Written by **Jack Kenny** on September 14, 2011

How FDR's Court-packing Plan Saved Social Security

The "real question," former Massachusetts Governor Mitt Romney said in Monday night's debate among republican presidential candidates, is: "Does Governor Perry continue to believe that Social Security should not be a federal program, that it's unconstitutional and it should be returned to the states? Or is he going to retreat from that view?"

In his cautious comments in the debate and in an op ed piece he wrote for *USA Today* Texas Governor Rick Perry certainly appeared to be retreating from his previous statements about Social Security, in which he called the program a "Ponzi scheme" and a failure "by any measure." (Maybe Perry remembers the smears directed against Republican presidential nominee Barry Goldwater in 1964. As John Aloysius Farrell, wrote in the *Boston Globe Magazine* in 1998: "When Goldwater told an audience in New Hampshire in 1964 that he preferred a voluntary Social Security system, Democrats launched a TV attack ad, showing two hands tearing up a Social Security card. It was a factor in Lyndon Johnson's landslide victory that year.") But if he is, in fact, retreating from the position that such an ambitious program is an unconstitutional expansion of the powers of Congress and the executive branch, he would hardly be the first execute an about face on the subject.

Consider what was said concerning the constitutional limits on federal authority by a prominent New York politician in 1930, five years before passage of the Social Security Act. Addressing specifically the issue of Prohibition, the gentleman noted:

"Wisely or unwisely, people know that under the Eighteenth Amendment Congress has been given the right to legislate on this particular subject, but this is not the case in the matter of a great number of other vital problems of government, such as the conduct of public utilities, of banks, of insurance, of business, of agriculture, of education, of social welfare and of a dozen other important features. In these, Washington must not be encouraged to interfere."

So said Franklin Delano Roosevelt (above), then governor of New York, just two years before winning

the first of his four elections as President. Beginning early in his first term, Roosevelt retreated in grand style from his "States' Rights" speech in which he described the federal system embodied in the Constitution in the way it had been generally understood and accepted since the Constitution was debated and ratified. The powers delegated to the national government, he noted in that address, included the defense of the nation and any of the states from foreign invasion, the power to make treaties with other nations and the regulation of commerce with foreign nations and among the several states. The issuing money and protecting it from counterfeiting, the regulation of weights and measures, the protection of patents and copyrights are also among the enumerated powers of the Congress, as are the establishment of federal tribunals and post offices and post roads.

"On such a small foundation have we erected the whole enormous fabric of Federal Government which costs us now $3,500,000,000 every year, and if we do not halt this steady process of building commissions and regulatory bodies and special legislation like huge inverted pyramids over every one of the simple Constitutional provisions, we shall soon be spending many billions of dollars more."

Roosevelt could hardly have painted a more vivid picture of what his own New Deal would be like, with its vast network of "alphabet soup" agencies, commissions and regulatory bodies, "spending many billions of dollars more." On a closely divided Supreme Court, a narrow majority was in agreement with the Roosevelt of the "States' rights" speech on the limitations of federal power. Though the Court upheld, by a vote of 5-4, a congressional resolution voiding gold payment requirements in private contracts, it ruled much of the New Deal legislation unconstitutional. In 1935, the court stuck down legislation establishing the National Recovery Administration and its dictates of prices, wages, hours and conditions of employment. In the same year, it voided the federal Railroad Retirement Act and the Farm Mortgage Act The following year, it struck down the Agriculture Adjustment Act, with its myriad regulations over what crops farmers may grow and on how many acres they may grow them.

When the Social Security Act was passed by Congress and signed by the President in 1935, it was by no means certain it would pass a constitutional challenge. Roosevelt himself had included both insurance and "social welfare" as "problems of government" in which "Washington must not be encouraged to interfere." Yet Social Security was passed as an exercise of the power of Congress under Article I , Section 8 of the Constitution "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States…"

James Madison, generally regarded as the principal author of the Constitution insisted the term "general welfare" in that clause was intended as a description of the list of enumerated powers that followed. In Federalist 41, he emphatically rejected the argument that the clause "amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare …. Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it.… But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon?"

In other words, why would we have a list of enumerated powers if the intent had been to authorize Congress to pass any legislation the members might consider a boon to the "general welfare"? Or as Ron Paul has asked, why would we then pass Amendments Nine and Ten, reserving to the States and people, powers not delegated to the federal government?

As expected, the Social Security Act was challenged on constitutional grounds. But by the time the case

had reached the Supreme Court, Roosevelt, clearly frustrated by a "horse- and-buggy" court that had overturned so much of his prized legislation, had advanced his court-packing plan to add one judge to the Supreme Court and lower federal courts for every sitting judge who would remain on the bench beyond age 70. The plan would allow the expansion of the Supreme Court to a maximum of 15 members and add up to 44 judges on the lower courts.

