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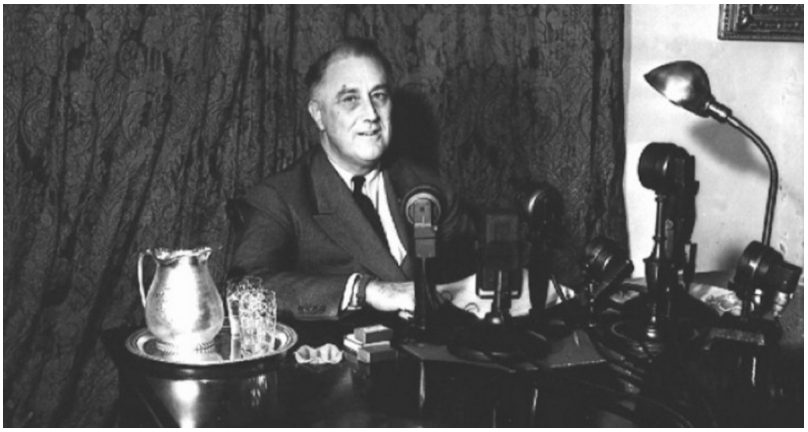
Seventy-five Years After FDR's Court-packing Scheme Failed



Seventy-five years ago, on July 22, 1937, President Franklin D. Roosevelt's attempt to pack the Supreme Court was derailed. On that date, the U.S. Senate voted to send back to committee a bill that would have enabled FDR to appoint six additional justices to the Supreme Court, thereby increasing the total number of Supreme Court justices from nine (the number at the time) to fifteen. By packing the court with additional pro-New Deal justices, FDR intended to insure that his New Deal programs would not be struck down as unconstitutional — as had already happened to parts of his New Deal such as the National Recovery Act.

But although in this instance the Congress did not go along with FDR's embarrassingly transparent effort to make the court a rubber stamp for whatever extra-constitutional programs the President could get Congress to approve, the Congress, both before and after 1937, has done little to rein the federal judiciary when it has issued decisions that do violence to the Constitution.

In our constitutional system, the role of the federal judiciary is a very limited one. The Supreme Court is the only federal court actually actually established by the Constitution; its "original Jurisdiction" is limited to "cases affecting Ambassadors, other public Ministers and Consuls, and those those in which a State shall be a Party"; and its "appellate Jurisdiction" is subject to whatever exceptions or regulations Congress shall make. All lower federal courts have been created by Congress, and those courts exercise powers granted by Congress and no more. In fact, if Congress were to choose to do so, Congress could constitutionally pass legislation to abolish all federal courts with the exception of the Supreme Court.

Until 1875, lower federal courts lacked the jurisdiction to hear cases involving federal questions — constitutional or federal judicial interpretation. Instead, these courts handled only cases involving diversity of citizenship among parties.

The Constitution did not grant the Supreme Court the power to interpret the Constitution. The Supreme Court gave itself that power in the case of *Marbury v. Madison*, written by Chief Justice John Marshall back in 1803. Judicial activism has been going on for a long time, and the reaction of American statesmen towards judicial usurpation has often been negative. John C. Calhoun called Supreme Court justices "black-robed deities." Thomas Jefferson warned:

> The Constitution is a mere thing of wax in the hands of the judiciary which they may twist into any way they please.… The great object of my fear is the Federal Judiciary. That body like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding which it gains, is ingulfing (sic) insidiously … [our freedoms.]

Jefferson opposed the Alien & Sedition Acts, signed into law by John Adams, which were a clear violation of the First Amendment prohibition that "Congress shall make no law … abridging the freedom of speech, or of the press." Yet the Supreme Court did nothing to suggest that the law violated the Constitution. Congressman Lyons of Vermont was actually imprisoned under the Alien and Sedition Acts for a newspaper article he wrote, and in 1797 Justice Thomas Iredell, a Supreme Court Justice in his capacity as a circuit judge, enjoined a jury to indict a sitting Congressman, Samuel J. Cabell of Virginia, for violating the Alien & Sedition Acts. Those laws were successfully resisted by the Virginia and Kentucky legislatures, which passed resolutions declaring the Alien & Sedition Acts unconstitutional, and by the American voters, who decisively defeated the Federalists (who supported the Acts) and put the Democrat-Republican Party in control of Congress.

