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Dimensions of Conflict in the Court-Packing Controversy in America 1936–1937

The year 1937 brought much more than the re-election of president Franklin Delano Roosevelt. It was also a year which brought a broad and radical challenge to the New Deal reform policies. It was also a year when American democracy demonstrated its complexity and "unfinishedness"[1] while at the same time demonstrating its ability to self-repair after confrontation at the very top of the power hierarchy.

The conflict between FDR and the Supreme Court (USSC) has many dimensions: institutional — as a conflict between the government (the president, Congress and the Administration) and the US Supreme Court over the range of powers of each actor; political — regarding the accountability of political elites; socio-economic — regarding the direction of development of the American democracy; philosophical — over the meaning of liberty; legal — regarding the separation of powers between the levels of government; personal — between persons and personalities representing divergent visions of power; and historical — reviving the constitutional debates from the early republic.

For some, the almost year-long clash between FDR and the USSC touched the very essence of liberal democracy. The president's plan for court reform, known colloquially as the Court-packing Plan (CPP), was simple. In order to dilute the conservative majority on the bench endangering the progress of New Deal liberal reforms, he sought permission to nominate six new justices to eventually achieve a body of 15 justices. The excuse for the increase was

1 M. Lerner, *The Unfinished Country,* New York 1959.

the court's high workload, evoking concern for institution's efficiency. New auxiliary justices would be nominated at six-month intervals, one for each justice who was 70 years of age until the maximum number of 15 was reached.

Roosevelt's announcement on February 5, 1937 caught the great majority of people by surprise, as no specific mention of any judicial branch reform was mentioned during the presidential elections, which had ended just four months earlier in a landslide for FDR and the Democrats. After most of the arguments had been ventilated in public debates, in the media and in behind the scenes conversations, after all the major actors: the president, the justices, prominent politicians, group and professional leaders, experts and non-experts, had spoken the level of tensions subsided. After all actors had demonstrated their emotions and thoughts the political system returned to normalcy. Institutionally unchanged, yet politically scarred, liberal democracy in America had been tested and it demonstrated its resilience. The outcome of the 1936/7 conflict serves to this day as a pretext for deliberations about the relations between the leaders and followers, and the manifest and latent limitations of presidential leadership. The lessons from those events in America may be useful for all countries where the autonomy of the judicial branch of government becomes a political issue. In America the echoes of those debates return each time a balance between ideological options on the Supreme Court bench becomes a hot issue of the day.

The facts: the Supreme Court in the American system of government

The Supreme Court is created by the Constitution and its prerogatives as the highest court of appeals are defined in the Article 3 of the Constitution. The political function of the Court as the "umpire" who can exercise *judicial review* and rule on the constitutionality of political decisions (laws and regulations) of other branches of government is not anchored in the Constitution. It is a product of the 1803 Marbury v. Madison case when the Court, in an indirect way, assumed that role and declared an act of Congress unconstitutional. The precedent stood unchallenged and over time became a natural power of the Court, by lay people viewed as a constitutional principle[2]. The number of justices is not set by the Constitution either.

2 R. Heimlich, *Judicial Review*, FactTank. News in Numbers, Pew Research Centre, 22.06.2011, http://www.pewresearch.org/fact-tank/2011/06/22/judicial-review/ (14.10.2018).

For years it fluctuated between five (1801) to ten (1866) until in 1869 it was fixed by Congress in The Judiciary Act at nine. When the Court issues decisions which deal with the burning issues of the day such as slavery, immigration, segregation, business and labour relations, separation of church and state, or minority rights, Americans have become particularly aware of its political role. Since the justices are nominated for life they tend to sit on the bench for decades, while in the meantime the society and politics may undergo changes. The Court is slow to change so it is often called a conservative institution, especially by those who grow impatient with the Court's judicial philosophy[3].

In spite of its apparent unaccountability to any other actor in the system, internally the court works like a perfect democratic institution. This is not because justices lobby, trade favours and persuade one another in political debates. None of this happens on the bench. The way the justices decide the cases comes closest to the ideal of deliberative democracy. After a conference when they express their views and vote on a decision, the work on a case continues: they write memos to one another arguing their positions carefully, making sure they always support their views with precedents and written words of their predecessors. Their constrained exchanges are full of mutual respect and high regard for the intellect standing behind the arguments. Such discussions take place during conferences when they sit alone around an elongated oval table or during the opinion writing phase when they circulate memos and statements among each other. Eventually a majority and other (minority and concurrent) opinions are produced and the general public receives the final ruling[4]. This quiet, slow and out-of-the -spotlight decision-making process gives the Court its legitimacy and even an aura of magic.

