A COURT DIVIDED: HARLAN FISKE STONE, JUDICIAL REVIEW, AND ADMINISTRATIVE REGULATION OF THE ECONOMY, 1941-1946.

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ABSTRACT

This essay examines the Supreme Court of Harlan Fiske Stone and its record in the area of government regulation of the economy. As most scholars know, the pre-1937 Court was often dominated by an infamous "Four Horseman" team of economic conservatives who rejected any and all efforts at government regulation. Ironically, by 1943, the Court was often dominated by an equally infamous team of economic radicals who favored government regulation at seemingly all costs – Even at the expense of judicial review.

I. Introduction: The Final Triumph of Economic Liberalism and the Advent of the Stone Court, January-July 1941

In terms of judicial history, July 1, 1941, marked the end of an era. On that day, Chief Justice Charles Evans Hughes, having presided over the Supreme Court for the past eleven years, announced his formal retirement from the bench. Appointed chief justice by Herbert Hoover at the advent of the Great Depression, Hughes led the court on a moderate path between the economic conservatism of the "Nine Old Men" and the economic radicalism of FDR to achieve the final incorporation of economic liberalism as official court doctrine.

Beginning this process during the early years of his tenure, Hughes guided the court through the constitutional crisis of 1935-1937 to use the legendary "Switch in Time" vote of Owen Roberts as a means to defeat the "Court Packing" Plan of Franklin Roosevelt and thus preserve the judicial integrity of the Court. At the same time, beginning with the *Parrish* decision of 1937 and accumulating with the Court's ruling in *US vs. Darby* in 1941, the Hughes Court repudiated the Laissez Faire precedents of the White and Taft era courts so as to firmly establish the power of both the state and national governments to regulate the private economy.

During this time, as the Court began its seemingly irreversible drift towards liberalism, the infamous "Four Horsemen" team of economic conservatives who had heretofore dominated judicial policy slowly made their departure from the bench. Two weeks after Franklin Roosevelt's third inaugural in January 1941, Associate Justice James McReynolds announced his resignation as the last remaining member of this conservative bloc. With the *Darby* decision coming just two days later, the eight remaining justices were able to rule unanimously in favor of the minimum wage/maximum hour provisions of the 1938 Federal Fair Labor Standards Act and thus in the process over-

turn the anti-regulatory precedents previously established in the 1918 case of *Hammer vs. Dagenhart.* In terms of both policy and personnel then, by early 1941, the final outlines of the Supreme Court of Franklin Delano Roosevelt were all but complete.

Hughes announced his retirement on July 1, 1941. By this time, there were no less than five Roosevelt-appointed justices on the bench. With the seat previously held by Justice McReynolds as yet unfilled, FDR now had the opportunity to place the final touches on what would now truly be known as the "Roosevelt Court." To lead it, he turned to Associate Justice Harlan Fiske Stone.[1]

II. The First Stone Court: The Byrnes Interlude and the Transformation of American Liberalism, July 1941 - February 1943

On June 12th, "as a reward for years of liberal service on a conservative court and in the interests of national unity," Roosevelt chose to elevate Associate Justice Harlan Fiske Stone to the position of Chief Justice.[2] With sixteen years of judicial decisions to commend him and with the strong backing of Hughes, the former Coolidge Attorney General and later ally of Holmes, Brandeis, and Cardozo had no trouble with his confirmation. On July 3, 1941, just two days after Hughes had retired, Harlan F. Stone was confirmed as the twelfth Chief Justice of the United States.

