Cynthia M. Koch: Ladies and Gentlemen, the President of the United States.

Franklin D. Roosevelt: Tonight, sitting at my desk in the White House, I make my first radio report to the people in my second term of office. I want to talk with you very simply tonight about the need for present action, the need to meet the unanswered challenge of one-third of a nation ill-nourished, ill-clad, ill-housed. The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions. In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body. We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. What is my proposal? It is simply this: whenever a Judge or Justice of any Federal Court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office, with the approval, as required by the Constitution, of the Senate of the United States. This plan will save our national Constitution from hardening of the judicial arteries. Those opposing the plan have sought to arouse prejudice and fear by crying that I am seeking to "pack" the Supreme Court and that a baneful precedent will be established. What do they mean by the words "packing the Supreme Court?" Let me answer this question with a bluntness that will end all honest misunderstanding of my purpose. If, by that phrase, "packing the Court", it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer: that no president fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court of the United States. We want a Supreme Court which will do justice under the Constitution and not over it. In our courts, we want a government of laws and not of men.

Cynthia M. Koch: In our courts, we want a government of laws and not of men. Let us take our guide today from the President, as we always try to do, when we gather here in Hyde Park in his library. Welcome to all of you, our distinguished speakers, our many invited guests, the wonderful people who have come from all corners of the country for this, the second national conference sponsored by the 12 presidential libraries that are part of the National Archives and Records Administration. I can't tell you how wonderful it is to see you all here and to have this day finally come to fruition. My name is Cynthia Koch and I'm the director of the Franklin D. Roosevelt Presidential Library here in Hyde Park. With our partners at the Franklin and Eleanor Roosevelt Institute, we are delighted to welcome you on behalf of our colleagues at all of the libraries. From Hoover through Clinton, those libraries span nearly three-quarters of the political history of the 20th century, giving us a unique opportunity, in our system of presidential libraries, to put forth

the kinds of public discussions and the kind of explorations that we will have today. And I think there can be no topic that more clearly delineates this history than the interplay of the presidency and the Supreme Court. As we gather at this, our nation's first presidential library, I ask you to join with me in remembering three important dates in the history of Franklin D. Roosevelt. The first of all is to note that this week past, on November 8th, we marked the 75th anniversary of his election as President of the United States in 1932. We, of course, are gathered today to explore the ramifications of the great court reorganization plan of 1937, which was 70 years ago this year, and we began this whole enterprise thinking how could we properly commemorate the birth of Franklin D. Roosevelt here in Hyde Park 125 years ago in 1882. So help us all as we think through those dates and help us remember those dates and their significance but let us all also remember what today is. Today is Veteran's Day and may we all pause for a moment in memory of the veterans of all wars and those who are fighting overseas in our name today.

[moment of silence]

Cynthia M. Koch: Thank you. The purpose of this conference and the one that preceded it, which was on Vietnam and the presidency held at the Kennedy Library in 2006, is to help draw public attention to the archival resources of presidential libraries and, in addition to the conference presentations which I know will be drawn exactly from those resources and also the things that have been placed in the libraries as a result of the public policy conversations that you will be hearing, we have a few extra additions to the conversation that I hope you'll take part in enjoying while you are here. The first is that there is an exhibit of political cartoons drawn from all of the archival collections of the 12 presidential libraries and that is in the hallway just outside this room. In your packet, you will also find a special publication with short essays written by archivists at all twelve presidential libraries and they are a wonderful opportunity to explore the history of each individual president and his interactions with the Supreme Court. We also have, on exhibit, in the presidential library, on loan from the state archives, which was loaned to us through the good offices of Chris Ward, the state archivist, New York State's own copy of the U.S. Constitution, an engrossed copy which carries the signature of Isaac Roosevelt, known locally as Isaac the Patriot, signer of the Constitution. So these all things bring together a wonderful collaboration. It is the collaboration that is led by a man who has no parallel, in my memory certainly, as the leader of the presidential libraries. He is Allen Weinstein and he knows and finds great spirit in telling all of us to do our very best to be good civic educators. We worked together under his extraordinary leadership because he has a long and distinguished resume as a scholar, a professor and a promoter of democracy. His resume, like that of all of our presenters today, is in the biographical notes and it's much too extensive for me to read to you in detail but I invite you to read it with due appreciation and then, without further ado, it is my pleasure and honor to introduce my boss' boss, the archivist of the United States, Allen Weinstein.

<applause>

Professor Allen Weinstein: Thank you very much. I just had to explain to Cynthia what the payoff was for that very nice introduction. <laughter> Welcome, ladies and gentlemen, welcome to an extraordinary occasion and we're delighted to have you all here. It's a room filled with people who have participated actively in the history of our time and, if I started to acknowledge all of the people we should acknowledge here, we would be here for quite a bit longer on that score. And so my colleagues from the other 11 libraries have to forgive me because I'm not going to mention everybody by name. I just don't have the time for that. But I do want to thank C-SPAN. Thank you, C-SPAN. Let's hear it for C-SPAN because...

<applause>

Professor Allen Weinstein: That's a general thank you for all the extraordinary work that C-SPAN does. The founder of C-SPAN, Brian Lamb, received the Presidential Medal of Freedom this week. Well deserved. But also to thank them for the extraordinary programs they have been running about the presidential libraries that some of you may have seen. How many have seen any of those programs? How many have seen all of those programs? <laughter> Shame on you. <laughter> Initially, I remember the initial plans for this conference, we were going to have a brief appearance by President Bush at the beginning. That doesn't seem to have worked out. He was busy yesterday, in any event, at his library, which opened-- what happens is that these libraries infect one another in wonderful ways. For example, President Bush, in a visit to the Clinton library two years ago, was fascinated by the interactive quality that he saw there and he basically set his team of people to redesigning his entire permanent exhibit at the Bush library and it opened yesterday. It's quite wonderful. You must all come take a look at it. Except, when we went to commemorate and celebrate the president's appearance, he wasn't there because he was busy jumping again. <laughter> And that's what happens when you get involved with presidential libraries. You reach the age of 84 with all the energy needed to take his, as he described it, his sixth jump, five of them voluntary. <laughter> So thank you, President Bush. I'm going to introduce the real speaker here, Anna Roosevelt, who is an extraordinary person in her own right, also the granddaughter of Eleanor, whose writings are now available, the first edition of Eleanor Roosevelt's complete writings will be available-- I think they're available now but certainly within the next few weeks. But I wanted to mention one thing of the many that I couldn't mention and I also want to introduce one person before that. That's Sharon Fawcett. Sharon, stand up, please. This is the-- <applause> Sharon is the assistant director for Presidential Libraries with the National Archives and we have an agreement that she does the work and I get the credit. <laughter> At least that's what it seems like and sometimes I feel a little bit awkward about that. We're embarked on an enterprise,

Sharon and I and our other colleagues from the other libraries, that is very unique in the history of this country, which is to try to tie together, in a system of presidential libraries, a system of presidential libraries, the libraries of the last 75 years and those that will come in future. So far, it's working, knock wood. Some of you were at our Vietnam conference last year. This conference was the extraordinary creation, initially, of your chairman, Bill vanden Heuvel. He'll speak for himself in that regard. And it was obviously carried out by Cynthia Koch's great staff here at the Roosevelt Library. But I thought I'd mention what we're going to do next year, if I can persuade my colleagues from the presidential libraries to accept my notion. Next year, we're going to try to top the greatness of this year and the greatness of last year, or at least to match them, by holding a conference on civil liberties in wartime, striking a balance, which will deal with civil liberties in the 20th and 21st centuries. So we'll be working on that. We may even get a Republican library involved, not just a Democratic library. See what happens. It's now my great pleasure to introduce to you the co-chair of the Franklin Delano Roosevelt Institute, a remarkable person in her own right and many of you know as a good friend of all of are's, Anna Roosevelt.

