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"What I Said Was 'Here Is Where I Cash In'": the Instrumental Role of Congressman Hatton Sumners in the Resolution of the 1937 Court-Packing Crisis, 54 UIC J. Marshall L. Rev. 379 (2021)

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"WHAT I SAID WAS 'HERE IS WHERE I CASH IN'": THE INSTRUMENTAL ROLE OF CONGRESSMAN HATTON SUMNERS IN THE RESOLUTION OF THE 1937 COURT-PACKING CRISIS

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I. THE CONGRESSMAN'S "CASH IN" UTTERANCE UPON DEPARTING THE WHITE HOUSE ON FEBRUARY 5, 1937

Frustrated and angered by the Supreme Court's invalidation of a dozen New Deal laws and programs as unconstitutional during the preceding two years, President Franklin D. Roosevelt (FDR) on February 5, 1937, summoned to the White House key leaders of Congress, including the Chair of the House Judiciary Committee, Representative Hatton W. Sumners of Dallas. The President announced a surprising legislative proposal — quickly tagged the "court-packing plan"[1] — to create on that bench a comfortable

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1. "Court-packing" was not a new term. See Edward B. Whitney, *Insular Decisions of December 1901*, 2 COLUM. L. REV. 79, 80 (1902) ("charges of court-packing [would] unsettle confidence in our form of government"). The term carries a whiff of opprobrium. *See, e.g.*, LAWRENCE M. FRIEDMAN, AMERICAN

majority of votes inclined to sustain the New Deal's laws and programs against ongoing constitutionality and related court challenges by businesses and individuals in cases filed in the federal courts. FDR took no questions and adjourned the meeting.[2]

Later in the year, after Roosevelt had lost his gambit, journalists Joseph Alsop and Turner Catledge published in the September 18th *Saturday Evening Post* an article titled "The 168 Days: The Story Behind the Story of the Supreme Court Fight," in which, under a subheading of "No. 1 Opposition Man," they reported that, immediately after the announcement, Vice President John Nance Garner, House Majority Leader Sam Rayburn, and Sumners returned in a taxi to the Capitol together:

> After they had left the White House, after they had turned down past the Treasury, Hatton Sumners spoke to the men with him.
>
> "Boys," he said, "*here's where I cash in my chips*."
>
> It was the first announcement of opposition to the plan . . . .[3]

The journalists slightly misquoted Sumners's pithy remark, and historians and legal scholars have almost uniformly perpetuated the mistake, countless times, to the present day.[4] They have, moreover, misunderstood it.

Thomas B. Love was a Texas Democratic politician who ran the next year against Sumners.[5] After reading that magazine article, he wrote Sumners on October 6th asking whether, back on February 5th, Sumners had uttered the eight words as Alsop and Catledge reported, "Boys, here's where I cash in my chips," and demanding

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LAW IN THE 20TH CENTURY 159 (2008) ("the infamous court packing plan . . . unleashed in 1937"). The legal definition is FDR's "unsuccessful proposal . . . to increase the number of U.S. Supreme Court justices from nine to fifteen." Black's Law Dictionary, court packing plan, at 456 (Bryan A. Garner ed., 11th ed. 2019).

2. JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 293 (2010) [hereinafter, SHESOL, SUPREME POWER] ("Roosevelt promptly excused himself").

3. Joseph Alsop & Turner Catledge, *The 168 Days: The Story Behind the Story of the Supreme Court Fight* [Part 1], SATURDAY EVENING POST, Sept. 18, 1937, at 8, 94 (emphasis added). Two more excerpts of the forthcoming book appeared in the magazine in the following weeks and the book was published the next year. JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 67-68 (1938) [hereinafter ALSOP & CATLEDGE, 168 DAYS].

4. This eight-word version "'Boys, here's where I cash in my chips,' appears in almost every account of the Court fight," G.M. Gressley, *Joseph C. O'Mahoney, FDR, and the Supreme Court*, 40 PAC. HIST. REV. 183, 190 (1971), and has become "part of congressional lore." *Mary Catherine Moore*, *Sumners, Hatton William* (1875-1962), TEXAS STATE HISTORICAL ASS'N, www.tshaonline.org/handbook/online/articles/fsu04 [perma.cc/J2C8-PFBV]. *See, e.g.*, PAUL D. MORENO, THE AMERICAN STATE FROM THE CIVIL WAR TO THE NEW DEAL: THE TWILIGHT OF CONSTITUTIONALISM AND THE TRIUMPH OF PROGRESSIVISM 278, 303 (2013); KERMIT L. HALL, THE LEAST DANGEROUS BRANCH: SEPARATION OF POWERS AND COURT-PACKING 353 (2000).

5. *Seeks Seat in Congress*, DALL. MORNING NEWS, June 19, 1938, at 1.

"what was the meaning of this statement?"[6] On October 23rd, Sumners responded:

> You inquire whether . . . I said "Boys, here's where I cash in my chips." What I said was "Here's where I cash in." You ask for an explanation, and briefly this is it . . . [M]y reaction was that the President must have been imposed on. I determined to go in and to do what I could to help straighten things out and not to count the cost to myself . . . as I saw the situation somebody had to go in and try to be helpful about it. As I further saw it, the person who did go in would probably not come out politically alive. I said "cash in" and I meant "cash in" as we know that expression in the Southwest . . . I do not have the slightest doubt that when we get a bit less controversial that it will be generally agreed that I have been able in this matter to render a service of value to the President, the party and the country, especially when considered in connection with the other legislation which I sponsored.[7]

By reprising his February 5th remark as six words, rather than eight — that is, "Here is where I cash in," leaving off "my chips" and then repeating the catchphrase "cash in" twice more in the letter — the Congressman emphasized that his February 5th statement had not contained the words "my chips."

More importantly, in this generally overlooked apologia, written soon after the crisis had ended, Sumners explained that "the meaning" of "cash in" was contrary to what Love obviously supposed. Accurately, if obliquely, Sumners's letter explained both for his opponent and for posterity the role he had played not simply in the defeat of the plan but more significantly in the solution of the litigation problem — the unconstitutionality rulings and two thousand injunctions against federal officials' implementation of New Deal programs — that had motivated the President to make his drastic proposal in the first place. Although largely unrecognized, Sumners played, this article argues, an instrumental role, and he deserves credit for the "legislation [he] sponsored," two additions to the Judicial Code that solved the problem and also constituted permanent contributions to the federal judicial system.

The frame of reference is that of legal history, employing lenses

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6. Thomas B. Love to Hatton W. Sumners, Oct. 6, 1937, Sumners Papers. In these footnotes, Sumners's documents and correspondence, which reside in the collection named "Hatton W. Sumners Papers" in the archive of the Dallas Historical Society at its headquarters, the Hall of State, in Dallas, Texas, is called the "Sumners Papers," and Sumners is referred to as "HWS." Correspondence to and from HWS in that archive is therefore cited as: "[name] to HWS, [or vice versa], [date], Sumners Papers." The author personally reviewed and copied all of those documents of the Sumners Papers that are cited in this article. Copies of all archival documents cited in these footnotes from the Sumners Papers and from other archives are in the possession of the author and of the UIC John Marshall Law Review.

7. HWS to Thomas B. Love, Oct. 25, 1937, Sumners Papers [hereinafter HWS to Love] (emphasis added).

of legal biography, legislative history, and political history qua legal history to refract and understand Sumners's written and spoken words and his actions as a legislator throughout the February-August 1937 period of the court-packing crisis.[8] With those tools, I determine his role and assess the results of his work including specific changes in the law and its functioning in the matters of a president's appointment of justices to the Supreme Court as one means of influencing its jurisprudence[9] and also of the pre-Supreme Court phases of the process of adjudicating constitutionality issues. Then the article assesses this lawyer-legislator's place in the 1937 crisis and his significance for the present.

First, as three legal historians recently observed, legal biography is "scholarship fit for the twenty-first century"[10] because a "natural nosiness" about others' lives attracts readers to legal, as it does to other types of, biography.[11] Then "legal biography creates an access point for scholars in other disciplines and for ordinary people into the life and development of the law."[12] As legal historian David Sugarman puts it, "legal life writing, broadly conceived, offers new ways of advancing legal history and socio-legal scholarship, and of encouraging inter-disciplinary dialogue between them, and also with other fields and audiences."[13] Second, legislative history, the down-in-the-weeds tracing of bill filings, committee proceedings and reports, and statements and votes by the members of Congress, a tradecraft taught in law schools' legal-research courses but generally considered unimportant today with "textualism" regnant in courts' interpretative endeavors, is quite helpful here.[14] It

8. Both contemporary commentators and scholars uniformly speak of the February through July or August period of controversy as a "*crisis*," justifiably based on its definition. *See* HARRY RITTER, DICTIONARY OF CONCEPTS IN HISTORY, *crisis*, at 79 (1986) ("A short period of decisive challenge, a turning point that determines the survival of a person, institution, or condition, or its disappearance").

9. Other methods include, of course, the appointment and confirmation process for federal judges, stripping or revising the legislative grants of jurisdiction, and impeachment of judges. *See* Terence J. Lau, *Judicial Independence: A Call for Reform*, 9 NEV. L. J. 79 (2008).

10. Victoria Barnes, Catharine MacMillan & Stefan Vogenauer, On Legal Biography, 41 J. Legal Hist. 115, 116 (2020) [hereinafter Barnes et al, Legal Biography].

11. Laura Kalman, The Power of Biography, 23 L. & Soc. Inquiry 479, 482 (1998); Paul Murray Kendall, The Art of Biography 4 (1965) ("The biographer explores the cosmos of a single being. History deals in generalizations about a time . . .").

12. Barnes et al, *Legal Biography*, *supra* note 9, at 116.

13. David Sugarman, *From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-legal Scholarship*, 42 J. L. & SOC'Y 7, 11 (2015).

14. "The term 'legislative history' typically refers to a fixed universe of statements and documents generated during the legislative process in Congress, consisting of committee reports and of statements made in hearings, committee markups, and on the floor of each chamber." Jesse M. Cross,

establishes an authoritative timeline and important details of agency in a story that hinges on revision of positive law in order to solve the New Deal's litigation problem and to assuage the public's consternation over the President's attempt to forge his own solution to that problem. Third, within the many "law & ____" dyads of legal-historical analysis that Catherine Fisk has well described,[15] the concept of "law & political history" is useful because it "locat[es] change in the functioning of law" including "change[s] in [certain] mechanisms . . . through which governance means are given effect."[16]

Because scholars have overlooked Sumners, it is generally not known that the relatively modest, low-profile Congressman viewed himself as the right man to, indeed, the only political actor who could, rescue both the Court and the President from the court-packing crisis — and that he did so by means of two targeted bills he had already filed. One called the Retirement Act quickly induced the vacating of the first seat on the Court, that of a sturdy opponent of the New Deal, Justice Willis Van Devanter.[17] That act, which has received scholarly focus only quite recently in an article by historian Judge Glock, assured the vindication of the New Deal by quickly procuring one, and soon more, vacancies on the bench for the President to fill.[18] Sumners's second bill, sometimes called the

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Legislative History in the Modern Congress, 57 HARV. J. LEGIS. 91, 94 n.8 (2020), citing WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 981-1021 (4th ed. 2007). A traditional appreciation of the value of legislative history states:

> an historian . . . would never . . . suggest that one could understand a major piece of legislation merely by reading its provisions. One needs legislative history, a knowledge of the political pressures at work on the bill, the effect that public opinion had in moving the process forward, what pressure groups supported and opposed the bill, and a myriad of other considerations.

Melvin I. Urofsky, *Beyond the Bottom Line: The Value of Judicial Biography*, 1998 J. SUP. CT. HIST. 143, 148 (1998). But "[c]ourts now generally appear less willing to credit legislative history, whatever the source." John M. De Figueiredo & Edward H. Stiglitz, *Signing Statements and Presidentializing Legislative History*, 69 ADMIN. L. REV. 841, 866 (2017). *See also* James J. Brundey & Corey Ditslear, *The Decline and Fall of Legislative History?,* 89 JUDICATURE 220 (2005-2006). On today's textualism, *see generally*, ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

15. Catherine L. Fisk, &: Law __ *Society in Historical Legal Research*, in MARKUS D. DUBBER & CHRISTOPHER TOMLINS, THE OXFORD HANDBOOK OF LEGAL HISTORY 479 et seq. (2018) [hereinafter DUBBER & TOMLINS].

16. Roy Kreitner, *Legal History as Political History*, in DUBBER & TOMLINS, *supra* note 15 at 139.

17. Mark Tushnet, *Willis Van Devanter*: *The Person*, 45 J. SUP. CT. HIST. 308 (2020).

18. Judge Glock, *Unpacking the Supreme Court: Judicial Retirement,*

Intervention Bill, which has been almost totally ignored, served to help prevent any further invalidations of New Deal laws and programs in a different way. It protected against or limited any unconstitutionality holdings for the legislative programs propounded by and enacted for Roosevelt, and for any later president, by involving the Justice Department at the earliest possible stage in federal-court cases between private litigants that generate such issues and also by raising the hurdle for litigants to obtain injunctions against federal officials' enforcement of a challenged law.

Sumners's role in the resolution of the crisis deserves consideration and appreciation after eight decades of neglect. His relatively simple legislative accomplishments bookend the period, the Retirement Act residing at the front end and the Intervention Act emplaced at the tail of the controversy, and have importance for more than just reinforcing the consensus of historians that FDR made a significant mistake in seeking to pack the Supreme Court.[19] Rather, the two acts evidence Sumners's distinctive and causal agency, foresightedly utilizing the legislative process to resolve the court-packing crisis of the Roosevelt presidency; moreover, his two enactments have served as permanent improvements to the judicial functioning of the federal government to the present day.[20]

II. HATTON W. SUMNERS'S LIFE AND CONGRESSIONAL CAREER

Although lacking a full biography and not well known today, Hatton W. Sumners (1875-1962) was a Congressman of national consequence during a legislative career spanning four of the first five decades of the 20th century.[21] He was a complex figure. Born

Judicial Independence, and the Road to the 1937 Court Battle, 106 J. AMER. HIST. 47 (2019) [hereinafter Glock, *Unpacking*].

19. A representative assessment: "In failing to get [the plan] through Congress, [FDR] cost himself the invincibility that had seemed to surround him since March 1933 and that the election of 1936 had only intensified . . . the court scheme . . . ruined his chances of expanding the New Deal." H.W. BRANDS, TRAITOR TO HIS CLASS: THE PRIVILEGED LIFE AND RADICAL PRESIDENCY OF FRANKLIN DELANO ROOSEVELT at 474-75 (2008) [hereinafter BRANDS, TRAITOR TO HIS CLASS].

20. *See* Arthur S. Miller & Jeffrey H. Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L.J. 51, 57 (1979) ("Can there be any doubt that Congress, by enacting H.R. 2260, intended to provide a means whereby the public's (the government's) interest could be defended in private litigation? The answer is clear beyond peradventure . . . . No longer must the Government stand idly by, a helpless spectator, while the Acts of Congress are stricken down by the Courts.").

21. *See* Mary Catherine Monroe, *A Day in July—Hatton W. Sumners and the Court Reorganization Plan of 1937* (M.A. thesis, Univ. of Texas at Arlington, 1973) [hereinafter Monroe, *A Day in July*]. A good but very short account is JAN ONOFRIO, *Hatton W. Sumners*, TENNESSEE BIOGRAPHICAL DICTIONARY 294

near Fayetteville, Lincoln County, Tennessee, he was the middle of three children of William A. and Anna Walker Sumners.[22] His older brother Tully became a physician and his younger sister Kate a homemaker and Hatton's lifelong confidante.[23] Their father had served as an officer in the Confederate Army, and by the 1880s his parents owned and operated a coeducational school in rural Tennessee.[24] The family moved to Garland, Texas in 1893.[25]

Sumners's pre-legal education included door-to-door book sales as a teenager in Tennessee before the move; a final year of schooling at Garland College, a private institution that served as the town's high school, in which he excelled in oratory[26]; and, last, a job in a relative's dry goods and grocery store in Garland.[27] Then he moved the short distance to Dallas and read law from 1895 to 1896 in the office of Alfred P. Wozencraft, a prominent lawyer who served as the City Attorney.[28] Sumners's notebook of his law-office apprenticeship is filled with references to natural law, the common law, and, at the very end, the U.S. Constitution.[29]

In 1897, he gained admission to the Texas bar and quickly organized a Democratic Party club for young businessmen and

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(2000) [hereinafter Onofrio, Sumners]. Sumners devised his estate to the Hatton W. Sumners Foundation which provides scholarships and sponsors law-related education. On its website is a useful, but episodic and not impartial biographical sketch by Whitehurst. *See* Elmore Whitehurst. *Hatton W. Sumners: His Life and Public Service: An Extended Biographical Sketch 7* (n.d.), www.hattonsumners.org/library/public_service.pdf [perma.cc/8W3H-XULG] [hereinafter Whitehurst, *Sumners*]; *see also* Elmore Whitehurst, *A Texas Portrait: Hatton W. Sumners*, 39 TEX. B.J. 331 (1976). A partial political biography of Sumners, ending ten years before he left Congress, is a dissertation. RON C. LOVE, CONGRESSMAN HATTON W. SUMNERS OF DALLAS, TEXAS: HIS LIFE AND CONGRESSIONAL CAREER, 1875-1937 (Tex. Christian Univ. dissertation 1990).

