Presidential Commission on the Supreme Court of the United States

Court-Packing in Context

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Co-Chair Rodriguez, Co-Chair Bauer, and members of the Commission:

I thank you for the invitation to submit written testimony for your consideration. My testimony will focus to some extent on President Franklin D. Roosevelt's proposal to enlarge the membership of the Supreme Court in 1937, but will focus principally on various alternatives to "Court-packing" that were considered at that time by Congress.

On February 5, 1937, President Roosevelt sent to Congress a proposal for the reorganization of the federal judiciary. The proposal included a provision for adding an additional justice to the Supreme Court for every sitting justice who had reached the age of 70 years and six months but had not retired. Because there were at the time six justices answering that description, the bill would have enabled Roosevelt to enlarge the Court from nine justices to fifteen, thus assuring himself of what he and his advisors regarded as a "dependable" majority sympathetic to the New Deal.[1]

Enlarging the membership of the Court of course was not a novel proposal in 1937. Indeed, as recently as January of 1936, Minnesota Farmer-Laborite Representative Ernest Lundeen had introduced a bill to expand the Court to eleven justices,[2] and Pennsylvania

[1] Barry Cushman, *Court-Packing and Compromise*, 29 Const. Com. 1, 10-17 (2013).
[2] H.R. 10362 (74-2) (1936).

Democratic Representative James L. Quinn's bill had proposed a Court of fifteen.[3] Throughout the struggle over Roosevelt's bill, there was much talk of a compromise under which the Court would be expanded to eleven or perhaps twelve justices.[4] Yet few bills embodying such a compromise were actually introduced. On February 5, the very day that Roosevelt's Court-packing plan was introduced, now-Senator Lundeen again introduced a bill expanding the Court to eleven.[5] As the prospects for passage of Roosevelt's bill further diminished and then collapsed, Florida Democratic Senator Charles O. Andrews and Oklahoma Democratic Representative Lyle Boren introduced similar eleven-justice proposals,[6] while Texas Democratic Representative William D. McFarlane's bill would have allowed appointment of a tenth justice in 1938 and an eleventh in 1939.[7] President Roosevelt steadfastly refused to accept any of these proposed compromise measures, insisting on passage of his own bill.[8] Meanwhile, between March and August of 1937, numerous members of Congress introduced joint resolutions that would have amended the Constitution to fix the number of justices at nine.[9]

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[3] H.R. 10102 (74-2) (1936).
[4] See Cushman, *Court-Packing and Compromise*, at 4-6, 8-9.
[5] S. 1378 (75-1).
[6] S. 2352 (75-1); S.J. Res. 100 (75-1) (March 12, 1937); S.J. Res. 100 (75-1) (May 6, 1937); S.J. Res. 100 (75-1) (June 10, 1937); S.J. Res. 100 (75-1) (August 20, 1937); H.J. Res. 496 (75-1).
[7] H.R. 8063 (75-1) (1937). On May 6, 1937, Senator McAdoo introduced a joint resolution that would have amended the Constitution to provide for a Court of fifteen justices for a period of twenty-five years, with Congress to fix the size of the Court thereafter for another period of twenty-five years. S.J. Res. 143 (75-1), 81 Cong. Rec. 4224 (1937).
[8] Cushman, *Court-Packing and Compromise*, at 2, 5-9, 13-14, 26.
[9] H.J. Res. 265 (75-1) (1937); H.J. Res. 277 (75-1); H.J. Res. 293 (75-1) (1937); H.J. Res. 303 (75-1) (1937); H.J. Res. 307 (75-1) (1937); H.J. Res. 312 (75-1) (1937); S.J. Res. 86 (75-1) (1937); H.J. Res. 360 (75-1) (1937); H.J. Res. 383 (75-1) (1937); S.J. Res. 317 (75-1) (1937). In Gallup poll taken in April of 1938, 61% of those with opinions said that they would "favor an amendment to the Constitution to fix the number of justices at nine." 1 GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION, 1935-1971, at 104-05 (1972).

In the hearings held before the Senate Judiciary Committee, opponents of the President's proposal produced seventy witnesses to testify in opposition to the Plan. They repeatedly testified that they identified with the Democratic Party, had voted for Roosevelt, and sympathized with the New Deal.[10] Yet they were united opposing the Court bill. These witnesses objected to the bill for a range of reasons. Some observed that it would set off an ever-escalating, iterated game of Court-packing between the two major parties, for which no logical end could be identified without an excursion into eschatology.[11] Most commonly, however, witnesses denounced the Court bill as an attack on judicial independence and the separation of powers.[12]

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[10] See, e.g., Hearings at 485-86, 508 (Statement of Senator Burton Wheeler); id. at 540, 543 (Statement of Raymond Moley); id. at 685 (Statement of William Hirth, Publisher of *The Missouri Farmer*); id. at 716 (Statement of Young B. Smith, Dean, Columbia University Law School); id. at 809-10 (Statement of John Miller, President, National Cooperative Council); id. at 885-886, 892 (Statement of Henry M. Bates, Dean, University of Michigan School of Law); id. at 1661-62 (Statement of Alan M. Linburg); id. at 1665-66, 1669 (Statement of William Alfred Eddy, President, Hobart & William Smith Colleges); id. at 1684 Statement of Col. Frederick Hobbes Allen, Constitutional Democracy Association); id. at 1761 (Statement of L.J. TePoel, Dean, Creighton College of Law); id. at 1840, 1849 (Statement of J.F. Smith, Chairman, Democratic Central Committee in Connecticut).

