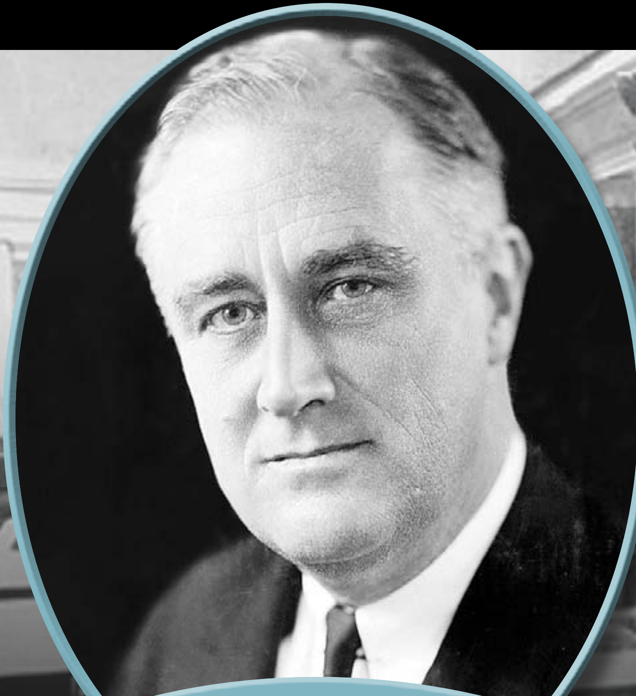
FDR vs. THE SUPREME COURT



CONTENTS

FDR vs. the Supreme Court by Merlo J. Pusey ARTICLE 1

The Spirit of the Laws Book XI (Excerpts) DOCUMENT 7

Constitution of the United States of America (Excerpts) DOCUMENT 9

Federalist No. 47 DOCUMENT........................ 12

Federalist No. 48 DOCUMENT........................16

Statement by Frank E Gannette DOCUMENT 19

Fireside Chat 9 DOCUMENT (MEDIA) 22

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ARTICLE

FDR VS. THE SUPREME COURT

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http://www.americanheritage.com/content/fdr-vs-supreme-court?page=showw

By Merlo J. Pusey

Did the President, as he claimed, lose a battle but win a war in his attempt to pack the Supreme Court? Historical perspective suggests another answer.

The great struggle between the President and the Supreme Court in 1937 stirred the national emotions to unusual depths because it brought Franklin D. Roosevelt's crusade against depression into collision with one of our most hallowed traditions. And after a lapse of twenty years it remains high on the list of the most dramatic contests in our constitutional history.

In the first phase of the struggle, beginning in 1935, the court invalidated a large part of the New Deal. The effect was to bring down upon its head the wrath of the country as well as that of the White House. In the second phase, two years later, Roosevelt moved against the court more boldly and directly than any other President had ever done. Public opinion then swung to the defense of the court, and FDR suffered the most humiliating defeat of his career. Yet the final outcome was a victory for liberal interpretation of the Constitution as well as for independence of the judiciary. The crash assault failed, and moderation won.

To understand the intensity of the struggle, it must be remembered that in the middle thirties the country was still trying to climb out of its depression storm cellar. In 1933 Roosevelt had come to power with the banks closed and the economy thoroughly demoralized. He had ushered in an almost revolutionary concept of government stewardship over the national economy. With the co-operation of a frightened Congress, he had devalued the dollar and placed industry under a system of codes and agriculture under production quotas. He had created various other "new instruments of power," initiated sweeping social reforms, and given organized labor the greatest impetus it had ever experienced.

The President's courage and industry were contagious. While the people applauded, Congress worked with feverish haste to enact almost every bill that the White House "brain trust" produced. Some of this outpouring of reform and recovery legislation has survived and become a distinctive part of our national heritage. But many of the early emergency bills, in addition to being highly experimental in nature, were poorly drafted. The men around the President realized that some of their ventures could scarcely be reconciled with the Constitution as it was then interpreted by the Supreme Court. But in their haste they passed lightly over this aspect of their problem. A new era was dawning. Its methods and objectives could not be judged by the outmoded criteria of the past. Many of the New Dealers concluded that, in any event, the Supreme Court would not dare to upset statutes on which the nation's recovery from its worst depression seemed to depend.

The rude awakening from this illusion came early in 1935, when the Supreme Court invalidated the National Recovery Administration's petroleum code as an unconstitutional venture into executive law-making. Soon there followed Chief Justice Charles Evans Hughes's opinion, written on behalf of a unanimous court, which wiped out the whole NRA and its progeny of Blue Eagles. [In the case before the court (commonly called the "sick chicken" case), four brothers named Schechter had been found guilty of marketing diseased fowl in violation of the NRA's poultry code. Their lawyers contended only that Congress had no power to regulate local—as distinguished from interstate—business, but the court went beyond this and invalidated the whole industrial recovery act. As Fred Rodell wrote in Nine Men: "A few sick chickens had murdered the mighty Blue Eagle."] The court found the NRA wanting on two counts: first, Congress had delegated extensive law-making powers to trade organizations acting with the approval of

The Supreme Court in 1932.

FDR VS. THE SUPREME COURT
– Continued –

the President; second, it had swept under federal control wholly local activities—in this instance the marketing of poultry—only remotely related to the interstate commerce which Congress is authorized to regulate.

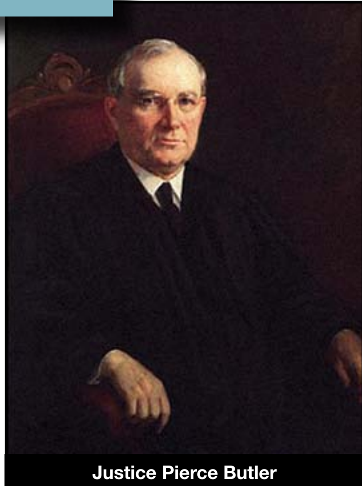
On the same "Black Monday" the court unanimously struck down the Frazier-Lemke Act for relief of farm debtors, with Justice Louis D. Brandeis writing the opinion, and reversed the President's dismissal of William E. Humphrey from the quasi-judicial Federal Trade Commission. The Humphrey decision is said to have nettled the President more than any other, but when he held a lengthy press conference and denounced the Supreme Court for taking the country back to a "horse-and-buggy" concept of interstate commerce it was the NRA decision that he had in mind.

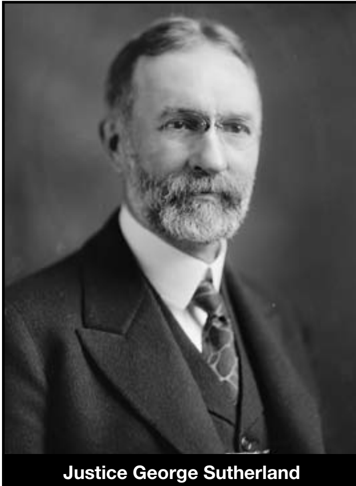
Actually the court's coup de grâce to the NRA was a blessing in disguise to the Roosevelt administration, for its unwieldy codes were already cracking up. The court saved the President from what would have been an embarrassing retreat. But FDR saw in the sweeping nature of the "sick chicken" decision a threat to other parts of his program, and in this he was right.

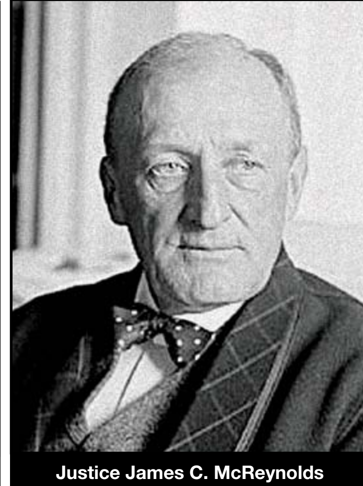
In most of the early New Deal cases the court had been unanimous, but as it moved on to more controversial issues its long-standing internal schism was much in evidence. On the conservative side, Justices Willis Van Devanter, Pierce Butler, George Sutherland, and James C. McReynolds nearly always stood together. To them any innovation was likely to appear as an unconstitutional seizure of power. The liberal wing, consisting of Justices Brandeis, Harlan F. Stone, and Benjamin N. Cardozo,

The Conservative Wing of the Court.

