THE FIGHT GOES ON

By Franklin Delano Roosevelt

This is the Second Half of the President's Own Story of the Fight for Supreme Court Reform. It is Part of the Introduction to a Forthcoming Volume of his State Papers

The Constitution Prevails

With the President are Governor Lehman and Senator Wagner

IN NOVEMBER, 1936, came the presidential and congressional elections. It was a hard-fought campaign, in which the issue was joined without reserve, in which no punches were pulled. The issue was a single one—the New Deal, its objectives, its methods, its future proposals. The opposition pointed to the Court as the only obstacle which had stood in our way. On the other hand, I made it clear that, if re-elected, I intended to continue to press harder and harder for our objectives, in order to carry out the will of the people. The spirit of the Democratic campaign was expressed in my speech at Madison Square Garden in New York City, on October 31, 1936: that for all our objectives—many of which had already been blocked by the Supreme Court—we had "only just begun to fight."

The election returns of 1936 left little room for doubt as to whether the people of the United States wanted that fight to continue. Forty-six states out of the forty-eight voted for the New Deal. The popular vote for the New Deal was 27,500,000 votes—or a plurality of over ten million votes out of the forty-five million cast.

As I returned to Washington after Election Day, I knew that the great interests and the great newspapers which had opposed my re-election in 1936 by violently attacking the policies and objectives of the last four years were all ready and set again to transfer the scene of battle from the legislative halls to the courtroom. Defeat at the polls would never deter them from seeking ultimate victory from the courts. That has been the traditional refuge of those who fight social progress at the ballot box.

In fact, many of the later New Deal measures were already even then working their way up to the Supreme Court: the Social Security Act, the National Labor Relations Act, the Public Utility Holding Company Act.

The problem was a simple one to state; but an almost impossible one to solve. Was the majority of the Court to remain what Mr. Justice Brandeis had characterized as a "super-legislature," passing upon the wisdom of legislation on the basis of their own personal political and economic philosophy? Was the electorate to be powerless to insist upon solution of its national problems through its Congress, without having to risk judgments of unconstitutionality based not on constitutional limitations but on personal predilections of five justices not elected by it? Or was this nation to retain its full powers to serve its own citizens, and to use those powers in a steady drive to meet the modern needs of humanity?

To stand still was to invite disaster. Across the seas, democracies had even then been yielding place

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And as the fight went on, and as the Court term was drawing to a close, the constitutionality of the Social Security Act came before the Court. The Court was still unchanged in personnel. The statute in question dealt with old-age pensions and unemployment insurance. It was based on the power which the Congress thought it had under our Constitution to "lay and collect taxes . . . to . . . provide for the general welfare of the United States." The tax for unemployment insurance was a tax on employers' pay rolls; and the action provided to carry out the purposes of the statute was joint action by the Federal Government in conjunction with the respective states. The system for old-age pensions was, on the other hand, purely a federal one. The taxes for old-age pensions were to be collected from employers and employees by the Federal Government alone, and disbursed by it alone. The federal law was upheld in its entirety on the ground that unemployment and old-age dependency were matters of general welfare.[8] The state tax for unemployment insurance was also upheld.[9]

The Fight is Won

This was a radical departure from a philosophy which had previously held mining and agriculture to be of purely local concern. If there is any doubt of this, an examination of the dissenting opinions in the social security law cases will show how well-founded had been our fears that like the "no man's land" for minimum wages in 1936, there would come to be a "no man's land" also for old-age pensions and for unemployment insurance, into which neither the federal government nor the states could step to meet the modern concepts of social security.

And here again, it would be a little naïve to refuse to recognize some connection between these decisions and the Supreme Court fight.

By the time the Court term was over

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in June of 1937, it was very clear that the entire approach of the Court to the many problems confronting us had completely changed. The views of the liberal minority of 1935 and 1936 were being gradually adopted by the one or two justices on the other side necessary to make them the views of the majority.

The blunt fact, therefore, is that by this time the Supreme Court fight had actually been won, so far as its immediate objectives were concerned.

The legislative fight was not discontinued immediately, however, because it was not certain whether this victory was permanent or temporary. Furthermore, even with a liberal Court, the basic principle of insuring a steady flow of new vigor and new intellectual approach into the personnel of the Court would still be a sound one. For only with that continuing process could we ever be sure that the Court would continually be kept personally abreast of changing social conditions by the addition of new men, brought up and molded in such conditions.

