STATEMENT

BY

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C. C.

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Mr. Chairman and Members of the Committee on the Judiciary:

The question of judicial reform is not a new one. Eminent judges, lawyers, statesmen, and publicists over periods of many years have complained of the defects of our judicial system and have sought to find remedies. Surely all thoughtful citizens desire constantly to improve our institutions, to adapt them to our needs as time advances, and to secure the best government that intelligence and wisdom can provide. What we differ about, if we differ at all, is the means of accomplishing the purposes we hold in common. That our judicial processes and the administration of justice are in need of improvement is hardly open to debate.

I.

The President's plan rests upon four pillars, based upon the following propositions:

A. The impossible situation created by the reckless use of injunctions in restraining the operation of Federal laws.

B. The presence on the Federal bench of aged or infirm judges.

C. The crowded condition of the Federal dockets, the delays in the lower courts, and the heavy burden imposed upon the Supreme Court.

D. The need of an effective system for the infusion of new blood into the judiciary.

All of these matters are inter-related, inter-woven, and interdependent. Moreover, they are part of the general problem of improving our democratic processes.

A.

GOVERNMENT BY INJUNCTION

The President, in his message of February fifth, called the attention of the Congress to the fact that the processes of government are "brought to a complete stop from time to time by injunctions issued almost automatically" and continued in effect while counsel maneuver, debate, and appeal.

This situation arises in part from the uncertain state of our constitutional law. In part, the condition is due to the failure of judges to exercise care, discrimination, and self-restraint in the use of this drastic remedy. As an immediate step the President has recommended that the Congress provide that: first, no court shall pass upon the constitutionality of an Act of Congress without notice to the Attorney General and an opportunity for the United States to present evidence and to be heard; and, second, where the trial courts pass upon such questions there shall be a direct appeal to the Supreme Court, and that such cases shall take precedence over all other matters pending in the Court. I am aware of no serious objections to these obviously necessary reforms.

B.

AGED OR INFIRM JUDGES

Since the Civil War attention has been turned from time to time to the problem of the aged or infirm judge.

In 1869 the House of Representatives passed a measure requiring the appointment of an additional judge to any court where a judge of retirement age declined to leave the bench. It failed in the Senate. This is the same remedy proposed by President Roosevelt today.

With the opening of the twentieth century similar proposals were again agitated. President Taft, a former Federal judge, felt keenly on the subject and frequently expressed himself with vigor. He felt that the absence of a compulsory retirement system for judges was "a defect" in our institutions, and he believed that "It is better that we lose the services of the exceptions who are good Judges after they are seventy and avoid the presence on the Bench of men who are not able to keep up with the work, or to perform it satisfactorily."

Not long afterward, Attorney General (now Mr. Justice) McReynolds returned to the earlier proposals and in his annual report for 1913 recommended that "When any judge of a Federal court below the Supreme Court fails to avail himself of the privilege of retiring now granted by law . . . 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." Attorney General Gregory repeated the suggestion in 1914, 1915 and 1916. These recommendations embodied the principle now urged by President Roosevelt, except that they did not apply to the Supreme Court.

In 1928 Charles Evans Hughes, now Chief Justice of the United States, agreed "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." He seemed to favor seventy-five rather than seventy as the proper retirement age. In England seventy-two is favored. In our universities a lower age than seventy is the general rule. In this country seventy seems to be the most favored retirement age for civil servants and for judges.

No one thinks judges are not human or that three score years and ten do not work upon them like upon other men. The verdict of experience is nearly unanimous that some sort of action should be mandatory when judges reach a certain, definitely fixed, age. Obligatory retirement might be provided by constitutional amendment. The President, however, has chosen a less drastic course in asking that additional judges be appointed to supplement the work of those of retirement age.

C.

THE CROWDED CONDITION OF THE FEDERAL DOCKETS, THE DELAYS IN THE LOWER COURTS, AND THE HEAVY BURDEN IMPOSED UPON THE SUPREME COURT.

In his last annual message, in December 1908, President Theodore Roosevelt complained of "the long delays ... in the administration of justice . . . which operate with peculiar severity against persons of small means and favor only the criminals whom it is most desirable to punish." Four years later the district court system was re-organized and in that year, exclusive of bankruptcy proceedings, an average of 276 cases were filed for each district judge. In 1936, an average of 484 such cases were filed - an increase of more than 75%. More than 50,000 cases, exclusive of bankruptcy proceedings, now overhang the Federal dockets. The new cases filed about equal the number of those disposed of, so that we make no serious impression on the back log of undigested cases.