In the meantime, Franklin Roosevelt had two associate positions to fill. On the same day that Stone was nominated for Chief Justice, Roosevelt nominated Attorney General Robert Jackson to succeed to the seat vacated by Stone. At the same time, he also nominated South Carolina Senator James F. Byrnes to the seat previously vacated by Justice McReynolds. Neither man was to face any serious opposition. Both had previously been considered for earlier appointments and had been considered along with William Douglas as running mates for Roosevelt in 1940.[3]

Jackson, as initially FDR's Assistant Attorney General, had served as Roosevelt's "gallant front-fighter on the Court Packing plan." Subsequently replacing first Stanley Reed as Solicitor General and then Frank Murphy as Attorney General, Jackson had been considered along with William Douglas and Hugo Black, for the Chief Justice's position before Roosevelt finally settled on Stone for whose associate justice position Jackson was now to fill. At age sixty-eight, however, Stone was seen as at best a transitional figure and there was much speculation that Jackson would ultimately succeed him as Chief Justice.[4]

Overcoming fierce opposition from Maryland Senator Millard Tydings who claimed that Jackson's Justice Department had done little in response to what the Senator considered libelous accusations that Tydings had personally benefited from a WPA project, Jackson nevertheless won easy Senate confirmation on July 7, 1941, just four days after Stone had taken the oath of office for Chief Justice.[5] In the meantime, James Byrnes, enjoying benefit of Senatorial courtesy, was to have his nomination confirmed by the Senate without being referred to committee.

A former Congressman and United States Senator since 1931, Byrnes by 1941 had risen to become de facto leader of the Senate and he was able to push most of Roosevelt's war measures through the Senate. Initially opposed to many of the President's New Deal measures, as well as FDR's Court Packing Plan, Byrnes nevertheless earned Roosevelt's respect for helping to stage-manage his third-term nomination in 1940. When the Tennessee-born McReynolds retired a few months later, Roosevelt, at the urging of such Southern and border state senators as Majority Leader Alben Barkley, President Pro Tempore Pat Harrison, and Senate Appropriations Chairman Carter Glass repaid his debt by appointing Byrnes to the position and the Senate responded by confirming him on the very same day.[6]

On October 5, 1941, former Associate Justice Louis Brandeis died at age eighty-five. One day later, the United States Supreme Court convened for its Fall 1941 session. At that time Chief Justice Stone and Associate Justices Jackson and Byrnes formally took their seats on a Bench that now consisted of seven Democrats and two Republicans, only one of whom, Justice Roberts, did not owe his present position to Franklin Roosevelt. A few weeks later, however, Justice Byrnes, in penning the Court's unanimous verdict in the case of *Edwards v. California*, was to help reveal the internal weaknesses and divisions which ultimately tore the supposedly monolithic Franklin Roosevelt Court asunder.[7]

In striking down a California statute making it a misdemeanor for anyone knowingly to bring into the state a non-resident "indigent person," the Court acted unanimously in overturning the 1837 Taney Court decision in *City of New York v. Miln*. Nevertheless, the Court here was seriously divided in its reasoning. Writing for a five man majority consisting of Stone, Roberts, Felix Frankfurter, and Stanley Reed, Justice Byrnes was to assert that the statute in question was unconstitutional in that it violated Article I, Section 8 - the Commerce Clause of the Constitution. Thus, in attempting to regulate the transportation of persons the Court's majority claimed that California had unconstitutionally interfered with Congress's authority over interstate commerce.

Later noting that Byrnes had used an analogy equating a state's authority over indigent people with that over diseased livestock, Justice William Douglas, in a three man concurrence with Hugo Black and Frank Murphy argued instead that the statute in question was unconstitutional in that it violated Article IV—the Privileges and Immunities Clause of the Constitution as well as the Fourteenth Amendment. Thus rather than merely interfering in interstate commerce, the state instead was guilty of the more serious offense of violating an individual's right to travel, a basic freedom guaranteed by the Constitution to all citizens.

