

## 16 "Unleashing a Thunderbolt": FDR Launches a Court-Packing Scheme to Save the New Deal

WILLIAM E. LEUCHTENBURG

Franklin Roosevelt swept into power in 1932, soundly defeating the incumbent president Herbert Hoover. It was a bitter verdict for the Republican party and a referendum for change. Once in office, FDR launched his New Deal, the most dramatic program of reform that an American president had ever undertaken. Four years later, Roosevelt's victory was even more impressive. He captured "the largest popular vote in history at the time and the best showing in the electoral college since James Madison ran unopposed in 1820." Not everyone cheered the outcome. A telephone survey in 1936 predicted that the Republican presidential candidate, Alf Landon, would win. The pollsters did not take into consideration that FDR's supporters, many of whom were still struggling to stay afloat in a depressed economy, had long since given up their telephones.

Of all of the federal agencies that made up the New Deal, the two most important were the National Recovery Act (NRA) and the Agricultural Adjustment Administration (AAA). Although, like Roosevelt, this legislation was generally popular with the American people, there were storm clouds on the horizon. These agencies, like the president who sponsored them, tested the constitutional limits of the executive branch of the government.

Because of his unprecedented use of federal power to help the needy and combat the Depression, Roosevelt was one of the most controversial presidents in American history. For millions of Americans, he was a folk hero. FDR was the courageous statesman who saved a crippled nation from almost certain collapse and whose New Deal salvaged the best features of democratic capitalism while establishing unprecedented welfare programs for the impoverished. For others, he was a tyrant, a demagogue, who used the Depression to consolidate his political power, whereupon he dragged the country zealously down the road to socialism. Despite his immense popularity, Roosevelt became the hated enemy of the nation's business community. Conservatives denounced him for failing to balance the budget. Liberals cried that he could do more to relieve the suffering. Communists castigated him as a tool of Wall Street. And socialists dismissed him as a reactionary. "He caught hell from all sides," recorded one observer, because few knew how to classify Roosevelt's political philosophy or his approach to reform. Where did he fit ideologically? Was he for capitalism or against it? Did the New Deal lift the country out of the Great Depression, or did it make the disaster worse?

In fact, FDR essentially had no established ideology. He rejected absolute theories in favor of bold and practical experimentation. And the New Deal itself, as one scholar explained, was not a coherent, farsighted program of reform, but "a series of improvisations" that reflected Roosevelt's pragmatic temper. He compared himself to a quarterback in a football game, "calling a new play after he saw how the last one turned out." If there was no philosophy behind FDR's New Deal, historian James MacGregor Burns concludes, "there was a loose collection of values." These consisted of "Roosevelt's warm humanitarianism, his belief that the needy must be helped, that [the federal] government must

step in when private institutions could not do the job." To those who were hurting, the New Deal represented a government that cared. And Roosevelt made people feel better about the future. "He was my friend," said a man in Denver. Comparing Roosevelt's reforms to the relative inaction of the Hoover administration, historian William Manchester concluded that if FDR had "been another Hoover, the United States would have followed seven Latin American countries whose governments had been overthrown by Depression victims."

Both private charities and impoverished state governments were totally incapable of dealing with the Depression, the greatest economic disaster in American history, which threatened the very survival of the nation. "There is not a garbage-dump in Chicago which is not diligently haunted by the hungry," journalist Edmund Wilson observed. Too many teachers saw hungry children in their classrooms. Too many unemployed men committed "altruistic suicides" because they felt guilty about failing to feed their families. A man who had not had a steady job in two years lamented: "Sometimes I feel like a murderer. What's wrong with me, that I can't protect my children?"

Out in the farmlands, rural families were also poverty-stricken and desperate. To stay warm, they burned their corn, which was cheaper than coal. When banks attempted to foreclose on farms, angry rural folk brandished shotguns and hangman's nooses to drive the deputy sheriff away. When a farm was auctioned, a neighbor would bid a dime and give the property back to its owner. Farm leaders in Nebraska threatened to march thousands of protestors to the state capitol and destroy it if relief was denied. Some feared that a revolution was building in the countryside.

