FDR Tries to "Pack" the Supreme Court

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Between the creation of the Supreme Court in 1789 and the Civil War, the court found only two acts of Congress to be unconstitutional. During the next 50 years, the court challenged laws passed by Congress only a half-dozen times. But then, following the election of President Franklin D. Roosevelt in 1932, the Supreme Court seemed to take aim at his New Deal program, which had been designed to combat the effects of the Great Depression.

In 1935, the "nine old men" (as the Supreme Court justices were then sometimes called) unanimously ruled three times against FDR and his New Deal. One of the decisions declared that the National Industrial Recovery Act, a major New Deal effort to lift the country out of the Depression, was unconstitutional. The following year, the court held that several more of FDR's economic recovery laws violated the Constitution. In addition, the court overturned some state reforms, like New York's minimum-wage law for women. Some of these Supreme Court rulings were decided by a 5–4 vote. In these cases, the opinion of only one justice sealed the fate of laws and programs affecting millions of Americans.

The series of anti-New Deal decisions by the Supreme Court angered President Roosevelt and prompted him to attempt to reform the federal court system itself. This included a so-called "court-packing" proposal that would have enabled FDR to appoint an additional six justices to the Supreme Court. Suddenly, the non-political branch of the federal government was caught up in an intense and bitter national political debate. The Supreme Court would never be the same again.

"Nine Old Men"

When the three unanimous Supreme Court rulings against New Deal programs were announced on May 27, 1935, New Dealers called it "Black Monday." Speaking with reporters, Roosevelt lashed out against the court, complaining of its "horse-and-buggy" mentality. Clearly, he believed that the justices were locked into a view of the Constitution that did not take into account the economic crisis then facing the nation. In the months that followed, FDR's fears grew that the Supreme Court would totally gut the New Deal, including such landmark legislation as the Social Security Act and the National Labor Relations Act.

At this time, the nine justices on the Supreme Court were actually divided into roughly three groups. Justices Van Devanter, McReynolds, Sutherland, and Butler made up the conservative wing. These men viewed the Constitution as the guardian of property and the capitalist system. Justice Sutherland once commented that, "the meaning of the Constitution does not change with the ebb and flow of economic events." On the other hand, the three liberals on the Court, Justices Brandeis, Cardozo, and Stone, saw the

need to interpret the Constitution in the light of new realities and problems. In between these two groups were two moderates: Justice Owen Roberts and Chief Justice Charles Evans Hughes.

Although appointed by a Republican (Hoover), Chief Justice Hughes tended to vote with the liberals in cases concerning New Deal legislation. This left a divided court with Justice Roberts providing the "swing vote." In 1935 and 1936, Roberts sided with the four conservatives to make up the five-vote majority that struck down a number of New Deal laws.

President Roosevelt and his supporters were also critical of the advanced ages of many justices. Six of the "nine old men" were 70 or older. Justice Brandeis (who happened to be one of the liberals) turned 80 in 1936. Many New Dealers resented the ability of a small group of conservative-minded men, all born before 1880, to block the will of the Roosevelt administration, Congress and the majority of the U.S. electorate.

The Court Reform Bill

In fact, previous conservative Republican presidents had appointed a large majority of all federal court judges (who also served life terms). In 1936, only 28 percent of the 266 federal judges were Democrats. Moreover, during his four years in office, FDR had yet to name one Supreme Court justice.

Shortly after "Black Monday," Roosevelt began talking privately with his advisers about how to curb the power of the Supreme Court. He asked his attorney general, Homer Cummings, to study the matter. Cummings and others first concentrated their efforts on a possible constitutional amendment.

In November 1936, Roosevelt won re-election by carrying all but two states. Although FDR did not make the Supreme Court an issue in his campaign, he nevertheless considered his landslide election as a mandate for federal court reform. He knew he had to act quickly since many New Deal laws passed during his first term were headed for the Supreme Court.

Working quietly, Attorney General Cummings drafted a bill that, on the surface, appeared to streamline the entire federal court system. But the real target was the Supreme Court. Cummings proposed that Congress pass a law granting the president the power to nominate an additional judge for every federal judge who, having served a minimum of 10 years, did not resign or retire within six months after reaching age 70. In effect, this would enable FDR to add up to six more justices to the Supreme Court as well as nearly 50 more lower-court federal judges. Of course, the Senate would still have to approve his nominations.