In yet another separate opinion, Justice Jackson attempted to agree with both sides finding reliance on the Commerce Clause to be permissible, though unnecessarily narrow.[8] With *Edwards* then, though the Court was able to act unanimously to throw out an unconstitutional statute, the various reasons expressed for its action suggested a subtle turn in Court priorities. With the Court now thoroughly united in the matter of economic liberalism, the stage now seemed set for a shift in emphasis to social

liberalism. And as time would soon show, adherence to economic liberalism did not always translate into full support of social liberalism. What had resulted in uneasy concurrence in *Edwards* would later lead to bitter dissent in other areas as the Roosevelt Court moved on beyond mere economics.

Two weeks after the Court had issued its ruling in *Edwards*, the Japanese bombed Pearl Harbor and the United States found itself at war both in Europe and the Pacific. While President Roosevelt would appoint Justice Roberts to head a commission to investigate the Pearl Harbor attack and President Truman would later send Justice Jackson to assist in the prosecution of Nazi war criminals at Nuremburg, FDR's attempt to "borrow Justice Byrnes temporarily to aid in revamping the production organization" for an America at war proved to be a job too great for Byrnes to remain on the Bench. Consequently, on October 3, 1942, after serving only one year on the Bench, Byrnes resigned to become President Roosevelt's wartime Director of Economic Stabilization. He would subsequently serve as Secretary of State under Truman and as Governor of South Carolina at the time of *Brown v. Topeka*. His resignation in 1942, however, was to have the more immediate effect of shifting the Court even further from economic to social liberalism.[9]

Perhaps no one was more aware of this development than Justice Frankfurter. In 1941, he had recommended that President Roosevelt appoint John Parker to the Court (thus reversing the Senate's prior rejection of Parker when he had been nominated by Hoover eleven years earlier). Frankfurter now lamented the departure of Byrnes for what he considered the accompanying loss of "that very rare faculty - sagacity, downright wisdom."

Unable to obtain Parker and with Byrnes leaving, Frankfurter now sought to recruit another potential justice of like mind to the Court. Consequently, even before Byrne's resignation from the Bench, Frankfurter actively began to lobby for the nomination of United States Circuit Court Judge Learned Hand to succeed him. What was to follow would be an intense three month campaign in which Frankfurter, in a series of letters and memoranda, would portray Hand in the great tradition of Holmes, Brandeis, and Cardozo, and "the only lad who will create no headaches" for the White House. Eventually, however, Frankfurter's efforts for the seventy-one year old jurist were to backfire.[10] On January 11, 1943, Roosevelt was to instead nominate the oft-times considered Wiley Blount Rutledge as his ninth and final appointee to the Court.[11]

Formerly Dean of the University of Iowa's School of Law, the forty-eight year old Rutledge was at that time serving as Associate Justice of the United States Court of Appeals for the District of Columbia. Known as a "staunch believer in liberal interpretation of the Constitution's 'general welfare' clause," Rutledge had earlier gained fame as a critic of the old Supreme Court's opposition to child labor laws. Winning easy confirmation by the Senate on February 8th, he formally took his seat on the Bench one week later and promptly became what Frankfurter had no doubt feared - "somewhat of a foursome with Justices Murphy, Black and Douglas."[12]

By early 1943 then, the final Supreme Court of Franklin Delano Roosevelt was firmly in place. Of the nine sitting justices, only Justice Roberts could still claim to have been free of any ties to Franklin Roosevelt and, given his prior forced conversion over *Parrish*, even he had difficulty in doing that. In the meantime, the depression which had necessitated that change had finally succumbed to war and both the nation and the Court were in the process of still further change.

III. The Second Stone Court: Wiley Blount Rutledge and the Narrow Triumph of Administrative Regulation, February 1943-April 1945