[11] See, e.g., Hearings at 513 (Wheeler); id. at 543, 587-88 (Moley); id. at 619 (Statement of Princeton University President H.W. Dodds); id. at 659 (Statement of Louis J. Taber, Master of the National Grange); id. at 741, 749 (Young B. Smith); id. at 862 (Thompson); id. at 895-96, 899, 906, 912 (Bates); id. at 919 (Statement of John T. Flynn, Writer and Economist); id. at 1664 (Linburg); id. at 1728 (Statement of Edward T. Lee, Dean, John Marshall Law School); id. at 1760, 1766, 1776 (TePoel); id. at 1802 (Statement of Dorothy Frooks); id. at 1844-45, 1851. (J.F. Smith).

[12] See, e.g., Hearings at 512 (Wheeler); id. at 546-47 (Moley); id. at 618-21, 626, 633-34, 637-39 (Dodds); id. at 659 (Taber); id. at 686-87 (Hirth); id. at 702-03 (Statement of Fred Brenckman, Washington Representative, National Grange); id. at 717, 746 (Young B. Smith); id. at 768, 806, 808 (Statement of Professor Erwin Griswold, Harvard Law School); id. at 809 (Miller); id. at 826-27, 851-53 (Statement of Edwin Borchard, Professor of Constitutional Law, Yale University); id. at 862 (Thompson); id. at 885-86, 891-93, 895, 897, 912 (Bates); id. at 919, 941 (Flynn); id. at 948-49 (Statement of Chicago lawyer Walter F. Dodd); id. at 1542-43 (Statement of Bishop James E. Freeman); id. at 1663-64 (Linburg); id. at 1666-67, 1669 (Eddy); id. at 1673-76, 1682 (Statement of Dr. Katherine J. Gallagher, Professor of History, Goucher College); id. at 1686, 1688-91 (Allen); id. at 1698, 1703-04 (Statement of Rabbi William F. Rosenblum, Temple Israel, New York); id. at 1707-08, 1716 (Statement of Francis H. Kinnicutt, President, Allied Patriotic Societies, Inc.); id. at 1722-26, 1729 (Lee); id. at 1735, 1748-49 (Statement of Louis B.

Only a few testified that the bill was an unconstitutional attempt to induce elderly justices to resign, and thus an indirect attack on their tenure during good behavior.[13] Most conceded that the bill was within the "letter" of the Constitution. But they argued emphatically that the bill was inconsistent with its "spirit."[14] Its purpose, which was candidly to place justices on the Court who would interpret the Constitution in a manner different from the manner in which it had been interpreted by the incumbent majority, was improper.[15] It was an attempt to amend the Constitution without going to the American people through the mechanism for amendment set forth in Article V of the Constitution.[16] If the people wanted to amend the Constitution to provide the federal government with greater regulatory authority, Article V prescribed the proper method.[17] Critics analogized the bill to congressional refusal to appropriate funds to support the

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Ward); id. at 1759-62, 1775-76 (TePoel); 1778, 1780-82, 1784 (Statement of Catherine Curtis); id. at 1799 (Frooks); id. at 1806-09, 1812-13, 1815, 1819 (Statement of Former Ambassador Jacob Gould Schurman); id. at 1824 (Statement of John W. Wayland); id. at 1841-42, 1844, 1846 (J.F. Smith).

[13] See, e.g., Hearings at 1718, 1728 (Lee).

[14] See, e.g., Hearings at 526-27 (Statement of E.E. Everson, President of the Farmers' Union); id. at 540, 586-87 (Moley); id. at 620-21 (Dodds); id. at 702-03, 710 (Brenckman); id. at 767 (Griswold); id. at 827, 851-53 (Borchard); id. at 862 (Thompson); id. at 1677-78 (Gallagher); id. at 1690 (Allen); id. at 1760, 1763 (TePoel); id. at 1806 (Schurman); id. at 1824 (Wayland).

[15] See, e.g., Hearings at 495, 497 (Wheeler); id. at 588 (Moley); id. at 594 (Statement of Representative William Lemke); id. at 622 (Dodds); id. at 659, 665, 667 (Taber); id. at 697, 709-10 (Brenckman); id. at 744 (Young B. Smith); id. at 766 (Griswold); id. at 809 (Miller); id. at 846, 849 (Borchard); id. at 918 (Flynn); id. at 947-48 (Dodd); id. at 1542 (Freeman); id. at 1764-65 (TePoel).

