHMENT

In this connection a startling statement made the other evening by a member of the Senate in support of the pending bill ought not to pass unnoticed. He said: "The proposed change in the number of judges is within the power of Congress. . . . Such changes constitute a part of the check and balance system provided in the fundamental law along with the power of impeachment . . ." In this statement there is a strange coupling of the power to change the number of judges and the power of impeachment. The power of impeachment is a power to punish. Was it intended by so joining together the power of impeachment and the power to change the number of judges, to express the conviction that the latter power was also designed by the Constitution to be exerted in punishment—punishment by Congress cooperating with the President of those members of the Federal Courts whose minds do not run

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along with theirs as to the constitutional powers of Congress and the limits placed by the Constitution on such powers?

A strange check and balance as so conceived! A check by Congress on the independence of the courts in decision and a balance weighted against the independence of the Court!

The theory as to the purpose of those who framed and ratified the Constitution, that dominates the President's thinking; the fact that his appointees will in the nature of things be men whose minds run along with his; his impatience—though this is a delicate subject it cannot be ignored—with minds that do not run along with his; his tacit bringing into question anew the constitutional legitimacy of the power exercised by the Court to deny acts of Congress effect when in the judgment of the Court the acts transcend the powers granted Congress, and the fact that this theory was foreshadowed by the "horse and buggy" comment, which if recollection serves me, was directed to a *unanimous* decision of the Court as to the constitutionality of the N. I. R. A. by which decision the Court exercised this power; his expressed lack of faith in the practical efficacy of the process of Amendment and impatience at the restraints that the amendatory process imposes,—an impatience not without reason, all combine to arouse uncertainty as to, and fear of, the consequences to our Constitutional order that may follow on the enacting of the bill.

THE COURT A BALANCE WHEEL. DO NOT SHAKE IT FROM ITS GEARINGS

Woodrow Wilson, from whose writings I again quote, said that the courts are the balance wheel of our constitutional system "taking the strain from every direction and seeking to maintain what any unchecked power might destroy. They are at once instruments of the individual against the government, of the government against the individual, of the several members of our political union against one another, and of the several parts of the government in their legal synthesis and adjustment."

My genuine fear is that the pending bill has in it potentialities that threaten to shake the balance wheel from its gearings.

If the bill is enacted, those who oppose its enactment can only pin hope that radical amendment of the Constitution through a process of judicial action short-cutting the constitutional mode of amendment will not result, on the fact that views of men not sobered by judicial responsibility may differ and have differed from the views of the same men when "lifted above all personal interest" and charged with responsibility to act, not as advocates but as arbiters.

In the Virginia Federal Convention George Mason addressing himself to the clause of the Constitution extending the original jurisdiction of the Court to controversies between a state and the citizens of another State, said: "Is not this disgraceful? Is this State to be brought to the bar of justice like a delinquent individual?" John Marshall with vision blurred by his zeal to bring ratification about replied: "I hope no gentleman will think that a State will be called at the bar of a federal court." Marshall later as Chief Justice when charged with responsibility to act not as an advocate but as an arbiter, called Georgia to the bar of the Court.

Woodrow Wilson recalled as an incident "full of instruction" that Chase, when Secretary of the Treasury under Mr. Lincoln, advocated the issue of irredeemable paper currency in relief of the Treasury, and was largely instrumental in inducing Congress to pass the statutes which filled the country with "greenbacks," declaring it to be his opinion that such issues were legal under the powers granted Congress by the Constitution; but that Chase when afterwards Chief Justice of the United States joined with the majority of the court in declaring the legal tender acts unconstitutional.

Woodrow Wilson commented: "The thing might happen with the most conscientious lawyer. It is one thing to have to decide a matter of that kind in connection with important business you are conducting, and it is quite another thing to have it to decide as a judge lifted above all personal interest in the matter and bidden take it upon its merits, not as an advocate but as an arbiter."

How true! Mr. Brandeis, whose sincerity whether at the bar or on the bench no one would question, while at the bar criticized the Miles decision (220 U. S. 373) invalidating a resale price maintenance contract under the Sherman Act; but on the bench Mr. Justice Brandeis voted to support the affirming decision in the later *Boston Store Case* (246 U. S. 8).

Now let us consider some of the suggestions made in support of the bill.

A COURT OF FIFTEEN "OLD MEN"

It is said in support of the bill that "life tenure of judges assured by the Constitution was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary." It is further suggested that a "constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world."

The bill gives no assurance of "a constant and systematic addition of younger blood." It fixes no maximum age of appointees. It does not relate additional appointments to the age of incumbents alone. It relates such appointments to age and period of service combined which may result in deferring the power of additional appointment beyond an incumbent's attaining the specified age. If the six judges now of both retiring age

and service, elect to continue in office; if six additional judges are appointed, the act becomes inapplicable in the future, and thereafter, as now, death, resignation, and impeachment alone will provide opportunity for the "infusion of new blood." Directed at a court of "nine old men" the pending bill sows seed which may fructify in a court of "fifteen old men." The bill assures a drastic allopathic dose of "new blood in the present." It gives no assurance of "constant and systematic" homeopathic doses of "new blood" as the years pass.