Against this frightening backdrop, Roosevelt readied himself for a second term in office. Fifteen years earlier, he had been stricken by polio and could never use his legs again. He wore thick leg braces and needed to grip the arms of his sons in order to stand erect. Having conquered his crippling illness, the president now faced new demons in the form of five "stubborn" judges on the United States Supreme Court who tried to destroy the very heart of the New Deal.

In the following selection, William E. Leuchtenburg, the author of six celebrated books on Roosevelt, maintains that for FDR the 1936 election "signified the people's verdict on the New Deal." Buoyed by that belief, Roosevelt prepared an unprecedented, and perhaps reckless, attack against the Supreme Court justices who voted to nullify the New Deal. "Unleashing a thunderbolt," the president asked that Congress empower him to appoint an additional justice for every member of the Court over the age of seventy. FDR's battle with the Supreme Court is a gripping story, and Leuchtenburg tells it with gusto. But his conclusions are sobering. Presidents, he says, should respect the sanctity of the Supreme Court. Justices, in turn, should not "unreasonably impede the functioning of the democratic branches of the government." These are important lessons for twenty-first-century leaders.

## GLOSSARY

### AGRICULTURAL ADJUSTMENT ADMINISTRATION (AAA)

This New Deal agency was designed to relieve impoverished farmers who suffered from falling prices and mounting crop surpluses. The AAA subsidized farm prices and reduced surpluses by telling farmers how much to plant and paying them for what they did not grow. In 1935, the Supreme Court ruled that the AAA was unconstitutional.

**BORAH, WILLIAM** A Progressive Republican senator from Ohio, he supported naval disarmament after the Great War and a noninterventionist approach toward Europe in the 1930s.

**BRANDEIS, LOUIS** In 1916, Woodrow Wilson made Brandeis the first Jewish justice on the United States Supreme

Court. Brandeis had earlier earned a reputation for opposing monopolies and defending individual rights. The Court-packing attempt offended Brandeis, who was eighty years old and a consistent supporter of Roosevelt's programs. Brandeis believed that the Depression represented "an emergency more serious than war."

**CARDOZO, BENJAMIN** Herbert Hoover appointed Cardozo to the Supreme Court. Cardozo earned a reputation as a scholarly justice who supported state and federal efforts to regulate the economy.

**CUMMINGS, HOMER** A former Democratic national chairman, Cummings was Roosevelt's attorney general and the architect of the Court-packing proposal. Appearing at a Senate hearing, Cummings argued for the appointment of "men of fresh outlook who will refrain from infringing upon the powers of Congress."

**FOUR HORSEMEN** These four justices consistently voted against New Deal legislation. They included a William Howard Taft appointee, Willis Van Devanter, and a Woodrow Wilson appointee, James McReynolds. Two of the other justices owed their seats to the scandal-ridden administration of Warren G. Harding. These justices were a former conservative Republican senator, George Sutherland, and a Minnesota Democrat and railroad lawyer, Pierce Butler.

**HUGHES, CHARLES EVANS** A former governor of New York and moderate Supreme Court Justice, Hughes was the nominee of the Republicans in the 1916 presidential election. He later became President Harding's secretary of state and served as chief justice of the Supreme Court from 1930 to 1941.

**ICKES, HAROLD** "Honest Harold" served as Roosevelt's secretary of the interior and head of the Public Works Administration (PWA).

**NATIONAL LABOR RELATIONS ACT (WAGNER ACT)** This legislation guaranteed labor the right to organize and established the National Labor Relations Board (NLRB) as a policing agency with the power to force employers to recognize and bargain with legitimate unions.

**NATIONAL RECOVERY ADMINISTRATION (NRA)** Established in 1933, this New Deal agency persuaded business establishments and major industries to adopt "fair practice codes" designed to reduce unemployment and to stabilize an unruly competitive economy by setting prices and market quotas. The NRA benefited workers by establishing shorter hours, higher wages, better working conditions, the elimination of child labor, and the right to union representation. In practice, the agency often impeded competition

by authorizing production quotas and price fixing. In 1935, the Supreme Court declared the NRA unconstitutional.

