FOR RELEASE
MONDAY, APRIL 26, 1937.
10:00 P. M.

PROGRESS OF THE PRESIDENT'S PLAN FOR JUDICIAL REFORM

Address by

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Under the Auspices

of

THE NATIONAL RADIO FORUM

Washington, D. C.

Monday, April 26, 1937,

9:30 P. M.

Over the Network

of the

National Broadcasting Company.

Ladies and Gentlemen:

Nearly three months have elapsed since the President submitted to the Congress his proposal for the reorganization of the Federal judiciary. Now that the Senate hearings, after six weeks of spirited debate, have been brought to a close, let us briefly survey the situation.

Those who testified in behalf of the plan pointed out the defects in the existing system and called attention to the unmistakable and improper invasion of the legislative field by the Supreme Court. With few exceptions even the opponents criticized the decisions of the Supreme Court, and called for effective remedies - presumably by Constitutional amendments. Pitifully few of those who testified approved in whole-hearted fashion the course the Supreme Court has pursued. And now, as if to make the conclusion unanimous, the Supreme Court, albeit by a narrow margin, has voted itself a "winter garment of repentance" and has upset crucial decisions of long standing.

Manifestly these events have contributed to a real understanding of our present difficulties. The need of judicial reform has been demonstrated. Only the method remains open to debate.

Lest the proposals of the President be obscured by words, it is necessary to keep steadily in mind what they are and what has already been done toward carrying them into effect. Parts of the plan have met with almost universal approval.

In the matter of injunctions and suits raising constitutional questions, I am aware of no serious opposition to the recommendation that the Attorney General be given notice and an opportunity to present the Government's side of the case, with the right of direct appeal to the Supreme Court. A measure to this effect has already passed the House and will shortly receive the consideration of the Senate.

The President also recommended a measure to permit the voluntary retirement of Supreme Court justices at the age of seventy, upon a pension. A bill to this effect has already been passed and is now the law of the land. The Congress has thereby recognized that seventy is a proper age for the retirement of Supreme Court justices - just as it has long been recognized as proper for judges of the lower Federal courts.

The recommendation for the appointment of additional judges, in order to relieve chronic congestion and inexcusable delay in the lower courts, has met with little opposition. So far as these courts are concerned, few responsible persons have challenged the need of an enlarged judiciary and a more flexible system.

The debate has centered upon the Supreme Court and it is constantly re-asserted that that Court is abreast of its work. The answer is simple. No one has contended otherwise, for the Supreme Court itself selects the cases it will review and thus controls the size of its own docket. Moreover, the opposition ignores the fact that, when justice has been speeded in the lower courts, more applications for review will be presented to our highest tribunal, already heavily burdened.

If, as the Chief Justice insists, sixty per cent of all applications for review are "wholly without merit", there still remain forty per cent which are subjected, as he says, to "critical examination." However, let us lay aside altogether the matter of passing upon applications for review, which the Chief Justice concedes to be "laborious", and direct our attention only to the cases actually received upon the docket and heard upon the merits. Even then, the Court assumes a staggering load. If each justice labored ten hours a day, Sundays, holidays, and during the summer recess, he would have to dispose of the legal papers involved at the rate of more than thirty pages an hour, and in addition, if we take the 1935 term as an example, find time, somehow, to hear arguments, participate in formal Court conferences, examine authorities, and write his share of 170 full opinions as well as 159 short memoranda and per curiam opinions. Surely it is not unreasonable to say, with a Court thus circumstanced, that some way must be found to ease or spread the burden.

As to the suggestion that an enlarged Court might improve its methods by a more efficient division of labor, the Chief Justice intimates that it might be unconstitutional for the Court to separate into "two or more parts * * functioning in effect as separate Courts." This is a patent begging of the question for no one in authority, so far as I am aware, has advanced any such idea. Instead, it has been suggested that, except in cases of great importance, only a rotating quorum of an enlarged Court should sit at a time, leaving the other justices free to write opinions or to examine applications for review. No one has ever challenged the constitutionality of the Statute under which the Court now operates and which authorizes a quorum of six Justices to discharge its functions.

Such a plan has proved to be eminently successful in state courts and in the Federal circuit courts of appeals throughout the country. The Committee on Jurisprudence and Law Reform of the American Bar Association in 1921 suggested a similar system for the Supreme Court. Such a plan contemplates not two or more Supreme Courts but the efficient use of the personnel of one.

Surely the Chief Justice cannot be understood as suggesting that it would be unconstitutional for less than a full court to render a decision. If that were true then the Supreme Court has rendered many invalid decisions in the course of its history, and but recently has handed down opinions in which only eight justices participated.

Let us now consider another aspect of the President's plan. The right to fill vacancies created by Providence is unquestioned in the present debate, but we are told that appointments, when made because incumbent justices are of retirement age and do not see fit to retire, constitute "packing" the Supreme Court. Yet, the necessity of a systematic replacement system, such as we find in every other field of government, as well as in commerce and industry, has been urged in one form or another by a long line of eminent men, including Justices Miller and McReynolds and Chief Justices Taft and Hughes.