Justice Willis Van Devanter

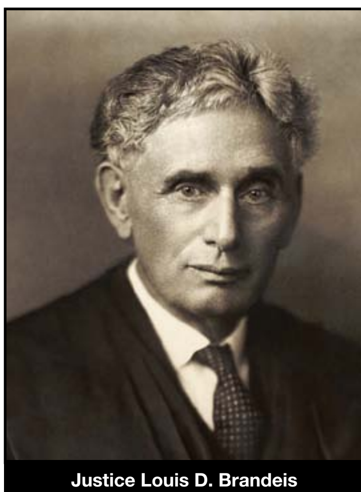

Justice Pierce Butler

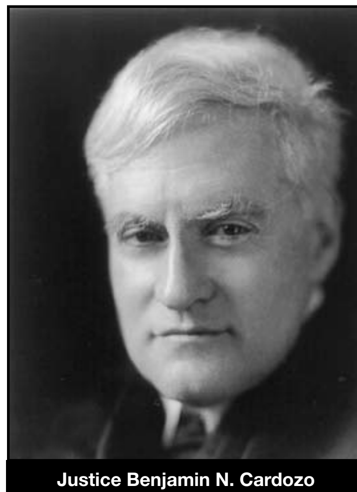

Justice George Sutherland


Justice James C. McReynolds

The Liberal Wing.

Justice Harlan F. Stone


Justice Louis D. Brandeis


Justice Benjamin N. Cardozo

FDR VS. THE SUPREME COURT
– Continued –

was more inclined to give Congress a free rein unless it had flagrantly overreached the limits of its power. Chief Justice Hughes occupied a middle ground, and Justice Owen J. Roberts often stood with him. For the New Deal, the result was fluctuation between reverses and narrow victories.

The court's action in the "gold clause" case in the spring of 1935 both relieved and angered the President. In this decision, four associate justices stood with Hughes in condemning Congress' repudiation of the government's promise to redeem its bonds and currency in gold. But, having thus bowed to principle, the court saved the economy from catastrophe by ruling that bondholders, who had suffered no loss of purchasing power when Congress increased the value of gold in terms of paper dollars, could not hold the government to its promise to pay in gold or its equivalent. From this latter part of the decision the four conservatives dissented. For the moment, the ingenious solution Hughes had invented to save the government from a crushing addition to its debt averted an open clash between the President and the court, for FDR had prepared a radio address announcing his refusal to enforce the decision—an address to be delivered if the court should allow the bondholders to take their pound of flesh.

Another New Deal innovation, the Agricultural Adjustment Administration, might have been saved had Congress, in building the AAA, used its power to regulate interstate commerce. Instead, it had used its taxing power. Hughes, Roberts, and the four conservatives concluded that the benefit payments to farmers, financed by a processing tax, had the effect of coercing them into compliance with a regulatory scheme that had no relation to interstate commerce. Stone and his liberal brethren dissented with unusual vehemence, and subsequent judicial thinking tends to support their conclusions if not the bite in Stone's words.

Both court factions broke away from Hughes's middle ground in the case involving the Guffey Act, designed to rescue the ailing coal industry. Hughes thought the price-fixing section of this statute was valid and that only its labor provisions were constitutionally defective. But a majority of five swept the whole act into the discard, with Brandeis, Stone, and Cardozo dissenting. The Municipal Bankruptcy Act met a similar fate.

Finally, the same majority of five released a legal block-buster by striking down New York State's minimum wage law for women. Coming on the heels of many decisions rejecting the extension of federal power over the economy, this restriction of state power seemed to indicate that no government could legally cope with the grave problems of the depression. The court's extreme stand-pattism raised an outcry throughout the land. Dissenting opinions by Hughes and Stone, in which Brandeis and Cardozo joined, pointedly disclosed the alarm felt within the court itself over this reactionary trend.

The white-bearded Chief Justice, whose liberal instincts were neatly blended with a high regard for traditional constitutionalism, was almost as much concerned over this turn of events as was the President. Both brooded on how to save the country from the consequences of static legalism. But, while Hughes thought in terms of correcting loosely drawn legislation and interpreting the basic law more liberally, Roosevelt turned toward more drastic measures.

Soon after the NRA decisions in 1935, FDR had put his attorney general, Homer Cummings, to work on "the court problem." In the following months the Department of Justice and the President quietly studied the respective merits of a constitutional amendment broadening federal powers, a statute limiting the court's jurisdiction, a provision requiring a two-thirds vote in the court to nullify an act of Congress, and an enlargement of the court's membership. No conclusions were drawn, however, and the issue was astutely avoided in the 1936 presidential campaign, except for a pledge in the Democratic platform that the economic and social problems of the day would be met in a constitutional manner. Republican charges that the President, if re-elected, would resort to the "tyranny" of court-packing met with impassioned Democratic denials.

Once Roosevelt's towering victory over Governor Alfred M. Landon was achieved, however, he moved against the court with supreme confidence. Did he not have a new mandate from the people to carry out his New Deal? Was not the court standing in his way? To Roosevelt's way of thinking, his chief problem was to find the most effective way of clearing this obstruction from his path.

It was Cummings who finally came up with the idea of naming new judges to replace the aged men on the bench. The fact that Justice McReynolds, when he had been attorney general in 1913, had advanced such a plan for driving overage judges of the lower courts into retirement made this approach irresistible. To the President's delight, Cummings shrewdly camouflaged the scheme in the trimmings of judicial reform. With the aid of a few trusted lieutenants, he drafted and redrafted a bill and a presidential message to Congress.

There was no discussion of the bill with the Cabinet, congressional leaders, or members of the court. FDR gave his annual dinner for the judiciary on the evening of February 3, 1937, without breathing a word of his secret to the judges. On the morning of February 5 he disclosed the contents of his message to an incredulous group of Cabinet and congressional leaders a few minutes before he jubilantly explained it to the press. Both his aloofness in working out the plan and his manner of presenting it suggested that he regarded it as almost *a fait accompli*.

FDR VS. THE SUPREME COURT
– Continued –

The President represented his bill as a reform aimed at correcting injustice and relieving the court of congestion. His inference was that aged justices on the Supreme Court bench were keeping their calendar clear by rejecting an excessive number of petitions for review—a charge that almost every lawyer knew to be false. Though he called for a "persistent infusion of new blood" into the judiciary, there was only a vague hint of the bill's real purpose in his suggestion that it would obviate the need for more fundamental changes in the powers of the courts or in the Constitution.

The heart of the bill was the provision giving the President authority to name an additional federal judge for every incumbent who had been on the bench ten years and had not resigned within six months after reaching the age of seventy. As six members of the Supreme Court had passed that age limit, FDR could immediately have appointed six new justices. If Chief Justice Hughes and his five aged associates had chosen to remain, the membership of the court would have been enlarged from nine to fifteen.

Legislators gasped over the boldness of the plan, yet many of them gave it immediate support. Others who dared to speak out against it assumed their opposition would be futile; Senator Carter Glass summed up his despair by exclaiming: "Why, if the President asked Congress to commit suicide tomorrow, they'd do it."

The impact on the justices varied. Roberts, the youngest among them and therefore not a direct target of the President's campaign, decided to resign if the measure were passed. Hughes, then 74, told his intimates, "If they want me to preside over a convention, I can do it." Brandeis, the eldest of the so-called Nine Old Men and one of the greatest liberals who ever sat on the Supreme Court bench, was cut to the quick by the President's indiscriminate assault upon age. Without exception, the justices were hostile to the scheme and resented the President's false inference that they were not able to keep up with their work.

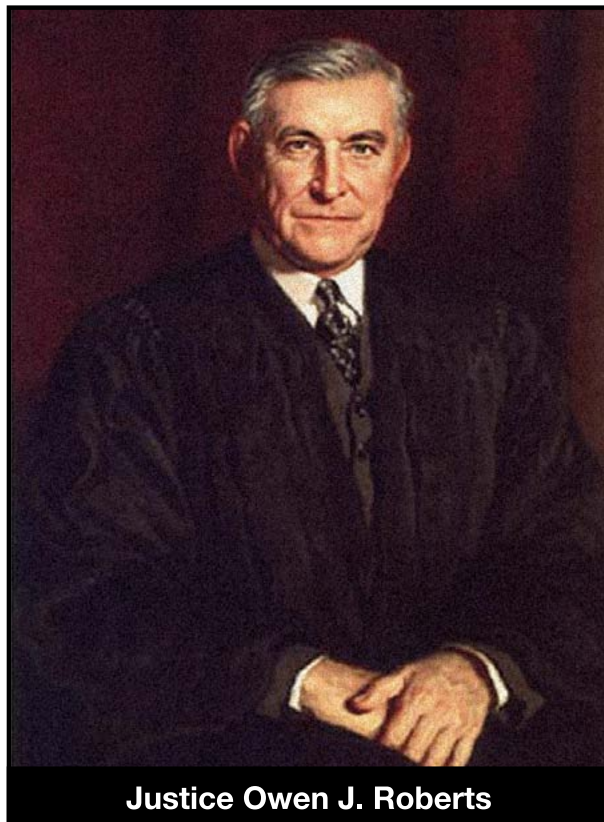
The first jolt that the bill sustained was a wave of public reaction against the deceptive trappings of reform in which FDR and Cummings had tried to camouflage their assault upon the court. Many, even among those who thought the conduct of the court had forced the President's hand, were critical of this indirection. It placed the Administration forces on the defensive from the very beginning.

