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The Judicial Reforms of 1937

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THE JUDICIAL REFORMS OF 1937

BARRY CUSHMAN*

ABSTRACT

The literature on reform of the federal courts in 1937 understandably focuses on the history and consequences of President Franklin D. Roosevelt's ill-fated proposal to increase the membership of the Supreme Court. A series of decisions declaring various components of the New Deal unconstitutional had persuaded Roosevelt and some of his advisors that the best way out of the impasse was to enlarge the number of justiceships and to appoint to the new positions jurists who would be "dependable" supporters of the administration's program. Yet Roosevelt and congressional Democrats also were deeply troubled by what they perceived as judicial obstruction in the lower federal courts. The "universal injunction" had yet to emerge, but friends of the administration nevertheless maintained that injunctive relief granted by the lower courts was substantially, and in some cases decisively, frustrating implementation of vital elements of the New Deal agenda. This Article surveys the uses and perceived effects of such injunctive relief, and relates the story of efforts by the political branches to address this challenge through (1) enlargement of the lower federal judiciary, and (2) reforms to judicial procedure and/or jurisdiction that would inhibit the power of lower federal courts to thwart implementation of federal programs. The principal solution at which the Roosevelt administration arrived required, among other things, that only three-judge district court panels be authorized to enjoin the enforcement of federal law. This requirement

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remained for nearly forty years before it was repealed in 1976—ironically, one might think—just as the universal injunction was emerging as a phenomenon, and the stakes of a single judge having power to grant injunctive relief increased accordingly.

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INTRODUCTION

The literature on reform of the federal courts in 1937 understandably focuses on the history and consequences of President Franklin D. Roosevelt's ill-fated proposal to increase the number of seats on the Supreme Court from nine to fifteen.¹ A series of decisions declaring various components of the New Deal unconstitutional² persuaded Roosevelt and some of his advisors that the best way out of the impasse was to enlarge the number of justiceships and to appoint to the new positions jurists who would be "dependable" supporters of the administration's program.³ Yet Roosevelt and congressional Democrats also were deeply troubled by what they perceived as judicial obstruction in the lower federal courts. They were particularly concerned with the issuance of injunctive relief restraining the execution of New Deal measures, and with the role that judicial appointments and the reform of judicial procedure might play in ameliorating such difficulties.

1. See JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); LEONARD BAKER, *BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT* 8-9 (1967). See generally William E. Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, in *ESSAYS ON THE NEW DEAL* 69 (Harold F. Hollingsworth & William F. Holmes eds., 1969); MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937* (2002); JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010); ROBERT SHOGAN, *BACKLASH: THE KILLING OF THE NEW DEAL* (2006); BURT SOLOMON, *FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* (2009).

2. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 288-89 (1936) (invalidating National Bituminous Coal Conservation Act of 1935); *United States v. Butler*, 297 U.S. 1, 68 (1936) (invalidating Agricultural Adjustment Act of 1933); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (invalidating Frazier-Lemke Farm Debt Relief Act of 1934); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550-51 (1935) (invalidating the Live Poultry Code of the National Industrial Recovery Act); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935) (invalidating the Railroad Retirement Act of 1934); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 414-15 (1935) (invalidating section 9(c) of the National Industrial Recovery Act).

3. See Barry Cushman, *Court-Packing and Compromise*, 29 *CONST. COMMENT.* 1, 14 (2013).

I. INJUNCTIONS

On February 17, 1937, just twelve days after the President unveiled his Court-packing plan, Democratic Senator Pat McCarran of Nevada introduced, and the Senate approved, Senate Resolution 82.⁴ That Resolution provided:

Whereas the President of the United States has presented to Congress a message bearing upon the judiciary and judicial reform, and has made reference to the delays surrounding the administration of justice and the inequality, uncertainty, and delay in the disposition of vital questions of constitutionality arising under our fundamental law; and

Whereas the operations of the Government, including the collection of its revenues, have been impaired and suspended by the exercise of jurisdiction over its agencies by the Federal courts; and

Whereas as a result of the issuance of extraordinary writs by Federal courts and of judgments rendered in such courts, such writs and judgments in all amounting to several thousands within the past 3 years, acts of Congress have been set aside or nullified or made inoperative: Therefore be it

Resolved, That for the aid and information of the Congress in the consideration of such conditions with a view to the correction of such abuses as may exist, [six named federal departments and fourteen named federal agencies] are each requested to transmit to the Senate, at the earliest practicable date, the following information:

- (1) A statement of all cases in which injunctions, restraining orders, or other judgments have been issued, rendered, or denied by the Supreme Court or inferior Federal courts since March 4, 1933, enjoining, suspending, or restraining the enforcement, operation, or execution of any act of Congress, or any provision thereof, administered by such department or agency, or by any other agency the functions of which have heretofore been transferred to such department or agency.

4. S. Res. 82, 75th Cong., 81 CONG. REC. 1273-74 (1937).

(2) A brief statement concerning each of such cases, showing the extent to which, and the manner in which, the operations of the Government have been affected.⁵

Over the course of the next five weeks, no fewer than seventeen departments and agencies submitted such reports.⁶ These included reports from the Department of Justice,⁷ the Department of the Treasury,⁸ the Department of the Interior,⁹ the Department of Agriculture,¹⁰ the Department of Commerce,¹¹ the Federal Trade Commission,¹² the Veterans' Administration,¹³ the National Mediation Board,¹⁴ the Federal Power Commission,¹⁵ the Federal Communications Commission,¹⁶ the Federal Emergency Administration of Public Works,¹⁷ the Social Security Board,¹⁸ the Tennessee Valley Authority,¹⁹ the Railroad Retirement Board,²⁰ the National Labor Relations Board,²¹ the Works Progress Administration,²² and the Securities and Exchange Commission.²³ The most comprehensive of

5. *Id.*

6. See INJUNCTIONS IN CASES INVOLVING ACTS OF CONGRESS, S. DOC. NOS. 75-25, 75-26, 75-27, 75-28, 75-29, 75-30, 75-31, 75-32, 75-33, 75-37, 75-38, 75-39, 75-41, 75-42, 75-43 (1937).

7. S. DOC. NO. 75-42.

8. *Id.*

9. S. DOC. NO. 75-37.

10. S. DOC. NO. 75-38.

11. S. DOC. NO. 75-39.

12. S. DOC. NO. 75-33.

13. S. DOC. NO. 75-32.

14. S. DOC. NO. 75-41.

15. S. DOC. NO. 75-30.

16. S. DOC. NO. 75-31.

17. S. DOC. NO. 75-27.

18. S. DOC. NO. 75-28.

19. S. DOC. NO. 75-44.

20. S. DOC. NO. 75-26.

21. S. DOC. NO. 75-29.

22. S. DOC. NO. 75-25.

23. S. DOC. NO. 75-43. The Chairman of the Interstate Commerce Commission submitted a letter explaining that "the laws under which the Commission operates were passed upon and held to be constitutional" before March 4, 1933, and because the Resolution inquired only about cases in which the execution of acts of Congress, as opposed to orders of the Commission, had been enjoined, the Commission had "no cases of the kind referred to in the resolution to report." 81 CONG. REC. 1464 (1937). It appears that the Secretary of Labor also submitted such a letter, though the Congressional Record does not disclose its content, 81 CONG. REC. 1662 (1937), and it does not appear to have survived as a Senate document. Attorney General Cummings's letter of transmittal for the reports of the Departments of Justice and of the Treasury explained that all of the information that would have been

these reports was that of Attorney General Homer Cummings, which reported on all such cases in which his Department had been involved, and also contained the report of the Department of the Treasury, which bore responsibility for the collection of taxes by which much of the New Deal was enforced or financed.²⁴ But the reports of several other departments and agencies also shed considerable light on the nature and effects of litigation in which neither Justice nor Treasury was involved.²⁵ In the aggregate, these reports demonstrate that even in a world without universal injunctions,²⁶ intervention by lower federal courts could substantially frustrate the implementation of regional and even national programs for relief, recovery, and reform.

Consider first the Roosevelt administration's program for industrial recovery. The centerpiece of that initiative was the National Industrial Recovery Act (NIRA) and the Codes of Fair Competition (the Codes) promulgated thereunder.²⁷ One hundred sixty-two suits were brought against government officials to enjoin various provisions of the NIRA or the Codes.²⁸ This resulted in the granting of four permanent injunctions, eleven temporary injunctions, and twenty-seven temporary restraining orders (TROs) against the government.²⁹ In many of these cases, the district court did not rule on the constitutionality of the NIRA or Code provision, but instead rested its decision on equitable principles, such as "whether [the] plaintiff was likely to suffer irreparable injury, or

reported by the National Bituminous Coal Commission was contained in the report of the Justice Department, and therefore that Commission would not be submitting a separate report. S. DOC. NO. 75-42, at iii.

24. S. DOC. NO. 75-42, at iii.

25. See, e.g., DEP'T OF AGRIC., S. DOC. NO. 75-38, at 2 ("There will be found many cases, listed below, involving rulings in injunction proceedings adverse to the Government respecting the regulation of such intrastate transactions.").

26. By "universal injunction" I mean an injunction that is binding on the enjoined party throughout the nation, and is not confined in its scope to particular plaintiffs or particular judicial districts or circuits. Such injunctions, which have become increasingly common in recent years, also have been referred to as "national" or "nationwide" injunctions. See Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020). For the sake of convenience, and at the suggestion of the editors, I have adopted the term "universal" without intending to take any position on this difference of opinion over terminology.

27. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), *invalidated* by A. L. A. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

28. S. DOC. NO. 75-42, at 58.

29. *Id.*

whether the Government officer sued was authorized to enforce the law against the plaintiff.”³⁰ In addition, the government successfully brought actions seeking injunctions or criminal penalties in forty-three judicial districts.³¹ The NIRA was held unconstitutional in eighteen of those districts, and Cummings noted that such decisions “served as effectively to restrain further prosecution in [such a] district as the granting of an injunction against the Federal prosecuting officers.”³² Cummings explained that it was “impossible to state definitely how each individual case separately affected the operation of the Government in enforcing” the NIRA, but he recognized that “[e]ach decision necessarily had an important effect upon compliance with the act in the district in which it was handed down.”³³

The NIRA was declared unconstitutional by the Supreme Court in *A. L. A. Schechter Poultry Corp. v. United States* on May 27, 1935, but enforcement of the NIRA had become problematic well before that decision.³⁴ Cummings reported that “[a]fter a number of lower courts had held the act unconstitutional, and when it became apparent that for this, and possibly other reasons, ... enforcement of the act was unlikely, violations became widespread.”³⁵ It was “common knowledge” that “during the last few months before the Schechter decision, the purpose of the act was nullified to a considerable extent by the inability of the Government to enforce it.”³⁶ This may have been due “as much to the decisions denying the constitutionality of the act as to the fact that injunctions were granted restraining its enforcement.”³⁷

The report of the Department of the Interior detailed the litigation concerning the Petroleum Code of the NIRA.³⁸ Section 9(c) of the NIRA authorized the President to prohibit the interstate shipment of so-called “hot oil”—oil produced in excess of the amount

30. *Id.* at 58-59.

31. *Id.* at 59.

32. *Id.*

33. *Id.*

34. 295 U.S. 495, 551 (1935).

35. S. DOC. NO. 75-42, at 59.

36. *Id.*

37. *Id.*

38. S. DOC. NO. 75-37, at 2-5.

permitted by the law of the state of production.³⁹ The President issued such a prohibition by executive order, and also delegated authority to promulgate appropriate rules and regulations to the Secretary of the Interior.⁴⁰ By a separate executive order, the President approved a Code of Fair Competition for the oil industry.⁴¹

A petition filed in the Supreme Court for the District of Columbia sought a temporary injunction against enforcement of the Code on the ground that the NIRA was unconstitutional.⁴² That relief was denied on August 15, 1933, after which the plaintiffs dropped the suit.⁴³ Another injunction was sought by another party before the same court on the same grounds later that year, and the injunction again was denied.⁴⁴ The following year the federal district court for the Eastern District of Texas, the location from which the vast majority of “hot oil” emerged, ruled in a series of cases alleging the unconstitutionality of the government’s oil program.⁴⁵ In two cases, the court held that certain regulations issued by the Secretary of the Interior under the authority of section 9(c), as well as the President’s order, “were not constitutionally supportable, since they were, in effect, an attempt by the Federal Government to regulate production within the State of Texas.”⁴⁶ As the Secretary explained, the court “based its decision upon the theory that the production and refining of oil constituted intrastate business.”⁴⁷ In those actions, according to the Secretary’s report, the court enjoined officials of the Department of the Interior “from requiring reports from refiners and producers” and “further forbade their going on property of *any producer* to discover whether he was in fact overproducing.”⁴⁸

39. National Industrial Recovery Act, ch. 90, § 9(c), 48 Stat. 195 (1933), *invalidated by* Pan. Refining Co. v. Ryan, 293 U.S. 388 (1935).

40. 2 FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 281-82 (1938).

41. *Id.* at 337; *see* Pan. Refining Co. v. Ryan, 293 U.S. 388, 405-12 (1935).

42. S. DOC. NO. 75-37, at 2.

43. *Id.*

44. *Id.*

45. *Id.* at 2-3.

46. *Id.* at 3.

47. *Id.*

48. *Id.* (emphasis added). On its face, the Secretary’s report appears to indicate that the injunctive relief ran in favor not merely of the named plaintiffs, but in favor of *all* refiners and producers—at least those within the Eastern District of Texas. For reasons to doubt that the

Nine days later, in seven consolidated cases in equity, the same federal judge issued a permanent injunction restraining named federal defendants from requiring of the complainants the reports required by the Secretary of the Interior; from instituting any civil or criminal actions against the complainants for alleged violations of the Petroleum Code and regulations; and from going upon the property of the complainants under the authority conferred upon them by the Petroleum Code or by the regulations of the Secretary of the Interior.⁴⁹ The next month, in March 1934, the same judge held in those same seven consolidated cases that a regulation issued by the Secretary of the Interior and certain provisions of the Petroleum Code were not authorized by the NIRA, and that the defendants, in seeking to enforce those measures, “were acting without authority of law and that their acts in so doing deprived the complainants of their property without due process of law.”⁵⁰

That May, the Fifth Circuit reversed the district court on each of these points, and remanded the case with directions to dismiss the bill.⁵¹ But in January 1935, the Supreme Court held in the same consolidated cases that section 9(c) violated the nondelegation doctrine, and directed the district court to grant permanent injunctions restraining the defendant federal officials from enforcing the Petroleum Code.⁵² The Acting Secretary reported that “[t]he effect of the decisions of both the inferior Federal court and the United States Supreme Court in the consolidated cases ... was completely to relieve the restraint on other oil producers and shippers, and to encourage a flood of violations of the regulations of the Secretary of the Interior.”⁵³

In the wake of the *Schechter* decision, Congress enacted the Bituminous Coal Conservation Act of 1935 (Coal Conservation Act).⁵⁴ One portion of this Act authorized a National Bituminous

injunction was understood this broadly at the time, see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 433-34 n.87 (2017).