<applause>

Anna Eleanor Roosevelt: Thank you, Archivist Weinstein, that was way too generous. I'm just honored to be here today to greet you on behalf of the Roosevelt family and the board of directors of the Franklin Delano Roosevelt Institute. I want to also acknowledge that my cousin, Chris, is here. He's a practicing attorney so a member of the judicial system and so we're very happy to have his involvement on behalf of the family. And Archivist Weinstein mentioned Ambassador William vanden Heuvel, who is the esteemed-- my esteemed co-chair and active in the Franklin and Eleanor Roosevelt Institute and so many of our members of the board of directors are here today. I see them sprinkled throughout the audience so I'm very happy that we're a part of this. I'd also like to point out a very special friend of our family just thank him for coming, David Douglas, the grandson of vice-president Henry Wallace, for whom this center is named is with us today. Thanks for being here, David. <applause> As I thought about this conference, it just occurred to me that it couldn't be a more poignant moment for us to gather to consider the relationship of leadership and the judiciary, specifically the Supreme Court. We've been reading, these last several days, about events in Pakistan, which shock and dismay us, as well they should, but we can't even enter into that discussion with dignity if we first don't look at ourselves. My grandmother observed that FDR felt that the primary benefit of his actions regarding the Supreme Court was an arousal of public interest in the court and its decisions. We often decry how the public seems to lack an understanding and certainly a real interest in the significance of the judiciary in its integrity, its independence and its effect on each of our daily lives. So, while we are anticipating getting to the real meat of this conference, which the panels will provide us and the speakers, I hope that each of us will go home from here and talk to

our children and our grandchildren and our neighbors and our colleagues and their children about the judiciary and its importance in a democracy so that the wisdom that will be shared here will not be lost. And now it's my honor to ask you to listen to a special welcome that we have received on video from President George Herbert Walker Bush, who landed safely yesterday.

George Herbert Walker Bush: Good afternoon and welcome. It's my great pleasure to help open the second national conference sponsored by our nation's 12 presidential libraries, from Hoover to Clinton, and the National Archives. It could not be more appropriate that this conference is held in Hyde Park and hosted by the Franklin D. Roosevelt Presidential Library and the Franklin and Eleanor Roosevelt Institute for it was FDR who started the first of our great presidential libraries, setting the precedent for all of us who would follow. This year, 2007, marks the 75th anniversary of Franklin Roosevelt's election to the presidency and the 125th anniversary of his birth. The chosen topic, too, could not be more appropriate, The Presidency and The Supreme Court, the Distinguished Justice Sandra Day O'Connor is the keynote speaker, is a subject that bears importantly on the lives of ordinary Americans, yet so few of our fellow citizens understand the many ways in which these two great branches of government can mutually shape our lives and our history. The relationship between the presidency and the Supreme Court is not just about the appointments process, which captures media attention wherever the President has the honor of making a new appointment to the Supreme Court. It's much more and much more subtle. Over the next day and a half, an outstanding group of scholars, journalists and policymakers will discuss what presidents, both as candidates and in office, have sought to do about and with the court; what presidents have done in and to the court appointment process; and what presidents have sought in litigation and had to deal with in court decisions. So I send my warmest wishes to all of you for an engaging and productive conference and I congratulate you on the fine work you are doing in advancing our citizens' understanding of our government. I have great confidence in and respect for the Supreme Court. Thank you.

Professor Allen Weinstein: This is a partnership of these great presidential libraries and all of them have foundations that work very closely, just as the Franklin Delano Roosevelt Foundation works closely with the library here. We, at the National Archives, have our foundation. In the audience, of course, we have a bunch of directors, key directors of the National Archives Foundation, the Foundation for the National Archives. We, of course, have the directors of the Eleanor and Franklin Roosevelt libraries. I wonder if we could ask them all to stand and we can thank them for our service to us? <applause> Thank you.

Alan Brinkley: Thank you all for coming today and I'm really pleased to be a part of this wonderful conference and especially pleased to be chairing a session with such

distinguished panelists and let me introduce them to you. To my immediate left is William E. Leuchtenburg, a professor emeritus from both Columbia University and the University of North Carolina and one of the most distinguished and renowned historians of our time. Bill is a pioneer of-- was a pioneer of New Deal studies, a field that he has dominated for more than 40 years, and he's been an especially influential contributor to the debate over the Supreme Court in the 1930s, as evidenced by one of his many books, "The Supreme Court Reborn." Moving over one more to the left is G. Edward White, the David and Mary Harrison distinguished professor of law and university professor at the University of Virginia. Ted is a prolific and influential historian of the Supreme Court, among many other things, and an important participant in the debate over the so-called constitutional crisis of the 1930s. He teaches at Virginia in both the law school and in the history department. And, finally, Jonathan Alter, who is senior editor and columnist at Newsweek, contributing editor and political analyst at NBC News, the author of "The Defining Moment, FDR's Hundred Days and the Triumph of Hope", which was published a little over a year ago and which has just come out in paperback and is a really wonderful account of the beginning of the Roosevelt administration. And just as we have two very distinguished historians today, we're very fortunate to have such a distinguished journalist and writer with us as well. So, this is a session that is designed to bring a sort of historian's perspective to the constitutional crisis of the 1930s or the constitutional controversies, perhaps would be a more accurate description, but I think all of us are rightly interested in the parallels between some of the events of the 1930s and our own fractious political climate today so don't be surprised if we hear not just about the 1930s but about some more recent events as well. Each of our panelists will speak for about 15 or so minutes and then we'll have a brief conversation among ourselves and then we'll open this up to questions from the audience. Let me say just a word before I introduce Bill about this topic. Bill and Ted and Laura Kalman who is here today but not on this panel, she'll be on a panel later in the conference, all participated in a similar panel at the American Historical Association meeting several years ago in Washington, a panel whose presentation was published in the American Historical Review in 2006. So we're all trying not to duplicate what we did in that earlier panel and we'll probably all fail to some extent. <laughter> I just want to say a word about this issue and how it sort of fits into the larger history of the court. The controversies over the Supreme Court in the 1930s are perhaps at least, for our time, the most visible evidence of the difficulty that Americans have always had with the Supreme Court. The Supreme Court is, in some respects, the most respected of all of our governmental institutions and it doesn't seem to matter how badly the court performs, it is always, at least in our time, a very highly respected institution. Yet, at the same time, as we know from our own recent history, the court is also almost always a center of controversy from its very beginnings. And so the turmoil over the Supreme Court both today and in the 1930s is not something unique to the 20th or 21st century. This is a continuing part of the sort of political negotiation that began with the writing of the Constitution that continued through the long initial creation of the powers of the Supreme Court under John Marshall, escalated during the period of the Civil War, continued through the Industrial Era and into the 20th century and

continues, of course, into the 21st. So this controversy is one that reaches backwards in history and also reaches forward in history, into our own time and that's what makes this such an interesting question or set of questions for us to try to answer. So let me turn, first, to Bill Leuchtenburg, who is, in many ways, the dean of the history of the Roosevelt court and we're very fortunate to have him here today. Bill?

