

NATIONAL POWER POLICY COMMITTEE

INTERIOR BUILDING

WASHINGTON

1718 Que Street, N.W.

February 12, 1938

Dear F.F. [Felix Frankfurter],

Shortly before 2:00 o'clock Wednesday afternoon, Ben concluded his oral argument in the Bond and Share case. I couldn't help remembering how the attack on the Holding Company Act began on September 17, 1935 with the notice that the American States-Lautenbach-Burco petitions had been filed the day before in the District Court in Baltimore. Joe and I had been in Washington just one week; ten days later we attended a hearing in Baltimore that then seemed to us a little surprising, and today seems shocking and incongruous. Since then the Burco case has been stifled, the North American case won, and the Bond and Share case chosen and completed. We shall win again, I know, and to Ben must go the laurel. Many capable lawyers have contributed something to the Government's case, but every page of every brief carries Ben's imprimatur, and his strategy and his intelligence characterizes every argument. No one disputes that fact. And somehow, because it is Ben, no one wishes to dispute it.

Monday morning found Ben at the office early, dressed in striped trousers but without the cutaway coat. Somehow a cutaway looks so conspicuous, and besides it was

too heavy, and he wouldn't get on today anyway, and it wasn't really necessary, and . . . the double-breasted coat would do just as well. About 10 o'clock the reply brief arrived - - an unexpected, insidious, and unnecessary little business that undoubtedly disturbed us far more than it enlightened the Court. We quickly read it through, Ben muttering all the while, occasionally bursting into indignant and incoherent explanation as he strode around the room. By 11:15 the brief was digested, hysteria was at precisely the right pitch, the necessary changes had been made in the oral argument, and we began our trek to the Court with at least 75 pounds of assorted legal literature.

I still cannot understand just why it was necessary to carry with us the 3 volumes of House Hearings, the single large volume of Senate Hearings, the 6 volumes of the Splawn Report, all the Holding Company Act debates in the Congressional Record, the 8 volumes of our own record (really 16, since we took 2 sets), all the "requisite" charts, all the briefs and papers in all the lower courts, 6 sets of all the Supreme Court briefs, 12 pencils, 6 tablets, and other miscellany that was truly miscellaneous. However, it would have been capricious to object to this vigilance on Monday since we had been at least as forearmed before the District Court and the Circuit Court of Appeals. Henry Herman and I must have appeared more than slightly litigious as we staggered up the 70,000 steps to Equal Justice and the offices of the Solicitor General.

The court room was jammed. Everyone was there from Alice Longworth to Ben's colored messenger. New Deal Washington was out en masse, the S.R.O sign (long queues) having been posted since midmorning. Unfortunately, two other cases had been

docketed to be heard before No. 636, with the result that argument on a muddled question of Oklahoma public-utility practice, and on a captious objection to a New York City tax was heard by an unexpectedly brilliant gathering. Our case was reached by 4:20 Monday afternoon. Reed very unobtrusively left the bench just as the Chief announced No. 636; Ben was so excited that he scarcely noticed the fact that only seven Justices remained. A few minutes later, however, he clutched my arm and whispered frantically, "Where's Stone?" I broke into a cold sweat, but a moment later found Stone hidden behind a pile of books. We were sitting just below him. Another disqualification would have been too much.

Thacher delivered a very effective ten-minute stump-speech, during which he achieved his usual boiled-lobster red. We returned to the office immediately after 4:30, and there reviewed the oral argument, reread the briefs, paced the floor, and ate candy. Another council of war before bed time, and home by midnight.

Tuesday morning, more taut than ever, Ben arrived before 9:00 o'clock. This time he was upset about Jackson who had seen fit, perhaps sensibly, to attend a little cabinet dinner the night before instead of preparing and reviewing his oral argument. We left the office at 11:15 and found the court room more crowded, if possible, than the day before. Ben was certain to be reached. Today Paul and Henry Hart sat with Ben and Jackson at the front table; Henry Herman and I sat at the small table just behind ready to thumb the record on the least provocation. The general Counsel's staff of the SEC was clustered close by, with a strong utility representation just outside the bar -- Willkie,

Fogarty, Grosbeck, Zimmerman, Hopson and the rest. Willkie shook hands with Ben and told him, confidentially, that he was there at his own expense, just to hear Ben. Tom sat on the side with Ickes.

Thacher opened, of course, in a verbal blaze of glory which this time quickly became dull and monotonous. No questions from the bench; no excitement of any kind. Just a drone of words. Only the Chief refrained from taking an occasional 40 winks. McReynolds, when awake, continued with whatever he was doing (from the reminiscent look on his face I should say he was writing his memoirs). Butler leaned forward to talk with Roberts; Roberts pointed to Tom; Butler turned to stare, and then leaned back without a smile. The Justice said not a word. Black listened intently. And all of us missed Cardozo so very much.

Thacher finished at 1:40, leaving Jackson 20 minutes before the luncheon recess. Jackson opened with the same broad factual-constitutional argument that he used in the lower courts, ignoring again the carefully prepared argument in our briefs. But somehow he was infinitely more effective than before; perhaps because the occasion was personally important; perhaps because he realized that there could be no further appeal. Almost all of the court was closely attentive. During the recess about ten of us had luncheon together in the Solicitor General's offices, with only Mrs. Jackson and two of her friends to keep the conversation from lapsing into a continuation of the oral argument. About 3:30 there was a bustle in the court room, and striding down the center aisle came Senator Wheeler. Ben turned, smiled, beckoned, and the Senator joined Government counsel at

the front table. There's a rumor afoot in Washington that the Chief smiled at Wheeler and gulped twice; you may accept it as a fact, however, that he did not smile at all, and that he only gulped once. Jackson finished at 4:17 having taken only a minute or two more than his allotted hour and a half. All of us had been afraid that he might run over his time, since Ben really needed every moment of his 90 minutes. Jackson had done a good, lawyer-like job, but somehow the atmosphere set by Thatcher, built on shifting emphases, half-truths, and misstatements, deliberate and inadvertent, had not been dispelled. No questions. The Court had begun to see what the case was about, but not with clarity or certainty. Jackson seemed to have reassured them that this was a proper case for the exercise of federal power; but for Ben remained the job of establishing that the Congress had not overreached itself.