**NATIONAL YOUTH ADMINISTRATION (NYA)** This New Deal agency sought to help young Americans, many of whom found it especially difficult to find work during the Great Depression. The NYA provided jobs for 2.6 million young workers, attempting to find employment in fields related to their primary interests. History majors, for example, often found jobs in document divisions of state archives. The Depression made it particularly hard for African American youth to obtain work. Mary McLeod Bethune, an educator and civil rights leader, helped steer NYA jobs to them.

**RICHBERG, DONALD** This former labor attorney was one of Roosevelt's most valued advisors. FDR appointed him to head the NRA. Reporters referred to Richberg as the "assistant president" and the "number one boy of the White House."

**ROBERTS, OWEN** At the time of the Court-packing case, this Herbert Hoover appointee was the youngest member of the Supreme Court. Roberts represented the swing vote on many issues of vital importance to the Roosevelt administration.

**RURAL ELECTRIFICATION ADMINISTRATION (REA)** This New Deal agency established utility cooperatives that provided electrical power to farmers.

**SECURITIES AND EXCHANGE COMMISSION (SEC)** This commission met the demand for closer regulation of Wall Street and the stock market. The SEC established more stringent margin requirements to control irresponsible speculation and placed trading practices under federal guidelines.

**SOCIAL SECURITY ACT** This New Deal legislation provided federal welfare assistance, as much as \$15 per month, to destitute elderly Americans and established a pension system for those with jobs. The program, however, excluded domestic servants and agricultural workers, many of whom were women and African American.

**STONE, HARLAN FISKE** Calvin Coolidge appointed his former attorney general to the Supreme Court, and Roosevelt would later make him chief justice. Stone consistently supported New Deal legislation.

**WORKS PROGRESS ADMINISTRATION (WPA)** Established in 1935, this New Deal agency launched numerous building and improvement projects to furnish jobs for the unemployed. Not all of the work was in construction. The WPA also employed dancers, artists, actors, musicians, and writers for special projects that utilized their distinctive talents.

As the first election returns reached his family estate in Hyde Park, New York, on a November night in 1936, Franklin Delano Roosevelt leaned back in his wheelchair, his signature cigarette holder at a cocky angle, blew a smoke ring and cried "Wow!" His huge margin in New Haven signaled that he was being swept into a second term in the White House with the largest popular vote in history at the time and the best showing in the electoral college since James Monroe ran unopposed in 1820.

The outpouring of millions of ballots for the Democratic ticket reflected the enormous admiration for what FDR had achieved in less than four years. He had been inaugurated in March 1933 during perilous times—one-third of the workforce jobless, industry all but paralyzed, farmers desperate, most of the banks shut down—and in his first 100 days he had put through a series of measures that lifted the nation's spirits. In 1933, workers and businessmen marched in spectacular parades to demonstrate their support for the National Recovery Administration (NRA), Roosevelt's agency for industrial mobilization, symbolized by its emblem, the blue eagle. Farmers were grateful for government subsidies dispensed by the newly created Agricultural Adjustment Administration (AAA).

Over the ensuing three years, the cavalcade of alphabet agencies had continued: SEC (the Securities and Exchange Commission); REA (the Rural Electrification Administration) and a good many more. The NYA (National Youth Administration) had permitted college students, such as the future playwright Arthur Miller, to work their way through college. The WPA (Works Progress Administration) had sustained millions of Americans, including artists such as Jackson Pollock and writers such as John Cheever. In a second burst of legislation in 1935, Roosevelt had introduced the welfare state to the nation with the Social Security Act, legislating old-age pensions and unemployment insurance. During the 1936 campaign, the

president's motorcade, mobbed by well-wishers wherever he traveled, had to inch along the streets in towns and cities across the nation. His landslide victory that year signified the people's verdict on the New Deal. Franklin D. Roosevelt, wrote Arthur Krock, the chief Washington correspondent for the *New York Times*, had gotten "the most overwhelming testimonial of approval ever received by a national candidate in the history of the nation."