[16] See, e.g., Hearings at 512 (Wheeler); id. at 602, 607 (Lemke); id. at 687 (Hirth); id. at 715 (Brenckman); id. at 717-18, 741, 745 (Young B. Smith); id. at 768 (Griswold); id. at 912-13 (Bates).

[17] See, e.g., Hearings at 483, 495, 500-05, 508, 511-12, 516 (Wheeler); id. at 519-20 (Everson); id. at 547, 554-55, 558-61, 563, 565, 587, 589 (Moley); id. at 611-12 (Lemke); id. at 618, 620, 623, 629, 635-36, 638, 650, 652 (Dodds); id. at 657, 660 (Taber); id. at 671 (Statement of Professor Theodore Graebner); id. at 698, 715 (Brenckman); id. at 716, 720, 742, 744, 749 (Young B. Smith); id. at 808 (Griswold); id. at 814, 816 (Miller); id. at 825-27, 830, 838, 840, 847-48 (Borchard); id. at 868-69, 881-83 (Thompson); id. at 891, 895-96 (Bates); id. at 917, 944-45 (Flynn); id. at 949-50 (Dodd); id. at 1540, 1547 (Freeman); id. at 1671, 1674 (Gallagher); id. at 1683-84 (Gallagher); id. at 1686-88, 1691 (Allen); id. at 1700 (Rosenblum); id. at 1722, 1730

judicial branch. That would be consistent with the letter of the Constitution, they argued, but it would violate the Constitution's spirit.[18] If the President's bill was not unconstitutional, it was "anti-constitutional."[19] These witnesses shared the President's concerns over some of the Court's recent decisions, and were openly critical of them.[20] But, as one witness put it, there was "a right way and a wrong way" to address these concerns. Court-packing was the "wrong way."[21]

These witnesses, and like-minded members of Congress, thus rejected Court-packing because they regarded it an extreme and unwarranted reaction to circumstances that could be addressed adequately by other, reasonable means consistent with both the letter and the spirit of the Constitution. In fact, many members of Congress introduced, and many opposition witnesses endorsed, a wide variety of proposals to amend the Constitution so as to address "the Court problem." Many of these would have expanded federal regulatory power, and/or relaxed the strictures of the Due Process Clauses by confining their coverage to questions of procedure.[22] But many other proposed amendments were directed toward the Court. One idea would have permitted Supreme Court decisions to be overturned by a majority popular vote in, or by a two-thirds vote of both Houses of Congress after, an intervening election for the House of Representatives. Two such proposals were introduced in 1936,[23] and another was offered two

(Lee); id. at 1775 (TePoel); id. at 1801 (Frooks); id. at 1817 (Schurman); id. at 1824, 1826 (Wayland); id. at 1844 (J.F. Smith).

[18] See, e.g., Hearings at 853 (Borchard); id. at 1678-79 (Gallagher); 1704 (Rosenblum).

[19] Hearings at 1062 (Statement of New York lawyer Charles C. Burlingham); id. at 1276 (Statement of New York lawyer Frederic R. Coudert); id. 1380 (Statement of U.S. District Judge John Clark Knox).

[20] See, e.g., Hearings at 486, 507 (Wheeler); id. at 540, 556, 563, 565, 589 (Moley); id. at 617-18 (Dodds); id. at 716, 719, 742, 744, 749 (Young B. Smith); id. at 764, 801 (Griswold); id. at 888, 897 (Bates); id. at 919 (Flynn).

[21] Hearings at 1803 (Frooks).

[22] See, e.g., S.J. Res. 92 (75-1), (1937).

[23] H.J. Res. 509 (74-2) (1936); H.J. Res. 565 (74-2) (1936).

days before the introduction of the Court-packing plan.[24] On February 17, 1937. Burton Wheeler, the Montana Democrat who led the Senate opposition to the Court-packing plan, introduced such a joint resolution. His proposal, co-sponsored by Democrat Homer Bone of Washington State, would have amended the Constitution to provide that Congress could overrule a Supreme Court decision invalidating a federal law by a two-thirds vote after an intervening House election.[25] Similar measures were introduced in the House in March and again in June.[26] In late March, Mississippi Democratic Senator Theodore G. Bilbo introduced a bill providing for override of Supreme Court decisions by a two-thirds vote of each House as soon as the decision had been rendered.[27] Two days later, Pennsylvania Democratic Representative introduced a proposed amendment to the Constitution that would have deprived all state and federal courts of power to declare unconstitutional any law passed by at least sixty percent of the members of each House of Congress.[28]

Members of Congress also introduced joint resolutions amending the Constitution to require the Court to provide advisory opinions on the constitutionality of federal legislation at the request of the President or Congress. Three such joint resolutions were introduced in 1935, and a fourth was offered in January of 1937.[29] On March 29, 1937, Mississippi Democratic Senator Theodore Bilbo proposed yet another.[30] Witnesses who spoke to such proposals suggested that