When that process is pierced by the urgency of current politics, personalization and immersion in the ideologically charged discussions of the day, the Court's work is stripped of its enchantment and becomes just a mundane adjudicating body. Americans appreciate this ivory-tower perception

3 S. Jessee, N. Malhotra, *Public (Mis)Perceptions of Supreme Court Ideology: a Method for Directly Comparing Citizens and Justices*, „Public Opinion Quarterly", vol. LXXVII, no. 2 (2013), p. 623.

4 *Supreme Court Procedures*, United States Courts, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (16.10.2019).

of the Court[5] because it yields an intellectual and expert quality to politics which no other actor may provide. This mysticism and intellectualism of the Court played a role in the CPP situation.

There are two mechanisms which bring change to the Court. The first one comes from inside the Court — it is the intellectual reflection, i.e. the evolution of the world view of individual Justices. The other comes from outside and may come in a much more dramatic form. This moment of change appears when a vacancy appears (either by death or retirement of one of the Justices). In either case change usually means that a balance between the world views on the bench is disturbed. In times of dramatic social change when a discrepancy between the philosophy of the Court and the dominant mood of the historical moment (the Hegelian Zeitgeist) reveals itself, the Court becomes a battleground institution. In such historical moments vacancies or their lack, as it was in the case in the mid-1930s, fuel heated ideological confrontations and manifestations of conflicts of interest. Emotions run high and the Court becomes a target of attention which it does not desire. Pressures mount and arguments flare up public zeal. Critics of the Court call it an usurping third legislative chamber, while its supporters see it as a guardian of American identity.

During its history the Court has issued decisions which raised eyebrows and were challenged or disregarded by the public. None of them, however, brought such a frontal attack by the president and his ruling party as the few cases which invalidated several key New Deal rules in the years 1934-1936. When keystones of the New Deal such as the Agricultural Adjustment Act (AAA) and the National Industrial Recovery Act, which established the fundamental economic reform agency the National Recovery Administration (NRA) were invalidated, and more were expected to meet with similar resistance by the Court, the stage was set for confrontation.

The facts

During Roosevelt's first term of 1933-1937 the Democrats enjoyed commanding majorities in both the House and the Senate, and most of the president's legislative agenda had been enacted with bi-partisan support and few dissenting votes. The New Deal program, meant to lift the American economy

5 J. Gibson, L. Spence, G. Caldeira, *Measuring Attitudes Toward the United States Supreme Court*, "American Journal of Political Science", vol. XLVII (April 2003), pp. 354–355.

and society from the gloom of the Depression, was built around the Keynesian philosophy of state activism and intrusion into new social and economic spheres of politics. Government became an active participant and initiator of policies such as subsidies for farmers and small entrepreneurs, welfare transfers, public works, minimum wage, retirement programs and support for collective bargaining and unions. Previously the social sphere of the economy had been left pretty much to the hidden hand of the market and individualistic laissez-faire capitalism and social darwinism in its social dimension. This clash of ideas was sure to translate into political confrontation between parties, factions, and interest groups, and in the electorate. The severity of the Depression either made key actors willing to support the New Deal experiment, or mitigated their critique until the initial results became known. The 1936 elections became the first major test of the New Deal experiment, and the Roosevelt reform camp won decisively (Roosevelt won 523 out of 531 electoral votes). Political legitimacy of the program was confirmed decisively in the executive and legislative branches.

The problem was with the federal judiciary instead, and more particularly, with the Supreme Court of the United States. It should be noted that all the justices were Republican nominees, three of them were seen as relatively liberal (Brandeis, Cardozo, and Stone), two were moderates or swing justices (Hughes and Roberts), and four of them were conservatives (McReynolds, Sutherland, Van Devanter, and Butler). This last group of staunch conservatives gained notoriety as the Four Horsemen of the Apocalypse, so unwavering was their embrace of the rules of deregulated trade (controlled at the level of states only) and freedom of contract. Chief Justice Hughes was gradually moving in the direction of the liberals, which left Roberts the key tie-breaker[6]. The conservatism of the Court stood in the way of the New Dealers' wishes to regulate interstate trade, wages, and labour conditions at the federal level. In the broader sense the confrontation was between the proponents of states' rights, freedom of contract and individualism versus centralization of control over the economy and collectivism. It was not the first time America had faced such a dilemma: the most notable of such ideological confrontations, this time with the central national bank at play, happened during the Jacksonian democracy in the 1830s.

