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REORGANIZATION OF THE FEDERAL JUDICIARY

JUNE 7 (calendar day, JUNE 14), 1937.—Ordered to be printed

Mr. MCCARRAN (for Mr. KING), from the Committee on the Judiciary, submitted the following

ADVERSE REPORT

[To accompany S. 1392]

The Committee on the Judiciary, to whom was referred the bill (S. 1392) to reorganize the judicial branch of the Government, after full consideration, having unanimously amended the measure, hereby report the bill adversely with the recommendation that it do not pass.

The amendment agreed to by unanimous consent, is as follows:

Page 3, lines 5, 8, and 9, strike out the words "hereafter appointed."

SUMMARY OF PROPOSED MEASURE

The bill, as thus amended, may be summarized in the following manner:

By section 1 (a) the President is directed to appoint an additional judge to any court of the United States when and only when three contingencies arise:

(*a*) That a sitting judge shall have attained the age of 70 years;

(*b*) That he shall have held a Federal judge's commission for at least 10 years;

(*c*) That he has neither resigned nor retired within 6 months after the happening of the two contingencies first named.

The happening of the three contingencies would not, however, necessarily result in requiring an appointment, for section 1 also contains a specific defeasance clause to the effect that no nomination shall be made in the case of a judge, although he is 70 years of age, has served at least 10 years and has neither resigned nor retired within 6 months after the happening of the first two contingencies, if, before the actual nomination of an additional judge, he dies, resigns, or retires. More-

over, section 6 of the bill provides that "it shall take effect on the 30th day after the date of its enactment."

Thus the bill does not with certainty provide for the expansion of any court or the appointment of any additional judges, for it will not come into operation with respect to any judge in whose case the described contingencies have happened, if such judge dies, resigns, or retires within 30 days after the enactment of the bill or before the President shall have had opportunity to send a nomination to the Senate.

By section 1 (b) it is provided that in event of the appointment of judges under the provisions of section 1 (a), then the size of the court to which such appointments are made is "permanently" increased by that number. But the number of appointments to be made is definitely limited by this paragraph. Regardless of the age or service of the members of the Federal judiciary, no more than 50 judges may be appointed in all; the Supreme Court may not be increased beyond 15 members; no circuit court of appeals, nor the Court of Claims, nor the Court of Customs and Patent Appeals, nor the Customs Court may be increased by more than 2 members; and finally, in the case of district courts, the number of judges now authorized to be appointed for any district or group of districts may not be more than doubled.

Section 1 (c) fixes the quorum of the Supreme Court, the Court of Appeals for the District of Columbia, the Court of Claims, and the Court of Customs and Patent Appeals.

Section 1 (d) provides that an additional judge shall not be appointed in the case of a judge whose office has been abolished by Congress.

Section 2 provides for the designation and assignment of judges to courts other than those in which they hold their commissions. As introduced, it applied only to judges to be appointed after the enactment of the bill. As amended, it applies to all judges regardless of the date of their appointment, but it still alters the present system in a striking manner, as will be more fully indicated later.

Circuit judges may be assigned by the Chief Justice for service in any circuit court of appeals. District judges may be similarly assigned by the Chief Justice to any district court, or by the senior circuit judge of his circuit (but subject to the authority of the Chief Justice) to any district court within the circuit.

After the assignment of a judge by the Chief Justice, the senior circuit judge of the district in which he is commissioned may certify to the Chief Justice any reason deemed sufficient by him to warrant the revocation or termination of the assignment, but the Chief Justice has full discretion whether or not to act upon any such certification. The senior circuit judge of the district to which such assignment will be made is not given similar authority to show why the assignment should not be made effective.

Section 3 gives the Supreme Court power to appoint a Proctor to investigate the volume, character, and status of litigation in the circuit and district courts, to recommend the assignment of judges authorized by section 2, and to make suggestions for expediting the disposition of pending cases. The salary of the Proctor is fixed at $10,000 per year and provision is made for the functions of the office.

Section 4 authorizes an appropriation of $100,000 for the purposes of the act.

Section 5 contains certain definitions.

Section 6, the last section, makes the act effective 30 days after enactment.

THE ARGUMENT

The committee recommends that the measure be rejected for the following primary reasons:

I. The bill does not accomplish any one of the objectives for which it was originally offered.

II. It applies force to the judiciary and in its initial and ultimate effect would undermine the independence of the courts.

III. It violates all precedents in the history of our Government and would in itself be a dangerous precedent for the future.

IV. The theory of the bill is in direct violation of the spirit of the American Constitution and its employment would permit alteration of the Constitution without the people's consent or approval; it undermines the protection our constitutional system gives to minorities and is subversive of the rights of individuals.

V. It tends to centralize the Federal district judiciary by the power of assigning judges from one district to another at will.

VI. It tends to expand political control over the judicial department by adding to the powers of the legislative and executive departments respecting the judiciary.

BILL DOES NOT DEAL WITH INJUNCTIONS

This measure was sent to the Congress by the President on February 5, 1937, with a message (appendix A) setting forth the objectives sought to be attained.

It should be pointed out here that a substantial portion of the message was devoted to a discussion of the evils of conflicting decisions by inferior courts on constitutional questions and to the alleged abuse of the power of injunction by some of the Federal courts. These matters, however, have no bearing on the bill before us, for it contains neither a line nor a sentence dealing with either of those problems.

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.

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.

OBJECTIVES AS ORIGINALLY STATED

As offered to the Congress, this bill was designed to effectuate only three objectives, described as follows in the President's message:

1. To increase the personnel of the Federal courts "so that cases may be promptly decided in the first instance, and may be given adequate and prompt hearing on all appeals";

2. To "invigorate all the courts by the permanent infusion of new blood";

3. To "grant to the Supreme Court further power and responsibility in maintaining the efficiency of the entire Federal judiciary."

The third of these purposes was to be accomplished by the provisions creating the office of the Proctor and dealing with the assignment of judges to courts other than those to which commissioned.

The first two objectives were to be attained by the provisions authorizing the appointment of not to exceed 50 additional judges when sitting judges of retirement age, as defined in the bill, failed to retire or resign. How totally inadequate the measure is to achieve either of the named objectives, the most cursory examination of the facts reveals.

BILL FAILS OF ITS PURPOSE

In the first place, as already pointed out, the bill does not provide for any increase of personnel unless judges of retirement age fail to resign or retire. Whether or not there is to be an increase of the number of judges, and the extent of the increase if there is to be one, is dependent wholly upon the judges themselves and not at all upon the accumulation of litigation in any court. To state it another way the increase of the number of judges is to be provided, not in relation to the increase of work in any district or circuit, but in relation to the age of the judges and their unwillingness to retire.

In the second place, as pointed out in the President's message, only 25 of the 237 judges serving in the Federal courts on February 5, 1937, were over 70 years of age. Six of these were members of the Supreme Court at the time the bill was introduced. At the present time there are 24 judges 70 years of age or over distributed among the 10 circuit courts, the 84 district courts, and the 4 courts in the District of Columbia and that dealing with customs cases in New York. Of the 24, only 10 are serving in the 84 district courts, so that the remaining 14 are to be found in 5 special courts and in the 10 circuit courts. (Appendix B.) Moreover, the facts indicate that the courts with the oldest judges have the best records in the disposition of business. It follows, therefore, that since there are comparatively few aged justices in service and these are among the most efficient on the bench, the age of sitting judges does not make necessary an increase of personnel to handle the business of the courts.

There was submitted with the President's message a report from the Attorney General to the effect that in recent years the number of cases has greatly increased and that delay in the administration of justice is interminable. It is manifest, however, that this condition cannot be remedied by the contingent appointment of new judges to sit beside the judges over 70 years of age, most of whom are either altogether equal to their duties or are commissioned in courts in which congestion of business does not exist. It must be obvious that the way to attack congestion and delay in the courts is directly by legislation which will increase the number of judges in those districts where the accumulation exists, not indirectly by the contingent appointment of new judges to courts where the need does not exist, but where it may happen that the sitting judge is over 70 years of age.

LOCAL JUSTICE CENTRALLY ADMINISTERED

Perhaps, it was the recognition of this fact that prompted the authors of the bill to draft section 2 providing for the assignment of judges "hereafter appointed" to districts other than those to which commissioned. Such a plan, it will not be overlooked, contemplates

the appointment of a judge to the district of his residence and his assignment to duty in an altogether different jurisdiction. It thus creates a flying squadron of itinerant judges appointed for districts and circuits where they are not needed to be transferred to other parts of the country for judicial service. It may be doubted whether such a plan would be effective. Certainly it would be a violation of the salutary American custom that all public officials should be citizens of the jurisdiction in which they serve or which they represent.

Though this plan for the assignment of new judges to the trial of cases in any part of the country at the will of the Chief Justice was in all probability intended for no other purpose than to make it possible to send the new judges into districts where actual congestion exists, it should not be overlooked that most of the plan involves a possibility of real danger.

To a greater and a greater degree, under modern conditions, the Government is involved in civil litigation with its citizens. Are we then through the system devised in this bill to make possible the selection of particular judges to try particular cases?

Under the present system (U. S. C., title 28, sec. 17) the assignment of judges within the circuit is made by the senior circuit judge, or, in his absence, the circuit justice. An assignment of a judge from outside the district may be made only when the senior circuit judge or the circuit justice makes certificate of the need of the district to the Chief Justice. Thus is the principle of local self-government preserved by the present system.

This principle is destroyed by this bill which allows the Chief Justice, at the recommendation of the Proctor, to make assignments anywhere regardless of the needs of any district. Thus is the administration of justice to be centralized by the proposed system.

MEASURE WOULD PROLONG LITIGATION

It has been urged that the plan would correct the law's delay, and the President's message contains the statement that "poorer litigants are compelled to abandon valuable rights or to accept inadequate or unjust settlements because of sheer inability to finance or to await the end of long litigation." Complaint is then made that the Supreme Court during the last fiscal year "permitted private litigants to prosecute appeals in only 108 cases out of 803 applications."

It can scarcely be contended that the consideration of 695 more cases in the Supreme Court would have contributed in any degree to curtailing the law's delay or to reducing the expense of litigation. If it be true that the postponement of final decision in cases is a burden on poorer litigants as the President's message contends, then it must be equally true that any change of the present system which would enable wealthy litigants to pursue their cases in the Supreme Court would result only in an added burden on the "poorer litigants" whose "sheer inability to finance or to await the end of long litigation" compels them "to abandon valuable rights or to accept inadequate or unjust settlements."

Of course, there is nothing in this bill to alter the provisions of the act of 1925 by which the Supreme Court was authorized "in its discretion to refuse to hear appeals in many classes of cases." The President has not recommended any change of that law, and the only amendment providing an alteration of the law that was presented to

the committee was, on roll call, unanimously rejected by the committee. It is appropriate, however, to point out here that one of the principal considerations for the enactment of the certiorari law was the belief of Congress that the interests of the poorer litigant would be served and the law's delay reduced if the Supreme Court were authorized to reject frivolous appeals. Congress recognized the fact that wealthy clients and powerful corporations were in a position to wear out poor litigants under the old law. Congress was convinced that, in a great majority of cases, a trial in a nisi prius court and a rehearing in a court of appeals would be ample to do substantial justice. Accordingly, it provided in effect that litigation should end with the court of appeals unless an appellant could show the Supreme Court on certiorari that a question of such importance was involved as to warrant another hearing by the Supreme Court. Few litigated cases were ever decided in which the defeated party thought that justice had been done and in which he would not have appealed from the Supreme Court to Heaven itself, if he thought that by doing so he would wear down his opponent.

The Constitution provides for one Supreme Court (sec. 1, art. III) and authorizes Congress to make such exceptions as it deems desirable to the appellate jurisdiction of the Supreme Court (sec. 2, art. III). One obvious purpose of this provision was to permit Congress to put an end to litigation in the lower courts except in cases of greatest importance, and, also, in the interest of the poorer citizen, to make it less easy for wealthy litigants to invoke delay to defeat justice.

No alteration of this law is suggested by the proponents of this measure, but the implication is made that the Supreme Court has improvidently refused to hear some cases. There is no evidence to maintain this contention. The Attorney General in his statement to the committee presented a mathematical calculation to show how much time would be consumed by the Justices in reading the entire record in each case presented on appeal. The members of the committee and, of course the Attorney General, are well aware of the fact that attorneys are officers of the Court, that it is their duty to summarize the records and the points of appeal, and that the full record is needed only when, after having examined the summary of the attorneys, the court is satisfied there should be a hearing on the merits.

The Chief Justice, in a letter presented to this committee (appendix C), made it clear that "even if two or three of the Justices are strongly of the opinion that certiorari should be allowed, frequently the other judges will acquiesce in their view, but the petition is always granted if four so vote."

It thus appears from the bill itself, from the message of the President, the statement of the Attorney General, and the letter of the Chief Justice that nothing of advantage to litigants is to be derived from this measure in the reduction of the law's delay.

QUESTION OF AGE NOT SOLVED

The next question is to determine to what extent "the persistent infusion of new blood" may be expected from this bill.

It will be observed that the bill before us does not and cannot compel the retirement of any judge, whether on the Supreme Court or

any other court, when he becomes 70 years of age. It will be remembered that the mere attainment of three score and ten by a particular judge does not, under this bill, require the appointment of another. The man on the bench may be 80 years of age, but this bill will not authorize the President to appoint a new judge to sit beside him unless he has served as a judge for 10 years. In other words, age itself is not penalized; the penalty falls only when age is attended with experience.

No one should overlook the fact that under this bill the President, whoever he may be and whether or not he believes in the constant infusion of young blood in the courts, may nominate a man 69 years and 11 months of age to the Supreme Court, or to any court, and, if confirmed, such nominee, if he never had served as a judge, would continue to sit upon the bench unmolested by this law until he had attained the ripe age of 79 years and 11 months.

We are told that "modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business." Does this bill provide for such? The answer is obviously no. As has been just demonstrated, the introduction of old and inexperienced blood into the courts is not prevented by this bill.

More than that, the measure, by its own terms, makes impossible the "constant" or "persistent" infusion of new blood. It is to be observed that the word is "new", not "young."

The Supreme Court may not be expanded to more than 15 members. No more than two additional members may be appointed to any circuit court of appeals, to the Court of Claims, to the Court of Customs and Patent Appeals, or to the Customs Court, and the number of judges now serving in any district or group of districts may not be more than doubled. There is, therefore, a specific limitation of appointment regardless of age. That is to say, this bill, ostensibly designed to provide for the infusion of new blood, sets up insuperable obstacles to the "constant" or "persistent" operation of that principle.

Take the Supreme Court as an example. As constituted at the time this bill was presented to the Congress, there were six members of that tribunal over 70 years of age. If all six failed to resign or retire within 30 days after the enactment of this bill, and none of the members died, resigned, or retired before the President had made a nomination, then the Supreme Court would consist of 15 members. These 15 would then serve, regardless of age, at their own will, during good behavior, in other words, for life. Though as a result we had a court of 15 members 70 years of age or over, nothing could be done about it under this bill, and there would be no way to infuse "new" blood or "young" blood except by a new law further expanding the Court, unless, indeed, Congress and the Executive should be willing to follow the course defined by the framers of the Constitution for such a contingency and submit to the people a constitutional amendment limiting the terms of Justices or making mandatory their retirement at a given age.

