

Unpacking the Supreme Court: Judicial Retirement and the Road to the 1937 Court Battle

Judge Glock

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judgeglock@gmail.com

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Abstract: In the substantial literature on the so-called court-packing battle of 1937, the seemingly trivial issue of retirement law and retirement pay for judges has received little attention. This article will demonstrate, however, that an understanding of judicial retirement is essential for understanding the long conflict over judicial independence in the United States, most especially in the 1937 struggle. It will show that the lack of a constitutional provision for judicial retirement led to numerous proposals and reforms throughout American history, all of which seemed to impinge on judicial independence by encouraging older judges to retire, and all of which inspired and shaped President Franklin Roosevelt's own 1937 plan. It will also show how a cut in Supreme Court retirement pensions shaped the nature of the Court's opposition to the New Deal, and how a new pension law in 1937 led to retirements that helped end Roosevelt's battle against the Court. This article will explain how Americans have long struggled to balance the important issue of judicial independence with supposedly mundane concerns about judicial retirement, and why these struggles culminated in the greatest constitutional crisis of the 20th century.

When Justice Oliver Wendell Holmes resigned from the Supreme Court in January 1932, individuals from across the political spectrum lauded him as no other justice in American history. The Republican Majority Leader in the Senate, James Watson, claimed that “[e]very lover of justice” would “keenly regret” his leaving, while William Green, head of the American Federation of Labor, stated that “working men and women are filled with a deep sense of loss.”¹

Yet when time came to show the more mundane aspects of respect, the nation proved surprisingly stingy. Within a few months of Holmes’s resignation, a so-called Economy Act cut federal salaries across the board, and the act almost perversely targeted Holmes. One clause on resigned federal judges set a maximum pension of \$10,000, which would cut Holmes’s income in half, and any other Supreme Court justice who resigned would be similarly threatened.² This seemingly minor act had profound, one could even say world-historical, ramifications. President Herbert Hoover’s Attorney General, William Mitchell, himself a prospective appointee to the Court, recognized one of the potential consequences. He argued that because of the law, “men who are on the bench, instead of retiring at a suitable time when their activity is reduced or their health impaired, will hang on like grim death until the Angel Gabriel blows the horn.”³ His prediction proved prescient, and more significant than he could know. Another Supreme Court justice would not retire for over five years, the longest period without a resignation or death since the creation of the nine-member Supreme Court.⁴ During this period, an unprecedented constitutional battle between the executive, legislative, and judicial branches consumed the nation.

¹ “Walsh in Senate Eulogizes Holmes,” *New York Times*, January 13, 1932, p. 3.

² “Economy Law Will Cost Justice Holmes \$10,000 of Yearly Pay,” *Chicago Tribune*, August 14, 1932, p. 8; G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York, 1993), 469.

³ “Opposes Cut in Pay of Justice Holmes,” *New York Times*, January 22, 1933, p. 3; For prospective appointment, Glen Jeansonne, *The Life of Herbert Hoover: Fighting Quaker, 1928-1933* (New York, 2012), 193.

⁴ Henry J. Abrahams, *Justices and Presidents: A Political History of Appointments to the Supreme Court 2nd Edition* (New York, 1985), 386-7.

There is a clear connection between the cut in pensions, the lack of resignations, and the constitutional conflict. Not long after news of Holmes's cut emerged, the tidy and proper Justice Willis Van Devanter wrote his sister that though he had "rather definitely concluded to retire as soon as the election was over and regardless of the outcome," the cut in pensions changed his mind. Van Devanter admitted that the "reducing provision is in a statute which is relatively temporary, but I fancy that it is likely to be continued throughout the depression if not longer. I do not like the idea of losing half of my salary by retiring and therefore I am reconsidering my former purpose."⁵ Van Devanter would remain on the court for the next five years, becoming known as one of the "Four Horsemen," who, along with the occasional assistance of other justices, struck down many of the New Deal's most important enactments. These decisions attracted the wrath of President Franklin Roosevelt and led to the President's famous proposal to "pack" the Supreme Court with extra justices in 1937. Van Devanter and his close friend and fellow conservative George Sutherland would only retire after, in the middle of the court-backing battle, Congress passed another little-noticed law that restored and protected retired justices' full salaries.

When the journalists Joseph Alsop and Turner Catledge wrote an early book-length study of the 1937 battle, they could place it on the highest ideological level, with no mention of salaries or pensions. Alsop and Catledge argued that during the fight, "[s]uddenly the shabby comedy of national politics, with its all pervading motive, self-interest, its dreary dialogue of public oratory and its depressing scenery of patronage and projects, was elevated to a grand, even a tragic plane." Most subsequent writers have kept it there.⁶ That the simple self-interest of justices for \$20,000 pension could be one of the most important factors in the whole struggle has perhaps seemed too much to be believed.

⁵ Willis Van Devanter to Mrs. John W. Lacey, October 26, 1932, Box 16, Willis Van Devanter Papers (Library of Congress, Washington, D.C.). This letter has, to the best of my knowledge, never been cited.

⁶ Joseph Alsop and Turner Catledge, *The 168 Days* (Garden City, N.Y., 1938), 10.

Yet the struggle over the retirement of judges has been a crucial part of the struggle over judicial independence in America. This debate has often been overlooked by historians.⁷ This article will try to show that from the beginnings of the Republic, the issue of how to handle aged judges bedeviled jurists and politicians alike. Although the Constitution contained numerous provisions protecting judicial independence, the lack of a clear provision on retirement made judges' futures subject to political whims, and led to numerous retirement reforms throughout American history that aimed to influence the judiciary.

This article also shows that the court-packing battle of 1937 was the culmination of previous battles over judicial independence and retirement. Yet the importance of retirement law as both a proximate cause of and also an inspiration for Roosevelt's court-packing plan has received little attention in the massive literature on the topic.⁸ The article will show that previous retirement proposals, which were often seen as attempts to "unpack" the courts by inducing retirement, provided a direct inspiration and seemingly solid precedent for Roosevelt's own plan. The article shows that

⁷ There is almost no discussion of judicial retirement in the literature on judicial independence in America. Those works dealing with judicial retirement focus on the individual decisions of judges to retire. In so far as they discuss broader legal reforms to retirement they do not describe the debate in the 1780s about retirement, the difference between "retirement" and "resignation," described below, the debate over retirement in the lower courts in the 1910s, or many of the changes and debates in the 1930s described here. Tom S. Clark, *The Limits of Judicial Independence* (New York, 2011); Bruce Peabody, ed., *The Politics of Judicial Independence: Courts, Politics, and the Public* (Baltimore, 2011); Deborah J. Barrow and Gary Zuk, "An Institutional Analysis of Turnover in the Lower Federal Courts, 1900-1987," *Journal of Politics*, 52, no. 2 (May 1990); David N. Atkinson, *Leaving the Bench: Supreme Court Justices at the End* (Lawrence, KS, 1999); Artemus Ward, *Deciding to Leave: The Politics of Retirement From the United States Supreme Court* (Albany, 2003).

⁸ William Swindler, Marian McKenna, Burt Solomon, Barry Cushman, and others rely largely on Charles Evan Hughes's notes in arguing that the 1932 cut in pensions may have had an effect on judicial retirement, but these do not focus on the retirement issue after 1932, or describe how earlier retirement reforms shaped Roosevelt's own plan. The retirement issue is not mentioned at all in William Leuchtenburg's account, or in a recent forum on the crisis. William F. Swindler, *Court and Constitution in the Twentieth Century, The New Legality, 1932-1968* (Indianapolis, 1970), 5-6; Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York, 1998), 15; Marian McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937* (New York, 2002), 34-6, 335-6; Burt Solomon, *FDR v. the Constitution: The Court-Packing Fight and the Triumph of Democracy* (New York, 2009), 15, 195, 208; Barry Cushman, "Court-Packing and Compromise," *Constitutional Commentary* 29, no. 1 (2013): 26, 30; William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York, 1995); "AHR Forum: The Debate over the Constitutional Revolution of 1937," *American Historical Review* 110, no. 4 (Oct. 2005): 1046-115; Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. The Supreme Court* (New York, 2010), 342-5, 446.

technical issues in previous retirement statutes led to first the cut and then the restoration of Supreme Court pensions, causing and then effectively ending the battle over the Supreme Court through their influence on conservative judicial retirements. This history should help explain how Americans have long struggled to balance their fervent belief in an independent judiciary with the seemingly prosaic problem of how to retire judges and pay for them. It should also demonstrate how these retirement reforms continue to shape the nature of American courts in our own time.

Judicial Retirement in Early American History

From the nation's inception, the issue of how to permit both judicial autonomy and accountability provoked debate. Alexander Hamilton, for one, hoped that almost nothing would compromise the independence given to federal judges under the new Constitution. In his *Federalist Paper No. 79*, he summoned all his rhetorical powers to praise federal judge's lifetime tenure, and the fact that the constitution forbade Congress from reducing judges' salaries during their time on the bench. He thought the salary provision was especially important because "a power over man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter." The impeachment clause of the Constitution, which he said could only be used for extreme "malconduct" of judges, was the "only provision on the point which is consistent with the necessary independence of judicial character."