6 L. Baker, *Back to Back: The Duel Between FDR and the Supreme Court*, New York 1967, pp. 120–123.

Here is a quick breakdown of events which produced the emotionally charged confrontational atmosphere between the Court and the White House at the beginning of 1937. Although the Court had narrowly upheld the Administration's monetary policy in the *Gold Clause Cases* early in 1935, it had also struck down the National Industrial Recovery Act's (NIRA) and oil program in the *Hot Oil Case*. Later that spring the Court held that the Railroad Retirement Act of 1934 did not pass the constitutional test. On what New Dealers called Black Monday in May of 1935, a unanimous Court finished off what remained of the NIRA in *Schechter Poultry*, struck down the Frazier-Lemke Farm Debt Relief Act, and held that the President did not have authority to remove a Commissioner of the Federal Trade Commission. In January of 1936, a divided Court invalidated the Agricultural Adjustment Act. A few months later, the Court pronounced the Guffey Coal Act unconstitutional. Although that spring saw the Tennessee Valley Authority survive a constitutional challenge, in June the Court held that the State of New York did not have the power to prescribe minimum wages for women working in industry. In the view of Roosevelt and of many others, an obstinate Court was preventing the country from achieving necessary recovery and reform[7]. This is what the President decided to explain to the public in his Fireside Chat in March 1937.

In Roosevelt's view the invalidated laws not only offered much desired relief from the economic hardships of the Depression, but established new rules for relations between government and business. They clearly gave the government an upper hand in the regulation of commerce over the private rules of contract. The Court, consisting solely of justices nominated in the times when the hidden hand of the market was seen as a superior regulator of business operations, was viewed by the New Dealers as a force standing in the way of progress and development.

The president made no mistake about that. He communicated his displeasure with the conservatism of the Court on numerous occasions during the campaign. People seemed to share his indignation and analyses. When he easily won re-election in November 1936 he had every right to presume that his Court reform in the name of making way for necessary economic and social reforms was endorsed by the majority of the electorate.

7 B. Cushman, *The Court-packing Plan as Symptom, Casualty, and Cause of Gridlock*, „Notre Dame Law Review", vol. LXXXVIII, no. 5 (2013), pp. 2089–2090.

Congress was filled with FDR supporters who rode his coattails and were eager to show their gratitude and loyalty to their leader. The stage was set for a confrontation.

The President speaks — legitimizing the need for reform. The conflict defined (Fireside Chat on March 9, 1937)

President Roosevelt understood very well that in order to succeed he needed to legitimize his decision to pack the Court. He was quite sure that Democrats in Congress would side with him, as so many of them had been just re-elected thanks to his popularity. For the first time since Reconstruction one party in the House controlled 75% of the seats (334 to 88). This time it was the Democrats who polled 78% of the popular vote nationwide to the Republicans' 21%. The public seemed to have also been supportive. The president could infer this support from the election results which happened after he had already made public his displeasure with the Court and indicated a wish to reform it in some way. Only one month earlier, in his annual message, Roosevelt stood in the House and vowed to find means to adapt our legal forms and our judicial interpretation to modern realities[8]. It was the biggest line of the speech devoted to the Court, and surely no indication of what was going to happen several weeks later.

On March 5, to the surprise of most actors, he unleashed his plan of radical reform of the Court in a special message to Congress. The astonishment was overwhelming. As Shesol writes 'news of the plan burst like a bombshell in the Congress already shell-shocked by FDR's proposal to reorganize the executive branch. The Court plan was met with anguish and acclamation, dividing unprepared members into cliques of the faithful, the doubtful and the outspokenly opposed [...] For all their prior discussion of the Court issue, for all their efforts to devise a solution, no one — not even the most ardent supporters of Court reform — had been prepared for this. As he intended, Roosevelt had thrown them all off balance'[9]. If the president counted on his announcement to evoke signs of support among the people who just four month earlier rode his coattails to Congress, the anguish in Congress must have chilled him. It also mobilized him to use the public to overcome the apparent uneasiness of the legislators. He addressed the

8 J. Shesol, *Supreme Power: Franklin Delano Roosevelt vs. the Supreme Court*, New York 2011, p. 137.

9 J. Shesol, *Supreme Power...*, op. cit., pp. 298–299.

public through the radio Fireside Chat, a move tested with much success since the beginning of the New Deal.

To Americans congregating around radio receivers he said: 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 ploughed. 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.

...when, almost two years later, it [the New Deal reforms] 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... The American people ... 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...

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.

Then he proceeds to claim that this was a clear usurpation of power, a new tyranny. ...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 so the president charged 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—not over it. In our Courts we want a government of laws and not of men.

In one of the following paragraphs he lay out a simple mathematical solution to the above-mentioned ills: 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... justifying his move as a simple intention to provide for a constant flow of new and younger blood into the Judiciary... to maintain a vigorous judiciary and he offered the Justices a carrot in the form of full pension: ... we think it so much in the public interest that we encourage the retirement of elderly Judges by offering them a life pension at full salary.

The president was not afraid to reveal the true rationale for his proposal: ...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.

To diffuse the anger of his opponents FDR invoked previous Court reform proposals, which similarly offered manipulation of the number of justices: There is nothing novel or radical about this idea. It seeks to maintain the federal bench in full vigour. It has been discussed and approved by many persons of high authority ever since a similar proposal passed the House of Representatives in 1869.

