

Laura Kalman Testifies Before the Presidential Commission

EDITOR'S NOTE: *On June 30, Society board member and history professor Laura Kalman testified before the Presidential Commission on the Supreme Court of the United States. The commission was established by President Joe Biden to provide a bipartisan analysis of the major arguments regarding the contemporary public debate over Supreme Court reform. The 36-member panel includes legal scholars, retired judges and practicing lawyers. Its mandate is to research various reform ideas and submit a report but not recommend adoption of any particular measure. Kalman was invited to address the commission in light of her research on President Franklin Delano Roosevelt's 1937 proposal to increase the size of the high court in the wake of that court's rulings invalidating New Deal legislation. In addition to the statement below that Kalman delivered to the commission (as slightly edited here), she entered into the record her article, "Court Packing as History and Memory." That article is taken from her forthcoming book on the same subject. The commission is scheduled to issue its report Dec. 15, 2021.*



Co-Chairs Bauer and Rodriguez and Commission Members:

Thank you for your kind invitation to testify. I teach twentieth-century U.S. political and legal history at the University of California, Santa Barbara. In my forthcoming book, *The Court Fight: A Political History of FDR's Court Packing Plan*, I argue that the memory of the court packing plan as a disastrous defeat for Roosevelt is undeserved. To facilitate your process, I have provided commission members with a copy, so fear not, I will not try to read all 550 pages into the record.

More than 80 years after FDR proposed it, court packing — the manipulation of the court's size to change its ideological composition — is again making news. After winning the greatest electoral college and popular victory ever in 1936, an election in which popular dissatisfaction with the conservative court figured heavily, Roosevelt stunned the country in February 1937. He proposed adding up to six new justices to the Supreme Court for every justice who reached the age of 70 and did not retire. He did so under the stated guise of helping out elderly justices. His real reason was that they blocked his programs. He had not had a single vacancy on the court, six of whose members were over 70. Five of the six were conservatives who struck down New Deal legislation, often by razor-thin margins.

A firestorm exploded. FDR was accused of "court packing," dictatorial ambitions, and political trickery — of undermining the rule of law and undercutting judicial independence. The overwhelmingly Democratic Senate recommitted his bill in July. The magnitude of his defeat made it look really foolish.

And indeed scholars have portrayed the 1937 Court Bill as the ill-fated, idiotic brainchild of a president made overbold by his 1936 victory. Consequently, in the 80-plus years since, court packing has become unthinkable; the court's current size, an entrenched norm. According to the consensus, FDR suffered from "the pride that goeth before a fall" after 1936, which led to his "tragic" error of trying to pack the court that was doomed to a trouncing from the outset.

I challenge the conventional wisdom. In my view, hubris did not explain Roosevelt's actions. He was

displaying the same acumen that enabled him to win reelection despite an antagonistic press and bitter elites. Far from erring tragically from the beginning, he came very close to getting between two and six additional justices. When FDR surprised Congress with his Court Bill in February, most thought its victory preordained. Into March, the original bill still looked strong, and throughout March, Congress would have happily given Roosevelt at least two extra justices. In April, the chances of some success remained excellent. In May, offers of a deal from the opposition abounded. Those offers continued to arrive at the White House until the Senate voted to recommit. Indeed in July, it looked as if FDR would get five additional justices. As his attorney general said, the fight could have been settled many times "by compromise."

But from FDR's vantage point, playing "constitutional hardball" by refusing to back down for so long was a good gamble. It enabled him to win the war despite losing the battle. The justices couldn't be sure that Congress would nix his plan, and some changed course. To be sure, there were plausible doctrinal reasons for their journey. Yet, like Roosevelt, I think that his court enlargement bill, with his 1936 win and earlier decisions' unpopularity, helped move the court to the more liberal interpretations of the Commerce Clause, the taxing and spending power, and the Due Process Clause that constitutionalized the New Deal.

Given that success, why should FDR's court packing plan — and, by implication, all attempts by the elected branches to expand the court, to alter lifetime tenure, or to constrain judicial power by other means — be remembered as foolish? The possibility of court expansion changed the political conditions under which the court created legal doctrine. It may have affected key justices' calculations about whether they needed to take advantage of the play, or flexibility, in existing doctrine to defuse the threat and to preserve the court's nonpartisan authority in the long run. The 1937 precedent suggests that a statute or constitutional amendment proposing a change in the court might give the justices reason to consider whether their present course is endangering the institution and its vital role in a liberal democracy. Thank you. ★