Yet even Hamilton could not avoid confronting three interrelated questions that would come to define all future debates on judicial independence and retirement: first, what to do about aged judges, second, what to do about disabled judges, and third, how to provide secure pensions for those who resigned from the bench. Hamilton argued that any attempt to compulsorily retire judges at certain

ages, such as the New York law that forcibly retired judges at age 60, removed too many qualified persons. He also noted that the “want of a provision for removing the judges on account of inability has been a subject of complaint,” but he claimed there was no objective way to determine disability or insanity and therefore no way to remove judges without involving politics. He finally argued that in a republic where “pensions [are] not expedient,” where pensions were in fact highly suspect because of their supposed corrupting tendencies in creating an officeholding class, it would be wrong to remove judges from a job “on which they depend for subsistence.” Hamilton thus argued that the Constitution appropriately provided no way to remove old or disabled judges and had no provisions for retirement. In Hamilton’s and the Constitution’s framing, most judges would remain at their posts until they passed away.⁹

The fact, however, that some judges lost what Hamilton called their “intellectual vigor” and remained on the bench only to collect a salary inspired complaint. The evident incapacity of two Supreme Court Justices in the late 1860s, Justices Robert Grier and Samuel Nelson, became an issue of public concern, and this concern was amplified by the aged justices’ opposition to radical Republican measures. Therefore, as part of a bill that expanded the Supreme Court from eight to nine justices in 1869, Reconstruction Republicans also included measures addressing the three major issues of judicial retirement.¹⁰ Their intention to reshape the courts both through new appointments and also through enticed retirements was manifest in the connection between the two provisions. The House Judiciary Committee, chaired by the noted 14th Amendment author John Bingham, first proposed that any federal judge, from either the district, circuit, or the Supreme courts, could retire at full and constitutionally

⁹ Alexander Hamilton, *Federalist Papers*, No. 79; For contemporary debates on pensions and judicial retirement which influenced and were influenced by Hamilton, see Max Farrand, *The Records of the Federal Convention of 1787* (New Haven, Yale University Press, 1911), Volume 1, June 23, 1787, 391; Volume 2, July 26, 1787, 117; *Antifederalist No. 9*; Joseph Story, *Commentaries on Constitution*, Volume 3 (Boston, 1833), 486-7.

¹⁰ Stanley Kutler, *Judicial Power and Reconstruction Politics* (Chicago, 1968), 49-61; Felix Frankfurter and James Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New Brunswick, NJ, 2009 [1928]), 74-5. These works do not investigate the retirement aspect of the law.

protected pay once he reached the age of 70 and had served on the bench for at least ten years. The committee also proposed that it be the “duty” of the President to appoint an additional judge for every eligible judge over 70 who refused to retire within a year, which they hoped would encourage the older judges to leave their seat. (This provision almost exactly modeled Franklin Roosevelt’s later plan, although historians have surprisingly not described the connection.) In case any judge at any age was deemed disabled by a member of the Supreme Court, the President could also forcibly place in him in retirement and appoint a new judge.¹¹

In the terminology of the time, “retire” meant that a judge would not officially leave his office but would take a semi-active status, serving on the bench only at his occasional discretion. Bingham explained that, by contrast, a complete resignation from the bench and a pension would make a judge “a mere pensioner upon the bounty of his countrymen, liable to be deprived of the pension by a mere repeal of the law.” The retirement provision, however, would keep judges’ salary protected for the remainder of his life under the salary clause of the Constitution, and allow him to continue his work at his leisure.¹²

Fears about an attack on judicial independence and the corrupting effects of pensions motivated opposition to plan, as they would throughout the following century. Representative Michael Kerr of Indiana said the appointment of another judge in place of any judge over age 70 was a subterfuge, not to “pack” the court, but to force old judges to retire. Kerr claimed that once a successor was appointed, the older judge “is practically retired, and he, if not we, will so understand it.” The judge would be

¹¹ *Congressional Globe*, 41 Cong., 1 sess., March 29, 1869, 336-7. The only mention I have found of the connection was in an early article by Leuchtenburg, which mention he did not consider important enough to include in his revised book version of the article. The article says that Department of Justice officers found “an 1869 bill that passed the House of Representatives,” but does not describe the bill or its connection to the final plan. Shesol only refers once to “an 1869 pension act” [emphasis added] to describe a joke of the President. William Leuchtenburg, “The Origins of Franklin D. Roosevelt’s ‘Court-Packing’ Plan,” *Supreme Court Review* (1966), 392; Shesol, *Supreme Power*, 295.

¹² *Congressional Globe*, 41 Cong., 1 sess., March 29, 1869, 336-7.

“notified that his services are no longer needed on the bench...It will be so understood by him and the country.” He also thought that the very idea of a government pension was “not in harmony with the principles of our Government,” since it tended to create a privileged class of officeholders.¹³ Despite such complaints, this seemingly radical reform bill easily passed the House of Representatives.¹⁴

When the bill reached the Senate, there were more prosaic concerns that prevented a full and protected retirement. Senator Lyman Trumbull, chairman of the Senate Judiciary Committee, worried that since “retired” judges could come back and serve on the bench at their whim: “we might have twenty judges of the Supreme Court” for some cases, and this would confuse what constituted a quorum or what was settled law. These operational quibbles caused Trumbull to remove the sections on extra judges for those over 70 or who were disabled, and substitute his own amendment, which would allow full pay on complete *resignation* for any judge after age 70, which meant the judge would have to abandon his office entirely and receive the straight pension Bingham excoriated. Trumbull said that “It has been suggested that there is no security in this that Congress may not afterward repeal the law,” but added that any such repeal “would be such a breach of faith on the part of the nation...that it is not to be conceived for a moment that any Congress would act in such a manner.” This version allowing a complete resignation from the bench and full pension was finally accepted by both chambers. The pension provision encouraged the two older justices to resign, as was intended.¹⁵ And although the exact text of Bingham’s plan was not enacted, its passage by the House showed his ideas to be very much in the mainstream of American constitutional thought at the time, and inspired subsequent efforts.

¹³ Ibid, 341.

¹⁴ Ibid, 342. The final vote was yea 90, nay 53. Ibid, 345.

¹⁵ *Congressional Globe*, 41 Cong., 1 sess., April 7, 1869, 574. Artemus Ward’s book, the only study to examine the retirement aspects of this bill, did not recognize the difference between “retirement” and “resignation” in the different proposals. It claimed that Bingham’s and Trumbull’s concerns about judges returning to the court after retirement were the result of “confusion.” Ward, *Deciding to Retire*, 75-8.

The Progressive Era of Retirement, for the Lower Courts

For years the new judicial resignation and pension procedures seemed to invite little criticism. Yet by the 1912 presidential election, in which judicial actions striking down progressive laws became a prominent subject of debate, reformers embraced the idea that the federal judiciary was superannuated, reactionary, and inefficient, and that drastic retirement reforms were necessary to reshape it.¹⁶ After Woodrow Wilson won the election, his first attorney general, James McReynolds, proposed a plan in this vein. In 1913 McReynolds suggested a new law that allowed the President to appoint another district or circuit court judge (not Supreme Court justices, who will be discussed below) for any pension-eligible judge over age 70 who refused to resign.

Many historians have already noted a connection between McReynolds's plan and Roosevelt's court-packing plan. Historian William Leuchtenburg argues that Roosevelt's Attorney General Homer Cummings's "discovery" of this suggestion may be "indeed the source of the final version of the proposal," but finds it "puzzling that Cummings did not mention" that discovery until later in his planning. Historian Jeff Shesol mentions McReynolds's proposal as an inspiration for Roosevelt only to note that McReynolds's "suggestion had gone nowhere."¹⁷ In fact, McReynolds's suggestion emerged

¹⁶ See William Howard Taft, *Popular Government: Its Essence, Its Permanence and Its Perils* (New Haven, 1913), 158-60; William G. Ross, "The Role of Judicial Issues in Presidential Campaigns," *Santa Clara Law Review* 42 (2002): 399-402. Congress could and did still pass individual pension provisions for the Supreme Court for those not meeting the earlier pension requirements, 10 years of judicial service and at least age 70. They had done this twice, once for Ward Hunt in 1882 and again for William Moody in 1910. Importantly, however, in tying these bills into a history of "coerced retirement" such as in 1937, they both required the justices to leave within a certain period to receive their full pension. Artemus Ward mentions that Hunt wanted to leave later, but does not mention the time limit on the bill. See, Ward, *Deciding to Leave*, 87, 106; "Two Will Retire From Supreme Court: Supreme Justices Moody and Harlan Soon to Make Request for Relief," *Chicago Daily Tribune*, June 16, 1910, p. 9; House Committee on the Judiciary *Retirement of Justice William H. Moody*, 61 Cong., 2 sess., H. Rep. 1621, June 17, 1910, *Congressional Record* 61 Cong., 2 sess., June 20, 1910, 8556.

¹⁷ Leuchtenburg, *Supreme Court Reborn*, 118-121; Shesol, *Supreme Power*, 210.

from earlier plans already discussed, as the Roosevelt administration realized, and a slightly modified version of McReynolds's plan was enacted by Congress.¹⁸

McReynolds's plan was not broached in some minor document that easily escaped Roosevelt's planners, but was the very first thing discussed in the 1913 *Annual Report* of the Department of Justice to Congress. In this report, McReynolds explained that while old or disabled judges could not be forcibly removed under the Constitution, new judges could be appointed who would "have precedence over the older one," which would seemingly bring fresh blood to the bench and encourage the older judge to resign.¹⁹ This plan was bruited publicly and without cavil in the *New York Times* not as a court-packing plan but as a "Plan to Shelve Aged Judges."²⁰ After President Wilson appointed McReynolds to the Supreme Court, where he would eventually become the most vociferous opponent of the New Deal, the new Attorney General, Thomas Gregory, continued advocating for the plan in the next five consecutive *Annual Reports*. Gregory used almost identical language as McReynolds, and usually placed the plan in second or third place of the most important recommendations from the Department of Justice for congressional legislation.²¹

In December of 1914 Senator Hoke Smith of Georgia introduced a bill that mimicked the administration's recommendations. As Smith and others pointed out on the Senate floor, for years Congress had created special additional judgeships whenever an older judge was deemed incapable of performing his duties, or when a district or circuit required more speedy work. This bill merely

¹⁸ There are no legislative histories of the resulting retirement act of 1919, and no connection of the act to the literature on Supreme Court retirement.

¹⁹ Office of the Attorney General, *Annual Report of the Attorney General of the United States for the Year 1913* (Washington, 1913), 5.

²⁰ "McReynolds to Ask Real Dissolutions," *New York Times*, December 10, 1913, p. 5.