What may have emboldened the president was the fact that a very similar scheme to adjust the size of the Court had been proposed to president Wilson in 1913 by none other than James McReynolds, then Wilson's Attorney General, now one of the conservative Four Horsemen on the Supreme Court bench[10]. Apparently FDR loved that irony and called it an answer to a prayer[11], which only demonstrates how the confrontation with the Court was turning into personal battles.

The Plan agitates conservatives and other political opponents of Roosevelt and the New Deal in Congress and in the White House

The sudden announcement of the CPP on March 5 and the president's somewhat awkward rationalization for it opened up the floodgates of heated debates. Key actors were now forced to either take a stand or hide. Among conservatives the court-packing proposal crystallized the anti-New Deal

10 J. Alsop, T. Catledge, *The 168 Days*, Garden City, N.Y. 1938, p. 33.
11 *Franklin D. Roosevelt: a Profile*, ed. W. Leuchtenburg, New York 1967, p. 394.

sentiment. In a way, it offered the spark which FDR opponents needed. For the representatives of rural interests from many states, the president's request symbolized a desire for unlimited power. Among the leaders of this group were two Texans: vice-president John Nance Garner, and representative Hatton W. Sumners. Each of them led the opposition to the CPP on different stages.

Garner was in a particularly difficult position since he was a part of the White House. The president was counting on his support in the Senate, but Garner left for his home state of Texas and refused to return to Washington. When the plan's most ardent supporter, Senate Judiciary Committee Chair Senator Joseph T. Robinson died unexpectedly in the midst of the legislative battle, FDR made Garner his delegate to the funeral. The Senate delegation travelled by train on a four-day trip and the president counted on Garner's persuasive skills to convince wavering senators to support the plan. Instead, Garner, himself an opponent of the scheme, quickly concluded from conversations with the senators that Robinson's death combined with the president's abrasive tactics meant that the plan was dead. When Garner told that to the president he fell into disrepute with Roosevelt, who blamed him for not schmoozing the senators enough[12]. In the 1940 re-election campaign Garner was dropped from the ticket. One might wonder whether sending Garner to Robinson's funeral instead of going himself was not a serious mistake which sealed the deal. The vice-president did not share the president's views as he saw in the plan the threat of splitting the Democratic Party and weakening the president's leadership. On both counts he was proven right.

In the House, Roosevelt faced opposition within Democratic ranks from the chair of the Judiciary Committee Hatton Sumners. A majority of Democrats, however, grateful for FDR's electoral boost, were favourably predisposed to the president and his initiative, so Sumners used stalling tactics and even induced the majority leader Sam Rayburn to convince the president to report the bill in the Senate first. In the House the CPP proposal remained frozen in the Judiciary Committee and the president's supporters did not even get the chance to demonstrate their power. Chairman Sumners

12 L. V. Patenaude, *Court-Packing Plan of 1937*, Handbook of Texas Online, The Texas State Historical Association, p. 122, 12.06.2010, https://tshaonline.org/handbook/online/articles/jzc01 (14.01.2018).

was certain that if the bill had left his committee it would have been approved on the floor[13].

In spite of the shock and resistance, the newspapers predicted its success. Few were betting against FDR. He was supposed to face some real opposition on the Democratic side as the „New York Times" forecast the next morning, but thought it beyond doubt that the bill would be passed. The „Baltimore Sun" concluded that the president had too much power for the opposition to overcome. The „Wall Street Journal" predicted that the plan would be easily adopted in the House and in the Senate the opposition was eight votes short of killing it[14]. That was before the debate flared and before the administration committed mistakes in promoting it in public discourse and in behind the scenes maneuvering.

In the Senate, Roosevelt faced formidable opposition from *both* parties. Leading the charge against the CPP was Burton Wheeler, a democrat from Montana. On his side was a progressive, George W. Norris from Nebraska. Both senators had so far been solid supporters of the New Deal and Roosevelt. Their opposition was based on one principal premise: while they shared the president's indignation at the Court's conservative majority and its enmity towards the key components of the New Deal, at the same time they could not accept the fact that FDR wanted to fiddle with the institution of the Court for political reasons. For them no established and reputable institutions of the system such as the Court deserved to be treated as a political prize or manipulated for even the noblest ideological reasons. They tried to convince the president that the CPP could set a dangerous precedent of the Court being treated instrumentally. If that happened, it would have seriously undermined the long-term stability of American democracy. The principle, or perhaps even the value, of judicial democracy was far more important than any program of socio-political reforms, no matter how urgently needed at a given moment of economic crisis.