22. Whitehurst, *Sumners*, *supra* note 21, at 1; *Father of Former Teacher Died*, Sumners Papers (undated obituary of Dr. Tully Sumners, brother of HWS); HWS to Kate Sumners Davis, and Mrs. Davis to HWS, multiple letters over decades, Sumners Papers (Mrs. Davis had no children; she and HWS corresponded frequently on family, personal, and political matters).

23. *Id.*

24. *Male and Female Academy, Boons Hill, Lincoln County, Tenn.*, July 17, 1876, copy in the file of the author (school brochure showing "W.A. Sumners, Principal" and "Mrs. A.E. Sumners, Preceptress").

25. Whitehurst, *Sumners*, *supra* note 21, at 1.

26. Whitehurst, *Sumners*, *supra* note 21 at 2.

27. *Id.*

28. *Id.*; DARWIN PAYNE, AS OLD AS DALLAS ITSELF: A HISTORY OF THE LAWYERS OF DALLAS, THE DALLAS BAR ASSOCIATIONS, AND THE CITY THEY HELPED BUILD (1999), at 91-92.

29. Sumners's notebook ends with his remarks about the U.S. Constitution including "Equal rights for all" but also urging himself to "memorize" its specific limitations on states' power set forth in Article I, § 10. HWS, *Study of the Law*, Sumners Papers.

professionals.[30] In 1900, voters elected him Dallas County Attorney, ousted him two years later in an election he contested as fraudulent, and then reelected him for one more two-year term.[31] He prosecuted saloons and gambling activities in Dallas, earning admiration from the progressive and prohibitionist Democrats in the city.[32] Then followed a period of private practice during which he served high-profile causes and individuals such as the students' association of what is now Texas A&M University in obtaining the dismissal of the institution's president,[33] Texas cotton growers in disputing freight rates before the Texas Railroad Commission,[34] and the famous cattleman Charles Goodnight who needed a financial restructuring. Additionally, he wrote essays as a correspondent for *Farm and Home* magazine, whose Dallas-based publisher, Frank Holland, sent him on a tour of Europe in 1907 to learn about agricultural-cooperative marketing.[35]

With mentoring and support from Holland, Sumners ran in 1912 as a Democratic Party candidate and won one of Texas' two at-large seats in the U.S. House of Representatives.[36] Two years later, the voters elected him in Dallas' Fifth Congressional District, the seat he held until retirement in 1947.[37] Within three terms, Sumners gained membership on the House's Judiciary Committee.[38] While he enacted little legislation, indeed introducing few substantive bills before the New Deal,[39] he secured a modicum of federal benefits and projects for Dallas such as in his first term securing its designation as a port of entry and later a new federal penitentiary in a Dallas suburb.[40]

During the years preceding the Great Depression he read works of and about law at the Library of Congress and steadily built

30. Whitehurst, *Sumners*, *supra* note 21, at 2.

31. *Id*. at 2-3; WRIT IS DISSOLVED, DALL. MORNING NEWS, Mar. 31, 1902, at 12; *Mr. Sumners Files Bond*, DALL. MORNING NEWS, Nov. 20, 1904, at 27.

32. Whitehurst, *Sumners*, *supra* note 21, at 2-3.

33. PAUL D. CASEY, THE HISTORY OF THE A. & M. COLLEGE TROUBLE 1908 at 101 *passim* (containing a verbatim transcript of Sumners's examination of witnesses in the hearing before the college's board of directors).

34. *Sumners's Employer in the Cotton Rates Reduction Case*, HOUS. POST, FEB. 3, 1910, at 4.

35. HWS, untitled journal of his European tour, Sumners Papers.

36. HWS, *Hatton W. Sumners: Candidate for Congressman at Large* (Subject to Democratic Primary), campaign poster, Sumners Papers; Whitehurst, *Sumners, supra* note 21, at 3.

37. Whitehurst, *Sumners*, *supra* note 21, at 4.

38. *Id*.

39. A statute he sponsored in 1928 still useful today — as demonstrated in the January 6, 2021 congressional proceeding to confirm the 2020 presidential electors' vote — is his amendment of the Electoral Count Act to simplify the procedures by which the states submit their presidential electors' votes to the President of the Senate for counting. H.R. 7373, 70th Cong., 45 Stat. 945, Pub. L. No. 569 (codified at 3 U.S.C. § 7a (1926, Supp. II, 1928)).

40. Whitehurst, *Sumners, supra* note 21, at 4.

a reputation as a lawyer-legislator.[41] By 1924, he ascended to the position of ranking minority member of the House's Committee on the Judiciary and served as its chair from 1931 until his 1947 retirement to Dallas.[42] He impressed the Supreme Court's justices with his legislative work on the "Judges' Bill" that became the Judiciary Act of 1925. During the years preceding and during the Great Depression, he experienced frustration but gained notice for handling the Senate trials of three impeached federal district judges.[43] He appeared as amicus curiae on behalf of the House in the Supreme Court on four occasions.[44] In the Twenties, Chief Justice William Howard Taft called him "the best lawyer in Congress" and dropped in on him at his Capitol Hill office, unannounced, from time to time.[45]

In 1934, at the urging of Roosevelt, Sumners accepted the invitation of the Philippine Islands' territorial government to assist in the preparation of a constitution to become effective upon independence under the Tydings Act.[46] He modeled his draft on the U.S. Constitution, tracking the language of its provisions but rearranging their order.[47] Reflecting his frustration with the American impeachment process, one of his innovations provided that Philippine federal judges would serve for life, as in the U.S. Constitution "during good behavior," but such "behavior" would be a justiciable issue.[48] The Philippine Constitutional Convention worked from and modified Sumners's draft to promulgate the Constitution of 1935 that the Islands' electorate adopted.[49]

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41. Raymond Moley & Celeste Jedel, *The Gentleman Who Does Not Yield: Hatton Sumners, Dallas Diogenes*, SATURDAY EVENING POST, May 10, 1941, 100 (1940) [hereafter Moley & Jedel]; Whitehurst, *Sumners*, *supra* note 21, at 4.

42. BEN R. GUTTERY, REPRESENTING TEXAS: A COMPREHENSIVE HISTORY U.S. AND CONFEDERATE SENATORS AND REPRESENTATIVES FROM TEXAS (1988) AT 144-45 [hereinafter GUTTERY, REPRESENTING TEXAS].

43. Hatton W. Sumners, *In Place of Impeachment—Trial by Judges*, 3 TEX.. B.J. 480 (1940); Whitehurst, *Sumners, supra* note 21, at 4-5.

44. An unattributed, undated, typed document in the Sumners Papers identifies those decisions as the Pocket Veto Case, 279 U.S. 655 (1929); Jurney v. McCracken, 294 U.S. 125 (1935); Edwards v. U.S., 286 U.S. 482 (1932); and the subsequently discussed Bekins v. U.S. case, notes 196 & 246 *infra* and text accompanying.

45. Moley & Jedel, *supra* note 41.

46. FDR to HWS, June 19, 1934, Sumners Papers.

47. *Cf.* U.S. CONST. with *Constitution of the Commonwealth of the Philippine Islands by Hatton W. Sumners, Chairman on Judiciary, U.S. House of Representatives, Washington, D.C.*, July 4, 1934, typescript, Sumners Papers [hereinafter, HWS Draft of Philippine Constitution].

48. *Cf.* U.S. CONST., art. III, § 1 with HWS Draft of Philippine Constitution, art. "The Judicial," 1st ¶, at 15.

49. HWS Draft of Philippine Constitution, *supra* note 47; *Dallas Man's Aid Asked in Drafting Filipinos' Charter*, DALL. MORNING NEWS, May 28, 1934, at 3; *Sumners Will Leave for Dallas on Monday*, DALL. MORNING NEWS, July 9,

In 1939, a Life magazine poll rated Sumners most highly for integrity and second in overall ability among all Representatives in the House.[50] A "confirmed bachelor" with "a physical constitution that was never robust," Sumners was devoted to his work, somewhat old fashioned and careless in his dress, and parsimonious.[51] One woman who lobbied him in the late thirties described him as "an old gentleman who'd been in the House forever and a day . . . the epitome of the Southern conservative [who] even wore a frock coat. He looked like a relic of the past."[52] A 1937 audio-video recording of Sumners in front of the Capitol, speaking in broad generalities about the court-packing crisis, discloses an old-fashioned public-speaking style.[53]

Sumners asserted that his politics were undergirded by his study and interpretation of natural law and Western legal history back to what he considered the source, "the Germanic tribes."[54] When he retired to Dallas in 1947, he took up residence in a dormitory of the law school of Southern Methodist University and worked in and for its programs of legal studies.[55] Ten years later he

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1934, at 6 (Sumners's "suggested Constitution . . . has been sent to Manila for study"). A blackline of the final version against his draft shows many core elements of his draft in the text promulgated by the Philippine convention and approved by its electorate on May 14, 1935. Conrado Benitez, *The New Philippine Constitution*, 8 PAC. AFFAIRS 428 (1935); *Constitution of the Philippines*, 17 INT'L CONCILIATION 137 (1936) (text of the document as adopted).

50. *Washington Correspondents Name Ablest in Life Poll*, LIFE MAG., Mar. 20, 1939, at 13, 15.

51. Senator Frederick Van Nuys, *The Work of the Senate Judiciary Committee*, 4 FED. BAR ASS'N J. 338 (1942) ("Hatton Sumners is a confirmed bachelor and has had his own sweet, imperial way domestically, politically, socially and financially all his life."). The Sumners Papers and newspapers indicate his frequent illnesses and indispositions along with at least two surgeries. He also mentioned a recurrent problem with "nerves." Sumners worked very hard, complaining to a Dallas friend that in 1937 "I had three days' vacation." HWS to W.R. Harris, July 3, 1938, Sumners Papers. Drew Pearson reported that Sumners had the "habit of not taking off his pajamas during the daytime, if he was going to spend the coming night away from home." Drew Pearson, *Washington Merry Go Round*, DALL. MORNING NEWS, Mar. 13, 1946, at 2. "His stinginess was legendary on Capitol Hill," including often sleeping in his office, never paying a fare if someone else was in the taxi, and occasionally eating from others' — including Sam Rayburn's — plates in the Congressional cafeteria. Anthony Champagne, *Hatton Sumners and the 1937 Court-Packing Plan*, 26 E. TEX. HIST. J. 46, 47 (1988) [hereinafter Champagne, *Sumners and the Court-Packing Plan*].

52. VIRGINIA FOSTER DURR, OUTSIDE THE MAGIC CIRCLE: THE AUTOBIOGRAPHY OF VIRGINIA FOSTER DURR (1985) at 128.

53. CriticalPast, *Texas Congressman,Hatton W. Sumners,delivers speech opposed to FDR's Court-Packin...HD Stock Footage*, YOUTUBE (Jun. 17, 2014) https://www.youtube.com/watch?v=CsYJm1V6xHU [perma.cc/B2Z6-YWNG].

54. *See, e.g.*, Hatton W. Sumners, *Are We Observing the Natural Laws Which Govern Governments*, 55 AM. BAR ASS'N, ANNUAL REPORT 300 (1932).

55. GUTTERY, REPRESENTING TEXAS, HATTON WILLIAM SUMNERS, *supra* note 42, at 145; *Hatton Summers to Direct Research at Legal Center*, DALL.

published his only book, a rambling discursus explaining his historical understandings of the Constitution and of law, arguing against dangers he perceived in the modern administrative state, and pleading for citizen involvement in politics.[56]

It was 1928 when Sumners first encountered Franklin Roosevelt.[57] After the Democratic Party candidate Al Smith lost the presidential election, FDR won election as Governor of New York and immediately reached out to Sumners, inviting him to the forthcoming gubernatorial inauguration and urging him to participate in the national Democratic Party organization.[58] The Congressman responded amiably but declined the invitation to Albany.[59] A handwritten notation at the top of Sumners's response letter in FDR's archival file reads: "Successful Congressman."[60] Once FDR won the presidency in 1932, it was Sumners who contacted the President-Elect to offer his ideas and assistance with legislation to address the Depression.[61]

Throughout his career, Sumners freely expressed racist views of African Americans in speeches and legislative work.[62] By 1922, Sumners acquired a national reputation for supporting the

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MORNING NEWS, Mar. 29, 1949, at 1.

56. HATTON W. SUMNERS, THE PRIVATE CITIZEN AND HIS DEMOCRACY (1959).

57. Reliable biographies of FDR include BRANDS, TRAITOR TO HIS CLASS, *supra* note 19; ROBERT DALLEK, FRANKLIN D. ROOSEVELT: A POLITICAL LIFE (2017); JEAN EDWARD SMITH, FDR (2007); KENNETH S. DAVIS, FDR: THE NEW DEAL YEARS 1933-1937 (1986); JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX, Vol. I (1956) [hereinafter BURNS, THE LION].

58. HWS to FDR, Dec. 18, 1928, Dem. Nat'l Comm., 1932 Texas Pre Convention Corr., Franklin D. Roosevelt Presidential Library & Museum, Hyde Park, N.Y., National Archives and Records Administration. In these footnotes, Roosevelt's archive is called the FDR Library.

59. *Id*.

60. *Id*.

61. HWS to FDR, Nov. 30, 1932, FDR Library. The President replied with "appreciation" for "your very important suggestion." FDR to HWS, Dec. 28, 1932, FDR Library.

62. In this article, "the words 'race,' 'racism,' and 'race relations' are . . . used as shorthand for specific historical legacies that have nothing to do with biological determinism, and everything to do with power relations." JACQUELINE JONES, A DREADFUL DECEIT: THE MYTH OF RACE FROM THE COLONIAL ERA TO OBAMA'S AMERICA xvii (2013). The term "racial thinking" is also used to mean "cognitive and emotional" prejudice; the term is interchangeable with "racial discrimination" which is "the exercise of power to create and reinforce social inequality between racially defined groups." Emilio Zamora, *Connecting Causes, Alonso S. Perales, Hemispheric Universal and Mexican Rights in the United States*, in MICHAEL A. OLIVAS, IN DEFENSE OF MY PEOPLE: ALONSO S. PERALES AND THE DEVELOPMENT OF MEXICAN-AMERICAN PUBLIC INTELLECTUALS 287, 311 n.3 (2013); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (calling for recognition and "reckon[ing] with" racism.).

maintenance of white supremacy by leading the opposition in the House to bills repeatedly introduced, to make lynching a federal crime and by opposing immigration.[63] Perpetrated mainly but not exclusively in the South, lynchings had a long and sordid history.[64] After Representative Leonidas C. Dyer of St. Louis introduced another of his bills in 1921 to make lynching a federal crime, Sumners filed an oppositional minority report as a House Judiciary Committee member; and in January 1922, he repulsively detailed his racial thinking in a peroration on the House floor that he had printed and sent, sometimes in stacks of five and ten, to recipients across the South and the West.[65] That year the second Ku Klux Klan took over Dallas County,[66] and in June, Sumners was surprised to learn from constituents that a Klan candidate opposed his re-election. Sumners insisted he was "not a member of the organization and [had] no direct or indirect affiliation with it" but "the same is true with respect to the anti-[KKK] organization."[67] He sent an

63. *See, e.g.*, *Foreign Born Cause of Labor Troubles*, DALL. MORNING NEWS, Nov. 29, 1919 at 4.

64. *See* CHRISTOPHER WALDREP, LYNCHING IN AMERICA: A HISTORY IN DOCUMENTS (2006); LYNCHING BEYOND DIXIE: AMERICAN MOB VIOLENCE OUTSIDE THE SOUTH (Michael J. Pfeifer ed., 2013).

65. An excerpt:

> I want to challenge the slanders which have been heaped upon the South by a lot of these hired Negro agitators and white negroettes . . . . Away back yonder . . . the men from New England . . . brought their shiploads of slaves from the jungles of Africa and sold them to my people. It was a tragedy, in so far as the white people were concerned . . . . but it was not a tragedy in so far as the black man was concerned. . . .
>
> That day never will come . . . when the black man and the white man will stand upon a plane of social equality in this country. . . .
>
> Now, I will be very candid . . . . The big difficulty is when the crime of rape is committed against a white woman. . . . you do not know where the beast is among them. . . . They say that lynching is an American institution. Well, it is. . . .