This suggestion in support of the bill attributes to life tenure a judiciary that is static and that fails to "recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever changing world." The attribution may well be questioned.

It was a State court of last resort with judges elected for a comparatively short period of years and holding under a Constitution requiring retirement at seventy, that determined that both State and Federal Constitutions prohibited imposing liability without fault and that denied effect to a Workmen's Compensation Act. It was a State court of last resort constituted in like manner that adjudged an act limiting the consecutive hours of labor of women in industry to violate both State and Federal Constitution and refused the act effect.

Apparently these courts without life tenure, coming from and going to the people through election at comparatively short intervals of years and subject to an age limitation, failed in these instances to "recognize and apply the essential concepts of justice in the light of the needs and facts of an ever changing world."

The Supreme Court, however, with judges appointed and enjoying life tenure strangely enough "recognized and applied essential concepts of justice" and adjudged that the enactment of both these types of statutes was within the competency of a State and did not violate the Federal Constitution. The judges of the State courts rendering these decisions holding Workmen's Compensation Acts and Acts limiting the consecutive hours of work of women unconstitutional, coming as they did into office through election, had in the nature of things "personal experience and contact with modern facts and circumstances under which average men have to work and live."

As indicated at the outset, the power of fixing the number of justices to constitute the Court was left with Congress in order that the number might be according to the needs of the work of the Court. The power was not left with Congress as a means of enabling it to assure that the judgments of the Court should merely mirror and reflect the convictions of the governmental enacting and appointing powers as to what are the "essential concepts of justice"; nor to assure that in such judgments all other convictions as to the essential concepts of justice should be ignored.

Justice is figured with eyes blindfolded symbolizing impartial judgment. The power now considered was not left with Congress to enable it to substitute for this symbolic figure another equipped with blinders holding the eyes of the Court to a single direction and that direction—towards the enacting and appointing powers.

It is said that in some instances the Court has departed from sound principles and engaged in "tortured construction" of the Constitution, and that a substantial minority of the Court have at times been moved to protest.

Admit that the Court has, on occasion, erred. To err is human. The President has claimed for himself and for Congress the privilege of erring, saying in substance: we will proceed in legislation by the process of "trial and error."

Surely, the two divisions of the government so claiming the privilege of moving on the basis of trial and error are not justified in seeking to disestablish and reconstitute the third on the ground that it has on occasion erred.

UNCERTAINTY

The President says: "I defy any one to read the opinions concerning the A. A. A., the Railroad Retirement Act, the National Recovery Act, the Guffey Coal and tell us exactly what, if anything, we can do . . . in this session of the Congress with any reasonable certainty that what we do will not be nullified as unconstitutional." It should be noticed that these words are not only directed at opinions in cases in which the Court divided but also at opinions in which the Court was unanimous. If the challenge is based on a charge of lack of clarity in the opinions—a claimed want of reasonable facility in the members of the court as now constituted to use words to express their conclusions clearly, I see nothing in the bill that assures that the new appointees will be more facile in expression. Will you forgive me if I suggest that the claimed difficulty which leads to the challenge may in part be owing to a like lack of facility in the legislative draftsmen of the acts before the Court. Reading these acts I, too, because of their generality and vagueness and their wide sweep, have been left in doubt as to precisely where Congress intended to go and how.

If the challenge is based on the ground that the opinions are confined to disposing of the specific issues which were before the Court in the several cases—on the ground that the Court has not in its opinions gone beyond the issues and has not used its opinions as vehicles for general instruction of Congress as to the scope and limitations of the constitutional powers of Congress —then it misconceives the judicial function. The decision in the *Dred Scott Case,* in which the Court proceeded beyond the issue to instructing Congress and the people as to the constitutional powers of Congress in general, and the consequences that followed, luridly illustrates the perils of such judicial action.

If the challenge is based on the division of opinion in the Court in some of these cases, it ought to be noted

that unanimity in opinion on the bench can no more be reasonably expected upon all questions at all times than it can reasonably be expected among legislators even though the issue on which opinion is taken be properly confined to one of constitutional power. Questions of constitutional power are not subject to mechanical determination by the application of a slide-rule.

AMENDMENT—A PROCESS OF APPEAL TO THE PEOPLE

It is urged in support of the bill that the decisions of the Court have created a situation in which "we must find a way to take an appeal from the Supreme Court to the Constitution itself."

What need to find "a way"?

A way was found and provided in the Constitution —the way of appeal to the people through the process of amendment of the Constitution.

The way that the pending bill would open leads away from the people. It takes us in another direction. Why abandon the provided way?

Why substitute a way that diverts the appeal and its determination from the people, and sends it to a Court specially arranged by act of the Congress—party to the appeal and whose acts are involved in the issue—to assure a result on appeal favorable to the Congressional action?

The Constitutional way of appeal to the people was taken to overcome the decision of the Court that permitted a State to be arraigned at the bar of the Court at the suit of a citizen of another State. The people rendered judgment on that appeal in ratifying the Eleventh Amendment. The same way of appeal to the people was taken to overcome the decision of the Court in the *Income Tax Cases*. In the Sixteenth Amendment the people rendered judgment on that appeal.