49. S. DOC. NO. 75-37, at 3.

50. *Id.*

51. *Id.* at 4.

52. *Pan. Refining Co. v. Ryan*, 293 U.S. 388, 414-15 (1935); S. DOC. NO. 75-37, at 4.

53. S. DOC. NO. 75-37, at 5.

54. See Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991, *invalidated by Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

Coal Commission to regulate the price at which bituminous coal was sold in interstate commerce.⁵⁵ Another portion recognized the rights of employees of coal producers to organize and bargain collectively, and created a labor board to adjudicate labor disputes in the coal industry.⁵⁶ As had been the case with the NIRA, enforcement of the Coal Conservation Act again was impeded by the judiciary. Before the Supreme Court declared the Coal Conservation Act unconstitutional in *Carter v. Carter Coal Co.* on May 18, 1936,⁵⁷ 130 suits had been brought seeking to restrain the government from enforcing the Act.⁵⁸ In 121 of these suits, temporary injunctions were issued.⁵⁹ Only four judicial districts declined to issue injunctions pending the resolution of the *Carter* litigation.⁶⁰ This “made it impossible to enforce the act, and no effort was made to enforce it even against companies which had not brought suit.”⁶¹ As Cummings summarized the matter, “For all practical purposes it can be said that the Bituminous Coal Conservation Act never became effective during the 9 months before the Supreme Court decision in ... *Carter*.”⁶²

Consider now the centerpiece of the administration’s program for recovery in the agricultural sector—the Agricultural Adjustment Act of 1933 (AAA).⁶³ The AAA’s objective was to raise the market prices of agricultural commodities by reducing their supply.⁶⁴ The AAA authorized the Secretary of Agriculture to enter into contracts with individual farmers, under which the farmer would agree to reduce his output of specified commodities in exchange for a benefit payment.⁶⁵ These benefit payments were financed by a special excise tax imposed upon the processors of agricultural commodities.⁶⁶ The tax was designed to produce the amount of revenue necessary to

55. *Id.* at 997-98.

56. *Id.* at 1001.

57. 298 U.S. 238, 316-17 (1936).

58. S. DOC. NO. 75-42, at 38.

59. *Id.* at 99.

60. *Id.* at 38.

61. *Id.*

62. *Id.* at 38-39.

63. Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933), *invalidated by* United States v. Butler, 297 U.S. 1 (1936).

64. *Id.* § 2.

65. *Id.* § 8(1).

66. *Id.* § 9(a).

underwrite the benefit payments that had been contracted for, and the statute appropriated the proceeds of the tax for that purpose.⁶⁷

Over the course of the AAA's brief life, 1898 suits were filed in sixty-nine federal district courts to enjoin collection of the processing taxes imposed by the AAA.⁶⁸ Of those cases, the courts granted injunctions or restraining orders in 1600 (84 percent), denied relief in 166 (9 percent), and withheld decisions in the remaining 132 (7 percent).⁶⁹ All of these injunctions were issued before the Supreme Court invalidated the processing tax on January 6, 1936.⁷⁰ In the district courts, where these suits were filed, only six denied relief, while the other sixty-three granted relief.⁷¹ Even in those cases where relief was denied, every circuit court other than the Fifth Circuit stayed collection of the tax pending appeal.⁷² Though fewer than 1766 processors were granted injunctive relief or a stay pending appeal, the amount of tax not collected as a result was approximately \$320 million.⁷³ By contrast, the amount of tax collected from the approximately 73,000 processors who did not file suit was over \$852 million.⁷⁴ In other words, relief granted to fewer than 2.4 percent of the nearly 75,000 processors upon whom the tax was imposed prevented the collection of 27 percent of the total revenue of approximately \$1.172 trillion due under the tax.

Shortly after the Court invalidated the AAA's processing tax, Congress repealed the processing tax imposed by the AAA's companion measure, the Bankhead Cotton Control Act (Cotton Control Act).⁷⁵ Two suits for injunctive relief already had severely complicated the effective enforcement of the Cotton Control Act. *Talmadge v. Page* was an action in the district court for the Middle District of Georgia, in which approximately 2200 cotton producers sought and were granted a temporary injunction preventing collection of the tax.⁷⁶ Cummings reported that this "paralyzed the

67. *Id.* §§ 9(a), 12(b).

68. S. DOC. NO. 75-42, at 1 (1937).

69. *Id.*

70. See *United States v. Butler*, 297 U.S. 1, 68 (1936); S. DOC. NO. 75-42, at 4-36.

71. S. DOC. NO. 75-42, at 1-36.

72. *Id.* at 3.

73. *Id.*

74. *Id.*

75. Bankhead Cotton Control Act, ch. 157, 48 Stat. 598 (1934).

76. S. DOC. NO. 75-42, at 37.

Government's efforts to enforce the Bankhead Act in Georgia."⁷⁷ Meanwhile, a small group of cotton ginner secured a temporary injunction from the district court for the Eastern District of Texas in *Wallace v. Thomas*.⁷⁸ Cummings reported that because of certain features of the program's design, "[t]he effect of this injunction was to tie up the entire cotton crop of the State of Texas."⁷⁹ Though a compromise between the government and counsel for the plaintiffs later settled this dispute, that compromise was secured in the shadow of injunctive relief with far-reaching consequences.⁸⁰ Cummings indicated that injunctions issued by just two federal district courts had effectively frustrated the implementation of the government's program in two of the nation's largest cotton-producing states.⁸¹

The report of the Secretary of Agriculture detailed the difficulties injunctive relief had created in the administration of the AAA's provisions regulating the marketing of agricultural commodities. As originally enacted, section 8(3) of the AAA provided for the regulation through regional licenses of the handling of agricultural commodities "in the current of interstate and foreign commerce."⁸² Those licenses also provided for the regulation of "intrastate transactions ... declared by the licenses to be inextricably intermingled" with interstate transactions.⁸³ Many courts issued injunctions against attempts to regulate intrastate transactions.⁸⁴ The problem was particularly acute with respect to the regulation of milk. Federal courts enjoined enforcement of milk licenses in Chicago, Boston, Los Angeles, Baltimore, Des Moines, Indianapolis, Oklahoma City, Tulsa, Providence, and Southern Illinois.⁸⁵ In each of

77. *Id.*

78. *Id.* at 37-38.

79. *Id.* at 38.

80. *Id.*

81. *See id.* Cummings also reported that in two cases, one from North Carolina and the other from South Carolina, injunctions had been granted against the enforcement of the Tobacco Inspection Act. *Id.* at 88. These cases, he lamented, had "prevented the act from going into operation in several communities." *Id.*

82. S. DOC. 75-38, at 1-2 (quoting Agricultural Adjustment Act, ch. 25, § 8(3), 48 Stat. 31 (1933)).

83. *Id.*

84. *Id.* at 2.

85. *Id.* at 2-4.

these cases, the Secretary reported that the decision “was completely to break down the operation of the license, ... to render impossible the enforcement generally, of the license,”⁸⁶ “to put an end the administration of the license, and ... to cripple the administration of these licenses and to cause cancellation or suspension thereof.”⁸⁷ The report hastened to add that “[t]he succession of injunctions granted against the enforcement of milk licenses ... had the effect also of rendering unenforceable milk licenses issued in areas other than those mentioned.”⁸⁸

Another key objective of the Roosevelt administration was to increase competition and improve services in the public utility sector. In 1935, as part of this effort, Congress enacted the Public Utility Holding Company Act (PUHCA).⁸⁹ The PUHCA was a response to longstanding complaints of a variety of abuses in the public utility industry.⁹⁰ The PUHCA required public utility holding companies to register with and provide certain information to the Securities and Exchange Commission (SEC).⁹¹ Registered companies were in turn subjected to extensive regulation,⁹² and holding companies failing to file a registration statement with the SEC were forbidden to engage in a variety of interstate transactions.⁹³ At the time of Cummings’s report, forty-four suits had been brought in federal district courts to prevent the PUHCA’s enforcement.⁹⁴ Because the government developed a civil suit to test the PUHCA’s constitutionality, and because “it was apparent that the ... suits brought by the holding companies constituted an attempt to harass the Government with a needless multiplicity of suits, no effort was made to defend the suits outside the District of Columbia on their merits.”⁹⁵ As a result, injunctions were issued in twenty-eight of the

86. *Id.* at 3.

87. *Id.* at 4.

88. *Id.* at 5.

89. *See* Public Utility Holding Company Act of 1935, ch. 687, § 1, 49 Stat. 803, 803-04.

90. *See* COMM. ON BANKING, HOUS. & URBAN AFFAIRS, THE PUBLIC UTILITIES HOLDING COMPANY ACT OF 1996, S. REP. NO. 104-365, at 1-2.

91. Public Utility Holding Company Act of 1935 §§ 2(a)(6), 5.

92. *See id.* §§ 6-29.

93. *Id.* § 4(a).

94. SEC. EXCH. COMM’N, INJUNCTIONS IN CASES INVOLVING ACTS OF CONGRESS, S. DOC. NO. 75-43, at 6 (1937); S. DOC. NO. 75-42, at 81.

95. S. DOC. NO. 75-42, at 81-82; *see also* S. DOC. NO. 75-43, at 6 (reviewing the govern-

suits.⁹⁶ The remaining suits were held in abeyance by the courts or by the parties pending the Supreme Court's decision in the civil test case.⁹⁷ "The attitude of the holding companies in adopting a plan of mass refusal to register and bringing suits for injunctions in many courts to forbid enforcement of provisions of the act," Cummings reported, had "seriously embarrassed its administration."⁹⁸ Both the Attorney General and the SEC had "announced that there would be no attempt to enforce the act until its validity had been established by the Supreme Court."⁹⁹ But had the government not taken that position, it was "certain that virtually every major holding company would have seized the opportunity to tie the Government's hands by obtaining injunctions in the Federal courts."¹⁰⁰

The Roosevelt administration also supported the construction of municipally owned utilities financed by grants and loans made by the Public Works Administration (PWA).¹⁰¹ Cummings reported that some form of injunctive relief had been granted in sixty-seven pending suits filed by private utility companies against the federal emergency administrator and other officials of the PWA.¹⁰² These injunctions sought to prevent the PWA from making loans or grants "to municipalities and other public bodies for the purpose of constructing competing publicly-owned and operated electricity generating and distribution systems."¹⁰³ In addition, preliminary injunctions were issued against the Works Progress Administration in two cases: one involving the construction of dams on the Colorado

ment's approach to the forty-four suits brought by the holding companies).

96. S. DOC. NO. 75-42, at 82.

97. S. DOC. NO. 75-43, at 6; S. DOC. NO. 75-42, at 82.

98. S. DOC. NO. 75-42, at 82. *But see* S. DOC. NO. 75-43, at 7 ("The effect of this multiplicity of litigation upon the administration of the Holding Company Act is difficult to determine. The Government's course had been decided when it first became apparent that there was to be a mass defiance of the law on the part of almost all holding companies.")

99. S. DOC. NO. 75-42, at 82; *see also* S. DOC. NO. 75-43, at 7 (explaining the government's course of action regarding the multiplicity of litigation).

100. S. DOC. NO. 75-42, at 82; *see also* S. DOC. NO. 75-43, at 7 (noting the actions taken by the government in order to protect itself).

101. *See* William M. Emmons III, *Franklin D. Roosevelt, Electric Utilities, and the Power of Competition*, 53 J. ECON. HIST. 880, 882-83, 885-86 (1993).

102. *See* S. DOC. NO. 75-42, at 63-81; *see also* FED. EMERGENCY ADMIN. OF PUB. WORKS, INJUNCTIONS IN CASES INVOLVING ACTS OF CONGRESS, S. DOC. NO. 75-27, at 5-27 (1937); FED. EMERGENCY ADMIN. OF PUB. WORKS, PUBLIC WORKS ADMINISTRATION ALLOTMENTS FOR GAS AND ELECTRIC PROJECTS, S. DOC. NO. 74-184, at 2 (1936).

103. S. DOC. NO. 75-42, at 63.

and Brazos Rivers, and the other the construction of an electric generating station and transmission system (the Santee-Cooper Project) in South Carolina.¹⁰⁴ “The effect of the restraining orders and injunctions issued in these cases,” Cummings complained, was “to delay or impede the construction of the particular projects concerned and, consequentially, to deter the ... basic purpose of” the Public Works title of the NIRA, “which was enacted to increase employment quickly.”¹⁰⁵ Moreover, as the General Counsel of the Tennessee Valley Authority (TVA) reported, in some of these cases the municipalities involved had “applied for, or contracted with, the [TVA] for the purchase of power and have held elections authorizing the necessary bond issues.”¹⁰⁶ Because PWA loans and grants “may have the indirect effect of providing an outlet for the [TVA]’s surplus power,” such injunctions “may therefore directly delay the disposition of the [TVA]’s power.”¹⁰⁷

The TVA’s report calculated the damages resulting from five cases in which injunctive relief had been granted against the TVA and/or PWA loans or grants for power projects in which the TVA was involved.¹⁰⁸ In *Ashwander v. Tennessee Valley Authority*, the plaintiff secured a decree invalidating a contract between the TVA and the Alabama Power Company for the sale of electricity, transmission lines, substations, and auxiliary properties.¹⁰⁹ The district court further enjoined various municipalities from making or performing any contracts with the TVA for the purchase of electric power, and from accepting or expending any funds received from the TVA or the PWA for the purpose of constructing a public distribution system to distribute power supplied by the TVA.¹¹⁰ The TVA estimated that its lost revenue from power sales was \$255,000,

104. WORKS PROGRESS ADMIN., INJUNCTIONS IN CASES INVOLVING ACTS OF CONGRESS, S. DOC. NO. 75-25, at 2-3.

105. S. DOC. NO. 75-42, at 63; *see also id.* at 95 (“The effect of these cases upon the Treasury has been to tie up indefinitely the disbursement of funds” that are “to be used in the construction of municipally owned electric light and power plants and water works”).

106. TENN. VALLEY AUTH., INJUNCTIONS IN CASES INVOLVING ACTS OF CONGRESS, S. DOC. NO. 75-44, at 1.

107. *Id.*

108. *Id.* at 1-4, 1 n.1.

109. *Id.* at 1 n.1.