[24] H.J. Res. 190 (75-1) (1937).
[25] S.J. Res. 80 (75-1) (1937).
[26] H.J. Res. 250 (75-1), 81 Cong. Rec. 1710 (1937); H.J. Res. 404 (75-1) (1937).
[27] S.J. Res. 118 (75-1) (1937).
[28] H.J. Res. 305 (75-1) (1937).
[29] H.J. Res. 317 (74-1) (1935); H.J. Res. 344 (74-1) (1935); H.J. Res. 374 (74-1) (1935); H.J. Res. 132 (75-1) (1937). Mr. Cross of Texas also introduced a bill in 1935 that would have required the Attorney General to submit the Court "all legislation, the constitutionality of which is in his opinion doubtful" for an advisory opinion concerning its constitutionality, and for the Court to supply such a written opinion within 90 days thereafter. H.R. 8309 (74-1) (1935).
[30] S.J. Res. 118 (75-1).

such measures would be of limited utility, as such advisory opinions could address only the facial validity of legislation, and not its validity as applied to particular factual circumstances – a matter of considerable concern, for instance, with respect to the reach of the commerce power.[31] On March 29, 1937, Democratic Senators Louis B. Schwellenbach of Washington State and Sherman Minton of Indiana introduced a resolution calling on the Court "to adopt such amendments to its rules and procedure as to enable the Congress of the United States, on a majority vote of both Houses of Congress, to request and receive from the Supreme Court of the United States advisory opinions as to the constitutionality of legislation pending before, and being considered by, the Congress of the United States."[32]

Members introduced numerous measures that would have changed the Court's voting rules to require a supermajority of six, seven, eight, or even all nine of the justices to invalidate federal and/or state legislation. Many of these proposals were bills, and typically limited their application to the exercise of the Court's appellate jurisdiction.[33] Four such bills were introduced in the weeks following Roosevelt's unveiling of his Court-packing plan.[34] Proponents of such measures, such as Independent Senator George Norris of Nebraska, maintained that such legislation was permissible under Congress's power to regulate the Court's appellate jurisdiction.[35] The weight of opinion by 1937, however, seems to have held that such a change to

[31] See, e.g., Hearings at 827, 850-51 (Borchard).
[32] S. Res. 103 (75-1) (1937).
[33] H.R. 7997 (74-1) (1935); H.R. 8054 (74-1) (1935); H.R. 8100 (74-1) (1935); H.R. 8123 (74-1) (1935); H.R. 8168 (74-1) (1935); S. 3739 (74-2) (1936); H.R. 10196 (74-2) (1936); H.R. 50 (75-1) (1937); H.R. 2265 (75-1) (1937); S. 437 (75-1) (1937); S. 1098 (75-1) (1937); H.R. 3895 (75-1), 81 Cong. Rec. 542 (1937); S. 1276 (75-1) (1937). S. 1098 (75-1) (1937) in addition provided that "the Justices shall consider the question of constitutionality raised in the case at bar without reference to…decisions heretofore rendered by the Supreme Court of the United States."
[34] H.R. 5172 (75-1) (1937); H.R. 5485 (75-1) (1937); S. 1890 (75-1) (1937); H.R. 7154 (75-1) (1937).
[35] See, e.g., Hearings at 1599 (Sen. Norris).

the Court's voting rules could be accomplished only by constitutional amendment,[36] and most of the proposals along these lines took that form.[37] No fewer than twelve such joint resolutions were offered in the wake of the President's February 5 announcement,[38] and they enjoyed support in principle from some opposition witnesses.[39] Several witnesses expressed concern that cases involving statutes impinging upon the protections of Bill of Rights (excepting, perhaps, the Fifth Amendment's Due Process Clause) should be exempted from such a supermajority requirement,[40] and New York Republican Representative Hamilton Fish III's bill, introduced on April 22, contained such an exemption.[41] On July 29, 1937, after the collapse of the Court-packing plan, Ohio Democratic Representative John McSweeney read into the Congressional Record a letter he had sent to Chief Justice Hughes that day. The letter read as follows:

> My DEAR MR. CHIEF JUSTICE: May I respectfully call to your attention a proposition which I feel, if carried into effect, would eliminate one of the controversial points relative to the Court reorganization program suggested by the President?

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[36] See Hearings at 562 (Moley); Letter from Franklin Roosevelt to Felix Frankfurter (Feb. 9, 1937), in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 382 (Max Freedman, ed., 1967); Memorandum from W.W. Gardner to the Solicitor General, on the Congressional Control of Judicial Power to Invalidate Legislation 29-30, 64 (Dec. 10, 1936) (unpublished manuscript) (on file with the University of Virginia); FRANKLIN D. ROOSEVELT, [1937 The Constitution Prevails] THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT lxiv (1941); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 386-87 (1967); JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS 29 (1938); MARIAN C. MCKENNA, FRANKLIN D. ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937, at 440 (2002).

[37] For earlier proposed constitutional amendments, see H.J. Res. 277 (74-1) (1935); H.J. Res. 287 (74-1), 79 Cong. Rec. 7546 (1935); S.J. Res. 149 (74-1), 79 Cong. Rec. 9415 (1935).

