Notes for Inns of Court Presentation on FDR Court Packing

In the Federalist No. 78, Hamilton called the tenure of judges during good behavior an "excellent barrier to the despotism of the prince" and "the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws." He said, "There is no liberty, if the power of judging be not separated from the legislative and executive powers."

But a little over a century later, Theodore Roosevelt said, "I may not know much about the law, but I do know you can put the fear of God into judges!"

Before we talk about the FDR court packing plan, we need to understand the historical context in which it came about and the reasons articulated for the plan.

FDR swept into office in 1933 and in the next two years, a flurry of legislation was passed. When the New Deal programs failed to bring about a robust recovery after two years, many conservatives became concerned that the emergency measures enacted during the crisis were becoming permanent. Three-fourths of district court, and two-thirds of appellate judges, had been appointed by Republican presidents. Conservative groups such as the National Committee to Uphold Constitutional Government girded up for a frontal assault on the New Deal in the courts. The constitutional battle tested the government's authority over three broad areas of the economy – industry, agriculture and labor.

The historians comment that the Justice Department was ill equipped to tackle the massive challenge of defending the New Deal legislation. Partly because nobody else wanted the job, including Felix Frankfurter, FDR appointed North Carolina lawyer J. Crawford Biggs as his Solicitor General. Biggs proceeded to lose 10 of his first 17 cases. The Supreme Court, after the 1933-34 term, quietly informed FDR that if the administration wanted to win any more cases, it should send someone else to argue them. Biggs resigned a year later.

Chief Justice Hughes commented about the Court's constitutional rulings: "The laws have been poorly drafted, the briefs have been badly drawn and the arguments have been poorly presented. We've had to be not only the Court but we've had do the work that should have been done by the Attorney General."

In two cases in 1934, the Supreme Court struck down provisions of the Economy Act, which reduced pensions for retired federal judges and repudiated veterans' insurance benefits. Because several justices were considering retirement but stayed on the Court, it has been speculated, including by the Chief Justice, that the entire court packing confrontation could have been avoided if a more liberal retirement package had been available.

In March 1935, 389 cases were pending in federal courts challenging the constitutionality of New Deal laws. By the end of that year, the Antitrust Division of the Justice Department alone had more than a thousand cases. In 1935, lower federal courts had issued more than 2,000 injunctions restraining various New Deal laws. Locally, Judge Alexander Akerman in *Hillsborough Packing v. Wallace,* declared the entire National Recovery Act unconstitutional in

response to a challenge by citrus packers on the act's marketing quotas. One by one, cases challenging major New Deal legislation made their way to the Supreme Court.

In early 1935, the Supreme Court struck down a provision of the National Industrial Recovery Act dealing with oil production quotas as an unlawful delegation of legislative authority to the President by allowing him to make laws without sufficient guiding standards.

During the financial crisis, when banks closed and people began hoarding gold, Congress passed laws prohibiting trade in gold without a license, ordering that all gold be returned to the Government and voiding provisions in public contracts or bonds that required payment in gold. Cases challenging the constitutionality of this action, colloquially called *The Gold Clause Cases*, made their way to the Court. After the case was argued in 1935, stock prices fluctuated wildly in anticipation of the Court's decision. When the laws were mainly upheld as a permissible Congressional regulation of the currency, the President and the markets breathed a sigh of relief.

But most New Deal laws were not so lucky. In striking down the Railroad Workers Retirement Act in May 1935, the Court took a very narrow view of Congress's commerce power. This called into question the constitutionality of the pending Social Security Act, which was similar in structure.

Then, on May 27, 1935, called "Black Monday", the Supreme Court, in three unanimous opinions, struck significant blows to the New Deal and Roosevelt.

In the first, *Humphrey's Executor v. U.S.*, the Court held that the President had wrongfully discharged a member of the Federal Trade Commission. Roosevelt took this as a personal affront, because he had discharged the member for disagreement with the administration.

In *Louisville Joint Stock Land Bank v. Radford*, the Court struck down the Frazier-Lemke Farm Mortgage Act of June 1934 which had permitted the federal government to buy farm mortgages in exchange for interest-bearing Treasury notes then permitted farmers to rent their land at low rates or reacquire property lost through foreclosure.