Professor William E. Leuchtenburg: Thank you, Alan. When, on a late winter day in 1992, Alphonso Lopez arrived at Edison High School in San Antonio toting a .38 and five bullets intended for a gang war, it is doubtful that his main goal was to provide a topic for discussion on a pleasant autumn afternoon in Hyde Park <laughter> or that he planned to become the subject of a landmark ruling by the United States Supreme Court. But, in fact, he did both. In a hotly disputed five to four decision in 1995, the Supreme Court struck down an act of Congress, the Gun-Free School Zones Act. In the United States against Lopez, Chief Justice Rehnquist, speaking for the court, declared, "We start with first principles." As James Madison wrote, the powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in State governments are numerous and indefinite. Rehnquist's opinion elicited no fewer than three dissents, the most forceful coming from Justice Souter, who accused the majority of "ignoring the painful lesson learned in 1937. It seems to fair to ask," he said, "whether the step taken by the court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago." Souter ended his protest against a decision that he maintained, "tugs the court off course" by veering toward "the old judicial pretension discredited and abandoned in 1937" with a foreboding observation. Today's decision may be seen only as a misstep, hardly an epical case. I would not argue otherwise. But I would raise a caveat. Not every epical case has come in epical trappings. Jones and Laughlin did not reject the direct/indirect standard in so many words but we know what happened. In a concurrence in Lopez, Justice Clarence Thomas wrote what was, in effect, a rejoinder to Souder. "Lopez," Thomas insisted, "did not represent a wrong turn. If anything, the wrong turn was the Court's dramatic departure in the 1930s from a century and a half of precedent." Claiming that commerce differed from manufacturing, Thomas cited the precedents of Schecter in 1935 and Carter in 1936. At an appropriate juncture, Thomas announced he wanted the court "to wipe the slate clean." The Lopez decision sent shock waves through the legal world. As Rehnquist was delivering his opinion, the justices, looking down from the bench, could see one prominent attorney in the courtroom silently mouthing the word "wow". Why the shock? After all, it does not seem patently unreasonable to conclude that whatever the interstate commerce clause in the Constitution means, it does not embrace behavior at a local school. No less a figure than Lawrence Tribe, surely no favorite of the far right, has said, with respect to the paucity of legislative findings in the Gun-Free School Zones Act, "Congress pushed the outer edge of the envelope rather carelessly." Why then the uproar? Why did the New York Times run Anthony Lewis' column on Lopez under the somber headline, "The Court Strides

Back to Its Darkest Days"? What did he mean by darkest days? What did Justice Souter mean by "the painful lesson learned in 1937"? What are the precedents the justices cited, Schecter, Carter, Jones and Laughlin? Above all, why the wow? To answer those questions, we need to turn to the age of Franklin D. Roosevelt and to draw upon the rich resources of presidential libraries. When FDR entered the White House in March 1933, at the depths of the worst depression this country's ever known, one of his first acts was to summon congress back to Washington in emergency session. During the ensuing first hundred days of 1933, as Jonathan Alter has written, "Roosevelt, with the help of congress, pushed through the most legislation in the shortest time in American history." Two of the measures provided the foundation stones of the New Deal, the National Industrial Recovery Act, administered by the NRA, with the symbol of the blue eagle, and the Agricultural Adjustment Act, the AAA, in the realm of Henry Wallace. It was a spectacular session but, when it ended, Roosevelt and New Dealers were very worried because they feared how the United States Supreme Court would respond. Over them, over the justices, over FDR and the New Dealers, as Francis Perkins has said, hung one particularly troubling precedent, Hammer against Dagenhart. Reuben Dagenhart was a North Carolina man who insisted that he had the right to send his two teenaged sons, one of them only 13, into the mills. In a five to four decision in 1918, the Supreme Court ruled that the Child Labor Act, which forbade him to do so, was unconstitutional because the power of Congress over interstate commerce does not extend to regulation of labor and because the law infringed upon the authority of states under the 10th amendment. That was still the prevailing doctrine when Roosevelt took office. Roosevelt knows that four of the justices, McReynolds, Butler, Van Devanter, Sutherland, are such staunch conservative ideologues that, every time one of the president's lawyers goes into the courtroom, he has four votes against him. If he loses even one of the remaining five, he's beaten. The New Deal may be dead. FDR's Attorney General, Homer Cummings, says, "It's like knowing that, every time you play golf, you're going to find yourself on the back nine four holes down with only five holes left to play." The conservative justices are called the Four Horsemen, a name well known in this period because it had been applied to the Notre Dame back field but the term conveys, of course, the Four Horsemen of the Apocalypse, agents of destruction. In the spring of 1935, for Roosevelt and the New Deal, the roof falls in. Justice Owen Roberts joins the Four Horsemen in invalidating a pension law with the clear implication that, when the Social Security Act reaches the Supreme Court, it, too, will be struck down. And, for the next year and a half, Roberts votes with the conservative four in every crucial case. Worse is to come. Just three weeks later, in the so-called sick chicken case, involving a Brooklyn kosher poultry farm, the Schecter brothers, the court invalidates the NRA. This is stunning news of international import. The French press runs it under large headlines, "Le Morte Des Le Blue", the death of the blue eagle. With the NRA gone, only the other foundation stone of the New Deal, the AAA, the farm program, is left. And, in the first week of 1936, the court kills AAA, too. That decision infuriates millions of farmers. That night, alongside a highway near the Iowa State Campus in Ames, police find effigies of the six justices who voted to demolish AAA strung up, each is life-size, each wears a black robe, each bears

a cardboard sign, identifying the particular justice who has been hanged. Over the course of 1936, the court strikes down a number of other laws, two decisions in particular are startling. In Carter, invalidating a little NRA for the coal industry, the court rules that not even coal mining may be regulated by the federal government. In its final action of the session, it invalidates a New York State minimum wage law for women, creating, as the president said, a no-man's land in which neither federal nor state government may act to protect the worker. At the end of that historic session, Justice Harlan Fiske Stone writes his sons, "We finished the term of court yesterday, I think in many ways one of the most disastrous in its history." In February, 1937, having been re-elected in a landslide, Roosevelt responds by asking congress to authorize him to add six justices to the court. He says he does so only to make the Court more efficient but everyone assumes he did so in order to get a court more amenable to the New Deal, to, in the phrase of the day, "pack the court". It was an audacious proposal but most commentators think the bill will be enacted for the Democrats hold a four to one advantage in the House and have so many seats in the U.S. Senate that numbers of democrats have to sit on the Republican side of the aisle. In Marksville, the Court begins handing down a series of decisions legitimating government action. These, together with other events, doom the plan. The key development is a switch of Justice Roberts, which turns a five to four margin against the New Deal to a five to four advantage for Roosevelt's program. Of these rulings in 1937, by far the most important is NLRB against Jones & Laughlin, a steel corporation. In his opinion for the Court, Chief Justice Hughes never acknowledges he's reversing Schecter and Carter but this is the pivotal case in creating a new constitutional order. We're able to put together this account, in no small part, because of the blessings of presidential libraries, especially here at the Roosevelt library, where the OF, PPF and PSF files are indispensable to students of the 1937 controversy. You might suppose that only the FDR library's holdings are pertinent since the conflict took place totally in Roosevelt's tenure but presidential libraries contain not just papers of White House years but those before and after a man becomes president. In the fierce fight to win votes for the court packing bill, no one can be certain how some obscure back bench Senators will vote. And, to understand the response of one of these back bench Senators, you have to go to the Truman Presidential Library in Independence, Missouri. To get insights into the machinations of an important opponent of the bill, you need to seek out sources in the Hoover Presidential Library in West Branch, Iowa. Hoover, incidentally, had one truly nutty idea. <laughter> To ask Justice McReynolds to persuade Justice Brandeis to resign <laughter> with a blast at President Roosevelt, a notion with no recognition that McReynolds notoriously was a vicious anti-Semite, the worst conceivable envoy to Brandeis. <laughter> During the fight, one large question was, what do the American people think of FDR's scheme? In 1937, polling is still primitive. The best known poll, that of the Literary Digest, had predicted that FDR, in 1936, would go down to overwhelming defeat at the hands of Alf Landon. But in April 1937 comes a test of popular sentiment in a special election called after a Congressman dies. An ambitious young man, not yet 30, jumps into the race as an out and out supporter of Roosevelt's plan. Other candidates in the field are much better known and he's not expected to win