Misinterpreting the electoral mandate

Roosevelt's miscalculation of the depth and nature of support is apparent from the reactions to the CPP is expressed in reactions to the March Fireside Chat. Lawrence and Cornelia Levine discuss them in *The Fireside*

13 L. V. Patenaude, *Court-packing Plan...*, op. cit., p. 123.
14 J. Shesol, *Supreme Power...*, op. cit., p. 300.

Conversations: America Responds to FDR During the Great Depression[15]. A large number of quotations state that while Roosevelt had won an enormous electoral victory in the 1936 election, the people voting for him had not expected him to try to alter the Constitution, and did not approve of his attempts to do so. One woman wrote that she along with 99% of the Iowans who voted for you did not give you a mandate to change the Constitution or the Supreme Court, and another man wrote: There is no clear outspoken command from the people to accomplish this thing [the CPP]. Even though the majority of FDR's supporters who would probably agree with his every policy is apathetic and in many cases revolted by this proposal. After reading the letters Levines express surprise at the frequency with which people, the majority of them FDR supporters, voiced such reservations[16]. They clearly stand on the side of values and institutions against political expediency which, we should make no mistake about it, would have benefitted them economically by enhancing their job security and guaranteeing desired government services. For these voters, the balance of powers was more important than a balanced checkbook.

The people saw the issue as a constitutional problem while for Roosevelt it was an ideological problem — the confrontation of his liberal policies with the conservatives on the Court[17]. Therefore, instead of going through Congress to change the Court rules or even possibly a constitutional amendment (the first would have been cumbersome, the latter not even feasible) FDR went for a simpler personnel solution and decided to change the ideological composition by nominating up to 6 new pro-New Deal liberal justices to create a new balance of power on the bench and protect New Deal philosophy for long years to come. People, and eventually his own partisans in Congress, saw the CPP as a more fundamental measure and decided against supporting it. Public opinion polls conducted during the election among the newspapers supporting Roosevelt indicated that most of the people opposed the CPP. The Gallup poll had the number slightly lower and showed that one in three FRD voters opposed the plan. Among republican voters that rate was only one in ten. Lawyers were also openly critical of

15 L. Levine, C. Levine, *The Fireside Conversations: America Responds to FDR During the Great Depression*, Berkeley 2010.

16 L. Levine, C. Levine, *The Fireside Conversations... op. cit.,* p. 184.

17 J. Shesol, *Supreme Power: Franklin Delano Roosevelt vs. The Supreme Court*, New York 2011, p. 12.

CPP. In an American Bar Association poll only one out of six respondents endorsed it[18].

Those who try to explain FDR's miscalculation point to an issue which seems to be greater than just this case. The president fell into a trap often committed by leaders dazed by the size of their electoral victory. The liberals defined the race as a referendum on the New Deal and his leadership, so he over-interpreted the size of his victory. He interpreted the landslide victory as endorsement of the New Deal policies and as legitimization of actions to remove all barriers on the way to the realization of that mandate[19]. FDR was right on all counts, yet he mistakenly defined the extent of that support. He assumed that his landslide victory signified total support for his measures, his philosophy, and for his person.

Whereas, as electoral behaviour scholars say, people may vote for a candidate for a multitude of reasons, often incompatible with one another[20]. Hardly ever does a vote mean endorsement of or acquiescence to all proposals no matter what. In the case of the CPP, Roosevelt failed to take into account that people's support for his plan put people at odds with such major political orientations as respect for institutions and principles of American democracy (the Constitution and the balance of powers) and political tradition (absence of reforms which require changes in these formal rules). The president also misinterpreted the depth of allegiance of his electorate. Gressley and Mahoney summed up his misconception of the mandate in the following way: the November re-election seemed to give him a 'blank check'. However, he was shocked when he attempted to cash it, only to find that his check had bounced.[21]

The plan ends with a rotten or a face-saving compromise

Several factors worked together to defeat the Senate Court reform bill in June. The president's overconfidence and his attempt to lead the fight his way was a major influence. He refused to listen to negative reports and kept

18 R. D. Friedman, *Chief Justice Hughes' Letter on Court-packing*, "Journal of Supreme Court History", vol. XXII, no. 1 (1997), p. 78.

19 G. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-packing Plan*, paper posted on-line, 2004, pp. 29–30. Paper prepared for the annual meeting of the American Political Science Association August 15, 1999.

20 W. Miller, M. Shanks, *The New American Voter,* Cambridge 1996.

21 G. M. Gressley, *Joseph C. O'Mahoney, FDR, and the Surpreme Court*, "Pacific Historical Review", vol. XL (1971), p. 186.

saying that he knew that the people were with him[22]. He did not recruit valued leaders in either chamber of Congress and centralized the operation in the White House, from where he would send emissaries to key actors on the Hill. Senator Wheeler's reservations were particularly damaging. The president's decision to promote the CPP himself from the White House personalized the conflict and drove his lukewarm or reluctant supporters to disagree with him. Those disagreements surfaced inside the Democratic Party, and the Republicans exploited them to their advantage. Their tactic, in the light of the Democrats' squabbling, was — silence. Senate republican leaders decided to allow the Democrats to do all the fighting. They also had to silence Republican Party leaders such as defeated presidential hopeful Alf Landon and former president Herbert Hoover, both of whom held personal grudges against FDR[23]. The Republican silence tactics deprived FDR and his supporters of exploiting partisanship as argument in the debate.