[38] S.J. Res. 98 (75-1) (1937); S.J. Res. 100 (75-1) (1937); H.J. Res. 276 (75-1); H.J. Res. 286 (75-1) (1937); H.J. Res. 293 (75-1) (1937); H.J. Res. 303 (75-1) (1937); H.J. Res. 307 (75-1) (1937); H.J. Res. 333 (75-1) (1937); S.J. Res. 86 (75-1) (May 12, 1937); H.J. Res. 360 (75-1) (1937); H.J. Res. 372 (75-1) (1937); H.J. Res. 486 (75-1) (1937) (authorizing Congress to require the concurrence of eight of eleven justices to declare an Act of Congress unconstitutional).

[39] See, e.g., Hearings at 560, 566 (Moley).

[40] See, e.g., Hearings at 566 (Moley); id. at 671 (Taber).

[41] H.J. Res. 333 (75-1) (1937).

> Both the proponents and the opponents of the Court plan and the citizens of our country in general agree that legislation enacted by the Congress of the United States should not be declared unconstitutional by a bare majority of the membership of the Supreme Court. Is it not entirely within your province as Justices of this Court to establish a rule whereby the members of the Court would not declare an act of the Congress unconstitutional unless at least six of the nine Justices voted it unconstitutional? This change could only be forced upon the Court by a constitutional amendment. However, I can find nothing in the Constitution or among the Federal statutes that would deny the Justices of the Court the right to establish voluntarily this regulation for a 6-3 or even 7-2 vote when the constitutionality of the acts of the Congress is in question.
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> A mutual respect for the members of the different branches of Government is essential to high efficiency in the operation of Government. Would it not be a mark of courtesy to the able and patriotic Members of the House and Senate, many of whom are distinguished lawyers and judges, for the Justices of the Supreme Court to rule that the vote of a bare majority of the Court was not sufficient to declare unconstitutional laws enacted by the 435 Members of the House of Representatives and the 96 Members of the United States Senate?
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> I shall be deeply grateful for any consideration which you and your fellow Justices may give to this suggestion.
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> I beg to have the honor to remain,
>
> Respectfully yours,
>
> JOHN McSWEENEY.[42]

A proposal to limit the tenure of justices surfaced as early as May of 1933, when Democratic Senator Clarence Dill of Washington State introduced a joint resolution amending Article III of the Constitution to provide that "The Judges of the Supreme Court and of the inferior courts shall be chosen in such manner and for such periods of time as Congress shall by law provide."[43] President Roosevelt's proposal stimulated the introduction of six such term-limiting amendments in 1937. On March 8, Mississippi Democratic Representative Rankin

[42] 81 Cong. Rec. 8175 (1937).
[43] S. J. Res. 58 (74-1) (1933).

introduced an amendment authorizing Congress to fix the terms of office for all federal judges.[44] Rankin informed his colleagues,

> I have discussed this proposition with large numbers of Members of both Houses, and I have yet to find any substantial number of Members in either party in either House of Congress who oppose it. If it were put to a vote today, I am confident that it would be passed overwhelmingly, and that it would be ratified by three-fourths of the States at soon as their legislatures could pass upon it. If this amendment is adopted and becomes a part of the Constitution, Congress can then fix the term of a Supreme Court judge at, say, 12 or 15 years, and could fix the term of a circuit court judge or a district judge at 5, 7, or 9 years, or at any other length of time that Congress might agree upon. In my opinion such an amendment should have been adopted a hundred years ago.[45]

A week later, Senator Norris introduced a measure that would fix the term of all federal judges at nine years. Federal judges holding office on the date of ratification would hold office for nine years from that date.[46] On May 20, Indiana Democratic Representative Finly H. Gray introduced a similar amendment limiting tenure on the Supreme Court to nine years, but applying only to justices appointed after ratification.[47] In August, Lyle Boren introduced a joint resolution limiting the tenure of all future Supreme Court justices to ten years.[48] Earlier, in late May, California Republican Representative Bertrand W. Gearhardt had introduced a measure limiting tenure on the Supreme Court to eighteen years, providing for staggered appointments to such terms every two years, and making provision for the assignment of incumbent justices to the various staggered terms. Under this proposal, there would have been two appointments to the Court during each four-year presidential term.[49]

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[44] H.J. Res. 267 (75-1 (1937).
[45] 81 Cong. Rec. 1964 (1937).
[46] S.J. Res. 103 (75-1) (1937).
[47] H.J. Res. 373 (75-1) (1937).
[48] H.J. Res. 496 (75-1) (1937).
[49] H.J. Res. 383 (75-1) (1937). This proposal, the consideration of which was supported by Harvard Law Professor Erwin Griswold, was reportedly the brainchild of Samuel H. Ordway, Jr., Civil Service Commissioner of New York City. Hearings at 769, 802.

