REVIEWS

A Phoenix too Frequent: Court Packing Revisited

Back to Back: The Duel Between FDR and the Supreme Court. LEONARD BAKER. Macmillan Company, New York, 1967. Pp. 311. $6.95.

Philip B. Kurland†

Knowing that religion does not furnish grosser bigots than law, I expect little from old judges.

Thomas Jefferson

PAST PROLOGUE

The Congress of the reconstruction era, like many an earlier and later Congress, found its ends only too frequently frustrated by decisions of the Supreme Court of the United States. In an attempt to subordinate the high court to popular will, various devices were brought forth to curb the power of the Court. None of them—the problem of the *McCardle* case[1] to one side—proved successful. But they remain of interest, if for no other reason than because of history's tendency to repeat itself.

One of the stalwarts of the attack on the Supreme Court in the Civil War reconstruction period was John A. Bingham of Ohio, a leader of the Radicals in the House of Representatives. Bingham has, especially since the recent reconstruction of reconstruction history, emerged as one of the minor heroes of the battle to secure post-Civil War civil rights. His role as Court baiter, however, has remained relatively obscure. He is celebrated more for his part in the impeachment of President Johnson and for his interpretation of the Fourteenth Amendment.[2] That it should turn out to be the Supreme Court rather than Congress that has ultimately vindicated Bingham's views is one of the minor ironies of history.[3]

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† Professor of Law, The University of Chicago.

1 *Ex parte* McCardle, 6 Wall. 318 (1867), 7 Wall. 506 (1868).

2 *See, e.g.*, Van Alstyne, *The Fourteenth Amendment, The "Right" To Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

3 On the problem of the ironies of history, it might not be amiss, at this period of our national difficulties, to refer once again to R. NIEBUHR, THE IRONY OF AMERICAN HISTORY (1952), although it has nothing to do with the subject of this review.

In 1867, Bingham proposed "sweeping away at once the Court's appellate jurisdiction in all cases."[4] And, if this failed, he was ready to turn to more drastic action:

> If, however, the Court usurps power to decide political questions and defy a free people's will, it will only remain for a people, thus insulted and defied, to demonstrate that the servant is not above his lord, by procuring a further Constitutional Amendment and ratifying the same, which will defy judicial usurpation, by annihilating the usurpers, in the abolition of the tribunal itself.[5]

Thus spoke the "liberals" of that day.

Since nothing came of these proposals, the attack was renewed in 1868, when the House Judiciary Committee reported a bill—apparently a duplicate of one that had been offered in the previous Congress—that would require a two-thirds majority before the Court could declare an Act of Congress unconstitutional. Again Bingham was in the forefront of the movement to curb the Court. His statements were appropriately characterized by Charles Warren as "a savage onslaught."[6] The bill passed the House by a substantial majority, but foundered in the Senate.

Bingham's third major effort along these lines, in the next Congress, has received almost no attention. But it is of peculiar interest because, in its essentials, it foreshadowed the Roosevelt Court-packing plan, although no connection between the two is anywhere suggested. In the first session of the forty-first Congress, Bingham proposed an amendment to the Senate Judiciary Bill. The amendment read in part as follows:

> [I]f any judge of any of the courts of the United States whose age now exceeds seventy years, or who shall hereafter arrive at the age of seventy years, shall for one year after the passage of this act, or after arriving at the age of seventy years, continue to hold his office without [applying for retirement], it shall in either of such cases be the duty of the President to nominate and appoint, by and with the advice and consent of the Senate, an additional judge for the said court, who shall have the same power and perform the same duties and receive the same compensation as the judge then acting in such court, . . . and shall, in connection with or in the absence of his senior associate, hold the courts prescribed by law for said

4 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 449 (rev. ed. 1937).
5 *Id.*
6 *Id.* at 467.

