February 5, 1937 [Message to Congress – Judicial Reform] 1033

FDR Speech File

FDR 1

INSERT A

clear

I have recently called the attention of the Congress to the ~~grave~~ need of a comprehensive program of reorganization of ~~necessity of reorganizing~~ the Administrative machinery of the Executive Branch of our Government, ~~in order that it may function in accord with the needs of the times.~~ I now make a similar recommendation to the Congress in regard to the Judicial Branch of the Government, in order it also may function in accord with modern necessities.

(1) 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 ~~agency of the Executive or the Judicial branch~~ one else in Amer ~~is~~ is given a similar mandate. It is therefore the duty of the President to ~~advise the Congress in regard to the needs of the Judiciary if he deems such information or recommendation necessary.~~ advise the Judiciary

stet

I ~~now~~ address you ~~for this reason, and~~ for the further reason that ~~the Constitution imposes on the Congress~~ direct responsibility in the ~~matter of the~~ creation of Courts and Judicial offices and in the ~~determina-~~ formulation

tion of ~~the procedure before the Congress~~ rules of practice and procedure. It is, therefore, one of the definite duties of the Congress constantly to maintain the useful ~~functions~~ functioning of the Federal Judiciary in accordance with modern standards.

This message deals with four such present needs: First, the desirability of eliminating congestion of calendars and of making the Judiciary as a whole less static by the constant and systematic addition of new blood to the Judicial personnel; second, The necessity of making it more elastic by providing for the ~~assignment~~ temporary transfer, under the direction of the Chief Justice, of Circuit and District judges, to serve in those places where the calendars of the Federal courts are most in arrears; third, the requirement of making at more frequent intervals or administrative in order that the Chief Justice may keep himself constantly informed of the progress of litigation or prosecution in every Federal court; fourth, the elimination of the inequality, the uncertainity, and the delay now existing in the determination of Constitutional questions involving Federal statutes acted on by the Congress and the President.

Numerous legislative reforms of procedure have been made by the Congress in former years. Additional proposals have been introduced

membership, he may retire or resign under already existing provisions of law if he wishes so to do.) It is thus apparent that any increase in the membership of the Courts, under the proposed enactment, would lie within the control of the judges themselves.

One further matter requires immediate attention. In addition to the law's delays, 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 differences of judicial opinion has brought the law, the courts, and, indeed the entire administration of justice dangerously near disrepute. A public statute which is held legal by one judge is illegal when brought before another. That which is lawful in one judicial district is unlawful in another. An act valid in one judicial circuit is invalid in another. As a practical matter the law is losing its most indispensable element - equality.

Moreover, the resulting tangles and embarrassments to labor, industry, agriculture, commerce, and the government are allowed to persist for weeks, months, and years. Finally in the appellate courts we are given decisions by two judges against one or three judges against two or by five against four. At times, the majority is itself divided as to the reasons or the scope of their opinion, so

additional judges in all federal courts, where there are incumbent judges of retirement age who have not seen fit to retire or to resign. I also recommend that the Congress provide machinery for taking care of sudden or long-standing congestion, by a well devised system under the direction of the Chief Justice, for the temporary assignment of circuit and district judges hereafter appointed, to serve in those places where the courts are in arrears. I attach a carefully considered draft of a proposed bill which, if enacted, would, I am sure, afford substantial relief along these main lines. The proposed measure also contains a limitation on the total number of judges who might thus be appointed and also a limitation on the potential size of any one of our courts.

This proposal does not raise any issue of constitutional law. It does 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

JDR Draft #1

I have recently called the attention of the Congress to the clear need of a comprehensive program of reorganization of 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 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 if he deems such information or recommendation necessary.

I address you for the further reason that the Constitution imposes on 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 useful functioning of the Federal Judiciary, ~~in accordance with modern standards~~.

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, in recent years, been greatly improved through the erection of suitable quarters, the provision of adequate libraries and the strengthening of the subordinate offices of the courts. But in may ways adequate mechanics represent merely the trappings of judicial office: they do not alone accelerate the processes of justice.

Since the earliest days of the Republic, the problem of the personnel of the courts has claimed 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 numbers of judges and the duties of judges in Federal Courts have been altered in one way or another. Insert A In the case of the Supreme Court, for example, the number of judges originally was seven; it was then reduced to five; and the number has been changed from time to time, rising once to ten judges.

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 United States Courts.

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

Delay in the lowest courts results in injustice. It makes lawsuits a luxury available only for 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 a long litigation. Only by speeding up the processes of the law and thereby reducing their costs, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.

The same facts are true in regard to the delays in the determination of appeals. Moreover, if trial of original actions is expedited and existing accumulations of cases are reduced, the volume of work imposed on the Circuit Courts of Appeals will also increase.