²¹ In 1915, it was recommendation number 12, in 1916 and 1917, it was recommendation number 3, and in 1918, during the war, recommendation number 2. See Attorney General *Annual Reports* (1914), 10; (1915), 9; (1916), 9; (1917), 9; (1918), 8.

formalized the procedure and gave the President some power over it.²² Smith soon made several changes in wording, however, to limit the President's discretion over appointments, finally settling on the requirement that the President had to find that the pension-eligible judge suffered from a "mental or physical disability" before making the extra appointment, although this decision was left entirely to the President.²³

As in earlier decades, the debate on appointing extra judges was tied to the debate on judicial independence and retirement salaries. Representative William Coleman of Tennessee soon introduced a bill in the House to provide a full and protected "retirement" with constitutionally protected salaries for lower court judges, as Bingham had once proposed. Coleman at first opposed his bill to Smith's by saying that it "does not attempt, like the Senate bill, to coerce any judge into retirement," thus threatening independence, but merely provided an incentive for leaving, thus "in some degree meet[ing] the situation aimed at by the Senate bill."²⁴ Importantly, this bill did not face the technical problems Trumbull noted earlier about retired judges overwhelming courts at their whim, since it allowed "the senior circuit judge," or the Chief Justice of the Supreme Court, to request temporary assignments of the retired judges on the lower courts. This kept the "retired" judges' salaries protected under the Constitution since they would continue serving, but removed their ability to return to the courts at their pleasure.²⁵ By 1919, after several procedural hiccups, both the extra appointment for a

²² *Congressional Record* 63 Cong., 3 sess., February 23, 1915, pp. 4395-8. For appointments of judges to compliment inactive lower court judges, see Senate Committee on the Judiciary, *Additional Circuit and District Judges of the United States in Certain Cases*, 64 Cong., 1 sess., January 5, 1916, S. Rep. 21; House Committee on the Judiciary, *Relief of Circuit and District Courts*, 64 Cong., 2 sess., January 5, 1917, H. Rep. 1252;

²³ *An Act to Revise Laws Relating to the Judiciary*, S 7041, 63 Cong., 3 sess., December 22, 1914; *ibid*, 64 Cong., 1 sess., December 7, 1915; *ibid*, January 5, 1916; *ibid*, December 13, 1916. For previous examples of Congress creating a new judge position, whereby the previous position would lapse after the judge died or resigned, see *An Act to provide for an additional judge*, Public Law 58-151, *U.S. Statutes at Large* 33 (1905): 987; *An Act providing for the appointment of an additional district judge for the southern district of the State of Georgia*, Public Law, 63-284, *U.S. Statutes at Large* 38 (1915): 959-60.

²⁴ *Congressional Record*, 64 Cong., 2 sess., February 3, 1917, Appendix, 274.

²⁵ See House Committee on the Judiciary, *Amendment of Laws Relating to the Judiciary*, 65 Cong., 2 sess., May 16, 1918, H. Rep. 573.

disabled judge provision by Smith and the full retirement provision by Coleman were combined and passed with broad support. They both answered the administration's purpose, as Smith claimed, and versions of them remain law to this day, with judges choosing to retire now known as "senior status" judges.²⁶

The most surprising aspect of these debates is the Supreme Court's exclusion from them, and the reason seems to be the same technical concerns that bedeviled Trumbull fifty years earlier, and which Coleman had solved for the lower courts. Representative Hatton Sumners of Texas, who would later play a prominent role in the court-packing fight of 1937, sat in the judiciary committee's hearings on the bills. He later said that it was then hard to know how "Justices of the Supreme Court could separate themselves from service on the Supreme Bench and be given lighter service" considering "it was more difficult to arrange to give the Supreme Court Justices some work than it was difficult to find assignment of other [judges]." The problem was that newly retired district or circuit court judges could be moved periodically to other positions at the same level whenever their services were needed. Supreme Court justices could supposedly only be recalled to serve on the Supreme Court, and Sumners argued "it would be dangerous" if the Chief Justice could assign two or three justices to the Supreme Court bench at his discretion, just as Trumbull had warned.²⁷ Thus, after 1919, older Supreme Court justices still only had the option of resignation and a pension, not retirement and constitutionally protected salaries, and no way to replace them in case of disability. These technical concerns and the Supreme Court exclusion from the bill proved more consequential than the drafters could have imagined.

This debate on judicial retirement most likely did not escape the attention of the Assistant Secretary of the Navy, Franklin Roosevelt, since this was a time of great discussion on federal retirement

²⁶ *An Act to Amend Judiciary Act*, Public Law 65-265, *U.S. Statutes at Large* 40 (1919): 1156-8.

²⁷ *Congressional Record* 75 Cong., 1 sess., February 10, 1937, 1113; See also *Congressional Record* 74 Cong., 1 sess., March 6, 1935, 3056.

issues more generally. There was a debate on compulsory retirement in the Navy, and Congress enacted the first general, and compulsory, civil service retirement act in 1920.²⁸ The relatively uncontroversial discussion surrounding these and the judiciary proposals should have given Roosevelt few qualms about the possibility of radically restructuring federal agencies and courts by encouraging retirement.

Supreme Court Justices Face the Depression-Era Congress

The personal interest of judges in their retirement salaries or pensions was widely acknowledged in this period. For years, almost every time a judge or justice left the bench the time at which he had been eligible for a pension or retirement was publicly discussed. There were even news stories up to the early 1930s whose only report was that sitting federal judges had now reached the age of their pension or retirement and could therefore resign or retire at their leisure.²⁹ Yet to many, the Great Depression made cuts to such munificent, and as always, suspect, pensions seem necessary. Congress proposed a bill in June 1932 that demanded an across-the-board cut in federal pay. The bill reduced the salary of certain high-paying federal jobs to a maximum of \$10,000. Included in this “Special Salary Reduction” provision were, “the salaries of all judges (except judges whose compensation may not, under the Constitution, be diminished)” especially “the retired pay of judges.”³⁰

²⁸ *Congressional Record* 63 Cong., 2 sess., February 13, 1914, 3442; “Renew Pension Campaign” *Washington Post*, March 30, 1917, p. 5; U.S. Civil Service Commission, “Retirement Act of May 22, 1920, with Notes,” Form 2368, December, 1921.

²⁹ “Drops Speer Charges,” *Washington Post*, January 24, 1914, p. 2; “Federal Judge to Quit Bench,” *Los Angeles Times*, January 17, 1915, p. II 1; “Judge Atkinson to Retire,” *Washington Post*, February 10, 1916, p. 9; “United States Supreme Court,” *Wall Street Journal*, November 5, 1920, p. 10; “Justice Reynolds at Retirement Age, 70,” *Washington Post*, February 4, 1932, p. 2; “Four on Supreme Bench Eligible for Retirement,” *Washington Post*, November 14, 1932, p. 2.

³⁰ *Congressional Record* 72 Cong., 1 sess., April 27, 1932, 9089-90. Congress most likely meant the “resigned” pay of judges, since “retirement” salaries were protected by the Constitution.

There is circumstantial evidence that the 1932 salary provisions, which cut Justice Holmes's pension, was not a mere mistake or anomaly, but was directly targeted at Supreme Court.³¹ It was in effect an attack on the independence of the judiciary, using Congress's "power over man's subsistence" that Hamilton had warned against. First, such a pension cut would not likely have escaped Congress's attention, since Congress often debated equally minor pay and appropriation issues. One debate in the Senate at the time concerned a cut in the appropriation for the Supreme Court library from \$50,000 to \$40,000. Senator George Norris claimed he would rather "reduce that appropriation than to take the food out of the mouth of hungry people," and after some debate this appropriation was cut further to \$25,000.³² In another indication of the specificity of the cut, the act cut the pensions of resigned *military* judges by only 20% of those salaries at \$20,000. Perhaps the Supreme Court's recent rebuke of Congress, when it struck down Congress's attempt to remove an already approved appointee, encouraged the cut.³³ Despite their earlier praise for Holmes, it seems Congress was unwilling to let him and his obstreperous brethren keep their full pensions.

Few in Congress, however, seemed to understand the full consequences of this action or its broader threat to independent courts. The cut that Senator Trumbull once thought an inconceivable "breach of faith" on the part of the nation, and which could have been prevented except for technical concerns about "retired" Supreme Court justices overwhelming the court in 1869 and 1919, was enacted into law without mention of a break. The first story concerning Holmes's pension cut was reported as something of a joke. The Associated Press said that "After spending a lifetime interpreting and applying the laws that master of them Oliver Wendell Holmes, finds legal technicalities will cost him \$10,000 this fiscal year." It noted that Holmes was "the hardest hit among the comparatively few former

³¹ See White, *Justice Oliver Wendell Holmes*, 469.

³² *Congressional Record* 72 Cong., 1 sess., June 1, 1932, 11730-2, 11735.

³³ Robert E. Cushman, "Constitutional Law in 1931-32: The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1931," *The American Political Science Review*, 27 (Feb., 1933): 39-57; *United States v. Smith*, 296 U.S. 6 (1932).

Federal judges affected by the economy measure,” but said that “Justice Holmes probably does not mind. His private fortune is ample and his sense of humor still keen.”³⁴

Inside the chambers of the Supreme Court, by contrast, still located in the basement of the Capitol building, the sense of attack by their upstairs neighbors was palpable. Chief Justice Charles Evan Hughes later wrote that the act explicitly affected both Justice Willis Van Devanter and Justice George Sutherland, claiming that “I have reason to believe that they would have retired earlier, had it not been for the failure of Congress to make good its promise to pay in full the salaries of Justices who resigned.” Hughes then explicitly cited the 1869 pension statute and the lack of the “privilege of retirement, as distinguished from resignation, which was accorded to the judges of the lower federal courts. The result was that Justices who otherwise would have retired remained on the bench.”³⁵

Internal evidence from the justices’ papers indicate that Hughes was correct about the importance of the pension cut. For one, Willis Van Devanter was uncommonly close to Hughes. In his autobiographical notes, Hughes’s celebrated Van Devanter’s ascension to the court, from a former Wyoming lawyer and federal appellate judge, and commented on his “perspicacity and common sense” which “made him a trusted adviser in all sorts of matters.”³⁶ Moreover, Van Devanter’s financial concerns were manifest in his letters. Despite George Sutherland’s joke that Van Devanter suffered from “pen paralysis” on the court, Van Devanter’s correspondence shows him to be a meticulous writer when the issue involved minor cleaning and food bills (as well as abstruse questions of his own Dutch

³⁴ “Economy Act Costs Holmes \$10,000 a Year,” *New York Times*, August 14, 1932, p. 19.