The year was 1937 and Roosevelt had just won reelection in a landslide, carrying 46 of the 48 states in 1936. Democrats enjoyed large majorities in both houses of Congress. Expanding the Court to allow Roosevelt to nominate more justices certain to be confirmed by the Democratic Senate would virtually assure that any New Deal legislation would receive the Court's imprimatur. Obviously, the justices of the Supreme Court, and especially its conservative jurists, were not pleased at the prospect of having the judicial branch of government remade to accommodate the agenda of the other two. A substantial portion of his own party saw the proposal as an excessive reach for power and Congress refused to pass the plan.

As it turned out, Congress didn't have to. Roosevelt's strategy worked. While the controversial plan was still before Congress, the Supreme Court reversed course. Justice Owen Roberts, who had usually sided with the Court's conservative block, switched sides, and a number of 5-4 decisions began going Roosevelt's way. An indication of the way the winds were blowing came in March when Roberts voted to uphold a minimum wage law in the state of Washington that was virtually identical to the one he had found to be unconstitutional in New York. Two weeks later he was part of a court majority voting to uphold the National Labor Relations Act. By the end of March, the Court had affirmed the constitutionality of the Railway Labor Act, the National Firearms Act and a revised Farm Mortgage Act.

In May the Court ruled in the case of *Helvering v. Davis*. George Davis, a stockholder of Edison Electric Illuminating Company of Boston, sued, alleging that the Social Security tax was unconstitutional.. The U.S. District Court in Massachusetts upheld the tax, but the Circuit Court of Appeals reversed that decision. Guy Helvering, Commissioner of the Internal Revenue Service appealed to the Supreme Court. In its brief, the government argued that the Social Security taxes "are gratuities" and "are not earmarked for any special purpose" but are "true taxes, their purpose being simply to raise revenue" that would be available "for the general support of the government.." The argument flew in the face administration testimony in Congress that the program would establish an insurance fund that would pay "annuities" to retirees.

In arguing before the Court that the law "does not constitute a plan for compulsory insurance within the accepted meaning of the term 'insurance,'" Assistant Attorney General Robert Jackson noted that the program entitled no one to "maintain a claim for any particular amount of money," and he reminded the court it had ruled in a previous case that a pension granted by the government is a "bounty" to which a pensioner "has no legal right." Yet in selling the program to the American people, the President and administration officials had claimed that Social Security was insurance and their benefits would come to them "as a matter of right."

By a 7-2 vote, the Court upheld the government's position that the Social Security Act represented a legitimate exercise by Congress of the taxing power to provide for "the general welfare." We may not know for certain whether or to what extent the justices were influenced by the court-packing plan, but it was hanging over their heads as they deliberated. Social Security was popular with the Congress and the public and a ruling against it might well have created momentum in favor of Roosevelt's court plan. Thus in "saving" Social Security the Court may have saved itself and entire federal judiciary from the

grand design of Roosevelt's "reform." The shift by Justice Roberts, which altered the center of gravity on the court, was memorably described as "the switch in time that saved nine."

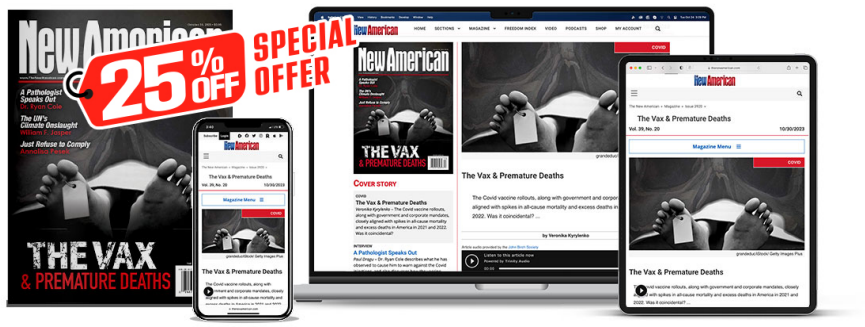
The arguments the administration relied on in court to defend the constitutionality of the program were, however, in direct contradiction to Roosevelt's praise of it: "We put those payroll taxes there so as to give the contributors a legal, moral, and political right to collect their pensions and their unemployment benefits," he said. "With those taxes in there, no damn politician can ever scrap my social security program." That robust assertion is also contradicted by the language of the legislation itself, which makes clear that, contrary to popular belief, Social Security recipients do not enjoy a contractual right to their payments: "The right to alter, amend, or repeal any provision of this Act is hereby reserved to Congress."

Subscribe to the New American

Get exclusive digital access to the most informative,
non-partisan truthful news source for patriotic Americans!

Discover a refreshing blend of time-honored values, principles and insightful perspectives within the pages of "The New American" magazine. Delve into a world where tradition is the foundation, and exploration knows no bounds.

From politics and finance to foreign affairs, environment, culture,
and technology, we bring you an unparalleled array of topics that matter most.



What's Included?

24 Issues Per Year
Optional Print Edition
Digital Edition Access
Exclusive Subscriber Content
Audio provided for all articles
Unlimited access to past issues
Coming Soon! Ad FREE
60-Day money back guarantee!
Cancel anytime.

Subscribe