The election-night jubilation was tempered, however, by an inescapable fear—that the U.S. Supreme Court might undo Roosevelt's accomplishments. From the outset of his presidency, FDR had known that four of the justices—Pierce Butler, James McReynolds, George Sutherland and Willis Van Devanter—would vote to invalidate almost all of the New Deal. They were referred to in the press as "the Four Horsemen," after the allegorical figures of the Apocalypse associated with death and destruction. In the spring of 1935, a fifth justice, Hoover-appointed Owen Roberts—at 60 the youngest man on the Supreme Court—began casting his swing vote with them to create a conservative majority.

During the next year, these five judges, occasionally in concert with others, especially Chief Justice Charles Evans Hughes, struck down more significant acts of Congress—including the two foundation stones, the NRA and the AAA, of Roosevelt's program—than at any other time in the nation's history before or since. In May 1935, the court destroyed FDR's plan for industrial recovery when, in a unanimous decision involving a kosher poultry business in Brooklyn, it shot down the blue eagle. Little more than seven months later, in a 6 to 3 ruling, it annihilated his farm program by determining that the Agricultural Adjustment Act was unconstitutional. Most of the federal government's authority over the economy derived from a clause in the Constitution empowering Congress to regulate interstate commerce, but the court construed the clause so narrowly that in another case that next spring, it ruled that not even so vast an industry as coal mining fell within the commerce power.

These decisions drew biting criticism, from inside and outside the court. Justice Harlan Fiske Stone, a

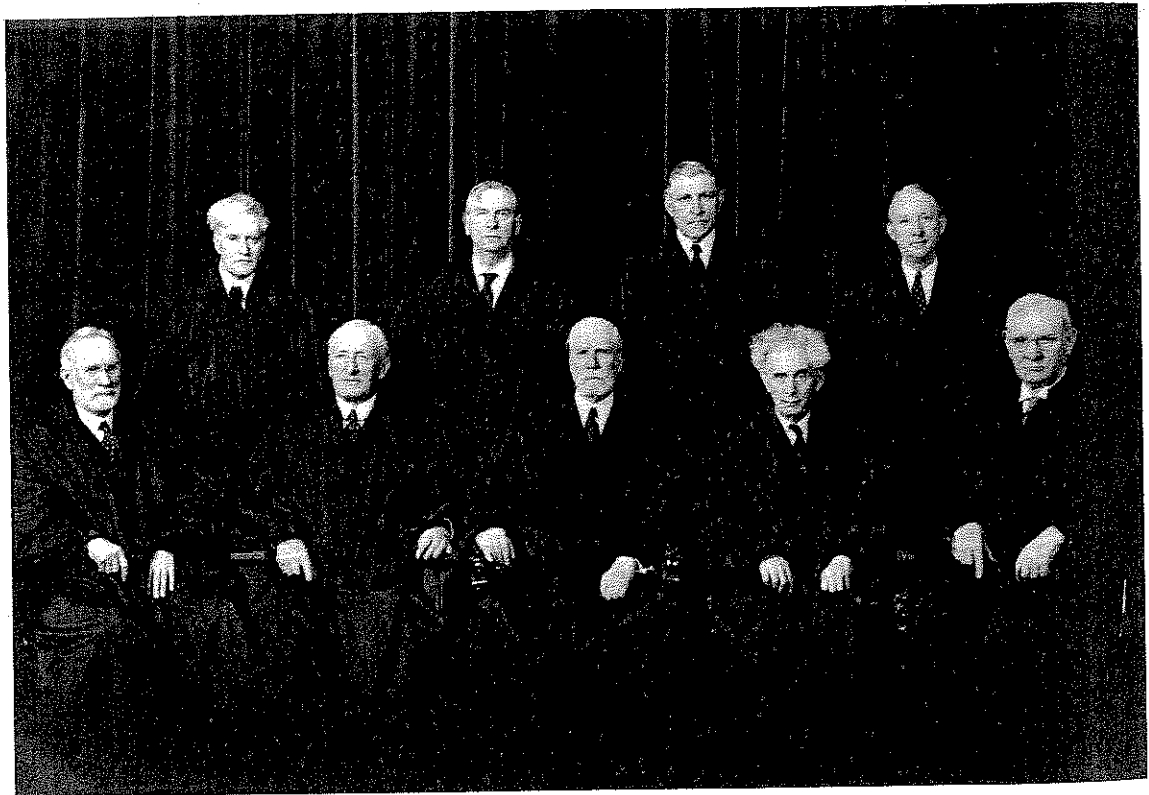
From "Showdown on the Court" by William Leuchtenburg, *Smithsonian*, May 2005, pp. 106–113. Reprinted by permission of the author.