One of the most common proposals was a constitutional amendment to impose a mandatory retirement age on federal judges and justices. Most of the joint resolutions proposed seventy-five as the appropriate age,[50] though a few proposed younger ages such as seventy[51] or seventy-two,[52] and one would have raised the age to eighty.[53] Several witnesses before the Judiciary Committee testified in favor of such proposals,[54] and a mandatory retirement amendment was the measure that polled best with the general public. In poll after poll taken during the Court fight, proposals to enlarge the Court's membership never commanded the support of a majority of those surveyed. But a Gallup poll taken in early April of 1937, 64% of respondents said that they would "favor an amendment requiring Supreme Court justices to retire at some age between 70 and 75." In a similar Gallup poll administered in mid-July, 70% of those with opinions agreed that "Supreme Court justices should be required to retire after reaching a certain age," with most thinking that the appropriate age would be seventy.[55]

As an alternative to Court enlargement, Congress also considered a handful of statutory remedies. The possibility of changing the Court's voting rules by statute has been discussed above. Another approach was to induce elderly justices to retire by providing that they could retire at full salary. Both Justice Willis Van Devanter and Justice George Sutherland were

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[50] S.J. Res. 86 (75-1) (February 17, 1937); S.J. Res. 86 (75-1) (May 11, 1937); S.J. Res. 100 (75-1) (March 12, 1937); S.J. Res. 100 (75-1) (May 6, 1937); S.J. Res. 100 (75-1) (June 10, 1937); S. J. Res. 100 (75-1) (August 20, 1937); S.J. Res. 143 (75-1) (1937); H.J. Res. 360 (75-1) (1937); S.J. Res. 217 (75-1) (1937); H.J. Res. 383 (75-1) (1937).
[51] S. J. Res. (75-1) (1937); H.J. Res. 307 (75-1) (1937).
[52] H.J. Res. 293 (75-1) (1937).
[53] H.J. Res. 303 (75-1) (1937).
[54] See, e.g., Hearings at 560 (Moley); id. at 611 (Lemke); id. at 636 (Dodds); id. at 720-21, 723, 726, 728-29, 735, 742-44 (Young B. Smith); id. at 769 (Griswold); id. at 845 (Borchard); id. at 953-54 (Dodd); id. at 1683 (Sen. M.M. Logan); id. at 1728-29 (Lee); id. at 1818, 1821 (Schurman).
[55] Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 Buff. L. Rev. 7, 68-73 (2002).

rumored to be anxious to retire.[56] But under the judicial pension system then in place, justices who had resigned from the Court were not protected against reductions in their stipends. Justice Holmes had resigned in 1932, and in the following year Congress had cut his pension in half with the Economy Act of 1933.[57] Democratic Senator Judiciary Chairman Hatton Sumners of Texas had introduced several bills making provision for secure retirement pensions for justices during 1935,[58] as had New Jersey Democratic Representative Edward J. Hart in February of 1936.[59] But these bills had not made any headway.[60] Indeed, Ohio Democratic Representative Stephen M. Young introduced bills in 1933 and 1935 that would have abolished payment of salaries to all resigned or retired federal judges.[61] In January 1937, Sumners introduced his bill once again,[62] and its ultimate fate remained uncertain. But after President Roosevelt introduced his Court-packing bill on February 5, the tide quickly turned. Senator Andrews introduced a bill providing for voluntary retirement of Supreme Court justices at full pay at age 72 on February

[56] 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 760 (1951); THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 302 (David J. Danelski & Joseph S. Tulchin, eds., 1973); Paul A. Freund, Charles Evans Hughes as Chief Justice, 81 Harv. L. Rev. 4, 23 n.64 (1967).
[57] LEONARD BAKER, BACK TO BACK: THE DUAL BETWEEN FDR AND THE SUPREME COURT 67-68 (1967).
[58] H.R. 5161 (74-1) (1935); H.R. 7782 (74-1) (1935); H.R. 7911 (74-1) (1935). See also S. 3529 (73-2 (1934) (introduced by Senator McKellar, repealing the reduction in pay of retired justices imposed by Section 13 of the Independent Offices Appropriation Act, 1934 and 1935).
[59] H.R. 11299 (74-2) (1936).
[60] WILLIAM F. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE NEW LEGALITY 38 (1970).
[61] H.R. 5956 (73-1) (1933); H.R. 5616 (74-1) (1935). Two joint resolutions introduced in 1933 would have amended the Constitution to permit Congress to fix (and thus to reduce) the compensation of federal judges. H.J. Res. 144 (73-1) (1933); H.J. Res. 164 (73-1) (1933).
[62] H.R. 2518 (75-1), 81 Cong. Rec. 169 (1937).