The evil they sought to avoid has been growing. In 1789, the average age of the justices of the Supreme Court was less than fifty years; half a century later, in 1841, when Harrison took over the Presidency, the average had increased to sixty years; when the second Harrison assumed the office of President in 1889, after the lapse of another half century, the average age had reached sixty-five; and now, after 148 years of national history, the average age has

reached the unprecedented peak of more than seventy years. With the utmost respect to those who now occupy the bench I ask you frankly whether it is fair, to a great and vital nation of 130 million people bent upon setting its house in order, to have a Supreme Court two-thirds of the members of which are over 70 years of age and a majority who are over 75 years of age.

I should like to point out still another trend. Because retirement is voluntary, the judges themselves exercise great control over the personnel of the various courts, since they may withhold their retirements until a President to their liking occupies the White House. The courts may thus "pack" themselves. Twice as many judges resigned or retired in the Hoover administration as have resigned or retired in four years of the present administration. Sixty-five per cent of the judges over seventy, and eligible for retirement during the first four years of the present administration, still remain upon the bench.

Every previous President from the beginning of the Republic who has served a full four year term has appointed from one to five justices of the Supreme Court. Even Harding, in his short incumbency, appointed four. But now, for the first time, a President has served a full term without making a single appointment to the Supreme Court. It is a matter well worth pondering.

The President in urging his plan called attention to the need of a "constant infusion of new blood" to "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."

The soundness of the President's position is readily demonstrated. How the Constitution shall be applied in a particular case depends largely upon

the experience of the judges and their understanding of the facts - not merely the facts of the case but the facts relating to economic and social conditions generally, the facts relating to our complicated industrial and economic system, the facts relating to the way in which business is conducted and the way in which people live.

We learn from the recent letter of the Chief Justice that litigants in ordinary cases, such as "controversies over contracts and documents of all sorts," to quote the Chief Justice, "have no right to burden the Supreme Court with a dispute which interests no one but themselves." Aside from settling conflicts of authority as between the lower courts, the Supreme Court devotes its attention to questions of "importance" and to "determining constitutional questions, or settling the interpretation of statutes." Most cases involving such matters, as we all know, arise when large interests seek to avoid the control deemed necessary by organized society. In short, the Court has largely ceased to hear private disputes, as such, and devotes its energies to a field of litigation which, in many crucial matters, involves censoring the work of the Congress, the executive, and the states.

Despite the fact that the attention of the Supreme Court is thus directed, the Chief Justice decries the addition of more justices, for there would be, he says "more judges to confer, more judges to discuss, more judges to be convinced and to decide." But, of course, he is careful to speak, as he says, "apart from any question of policy." However, with a Court primarily concerned in matters involving social and industrial policy, we cannot ignore questions of policy.

The point is easily illustrated. Twenty-five years ago, for example, the Supreme Court held valid a statute prohibiting the use of the channels of interstate commerce for the transportation of women or girls for immoral purposes. Five years later, however, the Court held that it was improper to close the channels of commerce to the products of child labor. Yet, the Constitution makes no distinction between the protection of women and the protection of children.

When another five years had passed the Court decided that even women in industry were entitled to no protection and held invalid the minimum wage statute of the District of Columbia. In 1925 and 1936, it again struck down acts adopted to prevent gross exploitation of the labor of women. In those three decisions, five judges of the Supreme Court determined social policy and the scope of the Constitution for fifteen years. Then, less than a month ago, again by the narrowest of margins, the line of minimum wage decisions was completely reversed. Who "amended" the Constitution on March 29th last? Not the President. Not the Congress. Not the states. Not the people. The Supreme Court "amended" it by correcting its previous mis-interpretation.

This bewildering history demonstrates how courts may ignore patent facts and paralyze both states and nation, by the peripatetic vote of a single judge holding office for life. It demonstrates, too, that enlightened judgment, when it comes, may hang precariously upon the social or economic views of one man. Small wonder that, in our own day, eminent lawyers and jurists have spoken of the Supreme Court as "a continuous constitutional convention".

The temper of these times demands a realistically minded court, if our institutions are to thrive - not a reactionary court temporarily in a

liberal mood. It is not the Constitution that is at fault, and the cumbersome machinery of amendment was not designed and cannot serve to correct judicial mistakes one by one. Some judges, seeking to read their own views and social philoscphies into our fundamental law, insist that, if their Constitution stands in the way of needed legislation, the only remedy is by way of formal amendment. And when, over their protest, constitutional interpretations are attuned to the facts of the time, such adjustments are made not by them but by their brethren. They remain fixed and immutable. When the nation moves it moves around them.

Lest anyone in his heart deny that the courts need "unpacking" let him recall that during the last four years every essential measure the Government has been called upon to defend has had to be submitted to a court of nine with four votes lost to it in advance.

Of course, no one desires a subservient Judiciary. Those who assert that such is the present purpose have grievously misjudged the President and misread the history of our long struggle to free ourselves of all tyrannies, executive, legislative and judicial. The independence of our courts must be zealously preserved - but it must be an independence in a very real and genuine sense, not merely an independence from coercion and improper influences, but from all ulterior motives and all impulses to invade the legislative field, and free too from blind subservience to deadening and obstinate legalism.

The President's plan is direct, simple, workable - and constitutional. Of all the plans submitted it is the least drastic. It touches no part of the Constitution. It impairs no power of the Supreme Court. It entails no disheartening delay. It enables our country to move forward to the solution of the problems that crowd upon us; and it preserves the courts and the Constitution as the workable instruments of a free people.