Ben spoke for 17 minutes. The room was electric. He was nervous, he was not in appearance prepossessing, but he rudely awakened the Court from its customary afternoon doldrums. The Justice relaxed with an almost beatific smile on his face; Black perched himself on the edge of his chair, cupped his face in his hands and didn't move while Ben spoke; Roberts simply glowered and looked away; Stone leaned back, put his head on his chair and stared at the ceiling; the Chief's eyes began to sparkle and he sat rigidly erect. I know how melodramatic this must sound, but no one who was there can deny that all of this is true.

The remainder of the day and evening passed slowly. We dissected Thatcher's argument, prepared a new opening for Wednesday and worried, and suffered, and finally went home shortly after 11:00 o'clock. Those few hours were unpleasant.

Not nearly so nervous as he had been the day before, Ben made a beautiful opening on Wednesday noon. His voice was strong and clear, and as he spoke, slowly and so convincingly, all of us leaned back not to criticize as we had before, but simply to listen to him speak and to revel in it. He was magnificent. Ben is not an orator, but his deficiencies, if any, were forgotten in the fervor and passion of his argument. He never once looked at the Justice, nor even at Stone; lost as he was, he still remained too self-conscious for that. He addressed himself almost wholly to the Chief, with an occasional glance at Black.

He explained, and he illustrated, and he quoted; he replied specifically to Thatcher's argument and gesticulated with scorn at "these defendants"; he pounded points home with his fist; he thundered of Senator Wheeler who "fathered" the bill; he slyly paid his respect to section 12 (i) and (with a glance at Black) emphasized the need for control of lobbying; and when Stone indicated in the only significant question in the entire six hours of argument that he understood and accepted the Government's position on separability, Ben grinned at the Court in that boyish way of his -- and continued to pile Pelion on Ossa. Then he read the Court a lecture. "The Government no less than the defendants might secure certain definite advantages by having this Court pass upon the validity of the Act and each of its provisions. But the judiciary is not concerned with

political or partisan issues as such; and to force upon it the review of legislation severed from the concreteness of vital controversy would go far to discredit the judicial process, and would throw upon the judiciary the full impact of bitter partisan and political strife. It is the merit and strength of the judicial process that it limits itself to concrete issues in genuine controversy.” Even if the Court should feel disposed to go beyond registration and to sustain provisions of the Act other than sections 4(a) and 5, as did Judge Hand in the court below, nevertheless the Government feels that such action would be exceedingly unwise. Dicta, critical or laudatory, must be avoided. “This restriction of the issues is sought by the Government not upon the basis of any technical or arbitrary rule of law or procedure. The restriction is dictated by considerations of policy and principle fundamental in our federal system of judicial review.” And by way of conclusion, “The Government submits that there is no satisfactory legal basis upon which this Court can strike down these simple publicity requirements and by such action, bar the only effective approach to the solution of one of our gravest national problems.”

MacLane spoke for 45 minutes and in my opinion gave the case away. He devoted his last 15 minutes to an explanation of why the defendant had argued the case as they had. The Government had selected Bond and Share for a test case, and it was their duty to seek an adjudication on as many issues as could properly be presented to the Court. Surely they could not be censured for doing only their duty. It was a pitifully obvious attempt to avoid the moral obloquy of the course they had followed.

Except for MacLane's apologia I should have predicted a 5 to 2 decision; as it is, my guess is 7 to 0 for the Government. I trust it is sheer coincidence that Carter v. Carter Coal Co. was No. 636 of the October Term, 1935, and that Securities and Exchange Comm. v. Electric Bond & Share Co. was No. 636 of the October Term, 1937.

When I recall our multi-party telephone conversation last Sunday afternoon I recognize how much nonsense this is, but not even that can take away the satisfaction of a job well done. I'm proud of our briefs and I'm proud of Ben's argument. We've all worked hard; Henry Hart and Paul joined Ben, Henry Herman and myself after the first galleys came back -- both of them were extremely helpful. Although I had met Henry Hart before, I knew him only very casually until this past month. He seems to be an exceptionally capable and charming person, unusually thoughtful, and selfless, and kind. I've learned to like him a great deal. But I'm glad it's over. During the past 12 weeks I've lost at least as many pounds, and almost all of my friends. I'm eager to get back to the warm, untroubled comfort of a nice, clean rut.

I've said nothing about the results of our protracted conversation last week, for I assume that one of the others has written to you or spoken with you. Suffice it to say that you were right, and that your caution prevented a good deal of heartbreak.

If Jackson is confirmed, and I believe that he will be, it is possible that there may be an opening for me in the SG's office. If you have time, and at your convenience, I should be grateful for your opinion.

[signature] Dave G. [David Ginsburg]

[handwritten postscript]

P.S.

If you could somehow persuade the Court to read the briefs, and to read them before the oral argument, I think you would have made a really notable contribution to the process of judicial review. But I think you think so, too!