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Congress Back Then: FDR's Court-packing Fiasco



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Thursday, July 01, 1999
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The *Supreme* Court. The title alone lends an air of distinction to that august legal body and its nine justices who sit in judgment on an entire nation. And indeed, the United States' highest tribunal, more than any other root of America's democratic tree, is revered among the people.

Factions may take issue with a particular decision (the 1973 *Roe v. Wade* ruling on abortion, for instance) or heatedly debate the qualifications of a particular justice (as they did with Clarence Thomas in 1991). But rarely do they agitate against the court as an institution. The Founding Fathers intentionally tried to insulate the court from the passions of politics, and they largely succeeded.

The Supreme Court at times has become a political lightning rod, yet the few attempts to attack it as an institution typically end in embarrassing failure. The politically foolish mission of President Franklin D. Roosevelt to "pack" the court with justices favorable to his social policies is a perfect case study. His plan, virtually dead on arrival on Capitol Hill, faltered 62 years ago this month.

A New Deal battle royal

Roosevelt's animosity toward the Supreme Court emerged in his first presidential term. Overwhelmingly elected in 1932, he promised a New Deal of social and economic involvement by the government in an America ravaged by the Great Depression. But the court, most of whose justices were appointed by Republicans, soon began to undo his work by ruling his New Deal laws unconstitutional on 5-4 votes.



"Nine Old Men" ruled many of Roosevelt's acts unconstitutional

In May 1935, the court attacked two laws. First, it invalidated the Railroad Retirement Act of 1934, a law that had established pensions for railway workers. Then in a blow to the cornerstone of the New Deal, the court gutted the National Industrial Recovery Act of 1933.Roosevelt lambasted the justices for those rulings. "We have been relegated to the horse-and-buggy definition of interstate commerce," he complained. But his contempt for the conservative-minded court of "Nine Old Men" -- six justices were age 70 or older, and the youngest was 61 -- did not deter them. In January 1936, the court ruled the Agricultural Adjustment Act of 1933 unconstitutional.

Re-elected to a second term by an even larger majority than in 1932, and given an even larger Democratic edge in Congress, Roosevelt,

then the only 20th-century president not to have appointed a Supreme Court justice in four years, began to ponder "the court problem" openly. He even took a subtle jab at the court in his second inaugural address, saying that Americans "will insist that *every* agency of popular government use effective instruments to carry out their will."

In his 1993 book *FDR: Into the Storm, 1937-1940*, Roosevelt biographer Kenneth S. Davis said commentators of the 1930s described the battle between Roosevelt and the Supreme Court as "the gravest constitutional crisis since the Civil War." A confrontation of some sort seemed inevitable, but few people, even among those closest to Roosevelt, expected what came next.

On Jan. 30, 1937, Roosevelt's 55th birthday, the president disclosed to his closest aides a draft bill to reorganize the federal judiciary. The measure -- mischievously linked to a long-ago proposal by 75-year-old Justice James C. McReynolds -- called for all federal judges to retire by age 70. If they failed to do so, the president could appoint another judge to serve in tandem with each one older than 70.

The practical effect of the proposal: Roosevelt could have appointed six more Supreme Court justices immediately, increasing the size of the court to 15 members. A Congress dominated by Democrats undoubtedly would have appointed judges friendly to Roosevelt and his New Deal agenda.

Doomed at the outset

Top aides suggested alternative judicial reforms -- a constitutional amendment allowing a two-thirds vote of Congress to overrule Supreme Court rulings, for example -- but Roosevelt would not budge. He also downplayed worries about the disingenuousness of his message, which said his bill was the best solution to an alleged judicial backlog rather than a justified attack on an unruly Supreme Court.

Roosevelt pitched his plan to Congress and the public Feb. 5, and the futility of his quest quickly became apparent. Republicans like Herbert Hoover, whom FDR ousted in the 1932 presidential election, accused Roosevelt of attempting "to pack the court." But the president's political enemies did far less damage to his cause than his friends.

According to FDR biographer Frank Freidel, House Judiciary Committee Chairman Hatton Sumners (D-TX) made this ominous statement to colleagues about his support of Roosevelt: "Boys, this is where I cash in my chips." Other conservative Democrats expressed similar sentiments.



AP Photo
Roosevelt's battle with the Supreme Court started in his first term

Sen. George Norris (I-NE), who had empanelled a national conference on judicial reform soon after Roosevelt's inaugural, announced his opposition to the court-packing bill, as did liberal Sen. Burton K. Wheeler (D-MT), who ultimately became the measure's most vocal foe. Even liberal

Justice Louis D. Brandeis, the oldest member of the court, privately expressed his opposition.

As the president's confidants had warned, opponents seized on Roosevelt's explanation of why the bill was necessary. William Allen White, one of the most renowned editorialists of his day, reached this conclusion Feb. 6: "Because he is adroit and not forthright, he arouses irritating suspicions, probably needlessly, about his ultimate intentions as the leader of his party and the head of government."

Still confident that he could win the public's backing despite opinion polls that indicated otherwise, Roosevelt ignored much of the criticism. In a March 9 "fireside chat," he acknowledged his true intentions -- to create a Supreme Court that could "understand these modern conditions" -- but it had no measurable influence on public opinion.

Support began to slip after Senate Judiciary Committee hearings later in March, and by June, Roosevelt reluctantly agreed to a compromise that would have allowed him to name just two new justices. But it was too late. On June 14, the committee issued a scathing report that called FDR's plan "a needless, futile and utterly dangerous abandonment of constitutional principle … without precedent or justification."

The real winners

The Senate opened debate on the substitute proposal July 2. But within days, Majority Leader Joseph T. Robinson (D-AR), the bill's leading advocate, left the chamber with chest pains. He, and Roosevelt's court-packing hopes with him, died at home July 14. On July 22, the Senate voted 70-20 to send the judicial-reform measure back to committee, where all the controversial language was stripped from it. The Senate passed the revised legislation a week later, and Roosevelt reluctantly signed it into law Aug. 26.

Roosevelt's biographers generally agree that his court-packing scheme robbed him of much of the political capital he had won in two landslide elections. It also hindered his all-out war on poverty. But to some extent, the president won his war with the Supreme Court.

First, the court's philosophy began to change even as Congress debated the merits of judicial reform. Owen J. Roberts, the youngest jurist, began to vote Roosevelt's way in close decisions, giving FDR 5-4 wins rather than losses by the same margin. Then before long, the "Nine Old Men" began to retire of their own volition, enabling the president to appoint a "Roosevelt court."

Everyone claimed some measure of victory. But in the end, the American people won the most because the Senate did exactly what its Judiciary Committee had recommended. The Senate "so emphatically rejected" FDR's court-packing scheme that no similar plan ever has been, or likely ever will be, "presented to the free representatives of the free people of America."