³⁵ David Danelski and Joseph Tulchin, ed., *The Autobiographical Notes of Charles Evan Hughes* (Cambridge, Mass, 1973), 302-303. These quotes have been the main source relied upon to argue for Van Devanter’s and Sutherland’s retirement. See notes above.

³⁶ Danelski and Tulchin, ed., *Autobiographical Notes of Charles Evan Hughes*, 171.

ancestry), and such penny-pinching correspondence on bills and payments became increasingly prevalent as the Depression wore on.³⁷

Beside the potential cut in salary, Van Devanter also had a very important tax incentive to remain on the court. As a sitting federal judge, Van Devanter's \$20,000 annual salary was exempt from federal and state income taxes under a Supreme Court decision written in 1920, *Evans v. Gore*, by a temporarily un-pen shy Van Devanter himself. In this decision he quoted Hamilton's *Federalist 79* to argue that a judicial salary should never be diminished, even indirectly. He viewed protecting his and his brethren's salary from tax as part of the protection of their independence.³⁸ As if to further emphasize the benefit to judges of their tax-exempt salaries, the Revenue Act of 1932, passed just weeks before the Economy Act, increased taxes on income at \$20,000 by 60%, and at \$10,000 by even more, and future tax increases in the Depression accentuated the benefit of protection from income taxes.³⁹ Willis Van Devanter could cheerfully note in a letter to the Internal Revenue Service in 1933 that he owed no taxes, surely a satisfying letter to write since his decisions had demanded such treatment.⁴⁰ If Van Devanter resigned he would have suffered from both congressional cuts in salary and increased taxes that a "retired" judge of the lower court judges under the 1919 act and his 1920 decision would have avoided. These concerns help explain Van Devanter's letter to his sister in 1932.

The case for George Sutherland remaining on the bench because of the Economy Act and incomplete retirement protection is less clear, but in the end it too is convincing. For one, Hughes considered Van Devanter one of Sutherland's "most intimate friends in the Court," and the choice of

³⁷ See Letterbook, Box 17, Van Devanter Papers (Library of Congress, Washington, D.C.).

³⁸ *Evans v. Gore* 253 U.S. 245 (1920); Overruled *O'Malley v. Woodrough*, 307 U.S. 277 (1939).

³⁹ An Act to provide revenue, equalize taxation, and for other purposes," Public Law 72-154, *U.S. Statutes at Large* 47 (1932): 169; Kenneth Garbade, *Birth of a Market: The U.S. Treasury Securities Market from the Great War to the Great Depression* (Cambridge, Mass., 2012), 224-6.

⁴⁰ Van Devanter to United States Collector of Internal Revenue, March 15, 1933, Box 16, Van Devanter Papers (Library of Congress, Washington, D.C.).

one to remain likely influenced the other.⁴¹ Sutherland was also obsessed with his tax burden, on both the federal and state level. In 1931 his home state of Utah passed an income tax on all residents for the first time, which would have hit his pension if he had resigned.⁴² Importantly, the tax still affected his investment income, but in 1936 he decided to write Utah to say he was officially leaving the state, and said “I take it there can be no doubt that my wife and I will not be liable for future state income taxes.”⁴³ (Importantly, Sutherland had both written and joined opinions that forbade a state to tax its bonds or stocks to a holder domiciled out-of-state, and which now allowed him to avoid all Utah taxes on his substantial Utah investments.)⁴⁴

Sutherland also gave public warnings at the time that he saw the cut in pension’s as a direct attack on the independence of the judiciary. When the government interpreted the Economy Act as cutting the salaries of retired judges of the Supreme Court of the District of Columbia, who the government argued were not official federal judges protected by the constitutional salary clause, a suit demanding the full pay made it to the U.S. Supreme Court. Justice Sutherland responded in a furious and lengthy opinion. He cited Hamilton’s *Federalist 79*, and, more thoroughly, Van Devanter’s opinion in *Evans v. Gore*, on the virtues of an independent salary for judges. He took his opinion even beyond the case at hand to argue that “it is not extravagant to say that there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation – not for his private advantage...but in interest of preserving unimpaired an essential safeguard” of judicial independence.⁴⁵ The friendship, tax, and even ideological issues all seem to corroborate Hughes’s understanding that Sutherland would have resigned in 1932 or

⁴¹ Danelski and Tulchin, ed., *Autobiographical Notes of Charles Evan Hughes*, 171.

⁴² Sutherland to Edward L. Burton, February 20, 1937, *ibid*.

⁴³ Sutherland to William W. Ray, October 31, 1936; Sutherland to Joseph Chez, October 31, 1936, *ibid*.

⁴⁴ *Farmers Loan and Trust Company v. Minnesota*, 280 U.S. 204 (1930) (J. McReynolds); *First National Bank of Boston v. Maine*, 284 U.S. 312 (1932) (J. Sutherland); *Hoeper v. Tax Commission of Wisconsin*, 284 U.S. 206 (1931) (J. Roberts).

⁴⁵ *O’Donoghue v. United States* 289 U.S. 519, 533 (1933).

soon after if not for the Economy Act, or if Congress had provided a retired status for Supreme Court justices such as was provided for lower court judges.

Even after the Economy Act, congressional and presidential attacks on judicial salaries and independence continued. Although Congress passed a bill correcting the \$10,000 judicial pension cut for judges on the second to last day of Hoover's presidency at his administration's request, just months later Congress passed another cut directed at judicial pensions, this time cutting pensions by 15%, and it was the Roosevelt administration at first applied it to "retired" federal court judges under the 1919 law.⁴⁶ One retired judge's claim for his full salary reached the Supreme Court the next year in the case of *Booth v. United States*. The Roosevelt administration in its brief took a strict stand on such retired judges, and argued that "holding office" meant the performance of obligatory duties, and since a retired judge could choose to perform any duties he wanted, judges were not protected by the salary clause. Justice Owen Roberts, perhaps looking to his own future under a potentially similar statute, wrote a strong opinion for unanimous court that the constitution protected retired judges' salaries just as it protected all judges' salaries.⁴⁷

Thus the reasons for justices' refusal to resign during the Depression were numerous, and the sense of attack by the executive and Congress on their salaries and independence obvious. Van Devanter wrote that the original cut "[s]erved as a notice that the same thing might be repeated later on," and indeed it was.⁴⁸ Justice Harlan Fiske Stone, the day after the revelation of the court-packing

⁴⁶ When the new President Franklin Roosevelt pushed another Economy Act reducing federal salaries in March 1933, the language protecting judicial salaries was retained, but this was reversed just months later. 76 *Congressional Record* 72 Cong., 2 sess., February 6, 1933, 3426-7; Associated Press, "Senate Restores \$20,000 Pay of Former Justice Holmes," *New York Times*, February 7, 1933, p. 21; *An Act Making Appropriations*, Public Law 72-428, *U.S. Statutes at Large*, 47 (1933): 1489, 1513-4; *An Act to Maintain the Credit of the United States Government*, Public Law 73-2, *U.S. Statutes at Large* 48 (1933): 12. *An Act making appropriations*, Public Law 73-78, *U.S. Statutes at Large* 48 (1933): 307.

⁴⁷ *Booth v. United States*, 291 U.S. 339 (1934)

⁴⁸ Van Devanter to L.H. Armstrong April 2, 1937, Box 20, Van Devanter Papers (Library of Congress, Washington, D.C.).

plan in 1937, wrote that one reason for the plan was that the “disposition of Congress to tinker with the Judges’ retirement allowance,” had been a “serious drawback to retirement from our court” and thus led to the older justices remaining on the bench.⁴⁹ Hughes claimed that the 1869 pension act “was regarded as a highly important safeguard of the independence of the federal judges...It was never doubted that Congress would faithfully perform its pledge.” After the Holmes debacle, however, “This was notice to all the Justices that they could no longer rely upon the congressional promise and their attention was drawn to the provision of the Constitution which only prohibited the diminution of their compensation ‘during their Continuance in Office.’”⁵⁰ One can only speculate that these cuts in retirement may have influenced Supreme Court animosity to congressional enactments in general, though they might have had some effect. They certainly made the Court aware that only a constitutionally-protected retirement would secure their own independence. In its absence, Sutherland and Van Devanter remained on the bench, providing important fifth or sixth votes for striking down a host of New Deal acts, and earning Roosevelt’s increasing enmity.

The Retirement Issue in the Roosevelt Administration and in Congress

The Roosevelt administration became concerned about the effects of judicial retirement laws just as they became concerned about the direction of the Supreme Court. The sharp oral argument of the *Gold Clause Cases* at the Supreme Court in January of 1935, concerning whether the President and Congress could abrogate provisions of old contracts written to require gold instead of federal paper money as payment, caused a sudden flurry of concern about the Court among Roosevelt’s aides. At one cabinet meeting soon after the arguments, Attorney General Homer Cummings broached the topic of increasing the members of the court to achieve a “favorable majority.” Leuchtenburg argues that this

⁴⁹ Shesol, *Supreme Power*, 342.

