

● PSF U.S. Supreme Court (1937) Subject File Box 186
Aug. - Dec. and Undated

Supreme Court 1937

Box 186

**IMPORTANT
AND URGENT**

PSF: Supreme Court



*file
personal*

**Office of the Attorney General
Washington, D.C.**

August 4, 1937.

The President,
The White House.

My dear Mr. President:

In view of conflicting statements which have been made in various quarters concerning recess appointments and the history thereof, I caused an additional study of the matter to be made. Enclosed herewith you will find a memorandum from Assistant Solicitor General Bell, accompanied by a rearrangement and amplification of material heretofore sent to you.

No doubt there were many factors which led recess nominees to await confirmation before taking their seats. In some instances, I imagine, such nominees already occupied important positions, either upon the bench or elsewhere, and were reluctant to give up such assured positions until they were certain of the appointment on the Supreme Court. Naturally they could not qualify for the Supreme Court, even under a recess appointment, without relinquishing any other position they may have held.

Sincerely yours,

Norman Thaw
Attorney General.

Encl.

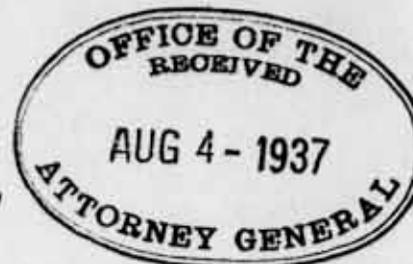
GOLDEN W. BELL
ASSISTANT SOLICITOR GENERAL

GGG

Department of Justice

Washington

August 3, 1937



MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Recess appointments of Supreme Court Justices
(Your memorandum of Aug. 2, 1937, attached)

In response to your memorandum of August 2, 1937, I have prepared and submit herewith a rearrangement of the material contained in our memorandum of July 29, and have added, with proper explanations, the names of Mr. Justice Holmes and Mr. Justice Harlan, who apparently were offered recess appointments but declined to accept them - no recess appointments actually being made in either case.

The records disclose only nine cases of recess appointments. In only one case was the vacancy available during the previous session of the Senate - and the appointee did not take his seat until after confirmation. Three judges (appointed to fill vacancies which became available while the Senate was at recess) took their seats on the bench before confirmation, and one of these was later rejected by the Senate after he had served four months as Chief Justice.

As to the practice, it may be said that recess appointees have, in most cases, refrained from sitting on the bench until after confirmation by the Senate, and that in the two latest instances (Harlan, 1877, and Holmes, 1902) the appointees have apparently either declined to accept recess appointments or prevailed upon the President to withdraw the offer and to submit the nominations to the Senate at its next session.

It is believed that no other justices than those mentioned in the attached list have had recess appointments - no others are shown by the records of the State Department (which kept the commission records prior to 1888) or of this Department (which has kept the commission records since 1888). It is at least possible that some other justice was tendered a recess appointment and declined to accept it, but a mere informal offer without issuance of a commission would not be disclosed by the official records of appointments and commissions. However, I have seen no mention made of any such instances other than the cases of Justices Harlan and Holmes.

Respectfully,

A handwritten signature in cursive script, appearing to read "Golden W. Bell".

GOLDEN W. BELL
Assistant Solicitor General.

**SUPREME COURT JUSTICES GIVEN RECESS APPOINTMENTS TO FILL VACANCIES
WHICH BECAME AVAILABLE WHILE THE SENATE WAS AT RECESS**

Took seat on bench and Senate later confirmed:

	Appointed	Took Seat	Confirmed
Levi Woodbury	Sept. 20, 1845	Dec. 2, 1845	Jan. 5, 1846
Benjamin Curtis	Sept. 22, 1851	Dec. 1, 1851	Dec. 20, 1851

Took seat on bench and Senate later refused to confirm:

	Appointed	Took Seat	Rejected
John Rutledge (Chief Justice)	July 1, 1795	Aug. 12, 1795	Dec. 15, 1795

Did not take seat on bench until after confirmation by Senate:

	Appointed	Confirmed	Took Seat
Thomas Johnson	Aug. 5, 1791	Nov. 7, 1791	Aug. 6, 1792
Bushrod Washington	Sept. 29, 1798	Dec. 20, 1798	Feb. 4, 1799
Brockholst Livingston	Nov. 10, 1806	Jan. 16, 1807	Feb. 2, 1807
Smith Thompson	Sept. 1, 1825	Dec. 9, 1825	Feb. 10, 1824
John McKinley	Apr. 22, 1857	Sept. 25, 1857	Jan. 9, 1858

(Appointed to newly created judgeship in place of William Smith who declined the appointment. Exact date of Smith's declination unknown but apparently occurred after Senate had recessed.)

