THE COURT ISSUE: A REPLY

The Social Frontier

October 1937
The Social Frontier for June contained a "Challenge to Messrs. Angell, Conant et al." to reply to a factual analysis of the Supreme Court issue published in that number of the magazine by Dr. Charles A. Beard. The challenge was addressed to nine New England college presidents whose "academic pronouncements" against the President's plan to remake the court were intimated to be in painful contrast to the factual presentation. There was no collusion in preparing the nine statements, and my reply is not on behalf of Messrs. Angell or Conant, or the othe six-sevenths of "et al."; I speak for myself alone.

I.

Dr. Beard's "first fact is that Congress has the constitutional right to alter by law the number of Supreme Court Justices." That point is not in dispute. But it should be observed that the Supreme Court was established by the Constitution itself; it is not the creature of Congress, and the power of Congress to fix the number of justices rests upon the provision that Congress shall "make all laws...necessary and proper for carrying into execution" the powers of the court. The words "necessary and proper" are vital. If attention is not paid to them, the legislative power, if it chooses so to do, may render impotent branches of the government which it has not the right to destroy. Sticking to the interpretation of the Constitution set up by Dr. Beard, it would be equally constitutional for Congress to pass an act providing that the membership
of the Supreme Court be raised to a million, that justices hereafter ap-
pointed should be paid one dollar yearly. Such legislation would be silly,
but many silly things are "constitutional." The central issue, therefore,
is not an undisputed power of Congress, but whether the exercise of that
power at this moment, under these circumstances, for the purposes for
which and to the extent to which it is sought to be exercised is wise,
just, and in the spirit of the Constitution. An antique author once wrote,
"Oh, 'tis wonderful to have a giant's strength, but it is tyrannous to
use it like a giant."

II

"The second fact is that Congress has changed the number of Supreme
Court Justices several times." That also is indubitable, but it does not
answer the all-important question whether it was done to facilitate the
exercise of the judicial power, or whether it was done with a view to usurp-
ing the judicial function through legislative manipulation. If done for
the first purpose, it was proper; if for the second, it was improper. The
emphasis upon the word "Republican" in referring to previous changes in
the number of justices is ambiguous. Does a thing which the Republicans
have done three times become prima facie wise, right, and just? I cannot
feel that such an argument is relevant. It would matter to me not at all
if the change were made by Democrats, Republicans, Know-Nothings, or Social
Frontiersmen, if one may bring such opposites into such close juxtaposition.
If it were made, as Dr. Beard asserts, not with a view to establishing the
number appropriate to the efficient management of judicial business, but
in order to pack the court for the purpose of achieving an interpretation
desired by the legislative branch itself, it seems to me improper. Maybe Dr. Beard feels that if the Republicans have taken such action three times, the Democrats should have three turns at bat. If that is the point of his argument, it seems to me poor logic and worse ethics. Congress has powers which it can abuse; if in the past it has abused its powers, or used them for improper purposes, it does not justify new or modern abuses. That our liberties have not perished and the Constitution has not been ruined by abuses is not a constructive argument for repeating them.

III

"The third fact...is that the Supreme Court is not the only guardian of the Constitution." That statement needs clarification. There are large and significant sections of the Constitution which have never come before the Supreme Court for judicial review, and so far as I can see, they are not likely to do so. It is true also that the Constitution does not in terms confer upon the Supreme Court the power to declare acts of Congress unconstitutional. However, the fact that it has been done for more than a century is interpretation of a very persuasive kind. Indeed, writing in another place, Dr. Beard himself has conceded that Marshall "demonstrated with logic that has never been answered that the Court under the Constitutic possess the power of declaring statutes void when they conflict with fundamental law."

What then is wrong with Dr. Beard's statement of fact? It is simply that there are some aspects of the Constitution which are proper for Congress to interpret. When some of these issues have been brought before the court, it has declined to pass upon them. Clearly the court does not claim to be the only guardian. There are other aspects of the Constitution which are appropriate for the executive to interpret. One president,
at least, directed a cabinet officer to disobey an act of Congress which he believed unconstitutional, and no appeal to the court was or could be taken. There are still other issues where judicial interpretation must be the final authority. The Massachusetts Constitution of 1780 was enormously explicit when it said that "In the government of this commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws, and not of men." The Federal Constitution does not use those terms, but it is founded upon the same principles, and therefore I disagree heartily with Dr. Beard's assertion that if Congress and the president believe that the Constitution has been misinterpreted by the Supreme Court in those cases which are peculiarly within its own field of appropriate attention, they should increase the number of justices in order to change the decisions. According to the logic of Dr. Beard, the Supreme Court is not the guardian of the Constitution at all, since Congress can always increase the number of justices in order to have its interpretation prevail. Under such circumstances the court would not represent one of the three coordinate branches of the government; it would be merely a deputy of Congress. Congress would dominate the exercise of the judicial power which was committed to the Supreme Court by the Constitution.

IV and V

The fourth "fact" is that the Supreme Court has reversed itself and has therefore, in making one decision or the other, "violated" the Constitution. Stated in those broad and unlimited terms it is not a fact.
The learned Mr. Justice Cardozo in a recent opinion pointed out that circumstances alter cases and that the Supreme Court may appear at successive times to be on opposite sides of the same question without real inconsistency. The same position was taken in a recent case and with great learning by the distinguished Chief Justice of the United States. But not to draw that point too fine, let us take the example used by Dr. Beard, the Legal Tender cases. The Supreme Court declared unconstitutional part of an act of Congress. According to Dr. Beard's own statement of the facts, the number of justices was increased for the purpose of packing the court, and the court, when packed, reversed itself. That is scarcely a relevant case to prove that the Supreme Court has been on both sides of the same question. It proves merely that the executive and the legislature interfered with the normal exercise of judicial power and produced a non-judicial result. That is the substance of Dr. Beard's fifth fact. I am astonished that a man of historical learning should parade General Grant as the wise and accurate defender of the true Constitution from judicial misconstruction. Meticulous care for the integrity of constitutional interpretation was not conspicuous among Grant's virtues.