It thus appears that the bill before us does not with certainty provide for increasing the personnel of the Federal judiciary, does not remedy the law's delay, does not serve the interest of the "poorer litigant" and does not provide for the "constant" or "persistent infusion of new blood" into the judiciary. What, then, does it do?

THE BILL APPLIES FORCE TO THE JUDICIARY

The answer is clear. It applies force to the judiciary. It is an attempt to impose upon the courts a course of action, a line of decision which, without that force, without that imposition, the judiciary might not adopt.

Can there be any doubt that this is the purpose of the bill? Increasing the personnel is not the object of this measure; infusing young blood is not the object; for if either one of these purposes had been in the minds of the proponents, the drafters would not have written the following clause to be found on page 2, lines 1 to 4, inclusive:

> *Provided*, That no additional judge shall be appointed hereunder if the judge who is of retirement age dies, resigns, or retires prior to the nomination of such additional judge.

Let it also be borne in mind that the President's message submitting this measure contains the following sentence:

> If, on the other hand, any judge eligible for retirement should feel that his Court would suffer because of an increase of its membership, he may retire or resign under already existing provisions of law if he wishes to do so.

Moreover, the Attorney General in testifying before the committee (hearings, pt. 1, p. 33) said:

> If the Supreme Court feels that the addition of six judges would be harmful to that Court, it can avoid that result by resigning.

Three invitations to the members of the Supreme Court over 70 years of age to get out despite all the talk about increasing personnel to expedite the disposition of cases and remedy the law's delay. One by the bill. One by the President's message. One by the Attorney General.

Can reasonable men by any possibility differ about the constitutional impropriety of such a course?

Those of us who hold office in this Government, however humble or exalted it may be, are creatures of the Constitution. To it we owe all the power and authority we possess. Outside of it we have none. We are bound by it in every official act.

We know that this instrument, without which we would not be able to call ourselves presidents, judges, or legislators, was carefully planned and deliberately framed to establish three coordinate branches of government, every one of them to be independent of the others. For the protection of the people, for the preservation of the rights of the individual, for the maintenance of the liberties of minorities, for maintaining the checks and balances of our dual system, the three branches of the Government were so constituted that the independent expression of honest difference of opinion could never be restrained in the people's servants and no one branch could overawe or subjugate the others. That is the American system. It is immeasurably more important, immeasurably more sacred to the people of America, indeed, to the people of all the world than the immediate adoption of any legislation however beneficial.

That judges should hold office during good behavior is the prescription. It is founded upon historic experience of the utmost significance. Compensation at stated times, which compensation was not to be diminished during their tenure, was also ordained. Those comprehensible terms were the outgrowths of experience which was deep-

seated. Of the 55 men in the Constitutional Convention, nearly one-half had actually fought in the War for Independence. Eight of the men present had signed the Declaration of Independence, in which, giving their reasons for the act, they had said of their king: "He has made judges dependent upon his will alone for their tenure of office and the amount and payment of their salaries." They sought to correct an abuse and to prevent its recurrence. When these men wrote the Constitution of their new Government, they still sought to avoid such an abuse as had led to such a bloody war as the one through which they had just passed. So they created a judicial branch of government consisting of courts not conditionally but absolutely independent in the discharge of their functions, and they intended that entire and impartial independence should prevail. Interference with this independence was prohibited, not partially but totally. Behavior other than good was the sole and only cause for interference. This judicial system is the priceless heritage of every American.

By this bill another and wholly different cause is proposed for the intervention of executive influence, namely, age. Age and behavior have no connection; they are unrelated subjects. By this bill, judges who have reached 70 years of age may remain on the bench and have their judgment augmented if they agree with the new appointee, or vetoed if they disagree. This is far from the independence intended for the courts by the framers of the Constitution. This is an unwarranted influence accorded the appointing agency, contrary to the spirit of the Constitution. The bill sets up a plan which has as its stability the changing will or inclination of an agency not a part of the judicial system. Constitutionally, the bill can have no sanction. The effect of the bill, as stated by the Attorney General to the committee, and indeed by the President in both his message and speech, is in violation of the organic law.

OBJECT OF PLAN ACKNOWLEDGED

No amount of sophistry can cover up this fact. The effect of this bill is not to provide for an increase in the number of Justices composing the Supreme Court. The effect is to provide a forced retirement or, failing in this, to take from the Justices affected a free exercise of their independent judgment.

The President tells us in his address to the Nation of March 9 (appendix D), Congressional Record, March 10, page 2650:

> When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress and to approve or disapprove the public policy written into these laws * * *.
>
> We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men.

These words constitute a charge that the Supreme Court has exceeded the boundaries of its jurisdiction and invaded the field reserved by the Constitution to the legislative branch of the Government. At best the accusation is opinion only. It is not the conclusion of judicial process.

Here is the frank acknowledgment that neither speed nor "new blood" in the judiciary is the object of this legislation, but a change in the decisions of the Court—a subordination of the views of the judges to the views of the executive and legislative, a change to be brought about by forcing certain judges off the bench or increasing their number.

Let us, for the purpose of the argument, grant that the Court has been wrong, wrong not only in that it has rendered mistaken opinions but wrong in the far more serious sense that it has substituted its will for the congressional will in the matter of legislation. May we nevertheless safely punish the Court?

Today it may be the Court which is charged with forgetting its constitutional duties. Tomorrow it may be the Congress. The next day it may be the Executive. If we yield to temptation now to lay the lash upon the Court, we are only teaching others how to apply it to ourselves and to the people when the occasion seems to warrant. Manifestly, if we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another and a different interpretation and one which may not sound so pleasant in our ears as that for which we now contend.

There is a remedy for usurpation or other judicial wrongdoing. If this bill be supported by the toilers of this country upon the ground that they want a Court which will sustain legislation limiting hours and providing minimum wages, they must remember that the procedure employed in the bill could be used in another administration to lengthen hours and to decrease wages. If farmers want agricultural relief and favor this bill upon the ground that it gives them a Court which will sustain legislation in their favor, they must remember that the procedure employed might some day be used to deprive them of every vestige of a farm relief.

When members of the Court usurp legislative powers or attempt to exercise political power, they lay themselves open to the charge of having lapsed from that "good behavior" which determines the period of their official life. But, if you say, the process of impeachment is difficult and uncertain, the answer is, the people made it so when they framed the Constitution. It is not for us, the servants of the people, the instruments of the Constitution, to find a more easy way to do that which our masters made difficult.

But, if the fault of the judges is not so grievous as to warrant impeachment, if their offense is merely that they have grown old, and we feel, therefore, that there should be a "constant infusion of new blood", then obviously the way to achieve that result is by constitutional amendment fixing definite terms for the members of the judiciary or making mandatory their retirement at a given age. Such a provision would indeed provide for the constant infusion of new blood, not only now but at all times in the future. The plan before us is but a temporary expedient which operates once and then never again, leaving the Court as permanently expanded to become once more a court of old men, gradually year by year falling behind the times.

WHAT SIZE THE SUPREME COURT?

How much better to proceed according to the rule laid down by the Constitution itself than by indirection to achieve our purposes. The futility and absurdity of the devious rather than the direct method

is illustrated by the effect upon the problem of the retirement of Justice Van Devanter.

According to the terms of the bill, it does not become effective until 30 days after enactment, so the number of new judges to be appointed depends not upon the bill itself, not upon the conditions as they exist now or as they might exist when the bill is enacted, but upon conditions as they exist 30 days thereafter. Because Justice Van Devanter's retirement was effective as of June 2, there were on that date only five rather than six Justices on the Supreme Court of retirement age. The maximum number of appointments, therefore, is now 5 rather than 6 and the size of the Court 14 rather than 15. Now, indeed, we have put an end to 5-to-4 decisions and we shall not be harassed by 8-to-7 decisions. Now instead of making one man on the Court all-powerful, we have rendered the whole Court impotent when it divides 7 to 7 and we have provided a system approving the lower court by default.

But we may have another vacancy, and then the expanded court will be 13 rather than 14. A court of 13 with decisions by a vote of 7 to 6 and the all-powerful one returned to his position of judicial majesty. Meanwhile, the passage of years carries the younger members onward to the age of retirement when, if they should not retire, additional appointments could be made until the final maximum of 15 was reached.

The membership of the Court, between 9 and 15, would not be fixed by the Congress nor would it be fixed by the President. It would not even be fixed by the Court as a court, but would be determined by the caprice or convenience of the Justices over 70 years of age. The size of the Court would be determined by the personal desires of the Justices, and if there be any public advantage in having a court of any certain size, that public advantage in the people's interest would be wholly lost. Is it of any importance to the country that the size of the Court should be definitely fixed? Or are we to shut our eyes to that factor just because we have determined to punish the Justices whose opinions we resent?

But, if you say the process of reform by amendment is difficult and uncertain, the answer is, the people made it so when they framed the Constitution, and it is not for us, the servants of the people, by indirection to evade their will, or by devious methods to secure reforms upon which they only in their popular capacity have the right to pass.

A MEASURE WITHOUT PRECEDENT

This bill is an invasion of judicial power such as has never before been attempted in this country. It is true that in the closing days of the administration of John Adams, a bill was passed creating 16 new circuit judges while reducing by one the number of places on the Supreme Court. It was charged that this was a bill to use the judiciary for a political purpose by providing official positions for members of a defeated party. The repeal of that law was the first task of the Jefferson administration.

Neither the original act nor the repealer was an attempt to change the course of judicial decision. And never in the history of the country has there been such an act. The present bill comes to us, therefore, wholly without precedent.

It is true that the size of the Supreme Court has been changed from time to time, but in every instance after the Adams administration, save one, the changes were made for purely administrative purposes in aid of the Court, not to control it.

Because the argument has been offered that these changes justify the present proposal, it is important to review all of the instances.

They were seven in number.

The first was by the act of 1801 reducing the number of members from six, as originally constituted, to five. Under the Judiciary Act of 1789 the circuit courts were trial courts and the Justices of the Supreme Court sat in them. That onerous duty was removed by the act of 1801 which created new judgeships for the purpose of relieving the members of the Supreme Court of this task. Since the work of the Justices was thereby reduced, it was provided that the next vacancy should not be filled. Jeffersonians explained the provision by saying that it was intended merely to prevent Jefferson from making an appointment of a successor to Justice Cushing whose death was expected.

The next change was in 1802 when the Jefferson administration restored the membership to six.

In neither of these cases was the purpose to influence decisions.

The third change was in 1807 under Jefferson when, three new States having been admitted to the Union, a new judicial circuit had to be created, and since it would be impossible for any of the six sitting Justices of the Supreme Court to undertake the trial work in the new circuit (Ohio, Kentucky, and Tennessee), a seventh Justice was added because of the expansion of the country. Had Jefferson wanted to subjugate John Marshall this was his opportunity to multiply members of the Court and overwhelm him, but he did not do it. We have no precedent here.

Thirty years elapsed before the next change. The country had continued to expand. New States were coming in and the same considerations which caused the increase of 1807 moved the representatives of the new West in Congress to demand another expansion. In 1826 a bill adding three justices passed both Houses but did not survive the conference. Andrew Jackson, who was familiar with the needs of the new frontier States, several times urged the legislation. Finally, it was achieved in 1837 and the Court was increased from 7 to 9 members.

Here again the sole reason for the change was the need of a growing country for a larger Court. We are still without a precedent.

CHANGES DURING THE RECONSTRUCTION PERIOD

In 1863 the western frontiers had reached the Pacific. California had been a State since 1850 without representation on the Supreme Court. The exigencies of the war and the development of the coast region finally brought the fifth change when by the act of 1863 a Pacific circuit was created and consequently a tenth member of the High Court.

The course of judicial opinion had not the slightest bearing upon the change.

Seventy-five years of constitutional history and still no precedent for a legislative attack upon the judicial power.

Now we come to the dark days of the reconstruction era for the sixth and seventh alterations of the number of justices.

The congressional majority in Andrew Johnson's administration had slight regard for the rights of minorities and no confidence in the President. Accordingly, a law was passed in 1866, providing that no appointments should be made to the Court until its membership had been reduced from 10 to 7. Doubtless, Thaddeus Stevens feared that the appointees of President Johnson might not agree with reconstruction policies and, if a constitutional question should arise, might vote to hold unconstitutional an act of Congress. But whatever the motive, a reduction of members at the instance of the bitterest majority that ever held sway in Congress to prevent a President from influencing the Court is scarcely a precedent for the expansion of the Court now.

By the time General Grant had become President in March 1869 the Court had been reduced to 8 members by the operation of the law of 1866. Presidential appointments were no longer resented, so Congress passed a new law, this time fixing the membership at 9. This law was passed in April 1869, an important date to remember, for the *Legal Tender* decision had not yet been rendered. Grant was authorized to make the additional appointment in December. Before he could make it however, Justice Grier resigned, and there were thus two vacancies.

The charge has been made that by the appointment to fill these vacancies Grant packed the Court to affect its decision in the *Legal Tender case*. Now whatever Grant's purpose may have been in making the particular appointments, it is obvious that Congress did not create the vacancies for the purpose of affecting any decision, because the law was passed long before the Court had acted in *Hepburn* v. *Griswold* and Congress made only one vacancy, but two appointments were necessary to change the opinion.

It was on February 7, 1870, that the court handed down its judgment holding the Legal Tender Act invalid, a decision very much deplored by the administration. It was on the same date that Grant sent down the nomination of the two justices whose votes, on a reconsideration of the issue, caused a reversal of the decision. As it happens, Grant had made two other nominations first, that of his Attorney General, Ebenezer Hoar, who was rejected by the Senate, and Edwin Stanton, who died 4 days after having been confirmed. These appointments were made in December 1869, 2 months before the decision, and Stanton was named, according to Charles Warren, historian of the Supreme Court, not because Grant wanted him but because a large majority of the members of the Senate and the House urged it. So Grant must be acquitted of having packed the Court and Congress is still without a precedent for any act that will tend to impair the independence of the Court.

A PRECEDENT OF LOYALTY TO THE CONSTITUTION

Shall we now, after 150 years of loyalty to the constitutional ideal of an untrammeled judiciary, duty bound to protect the constitutional rights of the humblest citizen even against the Government itself, create the vicious precedent which must necessarily undermine our system? The only argument for the increase which survives

analysis is that Congress should enlarge the Court so as to make the policies of this administration effective.

We are told that a reactionary oligarchy defies the will of the majority, that this is a bill to "unpack" the Court and give effect to the desires of the majority; that is to say, a bill to increase the number of Justices for the express purpose of neutralizing the views of some of the present members. In justification we are told, but without authority, by those who would rationalize this program, that Congress was given the power to determine the size of the Court so that the legislative branch would be able to impose its will upon the judiciary. This amounts to nothing more than the declaration that when the Court stands in the way of a legislative enactment, the Congress may reverse the ruling by enlarging the Court. When such a principle is adopted, our constitutional system is overthrown!

This, then, is the dangerous precedent we are asked to establish. When proponents of the bill assert, as they have done, that Congress in the past has altered the number of Justices upon the Supreme Court and that this is reason enough for our doing it now, they show how important precedents are and prove that we should now refrain from any action that would seem to establish one which could be followed hereafter whenever a Congress and an executive should become dissatisfied with the decisions of the Supreme Court.

This is the first time in the history of our country that a proposal to alter the decisions of the court by enlarging its personnel has been so boldly made. Let us meet it. Let us now set a salutary precedent that will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defense of the liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power, or factional passion, approves any measure we may enact. We are not the judges of the judges. We are not above the Constitution.

