



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

FDR, the Great Court-Packer

by Jim Powell

FDR won the 1936 presidential election with more than 27 million votes, compared to 16 million for his Republican opponent Alf Landon. FDR won the Electoral College vote by an even bigger margin — 523 to 8. He concluded that he could do anything, and he over-reached, triggering a harsh reaction among Democrats as well as Republicans. He squandered much of the goodwill that he had.

FDR had been frustrated after the Supreme Court struck down some of his most cherished New Deal measures, especially the National Industrial Recovery Act that authorized him to establish cartels for fixing prices, wages, and market shares in some 500 industries. FDR denounced Supreme Court justices for “assuming the power to pass on the wisdom of these [New Deal] acts.”

Soon after the 1936 election, he hatched the idea of expanding the number of Supreme Court justices with his supporters, thereby creating a new majority that would uphold New Deal policies. Supreme Court justices didn’t have to retire at any particular age, so he asked the Senate for the power to appoint one new justice per justice over 70 years old. At the time, six of the nine justices were over 70, and he relished the prospect of appointing six additional justices. FDR suggested that justices over 70 were so decrepit that they couldn’t do their jobs, which wasn’t true. Justice Louis Brandeis, an 81-year-old backer of the New Deal, was among those offended. FDR claimed his goal was to “save the Constitution from the Court and the Court from itself,” but hardly anybody bought that line.

As historian Frank Freidel explained, “Indignant though many of them had been over the anti-New Deal court decisions, a considerable part of the liberals viewed the court as a bulwark of American liberties.” The *New York Times*, which had endorsed FDR in 1932 and 1936, turned against him. Syndicated columnist

Walter Lippmann, a co-founder of the liberal *New Republic*, said he was “sick at heart.”

Both Democrats and Republicans denounced FDR’s “court packing” scheme. Senators reported that constituent mail was 9 to 1 against it. Montana’s Burton K. Wheeler, the first Senator to support FDR in 1932, opposed it. Progressives like Nebraska Senator George Norris were against it. Virginia’s Democratic Senator Carter Glass called it “a proposition which appears to me utterly destitute of moral sensibility and without parallel since the foundation of the Republic.” William E. Borah, Charles L. McNary and Arthur Vandenburg led the Republican opposition.

Although FDR’s court-packing scheme went down to defeat, Justice Owen Roberts — a “swing” vote on the court — was intimidated, and he began siding with the four liberals on the court, instead of the four conservatives. Then Willis Van Devanter, a stalwart opponent of the New Deal, announced his retirement. FDR filled the vacancy by nominating Alabama Senator Hugo Black, a former member of the Ku Klux Klan. George Sutherland, perhaps the most articulate New Deal opponent, retired not long afterward. He was replaced by Stanley Reed, an attorney who had worked for a number of federal agencies under Hoover and FDR. Within three years, FDR nominated Felix Frankfurter, William O. Douglas, and Frank Murphy to the Supreme Court, and he had himself a rubber stamp.

FDR got what he wished for, and it backfired. The first major decision of the New Deal court, in 1937, upheld the National Labor Relations Act (Wagner Act) that supported compulsory unionism in mass production industries. It led to an 11 percent increase in labor costs, compounding the effects of two more Fed blunders (hiking the required minimum bank reserves 50 percent, then another 33-1/3 percent), the Social Security payroll tax (there weren’t yet any Social Security benefits), and FDR’s undistributed profits tax, all of which began to hammer the economy in 1937. The resulting 1938 depression brought fresh opposition to New Deal policies. Republicans gained seats in congressional elections. There was growing support for tax relief.

The New Deal court was just coming into its own. In *West Coast Hotel Co. v Parrish* (1937), the justices upheld a law making it illegal for anybody to work for less than \$14.50 per 48-hour week in the state of Washington. Chief Justice Hughes wrote triumphantly, “The Constitution does not speak of freedom of contract.” Robert H. Jackson, special counsel to the Treasury Department and a future Supreme Court justice, exulted: “The doctrine of ‘freedom of contract,’ which had menaced all types of legislation, had been uprooted so definitely that it could hardly be expected to thrive again.” By repudiating freedom of contract, the

Supreme Court found it easier to sanction labor-union monopolies and violence.
The Great Court Packer must have been proud.

*Jim Powell, a Senior Fellow at the Cato Institute, is the author of **FDR's Folly, Bully Boy, Wilson's War, Greatest Emancipations, The Triumph of Liberty** and other books.*

This article was originally published in March 2009.