The last report of the Judicial Conference shows delays in securing trials in civil cases after joinder of issue in 34 out of the 85 judicial

districts. Actually the 34 congested districts handle a great majority of the civil litigation in the district courts. Thus, the total number of private civil cases pending in all of the 85 districts on June 30, 1936, was 31,294, of which 22,239 were pending in the 34 congested districts. In other words, the trial of more than two-thirds of the private civil litigation in United States district courts is stalled by clogged dockets.

This, however, is not the complete story of the law's delays. The statistics of the Judicial Conference have reference only to the interim between joinder of issue and the time a trial may be had if all goes well. Further time is lost in bringing cases to issue, due to delays in securing rulings on preliminary matters such as demurrers and motions. Another source of trouble is the undue lapse of time that frequently intervenes between the final submission of a case to the court and the date when the decision is actually rendered.

By way of illustration, permit me to refer to the situation in the Eastern District of Pennsylvania. The number of private civil cases there pending on January 31, 1937, was 1,593. Of this number 1,277 had been on the docket more than a year; 1,007 more than two years; 860 more than three years; 732 more than four years; 629 more than five years; 531 more than six years; 420 more than seven years; 361 more than eight years; 307 more than nine years; and 264 more than ten years.

But the mere measurement of delay is not all. Each of us knows from experience that many people submit to wrongs rather than resort to the courts or must accept unjust or improvident settlements.

We not only need more judges but we also need a flexible system. Some suggestion has been made that judges over seventy are not necessarily confined to congested areas. But all new judges should constitute a mobile

force, available for service in any part of the country under the direction of the Chief Justice. Congestion cannot be foreseen. It is a varying factor. It is self-evident that judges should be available for pressure areas.

Our laws already provide, under certain limitations, for the special assignment of judges to congested areas. This system is sadly in need of renovation. It is haphazard and unbusinesslike. There should be one responsible public official who works at nothing else. Hence the suggestion of a Proctor, operating under the control of the Chief Justice and the Supreme Court.

Most informed people recognize the propriety and force of these suggestions as applied to the lower courts, but question has been raised as to the matter of additional judges for the Supreme Court. During a great part of our history - particularly since the Civil War - the business of the Supreme Court has been sadly in arrears. In 1891 the Circuit Courts of Appeals were created to relieve the Supreme Court. Nevertheless President Taft, in 1910, spoke of its "slough of despond." Upon becoming Chief Justice he lost little time in attacking the problem. The Congress responded in 1925 with a measure giving the Supreme Court discretion, in most cases, to determine whether it would hear particular causes.

This was done to aid the Court by limiting the number of cases it would be called upon to hear upon the merits. There were objections from men like Senator Thomas J. Walsh, of Montana, who felt it vested in the Court "too much discretionary power," but the sheer necessity for some relief and the active support of the judges drove the bill to passage. Chief Justice Taft wrote, "There is no other way by which the docket in our court can be reduced,

so we can manage it."

By limiting the number of cases heard, the Court has been able to keep abreast of its self-determined docket. By thus inverting, as it were, the usual situation, the Court hears and decides not what is presented but only what it can handle. Of course, under such circumstances, the actual "docket" becomes only that number of cases which the Court can consider and desires to hear. Nevertheless there are those who, with something of a flourish, reassert the undisputed fact that the Supreme Court is up with its docket, apparently unmindful that, under the existing practice, there is no reason why it should be otherwise.

That the consideration of applications for certiorari places a heavy burden upon the Supreme Court is evidenced by the words of the Chief Justice himself, in an address delivered before the American Law Institute in May 1934. After explaining the operation of the system, he continued as follows:

> Thus all the Justices pass upon all the applications for certiorari. During vacation the papers on these applications follow us wherever we are, at home or abroad. Having approximately 300 of them to deal with during the summer, you can see that during the period when the Court is not in session there is a large amount of judicial work to be done.

The question is not whether the Court is up with the docket, but by what means it keeps up with the docket; and whether the burden that it must sustain is too great to warrant the careful consideration to which these petitions are entitled and whether assistance, by the appointment of additional judges, is indicated.