HWS, *speech*, 62 CONG. REC.1774-1786 (Jan. 26, 1922). That speech has been quoted by historians of lynching and of civil rights. *See, e.g.*, MICHAEL PHILLIPS, WHITE METROPOLIS: RACE, ETHNICITY, AND RELIGION IN DALLAS, 1841-2001, at 80 (2006) (quoting the speech and characterizing Sumners in the early 1920s as a "Klan sympathizer"); DARWIN PAYNE, BIG D: TRIUMPHS AND TROUBLES OF AN AMERICAN SUPERCITY IN THE 20TH CENTURY 77 (1994) (also categorizing Sumners as a "Klan sympathizer"). One of the few historians to delve into Sumners's career puts it this way: "his southern heritage may have prevented him from seeing another point of view regarding anti-lynching laws. He was not alone [among] his Texas colleagues; only one, San Antonio congressman Maury Maverick, supported anti-lynching legislation in the 1930's." Monroe, *A Day in July*, *supra* note 21 at 41.

66. LINDA GORDON, THE SECOND COMING OF THE KKK: THE KU KLUX KLAN OF THE 1920S AND THE AMERICAN POLITICAL TRADITION (2017); Kevin G. Partz, *Political Turmoil in Dallas*: *The Electoral Whipping of the Dallas County Citizens League by the Ku Klux Klan*, 119 SW. HIST. Q. 148 (2015).

67. HWS to Hiram A. Lively, June 17, 1922, Sumners Papers. Dr. J.M.

emissary to the Klan's Dallas leader, and the opponent received very few votes in the race while all other KKK candidates swept to victory.[68]

Sumners was a classic Southern Democratic Congressman, intent on protecting the region's system of segregation and racial oppression, always arguing for "states' rights," widely understood in the South as code for protecting Jim Crow,[69] and distrusting the federal government. However, the predicament of Texan and Southern farmers and his urban constituents in the maw of the Great Depression led Sumners along with most Texas congressmen to look to the New Deal for help.[70] He exemplifies the thesis posited by political scientist and historian Ira Katznelson that Southern Democratic members of Congress entered into an implicit "compact" with Roosevelt by which they were relieved of fear or concern about the federal government seeking to undo the systematic oppression of persons of color in the South in exchange for the legislators' active participation in the New Deal.[71] So freed, the Southerners collaborated "giddily" with the White House "to achieve their own long-standing desire to regulate and control the market" and

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Jones, whom Sumners acknowledged to be "a very good friend of mine," directly requested him to join: "Am enclosing blank which is self-explanatory" — the attached printed form was for membership in the KKK — "[because] we know you to be a Klansman at heart." The letter warned that a Klansman "is in the field against you and working hard" but concluded that "with this armament [KKK membership] your election is assured." J.M. Jones to HWS, June 15, 1922, Sumners Papers.

68. Sumners conferred about the request with several Dallas confidants, and then he asked one, lawyer William H. Harris, to "get in touch" with Jones and "with your high class diplomacy handle the situation." HWS to William H. Harris, June 23, 1922, Sumners Papers. *See Returns Canvassed by Democratic Conventions*, DALL. MORNING NEWS, Aug. 27, 1922, at 2 (Sumners: 7,579 votes; his opponent: 1,119).

69. *See* JERROLD M PACKARD, AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW 130 (2002) ("the guise of 'states rights'"); STEPHEN D. CLASSEN, WATCHING JIM CROW: THE STRUGGLE OVER MISSISSIPPI TV, 1955-1969 112 (2004) ("direct address of racial struggle was deflected thorough the use of code terms such as 'states rights'").

70. "Sam Rayburn, M[ar]vin Jones, James Buchanan, and Hatton Sumners were among the influential congressmen who chaired key committees and pushed New Deal legislation forward . . . . Senators Tom Connally and Morris Sheppard exerted similar influence in the Senate, with their friend Garner presiding over the Senate." PATRICK COX, THE FIRST TEXAS NEWS BARONS 105 (2005); *see also* Ron Biles, *The New Deal in Dallas*, 95 SW. HIST. Q. 1, 7-8, 15 (1991); Dorothy De Moss, *Resourcefulness in the Financial Capital: Dallas, 1929-1933*, in TEXAS CITIES IN THE GREAT DEPRESSION at 117 (1973) [hereinafter De Moss, *Dallas, 1929-1933*].

71. IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 158, 160, 162 (2013) [hereinafter KATZNELSON, FEAR ITSELF]; *see also* K. Heineman, *Asserting States' Rights, Demanding Federal Assistance: Texas Democrats in the Era of the New Deal*, 28 J. POLICY HIST. 342 (2016).

otherwise to foster "liberal democratic government."[72]

Sumners collaborated and cooperated with the White House on many New Deal bills and consistently assisted the administration in legislative matters in the House with the exception of certain White House-proposed criminal legislation that he regarded as poorly drafted or too invasive of the traditional sphere of state criminal law.[73] To a constituent in mid-1938, Sumners wrote: "I make no claims for myself, but insofar as the Congress is concerned, from the beginning of the administration until now I doubt that any President in the history of the country has been more consistently supported."[74] A contemporaneous *Dallas Morning News* article found that of thirteen key New Deal legislative measures, Sumners supported all but one, and he ended up voting for that one as well on final passage.[75]

A corollary to Katznelson's thesis is that in 1937 most Southerners in Congress fought the court-packing plan, despite their deal with the President, because they feared that the increase in executive power the plan represented might be marshaled against Jim Crow.[76] Sumners's legislative work to resolve the court-packing crisis is, however, an exception or qualification to that corollary. This congressman's racism persisted throughout the Roosevelt presidency but did not prevent him from formulating and obtaining enactment of legislation that solved the New Deal's litigation problem for the President.

Because Sumners chaired the House Judiciary Committee, FDR included him and his counterpart Henry F. Ashurst, Chairman of the Senate's Judiciary Committee, in the February 5th White House gathering to announce the court-packing plan. As Sumners's former secretary, legislative assistant, and lifelong associate,

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72. *Id*.

73. Champagne, *Sumners and the Court-Packing Plan*, *supra* note 51, at 47. One example of collaboration: Sumners to FDR, Feb. 17, 1933, FDR Library (reporting Sumners's meeting with "a group of industrialists interested in modification of the antitrust laws" including Howard Chapin, the automobile engineer and industrialist, and offering to meet with the President about it); FDR to W.H. McIntyre, Feb. 1933 (directing acceptance of Sumners's offer). As Glock put it, "Although the wisecracking conservative from Texas was suspicious of much of the New Deal, he was also a loyal Democratic Party soldier. As Chairman of the Judiciary Committee [he] worked diligently to pass Roosevelt's agenda." Glock, *Unpacking*, *supra* note 18, at 59. For an example of Sumners declining to support FDR's criminal legislation, see *Minutes of FDR meeting* ("Crime Bills. The President: Th[is] series of bills . . . has run into a snag in [the Judiciary] Committee and it is because Judge Sumners holds to a [states' rights] school of thought."). *See also* ONOFRIO, *Sumners*, *supra* note 21, at 297.

74. HWS to J.S. Durham, Apr. 18, 1938, Sumners Papers; *see also* HWS to W.R. Harris, July 3, 1938, Sumners Papers ("While I have not supported the administration 100%, I *have* supported the Administration. Anybody who agrees 100% is not supporting; he is riding," (emphasis added)).

75. *Sumners Record on New Deal*, DALL. MORNING NEWS, July 3, 1938, at 9.

76. KATZNELSON, FEAR ITSELF, *supra* note 71, at 178-79.

Elmore Whitehurst, later wrote, "February 5, 1937, was a critical date in the life and career of Hatton W. Sumners."[77] The President's proposal for authority to appoint of up to six more justices to the Supreme Court provoked an enormous public dispute; ultimately, seven months later, Roosevelt lost and reluctantly abandoned the plan. Sumners played a primary role in causing that outcome while at the same time enacting bills that solved the litigation problem that motivated the President's proposal.

III. THE NEW DEAL'S LITIGATION PROBLEM AND PRESIDENT FRANKLIN D. ROOSEVELT'S PROPOSED COURT-PACKING SOLUTION

In the dire circumstances of 1932, with the Great Depression worsening, Roosevelt stepped forward and won the presidency in a landslide, with a popular vote count of 22,800,000 to 15,750,000, and the Democratic Party secured firm control of both houses of Congress.[78] With ample political power throughout his first term to effectuate his agenda, Roosevelt's presidency promptly generated a surge of innovative legislation commonly known as the New Deal, tackling the economic and social problems of the Great Depression with both temporary relief for the unemployed and destitute including jobs and infrastructure programs and long-term reforms such as the National Industrial Recovery Act (the "NIRA"), monetary reforms, the National Labor Relations Act (the "Wagner Act"), securities regulation, the Agricultural Adjustment Act (the "AAA"), and Social Security.[79]

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77. Whitehurst, Sumners, *supra* note 21, at 6-7. Whitehurst joined Sumners's Washington office as Secretary in 1927 upon college graduation and served from 1933 to 1939 as Clerk of the House Judiciary Committee. Later he served in the Administrative Office of U.S. Courts and as a bankruptcy judge in Dallas. *Referee Elmore Whitehurst Resigns As Editor of the Journal*, 44 J. NAT'L CONF. REF. BANKR. 2, 8 (1970).

78. BRANDS, TRAITOR TO HIS CLASS, *supra* note 19, at 265.

79. A classic account by the eminent historian Bill Brands describes succinctly Roosevelt's New Deal:

> The program was definitely broad. . . . the Banking Act, . . . the Glass-Steagall Act, . . . the Economy Act, . . . the law establishing the Civilian Conservation Corps, . . . the Agricultural Adjustment Act, . . . the Tennessee Valley Authority, . . . the National Industrial Recovery Act, ... laws provided emergency relief to the poor and jobless, debt relief to farmers, and mortgage relief to home owners. . . . Roosevelt took the United States off the gold standard, undoing sixty years of American monetary policy.
>
> It was a breathtaking record . . . .

Sumners participated in legislating the New Deal by drafting or facilitating the passage of statutes pertaining to reform and modernization of the federal legal system including the addition of the railroad-reorganization chapter to the national bankruptcy law in 1933[80] and general corporate reorganization and municipal bankruptcy in 1934,[81] authorizations for interstate compacts,[82] law-enforcement amendments to address the nationwide crime wave such as authorizing Department (later, Federal Bureau) of Investigation agents to make arrests,[83] and numerous revisions to criminal law,84 grand jury proceedings,[85] criminal procedure,[86] and civil process.[87] Sumners worked collaboratively with Attorney General Homer Cummings. For instance, in 1936, Sumners sponsored a Justice Department-drafted statute making business-records evidence admissible in federal courts.[88]

Unsurprisingly, on behalf of both corporate and individual clients unhappy with the changes wrought by the President and Congress, lawyers challenged virtually all New Deal laws and programs in the federal courts on multiple constitutional grounds. By the second half of the President's first term, certain measures composing the New Deal began to encounter a problem in the Supreme Court. During Roosevelt's first term, the Court comprised eight Associate Justices, Willis Van Devanter (appointed 1910), Pierce Butler (1922), James Clark McReynolds (1914), Louis Brandeis (1916), George Sutherland (1922), Harlan Fiske Stone (1925), Owen J. Roberts (1930), and Benjamin N. Cardozo (1932), together with the Chief Justice of the United States, Charles Evans Hughes (1930).[89] All of the Justices were, of course, serving lifetime

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Brands, Traitor to His Class, *supra* note 19, at 352.

80. H.R. 14359, 72d Cong., P.L. 420, 47 Stat. 467 (1933).

81. H.R. 5884, 73d Cong., P.L. 296, 48 Stat. 911 (1934).

82. H.R. 7353, 73d Cong., P.L. 293, 48 Stat. 909, (1934).

83. H.R. 9476, 73d Cong., P.L. 402, 48 Stat. 1008, (1934).

84. H.R. 5091, 73d Cong., P.L. 62, 48 Stat. 152 (1934); H.R. 5208, P.L. 74, 48 Stat. 256 (1934); H.R. 8912, 73d Cong., P.L. 394, 48 Stat. 996 (1934); H.R. 6717, 74th Cong., P.L. 174, 49 Stat. 427, (1935).

85. H.R. 7748, 73d Cong., P.L. 180, 48 Stat. 648, (1934);

86. H.R. 7748, P.L. 180 (1934); H.R. 5091, P.L. 62, 48 Stat. 152 (1933).

87. S. 3040, 73d Cong., P.L. 416, 48 Stat. 1064 (1934); see Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351 (1987). The Rules Enabling Act of 1934 originated in the Senate, and Sumners managed the bill in the House. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 PENN. L. REV. 1015, 1100 n. 385 ("Sumners was the House manager").

88. H.R. 11690, 74th Cong. P.L. 734, 49 Stat. 1561 (1936); *A letter to Hatton W. Sumners, Chairman of the House Judiciary Committee*, H.R. REP. NO. 2357, Feb. 29, 1936, reprinted in CARL BRENT SWISHER, EDITOR. SELECTED PAPERS OF HOMER CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, 1933-1939 (1939) 261-62 [hereinafter PAPERS OF HOMER CUMMINGS] (requesting Sumners to carry the bill].

89. Glock, *Unpacking*, *supra* note 18, at 48; Federal Judicial Center,

appointments with constitutional protection against diminution in compensation.[90] In 1935, when the Court began to issue decisions that held notable New Deal enactments unconstitutional, the justices' ages ranged from seventy to seventy-seven; their ages were much higher than the American male life expectancy of sixty.[91] Columnist Drew Pearson lampooned the bench as "the Nine Old Men."[92]

President Herbert Hoover had appointed the last three justices: Hughes as Chief Justice after William Howard Taft resigned due to ill health, Roberts to fill the place of Edward T. Sanford, who died in office on the same day in 1930 that Taft died, and Cardozo to replace Oliver Wendell Holmes who resigned at age ninety on January 12, 1932.[93] The appointment of Hughes as Chief Justice was significant because, as Felix Frankfurter later wrote about the crisis, Hughes served as "the head of two courts, so different . . . was the supreme bench in the two periods of the decade during which Hughes presided."[94] During Roosevelt's first term, four justices formed a bloc generally dedicated to laissez-faire or substantive due process jurisprudence. Justices Van Devanter, Butler, McReynolds, and Sutherland, as FDR's presidency progressed, became popularly known as the "Four Horsemen" for their adamant opposition to the New Deal.[95]

Initially, the Hughes Court seemed friendly to innovative legislation to remediate the Depression. It upheld several state laws adopted in response to the bleak financial conditions, such as the mortgage-foreclosure moratorium law in *Home Building & Loan Association v. Blaisdell*[96] and regulation of milk prices in *Nebbia v.*

Biographical Directory of Article III Federal Judges, 1789-Present, www.fjc.gov/history/judges [perma.cc/ET8H-UAUL].

90. U.S. CONST. art. III, § 1.

91. Andrew Noymer, *Life expectancy in the USA*, 1900-98, www.u.demog.berkeley.edu/~andrew/1918/figure2.html [perma.cc/R3XH-AXT6].

92. DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN 119 (1937).

93. OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *Hughes, Charles Evans* at 415, 416 (Kermit L. Hall ed., 1992) [hereinafter, OXFORD COMPANION]; id., *Taft, William Howard* at 854, 856; id., *Cardozo, Benjamin Nathan* at 126, 127; id., *Holmes, Oliver Wendell* at 405, 410.

94. FELIX FRANKFURTER, OF LAW AND MEN 148 (1956).

95. Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 493 n. 28 (1997) ('The Four Horsemen of the Apocalypse' or 'of Reaction' was the pejorative nickname given to the four sternest opponents").

96. 290 U.S. 398 (1934); *see* JOHN A. FLITER & DEREK S. HOFF, FIGHTING FORECLOSURE: THE BLAISDELL CASE, THE CONTRACT CLAUSE, AND THE GREAT DEPRESSION (2012) (explaining that in this case the state law did not unconstitutionally impair the mortgage contract but rather simply extended the time for performance).

New York,[97] and in February 1935, it sustained Roosevelt's monetary program and the legislation that terminated the gold standard for U.S. currency in the *Gold Clause* Cases.[98] In those cases, the Chief Justice and Roberts teamed with Brandeis, Stone, and Cardozo for the majority, with the Four Horsemen dissenting. The Court in fact overruled most constitutionality challenges brought against New Deal programs.[99] For example, in 1936 the Court upheld the Tennessee Valley Authority and on January 4, 1937, the same with the Ashurst-Sumners Act.[100]

Beginning in early 1935, however, and continuing through mid-1936, Roberts joined the Four Horseman in several 5-4 decisions, and the more progressive justices occasionally joined for majorities, that invalidated multiple measures of the New Deal's legislative program:

January 7, 1935: *Panama Refining Co. v. Ryan*[101] (by 8-1 vote)—the "hot oil" provision of the NIRA;

May 6, 1935, 1935: *Railroad Retirement Board v. Alton Railroad*[102] (5-4)—the Railroad Retirement Act, requiring railroads to contribute funding to a pension for retirees;

On "Black Monday," as FDR's supporters called it, May 27, 1935: *A.L.A. Schechter Poultry Corp. v. U.S.*[103] (9-0)—the "codes of fair competition" provision of the NIRA, and *Louisville Joint Stock Land Bank v. Radford*[104] (9-0)— farmers' bankruptcy relief under the Frazier-Lemke Act;

January 6, 1936: *U.S. v. Butler*[105] (6-3)—the AAA;

May 18, 1936: *Carter v. Carter Coal Co.*[106] (6-3)—the Bituminous Coal Conservation Act of 1935 (the "Coal Act");

May 25, 1936: *Ashton v. Cameron County Water Improvement District No. One*[107] (5-4)—the first Municipal Bankruptcy Act; and,

June 1, 1936: *Morehead v. N.Y. ex rel. Tipaldo*[108] (4-3)—a state's minimum-wage law.