or even come close but, to FDR's delight, the young man does win and his victory is seen as proof the country favors court packing. It's in this fashion, as you have probably already guessed, that the young Texan, Lyndon B. Johnson, begins his congressional career and there's no way to understand that development without going to the Lyndon Johnson Presidential Library in Austin, Texas. The rebuff of his court packing plan is the worst defeat Franklin Roosevelt ever suffers but, in later years, he claims that though he'd lost the battle, he had won the war for, in the course of the struggle, he had brought about a fundamental transformation in the doctrines of the Court. Not every scholar agrees that FDR's actions were responsible for change but there's no doubt that there was what has been called nothing less than a constitutional revolution. Two decisions in particular are noteworthy. In 1941, in Darby, the court unanimously holds that Hammer v. Dagenhart was an aberration and no longer the law of the land. There's not too much to say. One historian has written that United States against Darby is one of the half dozen most important cases in the whole history of American constitutional law. Still more remarkable is Wickard against Filburn in 1942 in which the Supreme Court rules that on Ohio farmer, Roscoe Filburn, was in interstate commerce and hence subject to federal authority, even though he was growing wheat wholly for his own use on his own farm. Wickard against Filburn implies that the court will no longer consider whether to strike down any act of Congress as violating the commerce clause. This is why Lopez, in 1995, was such a shock, why the lawyer said wow. The court had not invalidated any act of Congress as beyond the bounds of the commerce power since Carter, 49 years before. After Lopez, a law professor at Ohio State, noting that, for two generations, the commerce clause had become an intellectual joke among academics and attorneys, asked, "Can Farmer Filburn now begin raising marijuana on his Ohio farm?" But was too much being made of Lopez? In his concurrence in Lopez, which was joined by Justice O'Connor, Justice Kennedy, like Justice O'Connor, a member of the majority, and alert to how the ruling could be interpreted, made a point of affirming stare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. In 1996, Larry Kramer of New York University Law School, wrote, "What should we make of Lopez? Initial reactions were largely of the Chicken Little variety and filled with dire predictions of renewed judicial shackles imposed on a hamstrung federal government. Sober second thoughts have been, well, sober, and many observers now say Lopez may not be such a big deal after all. So which is it? Is Lopez a sport, a judicial shot across the bow to remind congress to take its responsibilities seriously? Or have the ghosts of Sutherland, Butler, Van Devanter and McReynolds returned to haunt us after all?" Then, in the year 2000, five years after Lopez, comes a decision by the Supreme Court in an especially nasty case. In litigation that became known as U.S. against Morrison, a young woman named Christy Brzonkala alleged that, shortly after enrolling as a freshman at Virginia Tech, she was brutally gang raped by members of the football team, one of them Antonio Morrison. After the University behaved with appalling callousness to these very serious charges, she filed suit under a provision of an act of Congress, the Violence Against Women Act of 1994. In May 2000, once again five to four, the court struck down

the civil remedy provisions of the Violence Against Women Act. Rehnquist, citing Lopez, said, "Gender motivated crimes of violence are not economic activity and, hence, fall beyond the scope of the commerce power." In a fierce dissent joined by Justice's Breyer, Ginsburg and Stevens, Justice Souter scoffed at the majority's claim that its ruling rested on precedent. "The Act," he said, "would have passed muster at any time between Wickard in 1942 and Lopez in 1995." He accused the majority of recycling a theory repudiated in Darby. A large question then of our era is, how far will the present court go in rolling back the constitutional revolution of 1937? Legal authorities are not of one mind about the answer to that question. What is clear, though, is that hovering over the justices as they contemplate the future is the dark cloud of events that took place in 1937, 70 years ago this year, a crisis that cannot be comprehended without research in the exceptional archives of Presidential Libraries, pertinent for the 1930s, pertinent today. Thank you.

<applause>

Alan Brinkley: Thank you, Bill. Ted White?

Professor G. Edward White: I think Bill has ably set forth one side of the access that we're talking about today, the presidency on the one hand, President and Congress on the one hand and the court on the other. ***[problems with mike, static, skipping parts, short then fixed]*** I'm going to focus more on the judicial part of that and I want to say-- start by saying some [tape glitch] court packing hypothesis itself which we were introduced to at the very outset of this conference when we heard an excerpt from the March 9th, 1937, fireside chat and I want to remind us that, in that comment, Roosevelt, although claiming that he was not interested in putting justices on the court that would-- were spineless advocates of his own views and he thought that no one in the Senate would confirm such people, and he derided the term "pack the court" and talked about the difference between a nation of laws and a nation of men, it's interesting that he alluded to that perception at all. What's particularly interesting is, if the perception is that the court packing plan is an effort to pack the Court with justices that are sympathetic to the appointing president, that this represents a comparatively new set of perceptions about how justices work in American history. Now, I don't want to be misunderstood in saying that. I don't want to be misunderstood in thinking that people in American history were not-- did not consider the justices of the Supreme Court as capable of partisanship as any other human actors but what is missing until the generation of the '30s is any sort of popular or academic commentary that focuses on the individual perspectives, jurisprudential perspectives of judges, as human actors, implicitly suggesting that the battery of concerns, ideological and other that a judge brings to bear on interpreting legal sources is capable of overwhelming those sources. And so we get, at the beginning of the 1930s, for the first time in the history of a popular commentary on the Supreme Court,

the application of the labels of politics, labels like liberal and conservative, centrist and swing voter, to Supreme Court justices. Now, consider the assumptions of the Court packing hypothesis with this change in perceptions about Supreme Court justices in mind. The conventional view of the court packing hypothesis is that the Court, as Bill's account suggests, that the court is aware of and reacts to political pressures placed on it by the Roosevelt administration as other sorts of political actors would react. And that the switch in time that saves nine, a description of the court packing plan and its purported consequences, by someone in 1937, the best guess is that someone is Edward Corwin, the Princeton University political scientist. The interesting feature of that observation is that it assumes that judicial response to presidential pressure will be the response of an interested set of political actors who are capable of changing their views on constitutional interpretation and switching so that their accommodations to the New Deal save their institutional identity. Now, what's interesting about that hypothesis is not whether it's accurate or not. It is interesting that, in the 2006 discussion in the American Historical Review and at the American Historical Association, there were divided views on that point, divided views about whether there is a causal connection between the Court's behavior and the introduction of the court packing plan, divided views on whether the change in judicial attitudes toward the commerce power and the exercise of the commerce power by congress represents a response to that pressure or whether it is a more gradual jurisprudential development that occurs somewhat independent of that. But the interesting thing, from my point of view, is not that the-- not what the right answer to the court packing hypothesis is but that it is still setting the terms of discussions about the relationship between the Court and the Presidency or the Court and the larger political culture, more than 70 years later. This is very unusual for a historical hypothesis, an interpretation of history by scholars, to have that sort of staying power. Indeed, the common shelf life of historical interpretations as orthodox is less than a generation and that's why we have revisionist history because scholars taking another look at the interpretations of past events [tape glitch] find them wanting and they find them wanting, in part, because they're coming from different places themselves. Not so much true with this hypothesis so the suggestion might be then that something deeper and broader is going on. So I want to talk a little bit about what that might be and then I want to talk about whether, in fact, the assumptions that are under girding the court packing hypothesis are an accurate or helpful way to talk about judicial decision making. Let's assume that one believes that judges are a set of political actors like other political actors and that the Constitution is a relatively open-ended document so that, when a justice is appointed to the Supreme Court, he or she has power to literally change the meaning of the document and that, of course, the Court is an institution that doesn't have the sort of political accountability as other branches of government and justices are humans with human political agendas. So, under that theory, then, what's called, in political science, attitudinalism, best explains Supreme Court decision making, particularly the interpretations of the Constitution that justices make of open-ended clauses. You could argue, from this perspective, that the court packing, that every feature of the court packing hypothesis is a vindication of attitudinalism. First because the justices resist the