And in *Schechter Poultry*, the Court invalidated the entire National Industrial Recovery Act, including its wage and hour limits, limiting Congress's commerce power only to activities which directly affected interstate commerce.

In the robing room after the opinions were read, Justice Louis Brandies gave a message to two administration officials to give to the President: "This is the end of this business of centralization – go back and tell the President that we're not going to let this government centralize everything."

Schechter particularly was widely hailed. As a result, by executive order, all of the National Recovery Act's regulations were repealed.

Roosevelt was obstinate. He insisted that the country was with him, not the Court, and he told his advisors he would do what it took to bring the Court in line.

Schechter spawned a flurry of legislative activity. In the weeks afterward, Congress passed, among other things, the Social Security Act and the NLRA. Congress drafted all sort of proposals to deal with the Court, too, from requiring advisory opinions when acts of Congress were passed to requiring a unanimous vote to declare an act unconstitutional.

Then, in January 1936, the Court struck down the Agricultural Adjustment Act in *Butler v. United States*, as an unconstitutional delegation of legislative authority to the executive and exceeding Congress's spending power. The AAA had imposed a tax on food processors, the proceeds of which were used to pay subsidies to farmers to keep them from farming land, keeping prices high. The projected federal budget was set back by $1 billion as a result. The Cotton and Tobacco Acts, which had similar legal grounds, were quickly repealed by Congress.

In the aftermath of *Schechter*, Congress passed the Bituminous Coal Conservation Act of 1935, which extracted the coal codes from the wreckage of the National Recovery Act and revised some provisions to try to ward of constitutional objections raised by the Court. The miner's union threatened a national strike if the law was not passed. It included specific findings as to the state of the coal industry and its effect on interstate commerce. Many within the Justice Department still doubted its constitutionality in light of *Schechter*. FDR wrote a personal letter to Congress urging passage and to leave the issue of constitutionality to the courts.

After it narrowly passed in the waning days of the congressional term, a senator commented that "Like an autumn flower it will be blown away by the first winter blast of the Court."

The Carter Coal Company filed suit immediately. The suit was actually brought by company stockholders to enjoin the company's compliance with the act: the Government was not a named party. In those days there was no civil rule or statute requiring the Government to be involved in a suit challenging the constitutionality of a federal statute. It was a titanic legal battle by some of the nation's greatest legal minds. When the case got to the Court, six coal producing states filed amicus briefs in support of the act, stating the Act was the only way to deal with the modern coal industry. Many considered it the most well presented New Deal case to be argued to the Court.

By a 5-1-3 vote, the Court struck the Act down, holding the wage and hour provisions exceeded Congress' commerce authority and were a violation of due process. The opinion was more than 100 pages long.

In May 1936, in *Ashton v. Cameron County Water Improvement District*, the Court struck down a law that amended the Bankruptcy Act to permit municipalities to seek a readjustment of their debts. The Court held the law violated the Tenth Amendment rights of state sovereignty.

Then, in the *Tipaldo* case in late 1936, the Court applied its emerging doctrine to state laws, holding New York's minimum wage law, which had been drafted by Felix Frankfurter, an unconstitutional violation of the freedom of contract in the due process clause of the Fourteenth Amendment. The public asked: if neither the federal government nor the states had the power to enact such laws, who did?

Roosevelt remained convinced of two things: (a) the nation was with him and not the Court; and (b) the only way to deal with the pervasive economic problems caused by the Great Depression were the kind of wide-ranging bold initiatives embodied in the New Deal. Secretly, more than a

year earlier, Roosevelt assembled a small, close-knit team of Justice Department lawyers who launched an exhaustive research effort to find ways to limit the role of the Supreme Court in the New Deal. They considered Congressional action to limit the Court's jurisdiction, and a constitutional amendment authorizing the New Deal.

1936 was an election year. While Justice Department lawyers kept studying how to deal with the Supreme Court, Roosevelt said little on the campaign trail. He won in a landslide and Democrats gained seats in both houses of Congress.