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97. 291 U.S. 502 (1934).

98. Norman v. Balt. & O. R. Co., 294 U.S. 240 (1935); Nortz v. U.S., 294 U.S. 317 (1935); Perry v. U.S., 294 U.S. 330 (1935).

99. S. REP. NO. 711 at 47-48 (June 14, 1937) (counting 23 decisions holding legislation enacted in FDR's first term constitutional).

100. Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936); Ky. Whip & Collar Co. v. Ill. Cent. RR., 299 U.S. 334 (1937) [hereinafter, *Ky. Whip & Collar v. Ill. Cent.*] (sustaining a law Sumners and Ashurst had jointly sponsored regulating interstate shipment of prison-made goods).

101. 293 U.S. 388 (1935).

102. 295 U.S. 330 (1935).

103. 295 U.S. 495 (1935).

104. 295 U.S. 555 (1935).

105. 297 U.S. 1 (1936).

106. 298 U.S. 238 (1936).

107. 298 U.S. 513 (1936).

108. 298 U.S. 587 (1936).

During these two years, according to the Senate Judiciary Committee's mid-1937 count, the Court held New Deal enactments unconstitutional in a total of twelve cases,[109] numbers aberrantly high as measured and compared across U.S. history.[110] Two of those decisions, *Radford* and *Ashton*, invalidated bankruptcy-law amendments that came out of Sumners's committee, Sumners himself having authored the statute in the latter case.

While the unconstitutionality rulings were limited to arguably minor laws,[111] the legal efforts to derail the New Deal during FDR's first term were quite broad as shown by federal district courts granting more than 2,000 injunctions against the operation or implementation of a variety of challenged New Deal programs.[112] FDR regarded those adverse litigation outcomes — to many of which the government was not even a party — as a serious rebuke to the New Deal.[113] During 1935 and 1936 he called both Sumners and Ashurst to the White House for consultations, and other members of Congress reacted by filing bills to deny the Supreme Court the authority to make constitutionality rulings, to require a two-thirds vote to invalidate a law, and to amend Article III of the Constitution to increase the seats on the bench, none of which went anywhere.[114]

After his sixty-one percent landslide reelection on November 3, 1936, the President believed that he had a renewed mandate for his New Deal. Two weeks after the second inauguration, he took the dramatic step of his February 5th announcement of the plan he had worked out with Attorney General Cummings but shared with very

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109. Senate Comm. on The Judiciary, Reorganization of the Federal Judiciary, S. Rep. No. 711, 75th Cong., 1st Sess. 1 at 46-47 (1937). The other four decisions identified by the committee were unanimous: Booth v. U.S., 291 U.S. 339 (1934), Lynch v. U.S., 292 U.S. 571 (1934), Perry v. U.S., 294 U.S. 330 (1935), and Hopkins Ass'n v. Cleary, 296 U.S. 315 (1935).

110. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L. J. 563, 572-73 (2001) (for example, the author found that 92% of New Deal legislation that was invalidated was overturned on in less than two years, whereas for all other presidents' legislative programs that were overturned in that same amount of time the percentage was only 20%).

111. *Id*.

112. *See* text accompanying notes 147, 227-31 *infra* and text accompanying.

113. Roosevelt "was not willing to permit the Court to strangle more of the New Deal programs . . . . or to impede the new reform programs that he intended to champion during his second term." William G. Ross, *The Hughes Court*, 1930-1941: *Evolution and Revolution* at 235, *in* THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 235 (Christopher Tomlins ed., 2005) [hereinafter Ross, *Hughes Court*].

114. *'Hill' Shuns Fight to Curb High Court*, WASHINGTON POST, Apr 2, 1936, at 1; *see also* William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 359-62 [hereinafter Leuchtenburg, *Origins*].

few to overcome what he considered the judicial roadblock to the accomplishment of his full legislative agenda.[115] His plan did not involve constitutional amendment, which would have taken a long time with an uncertain result, but rather used the expedient of increasing the Supreme Court's membership legislatively from nine to a possible maximum of fifteen.

As the extensive and still-developing literature about the proposal discloses,[116] the court-packing plan was a watershed event in Roosevelt's presidency and in American law and history, a national experience that continues to reverberate to the present day. As unveiled on February 5, 1937, the core of the President's proposal was authorization to nominate one additional justice for every sitting member who had served ten or more years and had declined to retire at the age of seventy, up to a maximum of fifteen justices.[117] The President attempted to disguise his court-packing scheme in judicial-reform rhetoric, and he observed that the plan was not without precedent. Earlier precedents included the Federalist Congress's reducing the number of justices in 1801 to deny the new President, Thomas Jefferson, an appointment and the Reconstruction-era Congress's manipulating the number of justices to deny any appointment to President Andrew Johnson.[118]

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115. Breckinridge Long, *Diary*, Jan. 8, 1937 at 16, Breckinridge Long Papers, Library of Congress (after a lunch this day with the Attorney General, the diplomat noted that "Homer [Cummings] has devised a means and has a draft"). This was a move that, according to some reports, Roosevelt and his Attorney General, Homer Cummings, had been contemplating since early in the first term, when they had been concerned that the Supreme Court might invalidate the early monetary reform measures. Glock, *Unpacking*, *supra* note 18, at 58-60.

116. A February 4, 2021 search in the Law Journal Library of HeinOnline for the term "court-packing plan" yielded citations to 2,751 law-review articles. A few examples: Joshua Braver, *Court-Packing: An American Tradition?,* 61 B.C. L. REV. 2747 (2020); Stephan O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?*, 30 MCGEORGE L. REV. 863 (1999). Monographs abound. *See, e.g.*, WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY, THE NEW LEGALITY, 1932-1968 (1970); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); MARIAN MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR [hereinafter MCKENNA, CONSTITUTIONAL WAR]: THE COURT-PACKING CRISIS OF 1937 (2002); BURT SOLOMON, FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY (2009; WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995); SHESOL, SUPREME POWER, *supra* note 1. In print also are numerous articles in historical journals, political science analyses, and writings about the federal court system.

117. *Texts of Roosevelt's Court Message, His Proposed Bill and Cummings's Letter*, N.Y. TIMES, Feb 6, 1937, at 1, 8, 19-20.

118. Before 1869 the number of justices ranged from three to ten. Creation of the Federal Judiciary, The Organization of the Supreme Court, S. Doc. 91, 75th Cong., 1st Sess. (July 27, 1937), at 254 (providing a short history of the various congressional acts that changed the number of positions on the Court

The most recent precedent had occurred early in President Woodrow Wilson's administration when Attorney General James McReynolds (later, as Justice McReynolds, one of the Four Horsemen) proposed that the President be authorized to appoint an additional district or circuit court judge "for any pension-eligible judge over age seventy who refused to resign."[119] The 1919 law entitled a judge who had served at least ten years — "other than a justice of the Supreme Court" — to "retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor."[120] As a new member of the House Judiciary Committee in 1919, Sumners had attended the hearings on that bill, and FDR, a lawyer by education serving in 1919 as Assistant Secretary of the Navy, was also familiar with the enactment.[121] The 1919 judicial retirement law excluded the Supreme Court[122], so unlike all lower federal judges, the justices had no option for retirement with protection against diminishment of compensation but only the choice of working in office until death or else resignation with an unguaranteed federal pension.

In his February 5th announcement, the President argued that many of the justices were too elderly to keep the caseloads current and the dockets of lower federal courts were also clogged.[123] So as announced on February 5, 1937, FDR's plan included several practical provisions to encourage votes for the bill: an additional fifty federal judgeships for the trial and intermediate-appellate benches, authorization for the Chief Justice to rearrange lower-court judges' assignments, and creation of a position of federal-courts "monitor" to facilitate the flow of litigation.[124] Together with the central proposal to enlarge the membership of the Supreme Court, Roosevelt characterized these elements as a unified plan called the Judicial Reform Bill.[125]

Congressman Sumners, the "best lawyer in Congress," was

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beginning with the First Congress). Congress established the number of justices at nine by statute in 1869. Federal Judicial Center, Biographical Directory of Article III Federal Judges, 1789-Present, www.fjc.gov/history/judges [https://perma.cc/ET8H-UAUL]. While many Americans in 1937 believed that the number of nine seats on the Supreme Court's bench is constitutionally ordained, the Constitution simply establishes the Court and leaves to Congress its staffing. U.S. CONST. art. III, § 1.

119. Glock, *Unpacking*, *supra* note 18, at 52.

120. 40 Stat., ch. 29, § 6 (1919).

121. Glock, *Unpacking*, *supra* note 18, at 54.

122. *Id*.

123. S. REP. NO. 711, Appx. A, *Message from the President of the United States Transmitting a Recommendation to Reorganize the Judicial Branch of the Federal Government* (Feb. 5, 1937), at 26.

124. *Id*.

125. *Id*. at 27.

aware of and understood the legal problem for Roosevelt's New Deal posed by the opposition of a five-justice majority comprising the Four Horsemen plus Justice Roberts. As Whitehurst later wrote, Sumners "realized that the time had come for an infusion of new and younger blood on the Court."[126] As Sumners expressed it in retrospect to a constituent: "I realized that too much age was accumulating on that court and that the court was going too far in the field where governmental policy is fixed. I went to work on the matter two years before anybody else touched it."[127] His reference was to bills he had introduced earlier, in 1935.

The judicial restructuring proposal immediately aroused widespread public opposition and provoked a torrent of negative press coverage.[128] "Throughout the period under consideration, [media] coverage of the issue ran against President Roosevelt," and Gallup Polls showed consistently that opponents outnumbered the President's supporters on this issue.[129] The plan dominated the public agenda for "the 168 days," as counted by Alsop and Catledge in that first Saturday Evening Post article, until the date of July 22nd that they asserted to have been the moment of death of the proposal, when the Senate voted to recommit to its Judiciary Committee Senate Bill 1392 containing the President's plan.[130] Based on the importance of Sumners's second statute, the date of its signing, August 24th, is the more appropriate end date for the crisis period.

Historians and legal commentators differ as to whether the court-packing plan was doomed by the public opposition that today is demonstrated in both the newspapers of 1937 and in the avalanches of letters and telegrams in the archival papers of the key politicians[131] or, alternatively, whether it might have succeeded.[132] But the court-packing plan did fail — spectacularly — and human agency plays a significant part in the spinning out of the history of

126. Whitehurst, *Sumners*, *supra* note 21.

127. HWS to J.B. Durham, Apr. 18, 1938, Sumners Papers.

128. MERLO PUSEY, THE SUPREME COURT CRISIS 1 (1937) ("Street-corner discussions, arguments at restaurant tables, a seemingly endless stream of radio addresses and newspaper reports").

129. Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1145 (1987) [hereinafter Caldeira, *Public Opinion*].

130. ALSOP & CATLEDGE, 168 Days, *supra* note 3.

131. *See, e.g.*, BURNS, THE LION, *supra* note 57, at 314 (1956); Lionel V. Patenaude, *Garner, Sumners, and Connally: The Defeat of the Roosevelt Court Bill in 1937*, 74 Sw. Hist. Q. 36, 51 (1970) [hereinafter Patenaude, *Garner, Sumners, and Connally*]; MICHAEL E. PARRISH, THE HUGHES COURT: JUSTICES, RULINGS, AND LEGACY 26 (2002); MCKENNA, CONSTITUTIONAL WAR, at 561-62.

132. *See, e.g.*, Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 509 (2018) [hereinafter Grove, *Judicial Independence*] (arguing that "[t]he measure seemed likely to get through the Senate, and all participants agreed that it would pass the House of Representatives by a wide margin").

legal events. In the court-packing controversy, it was Hatton Sumners who played a primary, albeit previously unappreciated,[133] role by formulating, filing and procuring enactment of two judicial bills that bookended the resolution of the crisis.

IV. SUMNERS'S TWO JUDICIAL BILLS AS BOOKENDS TO THE CRISIS

a. March 1, 1937: The Retirement Act

On January 6, 1937, Vice President John Nance Garner presided over the official counting of Electoral College votes[134] that had arrived at the Capitol by registered mail.[135] One hour later, both houses of Congress assembled for the State of the Union address. Roosevelt adumbrated a proposal pertaining to the New Deal's litigation problem and the Supreme Court: "We do not ask the courts to call nonexistent powers into being, but we have a right to expect that conceded powers or those legitimately implied shall be made effective instruments for the common good."[136] Alsop and Catledge asserted that, of the audience in that chamber,

> only Representative Hatton W. Sumners, of Texas, the upright, learned chairman of the House Judiciary Committee, really believed what his ears told him. He saw at once that something like the court bill must be coming, and in an effort to avert it he promptly revived his judiciary retirement bill.[137]

Within a few days, Sumners filed not one, but two bills proposing solutions to the New Deal's litigation problem, neither of which shows signs of forced or hurried drafting. The first was House Bill 2260, filed on January 8th, and providing that:

> whenever in any court of the United States in any suit or proceeding to which the United States or any agency thereof or any officer or employee thereof, as such officer or employee, is not a party, the validity of any statute of the United States is drawn in question, the court having jurisdiction of the suit or proceeding shall certify such

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133. Glock and Champagne are among the tiny handful of scholars to have found Sumners "played a prominent role in the court-packing fight of 1937." Glock, *Unpacking*, *supra* note 18, at 54, Champagne, *Sumners and the Court-Packing Plan*, *supra* note 51, at 46, 47 ("a self-appointed brakeman" and "a leading opponent of the plan").

134. *Rayburn Shows Up With Resolutions to Begin New Job*, DALL. MORNING NEWS, Jan. 6, 1937, at 1, 16.

135. H.R. 7373, 70th Cong., (1926, Supp. II, 1928) (sponsored by HWS).

136. FRANKLIN D. ROOSEVELT, ANNUAL MESSAGE TO CONGRESS, Jan. 6, 1937, available at The American Presidency Project, www.presidency.ucsb.edu/node/209043 [perma.cc/2J7M-TWJC].

137. ALSOP & CATLEDGE, THE 168 DAYS, *supra* note 3.

> fact to the Attorney General if the court is of opinion that a substantial ground exists for questioning the validity of the statute [and] afford an opportunity for presentation of evidence . . . and argument on behalf of the United States by the Attorney General or counsel designated by him [with] right of review of such decision in the proper appellate court . . . .[138]

Coincidentally, in his diary entry that day, former Ambassador to Italy, Breckinridge Long, noted that, over lunch, Attorney General Cummings had been "in a communicative mood" about "the situation vis a vis the Supreme Court," and Cummings had commented that "[h]e has been confronted . . . with the legal phases of the bills and cases arising out of them *as they have arrived* before the Supreme Court."[139] In other words, the Justice Department had been uninvolved in many of the cases presenting constitutionality issues decided by the Court.

Of the above-highlighted 1935-1936 cases invalidating New Deal laws, in only three, *Schechter*, *Panama Refining*, and *Butler*, was the government a party either by virtue of having defended or asserted a claim or sought criminal enforcement against a private party, and the Justice Department was simply not involved in any of the others. The Judicial Code and the versions of the Revised Rules of the Supreme Court of the United States effective during Roosevelt's first term did not contemplate the device of intervention.[140] Moreover, the permission of the Supreme Court just to file a brief as amicus curiae was quite limited, available only by "special leave," even for the Justice Department.[141] Not until 1937 did the Court formalize amicus practice by adding a rule authorizing such briefs "by written consent of all parties."[142]

A perfect example of the phenomenon of cases presenting constitutionality issues arriving and being decided by the Supreme Court without the government's involvement is furnished by *Ashton* overturning the Sumners-authored Municipal Bankruptcy Act. In the Depression, several thousand cities, special-purpose districts, and political subdivisions of states became insolvent, unable to pay the bonds they had issued during the 1920s to finance civic

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138. H.R. 2260, 75th Cong. (Jan. 8, 1937).

139. *Diary of Breckinridge Long*, at 14, Jan. 8, 1937, Breckinridge Long Papers, Library of Congress (emphasis added).

140. REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES, www.supremecourt.gov/ctrules/scannedrules.aspx [perma.cc/F2QG-XPUV] [hereinafter REVISED RULES OF THE SUPREME COURT].

141. The case law discloses only two examples during FDR's first term of the Justice Department having obtained "special leave" to file an amicus brief. See *Ky. Whip & Collar v. Ill. Cent.*, *supra* note 99; Holyoke Water Power Co. v. Am. Writing Paper Co., 300 U.S. 324 (1937) (denying an attempt to sidestep the Gold Clause Cases).