The president's rationalization of the CPP as an attempt to streamline the work of overworked Court rather than as an element of ideological battle with the conservatives and Republicans, made it more difficult to tap into emotions of his supporters both in Congress and in the media. The untimely death of senator Robinson, the bill's chief sponsor, deprived him of the efforts of a key player in Congress. Overall, the mismanaged tactics and poor legitimization for the CPP were far from efficient. They failed to carry over support from elections and produce any momentum behind the proposal[24].

FDR tried to convince his party to endorse the Court Plan by inviting them all to a retreat on Jefferson Island. He thought that his personal charm and a show of interest would be sufficient to assure the votes. A few days later on June 6 the debate began in the Senate. Overshadowed by the threat of filibuster by the bill's opponents it never reached its full force, as on June 14 the Senate majority leader Joseph Robinson died of heart attack. He was intended to be the first new appointee and some senators supported the bill out of personal relationships with Robinson. After his death they instantly changed their minds[25].

22 J. Alsop, T. Catledge, *The 168 Days*, op. cit., p. 74.
23 J. M. Burns, *Roosevelt: The Lion and The Fox,* New York 1956, pp. 297–298.
24 R. D. Friedman, *Chief Justice Hughes' Letter...*, op. cit., p. 83.
25 B. Solomon, *FDR vs. the Constitution*, New York 2009, p. 241.

The solution appears

For all the drama of public discourse and congressional debates and the less dramatic but equally significant behind-the-scenes discussions and deal-making, the problem with the Court was solved remarkably smoothly. At first, the Court decided to go public with its defence and Chief Justice Hughes wrote an open letter to the Senate deconstructing the plan. The letter dismantled the president's overworked by the volume of work argument piece by piece, first of all showing data that the Court's output was not in any way lesser in comparison to other younger courts. This argument was further endorsed by Brandeis and VanDevanter in a letter to Wheeler. Their letter put the blame for the Court difficulties with the New Deal measures on poorly drafted laws in Congress as well as poor presentation of arguments by the members of Administration in Court[26].

In addition, the court suddenly began upholding several parts of the New Deal, including a minimum wage (5:4 vote, even though a year earlier a similar bill was invalidated) and the National Labour Relations Act (again by a 5:4 margin), and a Social Security Act (5:4 again)[27]. The change came silently and unexpectedly. On another challenge to a state minimum wage law (West Coast Hotel v. Parrish) one of the previous opponents of such regulations, Justice Owen Roberts reversed himself. The Court's opinion was announced on March 29. And then in May Justice Willis Van Devanter, a conservative, retired from the court, giving Roosevelt the chance to appoint his own Justice.

Nonetheless, in spite of the Court's apparent willingness to reverse its rejection of the New Deal philosophy and the new opening for what was expected to be another liberal pro-New Deal Justice, president Roosevelt did not drop his plan. As his advisors were saying, FDR wanted new rules for the Court to avoid being dependent on one vote on the bench. His political supporters, including those already on the bench like Justice Brandeis, called that impatient decision a serious mistake. Several months earlier when he heard about the plan, Justice Brandeis (a New Deal supporter) said gravely to the president's emissary Tom Corcoran: tell your president ... he has made a great mistake. All he had to do was wait a little while. I'm sorry for him[28].

26 B. Solomon, *FDR vs. the Constitution*, op. cit., pp. 152–153; R. D. Friedman, *Chief Justice...*, op. cit., p. 81.

27 Burns, *Packing the Court*, New York 2009, pp. 150–151.

28 J. Shesol, *Supreme Power...*, op. cit., p. 297.

The institutional conflict was not Roosevelt's to win. Brandeis knew that Roosevelt's impatience was bringing him dangerously close to a humiliating defeat.

The decision to continue with the plan was only swelling the ranks of his opponents willing to stand on the side of the Court to defend it as an institution against unnecessary encroachments from another branch of government. Brandeis himself represented the constitutional faction among Roosevelt's interlocutors. It included liberals like himself and senator Norris of Nebraska, VP Garner and many other politicians and experts who looked at the problem from the institutional position and protected the Court's independence in spite of their pro-New Deal political views[29]. For them, the plan, especially sticking to it after the situation had changed and the signals from the Court became favorable, revealed presidential stubbornness[30].