It is instructive that the 11th Amendment to the U.S. Constitution, the first after the 10 we call our Bill of Rights, was intended to limit the jurisdictions of federal courts. Yet it is ignored as routinely as the 10th Amendment, which mandates that those powers not delegated to the federal government by the Constitution are reserved to the states or the people. The 11th Amendment was effectively undone by the Supreme Court's 1908 *Ex Parte Young* decision, which allowed officials of states to be sued in federal courts.

In more recent years the Supreme Court has treated the Constitution so cavalierly that in the 1960s many Americans displayed bumper stickers and signs asking that Congress "Impeach [Chief Justice] Earl Warren." The Supreme Court began ordering school systems to bus children many miles away to achieve a desired racial balance in school populations. The court banned reciting a nondenominational prayer in public schools. The court invented a "penumbra" of privacy for women and translated this right to privacy into the right to commit prenatal infanticide. The Court struck down loyalty oaths in government positions, a most innocuous response to communist infiltration. Our highest court found that the death penalty, which is clearly contemplated in the Constitution, was unconstitutional. It has held that treating individuals as members of a race with quotas for employment, college admission, etc. did not violate the Equal Protection Clause of the 14th Amendment.

And, of course, current Supreme Court Chief Justice John Roberts has recently penned a decision that finds that the individual mandate of ObamaCare is a "tax" and that, is such, it is constitutional. Never mind that all federal tax revenue may be used only for constitutional purposes.

The New Deal, which presumed a federal right to regulate markets and individuals, laid the groundwork for future government interventions into the private sector. The expansion of federal power under Franklin Roosevelt and the creation of a vast alphabet of federal agencies — including federal regulatory agencies that retained simultaneously the power to create rules, prosecute to enforce those rules, and act as an administrative tribunal to judge its own actions — far exceeded anything contemplated by our Founding Fathers. Why didn't the Supreme Court strike down those laws and declare the agencies invented by the New Deal unconstitutional? It did, for a while.

Then Franklin Roosevelt proposed an increase of six more justices to the Supreme Court, which would have given him enough support to uphold the constitutionality of the New Deal legislation. Congress clearly has the power to increase or to decrease the size of the Supreme Court, and it has done so in the past. What FDR sought, however, was a fairly dramatic increase in the size of the Supreme Court from nine to 15 justices, with all of the six new justices appointed by President Roosevelt.

On July 22, 1937 — 75 years ago — the U.S. Senate rejected the "court packing" scheme of Franklin Roosevelt. Superficially, the independence of the Supreme Court was preserved. But that is only half

the story. What happened after that was the rest of the story. FDR's efforts to pack the court sent a strong message to the already-seated Supreme Court justices that their decisions against FDR's policies could result in a dramatically expanded court, thereby diminishing the clout of each justice. Associate Justice Robert Owens, who had supported the majority opinions striking down New Deal legislation, shifted his judicial thinking in the 1937 decision *West Coast Hotel Co. v. Parrish*. "A switch in time saves nine" was the quip among federal politicians and pundits. The Supreme Court no longer stood in the way of FDR. Even when Roosevelt interned Japanese-Americans in camps, the Supreme Court, in the 1943 case *Hirabayashi v. United States*, upheld, with no dissenting opinion, a special curfew for Japanese Americans, and in the 1944 case *Korematsu in v. United States*, upheld 6 to 3 FDR's internment of Japanese-Americans.

The Supreme Court has not proven to be much of a defender of our constitutionally protected rights. But it was never intended to be. Franklin, when asked in Philadelphia by a woman what sort of government the men drafting our Constitution were giving us, responded: "A republic, madam, if you can keep it."