142. REVISED RULES OF THE SUPREME COURT, Rule 27, subdiv. 9. In the 1939 edition, rule 47 was added to address the Attorney General intervention, with Sumners's Intervention Act attached in its Appendix. *Id.*, Rule 47, at 38 & Appx. to Rules, Act of Aug. 24, 137, at 10 (1939).

improvements and, in the instance of dozens of water districts in the Rio Grande Valley of Texas, to finance construction of the irrigation facilities that had enabled a boom in citrus and truck gardening.[143] Sumners's side business was lending and agricultural land investment, and having spent time there, he was aware of the Valley's rapid development during the Twenties and appreciated the Depression-induced problems of collapsed land values and uncollectible taxes that prevented the irrigation and special-purpose districts from servicing their bonds.[144] Shortly before Roosevelt's inauguration in 1933, Sumners proposed an innovative bankruptcy statute to authorize insolvent municipal debtors to obtain from federal district courts approval of compositions, agreements to refinance or reduce their debts, reached with their creditors.

In early 1933, Sumners convened a hearing, received testimony, and then personally harmonized all competing proposals in a bill enacted a year later, the Municipal Bankruptcy Act or "Chapter IX" of the Bankruptcy Act of 1898.[145] In the Valley, the insolvent Cameron County Water Improvement District No. One soon filed a Chapter IX case seeking confirmation of its composition. One dissident bondholder questioned the Act's constitutionality and took the issue to the Supreme Court. The record on appeal discloses that the Justice Department was never given any notice of the constitutionality issue, and it filed no paper.[146] It was up to the private litigant, an insolvent irrigation district whose lead counsel in the appeal had served in the district court as the bondholders' counsel, to make the arguments for constitutionality. Sumners's experience with *Ashton* informed his preparation and filing on January 8, 1937, of House Bill 2260, the Intervention Bill, to bring the Attorney General into constitutionality issues at early moments in cases.

Near the end of his February 5th message, the President identified a closely related problem occurring in the trial courts:

> [W]e find the processes of government itself brought to a complete stop from time to time by injunctions issued almost automatically,

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143. ALICIA M. DEWEY, PESOS AND DOLLARS: ENTREPRENEURS IN THE TEXAS-MEXICO BORDERLANDS, 1880-1940 58-74, 102-03 (2014).

144. Sumners's trips to South Texas, his investments in agricultural lands, and his lending activities both before and during his 34 years in Congress are documented in many files of the Sumners Papers.

145. H.R. Judiciary Committee, 75th Cong., Hearing on H.R. 1670, H.R. 3083, H.R. 4311, H.R. 5267 & H.R. 5009 (1933).

146. *Record on Appeal, Ashton v. Cameron County Water Improvement District No. One*, Archives, HARVARD LAW SCHOOL, play.google.com/books/reader?id=pyNA9e5YWycC&hl=en&pg=GBS.PP1. Justice Cardozo, one of the dissenters in that case, placed this copy of the record into that archive in 1937.

> sometimes even without notice to the Government. . . . Statutes which the Congress enacts are set aside or suspended for long periods of time, even in cases to which the Government is not a party. . . . [A]s an immediate step, I recommend that the Congress provide that no . . . injunction . . . on any constitutional question be promulgated by any Federal court without previous and ample notice to the Attorney General and an opportunity for the United States to present evidence and be heard.[147]

But Roosevelt did not include such provisions in the draft bill that the President appended to his message to Congress and that Ashurst filed as Senate Bill 1392, almost certainly because the President's team knew of Sumners's House Bill 2260, then on file for a month and proposing such intervention rights to the Attorney General.

Another judicial problem troubled Sumners. In early 1932, Justice Oliver Wendell Holmes resigned at age ninety after thirty years' service. Rather quickly Holmes's pension was cut in half due to President Hoover's Economy Act that was enacted later that year.[148] Sumners was appalled. By resigning, Holmes had lost his constitutional protection against reduction of compensation. The penny-pinching reduction of all judicial pensions also upset several of the justices. One of the Four Horsemen, Justice Van Devanter, had been planning to step down in 1933, but the severe reduction of Holmes' pension caused him to stay in office so he could continue to receive his full salary.[149] Justice Sutherland felt the same way.[150] Resignation would also have subjected these justices to income tax on their pensions which they had not been paying on their judicial salaries.[151] Sumners was in touch with those justices and knew their inclinations.

Two years earlier, in the first session of the 74th Congress, Sumners had introduced the first Supreme Court retirement bill. The bill would simply have brought the Supreme Court justices under the retirement provisions that had covered all the lower federal courts' judges since 1919.[152] On February 4, 1935, Attorney General Cummings opined at Sumners's request that "the

147. Presidential Message, 81 Cong. Rec. 879 (Feb. 5, 1937). In a nationwide radio address on February 14th, Cummings had decried, in passing, "the reckless use of the injunctive power" by district courts in New Deal constitutionality cases. *The President's Proposals for Judicial Reorganization*, (Feb. 14, 1937) in PAPERS OF HOMER CUMMINGS, *supra* note 88, at 150.

148. Legislative Appropriation Act of June 30, 1932, P.L. 212, 47 Stat. 382, 401 (1932).

149. Glock, *Unpacking*, *supra* note 18, at 16-18, 19-20.

150. *Id*. at 17-19.

151. *Id*. at 17. At that time, Justices were exempt from income taxation under a decision authored by Van Devanter, Evans v. Gore, 253 U.S. 245 (1920). Shortly after Van Devanter's departure, the Court held to the contrary in O'Malley v. Woodrough, 307 U.S. 277 (1939).

152. H.R. 5160, 75th Cong. (1937).

enactment of this measure is desirable."[153] The bill's legal theory was that, unlike a resigning justice, a retiring justice would remain a justice for lifetime with protected compensation but would lose the ability to sit in cases before the Supreme Court.[154] For clarity, Sumners's final version added, as the 1919 law had provided: "the President shall be authorized to appoint a successor to any such Justice of the Supreme Court so retiring from regular active service on the bench."[155] But his bill went nowhere. Another Texas congressman, Thomas L. Blanton of Houston, a perennial grumbler about federal expenditures with whom Sumners had tussled in the past, derailed Sumner's bill by complaining bitterly on the House floor that the justices would have better retirement terms than members of Congress.[156]

On January 11, 1937, just five days after FDR's State of the Union speech, and twenty-five days before the White House announcement, Sumners re-introduced his 1935 retirement bill as the second of his two judicial bills. Filed as House Bill 2518, it provided:

> Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to [all other federal] Judges . . ., and the President shall be authorized to appoint a successor to any such Justice of the Supreme Court so retiring from regular active service on the bench, but such Justice . . . so retired may nevertheless be . . . authorized to perform such judicial duties, in any judicial circuit . . . as such retired Justice may be willing to undertake.[157]

House Bill 2518, his Retirement Bill, and House Bill 2660, his Intervention Bill, were a package from his perspective, but his hometown paper noticed solely House Bill 2518. On January 18th, the *Dallas Morning News* reported House Bill 2518's filing and observed that "six of the nine present members would be eligible immediately" to retire and receive the bill's benefits.[158]

Only when Sumners informed its reporter following the President's announcement did the Dallas newspaper tie House Bills 2518 and 2260 together. Referring of course to his two bills, the Congressman "pointed out that two remedies suggested by the

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153. Cummings to HWS, Feb. 4, 1935, reprinted in PAPERS OF HOMER CUMMINGS, *supra* note 88. Glock has a slightly different account of the events, with the Justice Department drafting the bill and a supporting memorandum dated Jan. 29, 1935 and Sumners picking them up there. Glock, *Unpacking*, *supra* note 18, at 59.

154. S. REP. NO. 119 at 1 (Feb. 23, 1937).

155. H.R. 7911, 74th Cong. (1935).

156. 79 CONG. REC. 3057-60 (Mar. 6, 1935).

157. H.R. 2518, 75th Cong. (1937).

158. *High Court Judges Eligible to Retire by Sumners Bill*, DALL. MORNING NEWS, Jan. 18, 1937, at 1.

President are embraced in part in bills which have passed his committee for favorable action."[159] The article reviewed the Retirement Bill again and then described House Bill 2260 as proposing to accord standing to the Attorney General with the right to intervene "and have all the rights of other litigants in the suit" when an issue of a statute's constitutionality is drawn.[160] Roosevelt and his inner circle regarded Sumners's House Bill 2518 as complementary with the court-packing plan.[161] As it played out, the even-lower profile bill, House Bill 2260, was also necessary to resolve the New Deal's litigation problem completely.

The rest of January, the start of the first session of the 75th Congress, was a busy time for Sumners, filing other bills and performing constituent services such on January 11th presenting a prominent young Dallas judge, Sarah T. Hughes, for swearing in to the Supreme Court's bar.[162] January 20th saw the inauguration of Roosevelt in cold, wet weather, the first time that, thanks to the Lame Duck Amendment, a president had been sworn in so early.[163] The address by the President contained only obscure references to the New Deal's litigation problem.[164] On February 2nd, Sumners and Ashurst joined most of the justices and ninety guests in a gala dinner the President hosted in the White House's East Room. At that point, the President decided to launch his proposal three days later, on Friday, February 5th, because the Court was scheduled for arguments the next Monday in a case challenging the constitutionality of the Wagner Act.[165]

Roosevelt's team wished to have the court-packing plan introduced as a bill in the House, but Sumners maneuvered for the bill to be filed in the Senate so the hearings on it would be conducted in that chambers' Judiciary Committee, preserving freedom of action for himself. He quickly signaled that, as chair of the House Judiciary Committee, he might slice the bill into its constituent elements and otherwise take his time. According to Congressman (later Chief Justice) Fred Vinson, Sumners never even mentioned the packing plan in his committee throughout the crisis period.[166]

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159. *Part of President's Court Move Embraced in Pending House Bills*, DALL. MORNING NEWS, Feb. 6, 1937, at 1.

160. *Id*.

161. Glock, *Unpacking*, *supra* note 18, at 60.

162. *Local Judge Guest at White House*, DALL. MORNING NEWS at 5 (Jan. 13, 1937); *see* DARWIN PAYNE, INDOMITABLE SARAH: THE LIFE OF JUDGE SARAH T. HUGHES at 103 (2004). The first woman to serve as a Texas state judge and the second woman as a federal district judge, Hughes is additionally remembered for swearing in Lyndon B. Johnson as President aboard Air Force One shortly after the assassination of John F. Kennedy.

163. U.S. CONST. amend. XX.

164. Franklin D. Roosevelt, *Inaugural Address*, Jan. 20, 1937 (saying, e.g., "If I know aught of the spirit and purpose of our Nation, we will not listen to comfort, opportunism, and timidity. We will carry on.").

165. Leuchtenburg, *supra* note 114, at 399.

166. Memorandum from Cummings to FDR, Memo of interview with Rep.

Garner advised the President to have the bill introduced in the Senate, whose Majority Leader, Joseph Robinson of Arkansas, pledged to obtain passage. It is widely believed that Senator Robinson hoped his reward would be an appointment to the Supreme Court. Ashurst introduced the plan as Senate Bill 1392 on February 8th.[167]

On February 11th, the *Dallas Morning News* observed that the Retirement Bill "might easily be the means of solving the Supreme Court issue entirely" and reported that "[e]arly in the day Sumners was called to the executive mansion, where he conferred with President Roosevelt over judicial program and returned to the Capitol announcing that the President had no objections to consideration of both [of Sumners's] bills." Yet as soon as the House had passed House Bill 2518, "word reached Sumners from the White House that further study of [the standing and intervention bill, House Bill 2260] was wanted by the [A]ttorney General."[168] So House Bill 2260 stalled while, two weeks later, the Senate by a 76-4 vote approved House Bill 2518; and on March 1, 1937, just twenty-four days after the announcement of the court-packing plan, the President signed the Retirement Act into law.[169] Two months later, on April 9th, the House did approve the Intervention Bill, and the Senate referred House Bill 2260 to its Judiciary Committee,[170] where it would remain pending until the final days of the resolution of the crisis.

Although he immediately signed Sumners's Retirement Bill, the President did not abandon or alter his plan to pack the Court but threw himself deeply into the fight. In a radio "fireside chat" broadcast on March 9th, FDR took his argument to the people, insisting that the nation was in a crisis — "one-third of a Nation ill-nourished, ill-clad, ill-housed" — that required such action and conceding that his real intention was indeed to populate the Supreme Court with justices who would view the New Deal programs favorably.[171] His poll numbers temporarily rose[172], but then fell back, and the controversy raged on through March.[173]

Despite the intensity of the issue, the court-packing plan was

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Fred Vinson (July 26, 1937), FDR Library.

167. S. 1392, 75th Cong. (Feb. 8, 1937).

168. *House Passes Bill to Permit Judges to Quit*, DALL. MORNING NEWS, Feb. 11, 1937, at 1.

169. 50 Stat. 24.

170. 81 CONG. REC. 3306-13 (Apr. 9, 1937).

171. President Franklin D. Roosevelt, Fireside Chat 9: On "Court-Packing" (Mar. 9, 1937), www.millercenter.org/the-presidency/presidential-speeches/march-9-1937-fireside-chat-9-court-packing [perma.cc/D8XP-RKPG].

172. Caldeira, *Public Opinion*, *supra* note 129, at 1142.

173. Franklyn Waltman, *2 Polls Indicate Popularity Loss For Roosevelt*, WASH. POST, May 24, 1937, at 1.

not the only significant public-policy question of 1937. Roosevelt had a bill introduced to reorganize the executive branch, and various members of Congress sponsored bills regarding the nation's neutrality.[174] Sumners remained busy filing and moving legislation to enactment. He introduced sixty-two bills during the 75th Congress, ten of which were signed into law, about his average through the Roosevelt years.[175] Most of his enactments were amendments of federal criminal law including the crime of bank robbery,[176] execution of federal courts' death sentences by contract with states,[177] penalties for narcotics' convictions,[178] and grand jury procedure.[179] His other legislation was a tiny step toward judicial efficiency[180] and a bill that benefitted Dallas tourism.[181]

After the March 1st signing of the Retirement Act, with his Intervention Bill pending in the Senate and Roosevelt continuing to promote the court-packing plan, the Congressman had "to keep my own counsel for the present" as "both sides are more or less angry."[182] Because he chaired the House Judiciary Committee, Sumners received a heavy volume of correspondence from people all over the nation. Letters in the Sumners's archive opposed the plan by about 20-to-1.[183] Many correspondents expressed the view that the Court should remain at nine members because that is what they believed the Constitution explicitly requires or because that is the way the Court always has been staffed, neither of which is correct, of course.[184] Sumners did not reply to the out-of-staters but scrupulously answered his Dallas constituents.

Responding in late February to criticism from the prominent

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174. Turner Catledge, *Reorganization Plans Leave Congress Dazed*, N.Y. TIMES, Jan 17, 1937, at 65.

175. A search was performed in the ProQuest Congressional online research service with a query of Sumners's name and requesting the bills he sponsored during the 75th Congress. A copy of this report is in the possession of the author and the UIC John Marshall Law Review.

176. H.R. 5900, 75 P.L. 349, 50 Stat. 749 (1937).

177. H.R. 2705, 75 P.L. 156, 50 Stat. 304 (1937).

178. H.R. 6283, 75 P.L. 267, 50 Stat. 627 (1937).

179. H.R. 2702, 75 P.L. 348, 50 Stat. 748 (1937).

180. H.R. 2703, 75 P.L. 179, 50 Stat. 473 (1937) (concerning the senior circuit judges' annual conference).

181. H. J. RES. 221 (tariff exemption on goods imported for exhibition at the Greater Texas and Pan-American Exposition, a follow-on to the 1936 Texas Centennial Exposition); KENNETH B. RAGSDALE, CENTENNIAL '36: THE YEAR AMERICA DISCOVERED TEXAS 305 (1987).

182. HWS to P.D. Jackson, Pres. of Dallas Central Labor Council, Mar. 4, 1937, and HWS to Wm. Andress, Jr., Mar. 5, 1937, Sumners Papers.

183. Champagne, *Sumners and the Court-Packing Plan*, *supra* note 51, at 48, 49 n. 10 ("Sumners was bombarded with [an] enormous number of letters and telegrams" opposing the plan).

184. "The bitter fight that led to the defeat of [FDR's] "Court-packing" plan . . . has given the notion of a nine-person Court such sanctity that it is unlikely that the size will ever be changed." 13 WRIGHT, MILLER & COOPER, FED. PRAC. & PROC., *Jurisdiction* § 3507 (3d ed.).