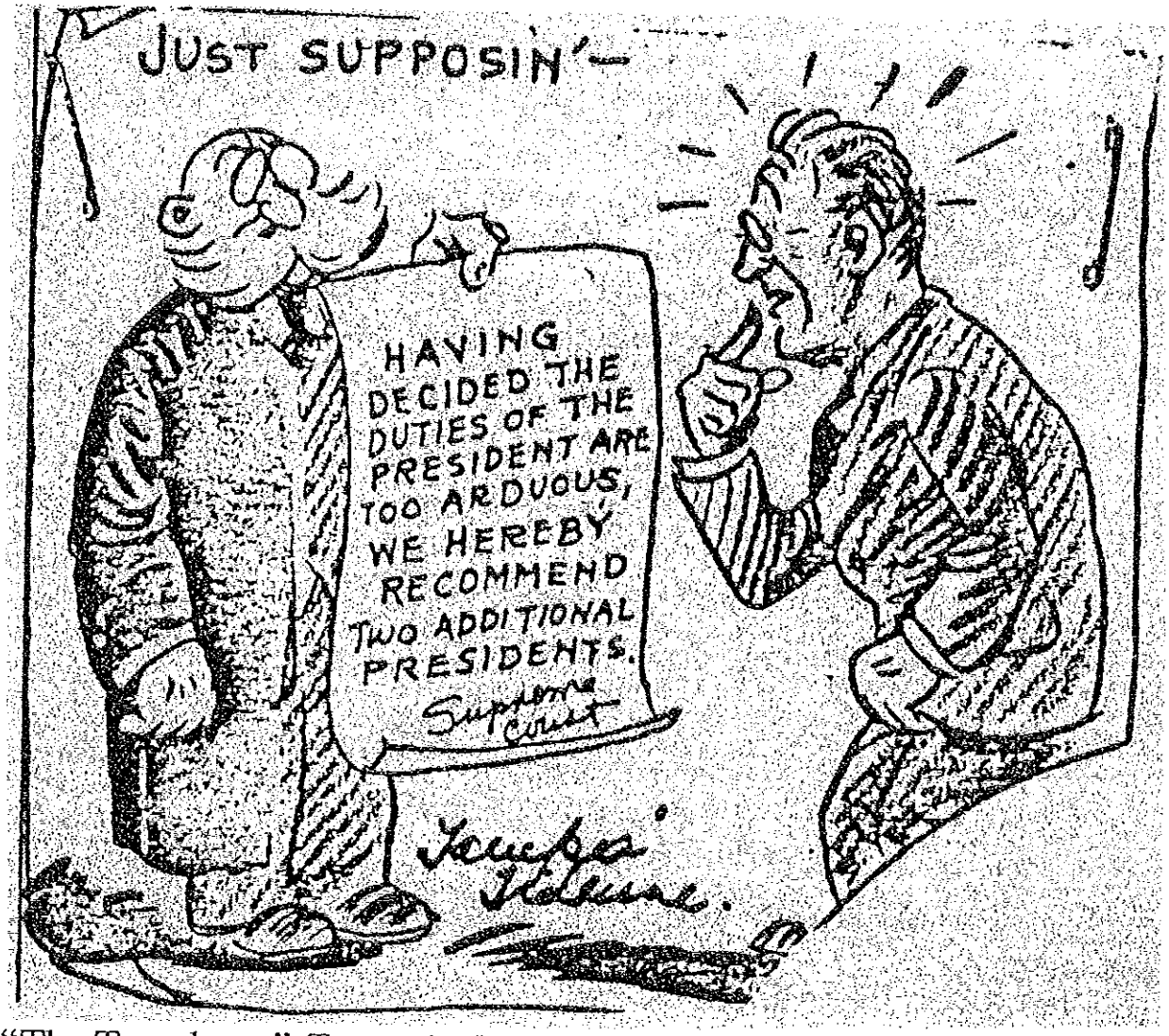
Not long after his inauguration speech in early 1937, Roosevelt sent the Judicial Procedures Reform Bill of 1937 to Congress.