SUGGESTED ALTERNATIVES

Grave social and economic problems admittedly confront us. It is not my suggestion that Congress, if the plan embodied in this bill is not put into effect because of the dangers that inhere in it, stand idly by and return to the policy of refraining from affirmative action which had characterized the past.

If it is the conviction of Congress that the present situation in the Court as now constituted of members a majority of whom are of advanced years is an ill, why not proceed in Constitutional mode to guard at least against the recurrence of this situation in the future by submitting an Amendment limiting the holding of judicial office by future appointees to attainment of the age of 70 or 75 years? I would support ratification of such an amendment. Why not submit an Amendment definitely prescribing and limiting the number of judges of the Court at ten or even at eleven if conviction exists in Congress that the Court is overburdened, though the unanimous testimony of the Court is to the contrary?

I would support ratification of such an Amendment for it would end all possibility of recurrence in the future of the threat to constitutional order which the present bill involves. Why not, if there is conviction that change in the existing situation in the Court is now demanded in the interest of the public welfare, submit the essential substance of the present bill in the form of an Amendment, or why not submit an Amendment which will effect correction of the existing situation gradually over a reasonable period of years?

If I have no enthusiasm for submitting the last two suggestions it is because both would at once affect Mr. Justice Brandeis, one, who as jurist and as man, has won a high place in the affection and esteem of the people and because of my perhaps unwarranted conviction that an amendment having that personal effect would be rejected by the people. Emotion plays an important part in human action. I look back to the Virginia convention of 1829 where the principle of retiring judges at the age of seventy years was proposed and where it appeared that Wythe, Pendleton, and Roane, jurists highly esteemed and beloved, had served on the supreme court of that State with distinction long after they would have reached the proposed age limit. The proposal was rejected.

There comes to mind, too, experience in New York. The first constitution of that State required the retirement of judges at the age of sixty-five years. When such constitutional age limit compelled Chancellor Kent to retire before he had reached the maximum of mental power, an Amendment to the constitution of the State advanced the age of retirement to seventy years. Candor compels me to say that as now inclined I would oppose ratification of such Amendments if *now* submitted.

It is urged that the process of Amendment is unnecessarily cumbersome. There is basis for this complaint. If the limitations now imposed upon Amendment exceed, under the conditions of this day, the restraints needed to assure due deliberation in consideration and maturity in resolution in changing the fundamental law, why not submit an Amendment to the people clarifying and simplifying the procedure in Amendment?

Why not, if the period of time that now passes between enacting legislation by Congress and final judicial determination as to its constitutionality is so great as to bring uncertainty and confusion that tends to paralyze the processes of government, submit an Amendment that will authorize Declaratory Opinions by the Court, at least with respect to some types of legislation, on request of the President, whose constitutional duty it is to enforce the law?

Why not establish an agency of Congress for impartial and disinterested study of the threatening problems to which the President has called attention in burning words; an agency for bringing together the facts of present-day life out of which these problems arise; an agency to explore the subject of most effective remedies and the possibility of putting such remedies

into operation under the Constitution as interpreted by the Court.

The results of the factual studies by such an agency reported to Congress and made the basis of its legislation would, if presented to the Court on argument in support of such legislation, furnish the Court with the fact-background against, and in the light of which, Congress acted.

Studies by such a Congressional agency, may, and in my judgment will, show the need of amending the Constitution. If they do, they will at the same time furnish the fact-data that should be taken into account in framing and submitting Amendments.

I regret that the offering of this bill has delayed, and will delay Congressional consideration of legislative action relating to pressing problems and to the means of meeting them within the Constitution as it now stands, or through submission of Amendments if the Constitution as it now stands does not admit of the legislation that is determined to be required in the general welfare.

I close with the prayer written by Jonas Phillips in 1787: "May the almighty God of our fathers . . . endow this Noble Assembly with wisdom, judgment and unanimity in their councils, and may they have the satisfaction to see that their present toil and labor for the welfare of the United States may be approved of through all the world and *in particular by the United States*. . . ."

A Reply

(*Continued from page* 363)

was that there were many people at the time who knew that quinine was a better remedy for fever than bleeding. They did not think that the fundamental principles of medicine required that it be banned. The witnesses who have testified in opposition to the President's proposal have practically all been sure that the majority of the Supreme Court has been misinterpreting the Constitution. There were many in the middle ages who felt the same way about the decree on quinine. But, they said, in spite of this, now is the time for all good men and true to come to the aid of the University of Paris. It is much better, they solemnly intoned, that we undergo any amount of suffering and confusion, even that thousands die, rather than damage the prestige of that great medieval institution. Where would the learning of the middle ages be if it were not for the University of Paris? Therefore, if we are to have any principles left, we must not damage the authority of that great institution by any common sense methods. Medicine is going ahead too fast anyhow, they said, and we have got to watch it in order to keep it back. In this particular effort their success was overwhelming.

It is a long, long time since this incident in the history of medicine occurred. We know now, however, that had more liberal-minded medical authorities been