> senior . . . judge; and upon the decease of said senior . . . judge, or upon his ceasing for any cause to hold said office, the said additional judge appointed under the provisions of this act shall be and become the judge of such court. . . .[7]

The debate on the floor of the House centered on the question of constitutionality. This in turn rested on an interpretation of the bill's proposals. If it really did no more than provide relief for superannuated or debilitated judges who voluntarily surrendered their posts, as the proponents argued, there seemed no concern about the amendment's validity. On the other hand, all seemed to agree that the Justices of the Supreme Court—for discussion quickly recognized the target of the proposed amendment—could not be compelled to retire. The case for unconstitutionality was, as a result, dependent on the compulsory nature of the dispossession of office. Representative Kerr made the argument in opposition:

> The man who is thus superseded by the appointment of another judge is practically retired from office, and he, if not we, will so understand it. He and the country will understand when his successor is thus appointed by the President and confirmed by the Senate that he himself is notified that his services are no longer needed on the bench; that he is superannuated, and no longer fit to discharge the duties nor to be trusted with the responsibilities of the office. It will be so understood by him and the country and it ought to be so understood by them, for that is what it means. It is an attempt, by indirection, not to increase the number of judges, so as to augment their working capacity to do the business of the court, but it is personal in its application to certain members of the court, and it is a mode devised to get rid of them, to retire or supersede them. Those are the judges over the prescribed age of seventy years. . . .
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> It seems to me that this provision will introduce into our judicial system and into the control of Congress over it a most dangerous principle of interference, one that will go to the very fundamental idea upon which that court was organized, upon which its great service as a coordinate department of Government must always rest. It will go directly, most logically and most dangerously to disturb the independence of that department of the Government, and to place it, as well as all others, under the power of the legislative department, and I submit that it was that very fear, an apprehension of that very danger, a prescience of what is this day done,

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7 CONG. GLOBE, 41st Cong., 1st Sess. 337 (1869).

> that led the framers of our Constitution to incorporate the provision organizing that court precisely as it is. In this opinion I am not unsustained by the history of this provision in our Constitution.[8]

Kerr thereupon turned to Story to point out that the Constitutional Convention specifically rejected an authorization for Congress to remove judicial officers "for inability to discharge the duties of office." And he, at least, had no doubt that the bill was proposing to do exactly what the Constitution forbade.

Again the bill, with the amendment, passed the House of Representatives, but failed to pass the scrutiny of the Senate. What did pass was a bill authorizing voluntary retirement on pension, which could, like the rejected amendment, be considered a devious means of accomplishing the same result as removal from office, but this time by way of bribe rather than coercion.

Needless to say, perhaps, the Court was shortly thereafter reconstituted. For time is always on the side of those who would change the Court's membership.

Three Score and Nine Years Later

What Leonard Baker has provided in his book *Back to Back* (the relevance of the title eludes me) is a well-told tale of how the New Deal reconstruction period recapitulated the history of the Civil War reconstruction period in this regard. Baker's story is a dramatic one. Indeed, if Hollywood does not use it, it should certainly supply television—educational television?—with an excellent script. Its plot, characters, suspense, conflict, heroics, pathos, triumph, and tragedy all make for better literature than anything concocted by Andrew Tully, Gore Vidal, or William Woolfolk. If it weren't for the absence of a heroine and a want of "candid" description of sexual activities that are the necessary ingredients of modern novels—and therein may lie the relevance of the title—*Back to Back* would be an obvious candidate for the best seller lists.

The origins of the Roosevelt Court-packing plan have been described best by Professor William Leuchtenburg,[9] whose scholarly study of the subject of Baker's book will still be eagerly awaited. History repeated itself without recognizing that it was doing so. Once again all the various devices for limiting the power of the Court were

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8 *Id.* at 341-42.

9 Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 Sup. Ct. Rev. 347.

considered and found wanting: constitutional amendment, legislative withdrawal of jurisdiction, requirement of more than a majority to invalidate a statute, and, penultimately, appointment of one additional Justice for each member of the Court over the age of seventy. The ultimate solution was to be found in Congressman Hatton Sumner's bill authorizing retirement at full pay.

That the Court-packing plan—the appointment of one additional Justice for each member of the Court over the age of seventy—was made after rejection of all the other possibilities is documented by a letter from Roosevelt to Felix Frankfurter:

> As a matter of fact, the decision was arrived at by a process of elimination. The amendment process, as you will remember, was fought bitterly by the conservative element through the past four years—the only concession being a few words from Landon which meant absolutely nothing. It is interesting to note that these same people this week are demanding the amendment method in place of any other.
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> The reason for the elimination of the amendment process was to me entirely sufficient: to get two-thirds of both Houses this session to agree on the language of an amendment which would cover all the social and economic legislation, but at the same time would not go too far, would have been most difficult. In fact, the chance of a two-thirds vote in this session was about fifty-fifty.
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> Supposing such an amendment had passed at the close of this session, every state legislature would have adjourned for the year. In 1938, only about one-third of the legislatures meet and because of the Congressional elections in 1938 the issue would, in all probability, be delayed in enough states to make ratification in 1938 impossible.
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> That brings us to 1939. The chances are that quite aside from this issue an unwieldy Democratic majority in both Houses will be slightly reduced as a result of the 1938 elections. Any such reduction would be used as an argument against ratification thus, in all probability, leaving the amendment unratified up to and through the 1940 national election.
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> If I were in private practice and without a conscience, I would gladly undertake for a drawing account of fifteen or twenty million dollars (easy enough to raise) to guarantee that an amendment would not be ratified prior to the 1940 elections. In other words, I think I could withhold ratification in thirteen states and I think you will agree with my judgment on this.

> It is my honest belief that the Nation cannot wait until 1941 or 1942 to obtain effective social and economic national legislation to bring it abreast of the times, avoid serious labor troubles, maintain farm prices, raise the purchasing power of the "one-third of the population that is ill-housed, ill-clad and ill-nourished."
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> . . . .
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> After this elimination, I searched through all the other proposals for legislative action and almost at once came face to face with the problem not of the Supreme Court but of the whole Federal Judiciary. From this it was a logical step to build up a program covering the whole judiciary impartially. You will realize that in this process, I eliminated the suggestions of compulsory retirement, seven-to-two decisions, etc. as being, in all probability, unconstitutional per se.[10]

There was an added fillip. For the plan purported to derive from a suggestion made by McReynolds when he was Attorney General of the United States:

> When James McReynolds as Attorney General in 1914 suggested that the federal judiciary be enlarged on a temporary basis by the appointment of a co-justice for every justice over seventy, he was on ground made somewhat firm by a historical practice of juggling with the size of the Supreme Court. This apparently is what made the device so intriguing when Cummings came across it in late December, 1936, and sold it to FDR as the device with which the Court could be humbled.[11]

Baker was not quite accurate on this score. The McReynolds plan was intended to apply only to lower court judges. But the joy of seeing McReynolds hoist on his own petard was too good an opportunity to be missed.

Like all good stories, Baker's tale is complex. There are three major conflicts that underlie the plot. And each overlaps the other. One is the contest between the President and the Court. The second is the struggle between the President and Congressional leaders for domination of the Democratic party and the government. The third rivalry is between the liberals and the conservatives, both within and without the Democratic party. It is this complexity that makes it difficult to discover who, if anyone, was the winner of the Court-packing controversy.

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10 ROOSEVELT & FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 381-82 (Freedman ed. 1968).

11 P. 134. *See also* Leuchtenburg, *supra* note 9.

Who were the heroes? That, too, is hard to say. Certainly consideration must be given to Burton K. Wheeler, the Montana Democrat who led the fight against Roosevelt at the risk of losing his seat. (He did later lose his seat but not because of the court problem.) Wheeler had earlier proposed a constitutional amendment to provide for Congressional veto of Supreme Court decisions. For what was he fighting then? Not to preserve the power of the Court. To extend the authority of Congress:

> If the Court were to be attacked and attacked successfully, it would lose power; that must be the purpose of the attack. Who should gain the power the Supreme Court lost? The answer to this question revealed why so many members of Congress who were angry with the Court were not angry enough to side with Roosevelt. Under the Roosevelt plan, the power lost by the Court would be picked up by the Presidency. . . . In contrast, Congress wanted the power lost by the Court to rest with Congress.[12]

Wheeler won the skirmish in the Senate, but he lost his influence with the White House and became one of the isolationist leaders of Roosevelt's later terms. Was the Court fight a contributor to the decline and fall of what was once regarded as a great liberal leader?

Something must be said for Senate majority leader Joe Robinson, who sacrificed his life in battling for the President's cause, in which he did not believe. But again the action was not completely unselfish. He knew that he was to succeed to a vacancy on the bench, especially if it were created as a result of the bill. His death signalled the end of the battle in the Senate. It was doubtful that the bill could have been successfully carried under his leadership. With the further rift created by the contest between Barkley and Harrison for succession to the leadership post, passage of the bill became impossible.