~~Also~~ the attainment of speedier justice will ~~make~~ ~~Lessen~~ the task of the Supreme Court itself. Would be added to by the recommendation which I make later in this Message ~~in regard to~~ 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 ~~to review~~, in its discretion, 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 ~~filed before it~~ 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. 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~~ 87% 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 hear cases is the capacity of the judges themselves, which brings forward the question of aged or infirm judges. This is a subject of delicacy and yet one which requires a frank discussion.

In the Federal Courts there are in all judges. Twenty-five of them are over seventy years of age. Originally no pension or retirement allowance was provided by the Congress. When after eighty years the Congress made provision for pensions, it found a well entrenched tradition of judges clinging 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. The voluntary retirement law of 1869 provided, therefore, only a partial solution. Still in force, that law has not proved effective in inducing aged judges to retire on a pension. Often "they seem to be tenacious of the appearance of adequacy." This had been foreseen in the debates when that

measure was being considered. It was then proposed that when a judge refused to retire, when reaching the age of seventy, 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, with the great increase of population and commerce, and with the more complex type of litigation, similar proposals were introduced in the Congress. To meet the situation in 1913, 1914, 1915 and 1918, 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 seventy, 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 seventy "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 between the ability and disability of an individual 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 twenty years ago. Records and briefs must be read; ~~studies~~ statutes, decisions, and ~~pertinent literature~~ technical, scientific, statistical and economic material 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, as well as into executive functions of the Government and of private business. ~~Mental~~ Lessening mental or physical ~~decrepitude~~ 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 these truths in the Civil Service of the nation and of many states by compelling retirement on pay at the age of seventy. We have recognized it in the Army and Navy by retiring officer personnel at the age of sixty-four. ~~Many~~ A number of states recognize these truths by prescribing in their constitutions the compulsory

world. Moreover, judges of ability and energy, coming freshly to the bench, would enable the courts to make headway against an unwieldy docket and the whole judicial machinery would take on new life.

I, therefore, earnestly recommend that the necessity of an increase in the number of judges be supplied by legistion providing for the appointment of additional judges in all federal courts, where incumbent judges of retirement age do not exercise their privilege to retire or to resign. 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.

I also recommend that the Congress provide machinery for taking care of sudden or long-standing congestion, by a well devised system under the direction of the Chief Justice, for the temporary assignment of circuit and district judges hereafter appointed, to serve in those places where the courts are in arrears. I attach a carefully considered draft of a proposed bill which, if enacted, would, I am sure, afford substantial relief along these main lines. The proposed measure also contains a limitation on the total number of judges who might thus be appointed and also a limitation on the potential size

retirement of aged judges, ~~in state courts~~.

Life tenure of judges, assured by the Constitution, was not intended to create a static judiciary; it was designed solely to place the courts beyond temptations or influences which might impair their judgments. A constant and systematic ~~infusion of new~~ 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, in the light of both reason and experience, that some provision 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 ~~accept~~ choose to retire or to resign. If an elder judge is not in fact incapacitated, no harm 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 by a well devised system, under the direction of the Chief Justice with the assistance of a Proctor, for the temporary assignment of circuit and district judges hereafter appointed to serve in those districts or circuits 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, ~~by providing speedier and more (substantial) justice~~. The proposed measure also contains a limitation on the total number of judges who might thus be appointed and also a limitation 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. Insert B

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 ~~public utility~~ 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. (Insert C) As a practical matter this means that for periods running as long as one year or two years or three years -- until final determination can be made by the Supreme Court -- the law ~~reaches~~ loses its most indispensable element -- equality.

Moreover, during the long processes of preliminary motions, original trials, petitions for rehearings, ~~on minor cases on~~ appeals, ~~before the circuit courts of appeals~~, reversals on technical grounds requiring re-trials, motions before the Supreme Court,

and the final hearing by the highest tribunal, labor, industry, agriculture, commerce and the Government itself go through a 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 or dividing 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 ~~as a matter of right~~, ~~often~~ without notice ~~an opening succeeded~~ to the government, and frequently in clear violation of the principle of equity ~~when~~ injunctions should be granted only in those rare cases of manifest illegality and ~~immediate~~ irreparable damage against which the ordinary course of the law offers no protection. ~~[illegible]~~. Statutes which the Congress enacts are set aside or suspended for long periods of time, even in cases in which the government is not a party.

In the uncertain state of the law, it is difficult for the ingenious to devise ~~enough~~ 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 engage 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 when 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 provide for to the Supreme Court ~~further powers and responsibilities in maintaining the efficiency of the entire Federal Judiciary~~ practical assistance in administering the business in the lower courts; fourth, to eliminate inequality, uncertainty and delay now existing in the determination of constitutional questions involving Federal statutues.

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 ~~structure~~ constitutional of our government -- changes which involve consequences so far reaching as to cause ~~doubt~~ uncertainty as to the wisdom of such course.