Just as ideological divisions and realignments had plagued the Court before the first Roosevelt appointment of Black, so now would they plague the Court after the final Roosevelt appointment of Rutledge. In attempting to fine-tune the economic reforms achieved after 1937, Rutledge was to join with his fellow Justices Black, Douglas and Murphy in forming a liberal bloc as solidly united as the conservative "Four Horsemen" bloc of Van Devanter, McReynolds, Sutherland, and Butler before it. Against them would be pitted an increasingly conservative element made up of Frankfurter, Jackson, and Roberts who, in terms of analogy, succeeded to the minority position previously held by Brandeis, Stone, and Cardozo. At the same time, Stone as Chief Justice would inherit Hughes' old role as leaning towards the minority, but nevertheless willing at times to join with the majority bloc. For his part, Reed would, on more than one occasion, adapt to Robert's old position as the crucial "Switch in Time" vote. The final results would be to see the Court more thoroughly divided than at any time since the constitutional crisis of 1935 - 1937.[13]

In the 1943 case of *Securities and Exchange Commission v. Chenery*, for example, Justices Frankfurter, Jackson, and Roberts were to join with the Chief Justice to overrule an administrative decision by the SEC. Justice Rutledge had not yet at that time taken his seat on the Bench and Justice Douglas, as a former SEC chairman, had recused himself from the case. That consequently left Justices Black, Murphy and Reed in a three man minority arguing that the Court should have deferred to the SEC's administrative judgement. Four years later, however, when the case came up for a second decision, the Court, now missing both Roberts and Stone, was to reverse itself in favor of the SEC by a vote of five to two with Frankfurter and Jackson in the minority.[14]

Under the tenuous control of its slim liberal majority then, the Roosevelt Court, after 1943, attempted to follow a policy of complete judicial deference in all administrative decisions affecting the economy. Thus in the 1944 case of *Federal Power Commission v. Hope Natural Gas Company*, Justice Douglas, speaking for a five man majority consisting of Black, Murphy, Rutledge, and Stone refused to examine the means by which the FPC set its rates. Declaring "[I]t is not the theory but the impact of the rate order which counts;" Douglas went on to rule that "[i]f the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end."[15]

With Roberts absent, Frankfurter, Reed, and Jackson were to dissent to this, arguing that the Court was carrying its cooperation too far and that the *Hope* decision would ultimately result in eliminating all semblance of legislative as well as judicial control over administrative action. In the matter of federal regulation of commerce then, while the scope of the inquiry may have changed from the days of *Dagenhart* and *Darby*, the Court's divisions over the matter remained intact.

So too were the Court's divisions in matters affecting state regulation of commerce. Thus, in the 1944 case of *Northwest Airlines v. Minnesota*, the Court split five to four to narrowly uphold the state in assessing taxes on a local state airlines corporation, even though only sixteen percent of the daily plane mileage was within the state. Here, in an unusual realignment which pitted Justices Frankfurter and Jackson, with Douglas, Black and Murphy against Stone, Roberts, Reed, and Rutledge, the Court majority ignored arguments that the state tax was an unconstitutional infringement on interstate commerce to instead judicially defer to the state's authority to tax in-state corporations. In the later cases of *McLeod v. Dilworth* (1944)[16] and *Hooven & Allison v. Evatt* (1945)[17] however, the old conservative bloc of Frankfurter, Jackson, Stone, Roberts, and Reed was to reemerge to place limits in state taxing powers "which had not even occurred to the pre-Roosevelt Court."[18]

Beyond the issue of taxation, a similarly divided Court in the 1944 case of *United States v. South-Eastern Underwriters Association*, found itself too helplessly fragmented to pass on the applicability of a federal statute to companies involved in the insurance business. While Justices Black, Douglas, Murphy, and Rutledge found the federal statute applicable, they were nevertheless one vote short of a clear majority. With neither Reed nor Roberts participating, however, the remaining justices, Stone, Frankfurter, and Jackson could not reach a majority opinion either. They did, however, at least agree that the insurance business did constitute interstate commerce to the extent of meriting Congressional regulation under the Commerce Clause. In the midst of its divisions then, the Roosevelt Court was at least able to overturn that part of the Chase Court's 1869 ruling in *Paul v. Virginia* which had earlier exempted insurance from such a classification and thus was able to expand the federal government's regulatory power in that area.[19]