Baptist leader J.B. Cranfill of Dallas that the Retirement Bill was simply "sugaring the old justices" and "bribing the old boys to get off the job," Sumners wrote:

> Most people that I know . . . are opposed to increasing the Federal [Supreme] Court to fifteen members . . . [and] know that these Judges must come off the bench, as I say, within a year, [and] regard it as good, common, practical sense to make it possible for these men to retire voluntarily when they want to do so . . . . [I]f some of them would retire now it would relieve the pressure which is to be brought to bear on this proposal for fifteen Supreme Court judgeships.[185]

To constituents with whom he was not particularly close, the Congressman spoke in broad generalities of the pressure and difficulties of his undertaking.[186] To confidants, such as a theatre manager on March 5th, he was quite explicit:

> I know exactly what I am trying to do; I know how I am trying to do it. . . . I am not holding anything in reserve, but am putting everything I have into the effort to work the problem out. The situation is somewhat like a fisherman who is trying to land a big fish in difficult water – I do not believe that anybody on the bank can tell him very well what to do. . . . I have got to do this thing myself and stand responsible for the results.[187]

Three days later, to a Dallas attorney and statewide bar leader, he expressed confidence that his Retirement Act would accomplish the desired result: "[w]hether I can do the thing I am trying to do or not, it seems to be the consensus of opinion here that I am the only person who has a chance to do it."[188]

And in fact, Sumners had to wait but two months to see that "the thing" he was "trying to do" was in fact working to resolve the crisis, although some intermediate steps helpfully occurred sooner.

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185. J.B. Cranfill to HWS, Feb. 23, 1937 and HWS to J.B. Cranfill, Feb. 26, 1937 (emphasis added), Sumners Papers.

186. For instance, in a March 18 letter, Sumners replied to Harold C. Weil of Dallas: "I fully appreciate the importance of this matter and you may be assured that the [House Judiciary] Committee will give it the consideration which that importance requires." To W.T. White, a high school principal: "I am working under very great pressure now." And to Robert Hincks, a prominent Dallas lawyer, on March 19: "I am doing my best to be useful in this very difficult and delicate situation." HWS to (i) Harold C. Weil, Mar. 18, 1937; (ii) HWS to W.T. White, Mar. 15, 1937; and (iii) HWS to Robert Hincks, Mar. 19, 1937; all three in the Sumners Papers.

187. HWS to Paul P. Scott, Mar. 5, 1937, Sumners Papers.

188. HWS to D.A. Frank, Mar. 8, 1937, Sumners Papers. To another Dallas attorney, he also expressed self-confidence: "[S]o far as I can see now there has been no mistake made, either in the strategy or the execution. . . . The entire nation seems to appreciate what I am trying to do . . . and the only reason I have gotten in it this time is because everyone seems to feel that no one else, at least under the circumstances, had a chance to do the job." WRS to W.D. Jones, Feb. 26, 1937, Sumners Papers.

On March 22nd, Sumners sent a reassuring missive to Chief Justice Hughes urging calm and patience,[189] and on the same day Hughes, joined by Justices Brandeis and Van Devanter, sent a letter to Senator Burton K. Wheeler, a member of the Senate's Judiciary Committee, reporting that the Court was not behind in its docket and that increasing the number of justices would actually impair its work.[190]

Then, on March 27th, the Supreme Court took a juristic turn, as described by Bernard Schwartz:

> A remarkable reversal in the Supreme Court's attitude toward the New Deal program took place early in 1937. . . . It is too facile to state that the 1937 change was merely a protective response to the Court-packing plan, to assert, as did so many contemporary wags, that "a switch in time saved Nine." . . . The 1937 reversal reflected changes in legal ideology common to the entire legal profession. The extreme individualistic philosophy upon which the Justices had been nurtured had been shaken to its foundations. If laissez-faire jurisprudence gave way to judicial pragmatism, it simply reflected a similar movement that had taken place in the country as a whole.[191]

On March 29th, with Roberts now voting in a majority and the Four Horsemen dissenting, the Supreme Court issued its decision in *West Coast Hotel Co. v. Parrish*,[192] upholding a state's minimum wage law, in effect overruling the only nine-month-old *Tipaldo* decision.

Next, on April 12th in multiple cases of which *NLRB v. Jones & Laughlin Steel Corp*.[193] is the landmark, the Court, again by a 5-4 vote, upheld the Wagner Act. Those decisions "formed the heart of the constitutional revolution of 1937."[194] Newspapers touted the decisions as removing any cause for packing the Court, and over Roosevelt's subsequent, lengthy tenure as President, the Court never again invalidated any New Deal legislation. From FDR's perspective, however, those decisions, while welcome, did not provide adequate assurance. Their 5-4 majorities depended on Justice Roberts, who had shown himself flexible in 1935 and 1936,

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189. HWS to Charles Evans Hughes, Mar. 22, 1937, Sumners Papers.

190. William E. Leuchtenburg, *The Nine Justices Respond to the 1937 Crisis*, 1997 J. SUP. CT. Hist. 55, 63-64 (1997); Richard D. Friedman, *Chief Justice Hughes' Letter on Court-Packing*, 1997 J. SUP. CT. HIST. 76, 79-82 (1997). The letter is an exhibit to the Senate Judiciary Report, S. REP. NO. 711.

191. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 234 (1993); John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine*," 73 OKLA. L. REV. 229, 238 (2021),

192. 300 U.S. 379 (1937).

193. 301 U.S. 1 (1937).

194. SCHWARTZ, *supra* note 191, at 237. William G. Ross explains: "The Court's abandonment of substantive due process and reinterpretation of congressional powers during the spring of 1937 was so sudden, so sweeping, and so permanent that its decision has come to be known as 'the judicial revolution of 1937.'" Ross, *Hughes Court*, *supra* note 113, at 238. Numerous authorities have found that Roberts had voted in these cases before learning of the court-packing plan.

so FDR continued to press his plan, and the Senate Judiciary Committee held many rounds of hearings.

Meanwhile, the spring of 1937 continued to be a busy time for Sumners as legislator. On the date of the Parrish decision, he filed House Bill 5969, his bill to reenact the Municipal Bankruptcy Act that the Court had declared unconstitutional in *Ashton* ten months earlier.[195] Taking cues from Justice Cardozo's extended dissent in that case, Sumners slightly revised and refiled the original act because the public need that inspired it persisted.[196] However, other aspects of Sumners's legislative efforts during this time have drawn condemnation, from then to today, as he continued to use his acumen and skills to oppose efforts to make lynching a federal crime. Participation in forging the New Deal had not undone his determination to ensure white supremacy.

On the same day in early January that Sumners had filed his Intervention Bill, Arthur Wergs Mitchell, the African American Congressman from Chicago, had introduced an anti-lynching bill, House Bill 2251, following by a few days House Bill 1507 by Representative Joseph A. Gavagan of New York.[197] Both were similar to the Dyer Bill of the 1920s, but Gavagan's was stronger. A total of about fifty additional bills on the topic were referred to the Judiciary Committee, but Sumners refused to let any of them out. When Gavagan and his supporters obtained a discharge petition to push his bill to a House vote, Sumners or his committee allies tried to outmaneuver them by procuring Mitchell's amendment of his bill, neutering an evidentiary presumption it contained to aid prosecution of the offense and rendering the bill, from the perspective of the NAACP, "utterly worthless,"[198] and then sending the Mitchell Bill to the full House before the Gavagan Bill could be heard.

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195. H.R. 5969, 75 P.L. 302, 50 Stat. 653 (1937).

196. In the *Bekins* case, see note 246 *infra*, the Supreme Court observed: "the statute is carefully drawn so as not to impinge on the sovereignty of the State." Bekins v. U.S., 304 U.S. 27, 51 (1938). A commentator has remarked: "A comparison of [the First and Second Municipal Bankruptcy Acts] leads one to wonder what statutory differences were constitutionally significant. Perhaps there were none." KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT 152 (2008).

197. H.R. 2251 (by Mitchell); H.R. 1505 (by Gavagan).

198. Walter White (Secretary, NAACP) to J.C. Austin, Apr. 3, 1939, NAACP Papers, Library of Congress (decrying the opposition of "Hatton Sumners of Texas and other bitter opponents of any anti-lynching legislation"); TM to J.T. Rosea, Apr. 2, 1939 ("Congressman Hatton Sumners . . . is at present making this argument that lynching can be stopped by the States and it is not necessary to have a Federal bill"); Walter White to Max Stern, Apr. 5, 1937, NAACP Papers ("every trick possible is being pulled out of the bag by Hatton Sumners . . . in trying to block passage of the anti-lynching bill"), all in Papers of the NAACP.

On April 8, the committee's majority recommended the amended Mitchell Bill, but Sumners protested, reprising his states-rights arguments, even though Mitchell had defanged his bill at the instigation of Sumners or others of his committee. Later that day, Sumners did vote "aye" on the procedural question of putting the Mitchell Bill to a vote of the full House, as he apparently had promised Mitchell he would do, but by a 257-123 vote the House declined to take up House Bill 2251,[199] defeating the Mitchell bill. When the Gavagan Bill came before the House on April 15th, Sumners denounced it, repeating the racial aspersions of his infamous 1922 diatribe including the allegation of African American men attacking white women and the assertion that lynching was thus justified.[200] Sumners praised Mitchell, who deigned to stand beside him in the well of the House, but the Gavagan Bill easily passed the House that date, only to die late in the year in a Senate filibuster led by another Texan, Senator Tom Connally. FDR did nothing to support the cause of anti-lynching in 1937, although First Lady Eleanor Roosevelt did.[201]

The following month, the event Sumners had been expecting since March 1st happened. On May 18th, Justice Van Devanter announced he would retire on June 2nd. He wrote the President that "I desire to avail myself of all the rights, privileges and judicial service specified in the [Retirement] Act of March 1, 1937."[202] He sent a copy to Sumners, who wrote back, "You have done a most courageous thing under the circumstances, a patriotic thing."[203] That development "sent the enemies of the Supreme Court into a tailspin"[204] and of course enabled appointment of a successor loyal to FDR, Senator Hugo Black of Alabama, assuring that a majority on the Court would continue safely favorable to the New Deal.

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199. 81 CONG. REC. 3352-53 (Apr. 15, 1937).

200. *Id*. at 3534. Sumners averred "a [recent] case to illustrate what I am talking about," a lynching in Texas of an African American for the alleged murder of "a 14-year-old girl at home. . . . weltering in her own blood," the alleged perpetrator soon located "on the railroad tracks, about 3 miles away" with blood on his clothes, which for Sumners justified the man's immediate, extrajudicial execution. He concluded by arguing that the rate of lynchings had been falling. In the Sumners Papers is his hand-made bar chart, using statistics provided to him by Tuskegee Institute. A copy of this bar chart is in the possession of the author and the UIC John Marshall Law Review.

201. Peter Irons, *Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties*, 59 WASH. L. REV. 693 (1984) ("Roosevelt did little to advance the cause of civil rights and liberties during his twelve years in the White House"); *see also* DAVID MICHAELIS, ELEANOR 323-26 (2020); Michael E. Parrish, *The Great Depression, The New Deal, and the American Legal Order*, 59 WASH. L. REV. 723 (1984); David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L.J. 741 (1981).

202. Glock, *Unpacking*, *supra* note 18, at 33-34.

203. *Id.*

204. Caldeira, *Public Opinion*, *supra* note 129, at 1148.

Additional developments confirmed the doom of the packing plan. The Court issued two more decisions on May 24th upholding key New Deal enactments, the old-age-and-survivor-benefits and the unemployment-compensation components of the Social Security Act.[205] And on June 14th, an 11-7 bipartisan majority of the Senate Judiciary Committee released its adverse report, authored by a senator who originally had been supportive, Patrick A. McCarran of Nevada.[206] The report was unrestrained in its criticism, denouncing "the futility and absurdity of the devious" and characterizing the proposal as an attempt "to punish the Justices" and "an invasion of judicial power such as has never before been attempted in this country."[207]

According to Glock, the President's continued insistence that the plan be approved by the Senate despite his having already achieved his goal "caused Hatton Sumners and many Democrats to publicly break with their leader."[208] As Sumners later told a constituent, "I realized that . . . the court was going too far in the field where governmental policy is fixed," which was why he worked for and obtained passage of his two judicial bills, but he "never said a word about the . . . 'President's Bill' until after new blood began to flow into the court."[209] On July 13th, the 159th day of the crisis, Sumners made a speech that Congressman Samuel B. Pettengill of Indiana credited "as important a single contribution to the defeat of the bill as any that was made."[210] In it, Sumners took credit for his Retirement Act having already resolved the crisis:

> We gave these judges the same right to retire previously given other judges. Was not that the thing to do? . . . . It was your bill; you passed it. . . . The Senate passed it. The President signed it. And notwithstanding the difficulties that were brought about by the great disturbance, one of these judges quit the bench under the provisions of that law. The President can fill that vacancy when he chooses. . . . That created a condition with regard to that Court which makes it

205. Helvering v. Davis, 301 U.S. 619 (1937); Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

206. JEROME E. EDWARDS, PAT MCCARRAN: POLITICAL BOSS OF NEVADA 77-78 (1982).

207. SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 711, 75th Cong., 1st Sess. 1 at 10, 11, 13 & 23 (1937).

208. Glock, *Unpacking, supra* note 18, at 34.

209. HWS to J.S. Durham, Apr. 18, 1938, Sumners Papers.

210. Samuel B. Pettengill, *The Supreme Court Fight in the House of Representatives*, THE TOCSIN, Feb. 1938, at 3, (accompanying note from Samuel Pettengill to Joseph C. O'Mahoney, Joseph C. O'Mahoney Papers, University of Wyoming). In general, contemporary observers gave more credit to Sumners's speech than have scholars of the past half century. For example, an August 1937 article stated that "In the opinion of many, Chairman Sumners's stirring speech in the House dealt the ill-fated 'compromise' its death-blow." Sylvester C. Smith, Jr., *Public Opinion Defeated the Court Bill*, 23 ABA J. 575, 576 (Aug. 1937).

> possible to change the relationship as much as adding two new judges would. There was no controversy, no noise. . . . [We have done it] with a surgical instrument, not a meat ax.[211]

The Justice to whom Sumners referred was, of course, Willis van Devanter. Summers's implication was that, if the Senate did send the bill to the House, he would bottle it up in his committee.[212]

That night Robinson died. According to Whitehurst:

> Senator Robinson, who had worn himself out leading the Senate proponents, and had hoped for the reward of a seat on the Supreme Court, was found dead of a heart attack in his apartment, with a copy of the Congressional Record in his hand. The fight to "pack" the Supreme Court was over. . . . F.D.R. would not speak to [Sumners].[213]

Nine days later, July 22nd, the 168th day as counted by Alsop and Catledge, Senate Bill 1392 officially died when the full Senate by the overwhelming, bipartisan vote of 70-20, recommitted it.[214] Virtually alone among scholars, Glock credits Sumners's Retirement Act with having "sabotage[d] the enactment of Roosevelt's court-packing plan."[215]

After April and May, there was no reason to try to pack the Court; the New Deal's litigation problem was solved to a significant degree; and the President's plan was effectively dead.[216] Yet the controversy dragged on. If events of March 29th through May 24th, including Van Devanter's utilization of the Retirement Act and the "constitutional revolution of 1937" were the climax of the court-packing crisis, the denouement required another three months, June through August, to play out. In May, the *Dallas Morning News*, noting that Sumners "has been intimate with the court situation" since February 5th, quoted him: "I am not done yet."[217]

b. August 24, 1937: The Intervention Act

After the Senate Judiciary Committee's harsh report of June 14th, Garner unexpectedly decamped for a long vacation in Texas, but the President nonetheless forged ahead by launching a "charm offensive," entertaining all the Democrats in Congress at the Jefferson Islands Club in Chesapeake Bay the weekend of June

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211. 81 CONG. REC., 7143 (July 13, 1937).

212. C*ommittee to Reject Court Change, House Warned by Sumners*, N.Y. TIMES, July 14, 1937, at 1.

213. Whitehurst, *Sumners, supra* note 21, at 7. His implication is that Robinson read Sumners's speech just before the heart attack.

214. 81 CONG. REC. 7381 (July 22, 1937).

215. Glock, *Unpacking, supra* note 18, at 36.

216. "Roosevelt could have declared victory and departed from the battlefield with head held high." Joseph L. Rauh Jr., *A Personalized View of the Court-Packing Episode*, 1990 J. SUP. CT. Hist. 93, 97 (1990).

217. *Sumners Had Part in Retirement of Associate Justice*, DALL. MORNING NEWS, May 19, 1937, at 5.

25th.[218] Roosevelt proffered a compromise, limiting the addition of justices to one per year but retaining the ultimate cap of fifteen. With debate opening on the Senate floor, the original sponsor Ashurst and two of his committee members filed a proposed substitute bill under the same number that included the one-additional-justice-per-year limit, and they also incorporated the text of Sumners's pending House Bill 2660. The proposed substitute bill was quickly tabled, and Senator Joseph O'Mahoney then filed on July 6th a very short amendment of Ashurst's bill, simply inserting the one-per-year limit, which McCarran replaced two days later with a better drafted but still terse amendment.[219] Under all of the proposed amendments, the original provisions in Senate Bill 1392 remained intact, including for more justices, fifty more federal lower-court judgeships, and a litigation proctor.

Working extremely hard, Majority Leader Robinson reportedly rounded up sufficient commitments, and with Washington weather turning brutally hot, he put the Senate on a grueling schedule of proceedings to dispose the scores of pending obstacles to Ashurst's bill, to wear down the opponents, and to pass the bill. With Robinson's death on July 13th,[220] any thread of hope for the plan snapped, and Sumners's pending Intervention Bill suddenly became highly relevant. Just then Garner returned from Texas and stepped in to negotiate a settlement with Senator William Borah, the leader of the Republican Senators, who insisted that Senate Bill 1392 be buried.