Let us look at the actual operation of this system during the 1935 term. The judges during that year were called upon to decide appeals and original proceedings in which the briefs totaled 15,862 pages and the

records 35,833 pages, or 51,695 pages in all. In addition, there were 869 petitions for writs of certiorari. These involved 53,868 pages of briefs and 290,364 pages of record, a total of 344,232 pages.

After all, there are only 365 days in a year. Let us make the extravagant assumption that the average justice worked ten hours each day, including Sundays and holidays and took no vacation, or 3,650 hours in all. Approximately 296 hours were spent on the bench hearing cases and about 108 hours were spent in formal conferences, leaving 3,246 hours for other judicial tasks. Briefs and records in all classes of cases totaled 396,690 pages (including briefs on rehearings amounting to 763 pages). If all of the time available were devoted to the mere examination of briefs and records each justice in 3,246 working hours must have undertaken to study and understand an enormous mass of material, the mere reading of which would have to proceed at the rate of 122 pages an hour, or 1,220 pages in a ten-hour day.

But in addition, the Justices wrote 170 opinions - majority, dissenting, and concurring. Moreover, the official reports, comprising three large volumes, disclose 159 additional short memoranda and per curiam opinions.

However we may look at it, it is a stupendous task. If there were more justices there would be more men for the exacting work of writing opinions, together with the painstaking labor over briefs and records which such writing requires. The Court might properly divide into groups for the consideration of applications for the review of cases. The number of applications, with accompanying briefs and records, which each judge would be expected to examine might thus be reduced by half or two-thirds. For this preliminary work five judges, considering half as many applications, could do more thorough work than nine judges each responsible for the whole number.

Indeed, it might be desirable if only a quorum of two-thirds of the Court sat to hear cases not involving important constitutional questions, leaving the others free to write opinions or to examine applications for review. A similar system prevails in some of the States and was suggested for the Supreme Court by the Committee on Jurisprudence and Law Reform of the American Bar Association in 1921. The Committee recommended that the Court be increased to eleven, that six constitute a quorum, and that a concurrence of five be necessary to render a decision. It was felt that this "would enable the court to be in session almost continuously, and thus to dispose of a much greater amount of business without impairing the uniformity of decision."

D.

NEW BLOOD FOR THE JUDICIARY

"Life tenure of judges," as the President stated in his recent message "was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary."

Former President Taft, in 1913, felt that "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."

There undoubtedly are, in the words of President Theodore Roosevelt,

"some members of the judicial body who have lagged behind in their understanding of these great and vital changes in the body politic, whose minds have never been opened to the new applications of the old principles made necessary by the new conditions."

The need of new blood in the body politic, in business, in industry, in government, in the judiciary, is at least as great as in the living organisms of nature. Why does this obvious fact bother some of our citizens? Perhaps because, amid a changing world, we like to imagine that we are unchanging. There is also the notion that the "law" is as fixed and as absolute as the multiplication table.

On the contrary the Constitution was not intended to be a code of law but was meant to be a general framework within which each generation might work out its problems in orderly fashion. In the words of the great Chief Justice Marshall, the Constitution 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."

James M. Beck put it another way when he said, "The Supreme Court is not only a court of justice, but in a qualified sense a <u>continuous constitutional convention</u>. It continues the work of the Convention of 1787 by adopting through interpretation the great charter of government, and thus its duties become political, in the highest sense of that word, as well as judicial." He then proceeds to discuss, in his book on the Constitution, the origins of what he

terms "this extraordinary politico-juridical tribunal."

Many people have been misled into believing that the Constitution is at fault. We are facing not a constitutional but a judicial crisis. Such crises have occurred before and have been resolved in various ways. Let us briefly examine some of them.

Nowhere does the Constitution state that the Supreme Court shall have power to declare Acts of Congress void. At first the justices doubted it. A good portion of the country doubted it. It was not until 1803, in the case of Marbury v. Madison, that the Supreme Court held that it possessed such power.

The power was not exercised again for more than half a century. Then Chief Justice Taney wrote the opinion for a divided Court in the Dred Scott case. Despite strong approval from the bar and the press, this case was one of the important factors leading to the Civil War. Abraham Lincoln assured his followers that an attempt would be made to have the decision overruled. The crisis thus precipitated the country is not likely to forget.