It would of course be a mistake to assume that the Roosevelt Court was always divided on all issues. In the 1942 case of *Federal Power Commission v. Natural Gas Pipeline Co.*, for example, the Court ruled unanimously to free administrative agencies from following "any single formula or combination of formulas" in the regulation of utility rates.[20] Similarly, in the case of *Wickard v. Filburn* (1942), the Court ruled unanimously that the Agricultural Adjustment Act of 1938 extended even to a farmer raising twenty-three acres of wheat for home consumption.[21] A California program for controlling the marketing of raisins was unanimously held not to obstruct interstate commerce in *Parker v. Brown* (1943).[22] Only Justice Roberts objected when the Court upheld the wartime Price Control Act's delegation of legislative powers to Roosevelt's Price Administrator in *Bowles v. Willingham* (1944).[23] In cases such as *Polish National*

Alliance v. NLRB (1944) where the Wagner Act was ruled to be applicable to insurance companies,[24] and *Federal Reserve System v. Agnew* (1947) where an administrative agency was ordered to remain within "the limits of its statutory grant of authority,"[25] the Roosevelt Court was able to exercise a considerable degree of cohesiveness. As has been shown, however, there were areas where the Court allowed both ideology and personal differences to cause both divisions and ill-feeling. It would ultimately be in the area of federal regulation of labor that the Roosevelt Court was to ultimately tear itself asunder.

Beginning with the 1943 case of *Switchmen's Union v. National Mediation Board*, the inner conflicts within the Roosevelt Court were to make themselves more and more apparent. With neither Black nor Rutledge participating, the Court here was to split four to three with Justices Douglas, Frankfurter, Murphy, and Stone voting that certifications by the National Mediation Board of representatives for collective bargaining purposes were not subject to judicial review. In an opinion bitterly resisted by Justices Reed, Jackson, and Roberts (and seemingly at variance with its later decision in *Agnew*), the majority went on to declare that "the Court could not even exercise the function of keeping the National Mediation Board within its statutory authority."[26]

Two years later, in the case of *Elgin, Joliet, & Eastern Railway v. Burley* (1945), the Court seemingly reversed itself by opening up administrative determinations to judicial review. Here, a five-judge majority composed of Rutledge, Black, Douglas, Murphy, and Reed held, contrary to long settled practice, that after a collective bargaining representative under the Railway Labor Act had submitted employee claims to the National Railroad Adjustment Board and had received an adverse decision, the individual employees could still seek to enforce their claims through their own court action. In the furor that was to follow, the Court felt compelled the very next year to grant a rehearing of the case, but the liberal majority once again stuck to its previous ruling. Speaking for the minority in both cases, Justice Frankfurter was to lament, "the far-reaching mischief of unsettling nonlitigious modes of adjustment."[27]

IV. The Final Days of the Stone Court: *Jewell Ridge* and Growing Divisions within the Post-Roosevelt-Era Court, April 1945 - June 1946

By 1945, then, the Court was clearly coming to loggerheads. Underneath the ideological underpinnings of its increasingly fractious opinions, the Court itself was exhibiting signs of internal animosities which began spilling out with the *Jewell Ridge Coal Company* decision of May 7, 1945. Here, in a case involving the United Mine Workers, the Court narrowly voted five to four in favor of the union's argument that its members were entitled to "portal to portal" pay. In seeking a rehearing, the coal company noted that Justice Black's former law partner had represented the union and that Black had improperly been a member of the five-man Court majority. While the Court customarily denied motions for rehearings without opinion, Chief Justice Stone here, aware of how strongly Jackson and Frankfurter felt on the matter, proposed a two-

sentence opinion denying rehearing on the ground that the Court was "without authority...to pass upon the propriety of the participation by its members in the decision of cases brought...for review."