Even if every charge brought against the so-called "reactionary" members of this Court be true, it is far better that we await orderly but inevitable change of personnel than that we impatiently overwhelm them with new members. Exhibiting this restraint, thus demonstrating our faith in the American system, we shall set an example that will protect the independent American judiciary from attack as long as this Government stands.

AN INDEPENDENT JUDICIARY ESSENTIAL

It is essential to the continuance of our constitutional democracy that the judiciary be completely independent of both the executive and legislative branches of the Government, and we assert that independent courts are the last safeguard of the citizen, where his rights, reserved to him by the express and implied provisions of the Constitution, come in conflict with the power of governmental agencies. We assert that the language of John Marshall, then in his 76th year, in the Virginia Convention (1829–31), was and is prophetic:

> Advert, sir, to the duties of a judge. He has to pass between the Government and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that in the exercise of these duties he should observe the utmost

fairness. Need I express the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The judicial department comes home in its effect to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree, important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience?

The condition of the world abroad must of necessity cause us to hesitate at this time and to refuse to enact any law that would impair the independence of or destroy the people's confidence in an independent judicial branch of our Government. We unhesitatingly assert that any effort looking to the impairment of an independent judiciary of necessity operates toward centralization of power in the other branches of a tripartite form of government. We declare for the continuance and perpetuation of government and rule by law, as distinguished from government and rule by men, and in this we are but reasserting the principles basic to the Constitution of the United States. The converse of this would lead to and in fact accomplish the destruction of our form of government, where the written Constitution with its history, its spirit, and its long line of judicial interpretation and construction, is looked to and relied upon by millions of our people. Reduction of the degree of the supremacy of law means an increasing enlargement of the degree of personal government.

Personal government, or government by an individual, means autocratic dominance, by whatever name it may be designated. Autocratic dominance was the very thing against which the American Colonies revolted, and to prevent which the Constitution was in every particular framed.

Courts and the judges thereof should be free from a subservient attitude of mind, and this must be true whether a question of constitutional construction or one of popular activity is involved. If the court of last resort is to be made to respond to a prevalent sentiment of a current hour, politically imposed, that Court must ultimately become subservient to the pressure of public opinion of the hour, which might at the moment embrace mob passion abhorrent to a more calm, lasting consideration.

True it is, that courts like Congresses, should take account of the advancing strides of civilization. True it is that the law, being a progressive science, must be pronounced progressively and liberally; but the milestones of liberal progress are made to be noted and counted with caution rather than merely to be encountered and passed. Progress is not a mad mob march; rather, it is a steady, invincible stride. There is ever-impelling truth in the lines of the great liberal jurist, Mr. Justice Holmes, in *Northern Securities* v. *The United States*, wherein he says:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear, seem doubtful, and before which even well settled principles of law will bend.

If, under the "hydraulic pressure" of our present need for economic justice, we destroy the system under which our people have progressed to a higher degree of justice and prosperity than that ever enjoyed by any other people in all the history of the human race, then we shall destroy not only all opportunity for further advance but everything we have thus far achieved.

The whole bill prophesies and permits executive and legislative interferences with the independence of the Court, a prophecy and a permission which constitute an affront to the spirit of the Constitution.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing (The Federalist, vol. 2, p. 100, no. 78).

The spirit of the Constitution emphasizing the establishment of an independent judicial branch was reenunciated by Madison in Nos. 47 and 48 (The Federalist, vol. 1, pp. 329, 339) and by John Adams (Adams' Works, vol. 1, p. 186).

If interference with the judgment of an independent judiciary is to be countenanced in any degree, then it is permitted and sanctioned in all degrees. There is no constituted power to say where the degree ends or begins, and the political administration of the hour may apply the essential "concepts of justice" by equipping the courts with one strain of "new blood", while the political administration of another day may use a different light and a different blood test. Thus would influence run riot. Thus perpetuity, independence, and stability belonging to the judicial arm of the Government and relied on by lawyers and laity, are lost. Thus is confidence extinguished.

THE PRESIDENT GIVES US EXAMPLE

From the very beginning of our Government to this hour, the fundamental necessity of maintaining inviolate the independence of the three coordinate branches of government has been recognized by legislators, jurists, and presidents. James Wilson, one of the framers of the Constitution who later became a Justice of the Supreme Court, declared that the independence of each department recognizes that its proceedings "shall be free from the remotest influence, direct or indirect, of either of the other two branches." Thus it was at the beginning. Thus it is now. Thus it was recognized by the men who framed the Constitution and administered the Government under it. Thus it was declared and recognized by the present President of the United States who, on the 19th day of May 1937, in signing a veto message to the Congress of the United States of a measure which would have created a special commission to represent the Federal Government at the World's Fair in New York City in 1939, withheld his approval because he felt that the provision by which it gave certain administrative duties to certain Members of Congress amounted to a legislative interference with executive functions. In vetoing the bill, President Roosevelt submitted with approval the statement of the present Attorney General that:

In my opinion those provisions of the joint resolution establishing a commission composed largely of Members of the Congress and authorizing them to appoint a United States commissioner general and two assistant commissioners for the New York World's Fair, and also providing for the expenditure of the appropriation made by the resolution, and for the administration of the resolution generally, amount to an unconstitutional invasion of the province of the Executive.

The solicitude of the President to maintain the independence of the executive arm of the Government against invasion by the legislative authority should be an example to us in solicitude to preserve the independence of the judiciary from any danger of invasion by the legislative and executive branches combined.

EXTENT OF THE JUDICIAL POWER

The assertion has been indiscriminately made that the Court has arrogated to itself the right to declare acts of Congress invalid. The contention will not stand against investigation or reason.

Article III of the Federal Constitution provides that the judicial power "shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made under their authority."

The words "under this Constitution" were inserted on the floor of the Constitutional Convention in circumstances that leave no doubt of their meaning. It is true that the Convention had refused to give the Supreme Court the power to sit as a council of revision over the acts of Congress or the power to veto such acts. That action, however, was merely the refusal to give the Court any legislative power. It was a decision wholly in harmony with the purpose of keeping the judiciary independent. But, while carefully refraining from giving the Court power to share in making laws, the Convention did give it judicial power to construe the Constitution in litigated cases.

After the various forms and powers of the new Government had been determined in principle, the Convention referred the whole matter to the Committee on Detail, the duty of which was to draft a tentative instrument. The report of this committee was then taken up section by section on the floor, debated and perfected, whereupon the instrument was referred to the Committee on Style which wrote the final draft.

When the Committee on Detail reported the provision defining the judicial power, it read as follows:

> The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States, etc. (Elliot's Debates, vol. 5, p. 380).

On August 27, 1787, when this sentence was under consideration of the full Convention, it was changed to read as follows on motion of Dr. Johnson:

> The jurisdiction of the Supreme Court shall extend to all cases arising under this Constitution and the laws passed by the Legislature of the United States.

Madison in his notes (Elliot's Debates, vol. 5, p. 483) reports the incident in this language:

> Dr. Johnson moved to insert the words, "this Constitution and the" before the word "laws."
>
> Mr. Madison doubted whether it was not going too far, to extend the jurisdiction of the Court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department.
>
> The motion of Dr. Johnson was agreed to, nem. con., it being generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature.

In other words, the framers of the Constitution were not satisfied to give the Court power to pass only on cases arising under the laws but insisted on making it quite clear that the power extends to cases

arising "under the Constitution." Moreover, Article VI of the Constitution, clause 2, provides:

> This Constitution and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land * * *.

Language was never more clear. No doubt can remain. A pretended law which is not "in pursuance" of the Constitution is no law at all.

A citizen has the right to appeal to the Constitution from such a statute. He has the right to demand that Congress shall not pass any act in violation of that instrument, and, if Congress does pass such an act, he has the right to seek refuge in the courts and to expect the Supreme Court to strike down the act if it does in fact violate the Constitution. A written constitution would be valueless if it were otherwise.

The right and duty of the Court to construe the Constitution is thus made clear. The question may, however, be propounded whether in construing that instrument the Court has undertaken to "override the judgment of the Congress on legislative policy." It is not necessary for this committee to defend the Court from such a charge. An invasion of the legislative power by the judiciary would not, as has already been indicated, justify the invasion of judicial authority by the legislative power. The proper remedy against such an invasion is provided in the Constitution.

VERY FEW LAWS HELD UNCONSTITUTIONAL

We may, however, point out that neither in this administration nor in any previous administration has the Supreme Court held unconstitutional more than a minor fraction of the laws which have been enacted. In 148 years, from 1789 to 1937, only 64 acts of Congress have been declared unconstitutional—64 acts out of a total of approximately 58,000 (appendix E).

These 64 acts were held invalid in 76 cases, 30 of which were decided by the unanimous vote of all the justices, 9 by the agreement of all but one of the justices, 14 by the agreement of all but two, another 12 by agreement of all but three. In 11 cases only were there as many as four dissenting votes when the laws were struck down.

Only four statutes enacted by the present administration have been declared unconstitutional with three or more dissenting votes. And only 11 statutes, or parts thereof, bearing the approval of the present Chief Executive out of 2,699 signed by him during his first administration, have been invalidated. Of the 11, three—the Municipal Bankruptcy Act, the Farm Mortgage Act, and the Railroad Pension Act—were not what have been commonly denominated administration measures. When he attached his signature to the Railroad Pension Act, the President was quoted as having expressed his personal doubt as to the constitutionality of the measure. The Farm Mortgage Act, was later rewritten by the Congress, reenacted, and in its new form sustained by the court which had previously held it void. Both the Farm Mortgage Act in its original form and the National Recovery Administration Act were held to be unconstitutional by a unanimous vote of all the justices. With this record of fact, it can scarcely be said with accuracy that the legislative power has suffered seriously at the hands of the Court.

But even if the case were far worse than it is alleged to be, it would still be no argument in favor of this bill to say that the courts and some judges have abused their power. The courts are not perfect, nor are the judges. The Congress is not perfect, nor are Senators and Representatives. The Executive is not perfect. These branches of government and the office under them are filled by human beings who for the most part strive to live up to the dignity and idealism of a system that was designed to achieve the greatest possible measure of justice and freedom for all the people. We shall destroy the system when we reduce it to the imperfect standards of the men who operate it. We shall strengthen it and ourselves, we shall make justice and liberty for all men more certain when, by patience and self-restraint, we maintain it on the high plane on which it was conceived.

Inconvenience and even delay in the enactment of legislation is not a heavy price to pay for our system. Constitutional democracy moves forward with certainty rather than with speed. The safety and the permanence of the progressive march of our civilization are far more important to us and to those who are to come after us than the enactment now of any particular law. The Constitution of the United States provides ample opportunity for the expression of popular will to bring about such reforms and changes as the people may deem essential to their present and future welfare. It is the people's charter of the powers granted those who govern them.

GUARANTIES OF INDIVIDUAL LIBERTY THREATENED

Let it be recognized that not only is the commerce clause of the Constitution and the clauses having to do with due process and general welfare involved in the consideration of this bill, but every line of the Constitution from the preamble to the last amendment is affected. Every declarative statement in those clauses which we choose to call the Bill of Rights is involved. Guaranties of individual human liberty and the limitation of the governing powers and processes are all reviewable.

During the period in which the writing and the adoption of the Constitution was being considered, it was Patrick Henry who said:

> The Judiciary are the sole protection against a tyrannical execution of the laws. They (Congress) cannot depart from the Constitution; and their laws in opposition would be void.

Later, during the discussion of the Bill of Rights, James Madison declared:

> If they (the rights specified in the Bill of Rights) were incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or Executive; they will be naturally led to resist every encroachment upon rights stipulated in the Constitution by the Declaration of Rights.

These leaders, who were most deeply imbued with the duty of safeguarding human rights and who were most concerned to preserve the liberty lately won, never wavered in their belief that an independent judiciary and a Constitution defining with clarity the rights of the people, were the only safeguards of the citizen. Familiar with English history and the long struggle for human liberty, they held it to be an axiom of free government that there could be no security for the people against the encroachment of political power save a written Constitution and an uncontrolled judiciary.

This has now been demonstrated by 150 years of progressive American history. As a people, Americans love liberty. It may be with truth and pride also said that we have a sensitive regard for human rights. Notwithstanding these facts, during 150 years the citizen over and over again has been compelled to contend for the plain rights guaranteed in the Constitution. Free speech, a free press, the right of assemblage, the right of a trial by jury, freedom from arbitrary arrest, religious freedom—these are among the great underlying principles upon which our democracy rests. But for all these, there have been occasions when the citizen has had to appeal to the courts for protection as against those who would take them away. And the only place the citizen has been able to go in any of these instances, for protection against the abridgment of his rights, has been to an independent and uncontrolled and incorruptible judiciary. Our law reports are filled with decisions scattered throughout these long years, reassuring the citizen of his constitutional rights, restraining States, restraining the Congress, restraining the Executive, restraining majorities, and preserving the noblest in rights of individuals.

Minority political groups, no less than religious and racial groups, have never failed, when forced to appeal to the Supreme Court of the United States, to find in its opinions the reassurance and protection of their constitutional rights. No finer or more durable philosophy of free government is to be found in all the writings and practices of great statesmen than may be found in the decisions of the Supreme Court when dealing with great problems of free government touching human rights. This would not have been possible without an independent judiciary.

COURT HAS PROTECTED HUMAN RIGHTS

No finer illustration of the vigilance of the Court in protecting human rights can be found than in a decision wherein was involved the rights of a Chinese person, wherein the Court said:

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. * * * The fundamental rights to life, liberty, and the pursuit of happiness considered as individual possessions are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth "may be a government of laws and not of men." For the very idea that one man may be compelled to hold his life or the means of living or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. (*Yick Wo* v. *Hopkins*, 118 U. S. 356.)

In the case involving the title to the great Arlington estate of Lee, the Court said:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. (*U. S.* v. *Lee*, 106 U. S. 196.)

In a noted case where several Negroes had been convicted of the crime of murder, the trial being held in the atmosphere of mob dominance, the Court set aside the conviction, saying:

The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Snyder* v. *Mass.*; *Rogers* v. *Peck*, 199 U. S. 425, 434.)

The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. (*Walker* v. *Sauvinet*, 92 U. S. 90; *Hurtado* v. *California*, 110 U. S. 516; *Snyder* v. *Mass.*, supra.) But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process * * *.

Under a law enacted by a State legislature, it was made possible to censor and control the press through the power of injunction on the charge that the publication of malicious, scandalous, and defamatory matters against officials constituted a nuisance. The Supreme Court, holding the law void, said:

The administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make less necessary the immunity of the press from previous restraint in dealing with official misconduct.

Speaking of the rights of labor, the Supreme Court has said:

Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay w! t they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital (*American Foundries* v. *Tri City Council*, 257 U. S. 184).

In another instance where the rights of labor were involved, the Court said:

The legality of collective action on the part of employees in order to safeguard their property interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. Congress * * * could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interference with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional rights of either, was based on the recognition of the rights of both (*Texas & New Orleans Railway Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548).

By the philosophy behind the pending measure it is declared that the Bill of Rights would never be violated, that freedom of speech, freedom of assemblage, freedom of the press, security in life, liberty,

and property would never be challenged. Law takes its greatest force and its most secure foundation when it rests on the forum of experience. And how has our court of last resort in the past been called upon to contribute to that great fortification of the law?