The evaluation of the outcome — mechanisms restraining damage in a consolidated democracy

Many factors combined to defeat the court bill. FDR's poor planning and overconfidence, his zeal and personalization of the conflict, his inability to say stop, the overworked court subterfuge under which the plan was presented, the silence of the Republicans, the fracturing of the Democrats and, most importantly, the switch in the Court's opinion. In the end, the consequences of the conflict over the Court produced very mixed results. Some claim, as John Kirkpatrick does, that both sides could claim victory in this battle ... FDR had his liberal court and was able to appoint Hugo Black, the senator from Alabama to replace Justice Van Devanter. Congress and the Court could claim victory because they were able to resist the demands of an immensely popular president and defeat him[31]. Others could say that moderation triumphed when a compromise reform bill which reformed the federal judiciary but not the Supreme Court was adopted. It was a face-saving measure to which FDR reluctantly agreed, as did his opponents in Congress who ultimately saw no benefit in humiliating the president by voting against any reform. For them democracy was more important than a temporary victory over the White House.

29 R. D. Friedman, *Chief Justice...*, op. cit., p. 78.

30 *Franklin D. Roosevelt a Profile...*, op. cit., p. 397.

31 J. Kirkpatrick, *FDR's Court-packing Scheme: A Test of Democracy*, Southern Illinois University Carbondale, Honors Thesis, 1990. Thesis paper 225 available at http://opensiuc.lib.siu.edu/uhp_theses (16.10.2019).

The president's opponents, both ideological and institutional, could walk off the battlefield with a trophy of his weakened leadership. In fact, no new major reform was ever even attempted by FDR until the end of his tenure. Future presidents received a clear message: challenging customary behaviour, rules and prerogatives of established institutions was not to be attempted even with the alleged support of the public. That support in cases of major institutional reforms could not be carried over from ideological and policy fields. The American public showed itself to be pragmatic when it comes to policies, yet idealistic with regard to the institutions. The American elites also learned that electoral mandates, even such decisive ones as in 1936, had their limitations. So ultimately, one could say that Roosevelt's victory was Pyrrhic: he won the battle with the Court but had to yield to the rules, institutions and customs of democracy because his victory did not let him have other ones in the future. The vicissitudes of the Court-packing Plan are often cited as one of the greatest lessons of democratic politics and ultimate proof of the resilience of democratic rules and institutions.

From a more theoretical point of view one can see in the Court-packing Plan many typical elements of a situation defined as attempt to bring major change to a political system. Among the factors creating the need for such change we see: (1) the ideological shift in the American society — a move away from laissez-faire philosophy to a more progressive approach to politics (prompted by the Great Depression); (2) the president's will to enact sweeping reforms in order to facilitate the policies he deemed necessary (3) partisanship boosted by the 1936 decisive victory of the Democratic party which encouraged thinking about new policy proposals accompanied by the fear that the Court and the conservatives (the Court, Republicans, corporate interest groups, media) would muster resistance to them. (4) the mythicization of the electoral mandate as a requirement to conduct unyielding policy requested by public opinion at the polls.

At the same time, we notice the operation of the forces of restraint: (a) conservatives in all spheres of politics, economy and society who feel mobilized by the electoral loss to defend the last of their strongholds — the Court; (b) a political culture which encouraged seeking compromise and stood in the way of maximizing gains produced by what was believed to be a temporary shift in public opinion; (c) a political tradition which offered very few precedents and memories of radical reforms which were adopted on (one) partisan basis. Tradition in American democracy, just as in the political culture, did not create expectations of maximization of the political mandate

even as a result of a decisive electoral victory; (d) factionalism within political parties, which prevented the interpretation of electoral victory and the resulting majority in Congress as a mandate to pursue one-dimensional policies. Roosevelt found opponents to his plan inside his own party; (e) the stability of political institutions and the rules of the game which have never been treated instrumentally to advance a partisan platform.

The clash between these two dynamics revealed several typical elements of politics which, most of the time, accompany attempts to bring about major reforms: (1) real and imagined loyalties come to the fore as actors are forced to take a stand in the spotlight; (2) the real scope of power/influence of actors; (3) the personality/character of major players; (4) the strength of institutions and written and unwritten rules of the political game; (5) the political style of major players; (6) the structure of (potential) interest distribution and coalitions; (6) the degree of commitment to the *status quo* or change by major actors; (7) the motivations of key players; (8) the capacity of the system to deal with major disruptions through available channels of communication and power distribution; (9) the capacity of the system to incorporate, co-opt, and manage innovation.

In short, the Court-packing Controversy became a major *test* of the stability and effectiveness of the system and orientations of major actors. In this case, in spite of the radicalism of some positions and intensity of emotions happening in the context of the Great Depression which was yet another challenge to social and political stability, it became clear that American democracy would not respond to incentives for revolutionary change. In spite of several populists who registered very high support in the general public such as Governor and Senator Huey Long in Louisiana or Fr. Charles Coughlin in Detroit, there were no calls for radical change in the design and mode of operation of the American system of government. Populists, just as reformers from Washington, recognized the capacity of the system to generate solutions to the problems from *within* its current structures.