A second severe jolt came when Senator Burton K. Wheeler read a letter from Chief Justice Hughes to the Senate Judiciary Committee, which was conducting hearings on the bill. Leaders of the fight in the Senate had asked the Chief Justice to appear in person, and he had agreed to do so if Justice Brandeis would accompany him. When he found that Brandeis believed strongly that no justice should testify in person, he contented himself with sending a letter setting forth the facts about the work of the court.

With cool logic, Hughes showed that the Supreme Court was fully abreast of its work, that it was very liberal in granting petitions for review, and that an increase in the size of the court would impair rather than enhance its efficiency. "There would be more judges to hear," he wrote, "more judges to confer, more judges to discuss, more judges to be convinced and to decide." Without touching on the major question of policy, Hughes left the President's arguments a shambles.

The Senate hearings produced a chorus of opposition to the bill from distinguished leaders in many walks of life. Such an outpouring of public opinion stiffened the spines of many legislators who had been worried but silent. The Republicans wisely kept in the background and let opponents of the bill in the President's own party lead the fight. The White House was increasingly alarmed by the disaffection of loyal New Dealers, but the President continued to scoff at any suggestion of compromise. To anxious members of his official family his stock answer was: "The people are with me; I know it."

Meanwhile a ferment had been working within the court. Some two months before the President had disclosed his plan, the black-robed justices had brooded afresh over the constitutionality of state minimum-wage laws and decided that their previous conclusion in the New York case had been wrong. In a new case the state of



Justice Owen J. Roberts

FDR VS. THE SUPREME COURT

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Washington, in asking the court to uphold a state minimum-wage law very similar to the New York statute it had invalidated, had directly urged the court to overrule the key precedent on this point, *Adkins v. Children's Hospital*, which the timorous New Yorkers had tried merely to circumvent. In December, 1936, the court voted four-to-four to uphold the Washington law and to reverse its own previous decision of only six months before in the New York case.

Four votes were enough to let the challenged statute stand because it had come to the Supreme Court with the sanction of the state of Washington's highest tribunal behind it. Three affirmative votes came from Hughes, Brandeis, and Cardozo. The fourth was that of Justice Roberts, who had switched sides from his position in the New York case, in part at least, because the state of Washington had made a frontal assault on the old precedent, which he felt had been discredited. At the time no one on the court had the slightest inkling of the bill taking shape at the White House, but Hughes was so delighted with Roberts' conversion that he almost hugged him.

Loath to have an issue of such importance disposed of by an even vote, however, Hughes decided to hold this Washington case until Justice Stone returned to the bench. Stone, who was ill, would certainly vote to uphold the state statute. When the Chief Justice revived the issue about February 1, 1937, Stone joined in a complete reversal of the old precedents, but before the opinion could be written and handed down the court found itself under threat of being packed.

Much has been written about this dramatic change of direction by the court, but actually the Washington case did not effect a clean break with the past. The court had upheld broad applications of state powers in both the Blaisdell case (involving the Minnesota Mortgage Moratorium Law) and the Nebbia case (involving the law under which New York was fixing the price of milk). Roberts followed the reasoning of these decisions instead of clinging to the older precedent. His recognition of error indicated that the court did not regard itself as infallible and therefore redounded to its credit.

Support for Roosevelt's judiciary bill further crumbled on April 12, when the court upheld the National Labor Relations Act in the fateful Jones and Laughlin Steel case. The opinion of Chief Justice Hughes was a sweeping confirmation of the power of Congress to regulate industrial relations having a direct impact on interstate commerce. The President claimed credit for the decision but was still not convinced that the court had gone far enough. He turned more heat on wavering legislators on behalf of his bill.

A few weeks later the Senate Judiciary Committee rejected the ill-fated legislation, just before the newly consolidated majority of the court gave its blessing to the Social Security Acts. These events spelled out the Administration's defeat in no uncertain terms, but rear-guard fighting continued because of a strange set of circumstances.

In devising remedies for "the court problem" no one had had the wit or the grace to offer the aged justices a reasonable chance to retire. Even before 1937, both Van Devanter and Sutherland had been eager to lay down their tasks, but Supreme Court justices could cease active service only by resignation, and Congress was then free to reduce their compensation, as indeed it had done in the case of Justice Oliver Wendell Holmes. So the aged judges held on despite some infirmities.

After the court fight began, opponents of the President's bill rushed through Congress a liberalized retirement measure in an effort to forestall a more drastic solution. Senator William E. Borah then persuaded his friend Justice Van Devanter to retire in order to make way for an appointment to the court by Roosevelt, who up to this time had had no opportunity to name a Supreme Court justice. Instead of easing the predicament, however, the sudden creation of a single vacancy threw the White House into near panic.

The President had previously offered the first seat at his disposal to Senator Joseph T. Robinson, a portly and conservative Democratic wheelhorse who, despite grave misgivings as to the judiciary bill's consequences, was directing the fight for it as majority leader of the Senate. If the President should fail to honor his well-known promise to Robinson, he would be left without a friend in the Senate. And fulfillment of the promise would have turned the court fight into a grotesque hoax; for Robinson, at 65, was the antithesis of the "new blood" for which the Roosevelt men were so persistently clamoring. Caught on this horn of his dilemma, the President had to continue fighting for his bill as the only means of balancing the prospective Robinson appointment with those of younger and more liberal men.

Thus the fight went on, despite a searing report from the Senate Judiciary Committee. Though it was largely the work of Democratic senators, that report characterized the court bill as "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." At last the Administration sought to compromise, but the Senate had the bit in its teeth. No bill that retained any hint of court-packing was thereafter acceptable.

The unfortunate Joe Robinson was increasingly torn between his distrust of the bill and his ambition to become a justice of the Supreme Court. Outwardly, he fought with desperation against the doom that was closing in on the bill. Secretly, he kept its foes informed about the wavering of senators in his ranks. On July 14, 1937, his sorely troubled heart failed under the strain; his death knell also signaled the end for the judiciary bill. Shortly after Senator Robinson's funeral the Senate formally

FDR VS. THE SUPREME COURT
– Continued –

buried the infamous measure in the usual way—by recommitting it to the Judiciary Committee.

Even this did not bring down the final curtain. FDR struck back by naming as a successor to Justice Van Devanter one of his most ardent supporters in the court fight—a man who would be anathema to his foes in the Senate and who would nevertheless be in a position to command confirmation—Senator Hugo L. Black of Alabama. Regardless of what may be said of Justice Black's subsequent career on the bench, the revenge motive appears to have been a major factor in Roosevelt's nomination of him. If the President found the Senate's discomfiture sweet, however, his satisfaction was short-lived. Shortly after his confirmation, disclosure that Black had once been a member of the Ku Klux Klan brought a fresh public clamor and intensified the bitterness of the whole affair.

Can this strange chapter in our history be regarded as an essential part of the process by which the Constitution has been modernized? Was President Roosevelt right in asserting, long after the fight was over, that he had lost a battle and won a war? Since 1937, undoubtedly, the Supreme Court has in many instances taken a broader view of the powers of Congress than it did before. But this came about without any change in the structure of the court, by an evolutionary process as different from court-packing as is an election from a *coup d'état.*

The chief reason why judicial decisions invalidating acts of Congress began to subside after 1937 was that Congress thereafter exercised greater care in casting its statutes. The reckless draftsmanship of the emergency period was eliminated. Sweeping delegations of power were avoided, and the new regulatory measures were based on the commerce clause instead of on the taxing power. Having fought a terrific battle to save the court from domination by the executive, Congress was especially eager to avoid the type of legislation that might precipitate another showdown.

Some individual judges made changes in their conclusions, as in the minimum-wage cases. But these were less extensive than is generally supposed, and in no instance can they be directly attributed to the court-enlargement plan. Chief Justice Hughes denied emphatically that the court bill had any bearing whatever on any of his decisions, and in no case did he urge his brethren to shade their views to save the court. The "switch-in-time-saves-nine" myth was never anything more than a journalistic wisecrack.

More important than anything else in the evolution of constitutional doctrine since 1937 has been the changed personnel of the Supreme Court. Before FDR's death in 1945 he had named seven of the nine members of the court and had elevated Stone to the chief justiceship. Though the new justices became involved in turbulent controversies among themselves, they went much further than the Hughes court had done in amplifying the commerce clause and other federal powers. In general the country has accepted and welcomed these new interpretations. But what would have been its attitude and what would now be the standing of the court before the bar of public opinion if its membership had been expanded to fifteen in order to bring about decisions favored by the White House?

If Roosevelt had sponsored a reasonable retirement bill for members of the Supreme Court in 1937, the evolutionary process would have been hastened and this entire sorry chapter in our history could have been avoided. The chief difficulty seems to have been that after his triumphal re-election in 1936 the President was riding too high to deal with the court with the moderation and restraint that should guide the relations of one co-ordinate branch of government to another. He chose a method which might indeed have lifted restraints from Congress and the Administration—there was never much doubt about that—but it would also have imperiled our constitutional system, the central genius of which is its system of checks and balances.