110. *See Ashwander v. Tenn. Valley Auth.*, 9 F. Supp. 965, 967 (N.D. Ala. 1935), *rev’d*, 78 F.2d 578 (5th Cir. 1935), *aff’d*, 297 U.S. 288 (1936).

that its legal expenses were \$100,000, and that the loss to consumers was \$315,000.¹¹¹ In *Alabama Power Co. v. Ickes*, the plaintiff secured an order enjoining PWA officials from making loans or grants to four cities in northern Alabama for the construction of municipal electrical distribution systems.¹¹² The TVA estimated that its resulting lost revenue was \$188,000, and that the loss to consumers was \$217,000.¹¹³ In *Kentucky-Tennessee Light & Power Co. v. Ickes*, the plaintiff secured an order enjoining PWA officials from making loans or grants “to the city of Paris[, Tennessee,] for the purpose of constructing or financing a municipal power plant.”¹¹⁴ The TVA estimated that its resulting lost revenue was \$18,000, and that the loss to consumers was \$84,000.¹¹⁵ In *Tennessee Public Service Co. v. Ickes*, the court enjoined the PWA from making any loan or grant to the city of Knoxville for the construction of a municipal power system.¹¹⁶ The TVA estimated that its resulting lost revenue was \$370,000, and that the loss to consumers was \$545,000.¹¹⁷

The most costly and consequential injunction was the one issued in *Tennessee Electric Power Co. v. Tennessee Valley Authority*.¹¹⁸ There, nineteen power companies, “including all the major utilities within transmission distance of any present or proposed dam of the [TVA],” sought to enjoin the TVA from executing the Tennessee Valley Authority Act and the “power program” authorized by the Act.¹¹⁹ After a hearing, District Judge John J. Gore enjoined the defendants “from making any new contracts for the sale of electricity or providing any additional facilities for electric service in the claimed service area of the complainants or any of them.”¹²⁰ This “sweeping ... decree broadly delay[ed] the [TVA]’s entire operations, the negotiating of contracts, the provision of additional facilities, as

111. S. DOC. NO. 75-44, at 5-6.

112. *Id.* at 2.

113. *Id.* at 6.

114. *Id.* at 2-3.

115. *Id.* at 6.

116. *Id.* at 3.

117. *Id.* at 6-7.

118. *See id.* at 5-8.

119. *Id.* at 3.

120. *Id.* at 3-4.

well as the performance of existing contracts.”¹²¹ “It [was] only fair to say that the decree, unless reversed, [would] delay, for at least 6 ½ months, the ultimate disposition of all the [TVA]’s available surplus power, amounting to more than 200,000 kilowatts.”¹²²

The TVA estimated its lost revenue resulting from the *Tennessee Power* decree at \$1.5 million and its direct legal expenses at \$50,000.¹²³ The TVA considered its projected loss to consumers of “25 to 30 percent of the present charges ... a very conservative estimate.”¹²⁴ The report also observed that the decree would require the TVA to discharge 650 employees whose services no longer would be needed, representing a payroll of \$1 million.¹²⁵ It estimated “[t]he cost of hiring and training new employees at a later date” to be about \$150,000.¹²⁶ In addition, all of “the work and expense in preparation for advertising for materials needed in construction projects” that had been enjoined would be “wasted.”¹²⁷ The decree also prohibited the provision of additional facilities for existing customers.¹²⁸ This meant that the TVA could not supply any increased requirements of those customers, and that “existing service would be jeopardized by overtaxing existing facilities.”¹²⁹ Finally, the injunction retarded the TVA’s effort to provide electrical service to rural customers, by enjoining the construction of over 1000 miles of rural lines, thereby preventing “service to more than 4,450 rural residents who have never been served by anyone before.”¹³⁰

More generally, the report remarked that “no dollars-and-cents estimate can accurately portray the loss in the waste of the public resources caused by the inability of the [TVA] to dispose of its available water power.”¹³¹ The objective of the Tennessee Valley

121. *Id.* at 7.

122. *Id.*

123. *Id.* at 7-8.

124. *Id.* at 8.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 7-8.

129. *Id.* at 8.

130. *Id.* In two additional cases, *Ruble v. Tennessee Valley Authority* and *Georgia Power Co. v. Tennessee Valley Authority*, no restraining orders or injunctions had been issued. *Id.* at 3-4. The report estimated the combined legal expenses for the two cases at \$10,000. *Id.* at 8.

131. *Id.*

Authority Act was “to end this waste by making a wide distribution of the benefits of this natural resource.”¹³² But as a result of the injunctions, “three-quarters of all the power disposed of by the [TVA] has been disposed of to the power companies. Thus, the monopoly of Government-owned power which the act sought to end has been perpetuated by injunction.”¹³³ Moreover, “[r]epeated injunctions threaten[ed] the continuity and dependability of [the TVA’s] operations upon which the public trust and confidence” rested.¹³⁴ The result was that “[t]he operation of important provisions of the act must ... be suspended until any possible doubt as to the validity of any part of it is resolved by the Supreme Court.”¹³⁵ This situation adversely affected “the attitude and morale” at the TVA, and made it difficult to attract and retain quality personnel.¹³⁶

A particularly irksome feature of *Tennessee Electric Power Co. v. Tennessee Valley Authority* was the forum shopping that led to the injunction. Democrats Hugo Black of Alabama and Kenneth McKellar of Tennessee joined Nebraska Independent George Norris in rising on the Senate floor to decry the peripatetic litigation that ultimately tied the hands of the TVA.¹³⁷ The senators explained that the Georgia Power Company had filed suit in Georgia state court seeking to enjoin the activities of the TVA in Georgia.¹³⁸ The case was removed to federal court, where Judge Samuel H. Sibley upheld the Tennessee Valley Authority Act’s constitutionality and denied the petition for a preliminary injunction.¹³⁹ The Georgia Power Company thereafter joined with eighteen other power companies in filing suit for an injunction against the TVA in the Northern District of Alabama.¹⁴⁰ On the day before the hearing on the petition, presumably out of concern that the relief requested would be denied,

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 9.

136. *Id.* at 8-9; see also FED. POWER COMM’N, RESTRAINING ORDERS AND INJUNCTIONS INSTITUTED AGAINST PUBLIC ELECTRIC PROJECTS, S. DOC. NO. 74-182, at 7-9, 19-23, 25, 38, 48 (1936).

137. See 81 CONG. REC. 479-80 (1937) (statements of Sens. Black, McKellar, and Norris).

138. *Id.* at 479 (statement of Sen. Black).

139. *Id.* at 480 (statements of Sens. McKellar and Norris).

140. *Id.*

the companies dismissed the suit.¹⁴¹ Meanwhile, the nineteen companies filed a similar suit in Tennessee state court.¹⁴² That suit was removed to the federal district court for the Eastern District of Tennessee, but the judge there recused himself on the ground that his wife owned stock in one of the power companies that was party to the suit.¹⁴³ The suit accordingly was transferred to the presiding judge for the Middle District of Tennessee, who finally issued the injunction.¹⁴⁴ Thus, as Senator Norris summarized the situation, “the power companies traveled around from one court to another,”¹⁴⁵ “through Georgia, Alabama, and finally into Tennessee, hunting a judge who was willing to grant their prayer.”¹⁴⁶ That “sweeping injunction,”¹⁴⁷ complained Senator McKellar, “issued by a single Federal district judge,”¹⁴⁸ “stopped the entire T.V.A.”¹⁴⁹ The federal government, Senator Norris agreed, had “been made impotent and helpless by injunctions issued at the behest of the private power companies.”¹⁵⁰

The NIRA and the Emergency Relief Appropriation Act of 1935 tasked the Federal Emergency Administrator of Public Works with the development of low-cost housing projects around the country.¹⁵¹ The condemnation proceedings initiated pursuant to these development plans resulted in district court rulings for the government.¹⁵² Several of these cases were brought in the Northern District of Georgia, the Northern District of Ohio, the Middle District of Alabama, the Southern District of Indiana, and the Northern

141. *Id.* (statement of Sen. Norris).

142. *Id.*

143. *Id.* (statements of Sens. McKellar and Norris).

144. *See id.*; *id.* at 1104-05 (statement of Sen. McKellar); *id.* at 2143 (statement of Sen. Norris). The federal district court for the Northern District of Georgia responded by enjoining enforcement of the *Tennessee Power* decree in Georgia. *Id.* at 479-80.

145. *Id.* at 480.

146. *Id.* at 2143.

147. *Id.* at 557.

148. *Id.* at 553.

149. *Id.* at 1105. It had the effect of “putting at naught” the statute establishing the TVA, and “virtually halting and tying up the entire [TVA] program.” *Id.* at 553.

150. *Id.* at 2143.

151. *See* INJUNCTIONS IN CASES INVOLVING ACTS OF CONGRESS, S. DOC. NO. 75-27, at 1-2 (1937).

152. *See id.*

District of Illinois.¹⁵³ But unfavorable decisions in the District of Columbia and the Western District of Kentucky led to projects being abandoned.¹⁵⁴ Particularly troubling to the administration was the Sixth Circuit decision affirming the judgment of the District Court in Louisville.¹⁵⁵ The PWA's report complained that this decision

seriously hampered the Federal Emergency Administration of Public Works in the acquisition of land for use in connection with slum-clearance and low-rent housing projects ... by throwing a cloud on the power to acquire such land by eminent domain, thereby making the only safe method of land acquisition that of purchase of necessary sites.¹⁵⁶

As a result, "[n]umerous slum-clearance and low-rent housing projects had to be abandoned and proposed projects were not undertaken because necessary land could not be acquired without resort to the power of eminent domain."¹⁵⁷

The case of *Railroad Retirement Board v. Alton Railroad* involved a joint bill in equity brought by 135 railroads to enjoin the enforcement of the Railroad Retirement Act of 1934.¹⁵⁸ That Act, which rested on the power of Congress to regulate interstate commerce, established a compulsory retirement and pension system for employees of the railroad industry, financed by exactions imposed upon railroad companies.¹⁵⁹ The Supreme Court of the District of Columbia held the Railroad Retirement Act unconstitutional and issued an injunction;¹⁶⁰ this judgment was affirmed by the Supreme Court of the United States.¹⁶¹ Congress responded by grounding the program in its powers to tax and spend, separating the provisions of the statute providing pensions for railroad employees from the provisions imposing taxes on the railroads, thereby enacting the

153. *Id.*

154. *Id.* at 2-3.

155. *Id.* at 3.

156. *Id.*

157. *Id.* By contrast, suits seeking to enjoin construction of projects on land that already had been acquired did not adversely affect the administration's operations. *Id.* at 3-5.

158. See Railroad Retirement Act, ch. 868, 48 Stat. 1283 (1934).

159. *Id.* §§ 4, 6.

160. S. DOC. NO. 75-42, at 85; see also R.R. RET. BD., S. DOC. NO. 75-26, at 1-2.

161. R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 374 (1935).

Railroad Retirement Act of 1935¹⁶² and the Carriers Taxing Act of 1935.¹⁶³ The railroads then brought suit to enjoin enforcement of the Carriers Taxing Act in the federal district court for the District of Columbia, where they were again successful.¹⁶⁴ Meanwhile, three smaller railroads that were not parties to the *Alton* litigation had been granted temporary injunctions or restraining orders pending resolution of the appeal in the second *Alton* case.¹⁶⁵

To be sure, the administration's experience in the lower federal courts was not uniformly negative. For example, Cummings reported that "[a]lthough injunctions have been granted in particular cases arising under the Railway Labor Act, as amended in 1934, it cannot be said that any of these cases seriously interfered with the effectiveness of the act. The act has been held constitutional whenever challenged."¹⁶⁶ This was confirmed by the report of the National Mediation Board, whose chairman added that "[t]he action of the courts has uniformly strengthened the law and been of great assistance in clarifying its administration."¹⁶⁷ Parties seeking to enjoin the collection of taxes imposed by the Social Security Act were similarly unsuccessful.¹⁶⁸ Of the seven district courts that ruled in such cases, six denied injunctions, and one granted a restraining order.¹⁶⁹ "The effect of that order," Cummings explained, had been merely "to relieve that particular complainant from paying its taxes up to the present time."¹⁷⁰

Commissioner James Landis reported that administration of the Securities Act of 1933 had not been seriously embarrassed by suits seeking injunctive relief, as only three such suits had been brought.¹⁷¹ In one of these cases, the prayer for a preliminary injunction had been denied, which permitted the Commission's

162. See ch. 812, 49 Stat. 967.

163. See ch. 813, 49 Stat. 974.

164. *Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955, 959 (D.D.C. 1936).

165. S. DOC. NO. 75-42, at 85.

166. *Id.* at 86.

167. S. DOC. NO. 75-41, at 3.

168. S. DOC. NO. 75-42, at 87.

169. *Id.*

170. *Id.* Similarly, in the only circuit court action in such a suit, the Fifth Circuit denied stays pending appeals by complainants from the adverse decision of the district court for the Northern District of Alabama. *Id.*; see also SOC. SEC. BD., S. DOC. NO. 75-28, at 1-2.

171. See S. DOC. NO. 75-43, at 1-2.

investigation to continue.¹⁷² In the other two, the Commission had not even contemplated any action against the plaintiffs.¹⁷³ In one of these, a motion to dismiss due to jurisdictional defects and improper venue was still pending at the time of the report.¹⁷⁴ In the other, the plaintiff dismissed the suit without prejudice.¹⁷⁵ The Commission prevailed in *Securities & Exchange Commission v. Wickham*,¹⁷⁶ where the federal district court for the District of Minnesota denied the defendant's motion for a preliminary injunction, and upheld the statute as an exercise of the commerce power.¹⁷⁷ Only in one case was the Commission's investigation impeded by stays pending appeal from decisions adverse to the defendant.¹⁷⁸

Landis reported a similar lack of judicial obstruction of the Commission's enforcement of the Securities Exchange Act of 1934. In one case, the plaintiff sought to enjoin enforcement of section 15 of the Securities Exchange Act, which required registration of brokers and dealers engaged in over-the-counter market transactions in securities.¹⁷⁹ Here again, the Commission did not contemplate any action against the plaintiff under that section in this case because the provision "was apparently inapplicable to him."¹⁸⁰ The case in the meantime likely had become moot due to revisions to the Securities Exchange Act Congress adopted in 1936.¹⁸¹ In a second case, the stay pending appeal from a decision in the Southern District of New York adverse to the defendant did not "seriously retard[]" the Commission's efforts because of the Second Circuit's prompt affirmance of the judgment of the lower court.¹⁸² In addition, a provision of the Securities Exchange Act permitted any person filing an application or report with the Commission to object to public disclosure of the information contained within the application.¹⁸³

172. *Id.* at 2.

173. *See id.* at 1-2.

174. *Id.*

175. *Id.* at 2.

176. 12 F. Supp. 245, 249 (D. Minn. 1935).

177. *See id.*; S. DOC. NO. 75-43, at 2.

178. S. DOC. NO. 75-43, at 2-3.

179. *Id.* at 3-4.

180. *Id.*

181. *Id.* at 4.