The result of the Supreme Court fight in the political halls of the Congress is now well-known. Owing to many factors, the most important of which was this reversal of the Court's attitude itself, the portion of the bill dealing with the Supreme Court itself was defeated —although many other provisions of the bill were adopted in 1937 and later.

It was not until after the end of the judicial term in June, 1937, that a single vacancy on the Court actually occurred. The about-face in the decisions of the Court had come from the very same personnel that had been on the Court since my first inauguration. The victory, therefore, cannot be attributed to the new justices. It was rather a realization by one or two members of the Court that the Court had exceeded its powers, that it had strayed away from the Constitution itself, and that the liberal minority of the Court had been

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correct in its conclusions.

In the succeeding terms of the Court, commencing in October, 1937, and running through to date, it has given continuous and consistent approval to the policies of government action which have motivated most of the reform measures of the New Deal. It has laid down principles of federal control of interstate commerce which have permitted the government to proceed in a direct and forthright manner to meet the social problems and conditions which beset it. Also with respect to federal powers of taxation, the Securities and Exchange Commission regulation of public utilities and public utility holding companies, fair labor standards legislation, stabilization of the bituminous coal industry, and the power of the federal government to develop the water power resources of the nation—in all these fields, and in others, the contentions of the federal government have been sustained.

Whatever doubts were created by the old Court before the elections of 1936 have been practically all removed. There has been a reaffirmation of the ancient principle that the power to legislate resides in the Congress and not in the Court; and that the Court has no power or right to impose its own ideas of legislative policy, or its own social and economic views, upon the law.

The result has been that the federal government now has the undisputed powers which had always been intended for it by the framers of the Constitution. These powers were clearly implied or expressed in the Constitution; and the recognition now at last given to them is in no sense indicative of any change in the Constitution itself. In fact, nearly every time that the Court in 1935 and 1936 proceeded to circumscribe these powers, it was acting beyond the Constitution itself, and seeking to grasp authority for itself which it did not possess. The change which came after the elections of 1936, and after the message on the reform of the judiciary, has been characterized by former At-

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torney General Jackson (now Associate Justice of the Supreme Court of the United States), as a "retreat to the Constitution." The phrase, to my mind, aptly describes the conduct of those justices of the Court who before 1937 had stood in the way of government progress. In the new approach which has come since those days, it can truly be said that the Constitution has prevailed over those men who sought to submerge it.

Democracy proved again that it had within it the power to function—the ability to furnish to its citizens the strength, the courage, the assistance, the instruments with which to meet their problems in an American way, in their continued effort to preserve and raise their American standard of living.

White House,
Washington, D. C.,
June 1, 1941. FRANKLIN D. ROOSEVELT.

In next week's article, "The Continuing Struggle for Liberalism," the President gives his own explanation of the purge and of his activities in the 1938 primary campaign.

"It was hard to read the opinions of the Court and say what we could do . . . in the way of flood control and drought control. . . ." The upper picture shows the rampaging Los Angeles River after destroying a bridge and taking six lives. Below, one of the dust storms that ravaged thousands of Western farms in 1935

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[1] West Coast Hotel Co. vs Parrish 300 U.S. 379.
[2] Virginia Railway Co. vs System Federation No. 40. 300 U.S. 515.
[3] Wright vs Vinton Branch of the Mountain Trust Bank of Roanoke. 300 U.S. 440.
[4] Hammer vs Dagenhart, 247 U.S. 251.
[5] National Labor Relations Board vs Jones and Laughlin Steel Corp. 301 U.S. 1.
[6] National Labor Relations Board vs Fruehauf Trailer Co. 301 U.S. 49.
[7] National Labor Relations Board vs Friedman-Harry Marks Clothing Co. 301 U.S. 58.
[8] Steward Machine Co. vs Davis 301 U.S. 548; Helvering vs Davis 301 U.S. 619.
[9] Carmichael vs Southern Coal and Coke Co. 301 U.S. 495.

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to dictatorships, because they had proven too weak or too slow to fulfill the wants of their citizens. Social forces in our day gather headway with ever-increasing speed. It would have been dangerous to block too long the just and irresistible pressure of human needs. Democracy here simply could not be permitted to fail to function.