Not long afterward, and despite this disastrous experience, the Court, in the famous case of Hepburn v. Griswold, held invalid the Legal Tender Act by a vote of four to three. Had that decision been permitted to stand it would have completely upset the financial operations of the government. There were two vacancies on the Court, which President Grant filled, on the day the opinion was handed down, with men whom he knew to be in sympathy with the statute. Another case was brought and the first decision was overruled by a vote of five to four. The judicial crisis was cured by a process which, in some quarters, was described as "packing the Court."

Twenty-five years later, one judge changed his vote in the income tax case (Pollock v. Farmers Loan & Trust Co.) and the income tax was invalidated. The resulting situation was repaired by a constitutional amendment adopted eighteen years later.

These events led Mr. Hughes to use the vivid observation that "in three notable instances the Court has suffered severely from self-inflicted wounds."

In the present century, we find five-to-four, or six-to-three decisions determining national policy in nearly every important field of legislation. The Constitution does not prescribe the abolition of sweat-shops, or the elimination of the products of child labor from interstate commerce, or the use of the taxing power for the benefit of agriculture. The Constitution says not a word on these subjects, but on each of them the deciding vote of one or two judges has nullified the will of Congress, has overruled the approval of the President, has disregarded the powerful arguments of other justices of the Court, and has run counter to the sentiment of the country.

On the question of split decisions on constitutional questions so profound a student of our Constitution as Albert J. Beveridge, wrote as follows:

> When five able and learned justices think one way, and four equally able and learned justices, all on the same bench think the other way and express their dissent in powerful argument, sometimes with warm feeling, is it not obvious that the law in question is not such a plain infraction of the Constitution as to be unconstitutional "beyond all question?"

Beveridge rejected efforts to alter the course of the Court by constitutional amendment. His plan was to secure better judges who would sparingly exercise of their power. He urged the Court itself to impose a self-denying ordinance so that at least a two-thirds vote would be necessary to void an Act of Congress. Speaking of the need of justices with a fresh outlook he said:

> The character of members of the Supreme Court is vital to the permanence of American institutions - not their moral character alone, but also their intellectual stature, their vision, their outlook on life, their knowledge of history, their familiarity with present conditions and developing tendencies, their sympathetic understanding of human nature and its reactions.

He insisted that they must be more statesmen than lawyers; that a judge "must have the contemporary mind; it must not be pickled in precedents."

Yet judicial history continues to repeat itself. In February 1935 financial chaos was avoided by the margin of only one vote in a five-to-four decision. It is difficult, indeed impossible, to reconcile the five-to-four decision in the private contract Gold Clause cases, or in any other cases involving constitutional questions with the settled and well-known rule of law that legislative enactments should be recognized and enforced by the courts, unless plainly and palpably, in violation of the Constitution.

The Supreme Court has frequently enunciated that doctrine. In the case of Williams v. Mayor the Court said, "Within the field where men of reason may reasonably differ, the legislature must have its way." In the

Legal Tender cases the Court said:

> A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress. * * * An Act of the legislature is not to be declared void, unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt . . .

Let us consider the minimum wage cases. The Supreme Court invalidated such statutes in 1936, and 1923, and divided evenly on the issue in 1917. As a result neither the Federal government nor the states may deal with the problem of sweat-shops. Yet, over that period, an actual majority of the judges of the Supreme Court declared such legislation constitutional. This curious result is due to the fact that the controlling and conservative group has remained on the bench longer than the liberals who have come and gone. The number of the latter is greater in the aggregate, for over this period there were ten of them, whereas there were only seven who believed such laws invalid.

Every time the Supreme Court renders a split decision voiding a statute on a constitutional question it flies in the face of its own rule, and encroaches upon the powers of the Congress.

II

The President's plan deals with the impossible situation growing out of the reckless use of injunctions. It deals with the presence on the Federal bench of aged or infirm judges. It deals with the crowded condition of the Federal dockets, the delays in the lower courts, and the heavy burden imposed

upon the Supreme Court. It supplies an effective and systematic means for the infusion of new blood into the judiciary so that we may have an up-to-date administration of the law, and forward-looking decisions upon social and economic questions. It is direct, coherent and well-considered. The more it is studied, the more freely and fairly it is debated, the more clearly will its merits appear.

The Federal judicial system is sound at heart and will stand every kind of inquiry and discussion, but those who mistakenly seek to preserve its faults and strive to perpetuate them, are playing with fire - dangerously. Let us not forget that the law is the servant and not the master of human need.