In *Cummings* v. *Missouri* the rights of the lowly citizen were protected in the spirit of the Constitution by declaring that "no State shall pass any bill of attender or ex post fact in law." In the *Milligan case*, in the midst of the frenzied wake of the Civil War, it was the Supreme Court which sustained a citizen against an act of Congress, suspending the right of trial by jury.

In the case of *Pierce* v. *The Society of Sisters*, it was the Supreme Court that pronounced the inalienable right of the fathers and mothers of America to guide the destiny of their own children, when that power was challenged by an unconstitutional act of a sovereign State.

Only a few months ago in the Scottsboro cases the rights of a Negro to have counsel were upheld by this Court under the due process clause of the Constitution. On March 26 of this year, in the *Herndon case*, the rights of freedom of speech and freedom of assembly were reenunciated. Only a few weeks ago the Supreme Court construed the Constitution to uphold the Wagner Labor Act.

It would extend this report beyond proper limits to pursue this subject and trace out the holdings of the Court on the many different phases of human rights upon which it has had to pass; but the record of the Court discloses, beyond peradventure of doubt, that in preserving and maintaining the rights of American citizens under the Constitution, it has been vigilant, able, and faithful.

If, at the time all these decisions were made, their making had been even remotely influenced by the possibility that such pronouncement would entail the appointment of a co-judge or co-judges to "apply the essential concepts of justice" in the light of what the then prevailing appointing power might believe to be the "needs of an ever-changing world" these landmarks of liberty of the lowly and humble might not today exist; nor would they exist tomorrow. However great the need for human progress and social uplift, their essentials are so interwoven and involved with the individual as to be inseparable.

The Constitution of the United States, courageously construed and upheld through 150 years of history, has been the bulwark of human liberty. It was bequeathed to us in a great hour of human destiny by one of the greatest characters civilization has produced—George Washington. It is in our hands now to preserve or to destroy. If ever there was a time when the people of America should heed the words of the Father of Their Country this is the hour. Listen to his solemn warning from the Farewell Address:

> It is important, likewise, that the habits of thinking, in a free country, should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding, in the exercises of the powers of one department, to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A first estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal, against invasions by the others, has been evinced by experiment, ancient and modern; some of them in our own country, and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be, in any

particular, wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance, in permanent evil, any partial or transient benefit which the use can, at any time, yield.

SUMMARY

We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle.

It was presented to the Congress in a most intricate form and for reasons that obscured its real purpose.

It would not banish age from the bench nor abolish divided decisions.

It would not affect the power of any court to hold laws unconstitutional nor withdraw from any judge the authority to issue injunctions.

It would not reduce the expense of litigation nor speed the decision of cases.

It is a proposal without precedent and without justification.

It would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights.

It contains the germ of a system of centralized administration of law that would enable an executive so minded to send his judges into every judicial district in the land to sit in judgment on controversies between the Government and the citizen.

It points the way to the evasion of the Constitution and establishes the method whereby the people may be deprived of their right to pass upon all amendments of the fundamental law.

It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy.

Under the form of the Constitution it seeks to do that which is unconstitutional.

Its ultimate operation would be to make this Government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is—an interpretation to be changed with each change of administration.

It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America.

WILLIAM H. KING.
FREDERICK VAN NUYS.
PATRICK MCCARRAN.
CARL A. HATCH.
EDWARD R. BURKE.
TOM CONNALLY.
JOSEPH C. O'MAHONEY.
WILLIAM E. BORAH.
WARREN R. AUSTIN.
FREDERICK STEIWER.

INDIVIDUAL VIEWS OF MR. HATCH

In filing this separate brief statement on S. 1392 it is not intended to depart in any degree from the recommendation of the majority report for the committee to the effect that S. 1392 should not pass. In that recommendation I join.

It should be noted that the recommendation and the arguments advanced by the majority are directed against the bill in its present form. It has been my thought that the principal objections set forth in the majority report can be met by proper amendments to the bill; that with sufficient safeguards, it can be made a constructive piece of legislation, not designed for the immediate present, but to provide a permanent plan for the gradual and orderly infusion of new blood into the courts. Such a plan, intended to aid in the better administration of justice and to enable the courts to discharge their judicial function more efficiently, but so safeguarded that it cannot be used to change or control judicial opinions, is within both the spirit and the letter of the constitution.

Intending to offer amendments which it is believed will accomplish this purpose, I desire to make this additional statement to accompany the majority report.

CARL A. HATCH.

APPENDIXES

APPENDIX A

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A RECOMMENDATION TO REORGANIZE THE JUDICIAL BRANCH OF THE FEDERAL GOVERNMENT

FEBRUARY 5, 1937.—Referred to the Committee on the Judiciary and ordered to be printed

THE WHITE HOUSE, *February 5, 1937.*

To the Congress of the United States:

I have recently called the attention of the Congress to the clear need for a comprehensive program to reorganize the administrative machinery of the executive branch of our Government. I now make a similar recommendation to the Congress in regard to the judicial branch of the Government, in order that it also may function in accord with modern necessities.

The Constitution provides that the President "shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." No one else is given a similar mandate. It is therefore the duty of the President to advise the Congress in regard to the judiciary whenever he deems such information or recommendation necessary.

I address you for the further reason that the Constitution vests in the Congress direct responsibility in the creation of courts and judicial offices and in the formulation of rules of practice and procedure. It is, therefore, one of the definite duties of the Congress constantly to maintain the effective functioning of the Federal judiciary.

The judiciary has often found itself handicapped by insufficient personnel with which to meet a growing and more complex business. It is true that the physical facilities of conducting the business of the courts have been greatly improved, in recent years, through the erection of suitable quarters, the provision of adequate libraries, and the addition of subordinate court officers. But in many ways these are merely the trappings of judicial office. They play a minor part in the processes of justice.

Since the earliest days of the Republic, the problem of the personnel of the courts has needed the attention of the Congress. For example, from the beginning, over repeated protests to President Washington, the Justices of the Supreme Court were required to "ride circuit" and, as circuit justices, to hold trials throughout the length and breadth of the land—a practice which endured over a century.

In almost every decade since 1789 changes have been made by the Congress whereby the number of judges and the duties of judges in Federal courts have been altered in one way or another. The Supreme Court was established with 6 members in 1789; it was reduced to 5 in 1801; it was increased to 7 in 1807; it was increased to 9 in 1837; it was increased to 10 in 1863; it was reduced to 7 in 1866; it was increased to 9 in 1869.

The simple fact is that today a new need for legislative action arises because the personnel of the Federal judiciary is insufficient to meet the business before them. A growing body of our citizens complain of the complexities, the delays, and the expense of litigation in the United States courts.

A letter from the Attorney General, which I submit herewith, justifies by reasoning and statistics the common impression created by our overcrowded Federal dockets—and it proves the need for additional judges.

Delay in any court results in injustice.

It makes lawsuits a luxury available only to the few who can afford them or who have property interests to protect which are sufficiently large to repay the cost. Poorer litigants are compelled to abandon valuable rights or to accept inadequate or unjust settlements because of sheer inability to finance or to await the end of a long litigation. Only be speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.

Delays in the determination of appeals have the same effect. Moreover, if trials of original actions are expedited and existing accumulations of cases are reduced, the volume of work imposed on the circuit courts of appeals will further increase.

The attainment of speedier justice in the courts below will enlarge the task of the Supreme Court itself. And still more work would be added by the recommendation which I make later in this message for the quicker determination of constitutional questions by the highest court.

Even at the present time the Supreme Court is laboring under a heavy burden. Its difficulties in this respect were superficially lightened some years ago by authorizing the Court, in its discretion, to refuse to hear appeals in many classes of cases. This discretion was so freely exercised that in the last fiscal year, although 867 petitions for review were presented to the Supreme Court, it declined to hear 717 cases. If petitions in behalf of the Government are excluded, it appears that the Court permitted private litigants to prosecute appeals in only 108 cases out of 803 applications. Many of the refusals were doubtless warranted. But can it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation to hear 87 percent of the cases presented to it by private litigants?

It seems clear, therefore, that the necessity of relieving present congestion extends to the enlargement of the capacity of all the Federal courts.

A part of the problem of obtaining a sufficient number of judges to dispose of cases is the capacity of the judges themselves. This brings forward the question of aged or infirm judges—a subject of delicacy and yet one which requires frank discussion.

In the Federal courts there are in all 237 life tenure permanent judgeships. Twenty-five of them are now held by judges over 70 years of age and eligible to leave the bench on full pay. Originally no pension or retirement allowance was provided by the Congress. When after 80 years of our national history the Congress made provision for pensions, it found a well-entrenched tradition among judges to cling to their posts, in many instances far beyond their years of physical or mental capacity. Their salaries were small. As with other men, responsibilities and obligations accumulated. No alternative had been open to them except to attempt to perform the duties of their offices to the very edge of the grave.

In exceptional cases, of course, judges, like other men, retain to an advanced age full mental and physical vigor. Those not so fortunate are often unable to perceive their own infirmities. "They seem to be tenacious of the appearance of adequacy." The voluntary retirement law of 1869 provided, therefore, only a partial solution. That law, still in force, has not proved effective in inducing aged judges to retire on a pension.

This result had been foreseen in the debates when the measure was being considered. It was then proposed that when a judge refused to retire upon reaching the age of 70, an additional judge should be appointed to assist in the work of the court. The proposal passed the House but was eliminated in the Senate.

With the opening of the twentieth century, and the great increase of population and commerce, and the growth of a more complex type of litigation, similar proposals were introduced in the Congress. To meet the situation, in 1913, 1914, 1915, and 1916, the Attorneys General then in office recommended to the Congress that when a district or a circuit judge failed to retire at the age of 70, an additional judge be appointed in order that the affairs of the court might be promptly and adequately discharged.

In 1919 a law was finally passed providing that the President "may" appoint additional district and circuit judges, but only upon a finding that the incumbent judge over 70 "is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character." The discretionary and indefinite nature of this legislation has rendered it ineffective. No President should be asked to determine the ability or disability of any particular judge.

The duty of a judge involves more than presiding or listening to testimony or arguments. It is well to remember that the mass of details involved in the average of law cases today is vastly greater and more complicated than even 20 years ago. Records and briefs must be read; statutes, decisions, and extensive material of a technical, scientific, statistical, and economic nature must be searched and studied; opinions must be formulated and written. The modern tasks of judges call for the use of full energies.

Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business. A lowered mental or physical vigor leads men to avoid an examination of

complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.

We have recognized this truth in the civil service of the Nation and of many States by compelling retirement on pay at the age of 70. We have recognized it in the Army and Navy by retiring officers at the age of 64. A number of States have recognized it by providing in their constitutions for compulsory retirement of aged judges.

Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world.

It is obvious, therefore, from both reason and experience, that some provision must be adopted which will operate automatically to supplement the work of older judges and accelerate the work of the court.

I, therefore, earnestly recommend that the necessity of an increase in the number of judges be supplied by legislation providing for the appointment of additional judges in all Federal courts, without exception, where there are incumbent judges of retirement age who do not choose to retire or to resign. If an elder judge is not in fact incapacitated, only good can come from the presence of an additional judge in the crowded state of the dockets; if the capacity of an elder judge is in fact impaired, the appointment of an additional judge is indispensable. This seems to be a truth which cannot be contradicted.

I also recommend that the Congress provide machinery for taking care of sudden or long-standing congestion in the lower courts. The Supreme Court should be given power to appoint an administrative assistant who may be called a proctor. He would be charged with the duty of watching the calendars and the business of all the courts in the Federal system. The Chief Justice thereupon should be authorized to make a temporary assignment of any circuit or district judge hereafter appointed in order that he may serve as long as needed in any circuit or district where the courts are in arrears.

I attach a carefully considered draft of a proposed bill, which, if enacted, would, I am confident, afford substantial relief. The proposed measure also contains a limit on the total number of judges who might thus be appointed and also a limit on the potential size of any one of our Federal courts.

These proposals do not raise any issue of constitutional law. They do not suggest any form of compulsory retirement for incumbent judges. Indeed, those who have reached the retirement age, but desire to continue their judicial work, would be able to do so under less physical and mental strain and would be able to play a useful part in relieving the growing congestion in the business of our courts. Among them are men of eminence and great ability whose services the Government would be loath to lose. If, on the other hand, any judge eligible for retirement should feel that his court would suffer because of an increase in its membership, he may retire or resign under already existing provisions of law if he wishes so to do. In this connection let me say that the pending proposal to extend to the Justices of the Supreme Court the same retirement privileges now available to other Federal judges, has my entire approval.

One further matter requires immediate attention. We have witnessed the spectacle of conflicting decisions in both trial and appellate courts on the constitutionality of every form of important legislation. Such a welter of uncomposed differences of judicial opinion has brought the law, the courts, and, indeed, the entire administration of justice dangerously near to disrepute.

A Federal statute is held legal by one judge in one district; it is simultaneously held illegal by another judge in another district. An act valid in one judicial circuit is invalid in another judicial circuit. Thus rights fully accorded to one group of citizens may be denied to others. As a practical matter this means that for periods running as long as 1 year or 2 years or 3 years—until final determination can be made by the Supreme Court—the law loses its most indispensable element—equality.

Moreover, during the long processes of preliminary motions, original trials, petitions for rehearings, appeals, reversals on technical grounds requiring retrials, motions before the Supreme Court, and the final hearing by the highest tribunal—during all this time labor, industry, agriculture, commerce, and the Government itself go through an unconscionable period of uncertainty and embarrassment. And it is well to remember that during these long processes the normal operations

of society and government are handicapped in many cases by differing and divided opinions in the lower courts and by the lack of any clear guide for the dispatch of business. Thereby our legal system is fast losing another essential of justice—certainty.

Finally, 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. Statutes which the Congress enacts are set aside or suspended for long periods of time, even in cases to which the Government is not a party.

In the uncertain state of the law, it is not difficult for the ingenious to devise novel reasons for attacking the validity of new legislation or its application. While these questions are laboriously brought to issue and debated through a series of courts, the Government must stand aside. It matters not that the Congress has enacted the law, that the Executive has signed it, and that the administrative machinery is waiting to function. Government by injunction lays a heavy hand upon normal processes; and no important statute can take effect—against any individual or organization with the means to employ lawyers and engaged in wide-flung litigation—until it has passed through the whole hierarchy of the courts. Thus the judiciary, by postponing the effective date of acts of the Congress, is assuming an additional function and is coming more and more to constitute a scattered, loosely organized, and slowly operating third house of the National Legislature.

This state of affairs has come upon the Nation gradually over a period of decades. In my annual message to this Congress I expressed some views and some hopes.

Now, as an immediate step, I recommend that the Congress provide 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. This is to prevent court action on the constitutionality of acts of the Congress in suits between private individuals, where the Government is not a party to the suit, without giving opportunity to the Government of the United States to defend the law of the land.

I also earnestly recommend that, in cases in which any court of first instance determines a question of constitutionality, the Congress provide that there shall be a direct and immediate appeal to the Supreme Court and that such cases take precedence over all other matters pending in that court. Such legislation will, I am convinced, go far to alleviate the inequality, uncertainty, and delay in the disposition of vital questions of constitutionality arising under our fundamental law.

My desire is to strengthen the administration of justice and to make it a more effective servant of public need. In the American ideal of government the courts find an essential and constitutional place. In striving to fulfill that ideal, not only the judges but the Congress and the Executive as well, must do all in their power to bring the judicial organization and personnel to the high standards of usefulness which sound and efficient government and modern conditions require.