Republican who had been Calvin Coolidge's attorney general, denounced Roberts' opinion striking down the farm law as a "tortured construction of the Constitution." Many farmers were incensed. On the night following Roberts' opinion, a passerby in Ames, Iowa, discovered life-size effigies of the six majority opinion justices hanged by the side of a road.

Fury at the court intensified when, in its final action of the term, it handed down a decision in the Tipaldo case. Until that point, defenders of the court had contended that the justices were not opposed to social legislation; the jurists merely wanted such laws to be enacted by the states, not the federal government. But early in June 1936, the court, by 5 to 4, struck down a New York state law providing a mini-

mum wage for women and child workers. Laundry owner Joe Tipaldo, said the court, could continue to exploit female workers in his Brooklyn sweatshop; the state was powerless to stop him. "If this decision does not outrage the moral sense of the country" said Secretary of the Interior Harold Ickes, "then nothing will." And, indeed, people of all political persuasions were incensed. On its editorial page, the *Knickerbocker Press*, an upstate New York Republican newspaper, asserted, "The law that would jail any laundryman for having an underfed horse should jail him for having an underfed girl employee."

The Tipaldo ruling persuaded Roosevelt that he had to act, and act quickly, to curb the court. As he told the press, the court had created a "no-man's-



After Roosevelt's landslide victory in 1936, the Supreme Court, pictured above, began to rule that the very heart of the New Deal was unconstitutional. FDR's attorney general warned: "Mr. President, they mean to destroy us." The ages of the justices—six of the nine were seventy or older—provided Roosevelt with what Leuchtenburg calls as "an audacious plan to reconfigure the court."

land' where no Government—State or Federal—can function." He had been waiting patiently for popular dissatisfaction with the court to mount; now anger at the Tipaldo decision surged. That ruling, the historian Alpheus T. Mason later wrote, "convinced even the most reverent that five stubborn old men had planted themselves squarely in the path of progress." The president recognized, however, that he must tread carefully, for despite widespread disgruntlement, most Americans believed the Supreme Court sacrosanct. When, in 1935, FDR had criticized it for adopting a "horse-and-buggy definition of interstate commerce," editorial writers had lashed out at him. Thereafter, the president had said little, even as he quietly heeded the counsel of his attorney general, Homer Cummings, who told him, "Mr. President, they mean to destroy us. . . . We will have to find a way to get rid of the present membership of the Supreme Court." With Roosevelt's encouragement, Cummings sought to come up with a workable plan to ensure a more favorable response to the New Deal from the court. These explorations proceeded stealthily; the president never mentioned the court during his campaign for reelection.

Roosevelt, however, had concluded that he could not avoid a confrontation with the court; it had already torpedoed the two principal recovery projects of his first term. It would soon rule on the Social Security Act and the National Labor Relations Act (the Wagner Act), regarded by the administration as a factory workers' Magna Carta. Legal analysts anticipated that the court would strike down both laws. In Tipaldo, it had gone so far as to say that the state was "without power by any form of legislation" to modify labor contracts between employers and women workers. Roosevelt surmised that he would be unable to take advantage of his landslide to sponsor new measures, such as a wages-and-hours law, because that legislation, too, would be invalidated.