Garner and Senate Democrats in favor of the plan had to concede. The Senate voted 70-20 on July 22nd to recommit the bill. The motion by Senator M. M. Logan of Kentucky, however, carried an implicit understanding that the Judiciary Committee would go to work and report a bill for some type of reform of the judiciary — and quickly.[221] To confirm that understanding, Senator Warren Austin of Vermont moved to amend the recommittal motion to require that the committee report a new bill, not on the topic "reform of the judiciary" but rather on "reform of judicial procedure," and Logan was compelled to admit that in the forthcoming work of the Committee, "the Supreme Court is out of the way."[222]

At this point, a shaken Ashurst rose and promised that his

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218. NANCY PETERSON HILL, A VERY PRIVATE PUBLIC CITIZEN: THE LIFE OF GRENVILLE CLARK 116 (2014); William E. Leuchtenburg, *FDR's Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 675-76 (1985).

219. Nonetheless, McCarran rose on July 10th to again denounce the plan. 81 CONG. REC. 7018-7027 (July 10, 1937).

220. SHESOL, SUPREME POWER, *supra* note 2, at 497-500.

221. 81 CONG. REC. 7375 (July 22, 1937).

222. 81 CONG. REC. 7381 (July 22, 1937).

committee would, "with zeal and fidelity, bring in within 10 days such a bill as the Senate desires."[223] He set a committee meeting for the next day[224] but it fell to McCarran, a former justice of the Nevada Supreme Court who had been informally taking the lead on the committee since May, to seize the initiative. He and the Senate Judiciary Committee members refocused on Sumners's long-pending House Bill 2260, the bill to grant the Attorney General the right of intervention and standing to appeal in all constitutionality cases. Substantially all accounts of the crisis have misreported that, after recommittal of Ashurst's bill, Congress then passed a "watered down" substitute of Senate Bill 1392 or that the objected-to features were "deleted" from a bill embodying the packing plan and then passed.[225] However, it was not the President's bill, S.B. 1392, or any version of the court-packing plan, but rather Sumners's Intervention Bill that then moved forward.

House Bill 2260 offered, if not the only, then certainly the easiest and quickest, route to accomplish something for the President that had a demonstrable relationship to the litigation problem that had motivated the packing plan, as well as to demarcate a clear termination of the crisis. McCarran embellished the bill's intervention provision, without altering its substance, by repeatedly adding the word "party" to the Sumners's provision for the Attorney General to intervene in lower-court proceedings. Then the Senator added two substantive sections. The first was for reassignment of cases in the event of the disability of senior judges, enlarging a provision in the existing law that Sumners had obtained three years earlier for senior circuit judges.[226] The second and more important was a requirement copied from existing Judicial Code sections applicable to the Interstate Commerce Commission and issues of validity of state statutes for a panel of two district judges and one Court of Appeals judge to determine any request in an action for an injunction against a federal official.[227] This was a deficiency of Ashurst's Senate Bill 1392 that McCarran had pointed out in the Senate Judiciary Committee's adverse report of June 14th.[228]

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223. *Id*.

224. 81 CONG. REC. 7381-82 (July 22, 1937).

225. *See, e.g.*, Introduction to the "Court Plan," PAPERS OF HOMER CUMMINGS, *supra* note 88, at 170 ("The essence of the President's proposal for judicial reform was deleted from the measure which finally passed the Congress in mid-August of 1937); *House Passes New Court Bill In Dull Style*, WASH. POST, Aug. 12, 1937, at 7 (the "measure stripped of its authorization to appoint [more] justice[s] . . . now goes to the White House"); Patenaude, *Garner, Sumners, and Connally*, *supra* note 131, at 50 ("a watered-down bill").

226. H.R. 7356, 73d Cong. (1934), P.L. 73-249, 48 Stat. 796.

227. David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 2 (1964) [hereinafter, Currie, *Three-Judge District Court*"].

228. S. REP. NO. 799 (1937) at 3.

In fact, it had been McCarran who, shortly after the announcement of the court-packing plan, quickly obtained Senate approval for a definitive survey of "the issuance of extraordinary writs by Federal courts and of judgments . . . in all amounting to several thousands within the past three years." The resolution requested the principal departments and agencies of the executive branch of the government to report to the Senate "all cases in which injunctions, restraining orders, or other judgments" had been issued "enjoining, suspending, or restraining the enforcement, operation, or execution of any Act of Congress, or any provision thereof, administered by such department or agency" together with a brief statement of "the extent to which, and the manner in which, the operations of the Government have been affected."[229]

Submitting his report on March 25th on behalf of the Justice and Treasury Departments as Senate Document No. 42, Attorney General Cummings had advised that 1,898 cases contesting the constitutionality of the AAA had been filed in federal district courts, and that "courts allowed injunctions or restraining orders in some 1,600 cases, denied injunctions in 166 cases and withheld decisions in 132 cases. In addition, 128 injunctions had been entered against the Coal Act, more than one hundred against the various parts of the NIRA, twenty-eight against the Public Utility Holding Company Act, and scores against various new taxes.[230] Fifteen other agencies reported significant numbers of adverse injunctions that had impaired their ability to administer the programs and enforce their respective duties under the challenged New Deal statutes.[231]

Congress did respond in some instances to the Court's unconstitutionality rulings of 1935 and 1936 by enacting redesigned programs.[232] For example, the Connally Hot Oil Act of 1935 omitted the offending provision that the *Panama Refining* Court had identified in the NIRA, and as noted, Sumners filed and obtained quick passage of a slightly tweaked Municipal Bankruptcy Act to overcome *Ashton*. However, the ability and propensity of the sitting trial court judges, seventy-eight percent of whom remained pre-Roosevelt appointees at the end of his first term,[233] to grant injunctions against the New Deal persisted. So, McCarran's addition to Sumners's bill of the three-judge injunctive provision addressed another facet of the New Deal's litigation problem that

229. S. RES. 82 § (1)-(2) (Feb. 17, 1937).

230. *Reports of Justice and Treasury Departments on Injunctions in Cases Involving Acts of Congress*, S. DOC. 42 (Mar. 25, 1937).

231. For a dissection of Cummings' and the other agencies' reports of specific harms the wave of injunctions caused the government, *see* Barry Cushman, *The Judicial Reforms of 1937*, 61 WM. & MARY L. REV. 995, 999-1020 (2020).

232. *Id*. at 1021-23.

233. *Id*. at 1024

House Bill 2260 had not covered.

On August 7th McCarran called up the amended House Bill 2260 in the Senate, advising that its amendments were made by him and his committee expressly "to carry out the instruction of the Senate of July 22 . . . when S.1392 . . . was recommitted."[234] The Congressional Record contains Senator Austin's and others' extended citations of reported case law on concepts of "case," "controversy" and "party," seeking to explain why McCarran had revised the provisions of Sumners's bill for the Attorney General not only to "have the same rights as a party to the extent necessary for a proper presentation of the facts and law," as Sumners had drafted it, but indubitably to "become a party."[235] The Senate approved McCarran's amendments to Sumners's Intervention Bill and "Garner gaveled that bill through the Senate so fast that there were many protests,"[236] sending the amended bill back to the House on August 7th.

The House disagreed on August 9th, necessitating a conference committee whose members included Sumners and McCarran, but not Ashurst, and resulting in further wordsmithing of the bill. The next day, August 10th, the Senate approved the conference version of House Bill 2260.[237] With Senate approval reported to the House early on August 11th, Sumners then took the lead on the House floor, explaining that the conferees had agreed to delete any requirement for the lower court to find either that "a substantial question exists" as to constitutionality or that "the government has an actual or probable legal interest," and substituted the test of "constitutionality [being] drawn in question."[238] When Sumners paused for questions, Congressman Kent E. Keller, noticing the change in wording, asked whether it made intervention by the Justice Department mandatory, and Sumners replied that intervention would be discretionary, that the Government "may have itself made a party [but] it cannot be [involuntarily] drawn in."[239] The Speaker declared the further amended bill passed.[240]

In conference, Sumners had agreed to one more change. The amended Sumners bill, House Bill 2260, now carried the title "Reform of Judicial Procedure," as Senator Austin had wanted, despite it being Sumners's bill and although, even as amended by the Senate and further revised in conference, it provided not one more federal judge and no proctor which had been central parts of

234. S. REP. NO. 963 (1937).

235. H.R. 2260 as amended by S. REP. NO. 996, July 28, 1973; 81 CONG. REC. 8507-11.

236. MICHAEL JOHN ROMANO, THE EMERGENCE OF JOHN NANCE GARNER AS A FIGURE IN NATIONAL POLITICS 265 (1990); 81 CONG. REC.8515 (Aug. 7, 1937).

237. 81 CONG. REC. 8609-8610 (Aug. 10, 1937).

238. Reform of Judicial Procedure, H.R. REP. NO. 1490, Aug. 10, 1937, at 5.

239. 81 CONG. REC. 8704 (Aug. 11, 1937).

240. 81 CONG. REC. 8705 (Aug. 11, 1937).

the President's plan.[241] The bill went to the President.

Sumners issued his own fifteen paragraph report of its passage and an explanation of its five sections, and he placed that as a letter to the editor in the pages of the August 15th issue of the New York Times, presenting it as a fait accompli.[242] Cummings begrudgingly approved it, opining to Roosevelt that "[m]easured against [the packing plan], it is but a meager performance [but] presents meritorious provisions of a minor character."[243] On August 23, a White House press release called the bill acceptable, and the next day the President signed the Intervention Act[244] along with other bills, including two of Sumners's amendments to the Criminal Code.

The Intervention Act of August 24, 1937, is Sumners's other bookend to the court-packing crisis, and it is of much greater significance than Cummings acknowledged. One salient example of this act's immediate efficacy suffices: the litigation of the constitutionality of Sumners's Second Municipal Bankruptcy Act in the first case filed under it soon after its re-enactment. The district judge notified the Justice Department on October 11th that an objecting bondholder had raised the constitutionality issue, and the government intervened for the first time under the Act.[245] When that court, citing *Ashton*, held the statute unconstitutional, the Justice Department appealed to the Supreme Court. Sumners received the Chief Justice's leave to file an amicus brief and to make the lead oral argument on April 7, 1938, and the government won the constitutionality issue in the decision of *U.S. v. Bekins* by a 6-2 vote two weeks later.[246]

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241. The sole exception is that McCarran grossly watered down the provision of S. 1392 that would have authorized the Chief Justice of the United States to delegate district judges to handle cases in other districts for efficiency; as he inserted it into Sumners's bill, the provision was solely to direct federal judges to fill in for disabled judges in other jurisdictions.

242. HWS, *More Dignified Legislation Seen Under New Court Bill*, N.Y. TIMES, Aug 15, 1937, at 8E.

243. Cummings to FDR, Aug. 17, 1937, reprinted in PAPERS OF HOMER CUMMINGS, *supra* note 88, at 173.

244. H.R. 2260; P.L. 352, 50 Stat. 751 (Aug. 24, 2021).

245. "This is the first case in which the United States intervened in private litigation to support the constitutionality of an act of Congress under the provisions of the act of August 24, 1937." *Report of Assistant Attorney General Sam E. Whitaker, in Charge of the Claims Division*, 1937 ATT'Y GEN. ANN. REP. 107, 119 (1937-1938).

246. 304 U.S. 27 (1938).

V.SUMNERS'S KEY ROLE IN RESOLVING THE CRISIS

a. The Congressman's Post-Crisis Relationship with Roosevelt

Whitehurst asserted that "F.D.R. never spoke to him again,"[247] and legions of commentators and historians have asserted that Sumners had departed the Roosevelt team. But those views are incorrect. The President was peeved that his plan failed, and he undoubtedly recognized Sumners's significant responsibility. But Roosevelt had been miffed at the Congressman previously, without permanent alienation.[248] In the immediate aftermath of the crisis, Roosevelt did take a small jab at Sumners. On September 21st, Congressman W.D. MacFarlane of Graham, Texas, sent FDR a clipping from the *Fort Worth Star-Telegram* reporting a speech Sumners made to the Dallas Bar Association on September 11th and characterizing it as expressive of the views "held by a large majority of the Texas Delegation and many other Delegations in the South as well as the North, all of whom call themselves democrats."[249] The newspaper reported that Sumners had stated that Congress "abdicated its power to follow the leader," implying that Roosevelt was acting like a dictator.[250]

With MacFarlane's missive in hand, Roosevelt drafted a letter dated September 21st for signature by his assistant W.H. McIntyre. Addressing the Congressman as "a dear friend of mine," the letter inquired about "the enclosed clipping."[251] FDR's covering memo to McIntyre directed: "Check and be sure you get an answer from Hatton. If you don't get an answer with a week or 10 days, check again."[252] Two weeks later Sumners replied to McIntyre that he had spoken to the bar group extemporaneously but recalled "the drift" of his speech as distinguishing "between our way of dealing with a

247. Whitehurst, *Sumners, supra* note 21, at 7.

248. When in FDR's first term Sumners proved unreceptive to a number of criminal-law and law-enforcement bills FDR and Cummings wanted, the following telephone exchange occurred, according a 1952 oral history interview of the Congressman:

> Roosevelt — "Hatton, when are you going to report those bills out of your committee?" Sumners — "Mr. President, I don't believe that they ought to be reported out." Roosevelt — "How would you like to have your committee taken away from you?" Sumners — "Who in hell is going to do it?" (Sound of phone banging on the receiver.)

Patenaude, *Garner, Sumners, and Connally, supra* note 131, at 39 n.13

249. W.H. MacFarlane to FDR, Sept. 21, 1937, FDR Library.

250. *Assails Nation's "Hero Worshiping"*, FORT WORTH STAR-TELEGRAM, Sept. 12, 1937, at 4.

251. FDR memo to W.H. McIntyre, Sept. 17, 1937, and McIntyre to Sumners, Sept. 21, 1937, FDR Library.

252. FDR to McIntyre, Sept. 17, 1937.

crisis in our country and the method pursued in Germany and Italy."[253] He then turned the tables to chide the President for "our present situation" in which "some people are so intense with regard to this court issue" that "it is almost impossible" to discuss fundamental public problems.[254]

But Sumners confirmed his loyalty:

> I want to be as useful as I can. You call on me just as you always have done. I feel just as I always did, but I would be willing to go to night school for a whole year to learn the barbers' trade if I could get the fellow just one time in my chair who started things.[255]

His allusion after the conjunction "but" in the last-quoted sentence portrays himself as a "barber" so devoted to the President that he would put his razor to the throat of "the fellow . . . who started things." In handwriting Sumners added: "I am a better friend to the Chief than he, whoever he is."[256] By referring "the fellow" and "whoever he is," Sumners was not indicating MacFarlane but rather insinuating the existence of an unknown, backstage manipulator. From the outset of the crisis, Sumners posited repeatedly that "someone" had "imposed" on Roosevelt to make the court-packing proposal.[257] The President was not amused, telling McIntyre that "[Sumners's letter] is very interesting and we can now file it with the reservation that he has not answered in any way."[258] But his pique did not damage the relationship.

When Love and another candidate sought FDR's endorsement in 1938,[259] Roosevelt refused, and he appointed Sumners to an important committee to study antitrust law, an assignment that Sumners touted in his reelection campaign.[260] Sumners was easily re-elected for the 13th time in November of 1938. The President continued to need Sumners, and vice versa, throughout the second term, and they worked together in 1938 to accomplish more legislatively.

Sumners continued to be a classic Southern Democratic representative in Congress, freely expressing racial antipathy and alert to maintain white supremacy, but Sumners's role in the 1937 court-packing crisis is an exception to the Katznelson corollary

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253. HWS to W.H. McIntyre, Oct. 4, 1937, FDR Library.

254. *Id.*

255. *Id.*

256. *Id.*

257. Beginning in March, in correspondence with certain constituents, then again in his July 13th speech in the House, and last in in the response letter he would soon write to Love — Love's letter to Sumners is dated October 6th, two days after Sumners's reply here to FDR — he had so asserted.

258. "TOI" to W.H. McIntyre, Oct. 11, 1937, FDR Library.

259. Love to FDR, June 25, 1938, FDR Library.

260. *Relations with F.D.R. Cordial, Says Sumners*, DALL. MORNING NEWS, July 17, 1938, at 1, 7.

about the position Southern Democratic members of Congress took against the packing plan during those months. For the other Southern congressmen, the optimal outcome would have been a simple, up-and-down defeat of the President's plan with the result being Van Devanter's remaining on the bench for the remainder of his life, which was four years. If Sumners had been of that mind, he would have straightforwardly opposed the plan, which he was in a strong position to do as Judiciary Committee chair. He maneuvered for the President's bill to be filed in the Senate, not in the House of Representatives, and he could have then sat on his hands or spoken publicly and early against the plan. But he did not.