early New Deal because there's a determined majority, as Bill says, a determined majority of conservatives who managed to pick up one more vote and they scuttle the New Deal because they hate Roosevelt and they hate the experimentation that the New Deal represents. Secondly, the president wins an overwhelming mandate in 1936 and suddenly has a major political constituency. Third, after winning in 1936, he starts off early in the 1937 year and introduces the court packing plan and, as you saw in the excerpt from the fireside chat, defends the court packing plan. The message being, and the message being understood, as he says it himself, this is a court with hardening of the arteries. What does he mean by hardening of the arteries? He means that their ideological views are obsolescent and I'm going to put new people on who are more sympathetic, personally, to changing the Constitution in a way that's consistent with the way I think in the 1930s it ought to be changed. So that, again, lends itself to the attitudinalist hypothesis. Next, that the court, being political actors themselves, a majority of the Court, gets the message and decides that their own identity is threatened. They're going to be confronted with the options of either having to retire or get uncongenial colleagues and so they tailor their interpretations to make a compromise, if you will, with the New Deal. And then, finally, because of that, the sequence of events is that the decisions that Bill is talking about take place in March, April and May of 1937. The court packing plan withers in Congress and dies in June. Ergo, the switch in time saves nine. Now, if you assume that that episode is a vindication of the fact that justices are primarily attitudinalists, then you can extend it, as Bill has, to talk about recent cases, to talk about Lopez and Morrison, to talk about Bush v. Gore, the theory being all along that justices are one species of political actors and they're relatively unconstrained by elected-- they're not elected officials, they're relatively unconstrained. They have no direct constituencies except public opinion. So one could, therefore, say that the real significance of the court packing hypothesis is that it initiates a new way of thinking about justices, a realistic view of judicial behavior, which is still with us and then that might explain why, for example, commentators, some commentators of today, are so worried about, let's say, the shift from regular forms of judicial review to judicial supremacy or even sovereignty. The idea that the Court is simply taking over and becoming the final arbiter of not just the Constitution but, by interpreting the Constitution, the final arbiter of contested political issues. Well, what I find surprising about this point of view is that it starts with the assumption that the principle concerns of justices on the Court are with the outcomes that the Court reaches in constitutional cases and how they vote. And, being political actors, they have political agendas and they are figuring out the liberal or the conservative position all the time and they are simply voting their preferences. What interests me about that is how you can square it with the way the Court makes decisions itself, the deliberative process of the institution. If you go through the Court's deliberative process, what emerges immediately is a series of factors that are not so visible to the general public or even to commentators because those people are focused on either the results the Court reached or the opinions and justifications that the Court announced in opinions. But there's a big step between argument and decision-making and, in that process, constraints, I would argue, constraints on potential ideology are more present

than the freedom to act in an ideological fashion. So just consider the ordinary way in which let's take a visible constitutional case, the ordinary way in which that case will be deliberated upon and decided by the Court. First, of course, the case is set for argument and then there is a conference. Now, bear in mind that the Court is a collegial institution, that it doesn't decide cases one by one, that justices don't issue, on the whole, seriatim opinions. There is an opinion for the Court, the opinion presupposes there is a majority of justices supporting it. So the first part, then, of the deliberation involves discussing the case and figuring out what group of justices shares a particular view, not which justice but which group. The next step is the assignment of an opinion and the circulation of an opinion by a justice writing on behalf of other justices, circulating that opinion to other justices for output from all of the remaining justices. So-- and, moreover, every justice participating in the process knows that, when the opinion comes down, that justice's name will be either visibly or implicitly assigned to it. The head notes of the Court reveal everybody's votes. Sometimes they don't say who joins the majority opinion but it is perfectly obvious who joins the majority opinion when there are concurrences or dissents and sometimes the majority opinion is declared as unanimous. So if Rehnquist or O'Connor or Scalia write an opinion for the Court, it is known that other justices have joined that opinion and not just joined the results but joined the language of the opinion. So, in short, if a justice, let's say, had a strong ideological agenda, he or she would have to understand that that agenda needs to be tailored along the way to the views of other justices or else a majority, a preliminary majority may be lost. One of the justices who joined-- be inclined to join the majority might write separately, more dissents might come out, the whole configuration of the case might come out potentially differently. So, in short, there are constraints on the ideological perspective of the Court, of the members of the Court from the beginning but the constraints go well beyond that. When you examine an opinion, when Bill was referring to the opinions of Souter and Thomas in Lopez, those opinions are couched-- not couched in the language of this is the wrong vote, this is the wrong ideological point of view, this is the wrong result for political measures but this is the wrong theory of Constitutional interpretation or this is the wrong institutional posture for the court. In short, opinions are sunk, set in the language of doctrine in the accumulated precedents, interpretations, prior decisions, of authoritative sources and let's assume, again, if you're an attitudinalist, that all that counts is the vote, what is it that you're going to be identified with as the author of an opinion after that opinion is delivered? It is the set of justifications accompanying the result, not just the result, and what are those sets of justifications put in but doctrine. What does a case mean when it's handed down? It doesn't primarily mean this is the result between the two parties. There is a dimension of that. But what does it stand for? What it stands for is a posture in the Court, a doctrinal interpretation of a clause of the constitution. What is its role in the accumulated legacy of the Court's work? Its role is that of doctrine. So there are not only-- a justice is not only constrained to tailor a position that his colleagues may support or her colleagues may support but to advance a set of justifications that persuades other members of the Court, that persuades future courts, that is part of the corpus of doctrine. So if that's so, that is, if the Court is constrained at every phase of its decision-making

process, then why should a set of interpretations that equate judicial decision-making primarily with political ideology and political voting adequately explain the way the Court works? It is if the attitudinalist's hypothesis leaves out most of what is affecting the justices in their decisions. Now, attitudinalists might respond in one of two ways. They might suggest that, well, yes, that may be but the opinions really are nothing but a way of rationalizing the votes, that the votes drive the opinions. Indeed, their justices are secretly voting one way and throwing out opinions to persuade others but that's just an effort that they're-- it's a set of obfuscation as window dressing. Well, that may be so. I mean, there may be justices who secretly believe one thing and write another. But what's left in the U.S. reports? The secret reasons or what's out there in the opinion, what other justices have joined? Or you might argue, alternatively, as an attitudinalist, that, well, yes, but in some fashion every opinion reduces itself to an issue of politics. It all has a particular consequence. But, if that's so, the consequences are extraordinarily short run and perhaps even unintelligible because, again, what is sitting there for the rest of us is the opinion and whether the opinion will remain a statute or not. So I would venture to say, when Thomas and Souter are talking about 1937, what they're talking about is the theory that perhaps beginning in 1937, the Court began to shift a posture toward the role of Congress, which was more deferential in subjecting congressional activity to Constitutional review than it previously did. Those postures certainly do change over time but it seems to me vastly over simple to claim that they change over time just because of the particular political-- short run political orientations of members of the court. So, in short, cycling back to the fireside chat and the role of the Court in politics in the '30s, the episode is extraordinarily important for us in Constitutional history but I think not for the conventional reasons that it's an example of a reaction to short-run political pressures by the Court as a set of partisan actors but because it's the first generation in which a attitudinalist theory of judging becomes offered and becomes orthodoxy. I think the concern we have today is not so much that we'll go back to the dark ages of the pre-1937 Court but that we will so focus ourselves on an attitudinalist view of judging that we'll leave out primarily what's going on when judges actually make decisions. Thank you.