While Jackson had been willing to accept this statement, Black declared that "any opinion which discussed the subject at all would mean a declaration of war." In response to what he considered to be Black's "bullying," Jackson then decided himself to write an opinion "to keep self-respect in the face of his threats." Jackson's opinion, concurred in by Frankfurter, concluded that "there is no authority known to me under which a majority of the Court has power under any circumstances to exclude one of its duly commissioned Justices from sitting or voting on any case."[28] From this altercation would spring the notorious Black-Jackson feud which came to characterize the final years of the Roosevelt Court. Ironically, had Black not participated in the *Jewell Ridge* decision, the resulting four to four vote would have had the effect of affirming the decision of the circuit court of appeals which had also been in favor of the union. Nevertheless, Black's actions here, by giving the Court's opinion the force of legal precedent, raised serious misgivings as to the former Klansman's sense of judicial ethics. Thus was the opening scuffle that would ultimately lead to the Roosevelt Court's demise.[29]

All of this came during a period of great transition. On April 12, 1945, Franklin Delano Roosevelt, after leading the nation through twelve lengthy years of first depression and then war, died just three months into his fourth term as President. Two months later, having successfully prevented Roosevelt from making a clean sweep of Supreme Court appointments, and having inherited Justice Holmes' old title of "The Great Dissenter," Justice Owen J. Roberts retired from the Bench, effective July 31st. As his successor, the new President, Harry S. Truman, selected Harold H. Burton as the first Republican nominee to be submitted to the Court since Roberts himself had been chosen by Hoover fifteen years before.

A former Mayor of Cleveland who had served as United States Senator from Ohio since 1941, Justice Burton was nominated to the Court by Truman on September 18th and was confirmed unanimously by the Senate just one day later. Considered by many at the time to be a "liberal Republican" and an "economic middle-roader," Burton was known "as a man with no causes or crusades to promote." Succeeding the Republican Roberts, he was also rightly expected to "fall in with the more moderate wing" of Stone, Frankfurter, and Jackson. As he formally took his seat on October 1st, Burton consequently brought "no fundamental change in the alignment of the Court."[30]

Burton's appointment did, however, open public criticism as to the Justice's background. As the third US Senator to be appointed to the Bench in eight years, Burton's appointment accentuated the fact that, with the exception of former Circuit Court Judge Rutledge, no other sitting member of the Court had had prior judicial training. While this fact alone did little to hurt Burton's elevation,[31] as the Stone Court entered into its final days and the Court's later difficulties became more pronounced, the character of the individual justices would become more and more at issue with the public.

With the advent of the Supreme Court of Fred M. Vinson (1946-1953), the High Bench's problems were to take on whole new dimensions.

V. Aftermath and Conclusions: The Decline, Fall, and Ultimate Legacy of the Court of Harlan Fiske Stone

On April 22, 1946, the Supreme Court of Harlan Fiske Stone met for one final time. At age seventy-three, the Chief Justice had presided over the Court for roughly four years and ten months. On the day in question, he read brief dissents to majority opinions announced by Justices Rutledge and Douglas respectively. With regard to the latter, a five-man majority opinion granting citizenship rights to an alien who had previously refused military service, Stone responded, "It's not the function of the Court to disregard the will of Congress on the exercise of its constitutional power." Staying one more case after that, Stone asked to be examined by awaiting physicians only to be assured that he was suffering merely from "a small case of indigestion." With that, Court was adjourned and the Chief Justice went home. Five hours later, Stone had expired—dead from a massive cerebral hemorrhage.[32] Stone's reign as Chief Justice was the shortest this country had seen since the resignation of Oliver Ellsworth in 1800. Beyond mere length of tenure, however, the Stone Court's ultimate legacy appears tarnished by its leader's inability to maintain order with an increasingly divided bench.