The justices who piloted the court through this difficult period won a double victory. The net effect of the 1935-37 ferment over constitutional issues was to confirm their insistence that judges must take into account changed social and economic conditions as well as past legal precedents. After Justice Roberts abandoned his four conservative colleagues in the Washington minimum-wage case, they did not again control the court on any vital issue. The views that prevailed were those of Chief Justice Hughes, and of Justices Brandeis, Stone, Cardozo, and Roberts.

The principle for which they struggled was continued independent judgment on the part of the court. They insisted that it must be free to upset an NRA which slopped over the line of constitutional power as well as to uphold an NLRB which did not. With these men still on the bench, the NRA would have gone down in 1938 as readily as it did in 1935. They stood for a Constitution which marched forward—but not to tunes called by the White House or by a spate of new justices suddenly appointed for that purpose.

Contrary to Roosevelt's boast, it was these men who won both the "battle" and the "war" in 1937. Twenty years after the notorious court-enlargement bill went down to defeat, it has scarcely a defender. If it may be credited with having written a salutary lesson in our history, it is only because cooler heads than those of its authors found sage and legitimate means of destroying it. The bill remains one of the major errors of American statesmanship in the current century. ▫

FDR VS. THE SUPREME COURT

MONTESQUIEU
THE SPIRIT OF THE LAWS BOOK XI

(EXCERPTS)

http://www.constitution.org/cm/sol_11.htm

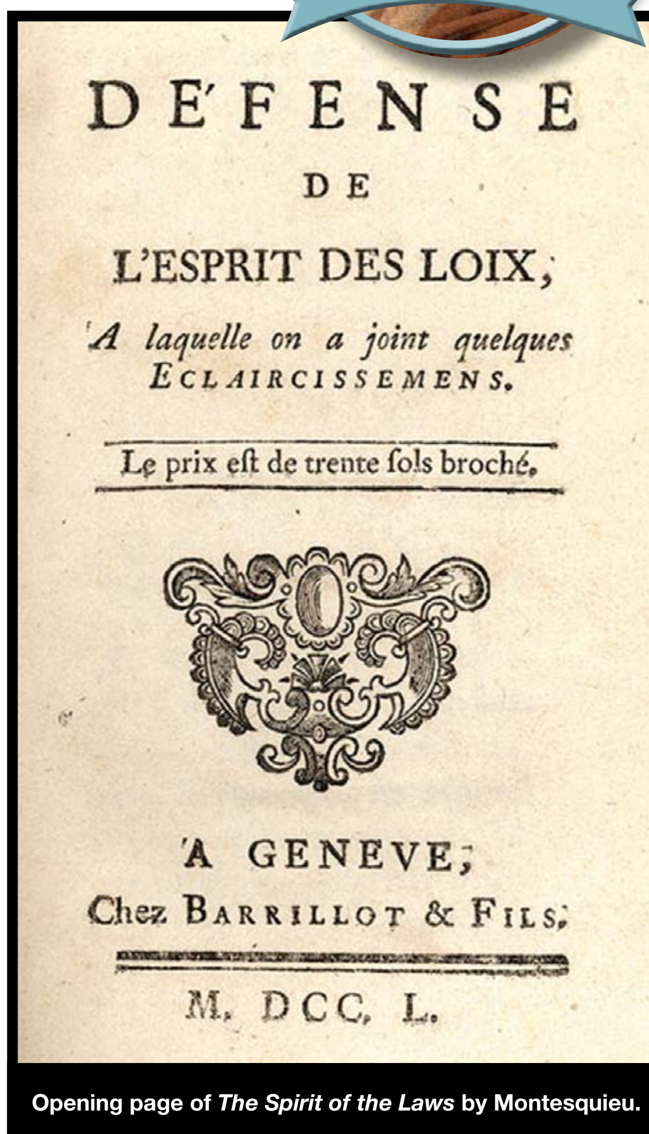
Montesquieu

In *The Spirit of the Laws* published in 1748, Montesquieu offered a wide–ranging comparative analysis of governmental institutions. He argued that the type of government varied depending on circumstances. **Separation of powers** is a political doctrine originating in *The Spirit of the Laws*. Montesquieu urged a constitutional government with three separate branches of government. Each of the three branches would have defined powers to check the powers of the other branches. This idea was called separation of powers. This philosophy heavily influenced the writing of the United States Constitution,

Book XI.
Of the Laws Which Establish Political Liberty, with Regard to the Constitution
4. The same Subject continued. Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits?

To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits.

5. Of the End or View of different Governments. Though all governments have the same general end, which is that of preservation, yet each has another particular object. Increase of dominion was the object of Rome; war, that of Sparta; religion, that of the Jewish laws; commerce, that of Marseilles; public tranquillity, that of the laws of China: navigation, that of the


DÉFENSE

DE

L'ESPRIT DES LOIX,

À laquelle on a joint quelques ECLAIRCISSEMENS.

Le prix eſt de trente ſols broché.

À GENEVE,

Chez BARRILLOT & FILS.

M. DCC. L.

Opening page of *The Spirit of the Laws* by Montesquieu.

MONTESQUIEU
THE SPIRIT OF THE LAWS BOOK XI
(EXCERPTS)

– CONTINUED –

laws of Rhodes; natural liberty, that of the policy of the Savages; in general, the pleasures of the prince, that of despotic states; that of monarchies, the prince's and the kingdom's glory; the independence of individuals is the end aimed at by the laws of Poland, thence results the oppression of the whole.

One nation there is also in the world that has for the direct end of its constitution political liberty. We shall presently examine the principles on which this liberty is founded; if they are sound, liberty will appear in its highest perfection.

To discover political liberty in a constitution, no great labour is requisite. If we are capable of seeing it where it exists, it is soon found, and we need not go far in search of it.

6. Of the Constitution of England. In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

…Here then is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.

These three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.

…20. The End of this Book. I should be glad to inquire into the distribution of the three powers, in all the moderate governments we are acquainted with, in order to calculate the degrees of liberty which each may enjoy. But we must not always exhaust a subject, so as to leave no work at all for the reader. My business is not to make people read, but to make them think. ▢

FOUNDING FATHERS

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

(EXCERPTS)

http://teachingamericanhistory.org/library/document/constitution-of-the-united-states/

September 17, 1787

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

FDR VS. THE SUPREME COURT

FOUNDING FATHERS
THE CONSTITUTION OF THE UNITED STATES OF AMERICA (EXCERPTS)

– CONTINUED –

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; —And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall

FDR VS. THE SUPREME COURT

FOUNDING FATHERS
THE CONSTITUTION OF THE UNITED STATES OF AMERICA (EXCERPTS)

– CONTINUED –

have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;— between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. □

FDR VS. THE SUPREME COURT

FEDERALIST NO. 47

BY JAMES MADISON

http://teachingamericanhistory.org/library/document/federalist-no-47/

Publius (James Madison)

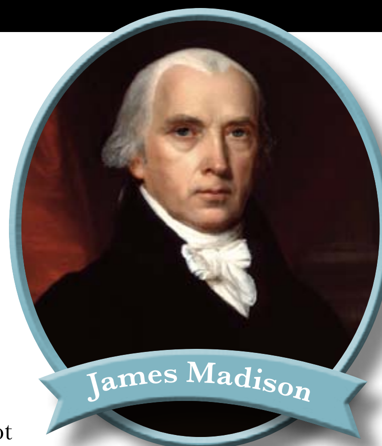
THE PARTICULAR STRUCTURE OF THE NEW GOVERNMENT AND THE DISTRIBUTION OF POWER AMONG ITS DIFFERENT PARTS

January 30, 1788

Having reviewed the general form of the proposed government and the general mass of power allotted to it, I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the Constitution is its supposed violation of the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to everyone that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.



The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor in the first place, to ascertain his meaning on this point.