Attorney General Cummings' testimony before Congress was grounded on four basic complaints of the administration:

- reckless use of injunctions to preempt operation of New Deal legislation
- aged and infirm judges who declined to retire
- crowded dockets at all levels of the federal court system
- the need for reform which would infuse new blood in the federal court system

Administration advisor, later Justice, Robert Jackson, testified criticizing the Court's misuse of judicial review and the ideological perspective of the majority.

We're going to watch now a clip from Roosevelt's Fireside Chat on March 9, 1937.



"The Turnabout." *Tampa Tribune,* c. February 15, 1937. Courtesy of the *Tampa Tribune* archives.

Precedent for the President

1789: CONGRESS DECIDED AT FIRST TO FIX THE NUMBER OF JUSTICES AT SIX.

1801: CONGRESS PLANNED ON A CHANGE TO FIVE, BUT THE SIX REMAINED VERY MUCH ALIVE.

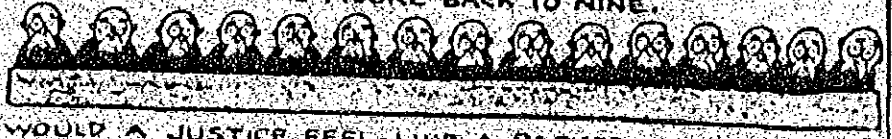
1807: SIX HIGH JUDGES, SUPREME AS HEAVEN— AND JEFFERSON ADDED NUMBER SEVEN.

1837: SEVEN HIGH JUDGES, ALL IN A LINE — TWO MORE ADDED, AND THAT MADE NINE.

1863: NINE HIGH JUDGES WERE SITTING WHEN LINCOLN MADE THEM AN EVEN TEN.

1866: TEN HIGH JUDGES, VERY SEDATE; WHEN CONGRESS GOT THROUGH THERE WERE ONLY EIGHT.

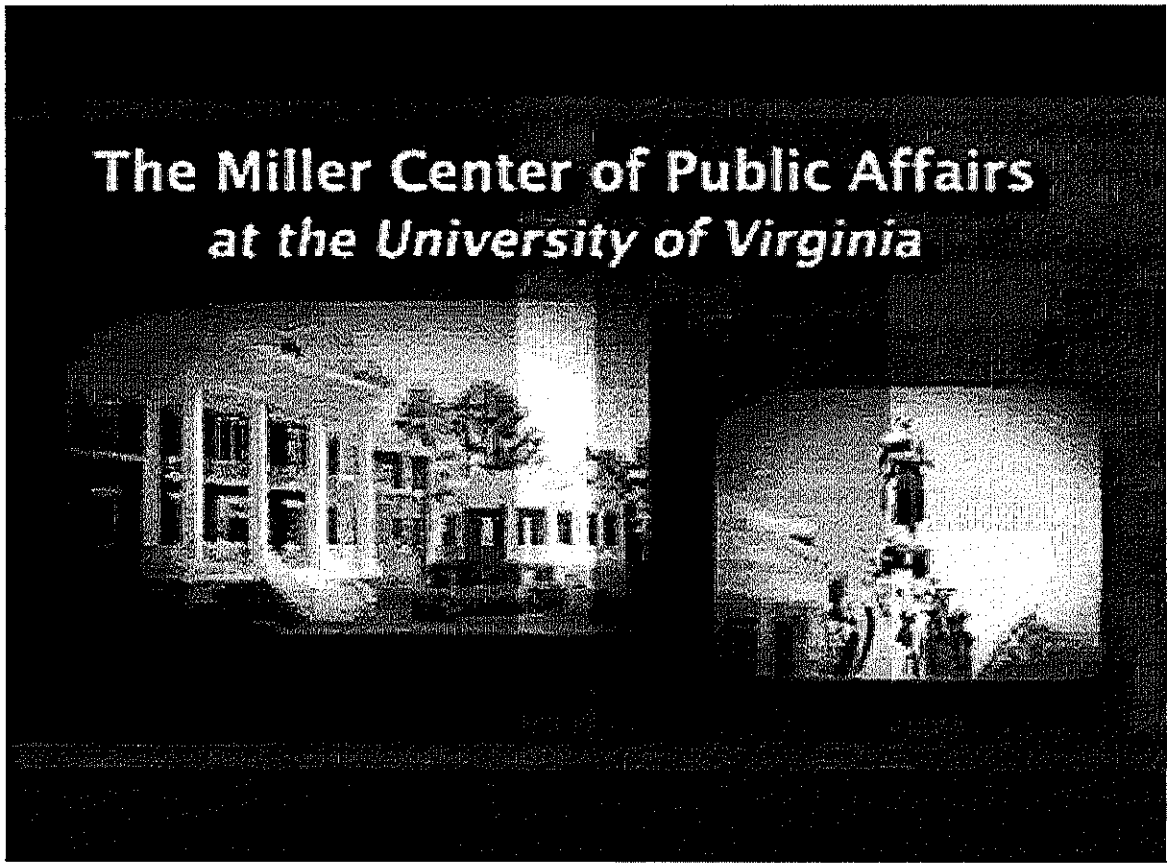
1869: EIGHT HIGH JUDGES WHO WOULDN'T RESIGN; GRANT BROUGHT THE FIGURE BACK TO NINE.