Oliver Wendell Holmes

(A recess commission was prepared, dated Aug. 11, 1902, but later canceled - the President stating that he did not desire to make recess appointment. D. J. Files.)

**SUPREME COURT JUSTICES GIVEN RECESS APPOINTMENTS TO FILL VACANCIES
WHICH WERE AVAILABLE DURING THE PREVIOUS SESSION OF THE SENATE**

Did not take seat on bench until after confirmation by Senate:

	Appointed	Confirmed	Took Seat
David Davis	Oct. 17, 1862	Dec. 8, 1862	Dec. 10, 1862
John Marshall Harlan			

(Warren, v. III, p. 288, gives date of appointment as March 29, 1877, at which time Senate was not in session. Arthur Krock, N. Y. Times, July 29, 1937, states that Harlan declined to take office until Senate confirmed. However, State Department has no record of any appointment of March 29, 1877, or of any recess commission. (The Department of Justice records of commissions began with the year 1888.) It is possible that a recess appointment was offered - but no commission actually issued.)



Office of the Attorney General
Washington, D. C.

PSF
Supreme Court

August 9, 1937.

The President,
The White House.

My dear Mr. President:

Enclosed herewith are transcripts taken from
Who's Who in America with reference to the following:

Chief Justice Walter P. Stacy, of North Carolina
Judge Walter E. Treanor, of Indiana
Judge Albert Lee Stephens, of California
Judge Samuel H. Sibley, of Georgia
Dean Lloyd K. Garrison, of Wisconsin
Senator Hugo L. Black, of Alabama
Senator Sherman Minton, of Indiana
Solicitor General Stanley F. Reed, of Kentucky
Judge Patrick T. Stone, of Wisconsin
Judge John J. Parker, of North Carolina
Judge Sam G. Bratton, of New Mexico.

Sincerely yours,

Attorney General.

STACY, WALTER P.

Chief Justice Walter P. Stacy, of North Carolina,
located in the fourth circuit.

Who's Who in America gives the following description
of the life of Chief Justice Stacy.

"Jurist; b. Ansonville, N. C., Dec. 26, 1884; s. Rev. L. E. and Rosa (Johnson) S.; ed. Weaverville (N.C.) Coll., 1895-98, Morven (N.C.) High Sch., 1899-1902; A.B., U. of N. C., 1908; studied law same univ., 1908-09, LL.D., 1923; m. Mrs. Maude DeGan Graff, of Lake Placid Club, N. Y. June 15, 1929. Practiced law, 1910-16; rep. of New Hanover County in Gen. Assembly of N. C., 1915; judge Superior Court, 8th Jud. Dist., 1916-20; elected asso. justice Supreme Court of N. C. for full term, 1920; apptd. by Gov. A. W. McLean, Mar. 16, 1925, to succeed Chief Justice Hoke (resigned) and in 1926 nominated without opposition in primary and elected chief justice Supreme Court of N.C. for term of 8 yrs. Mem. Am. and N. C. bar assns. Gen. Alumni Assn. Univ. of N. C. (pres. 1925-26). Lecturer summers, 1922-25 inclusive, in Law Sch. U. of N. C., tendered deanship in same, 1923; lecturer Northwestern U. Sch. of Law, summer sessions, 1926 and 27. Named by U. S. Bd. of Mediation, under Ry. Labor Act, as neutral arbitrator to serve on Bd. of Arbitration, and later elected chmn. of bd., to settle wage controversy between the Brotherhood of Locomotive Engrs. and certain railroads in Southeastern Territory of U. S., 1927-28; apptd. by President Coolidge, 1928, mem. of Emergency Bd. of five, under Ry. Labor Act, to investigate and report respecting a dispute between officers and members of Order of Ry. Conductors and Brotherhood of Ry. Trainmen, and certain railroads west of the Mississippi River; named by U. S. Bd. of Mediation, Jan. 1931, to serve as neutral arbitrator, in controversy between Brotherhood of Railroad Trainmen and New York Central, the "Big Four," and P. & L. E. railroads, and again in Nov. 1931, to serve as neutral arbitrator in controversy between the Brotherhood of Railway and Steamship Clerks, etc., and Railway Express Agency; apptd. by President Hoover, 1932, mem. of Emergency Bd. of three, later elected chmn. of board, to investigate and report concerning a number of the disputes existing between L. & A. and L., A. & T. rys. and certain of their employees; chmn. Commn. apptd. to redraft Constitution of North Carolina, 1931-32; named by U. S. Bd. of Mediation, 1933, to serve as neutral arbitrator in several controversies between Boston and Maine Railroad and certain of its employees; apptd. by President, 1933, mem. bd. investigation labor dispute Texas and New Orleans R. R. and, 1934, Delaware and Hudson R. R.; also apptd. chmn. Nat. Steel and Textile Labor Relations Bds. 1934, Methodist. Democrat. Office; Raleigh, N. C.