Yet it was hard to read the opinion of the Court on the Agricultural Adjustment Act and say what we were going to be able to do for the farmer. Or the opinions outlawing the Railroad Retirement Act, the Bituminous Coal Act, the National Industrial Recovery Act, the New York Minimum Wage Act, and decide just what we could do in the future for the exploited laboring man and woman; or what we could do in the way of flood control and drought control; or what we could do in all the other fields where we had promised progress—help for the blind and crippled, unemployment insurance and old-age pensions, total abolition of child labor, protection against monopolies, building decent housing for the lowest income groups, slum eradication, cheaper electricity, intelligent handling of industrial disputes through collective bargaining, minimum wages and maximum hours.

The challenge of a third of a nation ill-clad, ill-housed, ill-nourished, was still with us; and we seemed to be without the necessary weapons to meet the challenge.

Ever since the adverse decisions of 1935, I had, of course, begun to think of what should be done to retain in our democracy the functional tools which the Court seemed bent on taking away. Many plans began to come in to the White House from many citizens and from many sections of the country. I spoke with scores of people on the subject, and spent many days and nights in studies and conferences. During the summer and fall of 1936 these studies began to assume definite shape.

After the overwhelming mandate of the 1936 elections had been delivered by the people, I settled down to a process of elimination of the many plans suggested. I discussed the objectives and the issues with many people; but in the final determination of details I was joined by the Attorney General and Solicitor General of the United States, and by nobody else.

Of course I gave no consideration at all to the suggestion which came from some quarters that we do nothing about it. The policy of doing nothing is what had brought us to the brink of disaster in 1932. That has always been the policy which those who have opposed progressive legislation offer to remedy grave social and economic evils. It has always been the policy of those who mistrust democratic government and democratic processes. Of course these groups did not advocate "do-nothingism" frankly and openly on the ground that they feared the will of the people as expressed on Election Day. The attack they used was a name-calling barrage of propaganda, charging that whatever the duly elected executive and legislative representatives tried to do was "regimentation" or "Communism" or "dictatorship."

Another suggestion for delay was based on the thought that the hand of fate or the wish for retirement would remove some of the justices from the Court, and provide the opportunity for the appointment of new men more sensitive to modern conditions. This course was also soon rejected. It should

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be noted that this suggestion recognized that there was nothing wrong with our Constitution, but that the fault lay with those who were giving it a "tortured construction." It was rejected because we realized that there was no time left for that kind of inaction and waiting.

The reactionary members of the Court had apparently determined to remain on the bench as long as life continued—for the sole purpose of blocking any program of reform. This was nothing new in our national life. The same thing had happened in earlier days of our history; it had happened during President Wilson's administration. It was happening again. These men seemed to have a definite mission in life—to block our social and economic progress; and, dedicated to that mission, they clung to their places. Although it had become, on the average, the most aged Court in our history; although six justices had passed the age of seventy, not a single vacancy had occurred during my first term in office. The bench had been created almost entirely by appointments by conservative Presidents; and it was now continually passing economic and political judgments, almost month by month, on a liberal program of recovery and reform.

No! Time would not allow us to wait for vacancies. Things were happening,

No Time for Amendment

That same element of time was also most important in considering the question of passing a constitutional amendment to meet the Court crisis. I considered that remedy very carefully—and rejected it. The program of the New Deal involved the most controversial social questions in the last seventy-five years of our history. Tremendous interests were at stake—interests which would hesitate at nothing to gain their ends. It would only be necessary to prevent ratification in thirteen states in order to block any proposed amendment to the Constitution. I knew how long it would take to get the approval of thirty-six states. I had seen the long year-after-year ordeal of the proposed child labor amendment, which involved opposition which was only picayune in comparison with the intrenched antagonism to the new social program. No! It would take years and years to get a constitutional amendment which would meet our difficulties. Time was too pressing for that.

Besides, precisely what amendment would be submitted to the people? A dozen different ones had been proposed. How long would it take to get an agreement among the proponents of constitutional amendments to unite on one amendment which could pass through the Congress, even before it began to go through the long process of ratification by the states? Each type of amendment had its own passionate followers. Some of them were so radical that they made my own Court proposal seem practically reactionary.

For example, one senator proposed an amendment which would permit any decision of the Court declaring a law unconstitutional to be overridden by a two-thirds vote of the Congress elected after the decision was handed down. This meant that no matter on what ground the Court decided a statute invalid, the following Congress could recall the decision. Apart from the fact that it did not touch upon the question of state legislation at all, this proposed amendment was an attack upon the very function of the Court and upon the legitimate exercise of that

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function. I was not prepared, nor did I deem it advisable, thus to undermine one of the foundations of our democracy.