This message has dealt with four present needs:

First, to eliminate congestion of calendars and to make the judiciary as a whole less static by the constant and systematic addition of new blood to its personnel; second, to make the judiciary more elastic by providing for temporary transfers of circuit and district judges to those places where Federal courts are most in arrears; third, to furnish the Supreme Court practical assistance in supervising the conduct of business in the lower courts; fourth, to eliminate inequality, uncertainty, and delay now existing in the determination of constitutional questions involving Federal statutes.

If we increase the personnel of the Federal courts so that cases may be promptly decided in the first instance, and may be given adequate and prompt hearing on all appeals; if we invigorate all the courts by the persistent infusion of new blood; if we grant to the Supreme Court further power and responsibility in maintaining the efficiency of the entire Federal judiciary; and if we assure Government participation in the speedier consideration and final determination of all constitutional questions, we shall go a long way toward our high objectives. If these measures achieve their aim, we may be relieved of the necessity of considering any fundamental changes in the powers of the courts or the Constitution of our Government—changes which involve consequences so far-reaching as to cause uncertainty as to the wisdom of such course.

FRANKLIN D. ROOSEVELT.

FEBRUARY 2, 1937.

The PRESIDENT,
The White House.

MY DEAR MR. PRESIDENT: Delay in the administration of justice is the outstanding defect of our Federal judicial system. It has been a cause of concern to practically every one of my predecessors in office. It has exasperated the bench, the bar, the business community, and the public.

The litigant conceives the judge as one promoting justice through the mechanism of the courts. He assumes that the directing power of the judge is exercised over its officers from the time a case is filed with the clerk of the court. He is entitled to assume that the judge is pressing forward litigation in the full recognition of the principle that "justice delayed is justice denied." It is a mockery of justice to say to a person when he files suit that he may receive a decision years later. Under a properly ordered system rights should be determined promptly. The course of litigation should be measured in months and not in years.

Yet in some jurisdictions the delays in the administration of justice are so interminable that to institute suit is to embark on a lifelong adventure. Many persons submit to acts of injustice rather than resort to the courts. Inability to secure a prompt judicial adjudication leads to improvident and unjust settlements. Moreover, the time factor is an open invitation to those who are disposed to institute unwarranted litigation or interpose unfounded defenses in the hope of forcing an adjustment which could not be secured upon the merits. This situation frequently results in extreme hardships. The small businessman or the litigant of limited means labors under a grave and constantly increasing disadvantage because of his inability to pay the price of justice.

Statistical data indicate that in many districts a disheartening and unavoidable interval must elapse between the date that issue is joined in a pending case and the time when it can be reached for trial in due course. These computations do not take into account the delays that occur in the preliminary stages of litigation or the postponements after a case might normally be expected to be heard.

The evil is a growing one. The business of the courts is continually increasing in volume, importance, and complexity. The average case load borne by each judge has grown nearly 50 percent since 1913, when the district courts were first organized on their present basis. When the courts are working under such pressure it is inevitable that the character of their work must suffer.

The number of new cases offset those that are disposed of, so that the courts are unable to decrease the enormous backlog of undigested matters. More than 50,000 pending cases, exclusive of bankruptcy proceedings, overhang the Federal dockets—a constant menace to the orderly processes of justice. Whenever a single case requires a protracted trial the routine business of the court is further neglected. It is an intolerable situation and we should make shift to amend it.

Efforts have been made from time to time to alleviate some of the conditions that contribute to the slow rate of speed with which cases move through the courts. The Congress has recently conferred on the Supreme Court the authority to prescribe rules of procedure after verdict in criminal cases and the power to adopt and promulgate uniform rules of practice for civil actions at law in the district courts. It has provided terms of court in certain places at which Federal courts had not previously convened. A small number of judges have been added from time to time.

Despite these commendable accomplishments sufficient progress has not been made. Much remains to be done in developing procedure and administration, but this alone will not meet modern needs. The problem must be approached in a more comprehensive fashion if the United States is to have a judicial system worthy of the Nation. Reason and necessity require the appointment of a sufficient number of judges to handle the business of the Federal courts. These additional judges should be of a type and age which would warrant us in believing that they would vigorously attack their dockets rather than permit their dockets to overwhelm them.

The cost of additional personnel should not deter us. It must be borne in mind that the expense of maintaining the judicial system constitutes hardly three-tenths of 1 percent of the cost of maintaining the Federal establishment. While the estimates for the current fiscal year aggregate over $23,000,000 for the maintenance of the legislative branch of the Government, and over $2,100,000,000 for the permanent agencies of the executive branch, the estimated cost of maintaining the judiciary is only about $6,500,000. An increase in the judicial personnel, which I earnestly recommend, would result in a hardly perceptible percentage of increase in the total annual Budget.

This result should not be achieved, however, merely by creating new judicial positions in specific circuits or districts. The reform should be effectuated on the basis of a consistent system which would revitalize our whole judicial structure and assure the activity of judges at places where the accumulation of business is greatest. As congestion is a varying factor and cannot be foreseen, the system should be flexible and should permit the temporary assignment of judges to points where they appear to be most needed. The newly created personnel should constitute a mobile force, available for service in any part of the country at the assignment and direction of the Chief Justice. A functionary might well be created to be known as proctor, or by some other suitable title, to be appointed by the Supreme Court and to act under its direction, charged with the duty of continuously keeping informed as to the state of Federal judicial business throughout the United States and of assisting the Chief Justice in assigning judges to pressure areas.

I append hereto certain statistical information, which will give point to the suggestions I have made.

These suggestions are designed to carry forward the program for improving the processes of justice which we have discussed and worked upon since the beginning of your first administration.

The time has come when further legislation is essential.

To speed justice, to bring it within the reach of every citizen, to free it of unnecessary entanglements and delays are primary obligations of our Government.

Respectfully submitted.

HOMER CUMMINGS,
Attorney General.

I. Comparative statistics of cases filed in United States district courts during the year ending June 30, 1913, and the year ending June 30, 1936

[The year 1913 was selected as a basis of comparison because it was the first year of the existence of the district courts on the present basis]

	Year ending June 30, 1913	Year ending June 30, 1936
Total number of district judges	92	154
Criminal and civil cases filed (other than bankruptcy)	25,372	75,040
Average number of cases filed per each judge	276	484
Number of bankruptcy proceedings filed	20,788	[1] 60,624

[1] This figure includes proceedings under the recently enacted secs. 77 and 77b of the Bankruptcy Act, which require continuous personal attention on the part of the judges, while much of the work in other bankruptcy proceedings is done by referees.

II. *Number of cases (other than bankruptcy) filed and disposed of in the district courts during the fiscal years 1931–36* [1]

NUMBER OF CASES FILED

	1931	1932	1933	1934	1935	1936
United States civil	12,958	18,734	14,319	8,564	11,679	12,885
Other civil	24,000	26,326	26,656	26,472	24,403	26,342
Criminal	26,342	26,214	25,122	27,476	35,365	35,813
Total	63,300	71,274	66,097	62,512	71,447	75,040

NUMBER OF CASES TERMINATED

United States civil	12,907	14,101	14,474	11,200	12,575	14,435
Other civil	24,375	26,045	26,074	28,035	24,569	26,949
Criminal	30,180	27,794	25,513	26,534	32,299	36,396
Total	67,462	67,940	66,061	65,769	69,443	77,780

[1] In order to render the figures properly comparable, cases under the National Prohibition Act have been excluded from the computations.

NOTE.—The foregoing figures indicate that the number of cases terminated each year approximately equals the number of new cases filed, so that the courts are making no substantial gain in disposing of arrears.

PROPOSED BILL

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That—

(a) When any judge of a court of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy years and has held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and within six months thereafter has neither resigned nor retired, the President, for each such judge who has not so resigned or retired, shall nominate, and by and with the advice and consent of the Senate, shall appoint one additional judge to the court to which the former is commissioned: *Provided,* That no additional judge shall be appointed hereunder if the judge who is of retirement age dies, resigns, or retires prior to the nomination of such additional judge.

(b) The number of judges of any court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. No more than fifty judges shall be appointed thereunder, nor shall any judge be so appointed if such appointment would result in (1) more than fifteen members of the Supreme Court of the United States, (2) more than two additional members so appointed to a circuit court of appeals, the Court of Claims, the United States Court of Customs and Patent Appeals, or the Customs Court, or (3) more than twice the number of judges now authorized to be appointed for any district or, in the case of judges appointed for more than one district, for any such group of districts.

(c) That number of judges which is at least two-thirds of the number of which the Supreme Court of the United States consists, or three-fifths of the number of which the United States Court of Appeals for the District of Columbia, the Court of Claims, or the United States Court of Customs and Patent Appeals consists, shall constitute a quorum of such court.

(d) An additional judge shall not be appointed under the provisions of this section when the judge who is of retirement age is commissioned to an office as to which Congress has provided that a vacancy shall not be filled.

SEC. 2. (a) Any circuit judge hereafter appointed may be designated and assigned from time to time by the Chief Justice of the United States for service in the circuit court of appeals for any circuit. Any district judge hereafter appointed may be designated and assigned from time to time by the Chief Justice of the United States for service in any district court, or, subject to the authority of the Chief Justice, by the senior circuit judge of his circuit for service in any district court within the circuit. A district judge designated and assigned to another district hereunder may hold court separately and at the same time as the district judge in such district. All designations and assignments made hereunder shall be filed in the office of the clerk and entered on the minutes of both the court from and to which a judge is designated and assigned, and thereafter the judge so designated and assigned shall be authorized to discharge all the judicial duties (except the power of appointment to a statutory position or of permanent designation of a newspaper or depository of funds) of a judge of the court to which he is designated and assigned. The designation and assignment of a judge shall not impair his authority to perform such judicial duties of the court to which he was commissioned as may be necessary or appropriate. The designation and assignment of any judge may be terminated at any time by order of the Chief Justice or the senior circuit judge, as the case may be.

(b) After the designation and assignment of a judge by the Chief Justice, the senior circuit judge of the circuit in which such judge is commissioned may certify to the Chief Justice any consideration which such senior circuit judge believes to make advisable that the designated judge remain in or return for service in the court to which he was commissioned. If the Chief Justice deems the reasons sufficient he shall revoke or designate the time of termination of such designation and assignment.

(c) In case a trial or hearing has been entered upon but has not been concluded before the expiration of the period of service of a district judge designated and assigned hereunder, the period of service shall, unless terminated under the provisions of subsection (a) of this section, be deemed to be extended until the trial or hearing has been concluded. Any designated and assigned district judge who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of any time limit in his designation, to decide all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to

be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon in writing filed with the clerk of the court where the trial or hearing was had shall be as valid as if such action had been taken by him within that district and within the period of his designation. Any designated and assigned circuit judge who has sat on another court than his own shall have power, notwithstanding the expiration of any time limit in his designation, to participate in the decision of all matters submitted to the court while he was sitting and to perform or participate in any act appropriate to the disposition or review of matters submitted while he was sitting on such court, and his action thereon shall be as valid as if it had been taken while sitting on such court and within the period of his designation.

SEC. 3. (a) The Supreme Court shall have power to appoint a proctor. It shall be his duty (1) to obtain and, if deemed by the Court to be desirable, to publish information as to the volume, character, and status of litigation in the district courts and circuit courts of appeals, and such other information as the Supreme Court may from time to time require by order, and it shall be the duty of any judge, clerk, or marshal of any court of the United States promptly to furnish such information as may be required by the proctor; (2) to investigate the need of assigning district and circuit judges to other courts and to make recommendations thereon to the Chief Justice; (3) to recommend, with the approval of the Chief Justice, to any court of the United States methods for expediting cases pending on its dockets; and (4) to perform such other duties consistent with his office as the Court shall direct.

(b) The proctor shall, by requisition upon the Public Printer, have any necessary printing and binding done at the Government Printing Office and authority is conferred upon the Public Printer to do such printing and binding.

(c) The salary of the proctor shall be $10,000 per annum, payable out of the Treasury in monthly installments, which shall be in full compensation for the services required by law. He shall also be allowed, in the discretion of the Chief Justice, stationery, supplies, travel expenses, equipment, necessary professional and clerical assistance, and miscellaneous expenses appropriate for performing the duties imposed by this section. The expenses in connection with the maintenance of his office shall be paid from the appropriation of the Supreme Court of the United States.

SEC. 4. There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000 for the salaries of additional judges and the other purposes of this Act during the fiscal year 1937.

SEC. 5. When used in this Act—

(a) The term "judge of retirement age" means a judge of a court of the United States, appointed to hold his office during good behavior, who has attained the age of seventy years and has held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and within six months thereafter, whether or not he is eligible for retirement, has neither resigned nor retired.

(b) The term "circuit court of appeals" includes the United States Court of Appeals for the District of Columbia; the term "senior circuit judge" includes the Chief Justice of the United States Court of Appeals for the District of Columbia; and the term "circuit" includes the District of Columbia.

(c) The term "district court" includes the District Court of the District of Columbia but does not include the district court in any territory or insular possession.

(d) The term "judge" includes justice.

SEC. 6. This Act shall take effect on the thirtieth day after the date of its enactment.

APPENDIX B

JUDGES OF INFERIOR FEDERAL COURTS

(Date of memorandum, June 7, 1937)

This tabulation lists, with the exception of the Justices of the Supreme Court, all Federal judges, giving the year of appointment and present age of each judge, who are subject to the court reorganization bill. A list of Federal and Territorial courts not affected by the bill is included.

There are 24 judges in courts other than the Supreme Court who are 70 years of age or older. Two of these judges are not eligible to retire because they have not

yet served 10 years. They are Curtis D. Wilbur, ninth circuit, who is 70 and will have served 10 years on May 2, 1939, and William R. Green, Court of Claims, who is 80 and will have served 10 years on March 12, 1938.