Draft #1 DDR + SSR

The Congress now has before it a comprehensive program, which I have recommended for overhauling the executive branch of the Federal Government. Its object is to secure a more efficient and expeditious handling of the administrative business of the nation.

Better tools and machinery of management will not be enough, however, to put our house fully in order. Equally out-of-date and incapable of meeting modern needs is the equipment of the judicial branch of our government for the proper administration of justice. Equally hap-hazard has been its growth. Equally inflexible has been its ~~connection to the changing~~ machinery for meeting the growing demands of a nation in the midst of a changing mechanical world. Equally essential to the preservation of a functioning democracy is the modernizing of the business of the courts.

In submitting a program to the Congress for the executive branch, I pointed out frankly and without reservation how humanly impossible it is for the President adequately to handle his responsibilities with the implements now provided for him. The public welfare calls for the same candor and the same disclosure with respect to the work and personnel of the Judicial branch. The opportunity is at hand; and the times require the same drastic reform in both.

Have insert President's Insert A except first paragraph

The phrase, "rich man's justice" has become too common. Justice is among our most expensive commodities -- much in demand but, because of its cost, not sufficiently available to the average man.

Delusively attractive notions of economy, ineffective attempts to mend antiquated substructures by patchwork on legal procedure, a century and a half of acquiescence in inadequate fundamentals -- have made justice costly and slow. A growing body of our citizens complain of the complexities, delays, and expense of private and public litigation. Lawsuits have become a luxury for the few who can afford them or who have large enough property interests to protect, which will repay the cost. Poorer litigants are compelled to abandon valuable rights, or to accept inadequate and unjust settlements by sheer inability to finance a long litigation or to wait out the many years before their cause is finally determined. Only by simplifying and cheapening the processes of the courts by speeding them up can we eradicate the growing impression that they are a haven ~~only~~ merely for the well-to-do.

If statistics are needed to corroborate what is common impression of the work of the Federal courts, ~~I am~~ the attached ~~transmitting a~~ letter from the Attorney General ~~which~~ gives

some of the outstanding facts.

His recommendation is that new judges be appointed to provide facilities for speedier and cheaper justice. The remedy lies not merely in amendments to judicial procedure. There is required the infusion of a new spirit and energy into the system from top to bottom -- in its methods of administrative and, above all, in the personnel of its judges.

In all of our Federal courts, the District Courts with its judges, the Circuit Courts of Appeals with its judges, the Supreme Court with its nine judges, the Customs Court, the Court of Claims (etc.,etc.) with its judges, there is the definite rule of law requiring life tenure of office. I am advised that because of constitutional provision (article section) that rule cannot be changed by statute. Life tenure of judges was designed to place the courts beyond temptations or influences which might warp their judgments. That independence must be continued at all costs. But the principle of life-tenure has brought about other results which were not contemplated by the constitution and which are outstanding obstacles to quick justice.

In the Federal courts which I have enumerated, there are judges over the age of seventy years. In many

of our states, judges are compelled to retire at that age with provisions, of course, for pensions. No such pension or retirement allowances were originally allowed by the Congress in the cases of judges who might wish to retire upon reaching old age. When the Congress, after eighty years of our national history, determined to set up allowances for voluntary retirement on pension, it unfortunately found a well intrenched tradition of judges throughout the entire Federal judicial system 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, their responsibilities and debts accumulated. Except in the cases of men having other financial means, there was no alternative open to them except to continue to attempt to perform the duties of their offices to the very edge of the grave.

In some exceptional cases, of course, judges like other men retain to an advanced age the fullest mental and physical vigor. Those not so fortunate are often unable to recognize their own infirmities. Accordingly the voluntary retirement law passed in 1869 and still in force, has not proved effective in inducing aged judges to retire on a pension.

Since that date although judges were eligible to retire with pay, only availed themselves of that opportunity.

The duty of a judge involves much more than merely presiding at trials and listening to testimony or argument. Records and briefs must be read; statutes, decisions, and pertinent literature must be searched and studied; opinions must be formulated and written. The necessary drudgery of judicial work is a wearying drain upon the mental and physical energies of any man.

Mental and physical decreptitude lead men to avoid an examination of complicated and changing conditions. Little by little new facts become blurred through old glasses, fitted for the needs of another generation; and men, resting upon the complacent assumption that the scene is the same as it was in the past, cease to explore or inquire into the present and the future.

We have recognized these truths in the civil service of the nation and ~~in~~ of many (?) of the states by compelling retirement on pay at the age of seventy. We have recognized these truths in the Army and Navy by ~~compelling retirement~~ retiring personnel on pay at the age of , even ~~for~~ those who are not actually in field service. Many states have recognized these truths

by retiring aged judges in the state courts. And even in the elective offices of the Federal and State governments, the people have recognized these truths by consciously refraining, except in rare instances, from nominating or electing to important office men of advanced years.