The British constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depositary of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred that in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control*

FDR VS. THE SUPREME COURT

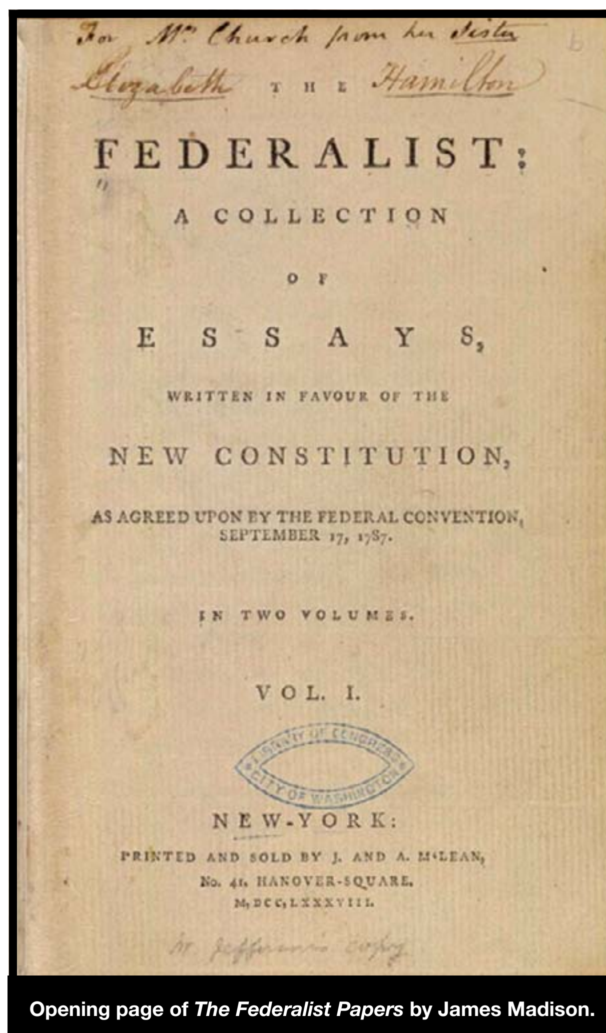
FEDERALIST NO. 47

– Continued –

over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority. This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator.* Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor.*" Some of these reasons are more fully explained in other passages; but briefly stated as they are here they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

If we look into the constitutions of the several States we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring "that the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other *as the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity.*" Her constitution accordingly mixes these departments in several respects. The Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments. The President, who is the head of the executive department, is the presiding member also of the Senate; and, besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department,


For Mr. Church from her Sister
Elizabeth THE Hamilton

FEDERALIST:

A COLLECTION

OF

ESSAYS,

WRITTEN IN FAVOUR OF THE

NEW CONSTITUTION,

AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787.

IN TWO VOLUMES.

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Opening page of *The Federalist Papers* by James Madison.

FDR VS. THE SUPREME COURT

FEDERALIST NO. 47

– Continued –

and his council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department are appointed by the executive department.

The constitution of Massachusetts has observed a sufficient though less pointed caution in expressing this fundamental article of liberty. It declares "that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them." This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the Constitution have, in this last point at least, violated the rule established by themselves.

I pass over the constitutions of Rhode Island and Connecticut, because they were formed prior to the Revolution and even before the principle under examination had become an object of political attention.

The constitution of New York contains no declaration on this subject, but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments. It gives, nevertheless, to the executive magistrate, a partial control over the legislative department; and, what is more, gives a like control to the judiciary department; and even blends the executive and judiciary departments in the exercise of this control. In its council of appointment members of the legislative are associated with the executive authority, in the appointment of officers, both executive and judiciary. And its court for the trial of impeachments and correction of errors is to consist of one branch of the legislature and the principal members of the judiciary department.

The constitution of New Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary or surrogate of the State; is a member of the Supreme Court of Appeals, and president, with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council to the governor, and with him constitutes the Court of Appeals. The members of the judiciary department are appointed by the legislative department, and removable by one branch of it, on the impeachment of the other.

According to the constitution of Pennsylvania, the president, who is head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department and forms a court of impeachments for trial of all officers, judiciary as well as executive. The judges of the Supreme Court and justices of the peace seem also to be removable by the legislature; and the executive power of pardoning, in certain cases, to be referred to the same department. The members of the executive council are made EX OFFICIO justices of peace throughout the State.

In Delaware, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The executive chief, with six others appointed, three by each of the legislative branches, constitutes the Supreme Court of Appeals; he is joined with the legislative department in the appointment of the other judges. Throughout the States it appears that the members of the legislature may at the same time be justices of the peace; in this State, the members of one branch of it are EX OFFICIO justices of the peace; as are also the members of the executive council. The principal officers of the executive department are appointed by the legislative; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other. Her constitution, notwithstanding, makes the executive magistrate appointable by the legislative department; and the members of the judiciary by the executive department.

FEDERALIST NO. 47

– CONTINUED –

The language of Virginia is still more pointed on this subject. Her constitution declares "that the legislative, executive, and judiciary departments shall be separate and distinct; so that neither exercises the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of the county courts shall be eligible to either House of Assembly." Yet we find not only this express exception with respect to the members of the inferior courts, but that the chief magistrate, with his executive council, are appointable by the legislature; that two members of the latter are triennially displaced at the pleasure of the legislature; and that all the principal offices, both executive and judiciary, are filled by the same department. The executive prerogative of pardon, also, is in one case vested in the legislative department.

The constitution of North Carolina, which declares "that the legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other," refers, at the same time, to the legislative department, the appointment not only of the executive chief but all the principal officers within both that and the judiciary department.

In South Carolina, the constitution makes the executive magistracy eligible by the legislative department. It gives to the latter, also, the appointment of the members of the judiciary department, including even justices of the peace and sheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the State.

In the constitution of Georgia where it is declared "that the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other," we find that the executive department is to be filled by appointments of the legislature; and the executive prerogative of pardon to be finally exercised by the same authority. Even justices of the peace are to be appointed by the legislature.

In citing these cases, in which the legislative, executive, and judiciary departments have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several State governments. I am fully aware that among the many excellent principles which they exemplify they carry strong marks of the haste, and still stronger of the inexperience, under which they were framed. It is but too obvious that in some instances the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is that the charge brought against the proposed Constitution of violating a sacred maxim of free government is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper. ▪

FEDERALIST NO. 48

BY JAMES MADISON

http://teachingamericanhistory.org/library/document/federalist-no-48/

Publius (James Madison)

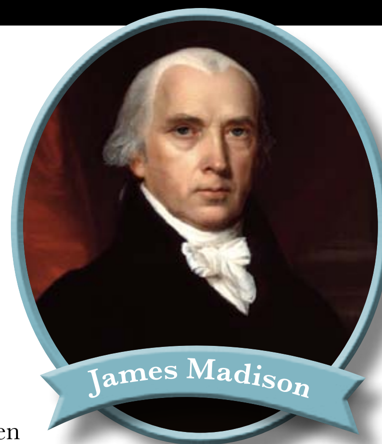
THESE DEPARTMENTS SHOULD NOT BE SO FAR SEPARATED AS TO HAVE NO CONSTITUTIONAL CONTROL OVER EACH OTHER

February 1, 1788

It was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be is the great problem to be solved.

Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government. The legislative department is every where extending the sphere of its activity and drawing all power into its impetuous vortex.



The founders of our republics have so much merit for the wisdom which they have displayed that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark that they seem never for a moment to have turned their eyes from the danger, to liberty, from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

In a government where numerous and extensive prerogatives are placed in the hands of a hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass and

FDR VS. THE SUPREME COURT

FEDERALIST NO. 48

– Continued –

being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they might be multiplied without end. I might collect vouchers in abundance from the records and archives of every State in the Union. But as a more concise and at the same time equally satisfactory evidence, I will refer to the example of two States, attested by two unexceptionable authorities.

The first example is that of Virginia, a State which, as we have seen, has expressly declared in its constitution that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who, besides his other advantages for remarking the operation of the government, was himself the chief magistrate of it. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting *Notes on the State of Virginia*, p. 195. "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others. For this reason that convention which passed the ordinance of government laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. *But no barrier was provided between these several powers.* The judiciary and executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can be effectual; because in that case they may put their proceeding into the form of an act of Assembly, which will render them obligatory on the other branches. They have accordingly *in many* instances, *decided rights* which should have been left to *judiciary controversy, and the direction of the executive, during the whole time of their session, is becoming habitual and familiar.*"

The other State which I shall take for an example is Pennsylvania; and the other authority, the Council of Censors, which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the Constitution, was "to inquire whether the Constitution had been preserved inviolate in every part; and whether the legislative and executive branches of government had performed their duty as guardians of the people, or assumed to themselves, or exercised, other or greater powers than they are entitled to by the Constitution." In the execution of this trust, the council were necessarily led to a comparison of both the legislative and executive proceedings with the constitutional powers of these departments; and from the facts

A great number of laws had been passed violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the Constitution against improper acts of the legislature.

FDR VS. THE SUPREME COURT

FEDERALIST NO. 48

– CONTINUED –

enumerated, and to the truth of most of which both sides in the council subscribed, it appears that the Constitution had been flagrantly violated by the legislature in a variety of important instances.

A great number of laws had been passed violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the Constitution against improper acts of the legislature.

The constitutional trial by jury had been violated and powers assumed which had not been delegated by the Constitution.

Executive powers had been usurped.

The salaries of the judges, which the Constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department, frequently drawn within legislative cognizance and determination.