FDR sent his court-reform bill to Congress on February 5, 1937. In his accompanying message, Roosevelt stated that the judiciary should be reorganized "in order that it also may function in accord with modern necessities." He pointed out that the number of justices on the Supreme Court had been changed by Congress six previous times. The president argued that the federal courts were crowded with pending cases causing costly delays. He also addressed the issue of "aged or infirm judges" and the need for "younger blood":

A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses filled, as it were, for the needs of another generation . . .

The "Court-Packing" Fight

Much to the surprise of President Roosevelt, his court-reform plan came under serious attack. The press soon began to refer to it as FDR's "court-packing" scheme. The president was compared with Hitler in seeking dictatorial powers. Even some liberal New Deal Democrats in Congress voiced their reservations.

Supporters of the bill decided to concentrate their efforts in the Senate. Appearing before the Senate Judiciary Committee, Attorney General Cummings presented the administration's case. "The proposed increase in the number of judges is not for the purpose of enslaving the judiciary," he said. "The purpose is to rejuvenate the judicial machinery, to speed justice, and to give to the courts men of fresh outlook who will refrain from infringing upon the powers of Congress."

But most of those testifying before the Judiciary Committee rejected FDR's plan as little more than a cover to pack the Supreme Court with liberal justices. The plan, they claimed, would make the court more political, thus undermining its independence. Critics argued that since there were no age regulations placed on the president or members of Congress, there should be none on federal judges either. Others claimed that it was not the Supreme Court justices who were overturning Roosevelt's New Deal laws, but the Constitution itself.

Perhaps the most persuasive witness before the Senate Judiciary Committee never appeared in person. This was Chief Justice Hughes who entered the political fray by submitting a letter that was read to the committee by Senator Burton K. Wheeler (D-Mont.). Hughes stated in his letter that the Supreme Court "is fully abreast of its work." He rejected the notion that more justices would make the court more efficient. The chief justice argued, "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide."

"The Switch in Time"

In the midst of the "court-packing" fight, a series of unexpected events occurred that finally sank FDR's court-reform bill. On March 29, 1937, the Supreme Court reversed itself and upheld a state minimum-wage law very similar to laws that the court had previously struck down. This case was decided by another 5–4 vote. But this time the four conservative justices were in the minority. Shortly afterward, the Supreme Court ruled as constitutional both the Social Security Act and the National Labor Relations Act, two key pieces of New Deal legislation. These cases, too, were decided by slim 5–4 majorities.

For some reason, Justice Owen Roberts decided to switch sides in these cases, thus providing the three liberals along with Chief Justice Hughes a bare one-vote majority. These decisions weakened the argument that younger, more liberal justices were needed on the Supreme Court. The press quickly called the sudden shift by Justice Roberts "the switch in time that saved nine." In the meantime, one of the conservative justices announced his intention to retire, thus giving FDR his first opportunity to make a Supreme Court appointment.

Despite these developments, Roosevelt refused to withdraw his court-reform bill. While he did agree to compromise, FDR's chances of getting the bill through Congress began to look poor. The Senate Judiciary Committee, although dominated by Democrats,

issued a report that recommended against the president's proposal. "This bill," the report declared, "is an invasion of judicial power such as has never before been attempted in this Country."

The last hope of the bill's supporters rested with the persuasive powers of the Senate Democratic Majority Leader, Joe Robinson. When he died suddenly before the full Senate voted, the court-reform bill was doomed. By late July 1937, Roosevelt gave in and agreed to drop the bill.

As it turned out in the years that followed, the Supreme Court upheld virtually all of FDR's New Deal reforms. Over the span of his remaining three terms in office, Roosevelt got to name a total of eight new justices to the Supreme Court. In the end, he did get to "pack" the court with men of his choosing. This "Roosevelt Court" took a more liberal direction in interpreting the Constitution, at least for a while. But the question remains, even today, whether the Supreme Court can truly be an independent body completely separated from political influences.

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