182. *Id.*

183. *Id.*

In approximately thirty of the cases in which the Commission refused confidential treatment of the information, suits were filed seeking review of the Commission's determination in the circuit courts of appeals.¹⁸⁴ In twenty of those cases, the registrants secured stays of Commission orders denying confidential treatment pending a final determination by the court.¹⁸⁵ As Landis pointed out, however, those stays were redundant because the Commission had adopted a rule providing "for such nondisclosure pending the conclusion of proceedings for review."¹⁸⁶

Nor did injunctive relief substantially impede the enforcement of the National Labor Relations Act. National Labor Relations Board Chairman J. Warren Madden reported that eighty-three suits seeking such relief were brought in the federal district courts.¹⁸⁷ Temporary injunctions were granted in eighteen of those cases, and permanent injunctions were issued in two.¹⁸⁸ In the remaining fifty-two suits, injunctive relief was denied.¹⁸⁹ Of the twenty cases in which injunctions were granted, the board appealed eighteen.¹⁹⁰ Of those eighteen cases, seven were reversed, three were affirmed, and one was withdrawn because the temporary injunction below had been dissolved.¹⁹¹ The remaining seven appeals were pending.¹⁹²

Of the fifty-two district court decisions denying injunctions, appeals were taken in twenty-three cases.¹⁹³ Thirteen of those decisions were affirmed in circuit courts of appeal, while none had been reversed.¹⁹⁴ Seven remained pending in the circuit courts, while eight were pending in the Supreme Court.¹⁹⁵ In three cases, appeals had been withdrawn.¹⁹⁶ The Supreme Court denied certiorari in a case in which the Fifth Circuit affirmed the district

184. *Id.*

185. *Id.*

186. *Id.*

187. NAT'L LABOR RELATIONS, S. DOC. NO. 75-29, at 1.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 2.

196. *Id.*

court's denial of a petition for an injunction.¹⁹⁷ Stays pending appeal were granted in the Eighth Circuit, but denied in the Second, Sixth, and Ninth Circuits.¹⁹⁸ Stays were granted by the U.S. Court of Appeals for the District of Columbia Circuit, though on final hearing the stays were vacated and the lower court's denial of the injunctions was affirmed.¹⁹⁹ Thus, though there was some conflict among the lower courts, Madden concluded that "the great weight of authority in the district courts has been that the National Labor Relations Board could not be enjoined."²⁰⁰ Similarly, while the First and Eighth Circuits held that the Board's procedure could be enjoined, the Second, Fifth, Sixth, Seventh, and Ninth Circuits held the contrary.²⁰¹

Meanwhile, several other less prominent components of the administration's program also escaped serious judicial embarrassment.²⁰² But there can be little doubt that officials in the Departments of Justice, Treasury, Agriculture, and the Interior, along with the National Recovery Administration, the National Bituminous Coal Commission, the Securities and Exchange Commission, the Federal Emergency Administration of Public Works, the Works Progress Administration, the Tennessee Valley Authority, and the Railroad Retirement Board, as well as the senators that commissioned each of their reports, believed that the granting of injunctive relief by lower federal courts posed major and sometimes decisive obstacles to the successful implementation of key elements of the New Deal.

Despite the fact that the universal injunction had yet to emerge, it appears that injunctive relief in the New Deal period was effective either to prevent or to substantially hinder the execution of federal law in three types of situations. With respect to the first two of these categories, there was some overlap. The first category was where there was a joint bill in equity brought by a critical mass of the

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. These included the Connally Hot Oil Act, S. DOC. NO. 75-42, at 41; the Economy Act of 1932, *id.* at 42-43; the Gold Hoarding Act of March 9, 1933, and the Gold Reserve Act of 1934, *id.* at 44-45.

regulated parties. This was the case, for example, with the suit to restrain enforcement of the Railroad Retirement Act brought in the District of Columbia;²⁰³ the suit to restrain enforcement of the Cotton Control Act in Georgia;²⁰⁴ and the action to restrain execution of the act creating the TVA in Tennessee.²⁰⁵ It appears that in these cases, the injunctive relief granted frustrated implementation of the respective programs as effectively as a universal injunction might have.

The second category, which, as mentioned, overlaps to some extent with the first, was where the challenged program was regional in character. This was the case with respect to the TVA,²⁰⁶ the Hot Oil provisions of the NIRA,²⁰⁷ and the Cotton Control Act.²⁰⁸ In such cases, there was no need for a universal injunction in order to prevent effective implementation of the programs. Shutting down the TVA in the Tennessee Valley, enjoining enforcement of the Hot Oil provisions in East Texas, and making it impossible to implement the Cotton Control Act in Georgia and Texas, effectively prevented federal regulators from attaining their policy goals.

The third and largest category involved cases in which relief was granted in so many individual cases that the challenged program could not be enforced effectively. This appears to have been the case with the AAA,²⁰⁹ where sufficient revenue to fund the entire program could not be collected; the NIRA²¹⁰ and the Guffey Coal Act,²¹¹ where a combination of lower court injunctions and decisions declaring the acts unconstitutional made enforcement of the acts by the government impossible; and the agricultural marketing provisions of the AAA, where invalidation of marketing licenses in many major metropolitan areas caused a breakdown of the program's enforcement outside the districts in which injunctive relief had been secured.²¹²

203. *See supra* text accompanying notes 158-65.

204. *See supra* text accompanying notes 75-81.

205. *See supra* text accompanying notes 105-50.

206. *See supra* text accompanying notes 105-50.

207. *See supra* text accompanying notes 38-53.

208. *See supra* text accompanying notes 75-81.

209. *See supra* text accompanying notes 63-74.

210. *See supra* text accompanying notes 27-37.

211. *See supra* text accompanying notes 54-62.

212. *See supra* text accompanying notes 82-88. With respect to this third category of cases,

II. CONGRESSIONAL RESPONSES

A. *Program Redesign*

Congress employed a number of strategies in response to these obstacles. One was to revise or reformulate these programs so as to rectify their constitutional defects.²¹³ The Hot Oil program was reenacted by the Connally Act in 1935, which did not contain the delegation of power that had doomed section 9(c) of the NIRA.²¹⁴ The revised measure was upheld in every reported lower-court challenge²¹⁵ and by the Supreme Court.²¹⁶ In 1937, Congress reenacted the price regulation provisions of the Bituminous Coal Conservation Act, but omitted the labor regulation provisions that the Court had found unconstitutional.²¹⁷ Again, the revised measure easily weathered constitutional challenge.²¹⁸ The AAA was revised so that it regulated the marketing of agricultural commodities under the commerce power rather than the production of commodities under the fiscal powers.²¹⁹ That revised statute was likewise sustained upon judicial review.²²⁰

it appears that the emergence of the universal injunction lowered the direct litigation costs required to frustrate implementation of federal programs. With respect to the overlapping first two categories, the universal injunction reduces the coordination costs imposed by the formulation of a joint bill in equity, and also creates significant opportunities for free riding.

213. I relate each of the stories contained in this paragraph in greater detail in Barry Cushman, *The Hughes Court and Constitutional Consultation*, 1 J. SUP. CT. HIST. 79 (1998).

214. See Connally Hot Oil Act, ch. 18, 49 Stat. 30 (1935).

215. See *Genecov v. Fed. Petroleum Bd.*, 146 F.2d 596, 598 (5th Cir. 1944); *President of the U.S. v. Skeen*, 118 F.2d 58, 59 (5th Cir. 1941); *Hurley v. Fed. Tender Bd. No. 1*, 108 F.2d 574, 576 (5th Cir. 1939); *Griswold v. President of the U.S.*, 82 F.2d 922, 926 (5th Cir. 1936); *President of the U.S. v. Artex Refineries Sales Corp.*, 11 F. Supp. 189, 192 (S.D. Tex. 1935).

216. *United States v. Powers*, 307 U.S. 214, 216-18 (1939).

217. See Bituminous Coal Conservation Act of 1937, ch. 127, 50 Stat. 72.

218. See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 907, 912-14 (1940). Congress similarly revised the Frazier-Lemke Farm Debt Relief Act, ch. 869, 48 Stat. 1289 (1934), which was held unconstitutional by a unanimous Court in *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935). The revised statute, Act of Aug. 28, 1935, ch. 792, 49 Stat. 942, was unanimously upheld in *Wright v. Vinton Branch of Mountain Tr. Bank*, 300 U.S. 514, 456-57 (1937). See Cushman, *supra* note 213, at 81-84.

219. Agricultural Adjustment Act of 1938, ch. 30, § 2, 52 Stat. 31.

220. *Mulford v. Smith*, 307 U.S. 38, 47-51 (1939).

As indicated above, the revision of the Railroad Retirement Act was the mirror image of the AAA reformulation—grounding the statute in the fiscal powers rather than in the commerce power—but with a twist. While the board’s appeal from the decision of the D.C. Circuit invalidating the revised statute was pending, President Roosevelt suggested that representatives from all of the major railroads sit down with representatives from all of the major railway unions to hammer out a pension deal satisfactory to all concerned.²²¹ The resulting agreement was codified in the Carriers Taxing Act of 1937²²² and the Railroad Retirement Act of 1937.²²³ Though sponsors of the revised program professed their belief that each bill was constitutional,²²⁴ California Democratic Representative Clarence Lea assured his colleagues that “[f]riends of this legislation, in my judgment, need not particularly fear ultimate Court disposal of this problem.”²²⁵ For as Michigan Republican Representative Carl Mapes explained: “It is agreed between the representatives of the railroads and the brotherhoods that they will not contest the constitutionality of this legislation ... and that they will use their influence against having anyone else bring such action.”²²⁶ The parties kept their agreement,²²⁷ and the retirement system that they created remains with us in modified form today.²²⁸ Note, however, that in order for Congress to achieve its legislative objective, it was necessary to persuade the parties with standing not to challenge the program’s constitutionality in court; it was clear that a single injunction issuing from a single court in the District of Columbia could grind the program’s administration to a halt.

Another strategy was to redesign a program so that no one would have standing to challenge it. The benefit payments under the first AAA were underwritten by an earmarked excise tax on processors

221. See Cushman, *supra* note 213, at 90, 107-09.

222. ch. 405, 50 Stat. 435.

223. ch. 382, 50 Stat. 307.

224. Cushman, *supra* note 213, at 90, 109 nn.112 & 114.

225. 81 CONG. REC. 6081 (1937).

226. *Id.* at 6087; see also Cushman, *supra* note 213, at 109 n.114.

227. See Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 693 (1946) (reporting that the “validity” of the revised retirement program “has never been challenged”).

228. See Railroad Retirement Act of 1974, 45 U.S.C. § 231 (2012); I.R.C. §§ 3221-3232 (2012).

because President Roosevelt insisted that the program “finance itself” rather than draw on the Treasury’s general revenues.²²⁹ It was this feature of the statute that provided standing to challenge the program.²³⁰ After the Court struck down the processing tax, the government continued to make the promised benefit payments to farmers, but now out of general revenue.²³¹ In 1923, the Court had held unanimously that a taxpayer’s interest in the moneys of the federal treasury was too “minute and indeterminable” to enable her to invoke the power of equity to enjoin a federal program financed by general revenues.²³² Indeed, many of the New Deal’s spending programs were designed so that they were financed from general revenue, and thus insulated from judicial review by this “taxpayer standing” doctrine.²³³

Congress took advantage of this feature of constitutional doctrine in redesigning its agricultural program. Less than two months after the *Butler* decision, Congress enacted the Soil Conservation and Domestic Allotment Act of 1936.²³⁴ The statute appropriated \$500 million to pay farmers to shift their acreage from soil-depleting, surplus crops to soil-building crops such as grasses and legumes.²³⁵ Over the objections of congressional opponents,²³⁶ the payments under the Soil Conservation Act were made from general revenue rather than from the proceeds of an earmarked tax, which meant that no taxpayer had standing to challenge the program.²³⁷

229. RAYMOND MOLEY, *THE FIRST NEW DEAL* 250 (1966); see ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 97 (1959).

230. See DEAN ALFANGE, *THE SUPREME COURT AND THE NATIONAL WILL* 180-81 (1937); Cushman, *supra* note 213, at 91-92.

231. See ALFANGE, *supra* note 230, at 180-81.

232. *Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923).

233. See Cushman, *supra* note 213, at 91-92.

234. ch. 104, 49 Stat. 1148.

235. See *id.* §§ 7, 15-16.

236. See, e.g., 80 CONG. REC. 1771-98 (1936) (statement of Sen. Hastings).

237. FRANK FRIEDEL, *FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY* 192 (1990); Richard S. Kirkendall, *The New Deal and Agriculture*, in *THE NEW DEAL: THE NATIONAL LEVEL* 83, 94 (John Braeman et al. eds., 1975); CARL BRENT SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 838 (2d ed. 1954); Stern, *supra* note 227, at 689-90.

B. Judicial Appointments

In addition to these adaptations through program redesign, Congress and the administration pursued two other means of reducing resistance to the New Deal in the lower federal courts. When 1936 came to a close, there were forty-seven circuit court judgeships²³⁸ and 160 permanent Article III district court judgeships.²³⁹ By the end of that year, twelve Roosevelt appointees had been confirmed to the federal courts of appeals, comprising slightly over a quarter of the circuit court bench.²⁴⁰ At the district court level, only thirty-five of Roosevelt's nominees, comprising approximately 21.8 percent of the trial court bench, had been confirmed.²⁴¹ Moreover, approximately one-third of those appointments had been to districts in border states or states of the old Confederacy,²⁴² where Democrats tended to be more conservative than their Northern counterparts. Just as he was denied the opportunity to make any appointments to the Supreme Court during his first term,²⁴³ Roosevelt also had not yet been able to change the face of the lower federal judiciary.

An additional means of increasing the number and proportion of Roosevelt appointees was to increase the number of federal judgeships.²⁴⁴ The 74th Congress pursued this strategy with alacrity,

238. *Chronological History of Authorized Judgeships—Courts of Appeals*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals> [<https://perma.cc/GXK5-YT8D>].

239. *Chronological History of Authorized Judgeships—District Courts*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts> [<https://perma.cc/C9XV-JBGC>].

240. See *Federal Judges Nominated by Franklin Delano Roosevelt*, BALLOTPEDIA, https://ballotpedia.org/federal_judges_nominated_by_Franklin_Delano_Roosevelt [<https://perma.cc/X98U-ZY9S>].

241. *List of Federal Judges Appointed by Franklin D. Roosevelt*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_federal_judges_appointed_by_Franklin_D._Roosevelt [<https://perma.cc/VAP5-63FA>] (citing *Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., <https://fjc.gov/history/judges> [<https://perma.cc/XY9M-98LG>]).