In the days following the 1936 election, FDR and Cummings put the final touches on an audacious plan to reconfigure the court. Dissents by Stone and other justices, notably Louis Brandeis and Benjamin Cardozo, persuaded Roosevelt that he need not

undertake the arduous route of a constitutional amendment, for it was not the Constitution that required changing but the composition of the bench. Naming a few more judges like Stone, the president believed, would do the trick. FDR recognized, though, that a direct assault on the court must be avoided; he could not simply assert that he wanted judges who would do his bidding. The most promising approach, it seemed, would be to capitalize on the public's concern about the ages of the justices. At the time of his reelection, it was the most elderly court in the nation's history, averaging 71 years. Six of the justices were 70 or older; a scurrilous book on the court, *The Nine Old Men*, by Drew Pearson and Robert Allen, was rapidly moving up the bestseller lists.

But Roosevelt kept Congressional leaders, his cabinet (save for Cummings) and the American people in the dark, deceiving even the shrewdest experts. On January 24, 1937, the editor of the authoritative journal *United States Law Week* declared that it was "plain that he does not at the present time have in mind any legislation directed at the Court." The Supreme Court itself had no inkling of what was afoot. When the president entertained the judiciary at a White House dinner on February 2, he told adviser Donald Richberg that "his choice should be whether to take only one cocktail before dinner and have it a very amiable affair, or to have a mimeographed copy of the program laid beside the plate of each justice and then take three cocktails to fortify himself against their reactions." The banquet was an amiable affair. But as the evening drew to a close, Idaho's senator, William Borah, sensing something as he saw the president chatting with two of the justices, remarked: "That reminds me of the Roman Emperor who looked around his dinner table and began to laugh when he thought how many of those heads would be rolling on the morrow."

Three days later, on February 5, 1937, Roosevelt shocked Congress, his closest advisers and the country by unleashing a thunderbolt. He asked Congress to empower him to appoint an additional justice for any member of the court over age 70 who did not retire. He sought to name as many as six additional

Supreme Court justices, as well as up to 44 judges to the lower federal courts. He justified his request not by contending that the court's majority was reactionary, but by maintaining that a shortage of judges had resulted in delays to litigants because federal court dockets had become overburdened.

"A part of the problem of obtaining a sufficient number of judges to dispose of cases is the capacity of the judges themselves," the president observed. "This brings forward the question of aged or infirm judges—a subject of delicacy and yet one which requires frank discussion." He acknowledged that "in exceptional



The Court-packing debate provided political cartoonists with an opportunity to illustrate a classic confrontation between the executive and legislative branches of the federal government. Roosevelt wanted the power to appoint an additional justice for every member of the Supreme Court over seventy. He reasoned that "the addition of younger blood will vitalize the court." Most historians doubt that this is what the founding fathers had in mind when they wrote the Constitution.

cases," some judges "retain to an advanced age full mental and physical vigor," but quickly added, "Those not so fortunate are often unable to perceive their own infirmities." Life tenure, he asserted, "was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts."

Roosevelt's message touched off the greatest struggle in our history among the three branches of government. It also triggered the most intense debate about constitutional issues since the earliest weeks of the Republic. For 168 days, the country was mesmerized by the controversy, which dominated newspaper headlines, radio broadcasts and newsreels, and spurred countless rallies in towns from New England to the Pacific Coast. Members of Congress were so deluged by mail that they could not read most of it, let alone respond. Senator Hiram Johnson of California noted, "I received some hundreds of letters a day, all on the Court—sometimes some thousands," and Senator Royal Copeland of New York, inundated by 30,000 letters and telegrams, begged his constituents to desist.

Both sides believed the future of the country was at stake. If Roosevelt won, opponents warned, he would destroy the independence of the judiciary and create an evil precedent for successors who wished to "pack" the court. If Roosevelt lost, his supporters countered, a few judges appointed for life would be able to ignore the popular will, destroy programs vital to the welfare of the people, and deny to the president and Congress the powers exercised by every other government in the world. Although the country divided evenly on the issue—about as many were for Roosevelt's plan as against it—the opposition drew far more attention, especially on editorial pages.