Life tenure of judges was not intended to create a static judiciary. Constantly and systemically, new blood must be added to the judicial personnel, lest for lack of vigor, it cease to carry its burden in the work of government. Younger judges of ability and energy, coming freshly to the bench, would enable the courts to make headway against an unwieldy docket; and the whole judicial machinery would take on new life. Thus vitalized, the courts will be better equipped to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world.

If there were not present the doubts about constitutionality, I should recommend compulsory retirement with pay of judges in all Federal courts at the age of seventy. That would be the best method of dealing with the problem. But because of the constitutional diffficulties, I recommend the adoption of a proposal which has been frequently made in

the past and which would bring younger blood into the judiciary periodically to keep the machinery of the courts adequately geared to meet the increasing amount and the more complicated nature of modern litigation.

When the first voluntary retirement measure came before the Congress, back in 1869,(?), the proposal was first made that, if a judge refused to retire on reaching the age of seventy, an additional judge should be appointed to assist in the work of the court. A statutory provision to that effect actually 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 with the more complex type of litigation, the question became more pressing. Similar proposals were introduced in the Congress; others were withheld because of the opposition of members of the Supreme Court. To meet this situation, in 1913, 1914, 1915, and 1916, Attorneys General McReynolds and Gregory recommended to the Congress that, when a district or circuit judge refused to retire at the age of seventy, an additional judge be appointed to preside over the affairs of the court in order that the judicial business might be promptly and adequately discharged.

In 1919 a measure finally passed which provided that the President "may", in his discretion, appoint additional district and circuit judges and then 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." The discretionary and indefinite nature of this legislation made it useless as an instrument for constantly rejuvenating the courts. In that respect the legislation confirmed the prediction of Justice Story, more than a century ago, who pointed out that such a provision would fail of its purpose because of the difficulty of determining the line between ability and disability and because instances of what he called "absolute imbecility" would be too rare to justify the adoption of such a measure.

The necessity for action has been pointed out, among many others, by a former President and Chief-Justice of the Supreme Court and also by the present Chief-Justice.

At page 159 of his book "Popular Government" (1913) William Howard Taft makes the following statement (copy statement attached hereto marked (1)

At page 75 of his book "The Supreme Court of the United States "(1928) the present Chief-Justice makes the following statement: (copy statement attached hereto marked (2).

It is obvious, in the light of both reason and experience, that some provision must be adopted which will operate in mandatory fashion. It should be based upon an understandable and workable system, applying to all our federal courts, without exception, where life tenure is involved. If the elder judge is not in fact disabled, no harm can come from the presence of an additional judge in the crowded state of the dockets. If the elder judge is in fact disabled, the appointment of the additional judge is indispensable.

I, therefore, earnestly recommend that the necessity of an increase in the number of judges be met by legislation providing for the appointment of additional judges in all federal courts, where there are incumbent judges of retirement age who have not seen fit to resign or retire. I also recommend that the Congress provide machinery for taking care of sudden or long-standing congestion, by a well considered system under the direction of the Chief Justice, for the temporary

assignment of circuit and district judges hereafter appointed, to serve in those places where the courts are in arrears. I attach a carefully considered draft of a proposed bill which, if enacted, would, I am sure, afford substantial relief along these main lines.

The bill provides for a proctor or administrative official to be attached to the Supreme Court whose duty shall be to watch the litigation and congestion in the courts, and from time to time make recommendations to the Chief Justice as to transferring judges temporarily to places where they are most needed and also recommendations as to other measures desirable to keep the work of the courts up-to-date. The proposed measure contains a limitation on the total number of judges who might be appointed, and also a limitation on the potential size of any one of our courts.

The age of seventy is perhaps arbitrary, as any age would be. Differences in human beings may indicate that in some cases that figure is too low. But unless some definite age is set, the system will be wholly unworkable.

Under the plan proposed, those who have passed the age of seventy and 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 resign or retire and prevent such increase. It would thus be left to the judges themselves to determine whether or not their numbers should be increased.

In these recommendations my desire is to strengthen the administration of justice. In the American ideal of government the courts find an essential and a cherished place. In striving to fulfill that ideal, not only the judges, but the Congress and the executive must do all in their power to bring the judicial organization and personnel to the standards which efficient government and modern conditions demand.

I have confidence that those standards of competency and efficienty can be reached in our courts by means of this legislation. If that confidence is not justified by events, other measures must be sought. But the many plans now before the Congress to curtail the powers of the courts or to override their decisions need not be matters of present concern if this

reorganization of the business and personnel of the courts proves its ability to remedy the present glaring defects in the administration of justice.