242. See *id.*

243. See *id.*

244. An alternative was to create vacancies through impeachment of judges appointed by Republican presidents. Democratic Representative Byron Scott of California pursued this approach when on August 5, 1935, he introduced (by request) a House resolution calling for investigation into the conduct of six lower court judges: three appointed by President Harding, two by President Coolidge, and one by President Hoover. H.R. Res. 330, 74th Cong. (1935);

creating eleven new district court judgeships and making permanent fifteen temporary district court judgeships that had been created in earlier years.²⁴⁵ During Roosevelt's first term, Congress also created a new judgeship for the Ninth Circuit and made a temporary judgeship there permanent.²⁴⁶ Indeed, the pace at which the Congress created new judgeships frequently attracted the criticism of opponents.²⁴⁷ Members of the 75th Congress continued these efforts to enlarge the personnel of the lower federal courts. By the time President Roosevelt unveiled his Court-packing plan on February 5, 1937,²⁴⁸ bills had been introduced to create eight new district judgeships²⁴⁹ and four new circuit judgeships.²⁵⁰ The next several months witnessed the introduction of bills to create an

79 CONG. REC. 12,766 (1935). The measure was referred to the Judiciary Committee and proceeded no further.

245. See Act of June 22, 1936, ch. 696, 49 Stat. 1806; Act of June 22, 1936, ch. 695, 49 Stat. 1805; Act of June 22, 1936, ch. 694, 49 Stat. 1804; Act of June 22, 1936, ch. 693, 49 Stat. 1804; Act of June 16, 1936, ch. 585, 49 Stat. 1523; Act of June 15, 1936, ch. 544, 49 Stat. 1491; Act of Aug. 28, 1935, ch. 793, 49 Stat. 945; Act of Aug. 19, 1935, ch. 558, 49 Stat. 659; Act of Aug. 2, 1935, ch. 425, 49 Stat. 508.

246. Act of Aug. 2, 1935, ch. 425, 49 Stat. 508; Act of June 16, 1933, ch. 102, 48 Stat. 310-11.

247. See, e.g., 80 CONG. REC. 8749-50 (1936) (statement of Sen. Young); 80 CONG. REC. 5736 (1936) (statement of Sen. Wolcott); 79 CONG. REC. 14,244-45 (1935) (statement of Sen. Norris); 79 CONG. REC. 13,414-15 (1935) (statement of Sen. King); 79 CONG. REC. 11,354 (1935) (statement of Rep. Truax).

248. SHESOL, *supra* note 1, at 284-85.

249. See H.R. 4345, 75th Cong., 81 CONG. REC. 875 (1937) (Western District of Virginia); S. 1342, 75th Cong., 81 CONG. REC. 675 (1937) (Western District of Virginia); S. 838, 75th Cong., 81 CONG. REC. 252 (1937) (creating a "mountain district" of Tennessee and a judgeship therein); H.R. 2708, 75th Cong., 81 CONG. REC. 196 (1937) (Southern District of Texas); H.R. 2707, 75th Cong., 81 CONG. REC. 196 (1937) (Western District of Washington); S. 490, 75th Cong., 81 CONG. REC. 111 (1937) (Southern District of Texas); S. 487, 75th Cong., 81 CONG. REC. 111 (1937) (Western District of Washington); S. 364, 75th Cong., 81 CONG. REC. 70 (1937) (District of North Dakota); S. 326, 75th Cong., 81 CONG. REC. 70 (1937) (District of New Mexico); H.R. 257, 75th Cong., 81 CONG. REC. 30 (1937) (Eastern District of Michigan); H.R. 83, 75th Cong., 81 CONG. REC. 25 (1937) (Western District of New York).

250. S. 1192, 75th Cong., 81 CONG. REC. 547 (1937) (Fifth Circuit); S. 563, 75th Cong., 81 CONG. REC. 112 (1937) (creating a new Eleventh Circuit Court of Appeals and three judgeships therein).

additional three district court judgeships²⁵¹ as well as three more circuit judgeships.²⁵²

President Roosevelt's Court-packing bill pursued this strategy with a vengeance. The bill would have allowed the appointment of up to fifty new judges to the federal courts.²⁵³ Because the bill would have permitted up to six appointments to the Supreme Court—precisely the number that President Roosevelt believed he needed in order to have a “dependable Court”²⁵⁴—Roosevelt's proposal would have authorized the appointment of up to forty-four new circuit and district court judges.²⁵⁵ Over time this would have brought the total number of Roosevelt appointments to those courts to 99 out of 255, or more than 35 percent of the lower federal bench.²⁵⁶

While the President's bill was pending, other bills to create additional judgeships made little headway. By year's end, Congress had created only three new judgeships: one for the Southern District of Ohio, which had a rapidly expanding docket, so that Cincinnati might have a resident federal district judge;²⁵⁷ and two for the Ninth

251. H.R. 8168, 75th Cong., 81 CONG. REC. 8348 (1937) (providing an additional district judge in Connecticut); S. 2484, 75th Cong., 81 CONG. REC. 5047 (1937); H.R. 7280, 75th Cong., 81 CONG. REC. 5096 (1937) (dividing the District of New Jersey into two judicial districts, and creating a judgeship for the Southern District); S. 2010, 75th Cong., 81 CONG. REC. 2803 (1937) (providing an additional judge to the Southern District of Ohio).

252. H.R. 6907, 75th Cong., 81 CONG. REC. 4314 (1937) (one additional judgeship for the Sixth Circuit); S. 1550, 75th Cong., 81 CONG. REC. 1271 (1937) (two additional judgeships for the Ninth Circuit).

253. S. 1392, 75th Cong., 81 CONG. REC. 956 (1937); H.R. 4417, 75 Cong., 81 CONG. REC. 946 (1937); *see also* H.R. 4417, 75th Cong. (1937).

254. *See* Cushman, *supra* note 3, at 1, 16.

255. *See* 81 CONG. REC. 5384 (1937) (statement of Rep. Robson of Kentucky) (“I am sure the gentleman has read the President's bill which provides for 44 roving judges hereinafter to be appointed.”). Not all of these judgeships would have been created immediately. As of February 5, 1937, there were only nineteen lower federal court judges who had reached retirement age. S. REP. NO. 75-711, at 4 (1937).

256. *See supra* text accompanying notes 240-41, 255.

257. *See* Act of Aug. 25, 1937, ch. 771, 50 Stat. 805; *To Authorize the Appointment of an Additional Judge for Southern District of Ohio: Hearing on S. 2010 Before Subcomm. of the Comm. on the Judiciary, 75th Cong. 2, 11, 20* (1937) (statements of Rep. Harlan and Sen. Bulkley); 81 CONG. REC. 9670 (1937) (statement of Rep. O'Brien); H.R. REP. NO. 75-1574, 81 CONG. REC. 9061 (1937); S. REP. NO. 75-709, 81 CONG. REC. 5638 (1937). The Judicial Conference had recommended the creation of new district court judgeships for the Northern District of Georgia, the Eastern District of Louisiana, the Southern District of Texas, and the Western District of Washington. 1935 ATT'Y GEN. ANN. REP. 6.

Circuit, where the volume of business had far outstripped the capacity of its judicial personnel.²⁵⁸ These were the only two Senate bills on which the Judiciary Committee, which understandably was preoccupied with the hearings on the Court-packing bill, took any action. The House Judiciary Committee was chaired by Hatton Sumners,²⁵⁹ who was publicly and vocally opposed to the President's bill, as were a majority of his colleagues on the Committee.²⁶⁰ They took action on only two of the House bills. One was a bill to create an additional judgeship for the shorthanded Sixth Circuit.²⁶¹ That bill was reported favorably in late July, but no further action was taken.²⁶² The other was Sumners's own bill to create an additional district court judgeship in his own State of Texas.²⁶³ That bill was reported favorably by Sumners's Committee on May 20,²⁶⁴ and passed by the House on June 7,²⁶⁵ but the Senate Judiciary Committee took no action on the bill.²⁶⁶ The Senate did not pass the bill for the Southern District of Ohio until June 28,²⁶⁷ long after the Judiciary Committee issued its adverse report on the Court-packing bill.²⁶⁸ The House did not pass the bill until August 21,²⁶⁹ the last day of the session, and well after the entire Court-packing crisis had been resolved. The President's effort to enlarge the lower federal

258. See Act of Apr. 14, 1937, ch. 80, 50 Stat. 64; *A Bill to Provide for the Appointment of Two Additional Circuit Judges for the Ninth Judicial Circuit: Hearing on S. 1550 Before the Subcomm. of the Comm. on the Judiciary*, 75th Cong. 1, 3, 14 (1937) (statements of Attorney General Alexander Holtzoff and the Honorable William Denman, Ninth Circuit Judge); 81 CONG. REC. 3254 (1937) (statement of Mr. Sumners) ("I believe everybody who has examined the situation agrees that it is imperative that that court have relief."); H.R. REP. NO. 75-553, 81 CONG. REC. 3115 (1937); S. REP. NO. 75-201, 81 CONG. REC. 2319 (1937). For an extended argument in favor of the creation of these judgeships, see the statement of California Democratic Representative John H. Tolan, 81 CONG. REC. APP., at 746-47 (1937).

259. *Committees of the 75th Congress: House Judiciary Committee*, C-SPAN, <https://www.c-span.org/congress/committee/?2115&congress=75> [<https://perma.cc/9ZKE-PVD7>].

260. See ALSOP & CATLEDGE, *supra* note 1, at 67, 88-89.

261. H.R. 6907, 75th Cong., 81 CONG. REC. 4314 (1937).

262. H. REP. NO. 75-1390, at 1 (1937); H. REP. NO. 75-1390, 75th Cong., 81 CONG. REC. 7858 (1937).

263. H.R. 2708, 75th Cong., 81 CONG. REC. 196 (1937).

264. H. REP. NO. 75-875, at 1 (1937); H. REP. NO. 75-875, 75th Cong., 81 CONG. REC. 4894 (1937).

265. H.R. 2708, 75th Cong., 81 CONG. REC. 5383, 5386-87 (1937).

266. See H.R. 2708, 81 CONG. REC. 5403, 5409 (1937).

267. S. 2010, 81 CONG. REC. 6343, 6353 (1937).

268. S. REP. NO. 75-711, at 1 (1937).

269. S. 2010, 81 CONG. REC. 9672-73, 9675 (1937).

judiciary in one fell swoop appears to have deterred, or at least retarded, congressional efforts to do so on a retail basis.²⁷⁰

270. Democrat Randolph Joseph Cannon of Wisconsin sought to change the composition of the lower federal courts by altering the manner in which their judges were selected. He introduced a joint resolution in the House that would have amended the Constitution to require that district and circuit court judges be "chosen by popular vote of the electors in each district." H.R.J. Res. 109, 75th Cong., at 5 (1937). The text of the amendment was proceeded by a lengthy litany of "Whereas" clauses, including the following:

Whereas many of the Federal judges have become unresponsive to the will of the people, are antagonistic and utterly opposed to the policies and spirit of the Congress as set forth in legislation; and

Whereas such Federal judges do not intend to nor do they sincerely and honestly enforce, interpret, and carry out the laws of the Congress, but they purposely attempt to and do nullify beneficent legislation by deliberate misconstruction and misinterpretation by flagrant, brazen disregard of plain, simple language; and

Whereas such judges impede and harass the Government by misuse of injunctions and other drastic writs; and

Whereas a typical instance of nullification by construction recently occurred when a circuit court of appeals, in affirming a decision of a district judge, emasculated the Norris-La Guardia Act, which was intended by Congress to curb the Federal courts in discriminating against organized labor, and which was passed after careful study by Congress and represented enlightened public opinion; and

Whereas in this and many instances the Federal courts, created by the Congress, failed to carry out the laws which are clearly within the constitutional power of Congress; and

Whereas it is well known that many Federal judges are biased and prejudiced against organized labor; and

Whereas history and experience have shown that a great many of the Federal judges are bitter partisans and are secretly participants in politics; and ...

Whereas Federal judges nullify legislation of Congress affecting workingmen but sustain the same legislation when it is for their own benefit, a pension law for deserving railroad men who had given lives of toil to the railroads of the country being held void but a pension for Federal judges giving them full salary after only ten years of service upheld; and ...

Whereas the life-tenure provision of the United States Constitution has not only failed to keep the Federal judges out of politics but has been the means of protecting political judges in office and of affording them immunity for not only wrongful, but oftentimes criminal activity in their courts; and ...

Whereas it is generally known that lawyers who have loyally served the interests of the common people and fought against big interests have rarely been appointed as Federal judges; and

Whereas the much discussed fear of Fascist dictatorship in our country has no basis in the legislative and executive departments which are responsive to the public will and subject to check by popular election, but Federal judicial autocracy which has been established in the Government gives much ground for apprehension; and

Whereas only popular election at stated intervals can provide the necessary

Relatedly, on March 12, Democratic Senator Charles O. Andrews of Florida introduced a joint resolution that would have created both new lower court vacancies and added new circuit court judgeships.²⁷¹ Andrews proposed to amend Article III of the Constitution in various respects, including by adding a provision for the mandatory retirement of all federal judges at the age of seventy-five.²⁷² “There appears to be little doubt in the minds of many of those who seem to be best entitled to know,” Andrews noted, “that the age of 75 should be the honored and accepted retiring date in the lives of a great majority of men.”²⁷³ Andrews observed that this was “a policy which has obtained in the Army and in the Navy,” and insisted that there was “no reason why it should not apply to other officers of the United States.”²⁷⁴ “The involuntary retirement of judges at the age of 75 is desirable,” Andrews explained, “because judges, after years on the bench, naturally sheltered from the everyday life experienced by the ordinary citizen, get out of touch with the people.”²⁷⁵ Quoting authorities ranging from former Attorney General William Wirt to Chief Justice Charles Evans Hughes, Andrews concluded that “there cannot be any serious doubt that 75 is a proper age for involuntary retirement.”²⁷⁶ Because there currently were seven circuit judges who either had reached the age of seventy-five or would do

safeguards to obtain an honest, able, and just judiciary.

Id. at 2-5. The joint resolution was referred to the Judiciary Committee, but proceeded no further. H.R.J. Res. 109, 75th Cong., 81 CONG. REC. 197 (1937). Cannon had introduced his resolution in the preceding session, to the same effect. H.R.J. Res. 574, 74th Cong., 80 CONG. REC. 6252 (1936).

271. See S.J. Res. 100, 75th Cong., 81 CONG. REC. 2138 (1937).

272. See S.J. Res. 100, 75th Cong. (1937). On February 15, Democratic Senator Allen J. Ellender of Louisiana had introduced a joint resolution amending the Constitution to require that all federal judges “shall be retired from all active duties upon reaching the age of seventy years.” S.J. Res. 77, 75th Cong., 81 CONG. REC. 1195 (1937). On March 8, Mississippi Democratic Representative John E. Rankin had introduced a joint resolution amending the Constitution “to authorize Congress to prescribe fixed terms of office for judges of the Supreme and inferior courts of the United States.” H.R.J. Res. 267, 75th Cong., 81 CONG. REC. 1992 (1937). Each joint resolution was referred to the respective Judiciary Committee, but proceeded no further.

273. S.J. Res. 100, 81 CONG. REC. 2616-17 (1937).

274. *Id.* at 2617.

275. *Id.*

276. *Id.*

so by May of 1937,²⁷⁷ ratification would have created seven vacancies almost immediately.