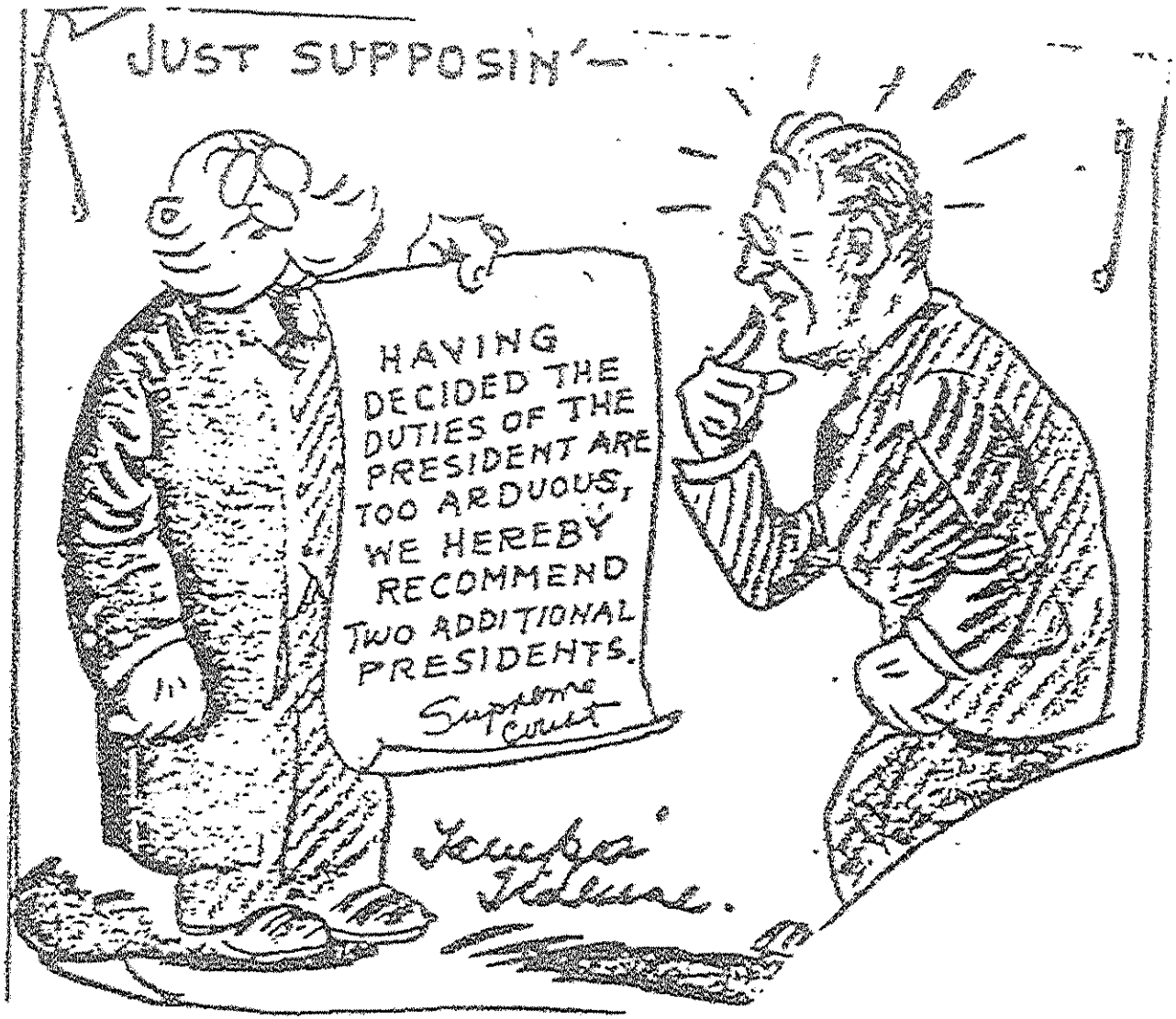


1937: WOULD A JUSTICE FEEL LIKE A PACKED SARDINE IF THE NUMBER WAS RAISED TO — SAY — FIFTEEN?

POWERPOINT PRESENTATION ON COURT-PACKING AND FLORIDA LEGISLATION

FDR Fireside Chat





"The Turnabout." *Tampa Tribune*, c. February 15, 1937. Courtesy of the *Tampa Tribune* archives.

Discussion Questions

1) Other than packing the Supreme Court, what were the other components of FDR's Judicial Procedures Reform Bill of 1937?

2) What were the reasons underlying why the Judicial Procedures Reform Bill of 1937 was introduced?

3) What would have been the impact if the Judicial Procedures Reform Bill of 1937 had been passed?

2011 FLORIDA LEGISLATURE

CS/HJR 7111-Judiciary

JOINT RESOLUTION by Judiciary Committee and Civil Justice Subcommittee and Eisnaugle (CO-SPONSORS) Aubuchon; Metz; Precourt; Williams, T.

Judiciary: Proposes revision of Article V of State Constitution, relating to judiciary, consisting of amendments to ss. 2, 11, & 12, Art. V, of State Constitution; revises provisions relating to repeal of court rules; limits readoption of repealed court rule; provides for Senate confirmation of Supreme Court justices; requires JQC to make all of its files available to House Speaker; provides for confidentiality of records provided to House of Representatives until impeachment is initiated; makes other conforming & modernizing changes.

RELATED BILLS

SJR 1664 – Senate Confirmation/Appointments to Supreme Court

JOINT RESOLUTION by Bogdanoff (CO-SPONSORS) Gaetz Senate

Confirmation/Appointments to Supreme Court: Proposes an amendment to the State Constitution to require Senate confirmation of appointments to the office of justice of the Supreme Court.

SJR 2084 –Repeal of Supreme Court Rule by General Law

JOINT RESOLUTION by Judiciary

Repeal of Supreme Court Rule by General Law: Proposes an amendment to the State Constitution to reduce the vote threshold required for the Legislature to enact a law repealing a rule of court and to prohibit the Supreme Court from readopting a rule repealed by the Legislature for a prescribed period.