TREANOR, WALTER E.

Judge Walter E. Treanor, of the Indiana Supreme Court, located in the 7th Circuit.

Who's Who in America gives the following description of Judge Treason's life.

"Judge; b. Loogootee, Ind., Nov. 17, 1883; s. James Donnelly and Gertrude (Sommers) T.; A. B., Indiana U., 1912, LL.B., 1922, J. D., 1923; S.J.D., Harvard, 1927; m. Elma Frank of Petersburg, Ind., Apr. 16, 1906 (died 1914); m. 2d. Aline Elizabeth Jean, of Petersburg, Dec. 9, 1916; 1 dau., Rosemary. Began as pub. sch. teacher, 1902; teacher Latin and history, Petersburg (Ind.) High Sch., 1903-11, prin. 1912-15; supt. Petersburg pub. schs., 1915-17; prof. of law Indiana U. Law Sch., 1922-30; judge Ind. Supreme Court, term 1930-36. Served as 2d lt. U.S.A. World War. Mem. Am., Ind. State and Monroe County Bar assns., Phi Beta Kappa, Delta Sigma Rho, Gamma Eta Gamma, Order of Coif. Democrat. Contbr. to legal periodicals. Home: 3627 Winthrop Av. Address: State House, Indianapolis, Ind.

ALBERT LEE STEPHENS

Circuit Judge Albert Lee Stephens, of California located in the Ninth Circuit.

Who's Who in America gives the following description of the life of Judge Stephens.

*Judge; b. State Line City, Ind., Jan. 25, 1874;
s. Edwin Elias and Amanda (Rice) S.; LL.B., U. of Southern Calif; 1903.
m. Marie Clarke, Dec. 26, 1907; children - Albert Lee, Clarke Edwin.
Admitted to Calif. bar, 1899, after pvt. study; practiced in Los Angeles;
justice of peace 1906-10; civil service commr., 1912-13 was also city
atty., 1913-19; became judge of Superior Court of Los Angeles County, 1919;
now U. S. dist. judge, Calif. Mem. Los Angeles Bar Assn., Order of Coif,
Blackstonian, Pi Sigma Alpha, Phi Alpha Delta. Democrat, Mason (32°, K.T.
Shriner) Elk, Eagle, Woodman. Home: 232 S. June St. Address: Federal
Bldg. Los Angeles, Calif.

SIBLEY, SAMUEL H.

Circuit Judge Samuel H. Sibley, of Georgia, located in the Fifth Circuit.

Who's Who in America gives the following description of the life of Judge Sibley.

"Judge; b. Union Point, Ga., July 12, 1873; s.

Samuel Hale and Jennie (Hart) S.; mother a pioneer temperance advocate of Ga; A. B., U. of Ga. 1892, LL.B., 1893, LL.D., 1925; LL.D. from Oglethorpe Univ., Atlanta, Ga. 1934 m. Florence Weldon Hart, of Union Point, Apr. 29, 1897; children — William Hart, Sara Virginia, Florence Weldon. Began practice at Union Point, 1893; county judge, Greene Co. Court, 1905-12; judge City Court, Greensboro, 1912-17; dist. atty. Ga. R. R. 1917-1919; U. S. dist. judge, Northern Dist. of Ga. 1919-31; judge U. S. Circuit Court of Appeals, 5th Circuit, since Jan. 1931. Mem. Chi Phi, Phi Beta Kappa Alumni Soc. U. of Ga. (pres. 1924, trustee 1925-33) Democrat. Presbyn. K of P., Moose. Moderator Gen. Assembly Presbyn. Ch. in U. S. 1934. Home; Marietta, Ga.

J

GARRISON, LLOYD K.

Dean Lloyd Garrison, of Wisconsin, located in the Seventh Circuit.

Who's Who in America gives the following description of the life of Dean Garrison.