11.[63] The House passed Sumners' bill on February 10,[64] and the Senate followed suit on February 26.[65] By March 1, President Roosevelt had signed the bill into law.[66]

Two bills introduced in early 1937 would have deprived the Court, in the exercise of its appellate jurisdiction, of the power to "pass upon or consider any plea which raises the question of the constitutionality of an Act of Congress."[67] Another contemporaneous bill provided that the Court "shall not review or declare" any "statute or Act of Congress void or unconstitutional whenever said statute or Act is based upon a finding of fact made by the Congress of the United States declaring that such statute or Act is a necessary and proper exercise of a power specifically granted to Congress by the Constitution of the United States."[68] Several such proposals had been introduced in the preceding Congress.[69] On February 18, 1937, California Democratic Representative Jerry Voorhis reintroduced a proposal that had been offered by Colorado Democratic Representative John Martin and New York Democratic Representative Frederick J. Sisson the preceding year. That bill provided that no state or federal court, except for the Supreme Court in the exercise of its original jurisdiction, should have jurisdiction to hear or decide any question concerning the constitutionality of any statute that a) was, or purported to be, an exercise of congressional power to tax, to pay the debts and provide for the common defense and general welfare of the United States; to regulate commerce among the States; and to

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[63] S. 1475 (75-1) (1937).
[64] 81 Cong. Rec. 1127 (1937).
[65] 81 Cong. Rec. 1649 (1937).
[66] Act of March 1, 1937, ch. 21, 50 Stat. 24.
[67] H.R. 2284 (75-1), 81 Cong. Rec. 139 (1937); H.R. 4279 (75-1), 81 Cong. Rec. 820 (1937).
[68] H.R. 44 (75-1) (1937).
[69] See H.J. Res. 329 (74-1), 79 Cong. Rec. 9506 (1935); H.J. Res. 301 (74-1), 79 Cong. Rec. 8213 (1935); H.J. Res. 296 (74-1), 74 Cong. Rec. 7890 (1935); H.J. Res. 462 (74-2), 80 Cong. Rec. 770 (1936); H.R. 9478 (74-2), 80 Cong. Rec. 32 (1936); and H.R. 10764 (74-2) (prohibiting any federal judge from declaring unconstitutional the act creating the Tennessee Valley Authority, and deeming any judge doing so to have vacated his office).

coin money and regulate the value thereof; or b) affected, or purported to affect, rights under the Due Processes Clauses of the Fifth or Fourteenth Amendment when the rights affected were not procedural in nature.[70] At the Senate Judiciary Committee hearing on Roosevelt's bill, however, Committee Chairman Henry Fountain Ashurst of Arizona revealed that he did not believe that any member of the Judiciary Committee who would vote in favor of curtailing the power of the Court to rule on the constitutionality of legislation.[71]

The denouement of the Court-packing struggle is a familiar story. On June 14, the Senate Judiciary Committee issued its adverse report on the President's bill. The report explained that the bill "applies force to the judiciary and in its initial and ultimate effect would undermine the independence of the courts"; that it "violates all precedents in the history of our Government and would in itself be a dangerous precedent for the future"; and that the "theory of the bill" was "in direct violation of the spirit of the American Constitution and its employment would permit alteration of the Constitution without the people's consent or approval."[72] It was "a needless, futile, and utterly dangerous abandonment of constitutional principle," "a proposal without precedent and without justification." It "would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights." It pointed "the way to the evasion of the Constitution" and established a "method whereby the people may be deprived of their right to pass upon all amendments of the fundamental law." It sought "to do that which is unconstitutional" under "the form of the

[70] H.R. 4900 (75-1), 81 Cong. Rec. 1390 (1937). See also H.R. 10128 (74-2), 80 Cong. Rec. 366 (1936); H.R. 10315 (74-2), 80 Cong. Rec. 549 (1936).
[71] Hearing at 1595.
[72] S. Rept. 711 (75-1) (1937), at 3.

Constitution." It 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."[73]

In July, the Senate took up a substitute bill that would have authorized the President to appoint as many as four additional justices, but at the rate of no more than one per year. Senate Majority Leader Joseph Robinson, the Arkansas Democrat to whom an appointment to the Court had been promised if he succeeded in pushing the bill through, was found dead in his apartment on July 14. Thereafter, what support there had been for the substitute bill collapsed. On July 22, by a margin of 70-20, the Senate voted to recommit the bill to the Judiciary Committee with instructions to eliminate all provisions for increasing the number of justices. By August 11, both Houses had passed an amended bill, which concerned principally issues of procedure in the lower federal courts.[74]

Throughout June and July, Roosevelt had continued to push for a Court-enlargement bill. Even after Chief Justice Charles Evans Hughes and Justice Owen J. Roberts voted to uphold the New York State minimum wage law for women, the National Labor Relations Act, and the Social Security Act, administration officials did not regard these justices as reliable supporters of the New Deal. They worried that Hughes and Roberts had not undergone a conversion, but instead had voted as they did in the spring on 1937 only because of the threat of Court-packing. Once the heat was off, it was feared, they would revert to form. Thus, even though Justice Willis Van Devanter had retired, there would still be five "conservative" justices.[75] This was particular concerning because the Administration anticipated that key cases and statutes would come before

[73] Id. at 23.
[74] Barry Cushman, *The Judicial Reforms of 1937*, 61 Wm. & Mary L. Rev. 995, 1042-47 (2020).
[75] Cushman, *Court-Packing and Compromise* at 11-13, 23.