Apart from this great division of opinion as to the kind of constitutional amendment to be adopted, there was always the danger that the same justices would read into any amendment finally passed the same "economic predilections" which they had read into the Constitution itself. Could human language ever be framed to meet all contingencies without possibility of judicial *(Continued on page 37)*

misconstruction? We had seen how difficult it was to do this in the past. Apparently it was not possible to do it, for example, with respect to the income tax. For we all know the artificial restrictions, limitations and interpretations which have been placed by the Court upon the simple phrase in the sixteenth amendment permitting the Congress "to lay and collect taxes on incomes, from whatever source derived." Chief Justice Hughes once remarked that the Constitution is what the judges say it is;—so is an amendment to the Constitution.

Furthermore, I was convinced that an amendment was wholly unnecessary to meet the situation. I knew that the Constitution was not to blame, and that the Supreme Court as an institution was not to blame. The only trouble was with some of the human beings then on the Court. Need I add here, parenthetically, that later judicial history has proven that all these assumptions were absolutely correct?

Some Differences of Opinion

The Democratic national platform adopted in 1936 said that we would seek solution of the nation's ills by legislation; and that an amendment would be sought only if all legislation had failed.

So, having eliminated the idea of a constitutional amendment, the problem was: what kind of legislation? Here, there were even more types of suggestions than there were for constitutional amendments. Some called for requiring unanimous opinions of the Court to declare a statute unconstitutional; or eight to one opinions, or seven to two. Others called for outright addition of new members to the Court.

Each of these had its own difficulties.

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How did anybody know, for example, how these same justices would look upon any legislation requiring a unanimous opinion, or more than a simple majority, for a valid decision? They might very well have decided that the Constitution meant that the Court's decision could be rendered only by the traditional majority.

As for adding justices outright to the Court, that would have been an expedient to correct the Court in 1937 only. The expedient was not a new one; the addition of justices had taken place several times before in our history—sometimes in order to change decisions. The trouble was, however, that as the years went by, the new members of the Court and their successors might likewise fall into the conservative mold, which so often takes shape when there is life tenure of position and complete lack of touch with swiftly moving social and economic forces. It would not provide a continuous, reinvigorating process, merely to add some additional members.

The plan which I finally proposed provided for a continuous and recurrent addition of new blood, new vigor, new experience, and new outlook. For, under my plan, as soon as a judge reached the age of seventy, a new judge would be appointed. The old judge could retire on full salary for life, if he wished. If he preferred not to retire, he might continue to remain on the bench; but he would be counterbalanced there by the new man who had had an active contact with life about him. There were other advantages in this plan. It was of undoubted constitutionality; and it seemed to me to have the best chance of passing both Houses of the Congress most quickly. And speed was so essential.

Along with this plan for the Supreme Court itself, I included in my message on the judiciary many other recommendations for necessary reforms in the federal administration of justice, covering all the courts from the lowest to the highest. Practically all of these other recommendations have been adopted.

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I made one major mistake when I first presented the plan. I did not place enough emphasis upon the real mischief—the kind of decisions which, as a studied and continued policy, had been coming down from the Supreme Court. I soon corrected that mistake—in the speeches which I later made about the plan.

There followed a most bitter fight—in the Congress and out of the Congress. I had expected it, of course. That fight is now a matter of history. It is interesting to note, however, that during all the long struggle, and in spite of the abuse and vilification of the plan from many quarters, nobody of any importance or prestige could be found who was willing publicly to indorse or justify the trend of the recent decisions of the Court.

Time and again during the fight I made it clear that my chief concern was with the objective—namely, a modernized judiciary that would look at modern problems through modern glasses. The exact kind of legislative method to accomplish the objective was not important. I was willing to accept any method proposed which would accomplish that ultimate objective—constitutionally and quickly. I received, however, no reasonable guarantee or assurance that some other definite method would obtain congressional approval. Rumors of compromise were plenty; but never a definite agreement or offer. Furthermore, it was clear that the opponents of the plan suggested by me would never be able to agree among themselves on a plan of their own. And the best legislative advice which I could get from the congressional leaders was that my own suggestion would ultimately be approved.