<applause>

[audio off then on]

Jonathan Alter: I have accomplished one of those and will try to be brief and I will let you judge sincerity. I wanted to make basically three points and I feel-- no, I'm not a professor and I don't play one on TV so I'm not going to try to play in their league in understanding deeper issues but I wanted to offer three ideas as fruit for thought. The first is that Franklin Roosevelt was, in some important ways, a Constitutional conservative. The second is that the nine old men switched before the time alleged and,

therefore, didn't switch in time to save nine. They switched in time before the "court packing" scheme in one extremely important respect. And then the third idea is that, despite having appointed no fewer than eight political figures to the Supreme Court during his presidency, FDR was, in many ways, a bipartisan figure when it came to the United States Supreme Court. So, on the first point, the idea of FDR as a Constitutional conservative, I want to look at it more broadly than the idea of the commerce clause and his attitude toward that and the nature of his legislation. To put it in context, when FDR took office at the depths of the Depression, the country was curled up in the fetal position. A lot of people believed that both capitalism and democracy were at an end and I'm not exaggerating. The head of the Harvard Business School thought that capitalism might be finished. The president of Columbia University, Nicholas Murray Butler, said that elections were not the most productive way for his society to select its leaders. He had just won the Nobel Peace Prize. The word dictator was a positive word. Studebaker had a car called the Dictator. Sold pretty well until about 1935. <laughter> The New York Daily News, the largest newspaper in the country, the headline as Roosevelt's coming into office, "Wanted: A Dictator". Even Eleanor thought that a mild species of dictatorship might be called for. Walter Lippmann, who was the dominant columnist of his era at a time when columnists actually had some status <laughter>, he went to Roosevelt shortly before the inauguration. He said, "Franklin, you may have to assume dictatorial powers." Roosevelt himself, in some ways, was tempted. I found here, just a few feet from where we are, buried in an obscure file, a draft of an address that FDR did not give to the American Legion on his first day in office, March 5th, 1933. The speech, as delivered, was a non-newsworthy, short restatement of his inaugural address but the draft of this speech to veterans, now in their 30s, most of them, from the Great War, said, "I reserve, by my right as commander in chief, to command you in any phase of the crisis," basically saying, like Mussolini who, by the way, was an extremely popular figure in the United States at this point, like Mussolini had taken his veterans and created the black shirts and I don't think Roosevelt exactly wanted to do that but either he or some of his advisors, we don't know who wrote this draft, they were worried and they thought they might need to take these veterans and use them, I don't know, to guard banks from these disastrous bank runs that were taking place. Not sure what he would have done with them but he at least considered moving in an extra constitutional direction. He decided not to. Decided to substitute his leadership abilities, his strength of character, his imagination and spirit of experimentation for the sword or for moving extra constitutionally. He passed the word on Capitol Hill, "Forget Lippmann." What I'm going to do, I'm going to do through you, the Congress. Now, he always held the threat that, if Congress didn't bend somewhat to his will, that maybe he would go extra constitutional but he didn't need to and the astonishing thing-- one of the astonishing things, to me, about what happened in the first hundred days is what did not happen. No constitutional amendments. Can you-- look at Pakistan and really, throughout human history, when leaders get in trouble, in a crisis, when they feel that they-- if they have the support of the people, which, you know, Musharraf doesn't but Roosevelt did, in spades, they usually take the power that's offered. They don't let the cup pass, you know? So he could have rammed through any number of

constitutional amendments in the first hundred days. He chose not to. He chose to be essentially a constitutional conservative in the same way that, on the financial system, he tongue-lashed the bankers as money changers in his inaugural but, when they came to him and wanted a national takeover of the banks, which had betrayed the American people, most were already closed before he even took office, 10,000 had gone out of business, he said, "No, we're going to keep banking in private hands." Backup position, postal banks. Can you imagine if the post office had run our banking system for the 20th century? He said no. So, in many ways, he was quite conservative in those first hundred days and I think, and in the way he didn't use the powers that he could have assumed. He said, "The only thing we have to fear is fear itself." He did not say, as I think some politicians today, the subtext of their notion is, the only thing we have to use is fear itself. That was not his position. Second point relates to Social Security. Frances Perkins came to FDR when he was president-elect and laid out a lot of what became the New Deal. She knew that there were constitutional problems and Roosevelt was very airy and dismissive about it, "We'll take care of that when the time comes." He wasn't ready to introduce Social Security in 1933. So he sent her to work to build political support for it and, in 1935, partly through the efforts of Louis Brandeis' son-in-law, Paul Raushenbush, who designed it out of Wisconsin, where they had had a plan, Social Security starts to gain momentum. But Perkins is terrified that Social Security will not make it because remember it's in early '35 that you get these bomb shells from the Supreme Court and Brandeis, who has, in this period, Felix Frankfurter goes on the court in 1939 but, in this period and for many years, he was paid $3,300 a year by Supreme Court Justice Louis Brandeis to keep him posted and keep him in the mix and he was involved politically in ways that are almost unimaginable today. You know, ways-- much less than, say, Abe Fortis got involved with-- much more than Abe Fortis got involved with LBJ. Brandeis and Frankfurter were everywhere, very, very politically involved. Brandeis was a little bit annoyed that a lot of his ideas for the first hundred days were not picked up on by Roosevelt. He particularly resented the NRA but Social Security, he's going to be okay, but do they have enough votes? Do they have enough votes? The Supreme Court has unanimously ruled in the Schecter case, these were not five to four decisions, unanimously slapping down big chunks of the New Deal so there was an assumption that they would do the same for Social Security, which is in the pipeline and was finally signed in August of 1935. Perkins goes to a dinner party and she runs into Harlan Fiske Stone, who later becomes Chief Justice and I'll get to that, and she worries about, you know, will Social Security pass constitutional muster and Stone says, "The taxing power of the federal government, my dear, the taxing power is sufficient for everything you want and need." Stone whispers to Perkins. This is before court packing. So, in other words, the way to get around Article 1 and the commerce clause in the minds of Stone and enough other justices, presumably Owen Roberts as well, I'm sure that Stone was speaking very confidently, is by, in this case, they set up a payroll tax. So, in other words, on Social Security, which they upheld in 1937, I don't believe they were doing that out of pressure from the court packing scheme. I think, even if Social Security had come up before '37, it would have been upheld because there was this taxing power notion that Stone and

other justices favored. So speaking of Stone, you have a notion here of things getting heavily politicized but I don't agree that the invalidation of the NRA, the NIRA, technically, was knocking out the centerpiece of the New Deal. The creation of the National Recovery Administration, at the end of the hundred days, was a broken play. It was-- in football terms. It was a response to Senator Hugo Black's proposal for a 30-hour work week, that you could work no more by federal law than 30 hours a week, which was about to pass the Congress. In response to that, they create this jerry built idea of a National Recovery Act, which actually was a big, messy, historically speaking and even at the time, bad piece of legislation. Harry Hopkins went to the head of the NRA, General Johnson, and said, "Your codes stink. This is a bad idea." It's cartelizing the economy, it's, you know, the blue eagle's nice for making people feel like there's forward progress but it's really not working very well. To give you an idea of some of what was wrong with the NRA, they actually regulated the burlesque industry from Washington and bureaucrats determined how many times a night a stripper could take off her clothes. <laughter> So this is the-- and it's not just, like, one or two, like, you know, anecdotes like Ronald Reagan's Welfare Queen anecdote, this was really the substance of this thing. The NRA was-- and when it was killed by the Supreme Court, a lot of people breathed a sigh of relief. In the New Deal, they breathed a sigh of relief. They had a lot of other important things going on that were certainly upheld. The Securities Act of '33 and '34, which created the system of financial transparency that's the foundation of our economy, to my mind, a lot more important part of the New Deal. That was upheld no problem. So it was not as if the struts were knocked out of the whole New Deal by these decisions but things did become very politicized and the final point I want to make is that, even though I think Professor White is right, that, you know, this whole idea of it attitudinizing court and heavily politicized court emerged in this era, when it was time for a new Chief Justice in 1941, the assumption, by a lot of people, was that Justice Frankfurter would become the new Chief Justice and, instead, at the recommendation of Frankfurter, but I believe he would have done it anyway, President Roosevelt elevated Harlan Fiske Stone to the job and he was a Republican. Can you imagine a Republican being elevated to be a Supreme Court chief justice by a Democrat or vice-versa nowadays? But that was of a piece with FDR's attitude toward governing in a crisis. The 1936 Republican candidate for vice-president, Frank Knox, became his Secretary of the Navy. Henry Stimson, who had been Herbert Hoover's Secretary of State, became his Secretary of War. When he was heavily criticizing congressional hearings by a senator from his own party, challenging the Haliburtons of the day, guy named Harry Truman, he went on the ticket in 1944. So there was, for all of the political nature of FDR's presidency, there was a sense of bipartisanship and a sense that he was president of all the people, that endured. So thank you.