The outcome of the Court-packing conflict brought exactly such form of change — a change within the system: the Court got a new Justice and soon thanks to the retirement of two other conservatives it moved in the direction of New Deal wishers; the philosophy of the Court and the philosophy of the streets outside blended to produce a liberal consensus which held almost intact until the 1970s (World War II mitigated the partisan and ideological rivalry); the balance between the branches of government was re-established (Congress asserted its powers, the presidency was weakened,

the public opinion elevated, and the Court walked away from centre stage; progressive reforms were slowed down, and after the Farm Act of 1938 and minimum wage was set at 40 c/hour, politics in Washington returned to its normalcy; with the empowerment of the black minority in the South, white voters there began their slow departure in the direction of Republicans.

America experienced all these things in 1929-1941, and the confrontation around the Supreme Court of 1936-1937 was a pivotal moment of that period. The Court-packing controversy was much more than a conflict over the reform of the federal judiciary — it was a multidimensional political conflict: ideological, partisan, social, and personal. At stake was the independence of the judiciary and separation of powers between branches of government and the fate of the New Deal policies. It would be hard to find a better summation of its meaning than the words of one of its key actors, Senator Burton Wheeler, who said: the emotional battle over the Court ended with the best of the possible outcomes. It left the world's oldest and most adaptable democratic republic with a sure-footed but less tyrannical president, a more sceptical Congress, and a vigorous and independent judiciary that took the American people's needs into account. The modern era of government and justice, had begun.

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Abstract

Bohdan Szklarski

Dimensions of Conflict in the Court-packing Controversy in America 1936–1937

Key Words:
Supreme Court, president, FDR, New Deal, ideology, reform, electoral mandate, leadership, failure

1936 brought a lot more than the re-election of president Franklin Delano Roosevelt. It was also a year which brought a broad and radical challenge to the New Deal reform policies. American democracy demonstrated its complexity and unfinishedness. The conflict between FDR and the Supreme Court has many dimensions: institutional — conflict between the government (the president, Congress and the Administration) and the US Supreme Court over the range of powers of each actor; political — regarding the accountability of political elites; socio-economic — regarding the direction of development of American democracy; philosophical — over the meaning of liberty; legal — regarding the separation of powers between the levels of government; personal — between persons and personalities representing divergent visions of power; and historical — reviving the constitutional debates from the early republic. For some, the clash between FDR and the USSC touched the very essence of the representative democracy. After a year, the level of tensions subsided and all parties were scarred, yet the political system as such demonstrated its resilience. Its outcome to these days serves as a pretext for deliberations about the relations between leaders and followers. Events in America may be useful for all countries where the autonomy of the judicial branch of government becomes a political issue.

Abstrakt

Bohdan Szklarski

Rywalizacja o władzę między prezydentem Franklinem Delano Rooseveltem a Sądem Najwyższym w USA

Rok 1936 przyniósł w USA znacznie więcej niż reelekcję prezydenta Franklina Delano Roosevelta. W przestrzeni publicznej zaistniał w skali dotąd niespotykanej ostry konflikt o program reform zwany Nowym Ładem. Amerykańska demokracja zaprezentowała swoją złożoność i niedookreśloność. Konflikt ten miał wiele aspektów: instytucjonalny - spór między rządem (prezydentem, Kongresem i Administracją) a Sądem Najwyższym odnośnie zakresu kompetencji instytucji władzy; polityczny — dotyczący odpowiedzialności elit politycznych przed społeczeństwem; społeczno -ekonomiczny — odnośnie kierunku rozwoju amerykańskiej demokracji; filozoficzny — spór dotyczący rozumienia pojęcia wolności; prawny — dotyczący formalnych relacji między poziomami władzy; personalny między osobowościami i osobistościami reprezentującymi odmienne widzenie władzy; historyczny — przypominający początki republiki i spory o konstytucję. Dla niektórych, spór prezydenta Franklina Delano Roosevelta z Sądem Najwyższym dotyka samej istoty demokracji przedstawicielskiej. Po roku, konflikt został w zasadzie zażegnany, wszystkie jego strony wyszły z niego „poturbowane", system polityczny pokazał swoją zdolność do regeneracji. Wnioski z niego płynące, są po dziś dzień przyczynkiem do ważnych dla amerykańskiej demokracji i ciekawych dla jej badaczy dociekań na temat przywództwa politycznego i jego relacji ze społeczeństwem. Analiza doświadczeń amerykańskich może swoim znaczeniem jest przydatna wszędzie tam gdzie przedmiotem politycznego sporu staje się niezależność władzy sądowniczej.

Słowa kluczowe: Sąd Najwyższy, prezydent, FDR, Nowy Ład, ideologia, reforma, mandat wyborczy, przywództwo, porażka