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INSERT (A)

The Proctor would be charged with the duty of watching the calendars and the business of all the courts in the Federal system; and should be in a position to recommend temporary shifting of judges to places where they are most needed.

****

INSERT (B)

We must not permit business of the nation and the processes of government to be argued into suspension and into impotency by lawyers.

****

INSERT (C)

or to wait out the many years for the full amount of relief or money due them.

****

INSERT (D)

The living institutions of a growing nation cannot function and thuse be preserved if they are held in mortmain.

****

INSERT (E)

Parties defeated in the Congress now regularly appeal to the courts to annul Congressional enactments not because their constitutional rights were invaded but

because the enactments are economically distasteful to them.

****

Miss Dewey:

This is not really Draft 1, but the one on top is. It is exhibitable because of FDR changes — as is the draft (probably 3d) below

RHC

Miss Drewry:

At pink markers are

1. Draft of message
2. Inserts to draft

These seem to me quite good for exhibit because of numerous emendations by FDR

AHmcjs

January 23, 1937.

The President,

The White House.

My dear Mr. President:

Dissatisfaction with the manner in which the business of the Federal Courts is dispatched, has been increasingly manifest through many years. Delay in the administration of justice is the outstanding defect of our judicial system. The bar, the public, and the business community, noting the leisurely manner in which litigation progresses, have united in lamentations. The law's delay has been proverbial since Shakespeare's time, but nowhere has it been more exasperating than in our own Federal Courts. It has been a cause of concern to practically every one of my predecessors in office.

The American concept of the judicial process is that the Judge is no mere arbiter of disputes brought to him at the convenience of counsel. 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. And 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".

In the present submergence of our trial judges, it is an unusual court in which the judge has either the time or energy to require a calendar of all cases not at issue and to press the court's officers for proper expedition before trial.

In some jurisdictions, the delays in the administration of justice are so interminable that to institute suit is to embark on a life-long adventure. Many persons hesitate to resort to the courts because of the hopeless conditions and the insurmountable obstacles that confront them. 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 in the hope of forcing an adjustment which could not be secured upon the merits. This deplorable situation frequently results in extreme hardship to the small business man or the litigant of limited means, who is unable to finance a protracted law suit. It is a

mockery of justice to say to a person when he files suit, that he may receive a decision years later. In most cases no legitimate reason appears why rights should not be determined within a few months at the utmost.

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 further 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 fifty 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 balance those that are disposed of, so that the courts are unable to decrease the enormous back-log of undigested matters. More than fifty thousand

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, engaging the attention of the court for several weeks or months, as not infrequently happens, the routine business of the court is, of necessity 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 legal proceedings 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. The problem must be attacked in a more vigorous and comprehensive fashion, if the United States is to have a judicial system worthy of the nation.

The only adequate remedy lies in the appointment of additional judges, who 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 one percent of the cost of maintaining the Federal establishment. While the estimates for the current fiscal year aggregate over $25,000,000 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 the whole judicial structure and assure the activity of judges

at places where the accumulation of business is greatest. As congestion is a varying factor, the incidence of which 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 not only take precedence over judges of retirement age, but 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.

Respectfully submitted,

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	38,367*

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* This figure includes proceedings under the recently enacted sections 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 1931-1936*.

Number of Cases Filed

	1931	1932	1933	1934	1935	1936
U. S. Civil	12,959	16,734	14,219	8,564	11,679	12,985
Other Civil	24,000	26,326	26,656	26,472	24,402	26,342
Criminal	26,341	28,214	25,132	27,476	35,285	35,813
Totals	63,300	71,274	66,027	62,512	71,447	75,040

Number of Cases Terminated

	1931	1932	1933	1934	1935	1936
U.S.Civil	12,907	14,101	14,474	11,200	12,575	14,485
Other Civil	24,375	26,045	28,074	28,025	24,569	26,948
Criminal	30,180	27,794	25,513	26,574	32,299	36,298
Totals	67,462	67,940	68,061	65,769	69,443	77,730

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.

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

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	60,624*

*This figure includes proceedings under the recently enacted sections 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 1931-1936*.

Number of Cases Filed

	1931	1932	1933	1934	1935	1936
U.S.Civil	12,956	18,734	14,319	8,564	11,679	12,885
Other Civil	24,000	26,326	26,656	28,472	24,403	26,342
Criminal	26,343	26,214	25,122	27,476	35,365	35,813
Totals	63,300	71,274	66,097	62,512	71,447	75,040

Number of Cases Terminated

	1931	1932	1933	1934	1935	1936
U.S.Civil	13,907	14,101	14,474	11,200	13,575	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
Totals	67,462	67,940	66,061	65,769	69,443	77,780

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.

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

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 ad ministration of justice are so interminable that to in-

stitute suit is to embark on a life-long 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 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.

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 fifty 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 back-log of undigested matters. More than fifty thousand 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 causes 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 one 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,

Attorney General.