the Court in the next two years – cases involving the reach of the National Labor Relations Act,[76] the constitutionality of the bills that would ultimately become the Fair Labor Standards Act of 1938[77] and the Agricultural Adjustment Act of 1938,[78] of the Public Utility Holding Company Act of 1935,[79] of the Bituminous Coal Conservation Act of 1937,[80] and of loans and grants by the Public Works Administration to municipalities for the construction and operation of electrical generation and distribution systems that would compete with private providers.[81] It was, wrote one Justice Department lawyer, "very important" that the Court "should reach its maximum liberal strength as quickly as possible because the crucial years for decisions under the New Deal are the next two when the statutes passed this year will be under adjudication."[82] In signing the substitute bill on August 24, Roosevelt grumbled that it had not "touched the problem of aged and infirm judges who fail to take advantage of the opportunity accorded them to retire on full pay," and pledged that he would continue to press for a "thoroughgoing reformation of our judicial process." Observers in the press reported that the President was "as determined to pack the Court as ever," and predicted that he would "renew the court fight next session." Such

[76] Santa Cruz Fruit Packing Co. v. Labor Board, 303 U.S. 453 (1938); Consolidated Edison Co. v. Labor Board, 305 U.S. 197 (1938); Labor Board v. Fainblatt, 306 U.S. 601 (1939).
[77] United States v. Darby Lumber Co., 312 U.S. 100 (1941). The Fair Labor Standards Act was not actually passed until 1938, but it was introduced in the spring of 1937, and it had been anticipated that it would be enacted during that year.
[78] Mulford v. Smith, 307 U.S. 38 (1939).
[79] Electric Bond & Share Co. v. S.E.C., 303 U.S. 419 (1938).
[80] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).
[81] Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Duke Power Co. v. Greenwood County, 302 U.S. 485 (1938).
[82] Memorandum on the Features of the Proposed Plan (unpublished manuscript) (on file with the University of Virginia).

speculation continued after Roosevelt delivered a fiery Constitution Day speech on September 17.[83]

And then something interesting happened: nothing. On October 12, Roosevelt called Congress into a special second session beginning November 15. His message to Congress, delivered on the first day of that session, contained nothing at all about the judiciary.[84] Neither did his annual message to Congress delivered at the opening of the third session on January 3, 1938.[85] During the second session of the Seventy-fifth Congress, held from November 15 to December 21, 1937 and the third session, held between January 3 and June 16, 1938, not a single bill proposing to enlarge the Supreme Court was introduced in Congress. Nor were any bills or joint resolutions altering the Court's voting rules; nor any curtailing the Court's appellate jurisdiction; nor any providing for compulsory retirement; nor any term-limiting the justices; nor any providing for the congressional or popular override of Court decisions; nor any calling for the Court to issue advisory opinions on congressional legislation. In 1938 Congress did create nineteen new lower federal court judgeships in districts or circuits with demonstrable staffing shortages.[86] But it abandoned all proposals touching on the Supreme Court.

Meanwhile, Roosevelt and the Democrats continued to win presidential and congressional elections, and to nominate and confirm Democratic judges and justices. By the time of his death in April of 1945, FDR had appointed nine Supreme Court justices, five of them

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[83] LAURA KALMAN, THE COURT FIGHT: A POLITICAL HISTORY OF FDR'S COURT-PACKING PLAN 404-08 (forthcoming), citing "The Purpose Remains," *N.Y. Herald Trib.,* Aug. 26, 1937; Drew Pearson and Robert Allen, "The Washington Merry-Go-Round: Borah, Roosevelt Speeches on the Constitution Will Be Forensic Dual," Aug. 19, 1937; "Court Battle Lines Drawn," *L.A. Times,* Sept. 19, 1937.
[84] 82 Cong. Rec. 3-7 (1937).
[85] 83 Cong. Rec. 7-11 (1938).
[86] Cushman, *The Judicial Reforms of 1937,* at 1049.

in his second term alone. Aside from Harlan Fiske Stone, whom Roosevelt had elevated to the Chief Justiceship four years earlier, the only other remaining member of the "Old Court" of the 1930s was Owen Roberts, and he would resign at the end of that July. Presidents Truman, Kennedy, and Johnson would appoint fellow Democrats to the bench; President Eisenhower appointed Earl Warren and William Brennan; and as a result the Democrats dominated the Supreme Court and the federal judiciary for three decades. As the Senate Judiciary Committee report on the Court-packing bill had put it, "Even if every charge brought against the so-called 'reactionary' members of this Court be true," it was "far better that we await orderly but inevitable change of personnel than that we impatiently overwhelm them with new members. Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American judiciary from attack as long as this Government stands."[87]

Animated by the passions of the moment, members of Congress in early 1937 had introduced and considered not only bills to enlarge the Court's membership, but in addition a wide variety of alternatives designed to address what they perceived as problems with the Supreme Court's interpretation of the Constitution. After deliberation, reflection, and on sober second thought, however, they ultimately chose "none of the above."

[87] S. Rept. 711 (75-1), at 14. See also Hearings at 909 (Bates); id. at 1820 (Schurman).