⁵⁰ Danelski and Tulchin, ed., *Autobiographical Notes of Charles Evan Hughes*, 302-303.

was the first indication of a concrete plan against the court, although beyond one mention in Harold Ickes's diary there is no evidence of it.⁵¹

Inside the Justice Department, in fact, when Cummings began to study how to influence the court, the first subject he investigated was changes in judicial retirement. On January 28th Alexander Holtzoff, Cummings's future assistant in the court-packing battle, wrote a memo on the "Resignation or Retirement of Supreme Court Justices," noting that if a Supreme Court justice resigned "he would be subject to the pay cut provision of the Economy Act." Cummings scribbled in the margin of this letter, asking Holtzoff if Congress could provide retirement "at full pay and in that respect put the Supreme Court on a par with the Federal Courts?" Holtzoff responded that it could. The implication of the memos was clear. Just two days later, Representative Hatton Sumners stopped by the office and picked up these memos and a drafted bill for Supreme Court retirement based on them, with the intention of introducing the bill in the House.⁵²

The administration found an appropriate vehicle for their Supreme Court plans in Hatton Sumners. Although the wisecracking conservative from Texas was suspicious of much of the New Deal, he was also a loyal Democratic Party soldier. As Chairman of the Judiciary Committee in the House since 1932, he had worked diligently to pass Roosevelt's agenda. His congressional colleagues also knew that Sumners had his own entrees into the Supreme Court that may have provided insight into its situation. Just two weeks before picking up the Department's proposed bill, Sumners made one of many successful arguments for his congressional colleagues before the Supreme Court, concerning their subpoena power. Sumners and Justice Van Devanter even became close. Sumners later wrote the justice

⁵¹ Harold Ickes, *The Secret Diary of Harold L. Ickes: The First Thousand Days, 1933-1936* (New York, 1953), January 11, 1935, 273-4; Leuchtenburg, *Supreme Court Reborn*, 86.

⁵² Alexander Holtzoff, "Memorandum for the Attorney General Re: Resignation or Retirement of Supreme Court Justices," January 28, 1935; Holtzoff, "Memorandum for the Attorney General Re: Memorandum for the Attorney General Re: Retirement of Supreme Court Justices," January 29, 1936; William Stanley, "Memorandum for Mr. Carusi," February 1, 1935, Box 199, Homer Cummings Papers (University of Virginia, Charlottesville, V.A.).

that “I am grateful for your friendship, proud of your friendship” and Van Devanter wrote back that “It would be but repetition to tell you how much I have valued our acquaintance and friendship” and remembering “happy recollections of you.”⁵³ Yet although the retirement act was widely considered before and since to be Sumners’s bill, Cummings and the administration were the motive force behind it. One of Cummings’s subordinates noted to his boss that Sumners “at your suggestion, introduced a bill which was drawn here, to extend the retirement privileges to Supreme Court Justices.”⁵⁴

In the House debate, Sumners emphasized many times that the bill only gave Supreme Court justices the same rights to protected retirement as district and circuit court judges (“I am going to repeat it”). When asked why Supreme Court justices were excluded earlier, Sumners explained both the old problem of the varying size of the Supreme Court and a new solution. Sumners argued that he and others had only recently realized that Supreme Court justices had two jobs, one at the actual Supreme Court, another riding circuit and attending lower court cases. Though the circuit court riding was purely optional and had not been used by the justices for decades, it was still technically part of their duties. He told Congress that “I think that part was thought out after the law granting” the right to retire to other judges was passed back in 1919. Therefore the new “retirement” act would remove Supreme Court justices from the highest bench, but would keep them on the second part of their nominal job, on lower courts, thus keeping them as “Supreme Court” justices under the constitution with full and protected pay.⁵⁵

Although some would later conclude that failure of Sumners’s bill was merely accidental, the actual opposition was conscious of the motives of the bill and what some saw as its assault on judicial

⁵³ Sumners to Van Devanter May 19, 1936 [typo 1937]; Van Devanter to Hatton Sumners, June 14, 1937, Box 19, Van Devanter Papers (Library of Congress, Washington, D.C.); *Jurney V. MacCracken*, 294 U.S. 135.

⁵⁴ Shesol has the only previous mention in the literature of Cummings’s involvement in this bill, where he only says that Hatton Sumners introduced the bill “at the administration’s prompting,” without mentioning their drafting and without citation, Shesol, *Supreme Power*, 342-343.

⁵⁵ *Congressional Record* 74 Cong, 1 sess., March 6, 1935, pp. 3054-60

independence.⁵⁶ Many congressmen pressed Sumners about whether he was trying to entice certain justices to leave. One congressman asked him, “May we be assured that there is no purpose anywhere...to use this bill as a means of changing the complexion of the court?” Sumners, taken aback, said that “Of course, I cannot answer that question.” Yet at one point Sumners said he wanted to speak “candidly” and hinted that if justices felt “perfectly secure... they will be more disposed to retire.” Besides concerns about encouraging members to leave the court, many representatives worried, as some had worried for generations, about the problem of paying large pensions. One congressman worried that simply ensuring a \$20,000 salary year after year was “a bad precedent to establish at this time...when the country is out of gear.” These two critiques, on court-packing or “unpacking,” and pensions, had their intended effect, and the bill went down 144 to 210.⁵⁷ Roosevelt’s first attempt to change the court had failed, ironically, on the very day that Justice Oliver Wendell Holmes, whose resignation necessitated the debate, passed away.⁵⁸

The Sumners’s bill continued to inspire other efforts to reshape the judiciary. Early in 1936, Alexander Holtzoff wrote another memorandum on the “Retirement of Supreme Court Justices,” which went into detail on the existing retirement and resignation provisions, and noted that “unfortunately the [retirement] bill was blocked on the floor.” Holtzoff, however, noted the age of all current Supreme Court justices, and suggested a constitutional amendment providing for compulsory retirement at age 70.⁵⁹ In early 1936 Roosevelt himself sent a memo addressing this proposed constitutional amendment

⁵⁶ Shesol, *Supreme Power*, 342-3.

⁵⁷ *Congressional Record* 74 Cong, 1 sess., March 6, 1935, 3054-60.

⁵⁸ Shesol, *Supreme Power*, 343.

⁵⁹ Alexander Holtzoff, “Memorandum for the Attorney General. Re: Retirement of Supreme Court Justices,” January 29, 1936, Box 147, Homer Cummings Papers (University of Virginia, Charlottesville, V.A.).

and broader retirement issues to Sumners. Yet Roosevelt continued to work on his own, more radical court plan in secret up until after his landslide election victory in 1936.⁶⁰

Retirement in the Court-Packing Battle

The fact that less than a month after Roosevelt announced his famous plan for packing the courts, Congress would finally pass a short bill by Hatton Sumners allowing for the full and protected retirement of Supreme Court justices has always seemed an odd and incongruous fact. The journalists Alsop and Catledge wrote that the Sumners's retirement measure was "one of the oddest little sideshows in the history of the court fight," and this line been repeated in subsequent histories. Many historians even considered the early passage of the retirement act a clear rebuke to Roosevelt's plan.⁶¹ Yet a close examination of Roosevelt's plan indicates that it was intended as part of a long history of bills that aimed to encourage judicial retirement. Roosevelt's plan therefore worked in tandem with Sumners's, even if the administration did not fully appreciate the consequences of the act for their own goals.

In 1937 Roosevelt decided to pursue a more radical plan to reshape the court partially out of over-confidence in his new congressional majority, but also because he was convinced that he needed many more justices to secure a permanent and liberal majority on the court, and he believed that retirement alone would not achieve that end quickly.⁶² Yet Roosevelt's new plan was still designed in the mold of previous retirement proposals. Many historians merely indicate that the plan allowed the

⁶⁰ Franklin Roosevelt to Sumners, February 13, 1936, Box 4925, Presidents Personal File (Franklin Roosevelt Library, Hyde Park, N.Y).

⁶¹ McKenna repeats this line almost verbatim, e.g. saying it was considered "one of the oddest sideshows..." Alsop and Catledge, *The 168 Days*, 40; McKenna, *Roosevelt and the Great Constitutional War*, 335.

⁶² Roosevelt had promised a Supreme Court position to the conservative majority leader of the Senate Joseph Robinson, and some decisions against the New Deal had been 6-3, so Roosevelt felt he needed at least four justices to ensure a strong majority. See Barry Cushman, "Court-Packing and Compromise."

President to appoint another judge for any judge over age 70 who did not resign or retire, which would mean six additional appointments to the Supreme Court as it then stood. Leuchtenburg noted that the age had the “not inconsiderable advantage of biblical sanction,” without mentioning the numerous previous retirement provisions.⁶³ In fact, the proposed act allowed the President to appoint an additional judge for any judge, in the district, circuit, or the Supreme courts, over age seventy who “*has held a commission or commission as judge of any such court or courts at least ten years*” [emphasis added], which was a requirement for receiving a full pension or retirement under the previous statutes. This meant the court-packing plan did not merely pay attention to the age of judges, but importantly to the ability of the older judge to resign or retire and accept his full pension or retirement salary, and it applied to all courts, up to and including the Supreme Court. This desire to accommodate the retirement provisions later created opposition by those who pointed out that, contrary to the much of the rhetoric, old age was not enough to require another appointment. As the Senate Judiciary Committee report later stated, “the penalty falls only when age is attended with experience.”⁶⁴ To the Roosevelt administration, however, it was important not merely that a judge was older, but that if another judge was appointed, the original judge could leave and take his full pay, which would therefore encourage them to resign or retire.

An early list of recommendations for the draft bill focused on the previous retirement provisions, and pleaded to “Be sure to follow the language of the Constitution and consider the Statutes dealing with retirement and resignation.”⁶⁵ When writing these drafts, Cummings sent extensive notes to Roosevelt about the “Legislative History of Act of 1869 including mention of the Bill that passed the House,” and told him of the “Act of 1869...framed on lines similar to the McReynolds and Gregory” idea.

⁶³ See Leuchtenburg, *Supreme Court Reborn*, 120; Shesol, *Supreme Power*, 256.