"Law dean; b. N. Y. City, Nov. 19, 1897; s. Lloyd McKim and Alice (Kirkham) G; A. B. Harvard, 1919. LL.B., 1922 m. Ellen Jay of N. Y. City June 22, 1921; children - Clarinda Kirkham, Ellen Shaw, Lloyd McKim. Admitted to N. Y. bar, 1923, and began practice at New York City; with Root, Clark, Buckner & Howland, 1922-26. mem. firm Parker and Garrison, 1926-32; dean of U. of Wis. Law School and prof. law since 1932. Served in U. S. Navy, May 1917- Feb. 1919. Asso. counsel Assn. Bar City of New York in ambulance chasing investigation, 1928, in bankruptcy investigation, 1929 spl. asst. to atty. gen. of U. S. in bankruptcy investigation, 1930-31 chmn. Nat. Labor Relations Bd. 1934. Mem. Am. Bar Assn. Wis. Bar Assn. Democrat. Episcopalian. Home 1820 Summit Av. Madison, Wis.

BLACK, HUGO L.

Senator Hugo L. Black of Alabama, located in the Fifth Circuit.

Who's Who in America gives the following description of the life of Senator Black.

"Senator; b. Harlan, Clay Co., Ala., Feb. 27, 1886. s. William LaFayette and Martha Ardellah (Tolan) B; ed. pub. schs. Ashland, Ala. LL.B., U. of Ala. 1906; m. Josephine Foster of Birmingham, Ala. Feb. 1921. children — Hugo LaFayette, Sterling Foster, Martha Josephine. Began practice at Birmingham, 1907; served as police judge 18 months, 1910-11; solicitor (prosecuting attorney) Jefferson Co. Ala. 1915-17; in gen. practice, Birmingham 1919-27: U. S. Senator from Ala. 2 terms 1927-39. Entered 2d O.T.C. Ft. Oglethorpe, Ga. Aug. 3, 1917. commd. capt. F. A. served in 81st F. A. and as adj. 19th Arty. Brigade. Democrat. Baptist. Mason (Shriner) Odd-Fellow, K. P. (Grand Chancellor of Ala. 1922) Home: Birmingham Ala. Address: Senate Office Bldg. Washington, D. C.

MINTON, SHERMAN

Senator Sherman Minton, of Indiana, located in the Seventh Circuit.

Who's Who in America gives the following description of the life of Senator Minton.

" Lawyer; b. Georgetown, Ind., Oct. 20, 1890; s. John Evan and Emma (Lyvers) M.; prep. edn. high sch. New Albany, 1907-10; LL.B., Indiana U., 1915; LL.M. Yale, 1916; m. Gertrude Gurtz, Aug. 11, 1917; children—Sherman, Mary Anne, John Evan. Began practice at New Albany, 1916; mem. Stotsenburg, Weathers & Minton, 1922-25; mem. Shutts & Bowen, Miami, Fla., 1925-28; returned to New Albany, 1928; public counselor of Indiana, 1933-34; now mem. Stotsenburg, Weathers, Minton & Phillips. Dem. primary nominee for U. S. Senate, June 1934, and elected for term 1935-41. Served as capt. inf. U. S. Army, 1917-19. Mem. Phi Delta Theta, Phi Delta Phi. Mason. Elk, Clubs: New Albany Country; Indianapolis Athletic, Army & Navy (Washington, D. C.) Home: New Albany, Ind.

REED, STANLEY F.

Solicitor General Stanley Reed, of Kentucky, located in the Sixth Circuit.

Who's Who in America gives the following description of the life of Solicitor General Reed.

"Lawyer; b. Mason Co. Ky. Dec. 31, 1884. s. Dr. John A. and Frances (Forman) R; A. B., Ky. Wesleyan Coll. 1902; A. B. Yale, 1906 (Bennett prize); studied law U. of Va. and Columbia U. auditeur benevole, Sorbonne, U. of Paris. 1909-10 m. Winifred Elgin of Maysville, Ky. May 11, 1908; children-- John A. Stanley Forman. Admitted to Ky. bar 1910, and began practice at Maysville; was mem. law firm Browning, Reed & Zeigler; formerly counsel Burley Tobacco Growers Cooperative Assn; gen. counsel Federal Farm Board, 1929-32; general counsel Reconstruction Finance Corporation., Dec. 1932-Mar. 1935; solicitor gen. of U. S. since 1935; spl. asst. to the atty. gen. Mem. Ky. legislature 1912-16; dir. Commodity Credit Corpn. Bank of Maysville, Ky; trustee Export-Import Bank of Washington, D. C. Mem. Federal Bd. of Hospitalization. Served as 1st lt. U. S. A. 1918. Counselor Am. Red Cross. Mem. Am. and Ky. State bar assns. Am. Law Inst., Sons of Colonial Wars, S.A.R., Delta Phi. Democrat. Protestant. Clubs: Cosmos, Burning Tree(Washington); Maysville Country. Home: Maysville, Ky. and The Mayflower, Washington. Address: Department of Justice, Washington, D. C.