District judges	10
Circuit judges	8
District of Columbia:	
Court of appeals	2
District court	1
Court of Claims	1
U. S. Customs Court	2
Total	24

Classification, by age groups

District judges:	
70 to 79 years	10
60 to 69 years	64
50 to 59 years	48
40 to 49 years	24
30 to 39 years	3
Total	149
Circuit judges:	
80 to 89 years	2
70 to 79 years	6
60 to 69 years	20
50 to 59 years	11
40 to 49 years	3
Total	42
District of Columbia: Court of Appeals and District Court:	
70 to 79 years	3
60 to 69 years	7
50 to 59 years	4
Total	14
Court of Claims, U. S. Customs Court, Court of Customs and Patent Appeals:	
80 to 89 years	2
70 to 79 years	1
60 to 69 years	12
50 to 59 years	3
40 to 49 years	1
Total	19
All judges (excluding Supreme Court Justices):	
80 to 89 years	4
70 to 79 years	20
60 to 69 years	103
50 to 59 years	66
40 to 49 years	28
30 to 39 years	3
Total	224

DISTRICT JUDGES

	Appointed	Present age
Alabama:		
Middle district, Charles B. Kennamer	1931	62
Southern district, John McDuffie	1935	53
Northern district, David J. Davis	1936	58
Arizona:		
David W. Ling	1936	47
Albert M. Sames	1931	64
Arkansas:		
Eastern district: John E. Martineau	1928	63
Western district: Heartsill Ragon	1933	52

DISTRICT JUDGES—Continued

	Appointed	Present age
California:		
Northern district:		
Adolphus F. St. Sure	1925	68
Harold Louderback	1928	56
Michael J. Roche	1935	58
Southern district:		
Paul J. McCormick	1924	58
George Cosgrave	1930	67
William P. James	1923	67
Harry A. Hollzer	1931	56
Leon R. Yankwich	1935	48
Albert L. Stephens	1935	63
Colorado: John F. Symes	1922	59
Connecticut:		
Edwin S. Thomas	1913	64
Carroll C. Hincks	1931	47
Delaware: John P. Nields	1930	68
Florida:		
Northern district: Augustine V. Long	1934	60
Southern district:		
John W. Holland	1936	53
Alexander Akerman	1929	67
Louie W. Strum	1931	47
Georgia:		
Northern district: E. Marvin Underwood	1931	59
Middle district: Bascom S. Deaver	1928	54
Southern district: William H. Barrett	1922	70
Idaho: Charles C. Cavanah	1927	65
Illinois:		
Northern district:		
James H. Wilkerson	1922	67
Philip L. Sullivan	1934	47
Charles E. Woodward	1929	60
John P. Barnes	1931	56
William H. Holly	1934	67
Eastern district:		
Walter C. Lindley	1922	56
Fred L. Wham	1927	52
Southern district:		
J. Earl Major	1933	50
Charles G. Briggle	1932	54
Indiana:		
Northern district: Thomas W. Slick	1925	67
Southern district: R. C. Baltzell	1925	57
Iowa:		
Northern district: George C. Scott	1922	72
Southern district: Charles A. Dewey	1928	59
Kansas: Richard J. Hopkins	1929	64
Kentucky:		
Eastern district: Hiram C. Ford	1935	43
Western district:		
Elwood Hamilton	1935	54
Vacancy		
Louisiana:		
Eastern district: Wayne G. Borah	1928	46
Western district: Benajmin C. Dawkins	1924	55
Maine: John A. Peters	1921	72
Maryland:		
W. Calvin Chesnut	1931	63
William C. Coleman	1927	52
Massachusetts:		
Hugh D. McLellan	1932	60
George C. Sweeney	1935	41
Elisha Brewster	1922	65
Michigan:		
Eastern district:		
Arthur J. Tuttle	1912	68
Ernest A. O'Brien	1931	56
Edward J. Moinet	1927	63
Arthur F. Lederle	1936	49
Western district: Fred M. Raymond	1925	61
Minnesota:		
Robert C. Bell	1933	56
Gunnar H. Nordbye	1932	49
Matthew M. Joyce	1932	60
Vacancy		
Mississippi:		
Southern district: Sidney C. Mize	1937	49
Northern district: Allen Cox	1929	50
Missouri:		
Eastern district:		
George H. Moore	1935	59
Charles B. Davis	1924	60
John C. Collett	1937	39

DISTRICT JUDGES—Continued

	Appointed	Present age
Missouri—Continued.		
Western district:		
Merril E. Otis	1926	52
Albert L. Reeves	1923	63
Montana:		
James H. Baldwin	1935	60
Charles N. Pray	1924	69
Nebraska:		
T. C. Munger	1907	75
James A. Donohoe	1933	59
Nevada: Frank H. Norcross	1928	68
New Hampshire: George F. Morris	1921	71
New Jersey:		
William Clark	1925	46
Guy L. Fake	1929	57
John B. Avis	1929	61
Philip Forman	1932	41
New Mexico: Colin Neblett	1917	61
New York:		
Northern district:		
Frank Cooper	1920	67
Frederick H. Bryant	1927	59
Southern district:		
John Clark Knox	1918	55
Henry W. Goddard	1923	61
William Bondy	1923	66
George M. Hulbert	1934	56
John M. Woolsey	1929	60
Francis G. Caffey	1929	68
Alfred C. Coxe	1929	57
Robert P. Patterson	1930	46
Vincent L. Leibell	1936	53
John W. Clancy	1936	49
Samuel Mandelbaum	1936	52
Eastern district:		
Mathew T. Abruzzo	1936	49
Marcus B. Campbell	1923	70
Robert A. Inch	1923	64
Grover M. Moscowitz	1925	50
C. G. Galston	1929	61
Mortimer W. Byers	1929	60
Western district:		
John Knight	1932	66
Harold P. Burke [1]	1937	41
North Carolina:		
Eastern district: Isaac M. Meekins	1925	62
Western district: Edwin Yates Webb	1919	65
Middle district: Johnson J. Hayes	1928	51
North Dakota: Andrew Miller	1922	66
Ohio:		
Northern district:		
Paul Jones	1923	56
Vacancy		
Samuel H. West	1928	64
Southern district:		
Mell G. Underwood	1936	45
Robert R. Nevin	1929	61
Oklahoma:		
Eastern district: Vacancy		
Northern district: Franklin E. Kennamer	1924	58
Western district: Edgar S. Vaught	1928	64
Roving: Alfred P. Murrah	1937	32
Oregon:		
James A. Fee	1931	48
Vacancy		
Pennsylvania:		
Eastern district:		
Oliver B. Dickinson	1914	79
George A. Welsh	1932	58
William H. Kirkpatrick	1927	51
Albert B. Maris	1936	43
Middle district:		
Albert L. Watson	1929	60
Albert W. Johnson	1925	64
Western district:		
Nelson McVicar	1928	66
Robert M. Gibson	1922	67
Fred. P. Schoonmaker	1922	67
Rhode Island: John C. Mahoney	1935	54
South Carolina:		
Eastern district: Frank K. Myers	1934	63
Western district: Charles C. Wyche	1937	51
East and west: J. Lyles Glenn	1929	45

[1] Nominated Apr. 27, 1937.

DISTRICT JUDGES—Continued

	Appointed	Present age
South Dakota: A. Lee Wyman	1929	62
Tennessee:		
Eastern district: Geo. C. Taylor	1928	52
Middle district: John J. Gore	1923	63
Western district: John D. Martin, Sr	1935	54
Texas:		
Eastern district: Randolph Bryant	1931	44
Western district:		
Robert J. McMillan	1932	51
Charles A. Boynton	1924	69
Northern district:		
T. Whitfield Davidson	1936	60
James C. Wilson	1919	62
Wm. H. Atwell	1923	67
Southern District: Thos. M. Kennerly	1931	63
Utah: Tillman D. Johnson	1915	79
Vermont: Harland B. Howe	1915	64
Virginia:		
Eastern district:		
Luther B. Way	1931	57
Robert N. Pollard	1936	56
Western district: John Paul	1932	53
Washington:		
Western district:		
Edward E. Cushman	1912	71
John C. Bowen	1934	49
Eastern district: J. Stanley Webster	1923	60
West Virginia:		
Northern district: Wm. E. Baker	1921	64
Southern district: George W. McClintic	1921	71
North and south: Harry E. Watkins	1937	38
Wisconsin:		
Eastern district: Ferdinand A. Geiger	1912	69
Western district: Patrick T. Stone	1933	47
Wyoming: Thomas B. Kennedy	1921	63

CIRCUIT JUDGES

First circuit:		
George H. Bingham	1913	72
James M. Morton, Jr	1932	67
Scott Wilson	1929	67
Second circuit:		
Martin T. Manton	1918	56
Julian W. Mack	1911	70
Learned Hand	1924	65
Augustus N. Hand	1927	67
Harrie B. Chase	1929	47
Thomas W. Swan	1926	59
Third circuit:		
Joseph Bufflington	1906	81
Victor B. Woolley	1914	70
J. Warren Davis	1920	70
J. Whitaker Thompson	1931	75
John Biggs, Jr	1937	41
Fourth circuit:		
John J. Parker	1925	51
Elliott Northcott	1927	68
Morris A. Soper	1931	64
Fifth circuit:		
Rufus E. Foster	1925	66
Samuel H. Sibley	1931	63
Joseph C. Hutcheson, Jr	1931	57
Edwin R. Holmes	1936	58
Sixth circuit:		
Charles H. Moorman	1925	61
Xenephon Hicks	1928	65
Florence E. Allen	1934	53
Charles C. Simons	1932	61
Seventh circuit:		
Evan A. Evans	1916	61
W. M. Sparks	1929	65
J. Earl Major	1937	50
Vacancy.		
Eighth circuit:		
Kimbrough Stone	1916	62
Archibald K. Gardner	1929	69
John B. Sanborn	1932	53
Joseph W. Woodrough	1933	63
Seth Thomas	1936	64

CIRCUIT JUDGES—Continued

	Appointed	Present age
Ninth circuit:		
Curtis D. Wilbur	1929	70
William Denman	1935	64
Francis A. Garrecht	1933	66
Bert E. Haney	1935	58
Clifton Mathews	1935	57
Tenth circuit:		
Robert E. Lewis	1921	80
Orie L. Phillips	1929	51
Sam Gilbert Bratton	1933	48
Robert Lee Williams	1937	68

DISTRICT OF COLUMBIA

COURT OF APPEALS		
George E. Martin	1924	79
Charles H. Robb	1906	69
Josiah A. Van Orsdell	1907	76
D. Lawrence Groner	1931	63
Harold M. Stephens	1935	51
DISTRICT COURT		
Alfred A. Wheat	1929	69
Thomas Jennings Bailey	1918	70
Peyton Gordon	1928	67
Jesse C. Adkins	1930	58
Oscar R. Luhring	1930	58
Joseph W. Cox	1930	61
James M. Proctor	1931	54
F. Dickinson Letts	1931	62
Daniel W. O'Donoghue	1932	61
COURT OF CUSTOMS AND PATENT APPEALS		
William J. Graham	1924	65
Oscar E. Bland	1923	59
Charles S. Hatfield	1923	54
Finis J. Garrett	1929	61
Irvine L. Lenroot	1929	68
COURT OF CLAIMS		
Fenton W. Booth	1905	68
William R. Green	1928	80
Benjamin H. Littleton	1929	47
Thomas S. Williams	1929	65
Richard S. Whaley	1930	62
UNITED STATES CUSTOMS COURT		
Charles P. McClelland	1903	82
Jerry B. Sullivan	1913	78
George S. Brown	1913	65
Genevieve R. Cline	1928	57
David H. Kincheloe	1930	60
Walter H. Evans	1931	67
William J. Tilson	1928	65
Frederick W. Dallinger	1932	65
William J. Keefe	1933	63

FEDERAL AND TERRITORIAL COURTS NOT AFFECTED BY THE COURT BILL

United States Court for China; term, 10 years.
District Court for the Territory of Alaska; term, 4 years.
District Court for the District of the Canal Zone; term, 4 years.
Supreme Court of the Territory of Hawaii; term, 4 years.
Circuit Courts of the Territory of Hawaii; term, 4 years.
United States District Court for the Territory of Hawaii; term, 6 years.
Supreme Court of Puerto Rico; no fixed term.
District Court of the United States for Puerto Rico; term, 4 years.
District Court of the Virgin Islands; term, 4 years.

APPENDIX C

LETTER OF CHIEF JUSTICE

SUPREME COURT OF THE UNITED STATES,
Washington, D. C., March 21, 1937.

Hon. BURTON K. WHEELER,
United States Senate, Washington, D. C.

MY DEAR SENATOR WHEELER: In response to your inquiries, I have the honor to present the following statement with respect to the work of the Supreme Court:

1. The Supreme Court is fully abreast of its work. When we rose on March 15 (for the present recess) we had heard argument in cases in which certiorari had been granted only 4 weeks before—February 15.

During the current term, which began last October and which we call "October term, 1936", we have heard argument on the merits in 150 cases (180 numbers) and we have 28 cases (30 numbers) awaiting argument. We shall be able to hear all these cases, and such others as may come up for argument, before our adjournment for the term. There is no congestion of cases upon our calendar.

This gratifying condition has obtained for several years. We have been able for several terms to adjourn after disposing of all cases which are ready to be heard.

2. The cases on our docket are classified as original and appellate. Our original jurisdiction is defined by the Constitution and embraces cases to which States are parties. There are not many of these. At the present time they number 13 and are in various stages of progress to submission for determination.

Our appellate jurisdiction covers those cases in which appeal is allowed by statute as a matter of right and cases which come to us on writs of certiorari.

The following is a comparative statement of the cases on the dockets for the six terms preceding the current term:

For terms 1930–32

	1930	1931	1932
Total cases on dockets	1,039	1,023	1,037
Disposed of during term	900	884	910
Cases remaining on dockets	139	139	127
Distribution of cases:			
Cases disposed of:			
Original cases	8	1	4
Appellate, on merits	326	282	257
Petitions for certiorari	566	601	649
Remaining on dockets:			
Original cases	16	19	17
Appellate on merits	76	60	56
Petitions for certiorari	47	60	54

For terms 1933–35

	1933	1934	1935
Total cases on dockets	1,132	1,040	1,092
Disposed of during term	1,029	931	990
Cases remaining on docket	103	109	102
Distribution of cases:			
Cases disposed of:			
Original cases	4	5	4
Appellate, on merits	293	256	269
Petitions for certiorari	732	670	717
Remaining on dockets:			
Original cases	15	13	12
Appellate, on merits	48	51	56
Petitions for certiorari	45	45	34

Further statistics for these terms, and those for earlier terms, are available if you desire them.

During the present term we have thus far disposed of 666 cases which include petitions for certiorari and cases which have been argued on the merits and already decided.

3. The statute relating to our appellate jurisdiction is the act of February 13, 1925 (43 Stat. 936). That act limits to certain cases the appeals which come to the Supreme Court as a matter of right. Review in other cases is made to depend upon the allowance by the Supreme Court of a writ of certiorari.

Where the appeal purports to lie as a matter of right, the rules of the Supreme Court (rule 12) require the appellant to submit a jurisdictional statement showing that the case falls within that class of appeals and that a substantial question is involved. We examine that statement, and the supporting and opposing briefs, and decide whether the Court had jurisdiction. As a result, many frivolous appeals are forthwith dismissed and the way is open for appeals which disclose substantial questions.

4. The act of 1925, limiting appeals as a matter of right and enlarging the provisions for review only through certiorari was most carefully considered by Congress. I call attention to the reports of the Judiciary Committees of the Senate and House of Representatives (68th Cong., 1st sess.). That legislation was deemed to be essential to enable the Supreme Court to perform its proper function. No single court of last resort, whatever the number of judges, could dispose of all the cases which arise in this vast country and which litigants would seek to bring up if the right of appeal were unrestricted. Hosts of litigants will take appeals so long as there is a tribunal accessible. In protracted litigation, the advantage is with those who command a long purse. Unmeritorious appeals cause intolerable delays. Such appeals clog the calendar and get in the way of those that have merit.

Under our Federal system, when litigants have had their cases heard in the courts of first instance, and the trier of the facts, jury or judge, as the case may require, has spoken and the case on the facts and law has been decided, and when the dissatisfied party has been accorded an appeal to the circuit court of appeals, the litigants, so far as mere private interests are concerned, have had their day in court. If further review is to be had by the Supreme Court it must be because of the public interest in the questions involved. That review, for example, should be for the purpose of resolving conflicts in judicial decisions between different circuit courts of appeals or between circuit courts of appeals and State courts where the question is one of State law; or for the purpose of determining constitutional questions or settling the interpretation of statutes; or because of the importance of the questions of law that are involved. Review by the Supreme Court is thus in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants.

It is obvious that if appeal as a matter of right is restricted to certain described cases, the question whether review should be allowed in other cases must necessarily be confided to some tribunal for determination, and, of course, with respect to review by the Supreme Court, that Court should decide.