By all accounts, Stone's elevation to Chief Justice in 1941 should have symbolized the final triumph of American Liberalism on a heretofore conservative bench. Appointed Attorney General by the ultra-conservative Calvin Coolidge in 1924, Stone's promotion to Associate Justice one year later was more likely due to the President's appreciation for his work in cleaning up the Teapot Dome scandals then to any understanding of Stone's true constitutional principles. While Coolidge was no doubt subsequently appalled that his one and only appointee to the bench refused to join the conservative bloc of justices previously appointed by Presidents Harding and Taft, he nevertheless must have taken some solace over the fact that the liberal bloc Stone elected instead to adhere consisted at that time of only Justices Brandeis and Holmes. With the post-Coolidge presidencies of Herbert Hoover and Franklin Roosevelt, however, this heretofore three men minority bloc ultimately found itself in a position to guide the Court from the economic conservatism of 1925 through economic moderation by 1930 to finally economic liberalism after 1937.

Appointed Chief Justice in large part for the reliability of both his ideology and his jurisprudence, Stone's tenure was nevertheless doomed by his seeming inability to govern the Court at a time when growing divisions within America's liberal community began to split his fellow justicies into increasingly hostile camps. While Stone's two immediate predecessors, William Howard Taft and Charles Evans Hughes, enjoyed unique leadership skills which allowed them to either downplay or directly manage similar divisions in the past, Stone himself had neither the temperament nor the desire

to do likewise. In attempting to allow his colleagues to reason out cases at length, the Chief Justice inadvertently opened the Court to strident dissents and public backbiting among the associate justices. Supported as he was by such brilliant but highly temperamental personalities as Frankfurter and Jackson and Douglas and Black, the Chief Justice's presumed reluctance to alleviate conflict helped leave the Court in a consistent state of perpetual inner antagonism and impotence.[33]

Insofar as the subsequent Supreme Court of Fred M. Vinson was to meet with similar difficulties, the two Courts combined ultimately share a legacy of providing a dozen year leadership void in between the infinitely skilled stewardships of Charles Evans Hughes and Earl Warren. In the end, both Courts' ultimate misfortune were to have been products of a liberalism unchallenged and thus left unrestrained of a need to show unity and cohesiveness. In the end, the liberal Democratic Courts created exclusively by first Franklin Roosevelt and then Harry Truman were to be victims of their own unfettered success and it would be left to an Eisenhower appointee named Earl Warren to restore any degree of purpose to American liberalism.

Notes

1. Hudspeth, Harvey Gresham, "Losing Battles and Winning Wars: Franklin Roosevelt and the Fight to Transform the Supreme Court, 1937-1941", *Essays in Economic and Business History: The Journal of the Economic and Business Society*, Volume XVII (1999), pp. See Also: Hudspeth, Harvey Gresham, "Cautious Transition: Charles Evans Hughes and the Supreme Court from the 'Nine Old Men' to the 'Roosevelt Revolution', 1930-1937", *Essays in Economic and Business History: The Journal of the Economic and Business Society*, Volume XVI (1998), pp. 179-195.

2. "Whispers in the White House," *Time*, March 10, 1941, Volume 37-1, pp. 14-15. See Also: "High Bench Echoes," *Newsweek*, June 16, 1941, Volume 17, p. 22.

3. Farley, James A., *Jim Farley's Story: The Roosevelt Years*, McGraw-Hill Book Co. Inc. (New York, 1948), p 301.

4. Kurland, Phillip B., "Transcript of Taped Interview of Robert Jackson," published in *The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions*; Leon Friedman and Fred L. Israel, Editors, Chelsea House Publishers (New York, 1969), Volume IV, pp 2562-2563.

5. "Congressional Record Citation to Nomination Confirmation of Robert H. Jackson to be Associate Justice of the Supreme Court of the United States," *The Supreme Court of the United States, Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee, 1916 - 1975*, Volume 4, pp. 47 - 51, 60 - 61, 64, 68.