Those who wish to see the several particulars falling under each of these heads may consult the journals of the council which are in print. Some of them, it will be found, may be imputable to peculiar circumstances connected with the war; but the greater part of them may be considered as the spontaneous shoots of an ill-constituted government.

It appears, also, that the executive department had not been innocent of frequent breaches of the Constitution. There are three observations, however, which ought to be made on this head: *first*, a great proportion of the instances were either immediately produced by the necessities of the war, or recommended by Congress or the commander-in-chief; *second*, in most of the other instances they conformed either to the declared or the known sentiments of the legislative department; *third*, the executive department of Pennsylvania is distinguished from that of the other States by the number of members composing it. In this respect, it has as much affinity to a legislative assembly as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence, unauthorized measures would, of course, be more freely hazarded, than where the executive department is administered by a single hand, or by a few hands.

The conclusion which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands. ◻

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FDR VS. THE SUPREME COURT

STATEMENT

BY FRANK E. GANNETT

http://www.archives.gov/education/lessons/separation-powers/#documents

Statement by Frank E. Gannett

Context: *It is safe to say that a respect for the principle of separation of powers is deeply ingrained in every American. The nation subscribes to the original premise of the framers of the Constitution that the way to safeguard against tyranny is to separate the powers of government among three branches so that each branch checks the other two. Even when this system thwarts the public will and paralyzes the processes of government, Americans have rallied to its defense.*

At no time in this century was the devotion to that principle more vigorously evoked than in 1937, when Franklin Roosevelt introduced a plan to increase the number of Justices on the Supreme Court. The conflict set off by the President's plan is more understandable when viewed in the historical context of expanding judicial power as well as in the contemporary context of pro- and anti-New Deal politics.

In the early national period, the judiciary was the weakest of the three branches of government. When Chief Justice John Marshall established the principle of judicial review in Marbury v. Madison by declaring an act of Congress unconstitutional, he greatly strengthened the judiciary. Even though the high court exercised this prerogative only one other time prior to the Civil War (Dred Scott v. Sanford), the establishment of judicial review made the judiciary more of an equal player with the executive and legislative branches.

After the Civil War, the Court entered a phase of judicial activism based on a conservative political outlook that further enhanced its own power. In accepting the view that the 14th amendment should be interpreted to protect corporations, the Court struck down laws that protected workers, such as minimum wage laws and laws prohibiting child labor. Critics of the Court's stand, including Justice Oliver Wendell Holmes, argued that these decisions were not based on the Constitution but upon the laissez-faire theory of economics. By 1937 the Court was widely regarded by the public as an enemy of working people.

This sentiment was exacerbated by the Great Depression. In 1935-36, the Court struck down eight of FDR's New Deal programs, including the National Recovery Act (NRA) and the Agricultural Adjustment Act (AAA). Public anti-judicial sentiment intensified; many critics questioned the constitutionality of the concept of judicial review itself. As a result of this reaction, several constitutional amendments were introduced into Congress in 1936, including one that would require a two-thirds vote of the Court whenever an act of Congress was declared unconstitutional; another that would permit Congress to revalidate federal laws previously declared unconstitutional by repassing them with a two-thirds vote of both houses, and even one that would abolish altogether the Court's power to declare federal laws unconstitutional.

FDR remained silent, hoping that the anti-judicial public sentiment would continue to grow without his having to enter the fray. He avoided any direct references to the Court in the 1936 election campaign. After his election victory, however, he submitted to Congress early in February 1937 a plan for "judicial reform," which forever came to be known as his attempt to "pack" the Supreme Court. Given Roosevelt's record for legislative success, it is interesting to discover why this plan to reconstitute the Court with Justices more favorable to the New Deal backfired.

FDR VS. THE SUPREME COURT

STATEMENT

– Continued –

Franklin Roosevelt and his Attorney General, Homer Cummings, had considered several options. They could have attacked the issue of judicial review head on, as Congress's proposed amendments had sought to do, but they chose not to, perhaps anticipating the public's attachment to the idea of the judiciary as the guardian of the Constitution. Instead, they chose to change the number of Justices on the Court, which had been done six times since 1789. Their plan had a different twist, however, for it proposed adding a justice for every justice over the age of 70 who refused to retire, up to a maximum of 15 total.

This proposal was all the more appealing because Justice Department lawyers had discovered that the very same idea had been proposed by Justice James C. McReynolds, one of the most conservative justices then sitting on the Court, when he had been Wilson's Attorney General in 1913. The administration could not resist the appeal of such irony, and without consulting Congress, the President and his New Deal aides blundered into one of the biggest political miscalculations of their tenure. By masking their true intentions, they created a split within their own party from which they never fully recovered.

It was expected that the Republicans would cry foul, but when the chairman of the House Judiciary Committee, Democrat Hatton Sumners of Texas, announced his opposition, the plan was as good as dead. Further resistance to the plan developed in Congress as the Court began a reversal of its previous conservative course by ruling in favor of such legislation as then National Labor Relations Act and the Social Security Act. Congressmen urged the White House to withdraw the bill, but confident of victory, FDR refused to back down. The cost was the alienation of conservative Democrats and the loss of the fight in Congress.

Letters poured into the White House and the Justice Department both attacking and supporting the President's plan. Many of the letters of support came from ordinary citizens who had worked in industries hurt by the Great Depression. The Worker's Alliance of Kalispell, MT, wrote, "We consider that Recovery has been delayed materially by the dilatory action of the Supreme Court. . . . An immediate curb on the Supreme Court is of utmost importance, then an amendment to put it in its proper place would be well and good." But others, most notably the legal establishment and the press, thought that the Supreme Court was already "in its proper place."

One of the most outspoken members of the press was the Rochester, NY, newspaper publisher, Frank Gannett. Our study document is a letter sent by Gannett to the Office of the Solicitor in the Justice Department and then referred to the Attorney General. Like many others in the file, it expresses the concern that the real issue is not judicial reform but the continued expansion of executive power.

Even those who trusted Roosevelt, and who believed in what the New Deal was trying to accomplish, were wary. The following excerpt from a telegram to President Roosevelt is typical.

Please watch your step while attempting to curb the powers of the honorable Supreme Court of the United States. Such action may be in order while so able a person as your excellency may remain in the president's chair but please let us look to the future when it might be in order for the citizenship of our great country to look to the Supreme Court for guidance which we might justly require. ■

FDR VS. THE SUPREME COURT

STATEMENT

– Continued –

A STATEMENT BY FRANK E. GANNETT, PUBLISHER GANNETT NEWSPAPERS

President Roosevelt has cleverly camouflaged a most amazing and startling proposal for packing the Supreme Court. It is true that the lower courts are slow and overburdened, we probably do need more judges to expedite litigation but this condition should not be used as a subtle excuse for changing the complexion and undermining the independence of our highest court. Increasing the number of judges from nine to fifteen would not make this high tribunal act any more promptly than it does now, but it would give the President control of the Judiciary Department.

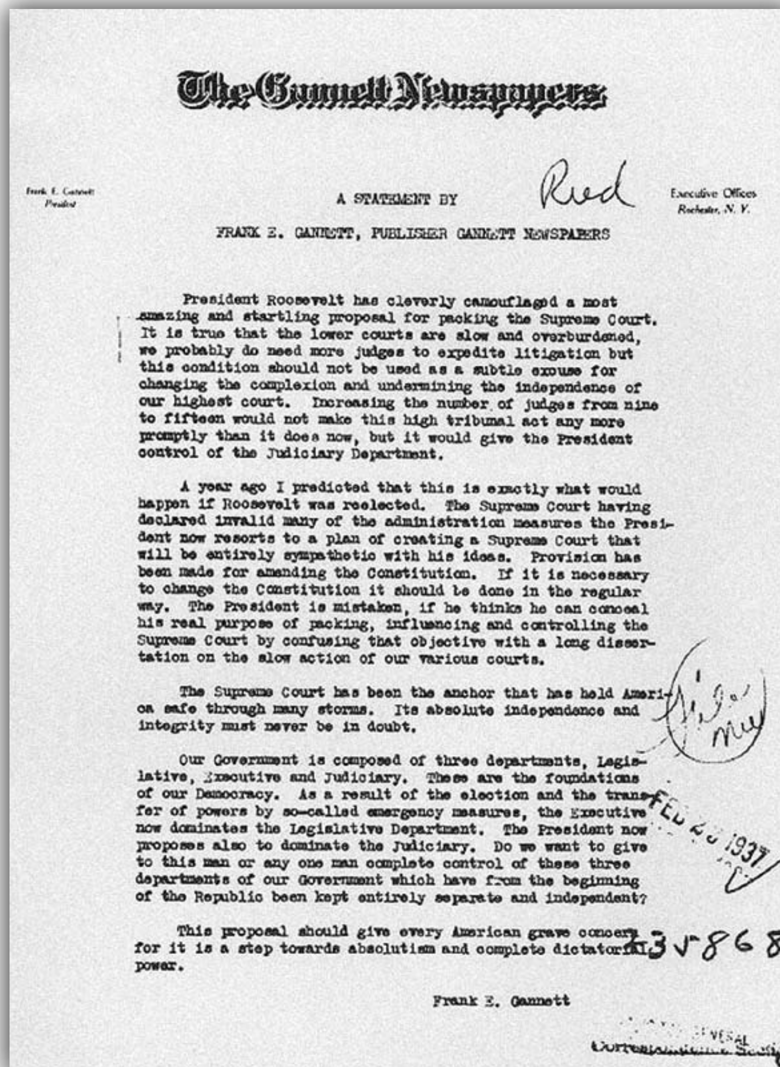
A year ago I predicted that this is exactly what would happen if Roosevelt was reelected. The Supreme Court having declared invalid many of the administration measures the President now resorts to a plan of creating a Supreme Court that will be entirely sympathetic with his ideas. Provision has been made for amending the Constitution. If is necessary to change the Constitution it should be done in the regular way. The President is mistaken, if he thinks he can conceal his real purpose of packing, influencing and controlling the Supreme Court by confusing that objective with a long dissertation on the slow action of our various courts.

