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THE PRESIDENT'S PROPOSALS FOR JUDICIAL REORGANIZATION

AN ADDRESS

BY

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Ladies and Gentlemen:

Only nine short days have passed since the President sent to the Congress recommendations for the reorganization of the federal judiciary. Yet in that brief time, unfriendly voices have filled the air with lamentations and have vexed our ears with an insensate clamor calculated to divert attention from the merits of his proposal. Let us, therefore, disregard for a moment these irrelevancies and direct our attention to a dispassionate consideration of the reasons for the action taken by the President and the remedy he suggests.

From the beginning of President Roosevelt's first administration I have been in intimate contact with him with reference to ways and means of improving the administration of justice. Literally thousands of proposals have been considered. In addition, the critical literature of the law has been searched, and the lessons of experience have been canvassed. Out of it have come certain well-defined conclusions.

First: In our federal courts the law's delays have become intolerable. Multitudes of cases have been pending from five to ten years.

Rather than resort to the courts many persons submit to acts of injustice. 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.

Furthermore, the small business man or the litigant of limited means labors under a grave and constantly increasing disadvantage because of his inability to pay the price of justice. I do not stress these matters further, because the congestion in our courts is a matter of common knowledge.

Second: Closely allied with this problem is the situation created by the continuance in office of aged or infirm judges.

For 80 years Congress refused to grant pensions to such judges. Unless a judge was a man of independent means there was no alternative open to him except to retain his position to the very last. When in 1869 a pension system was provided, the new legislation was not effective in inducing retirement. The tradition of aged judges had become fixed, and the infirm judge was often unable to perceive his own mental or physical decrepitude. Indeed, this result had been foreseen in the debates in Congress at that time. To meet the situation, the House of Representatives had passed a measure requiring the appointment of an additional judge to any court where a judge of retirement age declined to leave the bench. However, the proposal failed in the Senate.

With the opening of the twentieth century similar proposals were brought forward. The justices of the Supreme Court, however, protested and the project was abandoned. When William Howard Taft, a former federal judge, left the Presidency, he published his views. "There is no doubt," he said, "that there are Judges at seventy who have ripe judgments, active minds, and much physical vigor, and that they are able to perform their judicial duties in a very satisfactory way. Yet in a majority of cases when men come to be seventy, they have lost vigor, their minds are not as active, their senses not as acute, and their willingness to undertake great labor is not so great as in younger men, and as we ought to have in Judges who are to perform the enormous task which falls to the lot of Supreme Court Justices."

In 1913 Attorney General McReynolds (now a Justice of the Supreme Court) in his annual report for the Department of Justice urged that the Congress adopt a similar measure. Some judges, he argued "have remained upon the bench long beyond the time when they were capable of adequately discharging their duties, and in consequence the administration of justice has suffered. * * * I suggest an act providing when any judge of a Federal court below the Supreme Court fails to avail himself of the privilege of retiring now granted by law, that the President be required, with the advice and consent of the Senate, to appoint another judge, who shall preside over the affairs of the court and have precedence over the older one. This will insure at all times the presence of a judge sufficiently active to discharge promptly and adequately the duties of the court." In 1914, 1915, and 1916, Attorney General Gregory renewed this recommendation. Solicitor General John W. Davis aided in drafting legislation to carry out the proposal.

Instead of following this advice, however, the Congress in 1919 passed a measure providing that the President "may" appoint additional district and circuit judges, but only upon a finding that the incumbent judge over seventy "is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character." This legislation failed of its purpose, because it was indefinite and impossible of practical application.

The unsatisfactory solution of 1919 had been endorsed by former Justice Charles Evans Hughes, but in 1928 he made this further observation: "Some judges," he said in part,"have stayed too long on the bench. * * * It is extraordinary how reluctant aged judges are to retire and to give up their

accustomed work. * * * I agree that the importance in the Supreme Court of avoiding the risk of having judges who are unable properly to do their work and yet insist on remaining on the bench, is too great to permit chances to be taken, and any age selected must be somewhat arbitrary as the time of the failing in mental power differs widely."