The proposed increase in the number of judges is not for the purpose of enslaving the judiciary; not for the purpose of making it an adjunct of the Executive. The purpose is to rejuvenate the judicial machinery, to speed justice and to give to the Courts men of fresh outlook who will refrain from infringing upon the powers of the Congress.

There are some who, admitting the reason, necessity and logic of the President's proposal, are nevertheless beset by a sort of nameless fear that it will constitute a dangerous precedent.

In the course of our history the size of the Supreme Court has been changed six times by both increasing and reducing its membership. The power to make these changes is confided by the Constitution to the President and the Congress. The exercise of a constitutional power for a wholesome purpose furnishes a sound, not a dangerous, precedent. The fact that we may abstain from using a power admittedly ours is by no means a guarantee that that same power will not be used by others hereafter. It is a strange

doctrine that we must refrain from doing a good and necessary thing for fear that many years from now someone may use the same authority to do an evil thing. Let us study our own problems and solve them in the light of our own needs.

After all, the appointment of judges is not an unlimited power. Once appointed they are not subject to either the Congress or the Executive. Moreover, in their appointment the Senate must concur. To say that the power of appointment will be abused involves three unwarranted assumptions - that the Chief Executive is not to be trusted; that the Senate can be misled; and that the appointee will be "a spineless puppet." None of these assumptions is tenable. No one man can "pack" the Supreme Court. That would require the concurrence of the President, 49 Senators, and the appointee himself - 51 eminent men in all - a preposterous suggestion.

There is another group of persons who, in the present posture of world affairs, profess to see in this program the seeds of dictatorship. In view of the temperate nature of the President's proposal, this is a strange assertion. It must not be forgotten that when Jefferson refused to obey a subpoena issued by Chief Justice Marshall he was charged with being a tyrant; when Jackson derided an opinion of the Supreme Court and told Marshall to enforce his own decree, he was denounced as the apostle of anarchy; when Lincoln ignored the demand of Chief Justice Taney that the privilege of habeas corpus be restored, he was charged with assuming absolute power. No one of these Presidents was a dictator. Indeed, it is curious to note that all the great Presidents who have sought to do the most for the people have been charged with the assumption of dictatorial powers and with cherishing evil ambitions and unconstitutional purposes.

The ways of actual dictators and the manner in which they come into power make it clearly evident that the courts alone cannot resist their advance. Dictatorships grow out of ill-adjusted economic conditions, out of distress, out of fear, out of injustices - and when these forces are set in motion and dictatorships come into power, all laws, all precedents, all courts, all restraining influences are swept away.

Such assertions of fear are remindful of the mournful prognostications which have been made from time to time during the course of American history. When Jefferson was about to become President, John Marshall lamented that the tide of "real Americanism is on the ebb." Just a century ago Justice Story, when his brethren of the Supreme Court did not agree with him in the Charles River Bridge case, complained that "the old constitutional doctrines are fast fading," and Daniel Webster wrote that Story "thinks the Supreme Court is gone and I think so too, and almost everything else is gone or seems rapidly going." We hear the same sort of comment today. When the Gold Clause cases were decided two years ago, four of the justices announced that "the impending legal and moral chaos is appalling." To them the Constitution was gone.

Finally, it is suggested that the matter be left to a constitutional amendment. To this there are definite answers. First: No amendment is required because the proposal is clearly constitutional. What is really sought by some is a referendum, not to the whole people but to part of the people of only thirteen States. Second: The phraseology of any proposed amendment would be the subject of endless debate and once submitted might suffer the fate of the Child Labor amendment which has been pending for thirteen years. Third: Any amendment must, if adopted, be construed and

applied by the same judges who have brought us to our present pass. In the words of Thomas Jefferson, "The attempt to make the law plainer by amendment is only throwing out new amendments for sophistry." All that is required is an enlightened interpretation of the Constitution.

Of course, there are those who are not impressed by the need of these reforms. There are others, and I dare say a vast majority, who recognize these needs and hope to meet them. I submit that the President's plan is the most effective remedy that has been suggested. It aims at the restoration of the full legislative power so that the Congress may perform its constitutional function. What we desire to avoid is "a tortured construction of the Constitution." Our governmental machinery has gotten out of balance and that balance must be restored before it can effectively function.