⁶⁴ Senate Committee on the Judiciary, *Reorganization of the Federal Judiciary*, 75 Cong, 1 sess., S. Rep. 711, June 14, 1937, 7.

⁶⁵ “Draft form of statute to cover following points,” December 24, 1936, Box 199; Cummings Diary, December 24, 1937, 181, Box 234, Homer Cummings Papers (University of Virginia, Charlottesville, V.A.).

Cummings's assistants compiled almost every major congressional or outside statement on both the 1869, and 1919 acts, dozens of pages worth, as well as a host of similar proposals, in their preparation for the bill.⁶⁶ The long pedigree of similar forced retirement plans all seemed to support Roosevelt's plan and its acceptability.

The language of the proposed bill also was taken explicitly from previous retirement laws, especially the 1919 provision which gave the President the power to appoint an additional lower court judge if he decided that a judge was disabled. According to the drafter of Roosevelt's bill, the "language is adapted from Sec. 260 of the Judicial Code," the section on disabled judges. The draft noted in four separate footnotes that language was taken from this provision, and another memo noted that despite three words added to one section, "Otherwise, the language is identical."⁶⁷ A letter from the constitutional expert Edward Corwin to Roosevelt at this time explicitly cited the disability provision for appointing extra judges as an inspiration for his plan to change the court.⁶⁸ Another draft plan stated that the administration needed to create something like the disability provision which would "operate in a mandatory fashion...If the elder judge is not in fact disabled, no harm can come from the presence of an additional judge."⁶⁹ In this formulation, Roosevelt's plan merely removed the requirement that he deem an older judge disabled to add a new judge, and applied it to the Supreme Court, a mere punctilio of a change.

As had previous bills in this vein, Roosevelt's did not aim to pack the courts with new members, but to encourage existing judges and justices to retire, in other words to unpack the courts. According to

⁶⁶ Cummings to FDR, February 4, 1937, Box 200; See legislative histories in Box 234, Homer Cummings Papers (University of Virginia, Charlottesville, V.A.).

⁶⁷ Proposal Draft No. 5, January 5, 1937, Box 199; "Technical Memorandum on Judiciary Proposal," January 21, 1937, Box 200, Homer Cummings Papers (University of Virginia, Charlottesville, V.A.).

⁶⁸ Leuchtenburg reproduces the letter from Corwin to Roosevelt on December 16th, including Corwin's suggestion that there was "Something of a legislative precedent for such a measure is furnished by section 375 of title 28, of the U.S. Code," but he does not track down what that section is. *Salary of United States Judges after Resignation or Retirement, U.S. Code (1934)*, Title 28, Section 375, 1273; Leuchtenburg, *Supreme Court Reborn*, 118.

⁶⁹ "Draft of Suggestions on Judicial Reform," Draft #2, *ibid*.

Justice Department lawyer W.W. Gardner, the bill was aimed as a “stimulus to retirement,” and he thought its passage would “sufficiently show[] the Congressional desire for retirement” to justices then on the bench.⁷⁰ Gardner later remembered that the Roosevelt plan “would make retirement at 70 invariable.”⁷¹

Unlike previous retirement acts and reforms, however, which encouraged temporary appointments until the older or disabled judge died or resigned, the final proposed act said that the courts would be “permanently increased” by the new members appointed. Yet the bill contained two safety valves to encourage retirement before a new appointment and which would keep the number of judges on the bench stable. The first stated that an additional judge would be appointed only after a judge had reached the age of his full pension, and “within six months thereafter has neither resigned [n]or retired.” This provided a timely window for judges to remove themselves before the court was enlarged, as bills going back to Bingham’s had. The act also said that no other judge would be appointed “If the judge who is of retirement age dies, resigns, or retires prior to the nomination of such additional judge,” and said that the bill would not take effect until “the thirtieth day after the date of enactment.”⁷² This would give judges on the Supreme Court a chance to retire once a bill had been approved and before a nomination, allowing the court to remain at nine.

A bill for a full and protected Supreme Court retirement, such as the Sumners’s bill, therefore only furthered the administration’s purpose to reshape the court, and the administration planned to work with Sumners from the beginning. On January 11, 1937, just days into the new congressional session and before Roosevelt’s plan was public, Sumners re-introduced his bill to allow the Supreme Court to retire on full and protected pay, and W.W. Gardner wrote a memo pondering how it would

⁷⁰ W.W. Gardner, “Technical Memorandum on Judiciary Proposal,” January 21, 1937, *ibid*.

⁷¹ W.W. Gardner, “Pebbles from the Path Behind, Chapter VI,” *Green Bag* (Spring 2006):279-80.

⁷² President Franklin Roosevelt, “Message to Congress on the Reorganization of the Judicial Branch of the Government,” February 5, 1937, American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=15360>.

interact with their own plan. Gardner said the bill would have similar effects to their own plan and “would seem to do no harm either under existing law or in conjunction with our proposal.”⁷³

The specifics of the President’s message on the reorganization of the judiciary, publicly released on February 5, 1937, just like the actual provisions of the plan, were again suffused with the long history of retirement proposals. Roosevelt felt this history would easily justify the proposed changes. The message noted the passage by the House of the 1869 bill, and earlier Attorney Generals’ recommendations from the Wilson era. It also described the 1919 law that said the “President ‘may’ appoint additional district and circuit judges” if the President deemed judges disabled. This was cited as a precedent, and Roosevelt publicly claimed that “The discretionary and indefinite nature of this legislation has rendered it ineffective. No President should be asked to determine the ability or disability of any particular judge.” Roosevelt also noted the encouragements to retirement in his bill. He said that if “any judge eligible for retirement should feel that his court would suffer because of an increase in its membership, he may retire or resign under already existing provisions of law if he wishes so to do. In this connection let me say that the pending proposal to extend to the Justices of the Supreme Court the same retirement privileges now available to other federal judges [Sumners’s bill] has my entire approval.”⁷⁴

At Roosevelt’s press conference announcing his plan, he also emphasized his plan’s similarities to earlier retirement statutes. He spent much of his time explaining the history of judicial retirement, going back to 1869, as well as attempts to reform it, and why his proposed bill would be an improvement. When he described the importance of protecting Supreme Court retirement salaries

⁷³ W.W. Gardner “Memorandum for the Attorney General, In re: H.R. 2518, 75th Cong., 1st Sess., to provide for the retirement of Justices of the Supreme Court,” January 15, 1937, Box 199, Homer Cummings Papers (University of Virginia, Charlottesville, V.A.). Gardner now doubted that the retirement issue was a serious factor influencing the justices.

⁷⁴ Franklin Roosevelt “Message on the Reorganization,” February 5, 1937, *American Presidency Project*, <http://www.presidency.ucsb.edu/ws/?pid=15360>

under Sumner's bill, he was met with knowing laughter from the reporters. The President explained that "Any Circuit or District Judge may retire on full pay. A Supreme Court Judge can resign and get full pay. The only difference is that if he resigns and gets full pay, he is subject to changes in the income tax laws and things like that. This recommendation would put him on the same status as the judges in the other courts."⁷⁵ When a reporter asked if his whole bill was "intended to take care of cases where the appointee has lost the mental capacity to resign?" which was greeted with laughter, again showing that this was understood as an extension of the old "disabled" clause, the President agreed, "That is all."⁷⁶

Many in the press at the time thus understood the connection between Roosevelt's plan and earlier retirement statutes. Some described Roosevelt's bill as the "retire-at-70" plan, and noted that the bill appointed a new judge only for any judge who "fails to retire."⁷⁷ One article the day after the release of the plan was titled "Roosevelt Bill Would Permit Six to Retire."⁷⁸ Although supporters of the plan did not want to look as if they were unconstitutionally "forcing" judicial retirements, they did want to demonstrate the incentives for retirement. Majority Leader Senator Joseph Robinson said those who thought the goal of the plan was to have 15 justices on the court were mistaken. He said that "Should all the justices eligible for retirement take advantage of the privilege the number would not be increased and would remain at nine."⁷⁹ When Cummings in his testimony before the Senate Judiciary Committee was asked if his plan "provide[s] for the appointment of six additional judges" on the Supreme Court? He simply responded "No," and explained that "If none of them resign or retire of those who are eligible to do so within the 30-day period after the law becomes effective, then the appointments would be

⁷⁵ Franklin Roosevelt Press Conference #342, February 5, 1937, 8-14. Franklin Roosevelt Library Online, <http://www.fdrlibrary.marist.edu/archives/collections/franklin/?p=collections/findingaid&id=508>

⁷⁶ *Ibid.*, 18. Shesol argues that the President ended the conference on the question about mental capacity, and said "That is all," to silence the questioner. In fact, the conference contained two more questions and there was no indication that the President himself did not mean to agree with the questioner. Shesol, *Supreme Power*, 295.

⁷⁷ Arthur Krock, "In the Nation: Two Results of Supreme Court Argument," *New York Times*, February 10, 1937, p. 22; "Change Tactics in Plan to Pack Supreme Court," *Chicago Tribune*, February 10, 1937, p. 1.

⁷⁸ "Six on High Bench Eligible to Retire," *New York Times*, February 6, 1937, p. 1; "Roosevelt Bill Would Permit Six to Retire," *Chicago Tribune*, February 6, 1937, p. 7.