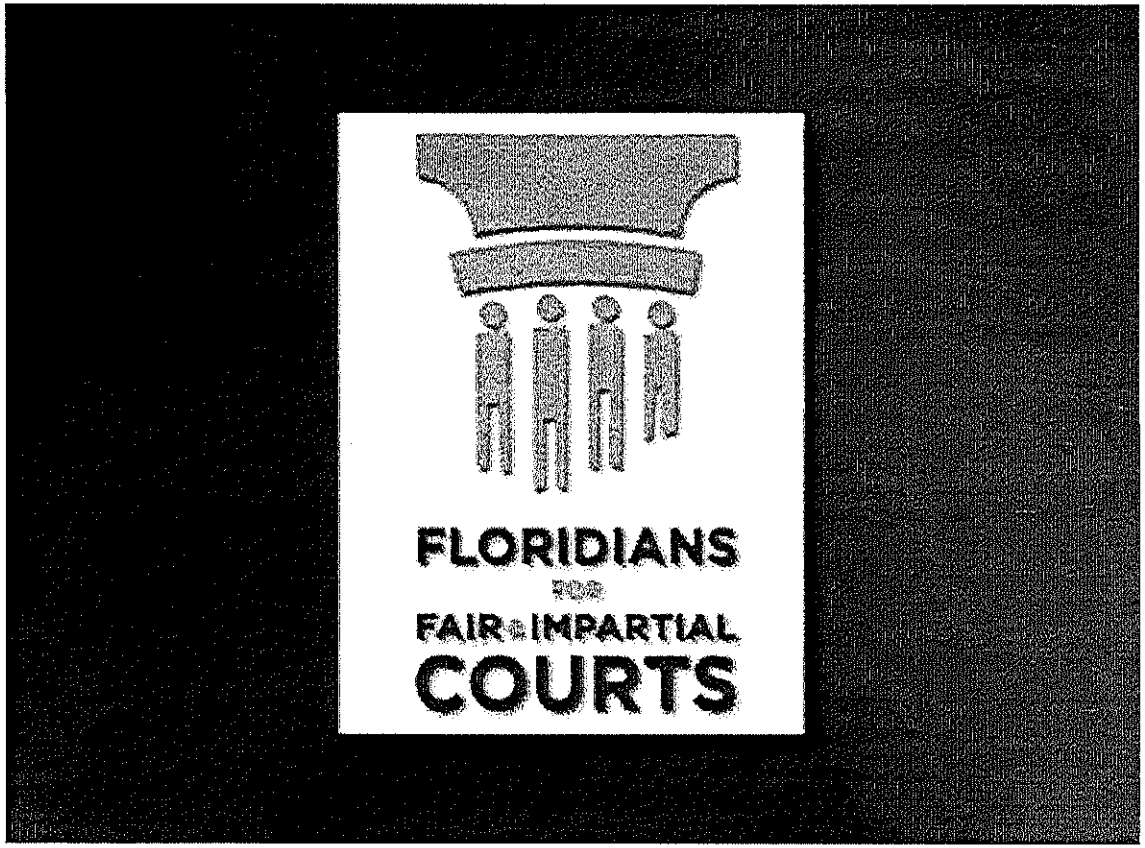
2011 FLORIDA LEGISLATURE

IF ADOPTED, THE CONSTITUTIONAL AMENDMENT WOULD HAVE DONE THE FOLLOWING:

- Established 1 Supreme Court with 2 divisions (civil and criminal)
- Supreme Court justices nominated by the Governor would have to be confirmed by Senate to take office. If the Senate does not reject the nominee within 90 days, the nominee is deemed confirmed
- Rulemaking authority would remain with Supreme Court, but Court rules of practice and procedure could be repealed by general law and Supreme Court may only readopt a rule if the rule is modified to conform to express legislative policy (simple majority) instead of the current 2/3 vote required by each house of the Legislature
- JQC findings would have been available to the House of Representatives, at the Speaker's request
- Provided stable funding for the Court

2011 FLORIDA LEGISLATURE

WHY WERE THE CHANGES NECESSARY?



2011 FLORIDA LEGISLATURE

Additional Reasons Given in Final Bill Analysis:

- Checks and Balances: Power to repeal a rule would act as a check and balance and prevent the court from readopting a rule repealed by the legislature. CS/HJR 7111 Final Bill Analysis

- Fairness: Since Legislature has power to remove justice or judge from office by impeachment and since JQC has disciplinary power,both House and JQC could request investigative files from one another. CS/HJR 7111 Final Bill Analysis

2011 FLORIDA LEGISLATURE

OTHER REASONS (As Reported in Press):

- Would quicken resolution of civil cases because criminal appeals get priority – CBS Miami.com, March 7, 2011
- Efficiency problems on the criminal side of the court – The Ledger, March 7, 2011
- Would ensure the courts administer justice fairly and swiftly – The Ledger March 7, 2011
- Legislature has responsibility to look at areas of how government could be run more efficiently – Orlando Sentinel, April 28, 2011
- Court system suffers from structural and financial problems – Orlando Sentinel, March 7, 2011

Panel Discussion

- Justice Peggy Quince
  - Justice Florida Supreme Court
- Gwynne Young
  - President Elect of The Florida Bar
- Howard Hunter
  - Partner Hill Ward Henderson
  - President Elect of FLABOTA

Additional Sources

1) Jeff Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court (2010).