Andrews's amendment also sought to make the circuit courts "more representative" by providing that they should thereafter consist of at least one judge from each state included within the territory comprising the circuit.²⁷⁸ Under the circumstances then obtaining, this would have resulted in the appointment of eleven new circuit judges.²⁷⁹ Andrews concluded that "[i]t would take many more judges to put into effect the recommendation of the President than would be required if and when the constitutional amendment I have suggested should be adopted."²⁸⁰

No action was taken on the joint resolution, and Andrews introduced modified versions of his proposal on three separate occasions between May and August.²⁸¹ The last of these versions retained the requirement concerning the composition of circuit courts, but exempted all judges sitting at the time of the amendment's ratification from its mandatory retirement provision.²⁸² Andrews took to the floor to reiterate his view that amending the Constitution to compel retirement at seventy-five "would permanently dispose of a recurring embarrassing controversy,"²⁸³ but his proposal received no further attention.

C. Reform of Judicial Procedure

The other strategy pursued by Congress was to reform judicial procedure and/or jurisdiction in ways that would inhibit the power of lower federal courts to thwart implementation of federal programs. Many such proposals were introduced in the weeks preceding Roosevelt's announcement of his plan to enlarge the lower federal judiciary. For instance, Pennsylvania Democratic

277. *Id.* at 2619.

278. *Id.* at 2618.

279. *Id.*

280. *Id.* at 2619.

281. S.J. Res. 100, 75th Cong., 81 CONG. REC. 9416 (1937) (proposed by Sen. Andrews, Aug. 20, 1937); S.J. Res. 100, 75th Cong., 81 CONG. REC. 5517 (1937) (proposed by Sen. Andrews, June 7, 1937); S.J. Res. 100, 75th Cong., 81 CONG. REC. 4229 (1937) (proposed by Sen. Andrews, May 6, 1937).

282. *See* 81 CONG. REC. 9416 (1937).

283. *Id.* at 9417.

Representative Francis Eugene Walter introduced a bill providing that, in any case in which neither the United States nor any of its officers or employees was a party to the suit, where the court declared any federal statute invalid, the clerk of the court was required to certify that fact to the Attorney General.²⁸⁴ The Attorney General or his representative then would have the same right to appeal the judgment as if the United States had been party to the suit.²⁸⁵ Moreover, upon motion by the Attorney General or his representative that the record in the case was inadequate for appellate review, the appellate court was instructed to remand the case to the proper court with direction that the United States be given the opportunity to present evidence and offer arguments concerning the statute's validity.²⁸⁶ The lower court was directed to expedite any such remanded suit and to preserve the status quo ante "in every way possible."²⁸⁷ The Attorney General or his representative was directed to invoke appellate jurisdiction in such cases, and to appear and argue on behalf of the United States.²⁸⁸

Senator Hugo Black of Alabama and Representative John E. Rankin of Mississippi, both Democrats, introduced bills that provided for a direct appeal to the Supreme Court from any lower court restraining order, decree, judgment, or injunction prohibiting the enforcement, operation, or execution of any federal law.²⁸⁹ The bills would have required the record in the case to be sent to the Court within ten days of the filing of a notice of appeal, and instructed the Court to give such appeals "preferential consideration."²⁹⁰ Two other Democrats, Senator Kenneth McKellar of Tennessee and Representative Frank Hancock, Jr., of North Carolina, sponsored bills that would have prohibited the lower federal courts from issuing

284. H.R. 4362, 75th Cong., 81 CONG. REC. 875 (1937).

285. H.R. 4362, 75th Cong. (1937).

286. *Id.*

287. *Id.*

288. *Id.*

289. H.R. 3593, 75th Cong., 81 CONG. REC. 405 (1937); S. 877, 75th Cong., 81 CONG. REC. 253 (1937).

290. H.R. 3593, 75th Cong. (1937); S. 877, 75th Cong. (1937). A comparable bill authorizing direct Supreme Court review of district court rulings on the constitutionality of federal statutes had been introduced by Progressive Senator Robert La Follette, Jr., of Wisconsin in the preceding Congress. S. 3211, 74th Cong., 79 CONG. REC. 10,721 (1935). The bill was referred to the Judiciary Committee, where no further action was taken.

any injunction restraining the enforcement, operation, or execution of an act of Congress “unless and until such Act shall have been held finally invalid by the Supreme Court.”²⁹¹ Farmer-Laborite Representative Henry Tiegan of Minnesota offered a measure that would have deprived the lower federal courts of jurisdiction to declare any federal statute unconstitutional, required that any such claim by a party be immediately certified to the Supreme Court for decision, and stayed all proceedings in the case until the decision had been certified back.²⁹² The bill also provided that, with respect to all cases currently pending in the Supreme Court, and in all cases pending there in the future, the concurrence of three-fourths of the Justices would be required before any judgment should be entered pronouncing a federal statute unconstitutional.²⁹³ Meanwhile, Democratic Representatives Charles Faddis of Pennsylvania and Harry B. Coffee of Washington State introduced bills that would have prohibited all federal courts, including the Supreme Court, from considering or passing upon pleas challenging the constitutionality of federal statutes.²⁹⁴

291. H.R. 3902, 75th Cong., 81 CONG. REC. 542 (1937); S. 1174, 75th Cong., 81 CONG. REC. 477 (1937). Representative Rankin had introduced a more detailed version of such a bill earlier in the session. H.R. 2295, 75th Cong., 81 CONG. REC. 140 (1937).

292. H.R. 3895, 75th Cong., 81 CONG. REC. 542 (1937).

293. H.R. 3895, 75th Cong. (1937). In the previous Congress, West Virginia Democrat Robert L. Ramsay had introduced a bill that would have deprived all inferior federal courts of jurisdiction to declare congressional statutes unconstitutional. H.R. 10839, 74th Cong., 80 CONG. REC. 1426 (1936). Earlier in that same Congress, Ramsay had introduced a similar bill that also would have required that all constitutional questions raised in lower federal courts be certified directly to the Supreme Court. H.R. 8054, 74th Cong., 79 CONG. REC. 7545 (1935). Independent Senator George Norris of Nebraska and Illinois Democrat Donald C. Dobbins each had introduced joint resolutions that would have amended the Constitution to vest exclusive jurisdiction over questions of the constitutionality of congressional acts in the Supreme Court of the United States. S.J. Res. 149, 74th Cong., 79 CONG. REC. 9415 (1935); H.J. Res. 287, 74th Cong., 79 CONG. REC. 7546 (1935).

294. H.R. 4279, 75th Cong., 81 CONG. REC. 820 (1937); H.R. 2284, 75th Cong., 81 CONG. REC. 139 (1937). These bills were anticipated by several measures introduced in the preceding Congress that would have deprived all federal courts of power to declare federal laws unconstitutional. *See* H.J. Res. 329, 74th Cong., 79 CONG. REC. 9506 (1935); H.J. Res. 301, 74th Cong., 79 CONG. REC. 8213 (1935); H.J. Res. 296, 74th Cong., 79 CONG. REC. 7890 (1935); H.J. Res. 462, 74th Cong., 80 CONG. REC. 770 (1936); H.R. 9478, 75th Cong., 80 CONG. REC. 32 (1936). H.J. Res. 329 also would have repealed the Tenth Amendment, while H.J. Res. 301 provided that any judge purporting to declare an act of Congress unconstitutional would be deemed to have vacated his office. H.R. 10315, 74th Cong., 80 CONG. REC. 549 (1936), would have prohibited federal courts (except for the Supreme Court exercising its original jurisdiction) from hearing cases in which a party sought to have an act of Congress declared

Roosevelt's Court-packing bill was transmitted to Congress on February 5, accompanied by a message explaining and defending his recommended legislation.²⁹⁵ At the conclusion of his message, Roosevelt raised a "further matter" not addressed by his bill, but which nevertheless required "immediate attention."²⁹⁶ The President lamented "conflicting decisions in both trial and appellate courts on the constitutionality of every form of important legislation," which had brought "the entire administration of justice dangerously near to disrepute."²⁹⁷ Such conflicts often persisted for a year or more pending their ultimate resolution by the Supreme Court, making the rights of citizens under federal law vary according to their locations. Such persistent conflicts deprived the law of "its most indispensable element—equality."²⁹⁸ Moreover, the lack of legal clarity during these periods deprived labor, industry, agriculture, and commerce of "another essential of justice—certainty."²⁹⁹

Finally, Roosevelt complained,

We find the processes of government itself brought to a complete stop from time to time by injunctions issued almost automatically, sometimes even without notice to the Government, and not infrequently in clear violation of the principle of equity that injunctions should be granted only in those rare cases of manifest illegality and irreparable damage against which the ordinary course of the law offers no protection.³⁰⁰

As a result, federal statutes were "set aside or suspended for long periods of time, even in cases to which the Government [was] not a party."³⁰¹ Such "[g]overnment by injunction" laid "a heavy hand upon normal processes."³⁰² For "no important statute" could "take effect—against any individual or organization with the means to

invalid on the ground that it exceeded Congress's powers to regulate commerce, to tax, or to regulate the value of money, or on the ground that it denied substantive due process. Each of these measures was referred to the Judiciary Committee, and received no further attention.

295. H.R. Doc. No. 75-142, at 9-11 (1937).

296. *Id.* at 5.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

employ lawyers” and to engage in “wide-flung litigation—until it ha[d] passed through the whole hierarchy of the courts.”³⁰³ Thus, “the judiciary, by postponing the effective date of acts of Congress, [was] assuming an additional function and [was] coming more and more to constitute a scattered, loosely organized, and slowly operating third house of the National Legislature.”³⁰⁴

In response to this state of affairs, Roosevelt offered two recommendations. The first was for a federal statute providing “that no decision, injunction, judgment, or decree on any constitutional question be promulgated by any Federal court without previous and ample notice to the Attorney General and an opportunity for the United States to present evidence and be heard.”³⁰⁵ The second was for a statute providing for “a direct and immediate appeal to the Supreme Court” in “cases in which any court of first instance determines a question of constitutionality,” and “that such cases take precedence over all other matters pending” in the Supreme Court.³⁰⁶ “[I]f we assure Government participation in the speedier consideration and final determination of all constitutional questions,” Roosevelt concluded, “we shall go a long way toward our high objectives.”³⁰⁷

Bills embodying these recommendations had been introduced before the announcement of the Court-packing plan,³⁰⁸ and similar bills continued to be introduced thereafter. On February 10, Senator McKellar introduced a bill mandating joinder of the United States in all cases challenging the constitutionality of a federal statute, prohibiting both state and lower federal courts from issuing any TRO, preliminary injunction, or interlocutory injunction in such cases, and providing for expedited direct appeals to the Supreme Court in such a case.³⁰⁹ On February 18, Texas Democratic Representative William D. McFarlane submitted a bill restating the provisions of the earlier McKellar/Hancock bill, and adding a section providing for expedited direct appeal to the Supreme Court from

303. *Id.* at 5-6.

304. *Id.* at 6.

305. *Id.*

306. *Id.*

307. *Id.*

308. *See supra* notes 284-94.

309. S. 1437, 75th Cong., 81 CONG. REC. 1081 (1937).

district court judgments and decrees holding any part of a federal statute unconstitutional.³¹⁰ Under this bill, in cases where the United States had not been a party to the district court proceeding, the Attorney General or his representative was to have the same right to seek such review as if the United States had been a party.³¹¹ That same day, California Democratic Representative Jerry Voorhis introduced a bill stripping the state courts and the lower federal courts of all jurisdiction, and the Supreme Court of appellate jurisdiction, to entertain cases in which a party questioned the constitutionality of any federal statute on the ground that it violated nonprocedural rights guaranteed by the Fifth Amendment's Due Process Clause, or in which a party questioned the constitutionality of any federal statute purporting to be an exercise of the powers granted by the Commerce, Taxing, General Welfare, or Monetary Clauses of Article I, Section 8 of the Constitution.³¹² And on February 24, Democratic Senator Lewis B. Schwellenbach of Washington State submitted a measure requiring that the Attorney General or his representative be notified of and given the opportunity to appear at any hearing on a motion for an order restraining or enjoining the enforcement of or compliance with any provision of an act of Congress.³¹³ The bill also provided for expedited, direct appeal of any such order to the Supreme Court.³¹⁴

Of these bills introduced during the first two months of 1937, only McKellar's February 10 bill received so much as a committee report,³¹⁵ and, at the request of several members of the Senate Judiciary Committee, that bill was recommitted the day after it was reported to the floor.³¹⁶ Two other measures did receive some consideration on the Senate floor, however. In 1935, Hugo Black introduced a bill identical to the one he introduced in 1937, providing for direct appeal to the Supreme Court of district court

310. H.R. 4899, 75th Cong., 81 CONG. REC. 1390 (1937).

311. *Id.*

312. H.R. 4900, 75th Cong., 81 CONG. REC. 1390 (1937). Democrat John A. Martin of Colorado had introduced a similar measure in the previous session. H.R. 10128, 74th Cong., 80 CONG. REC. 366 (1936).

313. S. 1767, 75th Cong., 81 CONG. REC. 1776 (1937).

314. *Id.*

315. *See generally* S. REP. NO. 125, 75th Cong., 81 CONG. REC. 1520 (1937).

316. 81 CONG. REC. 1585 (1937) (statement of Sen. Neely).

decisions restraining enforcement of a federal law.³¹⁷ The Judiciary Committee held a hearing on the bill, at which Chief Justice Hughes and Justices Willis Van Devanter and Louis D. Brandeis appeared and testified.³¹⁸ Apart from concerns about some of the bill's details, the jurists raised three more general objections to the measure. First, they maintained it was unnecessary because the Court already had authority to grant certiorari immediately in any such case appealed to the circuit court and, thus, to provide review of the district court's action before the circuit court had acted.³¹⁹ In fact, the Chief Justice related that the Court had done so recently on several occasions in cases raising important questions.³²⁰ In such cases, the Court granted the writ within one to four weeks of the submission of the petition, and delays in hearing argument were attributable to the government asking for additional time to prepare.³²¹

Second, Hughes explained, in many cases, the bill actually would delay ultimate resolution of the merits issue, because in cases involving TROs and interlocutory injunctions, the sole issue for the Court would be whether the trial judge had abused his discretion.³²² It would be extraordinarily rare for such abuse to be found by the Court, which would simply leave the order in place and remand the case for decision on the merits.³²³ Thus, the bill would "tend to be dilatory" and "would defeat the purpose which the measure has in view."³²⁴ Finally, Hughes observed, allowing a direct appeal of right in all such cases "would impose a very heavy burden upon the Supreme Court."³²⁵ Only cases involving very important questions of law should be reviewed by the Court, Hughes maintained, and surely many cases that would be covered by the bill did not fall within that category.³²⁶ Many such cases could be dealt with

317. S. 2176, 74th Cong., 79 CONG. REC. 2994 (1935).

318. See *Appeals from Federal Courts, Hearing on S. 2716 Before the Comm. on the Judiciary on S. 2716*, 74th Cong. 1-10 (1935).

319. See *id.* at 2-3, 9-10.

320. See *id.* at 3-4.

321. See, e.g., *id.*

322. *Id.* at 5.

323. *Id.*

324. *Id.* at 6.