5. Granting certiorari is not a matter of favor but of sound judicial discretion. It is not the importance of the parties or the amount of money involved that is in any sense controlling. The action of the Court is governed by its rules from which I quote the following (rule 38, par. 5):

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor full measuring the Court's discretion, indicate the character of reason which will be considered:

"(*a*) Where a State court has decided a Federal question of substance not therefore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

"(*b*) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of Federal law which has not been, but should be, settled by this Court; or has decided a Federal question in a way probably in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

"(*c*) Where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this Court; or where that court has not given proper effect to an applicable decision of this Court."

These rules are impartially applied, as it is most important that they should be.

I should add that petitions of certiorari are not apportioned among the Justices. In all matters before the Court, except in the more routine of administration, all the Justices—unless for some reason a Justice is disqualified or unable to act in a particular case—participate in the decision. This applies to the grant or refusal of petitions for certiorari. Furthermore, petitions for certiorari are granted if four Justices think they should be. A vote by a majority is not required in such cases. Even if two or three of the Justices are strongly of the opinion that certiorari should be allowed, frequently the other Justices will acquiesce in their view, but the petition is always granted if four so vote.

6. The work of passing upon these applications for certiorari is laborious but the Court is able to perform it adequately. Observations have been made as to the vast number of pages of records and briefs that are submitted in the course of a term. The total is imposing but the suggested conclusion is hasty and rests on an illusory basis. Records are replete with testimony and evidence of facts. But the questions on certiorari are questions of law. So many cases turn on the facts, principles of law not being in controversy. It is only when the facts are interwoven with the questions of law which we should review that the evidence must be examined and then only to the extent that it is necessary to decide the questions of law.

This at once disposes of a vast number of factual controversies where the parties have been fully heard in the courts below and have no right to burden the Supreme Court with the dispute which interests no one but themselves.

This is also true of controversies over contracts and documents of all sorts which involve only questions of concern to the immediate parties. The applicant for certiorari is required to state in his petition the grounds for his application and in a host of cases that disclosure itself disposes of his request. So that the number of pages of records and briefs afford no satisfactory criterion of the actual work involved. It must also be remembered that Justices who have been dealing with such matters for years have the aid of a long and varied experience in separating the chaff from the wheat.

I think that it is safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 percent or so in addition which have a fair degree of plausability but which fail to survive critical examination. The remainder, falling short, I believe, of 20 percent, show substantial grounds and are granted. I think that it is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality.

7. An increase in the number of Justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of Justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned. As I have said, I do not speak of any other considerations in view of the appropriate attitude of the Court in relation to questions of policy.

I understand that it has been suggested that with more Justices the Court could hear cases in divisions. It is believed that such a plan would be impracticable. A large proportion of the cases we hear are important and a decision by a part of the Court would be unsatisfactory.

I may also call attention to the provisions of article III, section 1, of the Constitution that the judicial power of the United States shall be vested "in one Supreme Court" and in such inferior courts as the Congress may from time to time ordain and establish. The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a supreme court functioning in effect as separate courts.

On account of the shortness of time I have not been able to consult with the members of the Court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the Justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

I have the honor to remain,
Respectfully yours,

CHARLES E. HUGHES,
Chief Justice of the United States.

Hon. BURTON K. WHEELER,
United States Senate, Washington, D. C.

APPENDIX D

REORGANIZING THE FEDERAL JUDICIARY

ADDRESS BY THE PRESIDENT OF THE UNITED STATES ON MARCH 9, 1937

Last Thursday I described in detail certain economic problems which everyone admits now face the Nation. For the many messages which have come to me after that speech, and which it is physically impossible to answer individually, I take this means of saying "thank you."

Tonight, sitting at my desk in the White House, I make my first radio report to the people in my second term of office.

I am reminded of that evening in March 4 years ago, when I made my first radio report to you. We were then in the midst of the great banking crisis.

Soon after, with the authority of the Congress, we asked the Nation to turn over all of its privately held gold, dollar for dollar, to the Government of the United States.

Today's recovery proves how right that policy was.

But when, almost 2 years later, it came before the Supreme Court its constitutionality was upheld only by a 5-to-4 vote. The change of one vote would have thrown all the affairs of this great Nation back into helpless chaos. In effect, four Justices ruled that the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring Nation.

In 1933 you and I knew that we must never let our economic system get completely out of joint again—that we could not afford to take the risk of another great depression.

We also became convinced that the only way to avoid a repetition of those dark days was to have a government with power to prevent and to cure the abuses and the inequalities which had thrown that system out of joint.

We then began a program of remedying those abuses and inequalities—to give balance and stability to our economic system—to make it bombproof against the causes of 1929.

Today we are only part way through that program—and recovery is speeding up to a point where the dangers of 1929 are again becoming possible, not this week or month perhaps, but within a year or two.

National laws are needed to complete that program. Individual or local or State effort alone cannot protect us in 1937 any better than 10 years ago.

It will take time—and plenty of time—to work out our remedies administratively even after legislation is passed. To complete our program of protection in time, therefore, we cannot delay one moment in making certain that our National Government has power to carry through.

Four years ago action did not come until the eleventh hour. It was almost too late.

If we learned anything from the depression we will not allow ourselves to run around in new circles of futile discussion and debate, always postponing the day of decision.

The American people have learned from the depression. For in the last three national elections an overwhelming majority of them voted a mandate that the Congress and the President begin the task of providing that protection—not after long years of debate, but now.

The courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions.

We are at a crisis in our ability to proceed with that protection. It is a quiet crisis. There are no lines of depositors outside closed banks. But to the far-sighted it is far-reaching in its possibilities of injury to America.

I want to talk with you very simply about the need for present action in this crisis—the need to meet the unanswered challenge of one-third of a nation ill-nourished, ill-clad, ill-housed.

Last Thursday I described the American form of government as a three-horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the executive, and the courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team overlook the simple fact that the President, as Chief Executive, is himself one of the three horses.

It is the American people themselves who are in the driver's seat.

It is the American people themselves who want the furrow plowed.

It is the American people themselves who expect the third horse to pull in unison with the other two.

I hope that you have reread the Constitution of the United States. Like the Bible, it ought to be read again and again.

It is an easy document to understand when you remember that it was called into being because the Articles of Confederation under which the Original Thirteen States tried to operate after the Revolution showed the need of a National Government with power enough to handle national problems. In its preamble the Constitution states that it was intended to form a more perfect Union and promote the general welfare; and the powers given to the Congress to carry out those purposes can be best described by saying that they were all the powers needed to meet each and every problem which then had a national character and which could not be met by merely local action.

But the framers went further. Having in mind that in succeeding generations many other problems then undreamed of would become national problems, they gave to the Congress the ample broad powers "to levy taxes * * * and provide for the common defense and general welfare of the United States."

That, my friends, is what I honestly believe to have been the clear and underlying purpose of the patriots who wrote a Federal Constitution to create a National Government with national power, intended as they said, "to form a more perfect union * * * for ourselves and our posterity."

For nearly 20 years there was no conflict between the Congress and the Court. Then, in 1803, Congress passed a statute which the Court said violated an express provision of the Constitution. The Court claimed the power to declare it unconstitutional and did so declare it. But a little later the Court itself admitted that it was an extraordinary power to exercise and through Mr. Justice Washington laid down this limitation upon it: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt."

But since the rise of the modern movement for social and economic progress through legislation, the Court has more and more often and more and more boldly asserted a power to veto laws passed by the Congress and State legislatures in complete disregard of this original limitation.

In the last 4 years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body.

When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress—and to approve or disapprove the public policy written into these laws

That is not only my accusation. It is the accusation of most distinguished Justices of the present Supreme Court, I have not the time to quote to you all the language used by dissenting Justices in many of these cases. But in the case holding the Railroad Retirement Act unconstitutional, for instance, Chief Justice Hughes said in a dissenting opinion that the majority opinion was "a departure from sound principles", and placed "an unwarranted limitation upon the commerce clause." And three other Justices agreed with him.

In the case holding the A. A. A. unconstitutional, Justice Stone said of the majority opinion that it was a "tortured construction of the Constitution." And two other Justices agreed with him.

In the case holding the New York Minimum Wage Law unconstitutional, Justice Stone said that the majority were actually reading into the Constitution their own "personal economic predilections", and that if the legislative power is not left free to choose the methods of solving the problems of poverty, subsistence, and health of large numbers in the community, then "government is to be rendered impotent." And two other Justices agreed with him.

In the face of these dissenting opinions, there is no basis for the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people.

In the face of such dissenting opinions, it is perfectly clear that as Chief Justice Hughes has said, "We are under a Constitution, but the Constitution is what the judges say it is."

The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress—a superlegislature, as one of the Justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men.

I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized.

How, then, could we proceed to perform the mandate given us? It was said in last year's Democratic platform, "If these problems cannot be effectively solved within the Constitution, we shall seek such clarifying amendment as will assure the power to enact those laws, adequately to regulate commerce, protect public health and safety, and safeguard economic security." In other words, we said we would seek an amendment only if every other possible means by legislation were to fail.

When I commenced to review the situation with the problem squarely before me, I came by a process of elimination to the conclusion that short of amendments the only method which was clearly constitutional, and would at the same time carry out other much-needed reforms, was to infuse new blood into all our courts. We must have men worthy and equipped to carry out impartial justice. But at the same time we must have judges who will bring to the courts a present-day sense of the Constitution—judges who will retain in the courts the judicial functions of a court and reject the legislative powers which the courts have today assumed.

In 45 out of the 48 States of the Union, judges are chosen not for life but for a period of years. In many States judges must retire at the age of 70. Congress has provided financial security by offering life pensions at full pay for Federal judges on all courts who are willing to retire at 70. In the case of Supreme Court Justices, that pension is $20,000 a year. But all Federal judges, once appointed, can, if they choose, hold office for life no matter how old they may get to be.

What is my proposal? It is simply this: Whenever a judge or justice of any Federal court has reached the age of 70 and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office, with the approval, as required by the Constitution, of the Senate of the United States.

That plan has two chief purposes: By bringing into the judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the administration of all Federal justice speedier and therefore less costly; secondly, to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our National Constitution from hardening of the judicial arteries.

The number of judges to be appointed would depend wholly on the decision of present judges now over 70 or those who would subsequently reach the age of 70.

If, for instance, any one of the six Justices of the Supreme Court now over the age of 70 should retire as provided under the plan, no additional place would be created. Consequently, although there never can be more than 15, there may be only 14, or 13, or 12, and there may be only 9.

There is nothing novel or radical about this idea. It seeks to maintain the Federal bench in full vigor. It has been discussed and approved by many persons of high authority ever since a similar proposal passed the House of Representatives in 1869.

Why was the age fixed at 70? Because the laws of many States, the practice of the civil service, the regulations of the Army and Navy, and the rules of many of our universities and of almost every great private business enterprise commonly fix the retirement age at 70 years or less.

The statute would apply to all the courts in the Federal system. There is general approval so far as the lower Federal courts are concerned. The plan has met opposition only so far as the Supreme Court of the United States itself is concerned. If such a plan is good for the lower courts, it certainly ought to be equally good for the highest court, from which there is no appeal.

Those opposing this plan have sought to arouse prejudice and fear by crying that I am seeking to "pack" the Supreme Court and that a baneful precedent will be established.

What do they mean by the words "packing the Court"?

Let me answer this question with a bluntness that will end all honest misunderstanding of my purposes.

If by that phrase "packing the Court" it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer: That no President fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court.

But if by that phrase the charge is made that I would appoint and the Senate would confirm Justices worthy to sit beside present members of the Court who understand those modern conditions; that I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy; that I will appoint Justices who will act as Justices and not as legislators—if the appointment of such Justices can be called "packing the Courts"—then I say that I, and with me the vast majority of the American people, favor doing just that thing—now.

Is it a dangerous precedent for the Congress to change the number of the Justices? The Congress has always had, and will have, that power. The number of Justices has been changed several times before—in the administrations of John Adams and Thomas Jefferson, both signers of the Declaration of Independence, Andrew Jackson, Abraham Lincoln, and Ulysses S. Grant.

I suggest only the addition of Justices to the bench in accordance with a clearly defined principle relating to a clearly defined age limit. Fundamentally, if in the future America cannot trust the Congress it elects to refrain from abuse of our constitutional usages, democracy will have failed far beyond the importance to it of any kind of precedent concerning the judiciary.

We think it so much in the public interest to maintain a vigorous judiciary that we encourage the retirement of elderly judges by offering them a life pension at full salary. Why then should we leave the fulfillment of this public policy to chance or make it dependent upon the desire or prejudice of any individual Justice?

It is the clear intention of our public policy to provide for a constant flow of new and younger blood into the judiciary. Normally, every President appoints a large number of district and circuit judges and a few members of the Supreme Court. Until my first term practically every President of the United States had appointed at least one member of the Supreme Court. President Taft appointed five members and named a Chief Justice; President Wilson three; President Harding four, including a Chief Justice; President Coolidge one; President Hoover three, including a Chief Justice.

Such a succession of appointments should have provided a court well balanced as to age. But chance and the disinclination of individuals to leave the Supreme Bench have now given us a Court in which five Justices will be over 75 years of age before next June and one over 70. Thus a sound public policy has been defeated.

I now propose that we establish by law an assurance against any such ill-balanced Court in the future. I propose that hereafter, when a judge reaches the age of 70, a new and younger judge shall be added to the Court automatically. In this way I propose to enforce a sound public policy by law instead of leaving the composition of our Federal courts, including the highest, to be determined by chance or the personal decision of individuals.

If such a law as I propose is regarded as establishing a new precedent, is it not a most desirable precedent?

Like all lawyers, like all Americans, I regret the necessity of this controversy. But the welfare of the United States, and indeed of the Constitution itself, is what we all must think about first. Our difficulty with the Court today rises not from the Court as an institution but from human beings within it. But we cannot yield our constitutional destiny to the personal judgment of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present.

This plan of mine is no attack on the Court; it seeks to restore the Court to its rightful and historic place in our system of constitutional government and to have it resume its high task of building anew on the Constitution "a system of living law."

I have thus explained to you the reasons that lie behind our efforts to secure results by legislation within the Constitution. I hope that thereby the difficult process of constitutional amendment may be rendered unnecessary. But let us examine that process.

There are many types of amendment proposed. Each one is radically different from the other. There is no substantial group within the Congress or outside it who are agreed on any single amendment.

It would take months or years to get substantial agreement upon the type and language of an amendment. It would take months and years thereafter to get a two-thirds majority in favor of that amendment in both Houses of Congress.

Then would come the long course of ratification by three-fourths of the States. No amendment which any powerful economic interests or the leaders of any powerful political party have had reason to oppose has ever been ratified within anything like a reasonable time. And 13 States which contain only 5 percent of the voting population can block ratification even though the 35 States with 95 percent of the population are in favor of it.

A very large percentage of newspaper publishers, chambers of commerce, bar associations, manufacturers' associations, who are trying to give the impression that they really do want a constitutional amendment, would be the first to exclaim as soon as an amendment was proposed: "Oh, I was for an amendment all right, but this amendment that you have proposed is not the kind of an amendment that I was thinking about. I am, therefore, going to spend my time, my efforts, and my money to block that amendment, although I would be awfully glad to help get some other kind of amendment ratified."

Two groups oppose my plan on the ground that they favor a constitutional amendment. The first includes those who fundamentally object to social and economic legislation along modern lines. This is the same group who during the campaign last fall tried to block the mandate of the people.

Now they are making a last stand. And the strategy of that last stand is to suggest the time-consuming process of amendment in order to kill off by delay the legislation demanded by the mandate.