The Supreme Court has been the anchor that has held America safe through many storms. Its absolute independence and integrity must never be in doubt.

Our Government is composed of three departments, Legislative, Executive and Judiciary. These are the foundations of our Democracy. As a result of the election and the transfer of powers by so-called emergency measures, the Executive now dominates the Legislative Department. The President now proposes also to dominate the Judiciary. Do we want to give to this man or any one man complete control of these three departments of our Government which have from the beginning of the Republic been kept entirely separate and independent?

This proposal should give every American grave concern for it is a step towards absolutism and complete dictatorial power.

—Frank E. Gannett



The Gannett Newspapers

Frank E. Gannett
President

Executive Offices
Rochester, N. Y.

Red

A STATEMENT BY

FRANK E. GANNETT, PUBLISHER GANNETT NEWSPAPERS

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FEB 1937

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FDR VS. THE SUPREME COURT

FIRESIDE CHAT 9: ON 'COURT-PACKING'

BY FRANKLIN D. ROOSEVELT

http://millercenter.org/president/speeches/detail/3309

Roosevelt shortly after giving one of his famous fireside chats.

(March 9, 1937)

Responding to criticism about his proposal to restructure the Supreme Court, Roosevelt criticizes conservative judges who blocked important New Deal programs andadvocates a restructuring of the judiciary. Ultimately, the President's plan deteriorates, but, nonetheless, Roosevelt was eventually able to reshape the court by appointing eight justices before his death in 1945.

Last Thursday I described in detail certain economic problems which everyone admits now face the Nation. For the many messages which have come to me after that speech, and which it is physically impossible to answer individually, I take this means of saying "thank you."

Tonight, sitting at my desk in the White House, I make my first radio report to the people in my second term of office.

I am reminded of that evening in March, four years ago, when I made my first radio report to you. We were then in the midst of the great banking crisis.

Soon after, with the authority of the Congress, we asked the Nation to turn over all of its privately held gold, dollar for dollar, to the Government of the United States.

Today's recovery proves how right that policy was.

But when, almost two years later, it came before the Supreme Court its constitutionality was upheld only by a five-to-four vote. The change of one vote would have thrown all the affairs of this great Nation back into hopeless chaos. In effect, four Justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring Nation.

In 1933 you and I knew that we must never let our economic system get completely out of joint again — that we could not afford to take the risk of another great depression.

We also became convinced that the only way to avoid a repetition of those dark days was to have a government with power to prevent and to cure the abuses and the inequalities which had thrown that system out of joint.

We then began a program of remedying those abuses and inequalities - to give balance and stability to our economic system - to make it bomb-proof against the causes of 1929.

Today we are only part-way through that program - and recovery is speeding up to a point where the dangers of 1929 are again becoming possible, not this week or month perhaps, but within a year or two.

National laws are needed to complete that program. Individual or local or state effort alone cannot protect us in 1937 any better than ten years ago.

It will take time - and plenty of time - to work out our remedies administratively even after legislation is passed. To complete our program of protection in time, therefore, we cannot delay one moment in making certain that our National Government has power to carry through.

Four years ago action did not come until the eleventh hour. It was almost too late.

If we learned anything from the depression we will not allow ourselves to run around in new circles of futile discussion and debate, always postponing the day of decision.

The American people have learned from the depression. For in the last three national elections an overwhelming majority of them voted a mandate that the Congress and the President begin the task of providing that protection - not after long years of debate, but now.

The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions.

We are at a crisis in our ability to proceed with that protection. It is a quiet crisis. There are no lines of depositors outside closed banks. But to the far-sighted it is far-reaching in its possibilities of injury to America.

I want to talk with you very simply about the need for present action

FDR VS. THE SUPREME COURT

FIRESIDE CHAT 9: ON 'COURT-PACKING'

– Continued –

in this crisis - the need to meet the unanswered challenge of one-third of a Nation ill-nourished, ill-clad, ill-housed.

Last Thursday I described the American form of Government as a three horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government - the Congress, the Executive and the Courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team, overlook the simple fact that the President, as Chief Executive, is himself one of the three horses.

It is the American people themselves who are in the driver's seat.

It is the American people themselves who want the furrow plowed.

It is the American people themselves who expect the third horse to pull in unison with the other two.

I hope that you have re-read the Constitution of the United States in these past few weeks. Like the Bible, it ought to be read again and again.

It is an easy document to understand when you remember that it was called into being because the Articles of Confederation under which the original thirteen States tried to operate after the Revolution showed the need of a National Government with power enough to handle national problems. In its Preamble, the Constitution states that it was intended to form a more perfect Union and promote the general welfare; and the powers given to the Congress to carry out those purposes can be best described by saying that they were all the powers needed to meet each and every problem which then had a national character and which could not be met by merely local action.

But the framers went further. Having in mind that in succeeding generations many other problems then undreamed of would become national problems, they gave to the Congress the ample broad powers "to levy taxes ... and provide for the common defense and general welfare of the United States."

That, my friends, is what I honestly believe to have been the clear and underlying purpose of the patriots who wrote a Federal Constitution to create a National Government with national power, intended as they said, "to form a more perfect union ... for ourselves and our posterity."

For nearly twenty years there was no conflict between the Congress and the Court. Then Congress passed a statute which, in 1803, the Court said violated an express provision of the Constitution. The Court claimed the power to declare it unconstitutional and did so declare it. But a little later the Court itself admitted that it was an extraordinary power to exercise and through Mr. Justice Washington laid down this limitation upon it: "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt."

But since the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and State Legislatures in complete disregard of this original limitation.

In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body.

When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress - and to approve or disapprove the public policy written into these laws.

That is not only my accusation. It is the accusation of most distinguished justices of the present Supreme Court. I have not the time to quote to you all the language used by dissenting justices in many of these cases. But in the case holding the Railroad Retirement Act unconstitutional, for instance, Chief Justice Hughes said in a dissenting opinion that the majority opinion was "a departure from sound principles," and placed "an unwarranted limitation upon the commerce clause." And three other justices agreed with him.

In the case of holding the AAA unconstitutional, Justice Stone said of the majority opinion that it was a "tortured construction of the Constitution." And two other justices agreed with him.

In the case holding the New York minimum wage law unconstitutional, Justice Stone said that the majority were actually reading into the Constitution their own " personal economic predilections," and that if the legislative power is not left free to choose the methods of solving the problems of poverty, subsistence, and health of large numbers in the community, then "government is to be rendered impotent." And two other justices agreed with him.

In the face of these dissenting opinions, there is no basis for the claim made by some members of the Court

FDR VS. THE SUPREME COURT

FIRESIDE CHAT 9: ON 'COURT-PACKING'

– Continued –

that something in the Constitution has compelled them regretfully to thwart the will of the people.

In the face of such dissenting opinions, it is perfectly clear that, as Chief Justice Hughes has said, "We are under a Constitution, but the Constitution is what the judges say it is."

The Court in addition to the proper use of its judicial functions has improperly set itself up as a third house of the Congress - a super-legislature, as one of the justices has called it - reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution and not over it. In our courts we want a government of laws and not of men.

I want - as all Americans want - an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written, that will refuse to amend the Constitution by the arbitrary exercise of judicial power - in other words by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts which are universally recognized.

How then could we proceed to perform the mandate given us? It was said in last year's Democratic platform, "If these problems cannot be effectively solved within the Constitution, we shall seek such clarifying amendment as will assure the power to enact those laws, adequately to regulate commerce, protect public health and safety, and safeguard economic security." In other words, we said we would seek an amendment only if every other possible means by legislation were to fail.