Despite widely publicized expressions of hostility, political pundits expected the legislation to be enacted. So long were FDR's coattails in the 1936 contest that when the Senate convened in the new year, many Democrats had to sit on the Republican side of the aisle, for every Democratic seat was occupied; the Republicans were left with only 16 members. Roosevelt had high expectations, too, for the House of Representatives, where Democrats held a 4 to 1

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advantage. *Time* magazine reported initially that "the bill would be passed without serious difficulty."

That prospect drove opponents of the plan to a fury of activity: protest meetings, bar association resolutions and thousands upon thousands of letters to editors. At a time when totalitarianism was on the march, Roosevelt's foes accused him of mimicking Hitler, Mussolini and Stalin by seeking to concentrate power in the hands of one man. FDR's supporters responded that at a time when democracy was under fire, it was vital to show the world that representative government was not hobbled by judges. That argument, however, was more subtle and harder to explain to the public.

Opponents also objected to FDR's focus on the justices' advanced ages. They saw it as a ruse to conceal his real, and in their eyes, nefarious objective, and as a display of gross disrespect for the elderly. One critic wrote in a letter to the *Washington Post*: "Between the ages of 70 and 83, Commodore Vanderbilt added one hundred million dollars to his fortune. . . . At 74 Immanuel Kant wrote his 'Antropology,' the 'Metaphysics of Ethics,' and 'Strife of the Faculties.' . . . Goethe at 80 completed 'Faust.' . . . At 98 Titian painted his historic picture of the 'Battle of Lepanto.' . . . Can you calculate the loss to the world if such as these had been compelled to retire at 70?"

Roosevelt's adversaries took full advantage of the opportunity to advance their case in hearings before the Senate Judiciary Committee held in March and April 1937. "This bill obviously is not playing the game," said Professor Erwin Griswold of Harvard Law School. "There are at least two ways of getting rid of judges. One is to take them out and shoot them, as they are reported to do in at least one other country. The other way is more genteel, but no less effective. They are kept on the public payroll but their votes are canceled."

The most dramatic testimony came from an unexpected participant: the Chief Justice of the United States. In a letter read by the Montana Democratic senator Burton K. Wheeler, Charles Evans Hughes blew gaping holes in the president's claim that the court was behind in its schedule and that additional

justices would improve its performance. Instead, he insisted, "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide."

Yet even after the chief justice's powerful statement, most observers still expected Roosevelt's proposal to be adopted. *Time* reported in late March that "the staunchest foes of the President's Plan were privately conceding that, if he chose to whip it through, the necessary votes were already in his pocket." Almost no legislator really liked FDR's scheme, but most Democratic senators thought they could not justify to their constituents defying the immensely popular president in order to keep intact a court that had given the country every reason to suppose it would soon strike down cherished new laws, including the Social Security Act.

The court, however, would spring some surprises of its own. On March 29, by 5 to 4, in *West Coast Hotel Co. v. Parrish*, it validated a minimum wage law from the state of Washington, a statute essentially no different from the New York state act it had struck down only months before. As a result, a hotel in Wenatchee, Washington, would be required to pay back wages to Elsie Parrish, a chambermaid. Two weeks later, in several 5 to 4 rulings, the court sustained the National Labor Relations Act. A tribunal that in 1936 had held that coal mining, although conducted in many states, did not constitute interstate commerce, now gave so broad a reading to the Constitution that it accepted intervention by the federal government in the labor practices of a single Virginia clothing factory. On May 24, the court that in 1935 had declared that Congress, in enacting a pension law, had exceeded its powers, found the Social Security statute constitutional.

This set of decisions came about because one justice, Owen Roberts, switched his vote. Ever since, historians have argued about why he did so. We know that he changed his mind on the validity of minimum wage laws for women before Roosevelt delivered his court-packing message, so FDR's proposal could not have been the proximate cause. Since there is no archival evidence to account for his abrupt change on



the minimum wage cases, scholars have been reduced to speculation. Perhaps, during a visit to Roberts' country retreat in Pennsylvania, Chief Justice Hughes had warned his younger colleague that the court was placing itself in jeopardy. Perhaps Roberts was impressed by the dimensions of FDR's landslide, which indicated that the president, not the court's majority, spoke for the nation. Perhaps he was affected by the biting criticism from within the legal community. It is even harder to account for why Roberts, in his subsequent votes in the Wagner Act and Social Security cases, supported such a vast extension of federal power—but the pressure exerted by the court-packing bill may very likely have been influential.

