

Warner Gardner and the Court-Packing Plan

The New Deal was President Franklin Delano Roosevelt's response to the Great Depression. Beginning in 1933, he advanced an unprecedented series of legislative programs designed to promote relief, recovery, and reform. However, the legislation ran headlong into the concept of "liberty of contract," exemplified by *Lochner v. New York*, 198 U.S. 45 (1905), and a case coming out of the D.C. Circuit invalidating minimum wage legislation, ultimately affirmed by the Supreme Court in *Adkins v. Children's Hospital*, 261 U.S. 525(1923). In these and other cases, a divided Supreme Court invoked the liberty of contract precedents to strike down key aspects of Roosevelt's program.

The oral history of Warner Gardner sheds crucial light on what was happening behind the scenes in Roosevelt's clash with the courts in these cases and provides a stark example of his political maneuvering.

A young lawyer, Gardner had worked in the Solicitor General's office for a year and a quarter when he was assigned to Attorney General Homer Cummings in 1936. The President's re-election was imminent, and both the President and the Attorney General wanted to do anything short of a constitutional amendment "to rescue the New Deal Program from the apparently intransigent majority on the Supreme Court." Cummings tasked Gardner with researching possible solutions, and Gardner devoted three months to the court plan.

Gardner concluded that the only avenue for change was through an increase in the number of justices, and this could only be effected through Congress. While Congress could not overrule Supreme Court decisions, it did have the power to change the number of justices. To this end, Gardner decided the solution would be to add a justice for each current member over the age of seventy. As an 87-year old, he recalled, "I was 27 at the time and it seemed to me obvious that senility set in no later than the 70th year [...] I don't subscribe to that view quite as heartily as I did then." An inflation of the size of the Court was not his intent; it was generally assumed that the newly appointed justices would encourage retirement for anyone over 70, resulting in a different nine justices on the Court.

The main concerns of New Dealers were four justices, all over the age of seventy—Butler, McReynolds, Sutherland, and Van Devanter. They consistently opposed Roosevelt's interventionist policies. Ironically, Justice McReynolds had served as Attorney General under Woodrow Wilson and had "suggested the same device for the district court judges." Gardner completed the paper outlining the plan and then drafted a bill per Cummings' request that both men were satisfied with. Gardner recalls a meeting between himself, Cummings, Tommy Corcoran, and Ben Cohen. Corcoran and Cohen were presidential assistants who "contributed a great deal to the innovative thought of the whole New Deal program." Their thoughts on the court-packing plan remained a subject of dispute between Gardner and Cohen's assistant at the time, Joe Rauh. "Joe was very close to [Cohen and Corcoran] and said that they were horrified and thoroughly

opposed.” Gardner saw no indication of these sentiments during their conference with Cummings.

Gardner does recall Cummings’ narrative changing after the completion of the draft. His justification shifted, and he urged that the justices over seventy were no longer capable enough to complete their own work and needed help. Gardner still agreed with Cummings’ ultimate objectives and was sent to the President as a representative of the Justice Department to answer questions that Roosevelt had about the plan and explain it in detail.

The Attorney General submitted the bill to Congress in February of 1937. Although Cummings introduced it as a bill to relieve old men, Bob Jackson, head of the Antitrust Division, “urged enactment strictly on the ground that the justices had abused their power.” The public, however, viewed the proposal as an “attack on the revered tradition” of lifetime tenure, and, as such, “not at all welcome.” Gardner attributes part of the outcry to opponents of the New Deal, Republicans and other members of various political and economic circles.

Despite regrets about the justification for the proposal, Gardner still believed that the legislation was necessary at the time. Its purpose was to remediate the presence of a Court that had struck down most attempts to cure the country of an economic depression and provide jobs to the one-third of workforce that was unemployed. He credits the proposal, though unsuccessful, with the change in the attitude of the Court—notably, in Justice Owen Roberts, whose reversal of course was characterized as a “switch in time that saved nine.” Perceived as a skillful, politically motivated shift, Roberts swayed the Court to uphold minimum wage legislation in Washington State two months after the introduction of the court packing plan, thus reversing *Adkins v. Children’s Hospital* in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). Though the legitimate political motivations of Roberts’ decision were disputed, the perceived outcome was the preservation of the integrity of the Court system. The Supreme Court’s abandonment of “liberty of contract,” prompted in all likelihood by the specter of the court-packing plan, cleared the underbrush and placed the New Deal on solid legal footing, thus helping America out of the Great Depression.

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