Draft #4

Draft of suggestions on

JUDICIAL REORGANIZATION

Draft A.

The Constitution imposes upon the Congress responsibilities in the creation of courts and judicial offices. The Congress may determine the procedure of the courts or authorize the courts themselves to do so. In 1934 the Supreme Court was given authority to prescribe rules in civil actions at law, and the work of preparing such regulations is in progress. Numerous legislative reforms of procedure, particularly in the field of criminal justice, have been made. Further proposals have either been introduced in the Congress or are under consideration by its individual members.

The judiciary, like the executive branch, has often found itself laboring under difficulties, due to inadequate means and insufficient personnel. Fortunately, marked advances have been made in the direction of providing additional facilities. The Supreme Court is at last housed in its own building. For the most part, the lower courts are suitably quartered. Books and libraries have been provided. A good deal has

been done in strengthening the subordinate offices of the courts. The appointment of clerks, attendants, and marshals has been authorized, their duties specified, their compensation regulated, and their responsibilities supervised. Such subjects merit our constant and continued attention, and much along these lines remains to engage our efforts. Yet, in many ways, these are merely the trappings of judicial office.

When the first Congress met, there developed a distinct hostility to the ~~creation of any lower federal courts. Adjustments, in the nature of compromise, resulted in the~~ creation of a limited number, leaving many matters and many people either to the State courts or without a forum. Indeed, from the beginning, over repeated protests to President Washington and to the Congress, 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. It was a hundred years before this practice was abandoned and the Circuit Courts of Appeals created. During that century, the Congress was indifferent to the hardships thus imposed upon the justices, many of whom were men of advanced years who had a right to expect that they be permitted to remain at the seat of government to attend the duties of the Supreme Court.

The processes of the courts were delayed beyond all reason. The Supreme Court was continually in arrears, and that condition was solved superficially by authorizing the Court to refuse, in its discretion, to hear appeals in many classes of cases. During the last fiscal year, although 867 petitions were filed, the justices declined to hear 717 cases.

If petitions in behalf of the government are omitted it appears that the court permitted private litigants to prosecute appeals in only 108 cases out of 303 applications. It may fairly be questioned whether full justice is achieved when a court is forced, by the necessity of keeping up with its business, to decline, even without any explanation, to hear a large proportion of the cases presented to it. It is also evident that if the present congestion of business in the lower courts is relieved an increased volume of appeals to the Supreme Court, can be handled only in the same unsatisfactory manner, unless its capacity to hear cases is in some way enlarged.

Delusive attractive notions of economy and a century and a half of acquiescence have made justice costly, prolonged, and often beyond reach. Lawsuits have become, to an increasing extent, a luxury for the few who can afford them or who have property interests to protect which will repay the cost. It is an unwholesome situation which has tended to give the impression that the

courts are the haven only for the wealthy or well-to-do.

If statistics are needed to confirm the common impression, the I append hereto a attached letter from the Attorney General in which he makes certain pertinent recommendations and sets forth, with supporting the statistical data, and the situation presented by our over-crowded federal dockets. Justice must be more than a theory. It must be available to everyone. There will always be difficulties in securing a perfect administration of justice, but the least we can do is to provide a sufficient number of courts and judges to hear causes.

A part of the problem is ~~Here I come to~~ the question of aged and infirm judges, a subject of delicacy and yet one which requires a frank discussion. When the Congress, after four score years of our national history, consented to provisions for voluntary retirement upon a pension, it found well entrenched a tradition of judges clinging to their posts in many instances far beyond their years of physical or mental capacity. Their salaries were small, responsibilities and [redacted] accumulated as they do with other men, and there had been no alternative open to them except to attempt to perform the duties of their offices to the very edge of the grave. In many cases, of course, judges like other men retained to an advanced age the full possession of mental and physical vigor. Those not so fortunate were often unable to perceive their own infirmities. The voluntary retirement law of 1869,

therefore, provided only a partial solution.

Indeed, this had been foreseen in the debates when that measure was under consideration. It had then been proposed, that, when a judge refused to retire on reaching the age of seventy, 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 with the more complex type of litigation the question became even more pressing. Similar proposals were introduced in the Congress; others were withheld because of the opposition of members of the Supreme Court. To meet this situation, in 1913, 1914, 1915 and 1916, the Attorneys General of those years, McReynolds and Gregory, recommended to the Congress that, when a district or circuit judge refused to retire at the age of seventy, an additional judge be appointed to presude over the affairs of the court in order that the judicial business might be promptly and adequately discharged.

In 1919 a measure finally passed which provided that the President "may" in his discretion appoint additional district and circuit judges and then 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." The discretionary and indefinite nature of this legislation rendered

it ineffective. ~~In that respect the~~ Instead it results confirmed the prediction of Justice Story, more than a century ago, who pointed out that such a provision would fail of its purpose because of the difficulty of determining the line between ability and disability and because instances of "absolute imbecility" would be too rare to justify the adoption of such a measure.