⁷⁹ "Change in Tactics in Plan to Pack Supreme Court" *Chicago Tribune*, February 6, 1937, p. 1.

made,” but only then. Cummings also testified about the 1869 Bingham bill and its appointment of additional judges only “where a judge of retirement age declines to leave the bench...This is the same remedy proposed by President Roosevelt today.”⁸⁰

The proposed “unpacking” nature of the plan, however, attracted attacks from those who saw it as just another attack on judicial independence. The Dean of Fordham Law School, Ignatius Wilkinson, argued that “fundamentally the operation of the plan aims to work an ouster by making uncomfortable, if not vexatious, the continuance” on the bench of older justices. He asked “Is the plan a constitutional attempt to ‘pack’ the court or is it possibly an unconstitutional measure to ‘push’ the older justices” to retire?” The Dean of the New York University Law School, Frank Sommer, said the bill was “an ‘invitation’ having the characteristic of ‘psychic coercion’” which would compel “the retirement at one fell swoop of two-thirds of the judges now constituting the Court.”⁸¹ The final, adverse Senate Judiciary Committee report on the bill stated this argument bluntly: “The effect of this bill is not to provide for an increase in the number of Justices composing the Supreme Court. The effect is to provide a forced retirement.”⁸²

Hatton Sumners, despite many histories portraying him as a stark opponent of the President, was of a piece with Roosevelt’s desire to reform the judiciary through encouraging retirement. He only disagreed with the exact means. After Roosevelt assistant Marvin McIntyre called Sumners on the telephone the day Sumners first re-introduced his retirement bill in January, seemingly to convince him that his bill might be considered as part of a wider plan involving the court, Sumners wrote a letter back saying that the administration should first let the retirement bill do the work of changing the court

⁸⁰ Senate Committee on the Judiciary, *Hearings on the Reorganization of the Federal Judiciary*, 75 Cong., 1 sess., March 10, 1937, 5, 15-6, 33. A supporter of the plan, former Dean of Duke Law School, Justin Miller said each judge under the bill “Is given opportunity to retire at 70. And I think they would.” Ibid, 151.

⁸¹ Ibid, 1138, 1019-20.

⁸² Senate Judiciary Committee, *Report on the Reorganization*, 9.

before moving to any other measures.⁸³ He continued to support a reform of the Supreme Court's jurisprudence, arguing that the Constitution "must be treated as a living thing, which it is."⁸⁴ When Sumners attended Roosevelt's announcement of his plan on February 5th, Cummings thought, despite Sumners's silence, "on the whole he was well pleased," especially by the celebration of his own retirement bill in the message.⁸⁵ Sumners walked out of the meeting determined to use the situation to push his own bill, claiming to the other representatives, "Here's where I cash in."⁸⁶

Sumner's quote has been consistently misreported in the history books as "Boys, here's where I cash in my chips," one of the most famous lines of the court battle, which seemed to indicate that Sumners was leaving the Roosevelt reservation and actively opposing the President.⁸⁷ Yet Sumners claimed that his thoughts as he left the meeting were that "I saw the situation [and thought] somebody had to go in and try and be helpful about it." Months later, already aware of the misreporting, he argued that "I said 'cash in' and I meant 'cash in' as we know that expression in the Southwest."⁸⁸ He wanted to "cash in" by using the situation to his and his party's benefit in pushing his retirement bill. He later said

⁸³ Roosevelt's assistant James Rowe wrote a letter in late February, after the court-packing plan was announced, arguing that the January 11th letter "simply strengthens my convictions that the chief trouble with Hatton Sumners is that he didn't inaugurate the present proposal," which indicates that he believed Sumners was not as opposed to the overall court-packing scheme as many have since argued. Other writers have not noticed this evidence of Sumners's early introduction to Roosevelt's planning process. *A Bill to provide for retirement of Justices of the Supreme Court*, H.R. 2518, 75th Cong., 1st Sess., January 11, 1937. Box 200, Homer Cummings Papers (University of Virginia, Charlottesville, V.A.); Sumners to Marvin McIntyre, January 12, 1937; Franklin Roosevelt to McIntyre, January 14, 1937; James Rowe to Thomas Corcoran, February 23, 1937, Box 11, Grace Tully Papers (Franklin Roosevelt Library, Hyde Park, N.Y.).

⁸⁴ Hatton Sumners to Marvin McIntyre, January 12, 1937; Roosevelt to McIntyre, January 14, 1937; February 23, 1937, Box 11, Grace Tully Papers (Franklin Roosevelt Library, Hyde Park, N.Y.).

⁸⁵ Cummings Diary, February 5, 1937, 23, Box 234, Homer Cummings Papers (University of Virginia, Charlottesville, V.A.); See also Harold Ickes, *The Secret Diary of Harold Ickes: Volume II: The Inside Struggle* (New York, 1954), February 6, 1937, p. 66; Shesol, *Supreme Power*, 292.

⁸⁶ Sumners to Thomas B. Love, October 23, 1937, Box 4925, Presidents Personal Files (Franklin Roosevelt Library, Hyde Park, N.Y.).

⁸⁷ See Shesol, *Supreme Power*, 293. James Patterson correctly reports the phrase, but does not pursue its meaning, and the quote is not repeated in subsequent accounts. James T. Patterson, *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939* (Lexington, KY, 1967), 92.

⁸⁸ Sumners to Thomas B. Love, October 23, 1937, Box 4925, Presidents Personal Files (Franklin Roosevelt Library, Hyde Park, N.Y.).

that he hoped “I have been able in this matter to render a service of value to the President, the party and the country, especially in connection with the other legislation I sponsored.”⁸⁹

Within five days of Roosevelt’s announcement, Sumners had the House Judiciary Committee approve his bill. Far from attracting the ire of the court-packing plan’s proponents, the Department of Justice was making helpful clarifying amendments to Sumners’s plan even after the President’s public plan was revealed.⁹⁰ Many in Congress saw the retirement bill not as opposition to the President, but as a strategy to achieve Roosevelt’s ends more quickly. One congressman opposed to it said this was simply a “strategy of the White House” and another argued that it was an attempt to “becloud this issue and encourage the procedure suggested by the President.” When one representative asked if the bill could be held off until it was made part of the Roosevelt’s broader plan, Sumners counseled against it, “unless someone wants to gum up the game.” The bill passed 315 to 75, with only 10 Democrats opposed but 58 Republicans.⁹¹ Immediately after the House passed the bill, word got across to the new Supreme Court building, where the Court was hearing a case on the Wagner Labor Act. During the hearing, a note was handed along down the bench with the news, as the justices squinted and smiled, and a few exchanged hushed whispers.⁹²

Sumners, in line with his desire not to sabotage the President’s plan but to redirect it, went to Roosevelt’s son and assistant, James, after the act’s passage by the House to try to negotiate a deal. Sumners did not argue that the President abandon his plan, but said that if he was only given some time to convince two justices to retire, the President could settle for a bill adding fewer additional justices.

⁸⁹ Ibid.

⁹⁰ W.W. Gardner, “Memorandum for the Attorney General,” February 6, 1937, Box 200, Homer Cummings Papers (University of Virginia, Charlottesville, V.A.).

⁹¹ Cushman, along with other historians, sees the passage of the bill as an example of opposition to Roosevelt’s plans, which does not explain why most Democrats, but not Republicans, endorsed it, and why Roosevelt and Cummings themselves endorsed it publicly. *Congressional Record* 75 Cong., 1 sess., February 10, 1937, 1113-26; “House Passes Retirement Bill,” *Washington Post*, February 11, 1937, p. 1; Cushman, *Rethinking the New Deal Court*, 15.

⁹² Shesol, *Supreme Power*, 344.

James Roosevelt still thought, however, that they needed even more retirements and needed them quickly to achieve their solid majority.⁹³ The Senate soon passed what was called the “Sumners-McCarran voluntary retirement bill” by 76 to 4, in what the *Chicago Tribune* called a “brief but acrimonious debate.” Again it was largely the supporters of the wider plan who pushed the bill, and only opponents who voted against it.⁹⁴ Inside the administration, the understanding of the effect of the act was either positive or neutral, and Roosevelt signed it on March first.⁹⁵

After the bill passed, Sumners remained a proponent of both judicial reform and compromise with the President. Although he kept the larger reorganization bill bottled up in his House Judiciary Committee, he refused to openly oppose the bill or the President. The press described Sumners at the time as a “silent, retiring, and even mysterious figure in the background of the Capitol Court fight.”⁹⁶ Most importantly, his connections with Van Devanter led him to believe that his retirement bill would lead to at least two conservative retirements without the necessity for a more desperate struggle.

Van Devanter was aware of Sumners’s efforts on his behalf. On the day the retirement act passed the House, Van Devanter wrote a friend on the entire history of the judicial retirement issue in Congress, from 1869 onwards, and included the precise vote count of the recent act, along with a copy of the bill, which he noted was “a distinctly friendly measure.” He continued talking about the retirement bill to others.⁹⁷ When Van Devanter finally decided to retire on May 18th, 1937, he sent a letter to the President, saying that “I desire to avail myself of the rights, privileges and judicial service

⁹³ Shesol, *Supreme Power*, 344-345; Cushman, “Court-Packing and Compromise,” 9-10.

⁹⁴ “Roosevelt May Tour Nation on Court Program,” *Chicago Tribune*, February 27, 1937, p. 1; *Congressional Record* 75 Cong., 1 sess., February 26, 1937, 1644-6.

⁹⁵ Homer Cummings, “Memorandum for Mr. Reed,” March 29, 1937; W.W. Gardner, “Memorandum for the Solicitor General. In re: Effect of Sumners Retirement Act on the President’s Proposed Judiciary Bill,” April 3, 1937, Box 200, Homer Cummings Papers, (University of Virginia, Charlottesville, V.A.).

⁹⁶ “Committee to Reject Court Change, House Warned by Sumners,” *Washington Post*, July 14, 1937, p. 1.