That is the reason why no so-called compromise was ever submitted by me to the Congress; that is why it was necessary to persist in the plan originally proposed. Had any satisfactory compromise been definitely offered which would have been effective in attaining the objective, and which would have

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been capable of quick passage, it would have been accepted by me.

The Court Begins to Change

Events happened in the midst of the fight to becloud the chief issue. There was, first, the retirement of Justice Van Devanter in June, 1937. Some have said that it was strategically timed; but of course that is incapable of proof at the present time. There came, then, the death of Senator Robinson, the Senate Democratic leader of the members in favor of the plan.

But the startling fact which did more than anything else to bring about the defeat of the plan in the halls of the Congress was a clear-cut victory on the bench of the Court for the objectives of the fight. The Court yielded. The Court changed. The Court began to interpret the Constitution instead of torturing it. It was still the same Court, with the same justices. No new appointments had been made. And yet, beginning shortly after the message of February 5, 1937, what a change!

Whether this change came as a result of the election returns of 1936, whether it came as a result of my message, whether it came as a result of public discussion during the course of the fight, or a combination of all these—those are important questions for the later historians of the period. These need not be discussed here.

I feel convinced, however, that the change would never have come unless this frontal attack had been made upon the philosophy of the majority of the Court. That is why I regard the message of February 5, 1937, as one of the most important and significant events of my administration on the domestic scene. That is why I regard it as a turning point in our modern history. For unless the Court had changed, or unless some quick means had been found to give our democracy the power to work out its needs, there is grave doubt whether it could have survived the crisis which was bearing down upon it from within, to say nothing of the present 1941 threat

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against it from abroad.

The change began very soon after the message was delivered.

A Surprising About-Face

On March 29, 1937, the Court completely reversed itself on the constitutional power of a state to pass a minimum wage law for women. Just nine months after denying this power to the states, the Court unequivocally decided, five to four, to uphold the power; and, in so many words, it expressly overruled its earlier contrary decisions.[1]

A new interpretation was thus placed on the doctrine of freedom of contract under which the old minimum wage law and other social legislation had been struck down by the Supreme Court. It was no longer to be given its old unrealistic meaning. It was now to mean, in the language of the Court, "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people."

This remarkable about-face came because one justice decided to change his vote of nine months earlier. Here was one man—not elected by the people—who by a nod of the head could apparently nullify or uphold the will of the overwhelming majority of a nation of 130,000,000 people.

On the same day the Court sustained the new Railway Labor Act providing for collective bargaining and mediation in railroad labor disputes;[2] and upheld for collective bargaining and mediation in railroad labor disputes;[2] and upheld a revised Frazier-Lemke Act which was only slightly different from the one they had previously set aside.[3]

Next month, April, 1937, there came further evidence that the Court was in full retreat, as it sustained the constitutionality of the National Labor Relations Act. This statute was designed to insure the right of collective bargaining to labor unions, and to prevent unfair labor practices on the part of employers. It was, of course, applicable only to products which went into interstate commerce.

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Remember that in the earlier decisions involving child labor[4] and NRA and bituminous coal, these labor issues had all been considered purely local questions which had no relationship to interstate commerce, even though the products themselves later went into interstate commerce.

Three of the five cases under the National Labor Relations Act then before the Court involved employers who manufactured goods for the interstate market—steel,[5] trailers,[6] and men's clothing.[7]

In each of these cases the Court, five to four, was able to find that labor disputes and strikes and stoppages of work did directly affect interstate commerce in the products manufactured.

In vain did four of the justices exclaim in a dissenting opinion (pp. 76-78): "The Court, as we think, departs from well-established principles followed in Schechter Corp. vs U.S., 295 U.S. 495 [NRA decision] and Carter vs Carter Coal Co. 298 U.S. 238 [bituminous coal decision]. . . . Every consideration brought forward to uphold the Act before us was applicable to support the Acts held unconstitutional in causes decided within two years. . . . [The Act] puts into the hands of a Board power of control over purely local industry beyond anything heretofore deemed permissible."

The minority was right in its criticism of the majority. The old minority of 1935 and 1936 had become the majority of 1937—without a single new appointment of a justice! The Court had decided to give interstate commerce a meaning and a scope commensurate with the realities of the modern situation. It had decided that the Constitution meant what it said when it provided that the "Congress shall have power . . . to regulate commerce . . . among the several states."

It would be a little naïve to refuse to recognize some connection between these decisions and the Supreme Court fight.

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