Instead Sumners pressed his Retirement Bill to quick enactment, only twenty-four days after the announcement of the packing plan. The Retirement Act guaranteed the sitting justices, if and when they retired, undiminished lifetime salaries and authorized them to continue in the adjudication of cases in the lower federal courts, if they desired — Van Devanter was the first to choose to do so.[261] In addition to Van Devanter, others departed the bench relatively soon: George Sutherland took advantage of the Retirement Act on January 17, 1938; Benjamin Cardozo died on July 9, 1938; and Louis Brandeis resigned and Pierce Butler died during the course of 1939.[262] Thus, within two and a half years, Roosevelt had five vacancies to fill, absolutely guaranteeing the survival of New Deal legislation and enabling FDR to shape the Court for a long time. (See Table I.) Over his full tenure, Roosevelt appointed eight justices;[263] and from *Parrish* onward, the Supreme Court overruled all challenges to all other New Deal legislation.[264]

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261. Van Devanter presided over a "difficult criminal case" and other matters in the Southern District of New York in the second half of 1937. More recently, Justice Tom Clark sat many times in the lower courts for ten years after his 1967 retirement, and until recent years the retired Justice O'Connor joined panels deciding scores of cases in the Courts of Appeal in all but one federal circuit. In the decades since, only five justices have resigned, most recently Abe Fortas in 1969, but 26 have retired with the benefits of the Retirement Act. *See* ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT (2003); Stephen L. Wasby, *Retired Supreme Court Justices in the Courts of Appeals*, 39 J. SUP. CT. Hist. 146, 149 (2014); E. Jon A. Gryskiewicz, *The Semi-Retirement of Senior Supreme Court Justices: Examining their Service on the Courts of Appeals*, 11 SETON HALL CIR. REV. 285 (2015); Minor Myers, III, *The Judicial Service of Retired U.S. Supreme Court Justices*, 32 J. SUP. CT. HIST. 46 (2007). The Retirement Act is of course available to today's sitting justices.

262. *See* Table 1, *infra*.

263. Ross, *Hughes Court*, *supra* note 113, at 238-39 (FDR was enabled "to 'pack' the Court seriatim without any legislated increase in the number of justices").

264. Today the Retirement Act is 28 U.S.C. § 371.

Table 1. Supreme Court Justices During Roosevelt's Presidency[265]

Justice	Age on *Black Monday (5/27/1935)*	*Supreme Court Appointment*	*Exit by Death*	*Exit by Retirement*	*Replaced by*
Willis Van Devanter (4/17/1859-2/8/1941)	76	12/16/1910		6/2/1937	Hugo Black
George Sutherland (3/25/1862-7/18/1942)	73	9/5/1922		1/17/1938	Stanley Reed
Benjamin Cardoza (5/24/1870-7/9/1938)	65	3/2/1932	7/9/1938		Felix Frankfurter
Louis Brandeis (11/13/1856-10/5/1941)	70	6/1/1916			William Douglas
Pierce Butler (3/17/1866-11/16/1939)	69	12/21/1922	11/16/1939		Frank Murphy
James McReynolds (2/3/1862-8/24/1946)	73	8/29/1914		1/31/1941	James Byrne
Owen Roberts (5/2/1875-5/17/1955)	60	5/20/1930		7/31/1945	Harold Burton
Charles Hughes (4/11/1862-8/27/1948)	73	2/13/1930		6/30/1941	Harlan Stone
Harlan Stone (10/11/1872-4/22/1946)	62	2/5/1925 &7/3/1941	4/21/1946		Fred Vinson

The Retirement Act was an efficient way to end the packing crisis; once Van Devanter took advantage of it, the crisis was over as a practical matter. The result was his replacement with Hugo Black, a Senator quite loyal to the President and, although discovered to have been a KKK member in the 1920s, one of the most liberal and consequential Supreme Court justices ever.[266] If

265. Federal Judicial Center, Biographical Directory of Article III Federal Judges, 1789-Present, www.fjc.gov/history/judges [perma.cc/ET8H-UAUL].

266. OXFORD COMPANION, *Black, Hugo Lafayette*, *supra* note 93, at 72-75.

simply ending the court-packing crisis had been Sumners's only objective, the enactment of the Retirement Act and the replacement of Van Devanter would have been out of kilter with, as Katznelson found it, the desire of Southern congressional Democrats. Moreover, in the scholarly literature, the Retirement Act is universally saluted as a permanent improvement to the functioning of the Supreme Court and the judicial branch of federal government.

Additionally, Sumners sponsored the Intervention Bill and worked through the legislative process to its enactment on August 24th, at the end of the crisis period. This act too is unanimously regarded by the few legal scholars who have noticed and commented on it as a permanent structural improvement to the federal judicial system.[267] The act did not end the packing crisis — the crisis was already over by the time the Senate Judiciary Committee took up and, with McCarran's amendment, passed Sumners's House Bill 2260 — but it operated to prevent a recurrence of the New Deal's litigation problem that had impelled the President to propose his plan. The Intervention Act actually enhanced federal power. Since then, the attorneys general have intervened, or have had opportunity to do so, in all cases in federal courts presenting dispositive issues of constitutionality of federal statutes.[268] Similarly, three-judge panels have consistently been required for injunctions in cases presenting such issues.[269] The act inhibited a new wave of invalidations and made it more difficult for future dissidents to obtain reversal of any existing or further New Deal programs, or the programs of any succeeding president of any party.[270]

Sumners had long been conversant with and participated to an extent in some of the currents of realism and reform running through the leading law schools[271] and legal think tanks such as the

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267. *Revision of Procedure in Constitutional Litigation: The Act of 1937*, 38 COLUM. L. REV. 153 (1938) ("Act seeks to ensure an adequate defense of federal legislation'); Caleb Nelson, *Intervention*, 106 VA. L. REV. 271, 345 n. 246 (2020) ("To ensure that the public was adequately represented in these cases").

268. In two of the next three cases, although notified, the Attorney General declined to intervene. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 100-01 (1938) (intervened); Wright v. Union Central Life Ins. Co., 304 U.S. 502, 504 (1938) (declined); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) (declined). One notable failure to notify and failure to intervene was 1938's *Erie* decision, in which Justices Butler and McReynolds in dissent characterized the majority's disapproval of the *Swift v. Tyson* doctrine as a constitutionality decision about which notice and opportunity to intervene should have been given to the Justice Department. Erie R. Co. v. Tompkins, 304 U.S. 64, 88-89 (1938).

269. 28 U.S.C. § 2284; Currie, *Three-Judge District Court*, *supra* note 227.

270. Today, the intervention provision of the Intervention Act is found at 28 U.S.C. § 2403 with Fed. R. Civ. P. 5.1 implementing it, and the three-judge injunctive provision is codified at 28 U.S.C. § 2284.

271. His correspondence includes letters with contemporary legal lights such as Roscoe Pound, Dean of Harvard Law School. S*ee, e.g.*, HWS to Roscoe

American Law Institute[272] and the American Judicature Society; and during the thirties he was closely associated with others who, for different reasons, were pressing for reforms of the legal system such as the leadership of the American Bar Association.[273] For example, during 1934 he facilitated the enactment of the Rules Enabling Act, considered today a landmark of federal legal-process reform, and he almost continuously sought to modernize federal criminal law. Sumners was a racist *and* he was also a Depression-era legal reformer at the federal level.

In 1937, Sumners may well have been personally conflicted. On one hand, he desired to protect white supremacy for the long run and to prevent or avoid the increase of federal power over state power that might be applied to overcome the South's system of racial segregation and oppression — how else can anyone read his speech of April 17th on the floor of the House and his repeated legislative efforts to derail anti-lynching bills, then and before and after 1937? Yet, on the other hand, he was deeply concerned about the ideal functioning of the federal legal system, specifically the constitutional separation of powers, including the concept of judicial independence and the proper and efficient operations of federal courts[274] and the federal legal system. Additionally, he was also concerned about the survival of the New Deal initiatives, such as economic recovery programs that benefitted his constituents in his

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Pound, May 19, 1930, Sumners Papers (stating "I was much impressed by your characterization of current developments," and also enclosing for Pound a copy of one of HWS's speeches).

272. Sumners spoke to meeting of the American Law Institute in 1940, and he filed in the House and carried the "Bill to Provide a Correctional System for Adult and Youth Offenders Convicted in the Courts of the United States" on behalf of the ALI a few years later. J. Harris Gardner, *Review of* SHELDON AND ELEANOR GLUECK, CRIMINAL CAREERS IN RETROSPECT, 22 TEX. L. REV. 514, 516 (1944).

273. The ABA had "the reputation . . . as a relentless source of opposition to the New Deal," RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY : ELITE LAWYERS IN THE NEW DEAL at 37 (1995), but it also worked for modernization of the law and legal procedure. Sumners had a strong relationship with both the ABA, *see Second Session of Assembly Hears Comprehensive Plan for Judicial Reform Presented by Section on Judicial Administration - Work of American Law Institute*, 24 A.B.A. J. 691, 740 (per its president, Arthur T. Vanderbilt, "I have never known any public official who has cooperated more with the officers of the American Bar Association than has Judge Sumners."), and the Texas Bar Association and the Dallas Bar Association, all of whom applauded him for his legislative work to resolve the court-packing crisis.

274. In 1939, Sumners delivered one of the keynote addresses at the Supreme Court on the occasion of its 150 anniversary, and his topic was "judicial independence." *Address of Hon. Hatton W. Sumners, Representative from Texas*, PROCEEDINGS AT THE CEREMONIES IN COMMEMORATION OF THE ONE HUNDRED AND FIFTIETH ANNIVERSARY OF THE FIRST MEETING OF THE SUPREME COURT OF THE UNITED STATES (Feb. 1, 1940).

Fifth Congressional District.[275] In these latter regards, one of the few scholars to have focused on Sumners put it very simply: "Throughout his congressional career, Sumners willingly worked within the system."[276] The Katnelson thesis provides an explanation of how Sumners resolved or accommodated his internal tension. Sumners was a participant in the compact or deal Katznelson found to have existed between the Southern congressmen and Roosevelt. Specifically, Sumners resolved any internal conflict, and both helped assure the survival of the New Deal and also improved the federal legal system through his two bills that bookended the court-packing crisis.

b. A Parsing of Sumners's "Cash In" Remark

Finally, the story of Sumners's bookend statutes provides occasion for parsing his famous "cash in" catchphrase of February 5th. Historian Lionel Patenaude, who interviewed Sumners in 1952, paraphrased what he understood the Congressman to have told him about those two words: "In Sumner's mind, 'cash in' meant what he said—willingness to sacrifice his political future for principle. In other words, he could not support the administration on this issue and had to risk the consequences."[277] But Glock reads the phrase differently: "He wanted to 'cash in' by using the situation to his and his party's benefit in pushing his retirement bill."[278] Glock has the better view.

Sumners should be believed that his February 5th utterance had not contained the additional words "my chips" because in his October 23rd reply to Love he specified the remark as "cash in" and then twice repeated it as that two-word phrase.[279] Sumners thereby indicated that "cash in" meant something different from "cash in my chips." His letter to Love mentioned that he meant the term "as we know that phrase in the Southwest."[280] Two Western slang dictionaries define the two-word phrase "cash in" as "[t]o pass from this mortal life" or "to die."[281] A number of general slang dictionaries demonstrate, however, another well-established meaning for "cash

275. De Moss, *Dallas, 1929-1933*, *supra* note 70.

276. Monroe, *A Day in July*, *supra* note 21 at 32.

277. Patenaude, *Garner, Sumners, and Connally*, *supra* note 131, at 38 & 38 n. 12 (citing as the source for the paraphrase "Sumners to L[ionel] V. P[atenaude], interview, September 25, 1952").

278. Glock, *Unpacking, supra* note 18, at 31.

279. Moreover, he used the phrase without "my chips" in several February-April letters to confidants in Dallas. *See, e.g.*, HWS to W.S. Mosher, Mar. 8, 1937, Sumners Papers [hereinafter HWS to Mosher].

280. HWS to Love, *supra* note 7.

281. RAMON F. ADAMS, WESTERN WORDS: A DICTIONARY OF THE RANGE, COW CAMP AND TRAIL, *cash in*, 29 (1944); RON GALE, "COWBOY JARGON": A DICTIONARY OF COWBOY AND WESTERN SLANG: WORDS AND PHRASES at 23 (2010).

in": "to make profit or to exploit"[282] or simply "to succeed."[283] And a few dictionaries provide alternative definitions of "cash in" as to "die" and, on the other hand, to "score," to "make a profit," or to "exploit."[284]

It is possible that the Congressman may have been conflating the "to die" and the "to succeed" senses of the phrase, with the resulting meaning that he was going to use his position in the fight over the plan to seek an advantage or to obtain a benefit for "the President, the party, and the country" but also, as indicated by the phrase in his reply to Love "not to count the cost to myself" that he recognized a risk of political injury.[285] One of his letters during the crisis to a constituent that used the phrase "cash in" may be supportive. To a Dallas businessman with whom he was close, the Congressman wrote on March 8th: "Insofar as my political fortunes are concerned, I am perfectly willing to cash in if I can be useful to my country in this great emergency. That is confidential, because people would misunderstand it. They would think I am trying to put myself on parade."[286]

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282. JONATHON GREEN, CASSELL'S DICTIONARY OF SLANG 248 (1998); SEE ALSO TOM DALZELL & TERRY VICTOR, EDS., THE NEW PARTRIDGE DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH, *cash in* 353 (2006) ("to die" or "to take advantage of something and profit thereby").

283. ERIC PARTRIDGE, A DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH, *cash in*, 187 (1984); ERIC PARTRIDGE, A DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH, *cash in* 131 (1953); *see also* B.A. PHYTHIAN, A CONCISE DICTIONARY OF ENGLISH SLANG AND COLLOQUIALISMS, *cash in* 32 ("to take advantage of opportunity to make money); NTC'S AMERICAN IDIOMS DICTIONARY, *cash in* 50 (B.A. Phythian ed., 1987) ("to earn a lot of money at something; to make a profit at something").

284. LESTER V. BERREY & MELVIN VAN DEN BARK, THE AMERICAN THESAURUS OF SLANG 117, 710 (1943) ("cash in" is a synonym for "die" but also for "score"); JONATHON GREEN, GREEN'S DICTIONARY OF SLANG, *cash in* 1001 (2010) ("to die" or alternatively "to make a profit, to exploit").

285. Some sources assert that Sumners would have been a candidate for appointment to the Supreme Court but for the court-packing crisis. *See, e.g.*, CONRAD BLACK, FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 409 (2012) ("The list of those the President was expected to name to the Supreme Court was headed by Felix Frankfurter, James M. Landis, Lloyd Garrison, Senator Robert Wagner, *and Hatton Sumners*." (emphasis added)); *Hatton W. Sumners Dies; Fought FDR*, DALL. MORNING NEWS, Apr. 20, 1962, at 1 ("In 1937, at the height of his career Mr. Summers was openly regarded as the logical choice for the next vacancy on the Supreme Court. But destiny intervened.").

286. HWS to Mosher, *supra* note 279 (emphasis added); *see also* HWS to P.D. Jackson, Mar. 4, 1937 ("when it is finished I hope I will have been useful in the situation"); HWS to D.A. Frank, Mar. 8, 1937 ("I have not the slightest concern as to what happens to me to do not only what I fee to be my duty, but possibly my opportunity to be useful"); HWS to Eric C. Schroeder, Mar. 15, 1937 ("My suggestion is that you wait until whole thing is over with and then make up your mind about my attitude."); HWS to E.P. Simmons, Mar. 20, 1937 ("I am trying to render [a service]"); HWS to Harry D. Scott, Mar. 30, 1937 ("no hope

The final sentence in Sumners's reply to Love in which the Congressman predicted that he was going to be "seen in the future as having rendered a valuable service" to everyone, "the President, the party and the country"[287] indicates that Sumners was not using the "cash in" phrase in the sense of a metaphorical death or of a gambler "cashing in" chips for money and simply walking away. Rather Sumners acknowledged that on February 5th, he knew he was striding directly into the middle of, not away from, the volatile situation the President created. The thrust of his response letter to Love was to signify that he hoped and even expected to succeed, and, believing his efforts would yield a positive result, that he might benefit personally from having caused the resolution of the crisis.

The terminal reference at the end of that final sentence of his letter to "the other legislation which I sponsored" confirms this interpretation because Sumners not only hastened and facilitated the President's addition of new, congenial justices for the Supreme Court by his Retirement Act but also sponsored the Intervention Act to reduce the risk and enable better control for Roosevelt in the event of new constitutional challenges to the New Deal. These are significant changes in the functioning of law, statutory law applicable to the relationship of the president and the Supreme Court, that well served Roosevelt and that benefit future chief executives who propose any innovative or wide-ranging program of legislation to effect great change in society or the economy. So Sumners really did "cash in" by accomplishing the President's goal — not by the court-packing plan but rather by his two statutory bookends to the crisis that the plan created.

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of reward or fear of punishment is going to turn me aside from what I feel is my duty"); all in Sumners Papers.

287. HWS to Love, *supra* note 7.