Perhaps then there were no heroes in this battle, except for the always heroic figure of Franklin D. Roosevelt. But there were a few clearly defined villains, of whom Mr. Justice McReynolds is clearly the most obvious. In any event he was certainly an easy choice for the role. It would be hard to find a more despicable character to have occupied the bench in the history of the Court. And the fact that he was appointed, along with Brandeis, by Woodrow Wilson—one of the most idealistic of all American presidents—gives adequate warning that "Court packing" is a dangerous game at best.

Even so, Baker's case against McReynolds is somewhat dubious. Baker, who accuses the "Four Horsemen" of being separated from the

12 P. 139.

"real world" is a bit naive himself about the ways of the Court. He quotes from McReynolds' dissent in *Nebbia v. New York*: " Plainly, I think, this Court must have regard to the wisdom of the enactment. At least, we must inquire concerning its purpose and decide whether the means proposed have reasonable relation to something within the legislative power—whether the end is legitimate, and the means appropriate."[13] Of this, Baker says: "In all the duel between the Supreme Court and Franklin Roosevelt there was perhaps no more arrogant statement than these words of James McReynolds. Not the Court but the people through their elected representatives determine the wisdom of legislation."[14] And yet, if any two sentences could be taken from a Supreme Court opinion to define the behavior of the Warren Court and many of its predecessors, none would come closer to the truth than these uttered by McReynolds.

One thing is clear, however. In totaling up winners and losers, there can be no doubt that McReynolds goes into the losing column. But there are other clear-cut "bad guys." Herbert Hoover was one of them, as he sought to return to the White House by leading the successful Republican defense of the Court. His motives and objectives were those of personal gain, undiluted by principle. Wiser heads than his in the Republican party understood that if they were to make a party issue of the question Roosevelt's victory would be assured. And Baker most adequately describes their use of silence as a political tactic. On the other side of the political fence, it is Jim Farley who gets the booby prize, for in addition to his failure adequately to measure the President's strength in the Senate was a repeated demonstration of arrogance that cost some of the support he might otherwise have garnered.

Most of the people involved don't wear either white or black hats. Lyndon B. Johnson plays a strange role. Running to fill a House vacancy, right in the middle of the Court controversy, Johnson campaigned as a New Deal supporter, in the face of the opposition to F.D.R.'s program by the powerful figures in the Texas Congressional delegation: Vice-President Garner, Senators Tom Connolly and Morris Sheppard, and Representatives Sam Rayburn and Hatton Sumners. Johnson won his seat and his spurs. *"The New York Times* carried a front-page story the next day about the victory of 'youthful Lyndon B. Johnson, who shouted his advocacy of President Roosevelt's court reorganization all over the Texas Tenth District.' "[15] Baker makes

13 291 U.S. 502, 556 (1934).
14 Pp. 125-26.
15 P. 188.

more of this election than it probably deserves, at least in terms of its relevance to the story he has to tell. He argues that Roosevelt looked upon this as clear evidence of the support of the American public for his program. There was more substantial evidence of the absence of a groundswell for packing the Court. But more fateful than the effect on Court packing, was the leg-up that Johnson thereafter received from Roosevelt toward a political career that neither could have expected to lead to the White House.

Brandeis, too, took an unusual part in the drama. Committed to a vow of silence that he believed appropriate for a Supreme Court Justice, he broke it to join Hughes in a letter, prepared without the consultation of six of the brethren, for use by Wheeler in his testimony against the plan. Brandeis is credited by Baker with a loyalty to the institution that overcame his dislike for his colleagues' abuse of it. Some might think that a plan that invoked age as a test of disability could not help but antagonize the oldest member of the Court. For many, as for Frankfurter: "That Brandeis should have been persuaded to allow the Chief to use his name is a source of sadness to me that I need hardly dwell on to you."[16]

The apostasy that hurt most, however, was Herbert Lehman's letter to Senator Wagner expressing his opposition to the Court-packing plan. Here is part of the exchange between Roosevelt and Frankfurter on the subject:

> Dear Frank:
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> Last night I tried to reach you by phone, and, on the whole, I am glad that I did not succeed. For I'm afraid I would have used language hardly decorous over the wire. I was—and am—hot all over regarding Herbert Lehman's letter. Some things aren't done—they violate the decencies of human relations and offend the good taste and the decorum of friendship. And so I was—and am—"hot"—but less with anger than with sadness. . . .
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> Dear Felix:
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> If you had got me on the telephone your language would have been just like Bernie Baruch's when he heard of the Lehman episode. Like you, I have no anger but only sadness. If I were British I would say only one thing—"it isn't cricket" . . . .[17]