Despite this long history of effort to obtain some measure of relief, we are now told in certain interested quarters that age has no relation to congestion in the courts. The verdict of experience and the testimony of those eminently qualified to speak from actual service on the bench are ignored.

Third: Attacks upon the constitutionality of measures enacted by the Congress have burdened the courts. The powers of government are suspended by the automatic issuance of injunctions commanding officers and agents to cease enforcing the laws of the United States until the weary round of litigation has run its course.

In the uncertain condition of our constitutional law it is not difficult for the skillful to devise plausible arguments and to raise technical objections to almost any form of legislation that may be proposed. Ofttimes drastic injunctive remedies are applied without notice to the Government or without opportunity upon the part of its representatives to be heard in defense of the law of the land.

Four: If the Constitution is to remain a living document and the law is to serve the needs of a vital and growing nation, it is essential that new blood be infused into our judiciary.

The Constitution is not a legal code. In the words of the great Chief Justice Marshall, it was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Justice Story likewise pointed out long ago that "The Constitution inevitably deals in general language. * * * Hence its powers are expressed in general terms leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its power, as its own wisdom and the public interests should require."

In short the Constitution is not a dam erected to check the flow of the life of our people. It is a channel through which that life flows, directing, guiding, facilitating it, but at no point endeavoring to stop it. That the freedom of our people to direct their own destiny has been hampered, especially of late, by judicial action is scarcely open to debate. These limitations upon Congressional power have brought into challenge a wide range of projects and measures overwhelmingly approved by our people.

To confess that our institutions are not capable of serving our needs implies an admission we should be reluctant to make. Questions of vast significance are moving to their solution. The problems of America are insistent. We are a nation. Our people think as a nation. They act upon a nation-wide front. Industry has long since spread its arms beyond the boundaries of a single State -- indeed, beyond the seas. Labor marches on the parade ground of a continent. It is idle to say that agriculture is a local matter, or a question for the farmers alone. They know that nature has

decreed it otherwise. The winds and the dust and the drought and the floods do not heed State lines. They have unmistakable jurisdictions of their own. I trust it may not be deemed indelicate if I borrow the quaint phrase of Mr. Justice Holmes and suggest that some of our judges "need education in the obvious."

The judiciary is but a coordinate branch of the government. It is entitled to no higher position than either the legislature or the executive.

The President recognized this situation in his first message to the new Congress delivered on the sixth of January, when he said,

> "With a better understanding of our purposes, and a more intelligent recognition of our needs as a nation, it is not to be assumed that there will be prolonged failure to bring legislative and judicial action into closer harmony. Means must be found to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern world."

In his message of February 5, the President clearly and forcefully announced his considered and deliberate recommendation. "Modern complexities," he said to the Congress, "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. * * * 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."

These four outstanding defects of our judicial system -- delays and congestion in the courts, aged and infirm judges, the chaos created by conflicting decisions and the reckless use of the injunctive power, and the need for new blood in the judiciary -- are dealt with by the President in his message of the fifth of February, in which he submits a simple, well rounded, comprehensive, and workable system which covers all these points and meets all these needs.

The proposed bill which the President submitted with his recommendations provides in substance that whenever a Federal judge fails to resign or retire at the age of 70, another judge shall be appointed to share in the work of the court. In no event, however, are more than 50 additional judges to be appointed, the Supreme Court is not to exceed 15 in number, and there are limitations on the size of any one of the lower federal courts.

It also provides for a flexible system for the temporary transfer of judges to pressure areas, under the direction of the Chief Justice.

The President further recommended the adoption of a proposal now pending in Congress to extend to the Justices of the Supreme Court the retirement privileges long ago made available to other federal judges. He also recommended 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 in behalf of the constitutionality of the law under attack. He further recommended that in cases in which any District Court determines a question of constitutionality there shall be a direct and immediate appeal to the Supreme Court, and that such cases shall take precedence over all other matters pending in that court.

This is the sum and substance of what the President proposes. This is the so-called attack upon our judicial institutions.

