**FDR AND THE SUPREME COURT PACKING FIGHT**

*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*. Article III Section 1 Constitution of the US

**LANDSLIDE VICTORY IN 1936: Problems with the Supreme Court**

* FDR has landslide victory over GOP Alf Landon the 1936 General Election.
* Landslide victories are usually a bad thing in US History, leading to problems. Arrogance which the Greek Tragedies called HUBRIS.

1964 LBJ landslide over AUH2O > Vietnam

1972 Nixon landslide over McGovern > Watergate

* Supreme Court rulings had declared 9 major New Deal programs as unconstitutional (out of 16 cases) – National Recovery Act NRA, National Industrial Recovery Act NIRA, Agricultural Adjustment Act AAA among others,
* 6 of 9 judges are over 70 years old, the “four horsemen of the Apocalypse” have viewed as their mission to stop the slide into Socialism by New Deal:

**Pierce Butler** (1866-1939) descendant of Dec of Ind signer, nominated by Harding, on court 14 yr

**James Clark McReynolds** (1862-1946) former Attorney General under Wilson, on court 20 yr

**Willis Van Devanter** (1859-1941) nominated by Taft on court 26 yr.

**George Sutherland** 1862-1942) nominated by Harding, on court for 15 yr

* Problem isn’t Democrat vs Republican, it’s how the Constitution is interpretated (Similar to Biblical Hermeneutics but secular) **THREE TYPES OF INTERPRETATION**:

**ORIGINALISM** analyzing the original intent of the Constitutional founders, conservative.

**TEXTUALISM** analyzingliteral word for word not reading anything into it, conservative.

**INSTRUMENTALISM** analyzing saying it is living document changing with times, liberal.

* The other 5 judges are: Harlon Stone (65), Chief Justice Charles Evans Hughes (75), Owen Roberts (62), Benjamin Cardozo (67) and Louis Brandeis (81) – Brandeis, Stone and Cardozo were the “Three Musketeers” supporting the New Deal against the “Four Horsemen”.

**THE COURT PACKING PLAN**

* FDR did not fill one justice in his first term 1932-1936
* FDR sees 4 possible “Solutions” to the Supreme Court problem:

1/ **PACKING** –Adding justices who would agree with his programs

2/ **AMENDMENT** – Amend the Constitution to add more justices, time consuming and uncertain

3**/ LEGISLATION –** Pass laws making it legal to override the Supreme Court – Constitutional?

4/ **IMPEACHMENT** – Impeach and remove justices for not using “good behavior.”

* Impeachment only tried twice, 1805 Samuel Chase was a Federalist and TJ tried to remove him from court, House voted 73-32 to impeach him, in Senate TJ had 25 Democratic Republicans, he only needed 23 to find Chase guilty and remove, no count got more than 18 votes and acquitted In 1970 Richard Nixon tried to remove William O. Douglas because supposed conflict of interest but really for being a Liberal Democrat, never got out of Judiciary Committee so not impeached (Ironically Douglas nominated by FDR will be longest serving judge, 36 years)
* FDR is delighted when Attorney General Homer Cummings discovers the “Wilson McReynolds” plan to pack the court during Wilson’s troubles with the court – In 1913 James McReynolds was Wilson’s Attorney General (Ironically, he is now one of the Four Horsemen FDR wants to remove) the packing plan said judges should retire at 70, if they didn’t retire, Wilson could pack court with judges for everyone who refused to retire.
* FDR sends the Judicial Reorganization Bill of 1937 to add 6 new justices to the Supreme Court.
* The Constitution does not state how many justices are on the Supreme Court, here is brief History of its member makeup.

**1788 6** Congress decides on 6 judges to make up the initial Supreme Court.

**1801 5** John Adams doesn’t want incoming TJ to fill open seat so reduces SCOTUS to 5

**1802 6** Thomas Jefferson reverses John Adams action of previous year

**1807 7** Thomas Jefferson increases Scotus to 7 in remove Federalist influence.

**1837 9** Andrew Jacksonincreased to 9 to reduce power of Chief Justice John Marshall

**1863 10** Lincoln increases to 10 to stop Scotus from ruling against his war powers.

**1866 7** Congressdecreased to 7 to stop Andrew Johnson from adding Southerners to Scotus.

**1869 9** Increased to 9 for Scotus to have same number as Judicial Districts Nine.

* FDR sends Tom Corcoran to assure Louis Brandeis, who has supported the New Deal in his decisions but is also the oldest justice, that this action is not directed at him – Brandeis doesn’t agree. Brandeis is 81 and sharp as a tack.

**THE SUPREME COURT PACKING BATTLE**

* First defection is VP John Nance Garner, known as “Cactus Jack”, he is from Texas and like most Southern Democrats is against the bill – Garner is most famous for saying about the VP job that it isn’t “*worth a bucket of warm piss*” – Garner calls FDR “*the most destructive man in all American History*” – not surprisingly when Garner runs in primary and loses for the Presidency against FDR in 1940, he is replaced on the ticket by Henry Wallace
* Rep Hatton Summers, Democrat from Dallas Texas, chairman of the House Judiciary Committee opposed the packing “*Boys,* *here is where I cash in my chips.*”
* Day by day opposition mounted, political cartoons from all over the country tells the mood of the people against this packing.
* Walter Lippman, writer and political commentator, said, “*FDR is drunk with power.*”
* Meanwhile Congress passed the Retirement Act on March 1, 1937 providing generous retirement packages for judges – specifically this is to encourage judges to retire and avoid the packing battle
* FDR appealed to the public in a radio program to gain popular support, accusing the court of acting unconstitutionally in its actions against the New Deal not him in wanting packing.
* The court then gave opinions on Washington State Minimum Wage law supporting the law, which was almost identical to a NY minimum wage law they had ruled unconstitutional earlier.
* The court ruled on the Wagner Act which was an important labor law that FDR wanted and ruled in his favor.
* FDR asked VP Garner could the Judiciary Reform Bill pass – Garner said *“Do you want it with the bark on or off Cap’n?* FDR*: “The Rough Way” –* Garner*: “You are beat! You haven’t got the votes.”*

**AFTER THE PACKING DEFEAT**

* In 1937 Justice Van Devanter 78 years old retires – FDR nominates Hugo Black for his seat.
* In 1938 Justice Cardozo’s unexpected death at 68, vacancy which FDR fills with Felix Frankfurter
* Retirements of others led to Justices Stanley Reed, William O. Douglas and Frank Murphy being named to the Supreme Court, all supporters of the New Deal and FDR – after not having any seats filled in his first term 1932-1936, FDR fills 5 in his second term 1936-1940.
* In his more than 12 years as President, FDR will fill 8 out of 9 of the Supreme Court seats.

*“Packing the Supreme Court was primarily a political issue, not a moral issue, as its opponents charged. The Constitution is vague on the function of the court”* Historian Page Smith

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