6. Byrnes, James F., *All in One Lifetime*, Harper & Brothers (New York, 1958), pp. 129 - 132. See Also: Lilienthal, David E., *The Journal of David E. Lilienthal: The TVA Years*, Harper & Row (New York, 1939), pp 285-286; Douglas, William O., *The Court Years: 1939-1975, The Autobiography of William O. Douglas*, Random House (New York, 1980), p. 26; Moley, Raymond, *The First New Deal*, Harcourt, Brace, & World, Inc. (New York, 1966), pp 365-369; "Catalytic Agent," *Time*, January 11, 1943, Volume 41-1, p. 20.

7. Byrnes, pp. 140 - 141. See Also: Douglas, p. 27.

8. *Edwards v. California*, 314 US 160 (1941).

9. Byrnes, pp. 147 - 157. See Also: Douglas, p. 253; Catalytic Agent," *Time*, January 11, 1943, Volume 41-1, p. 20.

10. *Roosevelt and Frankfurter: Their Correspondence, 1928-1945*, Annotated by Max Freeman, Little, Brown, & Company (Boston, 1967), pp. 580 - 581, 670 - 676. See Also: *From the Diaries of Felix Frankfurter*, edited by Joseph P. Lash, W.W. Norton & Co., Inc. (New York, 1975), p. 239; *The Douglas Letters, Selections from the Private Papers of Justice William O. Douglas*, edited by Melvin I. Urofsky, Adler & Adler (Bathesda,

Maryland, 1987), pp. 93 - 94.

11. "Everybody's Justice," *Time*, January 18, 1943, Volume 41-1, p. 19.

12. "People of the Week," *US News*, February 19, 1943, Volume 14, p. 66.

13. "The Judiciary," *Time*, June 27, 1949, Volume 53-23, p. 19.

14. *SEC v. Chenery*, 318 US 80 (1943).

15. *Northwest Airlines v. Minnesota*, 372 US 292 (1944).

16. *McLeod v. Dilworth*, 322 US 327 (1944).

17. *Hooven & Allison Co. v. Evatt*, 324 US 652 (1945).

18. Pritchett, C. Hermann, *The Roosevelt Court: A Study in Judicial Politics and Values*, 1937 - 1947, The MacMillan Company, (New York, 1948), p. 86.

19. *United States v. South Eastern Underwriters Association*, 322 US 533 (1944).

20. *FPC v. National Gas Pipeline Company*, 315 US 575 (1942).

21. *Wickard v. Filburn*, 317 US 111 (1942).

22. *Parker v. Brown*, 317 US 341 (1943).

23. *Bowles v. Willingham*, 321 US 503 (1944).

24. *Polish National Alliance v. NLRB*, 322 US 643 (1944).

25. *Board of Governors of Federal Reserve System v. Agnew*, 329 US 441 (1947).

26. *Switchmen's Union v. National Mediation Board*, 320 US 297 (1943).

27. *Elgin, Joliet & Eastern Railway v. Burley*, 325 US 711 (1945), 327 US 661 (1946).

28. *Jewell Ridge Coal Company v. Local No. 6167, UMW*, 325 US 161 (1945); rehearing denied, 325 US 897 (1945).

29. Pritchett, p. 27. See Also: Douglas, pp. 29 - 31.

30. "Even Stephen," *Time*, June 17, 1946, Volume 47-2, pp. 18 - 19.

31. Truman, Harry, *Memoirs by Harry Truman, 1945: Year of Decision*, Doubleday & Company, Inc. (Garden City, New York, 1955), pp 4-8. See Also: "Roberts Dissenting," *Time*, July 16, 1945, Volume 46 - 1, pp. 16 - 17; "People of the Week," *US News*, September 28, 1945, Volume 19, pp. 9 - 14.

32. "The Case Should be Stayed," *Time*, April 29, 1946, Volume 47-2, p. 28.

33. Nash, A.E. Keir, "Stone, Harlan Fisk, *The Oxford Companion to the Supreme Court of the United States*, Kermit L. Hall, Editor (New York: Oxford University Press, 1992), pp 838-840.