To them I say: I do not think you will be able long to fool the American people as to your purposes.

The other group is composed of those who honestly believe the amendment process is the best and who would be willing to support a reasonable amendment if they could agree on one.

To them I say: We cannot rely on an amendment as the immediate or only answer to our present difficulties. When the time comes for action, you will find that many of those who pretend to support you will sabotage any constructive amendment which is proposed. Look at these strange bedfellows of yours. When before have you found them really at your side in your fights for progress?

And remember one thing more. Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court bench. An amendment like the rest of the Constitution is what the Justices say it is rather than what its framers or you might hope it is.

This proposal of mine will not infringe in the slightest upon the civil or religious liberties so dear to every American.

My record as Governor and as President proves my devotion to those liberties. You who know me can have no fear that I would tolerate the destruction by any branch of government of any part of our heritage of freedom.

The present attempt by those opposed to progress to play upon the fears of danger to personal liberty brings again to mind that crude and cruel strategy tried by the same opposition to frighten the workers of America in a pay-envelope propaganda against the social security law. The workers were not fooled by that propaganda then. The people of America will not be fooled by such propaganda now.

I am in favor of action through legislation—

First, because I believe that it can be passed at this session of the Congress.

Second, because it will provide a reinvigorated, liberal-minded judiciary necessary to furnish quicker and cheaper justice from bottom to top.

Third, because it will provide a series of Federal courts willing to enforce the Constitution as written, and unwilling to assert legislative powers by writing into it their own political and economic policies.

During the past half century the balance of power between the three great branches of the Federal Government has been tipped out of balance by the courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack I seek to make American democracy succeed.

APPENDIX E

Classification, by dissent, of cases invalidating acts of Congress

Unanimous	30
1 Dissent	9
2 Dissents	14
3 Dissents	12
4 Dissents	11

Federal laws enacted since Mar. 4, 1933, which have been passed upon by the Supreme Court

The Court held the following such acts, or parts of such acts to be unconstitutional:

	Vote
1. Independent Offices Appropriation Act (48 Stat. 307, sec. 13):	
1. *Booth* v. *U. S.* (291 U. S. 339), held void the provision of the bill reducing retired pay of Federal judges	Unanimous
2. Economy Act, 1933 (48 Stat. 11, sec. 17, part):	
2. *Lynch* v. *U. S.* (292 U. S. 571) held void the provisions of said act which repealed all laws granting or pertaining to yearly renewable term insurance	Unanimous
3. National Industrial Recovery Act (48 Stat. 195, title I):	
3. *Schechter Poultry Corp.* v. *U. S.* (295 U. S. 495) held void provisions of said act relating to codes	Unanimous
4. *Panama Refining Co.* v. *Ryan* (293 U. S. 388), held void Section 9 (c) of the National Industrial Recovery Act dealing with "hot oil"	8–1
4. Gold Clause Resolution (48 Stat. 113):	
5. *Perry* v. *U. S.* (294 U. S. 330), held void sec. 1 of said act insofar as applicable to gold clause in Government obligations (but recovery was denied because plaintiff did not show damages)	8–1

NOTE.—Eight Justices concurred in holding the statute unconstitutional—Chief Justice Hughes, Justices Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Roberts, and Cardozo; but Chief Justice Hughes and Justices Brandeis, Stone, Roberts, and Cardozo held that the petitioner was not entitled to recover in the suit because he had suffered no damage; while Justices McReynolds, Van Devanter, Sutherland, and Butler dissented on this point.

Justice Stone dissented on the ground that, while he concurred with a majority of the Court in holding that the petitioner was not entitled to recover in the suit, because of failure to show any damage, he thought it "unnecessary and undesirable for the Court to undertake to say that the obligation of the gold clause in Government bonds is greater than in bonds of private individuals or that, in some manner and in some measure undefined, it has imposed restrictions upon the future exercise of the power to regulate the currency * * *. There is no occasion now to resolve the doubts which I entertain with respect to these questions. At present they are academic." He stated, therefore, that he did not join in so much of the opinion as held the act unconstitutional.

5. Railroad Retirement Act (48 Stat. 1283):	
6. *R. R. Retirement Board* v. *Alton R. Co. et al.* (295 U. S. 330)	5–4
6. Frazier-Lemke Bankruptcy Act, June 20, 1934 (48 Stat. 1289):	
7. *Louisville Bank* v. *Radford* (295 U. S. 555)	Unanimous
7. Amended Home Owners' Loan Corporation Act (48 Stat. 646):	
8. *Hopkins Assn.* v. *Cleary* (296 U. S. 315), held void sec. 5 (i) providing for the conversion of State loan associations into Federal associations upon vote of 51 percent of votes cast	Unanimous
8. Agricultural Adjustment Act (48 Stat. 31):	
9. *U. S.* v. *Butler*, (297 U. S. 1), provision relating to agricultural processing taxes held void	6–3
9. Agricultural Adjustment Act amendments (49 Stat. 750):	
10. *Rickert Rice Mills* v. *Fontenot* (297 U. S. 110)	Unanimous

Federal laws enacted since Mar. 4, 1933, which have been passed upon by the Supreme Court—Continued

10. Guffey Coal Act of 1935 (49 Stat. 991, ch. 824):
    11. *Carter* v. *Carter Coal Co.* (298 U. S. 238) (4 Justices dissented in part)..... 6–3
11. Municipal Bankruptcy Act, 1935 (48 Stat. 798):
    12. *Ashton* v. *Cameron Water Imp. Co.* (298 U. S. 513), readjusting of indebtedness by political subdivisions of States..... 5–4

Classification of above acts by dissent:		Classification of above cases by dissent:	
Unanimous	6	Unanimous	6
1 dissent	1	1 dissent	2
2 dissents	0	2 dissents	0
3 dissents	2	3 dissents	2
4 dissents	2	4 dissents	2

The following laws, or parts of laws, enacted since March 4, 1933, have been held constitutional in whole or in part by the Supreme Court:

1. Trading With the Enemy Act (48 Stat. 510):
    1. *Woodson* v. *Deutsche, etc., Vormals* (292 U. S. 449), restricting suits against Alien Property Custodian, the Treasurer of the United States, or the United States for recovery of deductions for administrative expenses made from alien property held by the Custodian..... Unanimous
2. District of Columbia jury law (49 Stat. 682, ch. 605):
    2. *U. S.* v. *Wood* (299 U. S. 123), upheld the law making Government employees, etc., in the District of Columbia subject to jury duty..... 6–3
3. Revenue Act of 1936 (49 Stat. 1747, title VII, part):
    3. *Anniston Mfg. Co.* v. *Davis, Collector* (May 17, 1937), held that a new administrative procedure for recovery of taxes collected under the A. A. A. is not unconstitutional on its face..... 8–1
4. Chaco Arms Embargo Act (48 Stat. 811):
    4. *U. S.* v *Curtiss-Wright Export Co.* (81 L. Ed. Adv. Op. 166), upheld the act as against the argument that it constituted a delegation of legislative power to the President..... 8–1
5. Sec. 77–B National Bankruptcy Act (48 Stat. 911, 915):
    5. *Kuehner* v *Irving Trust Co.* (81 L. Ed. Adv. Op. 248), upheld the limitation of claims of a landlord under indemnity clause of a lease to maximum of 3 years' rental..... Unanimous
6. Ashurst-Sumners Act of July 24, 1935 (49 Stat. 494):
    6. *Kentucky Whip & Collar Co.* v *I. C. R. Co.* (81 L. Ed. Adv. Op. 183), upheld the prohibition against transporting in interstate commerce of convict-made goods..... Unanimous
7. Silver Purchase Act (48 Stat. 1178, ch. 674):
    7. *U. S.* v. *Hudson* (81 L. Ed. Adv. Op. 261), upheld taxing certain transfers of silver..... Unanimous
8. Public Resolution No. 53, Trading with Enemy (48 Stat. 1267):
    8. *Cummings* v. *Deutsche Bank, etc.* (81 L. Ed. Adv. Op. 333), upheld a resolution under said act postponing delivery of property seized thereunder until certain obligations are met..... Unanimous
9. Federal Declaratory Judgment Act, 1934 (49 Stat. 955):
    9. *Aetna Life Ins. Co.* v. *Haworth* (81 L. Ed. Adv. Op. 394), held that said act fell within the ambit of congressional power when confined to cases of actual recovery..... Unanimous
10. Railway Labor Act of 1936 (48 Stat. 1185):
    10. *Virginian Ry.* v. *System Federation No. 40* (Mar. 29, 1937), upheld the act which requires a railroad company to "treat with" authorized representatives of its employees in its application to mechanical "backshop" employees..... Unanimous
11. Second Frazier-Lemke Act (49 Stat. 943):
    11. *Wright* v. *Vinton* (81 L. Ed. Adv. Op. 487), held that act does not violate due process clause of fifth amendment..... Unanimous
12. National Firearms Act (48 Stat. 1236):
    12. *Sonzinsky* v. *U. S.* (81 L. Ed. Adv. Op. 556), excise tax on firearms and registration of firearms dealers upheld.. Unanimous

Federal laws enacted since Mar. 4, 1933, which have been passed upon by the Supreme Court—Continued

13. National Labor Relations Act of 1935 (49 Stat. 449):
    13. *Associated Press* v. *N. L. R. B.* (81 Adv. Op. L. Ed. 603), upheld provisions of said act as applied to the employees of the Associated Press 5–4
    14. *N. L. R. B.* v. *Jones & Laughlin Steel Corporation* (81 L. Ed. Adv. Op. 563), upheld provisions of the act as applied to a steel corporation and its production employees 5–4
    15. *N. L. R. B.* v. *Fruehauf Trailor Co.* (81 L. Ed. Adv. Op. 582), upheld act as applied to a manufacturer of automobile trailers (80 percent of whose products are sold in other States) 5–4
    16. *N. L. R. B.* v. *Friedman-Harry Marks Clothing Co.* (81 L. Ed. Adv. Op. 585), upheld act when applied to a manufacturer of men's clothing (who shipped in 99 percent of his raw materials and shipped out 82 percent of the finished product to other States) 5–4
    17. *Washington, Virginia & Md. Coach Co.* v. *N. L. R. B.* (81 L. Ed. Adv. Op. 601), upheld the act as applied to an interstate motor-bus company ..... Unanimous
14. Revenue Act of 1934 (48 Stat. 680, 763):
    18. *Cincinnati Soap Co.* v. *U. S.* (May 3, 1937), upheld provision of Revenue Act of 1934 assessing processing tax on coconut oil from Philippines ..... Unanimous
15. Social Security Act (49 Stat. 620):
    19. *Stewart Machine Co.* v. *Davis* (May 24, 1937), upheld taxing provisions (title IX) 5–4
    20. *Helvering* v. *Davis* (May 24, 1937), upholds the validity of title II, providing for payment of old-age benefits 7–2
16. Gold-clause resolution (48 Stat. 113, sec. 1):
    21. *Norman* v. *B. & O. R. Co.* (294 U. S. 240), upheld the validity of this act when abrogating gold-clause stipulations applied to private contracts 5–4
    22. *Nortz* v. *U. S.* (294 U. S. 317), upheld gold-clause resolution in its requirement that holders of gold certificates accept legal tender currency of equal face value 5–4
    23. *Holyoke Water Power Co.* v. *American Writing Paper Co.* (81 L. Ed. Adv. Op. 383), held that the gold-clause resolution of June 5, 1933, when abrogating a gold-clause stipulation in a private lease, does not violate the 5th amendment 5–4

    NOTE.—This same section of the gold-clause resolution was held unconstitutional by an 8–1 opinion so far as applicable to Government obligations. (See *Perry* v. *U. S.*, supra.).

NOTE.—In several cases, the Supreme Court has specifically refused to pass on the constitutionality of legislation, deciding the cases before them on other grounds, e. g.:

Wilshire Oil Co. v. *U. S.* (295 U. S. 100), where the Court held that a decision of a circuit court of appeals on the validity of the National Industrial Recovery Act was unnecessary; and refused to review the question on certificate.

Moor v. *Texas & N. O. R. Co.* (297 U. S. 101), the Court dismissed a writ of certiorari to review this refusal of the lower court to grant a mandatory injunction to compel carriage of cotton, on which the tax under the Cotton Control Act had not been paid, where plaintiff claimed the act was unconstitutional.

In a further case the Court held that a decision of a circuit court of appeals holding invalid subsection (b) (5) of section 77B of the Bankruptcy Act was "premature", and affirmed the judgment of another "entirely adequate ground" without expressing any opinion on the constitutionality of the Bankruptcy Act: *Tennessee Publishing Co.* v. *Am. Nat'l Bank*, 290 U. S. 18 (unanimous).

Ashwander v. *T. V. A.* (297 U. S. 288) is cited by some writers as a decision favorable to the administration, but in that case the Court carefully confined its opinion to the particular contract before it, which called for sale of power generated at the Wilson Dam, constructed under the National Defense Act of 1916. "We express no opinion as to the validity * * * of the T. V. A.

Act or of the claims made in the pronouncements of the Authority" apart from the particular contract.

Classification of above acts by dissent:		Classification of above cases by dissent:	
Unanimous	10	Unanimous	11
1 dissent	2	1 dissent	2
2 dissents	0	2 dissents	1
3 dissents	1	3 dissents	1
4 dissents	3	4 dissents	8

NUMBER OF CASES, AS COMPARED WITH NUMBER OF PROVISIONS HELD UNCONSTITUTIONAL

Seventy-six cases in 148 years:
1 case in the first 50 years
19 cases in the next 50 years
56 cases in the last 48 years
} out of approximately 40,000 cases decided by the Supreme Court.

Sixty-four different acts construed:
3 enacted between 1789 and 1839, out of a total of 5,741.
22 enacted between 1839 and 1899, out of a total of 15,964.
39 enacted from 1889 through June 6, 1937, out of a total of 36,957.

Eighty-four different provisions of law in some respect invalidated, ranging from an entire act to the necessary implication of a single phrase.

(This tabulation, with revisions, was taken from W. S. Gilbert's Provisions of Federal Law Held Unconstitutional by the Supreme Court of the United States (1936), page 95. The case of *Counselman* v. *Hitchcock* (142 U. S. 547) is sometimes considered as invalidating R. S. 860; e. g., see Warren, Congress, the Constitution, and the Supreme Court, p. 314. Gilbert's reasons for not including this case in his summary are given on p. 89.)

Acts through the 72d Cong		55, 685
Acts of the 73d Cong	975	
Acts of the 74th Cong	1, 724	
	2, 699	
Acts of 75th Cong. through June 6, 1937	278	
		2, 977
Grand total		58, 662

There have been 11 cases invalidating provisions of Federal law which were decided by a majority of one (in each instance 5 to 4). These cases are:

Ex parte Garland (4 Wall. 333).
Pollock v. *Farmers' Loan and Trust Co.* (158 U. S. 601).
Fairbank v. *United States* (181 U. S. 283).
Employers' Liability Cases (207 U. S. 463).
Hammer v. *Dagenhart* (247 U. S. 251).
Eisner v. *Macomber* (252 U. S. 189).
Burnet v. *Cornado Oil & Gas Co.* (285 U. S. 393).
Knickerbocker Ice Co. v. *Stewart* (253 U. S. 149).
Newberry v. *United States* (256 U. S. 232).
Railroad Retirement Board v. *Alton R. R. Co.* (295 U. S. 330).
Ashton v. *Cameron County Water Imp. Dist.* (298 U. S. 513).

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