2) Noah Feldman, Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices (2010).

3) Martin Dyckman, A Most Disorderly Court: Scandal and Reform in the Florida Judiciary (Florida History and Culture) (2007).

4) Martin McKenna, Franklin Roosevelt and the Great Constitutional War: The Court Packing Crisis of 1937 (2002).

5) Stephen B. Burbank, Symposium: Perspectives on Judicial Independence Accountability and Separation of Powers Issues: What Do We Mean By "Judicial Independence," 64 Ohio St. L.J. 323 (2003).

6) Justice Sandra Day O'Connor and Justice Shirley Abrahamson, A Conversation About Impartiality, 89 JUDICATURE 8-18, 8 (2006).

7) G. Gregg Webb and Keith E. Whittington, Judicial Independence, the Power of the Purse, and Inherent Judicial Powers, 88 JUDICATURE 11, 11-19 (2004).

8) HJR 711 Floor Debate- http://www.youtube.com/watch?v=2iTYtKg2L9c

9) CS/ HJR 7111 Supreme Court Opening Remarks (4/14/11)- http://www.youtube.com/watch?v=tO2PJcjzTc

10) FDR Fireside Chat- www.hpol.org/fdr/chat/

11)http://www.floridabar.org/TFB/TFBResources.nsf/0/338E7FA61834CC8185257857005F0BB8/$FILE/FL%20Newspaper%20Editorials%20re%20adequate%20court%20funding%20as%20of%20031811.pdf?OpenElement

12) http://en.wikipedia.org/wiki/Judicial_Procedures_Reform_Bill_of_1937

13) http://www.fairandimpartial.com/

PANEL QUESTIONS

"The Perils of Court Packing"
Panel Discussion Outline

1. What happened in the 2011 legislative session in the effort to restructure the Judiciary and what created this situation?

    a. Describe the challenges to judicial independence in 2011:
        i) Split Court proposal
        ii) Funding issues
        iii) Judicial Nominating Commission issues
        iv) Rulemaking
        v) Other issues

    b. Discuss the catalyst for legislative proposals – describe the impact of the 8/31/10 Supreme Court decisions in *Department of State v. Mangat, Roberts v. Brown* and *Roberts v. Doyle*, authorizing redistricting amendments and rejecting the health care and homestead ballot initiatives.

    c. Identify the players and describe their roles and perspective:
        i) The Legislature – Dean Cannon in the House, Mike Haridopolis in the Senate (describe the makeup of the Legislature and institutional knowledge)
        ii) Governor
        iii) Chief Justice and the Supreme Court
        iv) The Florida Bar (identify limitations imposed by *Schwarz* and *Keller* cases)
        v) Voluntary Bar Associations/ABOTA (identify differences in approach from TFB)
        vi) Other players such as law enforcement and chamber of commerce

    d. Describe the public policy statements of the players and the actual motivation. Why were there differences?

    e. Describe the results of the 2011 session: rejection of the split court and acceptance of the Senate approval of a Supreme Court nomination, and rulemaking modification. Veto of the $400,000.00 appropriation to study restructuring.

    f. Describe how restructuring was defeated and what lessons were learned from the 2011 session:
        i) Describe what impact the debate has had on the judiciary
        ii) Other political fallout and impact on legislators who did not support the legislative agenda of House and Senate leaders
        iii) Describe the risks of revisiting a "Most Disorderly Court"

2. The expected challenges to judicial independence in 2012:

    a. Identify the players in 2012
    b. Expected legislative initiatives in 2012
    c. Judicial Nominating Commission issues
    d. Funding
    e. Judicial retention issues and a possible move to 60% affirmative vote. How should the performance of a judge be evaluated?
    f. What can individual members of The Florida Bar do to help support judicial independence?