Roberts' switch had two consequences for Roosevelt, only one of them good. The president could rejoice that his program might now be safe, as indeed it was. Never again would the court strike down a New Deal law. But Roberts' switch—and the announcement by Willis Van Devanter, one of the Four Horsemen, that he planned to retire—seriously undermined support for FDR's court-packing bill. Why, senators asked, continue the fight after the court was rendering the kinds of decisions the president had been hoping for? Or, as one wag put it, "Why shoot the bridegroom after a shotgun wedding?" With each new ruling upholding the government, support for the legislation eroded, and by the end of May Roosevelt no longer had the votes needed to enact the measure. Washingtonians regaled one another with a reworking of an old proverb that speedily made the rounds of movers and shakers: "A switch in time saved nine."

In truth, the jest was a mite too clever, for the struggle had not yet ended, but after Roberts' switch Roosevelt was never again as powerful as he had been that election night in November. On July 22, the Senate, weary of the strife, buried FDR's bill. From the Senate floor, California's Hiram Johnson, arms upstretched in a victory salute, looked up at the galleries and cried, "Glory be to God!"

The nasty fight over court packing turned out better than might have been expected. The defeat of the bill meant that the institutional integrity of the United

States Supreme Court had been preserved—its size had not been manipulated for political or ideological ends. On the other hand, Roosevelt claimed that though he had lost the battle, he had won the war. And in an important sense he had: he had staved off the expected invalidation of the Social Security Act and other laws. More significantly, the switch in the court that spring resulted in what historians call, "the constitutional revolution of 1937"—the legitimating of a greatly expanded exercise of powers by both the national and state governments that has persisted for decades.

The 168-day contest also has bequeathed some salutary lessons. It instructs presidents to think twice before tampering with the Supreme Court. FDR's scheme, said the Senate Judiciary Committee, was "a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America." And it never has been. At the same time, it teaches the justices that if they unreasonably impede the functioning of the democratic branches, they may precipitate a crisis with unpredictable consequences. In his dissent in the AAA case in 1936, Justice Stone reminded his brethren, "Courts are not the only agency of government that must be assumed to have capacity to govern." These are lessons—for the president and for the court—as salient today as they were in 1937.

*The controversial court-packing debate and a steep recession marred the start of Roosevelt's second term. It also became increasingly clear that the New Deal, for all of its good intentions, had not restored prosperity in peacetime. The treacherous Depression continued to plague Americans. It would require another cataclysmic event, the start of World War II, to bring about economic recovery.*

## QUESTIONS TO CONSIDER

- 1 What had Roosevelt and his New Deal accomplished before the presidential election of 1936? Why did many American believe that FDR's achievements

had restored public confidence in government? What "inescapable fear" interfered with the 1936 election night celebration?

2 Who were the Four Horsemen? What impact did they, along with Justice Owen Roberts, have on many of the most fundamental aspects of New Deal legislation? Why did the decision in the *Tipaldo* case especially infuriate Roosevelt and a great majority of the American people?

3 Describe Roosevelt's plan to add new justices to the Supreme Court and the rationale he used to justify this scheme. How did the country react to FDR's attempt to "pack" the Court?

4 What were the major objections to Roosevelt's Court-packing plan? How did Chief Justice Charles Evans Hughes respond to FDR's argument that more judges would expedite the Court's decision-making process and alleviate the backlog of pending cases?

5 Why did Justice Owen Roberts begin changing his voting patterns on the Court? What impact did Roberts and the announced retirement of one of the Four Horsemen have on the Court-packing bill?

6 The author asserts that the Court-packing debacle produced some important lessons for both future presidents and members of the Supreme Court. What are those lessons?

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