It is obvious, in the light of both reason and experience, that some provision must be adopted which will operate ~~in mandatory fashion~~ automatically. Clearly it should be based upon an understandable and workable system, applying to all our federal courts, without exception, where life tenure is involved. If ~~the~~ an elder judge is not in fact ~~disabled~~ incapacitated, no harm can come from the presence of an additional judge in the crowded state of the dockets; if ~~the~~ an elder judge is in fact ~~disabled~~ incapacitated, the appointment of an additional judge is indispensable.

The duty of a judge is more than presiding or listening to testimony involves or arguments. Records and briefs must be read; statutes, decisions, and pertinent literature must be searched and studied; opinions must be formulated and written. The necessary drudgery of the law is a wearying drain upon the energies of any man.

Irvin C.

Mental and physical decreptitude lead men to avoid an examination of complicated and changing conditions. Little by little new facts become blurred through old glasses, fitted, as it were, for the needs of another generation; and men, resting upon the complacent assumption that the scene is the same as it was in the past, cease to explore or inquire in the present. or in the future.

Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might warp their judgments. But life tenure was not intended to create a static judiciary. Constantly and systematically periodically new blood must be added to the judicial personnel, lest it wither and, for lack of vigor, it cease to carry its burden. Thus vitalized, the courts will be better equipped to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world. Moreover, younger judges of ability and energy, coming freshly to the bench, would enable the courts to make headway against an unwieldy docket; and the whole judicial machinery would take on new life.

I, therefore earnestly recommend that the necessity of an increase in the number of judges be supplied by legislation providing for the appointment of

that the lower courts are still without a clear guide for the dispatch of business. Our legal system is fast losing another essential of justice - certainty.

Finally in each court, district and circuit, we find the machinery of government brought to a stop from time to time by injunctions issued almost as a matter of right, often without notice or hearing accorded the government, and frequently in clear violation of the broad principles of equity - that injunctions will be granted only in those rare cases of manifest illegality and immediate damage against which the ordinary course of the law offers no protection. The statutes which the Congress enacts are set aside or suspended for long periods of time, merely because suit has been filed. In the uncertain state of 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 laborously brought to issue and debated, the government must stand aside. It matters not that the Congress has enacted a law, that the executive has signed it and that the administrative machinery is waiting to function. Government by injunction lays its heavy hand upon normal processes and no important statute can take effect -- against any individual or organization with the means to employ lawyers

and engage in wide flung litigation -- until it has passed through the whole hierarchy of the courts. Thus the judiciary is surrendering its essential function and is coming more and more to constitute a scattered and peculiarly organized and operating third house of the national legislature.

Insert 7-4

This state of affairs has come upon the nation gradually, over a period of decades. In my annual message I expressed some views and some hopes. 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 to be heard. I also earnestly recommend that, when 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 arising under our fundamental law.

In these recommendations my desire is to strengthen the administration of justice and make it a more effective servant of public need. In the American ideal of government the courts find a cherished place. In striving to fulfill that ideal, not only the judges, but the Congress and the executive must do all in their power to bring the judicial organization and personnel to the standards which sound and efficient government and modern conditions demand.

If we enlarge the inferior and appellate courts so that cases may be promptly decided in the first instance, and afford an adequate and prompt hearing upon appeal, if we assure government participation in the consideration of all constitutional questions, and a speedy final decision of such issues by the Supreme Court, if we invigorate all the courts by the persistent infusion of new blood, if we give the Supreme Court further powers and responsibility in maintaining the efficiency of the entire federal judiciary, we shall go a long way toward our high objectives. If these endeavors achieve their aim we may be relieved of attempting any of those fundamental changes in the powers of the courts, or the structure of our government, which involve consequences so far reaching as to cause grave apprehension regarding the wisdom of any such course.

Draft

I have recently called the attention of the Congress to the clear need for a comprehensive program of reorganization of 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 in recent years been greatly improved through the erection of suitable quarters, the provision of adequate libraries and the ~~strengthening~~ addition of ~~the~~ subordinate court offices ~~of the courts~~. But in many ways these are ~~adequate now but represent~~ merely the trappings of judicial office. They play a minor part in ~~alone do not constitute~~ the processes of justice.

Since the earliest days of the Republic, the problem of the personnel of the courts has ~~required~~ 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 numbers of judges and the duties of judges in Federal Courts have been altered in one way or another. The Supreme Court was established with six members in 1789; it was reduced to five in 1801; it was

increased to seven in 1807; it was increased to nine in 1837; it was increased to ten in 1863; it was reduced to seven in 1866; it was increased to nine 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 United States Courts.