<applause>

Alan Brinkley: Thank you very much, Jon. We have a lot to talk about from these three presentations. We also have a lot of questions already from the audience. I just want to pause for a moment and note that the history of the New Deal, generally, in the history of the New Deal in the Supreme Court didn't begin with any of us, it began really with Arthur Schlessinger, a great friend of this library and of all of ours, and so I just want to spend-- take a moment to remember Arthur, to acknowledge the presence today of Alexandra Schlessinger, his wife, Steven Schlessinger, his son, and to remember a great friend and a great historian.

<applause>

Alan Brinkley: Because we're a little short on time, I think I'll ask the other panelists, if they wish very briefly, to respond to any of the other presentations today and then we'll try to get very quickly to questions. Any?

Professor William E. Leuchtenburg: Just a brief response. I have, at different times in my life, been called a born again New Dealer <laughter> and a consensus historian and I suppose I'm willing to accept both of those categorizations. I'm less eager to think of myself as an attitudinalist <laughter> because much of-- most, almost all that Ted said, I would agree with about how decisions are reached. I'm doubtful that the notion that ideology and political orientation plays some part in the behavior of justices begins with the 1930s. In the disputed election of 1876, there was a commission of 15, five of whom were Supreme Court justices and, in every case, as was widely noted, the justices voted on party lines. The accusation that justices voted on their ideologies was common in the populace era and it was Findlay Peter Dunn, Mr. Dooley, who said that justices followed the election returns. So that's been a not unfamiliar notion and, if one goes through the correspondence of Chief Justice Taft, he talks regularly about our crowd hanging together against the Bolsheviki on the courts. On one other point, with respect to Frances Perkins' anecdote of Stone telling her about the taxing power, one has to realize that the taxing power was the very basis of AAA, which the Supreme Court, in a six to three decision, struck down with a vigorous dissent by Harlan Fiske Stone, who accused the majority in the court, the opinion by Owen Roberts, of, in his words, "a tortured construction of the constitution."

Professor G. Edward White: I would prefer to hear questions from the audience. I just want to make one comment. I thought I said, when I brought up this issue of the 1930s being the first generation in which justices were perceived as having political ideologies, I didn't mean-- I didn't say that. I said it's the first generation where commentators suggested that central factor driving justices is political ideology and that there's no separation between the authority of legal sources and the authority of the interpreters so

that, when you appoint a justice to the court, there are basically no constraints on that individual. That perspective, I would argue, is new in the 1920s and '30s and, if you want to go through the literature and look for articles writing about the individual perspectives of justices as opposed to court decisions, articles on the jurisprudence of Justice A or the jurisprudence of Justice B, there aren't any. They don't exist until the 1920s so that's the only point I wanted to make.

Alan Brinkley: Well, let's go to questions from the audience. Of course, there's still time, if you have questions, to write them down and pass them up to us. First question we received, which is a very interesting and provocative one, which of the panelists would accept Franklin Roosevelt's 1937 proposal relating to the federal judiciary? In other words, would you have supported court packing? <laughter>

Jonathan Alter: No. <laughter> I mean, I was interested that the first witness at the congressional hearings on court packing was Raymond Moley, who had been FDR's top aide and basically the head of the brain trust in 1932 and '33. He agreed that the Court needed to respond to the changes going on in the country and that they were being obstructionists but he was, by that time, his relationship with FDR had soured, it took place in '36, and he resented the trickery with which FDR introduced it by shielding his real motives behind this idea that, you know, the Court wasn't getting its work done and a lot of other spin that they tried to use to get it through and that they quickly abandoned and Moley's point I thought was quite an interesting one which was, if you want to do this, propose a constitutional amendment. And that the reason they hadn't done that was because they knew it would be rejected so they tried to change it as a matter of law, as a judicial reorganization rather than as a constitutional amendment. But I thought it was of an interesting piece that, in the popular imagination, the court packing scheme was always used as a sign of FDR's, you know, extra constitutional power grab and, really, he was just proposing a bill that happened to be a bad idea. It was defeated in Congress but it wasn't some sort of what we would now consider to be a power grab.

Professor G. Edward White: The bill is disingenuous that it makes age a proxy for something. Would we want to-- do we believe that a justice is a better justice or a less good justice based on the age alone of that justice? And yet the driving force behind the bill is that, somehow, when a justice reaches the age of 70, a light goes off in his or her head. I feel this increasingly as I... <laughter>

Professor William E. Leuchtenburg: Well, I would agree with Ted that it's disingenuous. I don't think that Roosevelt had many or any good options. It's often said that this was a foolish thing that he did but, if he had gone to Congress, to the American people, and said it's not age that's really at issue, I just think that the justices are handing

down the wrong kinds of decisions and I want a court that hands down the right kinds of decisions, I'm not at all sure that would have gone over very well, either, so he had to move in a direction that wasn't very promising or simply be passive and, with every expectation that the Court, on the basis of its past behavior, was going to strike down the Social Security Act, was going to strike down the Wagner National Labor Relations Act, for Roosevelt to be passive does not strike me as being the height of wisdom or at all in keeping with his character.

Jonathan Alter: But it was so hubristic. I mean, and so in keeping with what second term presidents do, you know? His second term was his worst and it's hard to imagine, I don't think one comes to mind, of a president whose second term was better than his first. They always seem to overreach and get into trouble right after they get a big re-election victory and this just seems to be of a piece with that.

Alan Brinkley: It's important to remember, I think, that the fact that there are nine justices in the Supreme Court is itself is a legislative decision. There's nothing in the constitution that specifies how many justices should be on the Supreme Court so there was nothing constitutionally outrageous about the court packing scheme but I wouldn't have supported it, either. And the reason I wouldn't have supported it is because-- not because I disagree with Bill about the dangers of the court in the 1930s but because of the precedential dangers that it would set. If, every time a president didn't like the Supreme Court, he could change the size of the court, the court would be of no-- would have no real standing at all. Another question. This is certainly an apt question, given our present climate. To what extent were nominees to the court, in the '30s, '40s and '50s, questioned by the Senate on their judicial or political positions?

Professor G. Edward White: Well, I can respond to that. On the whole, they weren't. We've really had two major shifts in the confirmation process of Supreme Court justices in the 20th and early 21st century and one is related to the Fortis affair, remember, where Abe Fortis is first proposed by the Johnson administration as Chief Justice and ends up being filibustered in the Senate. Johnson is then a lame duck president and the expectation on the part of the Republicans is that they may have success in the 1968 election, which they end up doing. So the increased scrutiny and participation by the Senate in Fortis and then the subsequent resignation of Fortis marks the beginning of a higher level of scrutiny and then, of course, the next episode is the confirmation hearings of Robert Bourke, where, for the first time, members of the Senate judiciary committee openly say, "I agree that Judge Bourke's legal qualifications are superb but I'm voting against him on ideological grounds." That marks the entrance into the new process. That's why, primarily, those two episodes are primarily why now it's almost a sine qua non known for appointment on the court that you have previous judicial experience. When you think of the people who are on the Supreme Court of the United States and

have been regarded as having illustrious careers who wouldn't get through the present confirmation process, that would include Hugo Black, Earl Warren, William Douglas, Felix Frankfurter, the list-- John Marshall, the list would go on and on. So...