⁹⁷ Van Devanter to Robert H. Kelley, February 10, 1937; Van Devanter to L.H. Armstrong, April 3, 1937, Box 44, Van Devanter Papers (Library of Congress, Washington, D.C.).

specified in the Act of March 1, 1937," effective at the end of the current Court session in June.⁹⁸ Just as he sent the letter to Roosevelt, he sent a copy to Sumners, who wrote back telling him that "You have done a most courageous thing under the circumstances, a patriotic thing."⁹⁹ Chief Justice Hughes later said that Sutherland, "who did not wish to create a second vacancy until the first had been filled" held on until early next year, "but both had determined to retire when the privilege was accorded by the Act of 1937."¹⁰⁰

Despite the administration's support for Sumners's bill, they misjudged both the likelihood of and reaction to an immediate retirement from the Court after its passage. There was widespread shock and much commentary that Van Devanter's retirement "greatly weakened support for President Roosevelt's" bill, with some saying that since it allowed another appointment there was no necessity for the larger plan. The shock was amplified since the announcement of Van Devanter's retirement was reported to the members of the Senate Judiciary Committee just as they were heading into the committee room to vote on Roosevelt's plan. Many speculated that it encouraged the vote of 10-8 against the plan, perhaps the most public and significant rebuke to Roosevelt in the whole battle. The committee's final report noted the "futility and absurdity of the devious rather than the direct method [of retirement] is illustrated by...the retirement of Justice Van Devanter."¹⁰¹

It was only after Van Devanter's retirement, as well as the seeming change in the court's jurisprudence in upholding some New Deal acts, that Roosevelt's insistence on pushing his court plan

⁹⁸ Van Devanter to Roosevelt, May 18, 1937, *ibid.*

⁹⁹ Sumners to Van Devanter, May 19, 1936 [typo, 1937], Box 44; Van Devanter to Sumners, June 14, 1937. Box 20 *ibid.*

¹⁰⁰ Danelski and Tulchin, ed., *Autobiographical Notes of Charles Evan Hughes*, 303.

¹⁰¹ Senate Judiciary Committee, *Report on the Reorganization*, 11; Franklyn Waltman, "Invalidation of Social Security Act Seen as Only Hope," *Washington Post*, May 19, 1937, p. 1; "Justice van Devanter Resigns; Court Bill Loses in Committee," *Los Angeles Times*, May 19, 1937, p. 1; "Capital is Surprised by Sudden Resignation of Justice Van Devanter," *New York Times*, May 19, 1937, p. 1; "Justice Van Devanter's Retirement," *Chicago Tribune*, May 20, 1937, p. 12; Shesol, *Supreme Power*, 446-448.

caused Hatton Sumners and many Democrats to publicly break with their leader.¹⁰² In Sumners's famous July speech from the House floor, his first public comments on the measure, he argued that Roosevelt's plan had now become unnecessary and even dangerous. The *Washington Post* reported Sumners, dressed in a natty tan suit, argued his case as a country lawyer, "clinching his sentences with hand-slapping and thrusts of his fist." He began by congratulating the House on "put[ing] through the same program here dealing with the Supreme Court that a good level-headed doctor would put through." He told them, in one of many iterations of a medical metaphor, "You made an examination, a sort of diagnosis. You located an obstruction which blocked up the intake. We found that in the act of 1919...we had denied these Supreme Court judges" the privilege of retirement, which meant too many older judges had remained on the bench. Sumners now asked why the President wanted to "split us from top to bottom," in trying to change a court which was already transforming both in jurisprudence and membership. Sumners worried that "[f]rom the votes we have been seeing here in the last 3 or 4 weeks this situation, this strife, is beginning to reflect itself in the general legislative reaction of this House."¹⁰³ This moment was, in fact, the beginning of the end of the Democratic liberal coalition, where many once loyal Southern soldiers deserted the President and began to vote their conservative inclinations.¹⁰⁴ After the failure of Roosevelt's first bill, the President proposed a compromise plan allowing for new appointments for judges over age 75 who refused to retire, but this bill also ran

¹⁰² Most contemporary writers agree that the supposed "switch" in court jurisprudence had more to do with long-term development of judicial thought than on sudden political pressure of Roosevelt. Leuchtenburg, *Supreme Court Reborn*; Barry Cushman, *Rethinking the New Deal Court*.

¹⁰³ *Congressional Record* 75 Cong., 1 sess., July 13, 1937, 7142-5; "Committee to Reject Court Change, House Warned by Sumners," *Washington Post*, July 14, 1937, p. 1.

¹⁰⁴ Patterson said the court bill "led conservatives of both parties to begin to work together in a bipartisan fashion." Patterson, *Conservative Coalition*, 126.

aground in July after Majority Leader Senator Joseph Robinson died, and as Congress became even more obstreperous.¹⁰⁵

Besides sabotaging the enactment of Roosevelt's court-packing plan and encouraging congressional opposition, the retirement act caused other, unexpected difficulties for the administration, which historians have not investigated. As early as May 1937, when Roosevelt considered appointing Senator Robinson to Van Devanter's post, Gardner wrote a memo on the little-studied constitutional provision preventing a member of Congress from accepting an appointment to an office that had been created or whose pay had increased when that individual was in Congress. This would seem to prevent Robinson's appointment, since the act either increased the pay of a new justice by increasing retirement benefits, or it created a new "10th" judicial seat on the Supreme Court, as Van Devanter had only "retired" and not resigned from his seat.¹⁰⁶ The administration faced the same dilemma after Senator Joseph Robinson died and they decided to appoint the fiery Alabama Senator Hugo Black to the position.¹⁰⁷ To the claim that no vacancy was created by Van Devanter's retirement under the act, since he was technically still a Supreme Court justice, the administration argued that "The answer to that objection would seem to be that Congress has the authority to prescribe the size of the Supreme Court," once again connecting the retirement statutes to Roosevelt's earlier proposal.¹⁰⁸ Still, many newspapers and legal commentators claimed it was an illegal appointment. The kerfuffle surrounding the later revelation of Black's previous Ku Klux Klan ties obscured that the retirement act

¹⁰⁵ A much more constrained judiciary bill which included only court procedural reforms did pass with little debate in August of 1937. William Leuchtenburg, "FDR's Court-Packing Plan: A Second Life, A Second Death," *Duke Law Journal* (1985): 673-685.

¹⁰⁶ W.W. Gardner, "Memorandum for the Solicitor General," May 26, 1937; Gordon W. Bell, "Memorandum for the Attorney General," August 12, 1937; Alexander Holtzoff, "Memorandum for the Attorney General," August 17, 1937, Box 200, Homer Cummings Papers (University of Virginia, Charlottesville, V.A.); Franklyn Waltman, "Invalidation of Social Security Act Seen as Only Hope," *Washington Post*, May 19, 1937, p. 1. "Van Devanter to Sit In Federal Court Here to Relieve Heavily Congested Calendar," *New York Times*, December 29, 1937, p. 42.

¹⁰⁷ Stanley Reed to Carusi, August 17, 1937; "Notes on Senator Black's Eligibility to Appointment as Associate Justice of the Supreme Court," August 17, 1937. Box 200, Cummings Papers, UVA.

¹⁰⁸ "Notes on Senator Black's Eligibility to Appointment as Associate Justice fo the Supreme Court," August 17, 1937. Box 200, Homer Cummings Papers (University of Virginia, Charlottesville, V.A.).

was the most important issue at the time of Black's nomination, and was the most debated issue by his Senate colleagues before they approved it. To many, it seemed as if Roosevelt was still trying to pack the court with illegitimate members and erode judicial independence, and this further drove Congress from the President.¹⁰⁹

Conclusion

The struggle over judicial retirement defined generations of debate on judicial independence in America. While the Constitution guaranteed judicial independence and stable salaries, the lack of a provision for retirement meant a part of judges' salaries could still be subject to political control. The open-ended nature of judicial retirement in the United States eventually came to define the alpha and omega of the United States's most significant constitutional battle in the Great Depression. Gaps and changes to retirement pensions for the Supreme Court caused conservative members on the Court to remain and made the Court a profound source of opposition in the New Deal. Previous provisions for judicial retirement for age and disability, and of the pay of such retired judges, also shaped and inspired Roosevelt's and Cummings's own ideas. Finally, the passage of a new retirement act effectively ended Roosevelt's more radical plans to upset judicial independence, drove Congress from his grasp, and even hampered his later Court appointments.

¹⁰⁹ Leuchtenburg in his chapter on the nomination of Black mentions the issue of the retirement act in only one sentence. Ickes, *Diary Volume II*, August 18, 1937, 196; "Court Vacancy Did Not Exist, Lawyer Holds," *Washington Post*, September 19, 1937, p. 2; Turner Catledge, "Senate Is Startled," *New York Times*, August 13, 1937, p. 1; "Black Confirmed by Senate, 63-16; Debate is Bitter, Inquiry is Beaten; Eligibility Question is Raised," *New York Times*, August 18, 1937, p. 1; "Justice Black on Bench as High Court Receives Protests on Seating Him," *New York Times*, October 5, 1937, p. 1; Leuchtenburg, *Supreme Court Reborn*, 188.

As many writers have noted, one result of the 1937 court battle was a renewed sense of the importance of judicial independence among Congress and the public.¹¹⁰ Another, less-noted cause of the increased independence is that the retirement act gave Supreme Court justices the option of a stable and constitutionally protected retirement, which limited future attempts to coerce them to leave. Yet Congress can and has continued to pass judicial retirement reforms, which still provide a means by which future Congresses and Presidents can influence the courts. This remains a significant constitutional issue. At the same time, the ability of justices to retire with full salaries at the time of their choice has increased the ability of justices to retire “strategically,” and thus hand off their seats to a party or President of their choosing. Thus the retirement law of 1937 has exacerbated partisan alignments in the courts, creating yet another constitutional concern.¹¹¹ Despite its importance, the retirement issue has attracted little attention in the history of the 1937 court battle. Yet if we are going to understand that battle, which reshaped the nature of American law and politics, we have to understand how and under what circumstances nine older judges planned to collect their retirement, and how the country has struggled with such a seemingly mundane issue since its founding.

¹¹⁰ McKenna, *Franklin Roosevelt*; Jeff Shesol, *Supreme Power*.

¹¹¹ There have been a few judicial retirement reforms since 1937, especially a 1954 law which allowed retired judges to receive salary increases commiserate with their sitting colleagues. Since 1937 and especially since 1954, very few justices have died on the bench as opposed to retiring. See Ward, *Deciding to Leave*, 155;