325. *Id.*

326. See *id.* at 6-7.

adequately in the circuit courts.³²⁷ The existing discretion to review important cases by certiorari was sufficient and preferable to the scheme proposed by Black's bill.³²⁸

In rebuttal, Black argued that the Court was not reviewing the decisions of district courts quickly enough.³²⁹ Black was particularly concerned about the state of the TVA, whose activities were "now paralyzed by court injunction" forbidding them to sell power to a municipality.³³⁰ It was unlikely that the Court would act on an appeal from the district court's injunction until the following term, with the result that "thousands of kilowatts of power" produced at the Muscle Shoals plant were "going to waste"³³¹ and "[l]osses of millions of dollars" would "be suffered, which could be avoided by a decision of the court formally settling the disputed questions of law."³³² By contrast, under his bill, Black maintained that "the case could be presented within a very few weeks and the result would be the least possible disorganization of the T.V.A."³³³ As to Hughes's second objection to the bill, Black was content to amend the bill so that it did not apply to TROs and interlocutory injunctions.³³⁴ And as for the feared burden on the Court, Black was confident that the Attorney General could be trusted to exercise appropriate judgment in determining which cases to appeal.³³⁵

Black's bill proceeded no further in the 74th Congress, but he introduced it again on January 15, 1937.³³⁶ The Senator observed that

at the present time the Tennessee Valley Authority is specifically restrained from practically any and all action until a restraining order shall be finally acted upon by a judge, and perhaps until it shall reach its devious way on up to the Supreme Court of the United States. As a result, numerous

327. *See id.* at 7.

328. *See id.* at 8; *see also id.* at 9-10 (testimony of Justice Van Devanter).

329. *See id.* at 12.

330. *Id.* at 13.

331. *Id.* at 18.

332. *Id.* at 13.

333. *Id.*

334. *Id.* at 17.

335. *See id.*

336. *See S. 877, 75th Cong., 81 CONG. REC. 259 (1937).*

municipalities are deprived of the privilege of obtaining loans provided by the Government and are likewise deprived of the privilege of operating their own municipal plants.³³⁷

Black's bill was an effort "to bring about immediate action by the Supreme Court when laws affecting 128,000,000 people are suspended by injunctive process or by restraining orders of an inferior court," so that "the rights of the people shall not be taken away from them any longer than is necessary."³³⁸ The Alabamian noted that

when the enforcement of the A.A.A. law was restrained, hundreds of suits were filed all over the United States. These required the time of the Attorney General's office, the judges, the clerks, and thousands and thousands of dollars were spent in these lawsuits to determine the constitutionality of the law. If there had been a method of speedy determination provided, that long delay and unnecessary expense would have been obviated.³³⁹

Senator Ashurst reminded Black of Hughes's testimony before the Judiciary Committee indicating that such a method of speedy determination already existed, and that Black's bill was therefore unnecessary³⁴⁰—a theme that would be pursued at greater length by Vermont Republican Warren Austin in a Senate speech on April 9.³⁴¹ Black responded that two recent cases showed the necessity for his bill.³⁴² In a TVA case from North Carolina, the Court sent the case back to the district court because "the record was not complete."³⁴³ In another case, the Court refused to grant certiorari from a decision sustaining a challenge to the Social Security Act.³⁴⁴ Ashurst assured Black that "at a most early date," he would receive an invitation to appear before a Judiciary subcommittee to testify

337. 81 CONG. REC. 259 (1937).

338. *Id.*

339. *Id.* at 260.

340. *See id.* at 260-61.

341. *See id.* at 3327-28.

342. *Id.* at 261.

343. *Id.*

344. *Id.*

with respect to his bill,³⁴⁵ but events took a different course and Black's bill made no further progress.

The second bill discussed on the Senate floor was McKellar's bill prohibiting the lower federal courts from issuing any injunction restraining the enforcement, operation, or execution of an act of Congress "unless and until such Act shall have been held finally invalid by the Supreme Court."³⁴⁶ The Tennessee Senator explained that the principal motivation for his proposal was the role that injunctive relief had played in frustrating the operations of the TVA.³⁴⁷ But on February 10, several Senators contended or suggested that denying lower federal courts the power to grant immediate injunctive relief in cases of irreparable injury would deprive litigants of their liberty or property without due process,³⁴⁸ and McKellar's bill received no further consideration.

Instead, the bill that ultimately would embody the judicial reforms of 1937 originated in the House. H.R. 2260 was introduced by Representative Sumners on January 8, nearly a month before Roosevelt announced his own proposal.³⁴⁹ In its initial form, the bill provided that in any federal court proceeding to which neither the United States nor one of its agencies, officers, or employees was a party, and where the validity of a federal law was drawn into question, the court having jurisdiction was required to certify that fact to the Attorney General if the court believed that there were substantial grounds for the challenge.³⁵⁰ The Attorney General or his representative then was directed to appear in the proceeding, where he was to have the right to introduce evidence and offer argument, and to "have the same rights as a party to the extent

345. *Id.*

346. S. 1174, 75th Cong., 81 CONG. REC. 477, 482 (1937).

347. *See* 81 CONG. REC. 1104-05 (1937).

348. *See id.* at 1106-07 (statement of Sen. Tydings); *id.* at 1104 (statement of Sen. Adams); *id.* at 1102 (statement of Sen. Austin); *id.* at 1096, 1099, 1101 (statement of Sen. King). Senator King also contended at length that denying lower federal courts the power to issue injunctions would deprive them of a portion of the judicial power with which they were endowed by the Constitution upon their creation by Congress, and would thus be unconstitutional. *See id.* at 1093-96. However, this claim does not appear to have resonated with his colleagues, who regarded it as inconsistent with established precedent. *See id.* at 1099-100; *see also* S. REP. NO. 125, at 2-8 (1937) (memorandum by Sen. McKellar).

349. *See* H.R. 2260, 75th Cong., 81 CONG. REC. 139 (1937).

350. H.R. 2260, 75th Cong. (1937).

necessary for a proper presentation of the facts and law relating to the constitutionality of the statute.”³⁵¹ If the court ruled against the validity of the federal law, the government was to have the same right of appeal as if it had been a party to the proceeding.³⁵²

The bill was reported back favorably with amendments on February 9.³⁵³ The criterion for notification and participation of the Attorney General was changed from a challenge to the “validity” of the law to a challenge to the “constitutionality” of the law.³⁵⁴ The amended bill also contained a provision authorizing the Attorney General to appeal directly to the Supreme Court from any “final or interlocutory judgment, decree, or order, or from an intermediate order,” and further provided that “appeals so taken shall have precedence over other cases in the Supreme Court.”³⁵⁵ With respect to this new provision, the report remarked, “[T]he importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of the Congress requires no comment.”³⁵⁶

The bill was debated on April 7.³⁵⁷ Sumners explained that the objective of the bill was to ensure that the interests of the United States were adequately represented in litigation challenging the constitutionality of federal law.³⁵⁸ As the discussion proceeded, Sumners’s language became more colorful. “It is ridiculous,” he insisted, “that the final determination as to the constitutionality of an act of Congress be held in abeyance for 2 or 3 years and nobody knows whether or not it is constitutional.”³⁵⁹ Also “ridiculous,” he argued, was “that the defense of the constitutionality of things you and I do here under our duty as national legislators should be left entirely to some little 2-by-4 lawyer in a private litigation, with nobody there to speak in behalf of the Congress of the United

351. *Id.* at 2.

352. *Id.*

353. See H.R. REP. NO. 75-212, at 1, 81 CONG. REC. 1067 (1937).

354. H.R. REP. NO. 75-212, at 1.

355. *Id.*

356. *Id.* at 2. On February 24, Republican Earl C. Michener of Michigan indicated that Roosevelt wished to have the bill considered by the House. See 81 CONG. REC. 1562 (1937).

357. 81 CONG. REC. 3254-55, 3257-59 (1937).

358. *Id.*; see also *id.* at 3266 (statement of Rep. Celler).

359. *Id.* at 3269.

States.”³⁶⁰ Tennessee Democrat Walter Chandler reminded his colleagues that provisions for direct appeals from district courts to the Supreme Court already were provided in cases involving the antitrust laws, the Packers and Stockyards Act, and orders of the Interstate Commerce Commission.³⁶¹ Sumners’s bill, he argued, simply extended that principle to all cases in which a district court ruled against the constitutionality of a federal law.³⁶²

The bill was amended on the floor to provide that direct appeals to the Supreme Court would take precedence only over non-constitutional cases pending before the Court,³⁶³ and that such direct appeals also would lie in cases to which the United States or one of its agencies, officers, or employees was a party.³⁶⁴ The bill then was passed by a vote of 122 to 14.³⁶⁵ On April 9, the bill was referred to the Senate Judiciary Committee,³⁶⁶ where it was placed on ice pending resolution of the fate of the President’s bill.

On May 18, the Senate Judiciary Committee voted to report the President’s bill adversely with the recommendation that it not pass.³⁶⁷ On June 14, the Committee issued its report.³⁶⁸ The bulk of the document focused on the Supreme Court issue, but the report also identified two other deficiencies in the bill. The first was that the proposal did nothing to address “the alleged abuse of the power of injunction by some of the Federal courts” raised in the President’s February 5 accompanying message to Congress.³⁶⁹ The report noted:

Nothing in this measure attempts to control, regulate, or prohibit the power of any Federal court to pass upon the constitutionality of any law—State or National.

Nothing in this measure attempts to control, regulate, or prohibit the issuance of injunctions by any court, in any case, whether or not the Government is a party to it.

360. *Id.*

361. *Id.* at 3273.

362. *Id.*

363. *See id.* at 3269-70.

364. *See id.* at 3272.

365. *Id.* at 3273.

366. *Id.* at 3313.

367. ALSOP & CATLEDGE, *supra* note 1, at 208-09.

368. *See* S. REP. NO. 75-711, at 1, 81 CONG. REC. 5639 (1937).

369. S. REP. NO. 75-711, at 3.

If it were to be conceded that there is need of reform in these respects, it must be understood that this bill does not deal with these problems.³⁷⁰

Second, the increase in lower court judges was conditioned entirely upon the incumbent's age and unwillingness to retire, rather than "in relation to the increase of work in any district or circuit."³⁷¹ Meanwhile, the "facts indicate[d] that the courts with the oldest judges ha[d] the best records in the disposition of business."³⁷² The twenty-four lower court judges of retirement age were "either altogether equal to their duties or [were] commissioned in courts" with no congestion.³⁷³ Therefore, it was "obvious that the way to attack congestion and delay in the courts ... directly" was not the method proposed by the President, but instead "by legislation which [would] increase the number of judges in those districts" where there was an "accumulation of litigation."³⁷⁴

By now it was clear that the President's bill could not pass the Senate, so proponents of judicial reform went back to the drawing board. On July 2, Democratic Senators Ashurst, Carl Hatch of New Mexico, and M.M. Logan of Kentucky introduced an amendment in the nature of a substitute for Roosevelt's proposal.³⁷⁵ The substitute bill would have allowed the President to appoint an additional Justice to the Supreme Court for each Justice who had reached the age of seventy-five without retiring, with the qualification that no more than one such additional Justice could be appointed in any calendar year.³⁷⁶ Additional lower court judges still could be appointed for any such judge who had reached the age of seventy without retiring, though the number of such additional appointments was now capped at twenty.³⁷⁷

The bill was in most other respects very similar to the bill that the President had proposed, with the exception that it now added an

370. *Id.*

371. *Id.* at 4.

372. *Id.*

373. *Id.*

374. *Id.*

375. S. 1392, 81 CONG. REC. 6740 (1937).

376. *Id.*

377. *Id.*

entirely new “Title II,” which was a mildly modified version of Sumners’s H.R. 2260.³⁷⁸ The House bill had been amended to allow the United States to intervene formally in the district court proceeding and to become a party.³⁷⁹ The government was authorized to appeal directly to the Supreme Court any adverse judgment, decree, or order of a district court that was based in whole or in part upon a decision that a federal law was unconstitutional.³⁸⁰ Any such direct appeal was, upon motion of the government, to “be advanced to a speedy hearing.”³⁸¹

In the contentious debate that unfolded over the following two weeks, the provisions of the bill relating to the lower federal courts were scarcely mentioned.³⁸² The focus was, understandably, on the provisions relating to the size of the Supreme Court.³⁸³ On July 22, following the death and funeral of Senate Majority Leader Joseph Robinson of Arkansas—who had been promised the next seat on the Court should the substitute bill become law³⁸⁴—the Senate Judiciary Committee reached an agreement to recommend that the Senate recommit the bill, with instructions to the Committee to report a judicial reform bill within ten days.³⁸⁵ The senators agreed that in the Committee’s deliberations “no consideration” was to be given “to adding judges to the Supreme Court or to any court on any other basis than that of need in order to perform the functions of the court.”³⁸⁶ As Logan put it in response to a question from Republican

378. *See id.* at 6741.

379. *Compare id.*, with *id.* at 3272.

380. *Id.* at 6741.

381. *Id.* Kentucky Democrat Fred M. Vinson introduced a companion measure in the House on July 6. H.R. 7765, 75th Cong., 81 CONG. REC. 6869 (1937).

382. For brief and inconsequential exceptions, see 81 CONG. REC. 7376, 7381 (1937) (speech of Sen. Logan); *id.* at 6905 (colloquy between Sens. Burke and Logan); *id.* at 6904 (colloquy between Sens. Overton and Logan); *see also id.* at 6910 (Sen. Logan referencing portions of the Judiciary Committee’s adverse report on the President’s bill regarding one of the bill’s provisions concerning lower federal courts).

383. *Id.* at 6787-813, 6873-90, 6894-922, 6966-82, 7018-27.

384. ALSOP & CATLEDGE, *supra* note 1, at 156-58; 2 HAROLD L. ICKES, THE SECRET DIARY OF HAROLD L. ICKES 153 (1954); Leuchtenburg, *supra* note 1, at 100; SHESOL, *supra* note 1, at 309; SHOGAN, *supra* note 1, at 200; SOLOMON, *supra* note 1, at 185-86; Joseph Alsop, Jr. & Turner Catledge, *Joe Robinson, The New Deal’s Old Reliable*, SATURDAY EVENING POST, Sept. 26, 1936, at 5; *Good Soldier*, TIME, July 1935, at 19-21.

385. 81 CONG. REC. 7375, 7381 (1937).

386. *Id.* at 7382.

Senator Hiram Johnson of California, "the Supreme Court is out of the way."³⁸⁷ The motion carried by a vote of 70 to 20.³⁸⁸

On July 28, the Senate Judiciary Committee complied with the Senate's instructions by reporting back an amended version of Sumners's House bill.³⁸⁹ The Senate's version of the bill also required notification of the Attorney General when a substantial constitutional question was raised in private litigation, but it did not authorize the government to appear unless it had become a party, and it permitted the government to intervene and become a party only upon a showing that it had "a legal interest or may have a probable interest."³⁹⁰ This language, the report explained, was "intended to make the right of intervention and appeal ... coextensive with the judicial power of courts of the United States to exercise jurisdiction over cases and controversies."³⁹¹ Such interests were "not limited to pecuniary interest," but also extended "to rights and duties related to sovereignty."³⁹² The United States was not excluded

from drawing the judicial power to its proper assistance either as an original party, or as an intervenor, when, in private litigation, decision of the constitutional question may affect the public at large, may be in respect of matters which by the

387. *Id.* at 7381.