It is indubitable that the Supreme Court has from time to time made mistakes and has sought on other occasions to correct them. It is likewise true that opinions of the court have been neglected and defied and that at least two amendments of the Constitution have also been neglected and defied by Congress and by the executive. Is Dr. Beard arguing that legislative and executive interpretations of the Constitution have been right so much more often than those of the Supreme Court that he wants ultimate judicial power committed to Congress or the president?
VI

"The sixth fact is that presidents have nominated...Justices of the Supreme Court...in order to reverse previous opinions." It may be a fact, but if it is, it is quite irrelevant. If the precedents were bad precedents, they should not be followed. The whole question comes down to a difference of opinion as to the validity of the motives which prompted the earlier actions.

VII

"The seventh fact is that it would be absurd for a president to nominate for the Supreme Court, and for his supporters in the Senate to confirm, men known to be opposed to their views of the Constitution." The use of the word "absurd" immediately labels this as opinion rather than fact. Furthermore, we have recent indubitable evidence that it is not a fact. The liberal Wilson appointed Messrs. Brandeis and McReynolds. Does Dr. Beard regard them as two hearts that beat as one? The conservative Coolidge nominated the liberal Stone. The "reactionary" Hoover appointed the liberal Hughes and Cardozo, who have usually voted together; he also appointed Owen J. Roberts, who has been often on the liberal side. President Hoover did not think it "absurd" to choose in succession to the learned and liberal Mr. Holmes, the learned and liberal Mr. Cardozo. Mr. Cardozo was tainted with the public office-holding experience with which Dr. Beard charged John Marshall, and he was a member of the Democratic party, all of which was well known. Therefore the implication that presidents always make choices which will advance their own ideas does not stick. Moreover, these facts are not only incontrovertible but of decisive importance, for...
if Mr. Coolidge and Mr. Hoover had done what Dr. Beard insists has "always" been done, the five to four decisions in favor of the New Deal during the last term would have been two to seven decisions against it.

VIII

With the eighth fact, "that only once in 150 years has a decision of the Supreme Court against an act of Congress been reversed by Constitutional Amendment," I have no quarrel. The argument which follows is, to my mind, a perfect example of a nonsequitur. It starts with the assumption that it is necessary to "overcome" an adverse decision. The record shows that the court has been sparing in decisions holding acts of Congress unconstitutional, and that most of those decisions have been accepted and not "overcome." Some laws have been redrafted and resubmitted. No one has proposed "to tinker with the Constitution every time a case arises." That is a plain attempt to beg the question. To arrive from such "facts" at the conclusion that constitutional amendment is futile as a means of determining the settled purpose of the people with reference to governmental powers does not make sense to me.

IX

"The ninth fact is that the process of amending the Constitution is not democratic in nature." That is irrelevant in this discussion. It is what we have, and if we want to change it, we should set about it. If we are always to do "what the people voted for last November," we would not have our present Constitution at all. The separation of powers, the checks and balances, the long term of senators, the term of the president,
the independent judiciary--those and many other elements within the Constitution were designed to keep "last November" from being too much in the foreground, and to encourage recollection of the fact that, as in "last November," there is always a substantial minority who should not be without rights, and influence. Moreover, whatever else "the people" voted for in November, it was certainly not for this plan. The court issue was carefully removed from the campaign by no other person than the President himself, and if the opponents of his scheme refer to amendment as the "natural," "right," "normal," or "democratic" way to "overcome" an adverse decision, they are not to be chided by Dr. Beard, for the author of the famous conditional demand for a clarifying amendment was Mr. Roosevelt himself, who inserted it into the Democratic platform.

X

The tenth "fact" is simply an opinion stated in such categorical terms as to give it the trappings and the suits of fact. The statement that "Congress has the same right as the Supreme Court to be courageous and independent" is an extraordinary one to be found in this argument. If the legislation proposed on February 5, 1937, for reorganizing the judiciary is a manifestation of congressional initiative and courage and independence, Dr. Beard is the first to discover it. Even he and the editors of The Social Frontier speak of the scheme as the President's plan. It was conceived and drafted by the executive, and suddenly, without consultation with the leaders, left on the congressional doorstep. Many of the President's strongest supporters gagged at it, and the only independence and courage manifested was by those who defied threats to their patronage and other forms of pressure in order to maintain the independence of the legislative body and of the judiciary.
Dr. Beard began with an admirably objective statement distinguishing between fact and opinion. As the article advanced, the distinction was not maintained, and under his ninth "fact" he found it necessary to impugn the motives of opponents of the President's plan. That is not fact, nor is it opinion; it comes perilously close to calling "one another names," which, as Dr. Beard says, is "never helpful." It has never yet been demonstrated that what Dr. Beard, writing as a scholar, once called "packing" the Supreme Court "by political methods" is really necessary "to achieve New Deal policies."

In my opinion it is fantastic to interpret the power of Congress to establish the number of justices as though it meant that whenever Congress disapproved a judicial decision it shall create enough new justices to change it. That is the point where my opinion differs from that of Dr. Beard.