Jonathan Alter: I think one thing that's really interesting is that, on the Hoover court, Cardozo was the only one who was not basically a commercial lawyer but Roosevelt appointed Black, Burns, Reid, Murphy, Jackson and Douglas all out of the realm of politics, either, you know, former Attorney General, former Senator, head of the SCC, people who were kind of on his team and I think that may have-- then Eisenhower did the same thing with the politician, Earl Warren, and then that sort of fell a little bit out of fashion and Bill Clinton tried to reintroduce that idea of bringing real world experience to the court. That was why he wanted Mario Cuomo but, you know, relinquished that idea. But there's been that interesting tension between whether you bring people directly from the world of politics or appoint those of legal distinction.

Professor William E. Leuchtenburg: What Ted is saying about things becoming more intense is certainly true and-- but I'd rather leave this question to the panel that's going to succeed us, which is going to be taking this up. Just one comment on the past. In the Hoover presidency, there were two nominations where the ideology of the nominees was very strongly contested. One was Charles Evans Hughes. Despite the fact that he'd been an associate justice on the Court, because he had become a corporation attorney and something, if I remember the correct sum, I think it was 26 votes were cast against him because he was regarded as a right-wing menace if he got on the bench. More striking is the nomination of John J. Parker, a circuit court of appeals judge, who was opposed, both by organized labor and by the NAACP and his nomination went down to defeat after his views were challenged, wholly on ideological grounds.

Alan Brinkley: Here's a more contemporary question from someone in the audience. Since there was no commerce clause issue in Bush v. Gore, what do the panelists have to say regarding that decision and what it implies for the current court's attitude towards the boundary between federal and state jurisdictions on such basic political questions as who counts and certifies electoral outcomes? Any takers? <laughter>

Professor G. Edward White: Of course, Bush v. Gore is the poster child for attitudinalism. <laughter> <applause> But it may not be fully understood that the court tried its best not to decide the case. Bush v. Gore is in a long tradition of other branches of government finding themselves in what they regard as an intractable political controversy and delegating the matter to the Court by suggesting that they are incapable of resolving this in the short run and, if the matter were constitutionalized, and the Court entertained and decided the issue on constitutional grounds, the heat would be taken off

those other branches. And if you want to go back and think about major cases, how many qualify on those terms, Dred Scott, the legal tender decision, the income tax decision, the question of incarcerating Japanese in World War II, Brown v. Board of Education, Roe v. Wade, these are all instances in which the other branches of government, in a sense, communicated the view that they would be happy to have constitutional challenges entertained and resolved by the Court.

Jonathan Alter: You know, I covered it. I was in Tallahassee at a courthouse where they were counting the votes and actually a very successful, so far, fairly incident-free morning. They'd had several hours of counting votes and there were many fewer incidents than anybody expected after everything we'd all been through and it seemed like finally what should have happened earlier in the process was taking place, which was, you know, a full and fairly supervised recount. So there was no need for the Court to step in at that point. It was done on a strictly political basis and the best summary of it is in a book by a friend of mine, Jeff Tubin that just came out called "The Nine" and I think he does a very good job of explaining the politics of it.

Alan Brinkley: I think it's also important to remember that the electoral votes of the state are ultimately determined by the state legislature. The Florida state legislature, in the hands of Republicans, had made it pretty clear that they were not going to accept any recount, no matter how well it was done. Maybe that would have changed had the result been differently. So I'm no great fan of Bush v. Gore but it did, as Ted said, it did move the decision out of the politics of the state legislature and into the Supreme Court.

Jonathan Alter: But why couldn't they have just waited at least until the recount...

Alan Brinkley: I'm not saying they couldn't...

Jonathan Alter: ...was completed. There was no...

Alan Brinkley: I'm just saying...

Jonathan Alter: ...urgency on-- it was on a weekend.

Alan Brinkley: If the Supreme Court hadn't acted, if the Supreme Court had not acted, had the recount continued, had Gore been seen to be the winner of the popular vote in Florida, it isn't clear that he would have won the state anyway.

Jonathan Alter: I agree with that.

Alan Brinkley: We've got two questions here that may have already been answered but let me just raise them again since obviously some people in the audience still want to hear about this. I'll just read one of them because they're really both the same and they're directed at Bill Leuchtenburg and Ted White. Why do you think Owen Roberts changed his mind? <laughter> Briefly.

Professor William E. Leuchtenburg: I think the beginning of wisdom in answering that question is we do not know. Paul Freund, we say the greatest constitutional scholar of the period, at Harvard Law School, once told me that he'd gone up with Mrs. Roberts into the loft of the barn in the Roberts farm in Pennsylvania and not been able to find any Roberts papers. And I've used the analogy of George Orwell as though someone had gone into every manuscript collection, and I've been into literally hundreds of them, and removed every Roberts letter because we have no paper trail for us. One thing we can say is this and this is something we've known for 40, 50 years. That, in 1936, Roberts votes with the majority striking down a minimum wage law. In March of 1937, he votes with the majority upholding a minimum wage law for women. In between comes the court packing plan. Ergo, many thought, the court packing plan got him to change. What's wrong with that chronology is we know that Roberts cast his vote prior to the court packing plan. So the court packing plan could not have accounted for that particular change of mind. The larger question is, how did he change from the kinds of votes and the things he said in rail pension and Butler and the other decisions in '35 and '36 to his position on Jones and Laughlin and the Social Security cases and some subsequent cases? And there it's conceivable to me that the court packing plan played a part. I don't know how large a part.

Jonathan Alter: I know it wasn't addressed to me but just a couple of sort of notes that I found interesting. Felix Frankfurter's diary for 1937 was stolen from the Library of Congress and, you know, and he was in the middle-- he had his fingers in everything. So we're flying blind a little bit here on that. On the minimum wage case, now I could be wrong about this but my memory is that the Tipaldo case, the first one, was complicated by an even earlier minimum wage case from the '20s that I think was called Adkins and that, in that case, which was argued by Dean Atchison, of all people, so the first case striking down the minimum wage was done on sort of technical, on some technical issues that related to precedent and they used that as an explanation for why they were changing their minds in the second case.

Professor G. Edward White: In 1955, Justice Frankfurter produced a memorandum, hitherto unpublished, that Justice Roberts had written in which Justice Roberts

suggested that he had not, in fact, changed his mind but that, in the 1936 case, the two cases around New York minimum wage law in 1936 and then the Washington minimum wage law in 1937 where Roberts takes different positions but the memorandum that Roberts wrote that Frankfurter presented suggested that it was a more complicated matter than that going back to a 1934 case in which Roberts believed that he wasn't going to change his view in the 1936 case unless the Court fully understood the implications of the 1934 precedent. There's been a lot of speculation that that was produced after the fact. There's even one law review article that implied that Frankfurter wrote the memorandum himself but I'm inclined to agree with my colleague, Barry Cushman, who wrote a book that was published in 1996 calling for a "new trial" for Justice Roberts, suggesting that the idea that he had simply switched under political pressure was over simple and giving a very detailed, doctrinal analysis to try to make the point. So, since Bill is correct that we don't have any-- far from having any smoking gun, we don't even have a piece of artillery at all in the archives, it's unfortunately in these sorts of events it's open season for academics and others to speculate.

Alan Brinkley: Well, we're out of time. I want to thank, first of all, the members of the audience who submitted questions and apologize that we didn't get to all of them. I want to thank the members of the panel and I want to thank all of you for being such a good audience. Thanks so much.

<applause>

End of Session 1