The Lehman letter itself was by no means crucial to the outcome. It made it quite clear, however, that the battle was not simply one

16 ROOSEVELT & FRANKFURTER, *supra* note 10, at 392.

17 *Id.* at 403-04.

between liberals and conservatives. Lehman's statement of opposition undoubtedly derived from a desire to protect the Court as an institution. But it helped instead to bring about a victory of Congress over the President, who had in fact already won his battle with the Court. Unlike many other opponents in this cause, Lehman apparently was forgiven by F.D.R.

Why did the plan fail? There are a multitude of reasons offered. First, was the point made early in his book by Baker:

> Actually FDR had begun his Court fight clumsily. Five years earlier, when he was first campaigning for the Presidency, [Senator Key Pittman] had written him: "Everyone now understands what you stand for. Be careful not to confuse the issue." FDR's political technique was in line with this advice. When he announced a policy, proposed legislation, took on a political fight, everyone knew what he was doing and why. With the Court fight, however, Roosevelt had lapsed. His emphasis in his message of February 5 on the inability of the older justices to carry their fair share of the work misrepresented the issue and confused the people. He had been too tricky.[18]

For this reason he had difficulty in getting popular support.

A second reason was that the conservatives in his party had become disenchanted with Roosevelt and saw an opportunity to beat the President with no sacrifice of their own power. Hatton Sumners, the chairman of the House Judiciary Committee, was prepared to sabotage the Senate bill if it ever passed the upper house. Ashurst, the chairman of the Senate Judiciary Committee, undermined the possibility of success by dragging out the hearings. Garner, sulking in his Texas tent a good part of the time, lifted no finger to help. And none of the organized Presidential constituencies, labor, agriculture, etc., was prepared to put pressure on their legislators to secure this goal.

Perhaps the most important reason for the failure of the plan was that its stated goal was accomplished without the need for legislation. Indeed, if one views the war as solely between the President and the Court, the President was clearly the victor. The Court had changed its tune and had begun to sustain New Deal legislation hardly distinguishable from that which it had theretofore struck down. Van Devanter had resigned, pursuant to Hatton Sumner's bill that gave full salary on retirement. Indeed, it is hard to see why Roosevelt pressed on with his plan after the capitulation of the Court had taken place. The continuation of the contest suggests the validity of Baker's major

[18] P. 47.

theme, that the essential nature of the contest was between the executive and the legislature. And this is borne out by the nature of the report filed by the Senate Judiciary Committee only hours after the announcement of Van Devanter's resignation:

> The report began with the President's assertion that the purpose of his bill was to infuse new blood into the Court. The report rejected this, saying that the purpose was to persuade justices over seventy to resign. It continued, lashing out at FDR and his Administration for presenting "a needless, futile, and utterly dangerous abandonment of constitutional principle" when it sent the Court bill to Congress. The bill's "ultimate purpose," said the report, "would be to make this Government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the government choose to say it is—an interpretation to be changed with each change of administration." Rarely—perhaps never—had a committee of Congress, controlled by the same political party as the White House, spoken so sharply and so critically of the action of the man in the White House. Even then, the report was not done. Its closing line was without equal. "It is a measure," said the report of the Court bill, "which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[19]

Looking Backward

Three decades later, a different conclusion might be drawn than that which would seem so apparent to those keeping score in 1937. It would have appeared then that Roosevelt had chastened the Court and been subdued by Congress. It looks now that what Congress did was to preserve the mystique of the Court as an untouchable institution, however political its actions and motives, not at the expense of the executive power but rather to the cost of legislative authority. Roosevelt went on to turn the government of the United States from what Wilson had called "legislative government" to what is now readily perceived as "presidential government." And the Court, freed from the threat of interference by legislature or executive, has returned to its old ways, abiding by McReynolds' description of its function, although on behalf of a different clientele than that which was served by the "Four Horsemen."

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19 Pp. 229-30.

Baker's book is indeed a fascinating story. It is well worth reading by those who appreciate that not all constitutional doctrine is made in the courts. And the doctrinaire may find bases for doubts about their doctrine. For the book affords further evidence that the law of life is neither logic nor experience.