When I commenced to review the situation with the problem squarely before me, I came by a process of elimination to the conclusion that, short of amendments, the only method which was clearly constitutional, and would at the same time carry out other much needed reforms, was to infuse new blood into all our Courts. We must have men worthy and equipped to carry out impartial justice. But, at the same time, we must have Judges who will bring to the Courts a present-day sense of the Constitution - Judges who will retain in the Courts the judicial functions of a court, and reject the legislative powers which the courts have today assumed.

In forty-five out of the forty-eight States of the Union, Judges are chosen not for life but for a period of years. In many States Judges must retire at the age of seventy. Congress has provided financial security by offering life pensions at full pay for Federal Judges on all Courts who are willing to retire at seventy. In the case of Supreme Court Justices, that pension is $20,000 a year. But all Federal Judges, once appointed, can, if they choose, hold office for life, no matter how old they may get to be.

What is my proposal? It is simply this: whenever a Judge or Justice of any Federal Court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office, with the approval, as required by the Constitution, of the Senate of the United States.

That plan has two chief purposes. By bringing into the judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the administration of all Federal justice speedier and, therefore, less costly; secondly, to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries.

The number of Judges to be appointed would depend wholly on the decision of present Judges now over seventy, or those who would subsequently reach the age of seventy.

If, for instance, any one of the six Justices of the Supreme Court now over the age of seventy should retire as provided under the plan, no additional place would be created. Consequently, although there never can be more than fifteen, there may be only fourteen, or thirteen, or twelve. And there may be only nine.

There is nothing novel or radical about this idea. It seeks to maintain the Federal bench in full vigor. It has been discussed and approved by many persons of high authority ever since a similar proposal passed the House of Representatives in 1869.

Why was the age fixed at seventy? Because the laws of many States, the practice of the Civil Service, the regulations of the Army and Navy, and the rules of many of our Universities and of almost every great private business enterprise, commonly fix the retirement age at seventy years or less.

The statute would apply to all the courts in the Federal system. There is general approval so far as the lower Federal courts are concerned. The plan has met opposition only so far as the Supreme Court of the United States itself is concerned. If such a

FDR VS. THE SUPREME COURT

FIRESIDE CHAT 9: ON 'COURT-PACKING'

– CONTINUED –

plan is good for the lower courts it certainly ought to be equally good for the highest Court from which there is no appeal.

Those opposing this plan have sought to arouse prejudice and fear by crying that I am seeking to "pack" the Supreme Court and that a baneful precedent will be established.

What do they mean by the words "packing the Court"?

Let me answer this question with a bluntness that will end all honest misunderstanding of my purposes.

If by that phrase "packing the Court" it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer: that no President fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court. But if by that phrase the charge is made that I would appoint and the Senate would confirm Justices worthy to sit beside present members of the Court who understand those modern conditions, that I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy, that I will appoint Justices who will act as Justices and not as legislators - if the appointment of such Justices can be called "packing the Courts," then I say that I and with me the vast majority of the American people favor doing just that thing- now.

Is it a dangerous precedent for the Congress to change the number of the Justices? The Congress has always had, and will have, that power. The number of justices has been changed several times before, in the Administration of John Adams and Thomas Jefferson - both signers of the Declaration of Independence - Andrew Jackson, Abraham Lincoln and Ulysses S. Grant.

I suggest only the addition of Justices to the bench in accordance with a clearly defined principle relating to a clearly defined age limit. Fundamentally, if in the future, America cannot trust the Congress it elects to refrain from abuse of our Constitutional usages, democracy will have failed far beyond the importance to it of any king of precedent concerning the Judiciary.

We think it so much in the public interest to maintain a vigorous judiciary that we encourage the retirement of elderly Judges by offering them a life pension at full salary. Why then should we leave the fulfillment of this public policy to chance or make independent on upon the desire or prejudice of any individual Justice?

It is the clear intention of our public policy to provide for a constant flow of new and younger blood into the Judiciary. Normally every President appoints a large number of District and Circuit Court Judges and a few members of the Supreme Court. Until my first term practically every President of the United States has appointed at least one member of the Supreme Court. President Taft appointed five members and named a Chief Justice; President Wilson, three; President Harding, four, including a Chief Justice; President Coolidge, one; President Hoover, three, including a Chief Justice.

Such a succession of appointments should have provided a Court well-balanced as to age. But chance and the disinclination of individuals to leave the Supreme bench have now given us a Court in which five Justices will be over seventy-five years of age before next June and one over seventy. Thus a sound public policy has been defeated.

I now propose that we establish by law an assurance against any such ill-balanced Court in the future. I propose that hereafter, when a Judge reaches the age of seventy, a new and younger Judge shall be added to the Court automatically. In this way I propose to enforce a sound public policy by law instead of leaving the composition of our Federal Courts, including the highest, to be determined by chance or the personal indecision of individuals.

If such a law as I propose is regarded as establishing a new precedent, is it not a most desirable precedent?

Like all lawyers, like all Americans, I regret the necessity of this controversy. But the welfare of the United States, and indeed of the Constitution itself, is what we all must think about first. Our difficulty with the Court today rises not from the Court as an institution but from human beings within it. But we cannot yield our constitutional destiny to the personal judgment of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present.

This plan of mine is no attack on the Court; it seeks to restore the Court to its rightful and historic place in our Constitutional Government and to have it resume its high task of building anew on the Constitution "a system of living law." The Court itself can best undo what the Court has done.

I have thus explained to you the reasons that lie behind our efforts to secure results by legislation within the Constitution. I hope that thereby the difficult process of constitutional amendment may be rendered unnecessary. But let us examine the process.

There are many types of amendment proposed. Each one is radically different from the other. There is no substantial groups within

FDR VS. THE SUPREME COURT

FIRESIDE CHAT 9: ON 'COURT-PACKING'

– CONTINUED –

the Congress or outside it who are agreed on any single amendment.

It would take months or years to get substantial agreement upon the type and language of the amendment. It would take months and years thereafter to get a two-thirds majority in favor of that amendment in both Houses of the Congress.

Then would come the long course of ratification by three-fourths of all the States. No amendment which any powerful economic interests or the leaders of any powerful political party have had reason to oppose has ever been ratified within anything like a reasonable time. And thirteen states which contain only five percent of the voting population can block ratification even though the thirty-five States with ninety-five percent of the population are in favor of it.

A very large percentage of newspaper publishers, Chambers of Commerce, Bar Association, Manufacturers' Associations, who are trying to give the impression that they really do want a constitutional amendment would be the first to exclaim as soon as an amendment was proposed, "Oh! I was for an amendment all right, but this amendment you proposed is not the kind of amendment that I was thinking about. I am therefore, going to spend my time, my efforts and my money to block the amendment, although I would be awfully glad to help get some other kind od amendment ratified."

Two groups oppose my plan on the ground that they favor a constitutional amendment. The first includes those who fundamentally object to social and economic legislation along modern lines. This is the same group who during the campaign last Fall tried to block the mandate of the people.

Now they are making a last stand. And the strategy of that last stand is to suggest the time-consuming process of amendment in order to kill off by delay the legislation demanded by the mandate.

To them I say: I do not think you will be able long to fool the American people as to your purposes.

The other groups is composed of those who honestly believe the amendment process is the best and who would be willing to support a reasonable amendment if they could agree on one.

To them I say: we cannot rely on an amendment as the immediate or only answer to our present difficulties. When the time comes for action, you will find that many of those who pretend to support you will sabotage any constructive amendment which is proposed. Look at these strange bed-fellows of yours. When before have you found them really at your side in your fights for progress?

And remember one thing more. Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court Bench. An amendment, like the rest of the Constitution, is what the Justices say it is rather than what its framers or you might hope it is.

This proposal of mine will not infringe in the slightest upon the civil or religious liberties so dear to every American.

My record as Governor and President proves my devotion to those liberties. You who know me can have no fear that I would tolerate the destruction by any branch of government of any part of our heritage of freedom.

The present attempt by those opposed to progress to play upon the fears of danger to personal liberty brings again to mind that crude and cruel strategy tried by the same opposition to frighten the workers of America in a pay-envelope propaganda against the Social Security Law. The workers were not fooled by that propaganda then. The people of America will not be fooled by such propaganda now.

I am in favor of action through legislation:

First, because I believe that it can be passed at this session of the Congress.

Second, because it will provide a reinvigorated, liberal-minded Judiciary necessary to furnish quicker and cheaper justice from bottom to top.

Third, because it will provide a series of Federal Courts willing to enforce the Constitution as written, and unwilling to assert legislative powers by writing into it their own political and economic policies.

During the past half century the balance of power between the three great branches of the Federal Government, has been tipped out of balance by the Courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed. You and I will do our part. ■

AUDIO PART ONE: http://www.youtube.com/watch?feature=player_embedded&v=W6Uj9TL1TS0

AUDIO PART TWO: http://www.youtube.com/watch?v=ot5SHkuBdSA