Despite the manifest need of these reforms, despite the comprehensive and reasonable nature of these proposals, despite the long history which brought them forth, despite the eminent judges and statesmen who have either expressed views or actually proposed measures of substantially the same character, the President is now the storm center of a virulent attack. The technique of the last political campaign has been revived. We are solemnly assured that the courts are to be made mere appendages to the executive office, that the judges to be appointed cannot be trusted to support the Constitution, and that the tragedies of despotism await only the adoption of the President's recommendations.

Yet, no serious objection has been made to any one of the purposes or to any part of the plan, except its application to certain members of the Supreme Court. Why the Supreme Court should be granted a special exemption from the plan, no one has been able to explain. If there were no judges on that court of retirement age, there would be no substantial objection from any responsible quarter. What then is the real objection? It is simply this: Those who wish to preserve the status quo want to retain on the bench judges who may be relied upon to veto progressive measures.

Opponents of this measure assert that it is immoral. The reason they charge that it is immoral is because they are unable to charge that it is unconstitutional. Whether the plan is immoral or not must be tested by the results it produces. If it produces a wholesome result in a perfectly legal way, it can scarcely be called immoral.

It is true that the President's proposal may possibly but not necessarily have the effect of increasing the size of the Supreme Court. But there is nothing new in that. Jefferson, Jackson, Lincoln and Grant, together with the Congresses of their respective periods, saw no objection to enlarging the Court.

Again it is loosely charged that the present proposal is a bold attempt to "pack" the Court. Nothing could be farther from the truth. Every increase in the membership of a court is open to that charge, and indeed every replacement is subject to the same objection. Under the President's proposal, if there is any increase in the total number of judges, it will be due entirely to the fact that judges now of retirement age elect to remain on the bench. If those judges think it would be harmful to the court to increase its membership, they can avoid that result by retiring upon full pay.

The Constitution imposes upon all Presidents the duty of appointing federal judges, by and with the advice and consent of the Senate. Upon what ground, may I ask, do the opponents of the President justify the claim that he shall not perform the duty that all other Presidents have performed. George Washington appointed twelve members of the Supreme Court. Jackson appointed five. Lincoln appointed five. Grant appointed four. Harrison appointed four. Taft appointed five and elevated still another to be Chief Justice. Harding appointed four and Hoover appointed three. President Roosevelt has appointed none at all.

It is assumed and sometimes asserted that the appointees under the present recommendation would be subservient to the executive. Recorded experience belies that contention. All judges must be approved by the Senate, and once seated are not subject to executive domination or control.

Out of every flight of hysteria on this question there comes a further charge that the President's proposals will lead to dictatorship, through the establishment of an evil precedent. But there have been far more significant precedents than this. Jefferson ignored a subpoena issued by Chief Justice Marshall. Jackson, in a stubborn moment, told the Supreme Court to try and enforce its own decrees. Lincoln totally disregarded Chief Justice Taney's demand that the privilege of the writ of habeas corpus be restored. No one of these Presidents was a dictator, but each illustrated how powerless the courts are unless the purity of their motives and the justice of their decisions win them the popular support. Indeed the Supreme Court in its opinions has specifically recognized this fact.

Let us have done with irresponsible talk about dictatorship. Let us turn our minds to realities. We hear much about the perils that beset democracy. If we are to defend successfully our institutions against all comers from the right and from the left we must make democracy work.

Those who are violently opposing the President's recommendations insist that the reforms he seeks to bring about should be accomplished by amending the Constitution and by that method alone. This is the strategy of delay and the last resort of those who desire to prevent any action whatever. Thirteen State legislatures can prevent the adoption of any Constitutional amendment. The child labor amendment, submitted thirteen years ago, has not yet been ratified. Furthermore, if an amendment were secured, it would still have to run the gauntlet of judicial interpretation.

The more thoroughly the President's plan is debated the more clearly will its merits appear. It meets legitimate need. It is reasonable,

it is moderate, it is direct, it is constitutional. It works out our problems within the framework of our historic institutions and it guides us to a clear path away from our present difficulties.

The envious and the malicious may challenge the integrity of the President and the purity of his motives, but the only apostasy of which he could be guilty would be to break faith with the people who trust him to carry on.