388. *Id.*

389. S. REP. NO. 75-963, at 1, 81 CONG. REC. 7714 (1937). For the text of the amended bill, see 81 CONG. REC. 8514 (1937).

390. S. REP. NO. 75-963, at 1-2.

391. *Id.* at 2. The report continued, "The Federal courts cannot have jurisdiction, even though a constitutional question be involved, without a real case or controversy, properly brought before the court, and in which a decision is required by the circumstances." *Id.* at 3. For elaboration of this point, see 81 CONG. REC. 8507-12 (1937) (statement of Sen. Austin).

392. S. REP. NO. 75-963, at 2. Here the report quoted a passage from *In re Debs*:

Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other * * * Whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or to prevent it from taking measures therein to fully discharge those constitutional duties.

Id. (quoting *In re Debs*, 158 U.S. 564, 584, 586 (1895)).

Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights.³⁹³

But it was necessary that the government have such an interest, because Congress could not “empower the Attorney General to intervene without becoming a party because the Federal court can only have jurisdiction to hear and dispose of a case or controversy properly before the Court, that is, in an action brought by one fully entitled to sue and by a proper proceeding.”³⁹⁴ Nor could Congress “empower the Attorney General to appeal a case in which the United States is not a party,” nor “to take a question of constitutionality to the Supreme Court in a case solely between citizens after it has been closed by judgment and is no longer a controversy.”³⁹⁵ The judicial power did not “comprehend the giving of advice to any other department of Government.”³⁹⁶

The Senate version of the bill retained the right of the government to appeal an adverse constitutional holding directly to the Supreme Court, and provided that such appeals were “to be heard by the Supreme Court at the earliest possible time and [were] to take precedence over all other matters not of a like character.”³⁹⁷ But a new section of the bill concerned an issue on which Roosevelt had called for action, but which neither the House bill nor the Logan/Ashurst/Hatch bill had addressed. Section 3 made provision “for hearing and determination *by a court composed of three judges*” in cases in which a party sought injunctive relief against the enforcement, operation, or execution of any act of Congress on the ground that it was unconstitutional.³⁹⁸ At least one of these judges was required to be a circuit judge, and the Attorney General was required to be notified of the pending hearing.³⁹⁹ The report explained that such three-judge panels already were prescribed for

393. *Id.* at 3-4.

394. *Id.* at 2. The report also stated, “The judicial power does not extend to appeals by persons not parties to a case or a controversy, who intervene to invoke it solely for the purpose of review of an act of Congress.” *Id.* at 3.

395. *Id.* at 2.

396. *Id.*

397. *Id.* at 4.

398. *Id.* (emphasis added).

399. 81 CONG. REC. 8514 (1937).

injunctive proceedings involving orders of the Interstate Commerce Commission, and for cases in federal court concerning the validity of state statutes.⁴⁰⁰ Between the time that the application for injunctive relief was made and the time that the three-judge panel was assembled, the judge to whom the application was made was to have authority to issue a TRO.⁴⁰¹ Section 3 further authorized direct appeal to the Supreme Court from any order granting or denying injunctive relief in such a case.⁴⁰² Thus, rather than depriving the lower federal courts of power to enjoin the execution of federal law, the amended Senate bill simply reduced the probability that a lower federal court might do so by diluting the power of a single district court judge to provide such potentially debilitating equitable relief.

The report concluded that the Committee did not have sufficient information concerning congestion in the lower federal courts “to provide in a single bill for the creation of such necessary additional judges as conditions may warrant or authorize.”⁴⁰³ The Committee also was of the view that “a blanket bill providing for a large number of additional judges would present practical difficulties in the matter of consideration and passage,” and that “dealing with these matters in individual bills relating to the particular district or circuit affected” was “the sounder and better practice.”⁴⁰⁴ The Committee therefore recommended that the Senate request that the Attorney General, in collaboration with the Judicial Conference, make a survey of the conditions in the various districts and circuits, and report their recommendations for additional judgeships at the next session of Congress.⁴⁰⁵

The Senate passed the amended bill on August 7,⁴⁰⁶ but the House disagreed to the Senate amendments and asked for a conference.⁴⁰⁷ The Senate insisted on its amendments and agreed to a

400. S. REP. NO. 75-963, at 4; *see also* 81 CONG. REC. 8703 (1937) (statement of Rep. Sumners).

401. 81 CONG. REC. 8514 (1937); *see also id.* at 8703 (statement of Rep. Sumners).

402. *Id.* at 8514. Pennsylvania Democrat J. Burrwood Daly had introduced a bill very similar to section 3 in the House on July 8. H.R. 7773, 75th Cong., 81 CONG. REC. 6963 (1937).

403. S. REP. NO. 75-963, at 5.

404. *Id.*

405. *See id.*

406. 81 CONG. REC. 8514-15 (1937).

407. *Id.* at 8557.

conference,⁴⁰⁸ and on August 10 the conference committee issued its report.⁴⁰⁹ The Senate adopted the conference report without debate on August 10,⁴¹⁰ and the House followed suit the next day.⁴¹¹ The bill was signed into law by Roosevelt on August 24,⁴¹² after the bruising congressional session had ended. In its final form, the bill largely resembled the Senate version. The Attorney General was authorized to intervene and become a party, though the requirement that he first show a legal interest on the part of the United States was omitted.⁴¹³ The Senate provision for direct appeal of adverse decisions to the Supreme Court, however, was retained.⁴¹⁴ And the Senate provision requiring three-judge panels in injunction cases was adopted with some minor modifications.⁴¹⁵ This provision for three-judge panels in cases seeking injunctive relief against the execution of federal laws remained in place until it was repealed by the 1976 amendments to the Code of Judicial Procedure⁴¹⁶—ironically, one might think, just as the universal injunction was emerging as a phenomenon,⁴¹⁷ and the stakes of a single judge having power to grant injunctive relief accordingly were becoming considerably elevated.

III. AFTERMATH

At the request of the editor of the *New York Times*, House Judiciary Committee Chairman Sumners prepared an explanation of the bill that Congress had just passed for the paper's August 15 edition.⁴¹⁸ In the course of his exposition, Sumners remarked that the measure "recognizes that to give to a single judge the power to tie up the functioning of a national law or the exercise of a national

408. *Id.* at 8527.

409. H.R. REP. NO. 75-1490, 81 CONG. REC. 8701 (1937).

410. 81 CONG. REC. 8580, 8610 (1937).

411. *Id.* at 8705.

412. *See id.* at 9679; *see also* Act of Aug. 24, 1937, ch. 754, 50 Stat. 751.

413. H.R. REP. NO. 75-1490, at 5.

414. *Id.* at 5-6.

415. *Id.* at 6.

416. *See* Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119. For an explanation of the rationale for the repeal, *see* S. REP. NO. 94-204, at 1-4 (1975).

417. *See* Bray, *supra* note 48, at 437-45.

418. 81 CONG. REC. APP., at 2116 (1937).

power is a disproportionate thing to do.”⁴¹⁹ In contemporaneous remarks, Illinois Republican Representative Chauncey W. Reed proclaimed that Congress had given the country “Judicial Reform, Not Chaos.”⁴²⁰ Under the Sumners judicial retirement bill, which President Roosevelt signed into law on March 1,⁴²¹ “aged Justices of the Supreme Court may now retire from active service on the bench without the apprehension that the emoluments of their office may some day be discontinued or diminished.”⁴²² The Chandler bill, which was passed by the House on August 10,⁴²³ and would become law in the following year,⁴²⁴ would provide “a new, concise, and comprehensive bankruptcy act.”⁴²⁵ And H.R. 2260 permitted the federal government to intervene in cases in which the constitutionality of a federal statute was challenged, and authorized direct appeal to the Supreme Court in the event of a decision holding the challenged statute invalid, “with the assurance that it will take precedence in that tribunal over all other matters not of a like character.”⁴²⁶

Reed observed that it was

significant that these major reforms affecting the judiciary and judicial procedure originated in the House of Representatives many weeks prior to the President’s message of February 5, and that they were already on the road to legislative enactment on the day that the Nation was stunned by the pronouncement from the White House that the entire judicial branch of our Government must be made over by the wholesale appointment by him of new judges to replace those who had reached their seventieth birthday. It [was] also significant that the mandate of the President for the immediate enactment of his bill in no way arrested or delayed the careful and deliberate consideration of these constructive measures. While the Senate proceeded to consider the essence of the President’s message, the House of Representatives went forward with its program of real judicial

419. *Id.*

420. *Id.* at 2135.

421. *See* Act of Mar. 1, 1937, ch. 21, 50 Stat. 24.

422. 81 CONG. REC. APP., at 2135 (1937).

423. 81 CONG. REC. 8649 (1937).

424. *See* Act of June 22, 1938, ch. 575, 52 Stat. 840.

425. 81 CONG. REC. APP., at 2135 (1937).

426. *Id.*

reform, and [enacted legislation that would] advance the efficacy of our judicial system.⁴²⁷

With the Court-packing controversy settled, the 75th Congress resumed the piecemeal expansion of the lower federal courts. In 1938, Congress created five new circuit court judgeships, and made a temporary judgeship permanent.⁴²⁸ Two years later, Congress created one new judgeship for the Sixth Circuit and two new judgeships for the Eighth Circuit.⁴²⁹ At the district court level, in 1938, Congress added twelve permanent judgeships, and made another temporary judgeship permanent.⁴³⁰ That same year, Congress also created three new temporary district court judgeships,⁴³¹ two of which were made permanent in 1940,⁴³² and the other in 1941.⁴³³ In 1940, Congress also established one permanent and seven temporary district court judgeships.⁴³⁴ In sum, in 1938 alone, Congress created nineteen new permanent lower court judgeships.⁴³⁵ In the two years of 1938 and 1940, Congress created twenty-five lower court judgeships; and between 1938 and 1941, Congress created twenty-six⁴³⁶—not quite the forty-four that Roosevelt had requested in his Court-packing bill, but many more than the mere three that Congress granted him in 1937.⁴³⁷ During Roosevelt's tenure, the number of Article III judges grew from 211 to 262.⁴³⁸ By

427. *Id.*

428. *See* Act of May 31, 1938, ch. 290, 52 Stat. 584.

429. *See* Act of May 24, 1940, ch. 209, 54 Stat. 219.

430. *See* Act of May 31, 1938, ch. 290, 52 Stat. 584.

431. *Id.*

432. *See* Act of Nov. 27, 1940, ch. 920, 54 Stat. 1216; Act of June 8, 1940, ch. 282, 54 Stat. 253.

433. *See* Act of Nov. 21, 1941, ch. 479, 55 Stat. 773.

434. *See* Act of May 24, 1940, ch. 209, 54 Stat. 219.

435. *See supra* text accompanying notes 428, 430.

436. *See supra* text accompanying notes 428-34.

437. *See supra* text accompanying notes 257-58.

438. Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 694 n.162 (2010). These figures actually understate the growth of the Article III judiciary during Roosevelt's tenure, as many of the judgeships existing when Roosevelt took office were temporary offices that would cease to exist upon the death or resignation of the incumbent judge. *See* Act of Sept. 14, 1922, ch. 306, 42 Stat. 837-38 (establishing twenty-three temporary district court judgeships). Congress made fourteen of these judgeships permanent in 1935, Act of Aug. 19, 1935, ch. 558, 49 Stat. 659, and one more permanent in 1938, Act of May 31, 1938, ch. 290, 52 Stat. 584.

the time of his death in 1945, in addition to appointing nine Justices to the Supreme Court, Roosevelt had appointed fifty-two circuit court judges and 136 district court judges,⁴³⁹ remaking the face of the lower federal courts for a generation. Rather than accelerating this process, Roosevelt's Court-packing proposal appears to have impeded it.⁴⁴⁰

On the morning of February 5, 1937, Tommy Corcoran made a surprising and not altogether welcome appearance in the robing room at the Supreme Court.⁴⁴¹ His purpose was to warn Justice Brandeis of Roosevelt's Court-packing proposal before it became public knowledge.⁴⁴² Corcoran handed a copy of the press release outlining the President's plan to the Justice, who, after reading it, remarked, "[T]ell your president ... he has made a great mistake. All he had to do was wait a little while. I'm sorry for him."⁴⁴³ Brandeis presumably was referring to the situation on the Supreme Court. But his response applied as well to the state of the lower federal courts. With respect to each, as Senate Judiciary Committee Chairman Henry Fountain Ashurst had counseled Roosevelt not long before the President announced his plan, "Father Time, with his scythe, is on your side."⁴⁴⁴

CONCLUSION

Narrative accounts of the Court-packing crisis often conclude with a whimper, noting briefly that Congress enacted some lower court reforms—typically unspecified—as a paltry sort of consolation prize for the President, a weak balm to the open wound of political humiliation. Authors have characterized the bill finally enacted by Congress as an "emasculated version" of the Court-packing bill "leaving only some minor provisions about reforming the lower federal courts,"⁴⁴⁵ as "a hodgepodge of procedural changes that went

439. *Judgeship Appointments by President*, U.S. COURTS, <https://www.uscourts.gov/sites/default/files/apptsbypres.pdf> [<https://perma.cc/L26E-CT4W>].

440. *See supra* Part II.B.

441. *See* SHESOL, *supra* note 1, at 296-97.

442. *Id.* at 297.

443. *Id.*

444. BAKER, *supra* note 1, at 8; SHESOL, *supra* note 1, at 206.

445. BAKER, *supra* note 1, at 267 (offering no description of the bill's provisions).

largely unnoticed,”⁴⁴⁶ and as a “face-saving expedient[.]”⁴⁴⁷ As Homer Cummings lamented to Roosevelt, the final bill was a “meager performance.”⁴⁴⁸ Yet the lower court reforms enacted by Congress in 1937 responded to a widespread, bipartisan perception of a significant problem in the administration of justice, were introduced before and seriously considered during the entire time that the Court-packing plan was pending, and, because these reforms were actually enacted and in force for nearly four decades, they almost certainly had a greater influence on the course of American legal development than did the President’s failed attempt to expand the nation’s highest tribunal.

446. MCKENNA, *supra* note 1, at 521.

447. ALSOP & CATLEDGE, *supra* note 1, at 281-82 (offering no description of the bill’s provisions).

448. SHOGAN, *supra* note 1, at 219; *see also id.* at 497 (referring only briefly to the substitute bill’s “lower court reforms”); SOLOMON, *supra* note 1, at 251 (simply reproducing the incomplete description of the agreement concerning the contents of the final bill provided by Senator O’Mahoney’s meeting notes); William E. Leuchtenburg, *FDR’s Court-Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673, 689 (making no mention of the lower court reforms of the substitute or final bills).