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

Delay in ~~the lowest~~ new courts 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 a long litigation. Only by 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.

~~The same facts are true in regard to~~ 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% 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 hear 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 seventy 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 eighty 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. 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. "They seem to be tenacious of the appearance of adequacy." This 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 seventy, 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 in office recommended to the Congress that when a district or a circuit judge failed to retire at the age of seventy, 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 seventy "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 twenty years ago. Records and briefs must be read; statutes, decisions, and extraneous 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 seventy. We have recognized it in the Army and Navy by retiring officers at the age of sixty-four. 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 not intended to create a static judiciary. It was designed to place the courts beyond temptations or influences which might impair their judgments. 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

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 ~~for the temporary transfer~~ of any circuit or district judge hereafter appointed in order that he may serve as long as needed ~~to serve~~ in any circuit or district where the courts are in arrears.

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 ~~Chief Justice~~ Supreme Court should be given an administrative assistant, who may be called a Proctor, through whom judicial business may be better organized and expedited, and assignments made for the temporary transfer of circuit and district judges hereafter appointed to serve in those circuits or districts 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 limitation 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.

Extra wide

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 one year or two years or three 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 re-trials, 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 in 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 engage 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 ~~provide for~~ 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.

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Speech # 1033

2/5/37

OFFICE OF
THE ATTORNEY GENERAL

Jan 11/37

Highly Confidential

Dear Mr President:

This is Draft #7 (the last) in the matter of Judges.

It embodies some of the minor changes we discussed.

Cummings

Draft No. 7
January 9, 1937

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 shall nominate, and by and with the advice and consent of the Senate, shall, for each such judge who has not so resigned or retired, 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 eligible for retirement 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 eligible for retirement is commissioned to an office as to which Congress has provided that a vacancy shall not be filled.

SEC. 2. The judge who is eligible for retirement shall be held and treated as if junior in commission to the judges of (or who are assigned to) the court who are not eligible for retirement. This section shall not be applicable to the Chief Justice of any court.

SEC. 3. (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. 4. (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; and (3) 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. 5. 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. 6. When used in this Act --

(a) 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.

(b) 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.

(c) The term "judge" includes justice; and the term "Chief Justice" includes the Presiding Judge of the United States Court of Customs and Patent Appeals.

SEC. 7. This Act shall take effect on the thirtieth day after the date of its enactment.

Draft No. 8
January 28, 1937

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 commissioner. 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.

(vacancy?)

(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; and (3) 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.

Carbon & oregional copy
used by Pres in press
conf. - Judiciary message
sent up to Congress
Feb 5 - 1937

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.

Copy used by President

in Press Conference.

1033

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.

Office of the Attorney General
Washington, D.C.

January 23, 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 life-long 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 in the hope of forcing an adjustment which could not be secured upon the merits. This situation frequently results in extreme hardship to the small business man or the litigant of limited means who is unable to finance a protracted law suit.

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 fifty 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 back-log of undigested matters. More than fifty thousand 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 causes 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 one percent of the cost of maintaining the federal establishment. While the estimates for the current

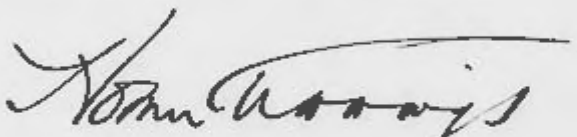
fiscal year aggregate over $23,000,000 for the maintenance of the legislative branch of the government, and over $2,100,000,000 for the permanent agencies of the executive branch, the estimated cost of maintaining the judiciary is only about $6,500,000. An increase in the judicial personnel, which I 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.

Respectfully submitted,



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	63,387*

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* This figure includes proceedings under the recently enacted sections 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 1931-1936*.

Number of Cases Filed

	1931	1932	1933	1934	1935	1936
U. S. 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
Totals	63,300	71,274	66,097	62,512	71,447	75,040

Number of Cases Terminated

	1931	1932	1933	1934	1935	1936
U.S.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
Totals	67,462	67,940	66,061	65,769	69,443	77,780

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.

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

THE WHITE HOUSE
WASHINGTON

February 5, 1957

MEMORANDUM FOR THE PRESIDENT:

Please make it clear in your opening remarks to the press that all that you say on the "subject of the day" must be held in strictest confidence by them until "the subject" is released in accordance with the wording of the release on the press copies.

I hope you will add to this a request that none of those present shall reveal what you say, or the text of the material they receive at your conference, to any person outside of those in the employ of their own organizations, until the time of release. This is a precaution to prevent newspapermen from going to the Capitol and begin collecting comments and opinions, or interviewing members of the Court or others in advance of the release.

Please request further that no one leave the Conference until it is over.

S[redacted]Y

Copies of the message etc. for the Press, will be given them as they out.

D. E.