STONE, PATRICK T.

District Judge Patrick T. Stone, of Wisconsin,
located in the Seventh Circuit.

Who's Who in America gives the following description of the life of Judge Stone.

"Judge; b. Pembroke, Ont., Can. June 21, 1889. s. Patrick Edward and Bridget (Kerley) S; brought to U. S. as a child, naturalized, 1901. LL.B., Marquette U. 1912; m. Blanche E. Dessert, of Wausau, Wis. Spt. 8, 1918; children — Patricia Evelyn (dec) Mary Louise, Louis Owen, Patrick Henry, Admitted to Wis. bar, 1912; city atty. Wausau, 1921-29; mem. Stone & Park 1927-33; judge U. S. Court, Western Dist. Wis. since 1933. Served in U. S. Navy, World War. State historian Am. Legion, Wis. dept. 1919-20, judge advocate since 1932. Democrat. Catholic. Home: Wausau, Wis. Address: Government Bldg., Madison, Wis.

PARKER, JOHN J.

Circuit Judge John J. Parker, of North Carolina,
located in the Fourth Circuit.

Who's Who in America gives the following description
of the life of Judge Parker.

"Judge; b. Monroe, N. C., Nov. 20, 1885. s. John Daniel
and Frances (Johnston) P.; A. B. University of N. C. 1907, LL.B., 1908;
LL.D. from same university in 1927; m. Maria Burgwin Maffit, of Wilmington,
N. C. Nov. 23, 1910; children — John Johnston, Sara Burgwin, Francis
Iredell. Admitted to N.C. bar, 1908, and began practice at Greensboro;
moved to Monroe, 1909; mem. firm Stack and Parker, 1910-19, Stack,
Parker & Craig, 1919-22, moved to Charlotte, 1922, becoming head of firm
Parker, Stewart, McRae & Bobbitt. Rep. nominee for gov. of N. C. 1920;
spl. asst. to atty. gen. of U. S. 1923-24; mem. Rep. Nat. Com. 1924;
del. at large from N. C. to Rep. Nat. Conv. 1924; circuit judge U. S.
Court, 4th Circuit, by apptmt. of President Coolidge, since Oct. 3, 1925;
apptd. mem. Supreme Court of U. S. by President Hoover but apptmt. not
confirmed by Senate; mem. commn. to draft revised constn. for N. C. 1931.
Trustee U. of N. C., St. Mary's School and Junior College (Raleigh). Mem.
Am. Bar Assn. (v.p.) N. C. Bar Assn. Phi Beta Kappa, Phi Delta Phi,
Golden Fleece, Order of the Coif. Episcopalian. Mason. Clubs: Kiwanis,
Charlotte Country. Home. Charlotte, N. C.

BRATTON, SAM. G.

Circuit Judge Sam G. Bratton, of New Mexico, located in the Tenth Circuit.

Who's Who in America gives the following description of the life of Judge Bratton.

"Judge; b. Kosse, Limestone Co. Tex., Aug. 19, 1888; s. C. G. and Emma Lee (Morris) B.; ed. pub. schs; m. Vivian Rogers, of Hereford, Tex. Jan. 25, 1908; a daughters, 1 son. Admitted to Tex. bar, 1909, began practice at Farwell; moved to Clovis, N. M. 1915; elected judge Dist. Court 5th Jud. Dist. of N. M. Nov. 1918, term of 6 yrs. and resigned, 1922, after serving 4 yrs., having been elected asso. justice Supreme Court of N. M., served on bench of Supreme Court 18 mos; resigned, Sept. 16, 1924, to make race of U. S. Senate; elected to Senate at age of 36, for term 1925-31, reelected for term 1931-37, resigned June 26, 1933; apptd. justice, U. S. Court of Appeals, 10th Circuit, 1933. Democrat. Mem. M. E. Ch., S. Mason (32^o, Shriner). Home. Albuquerque, N. M.

OFFICE OF
THE ATTORNEY GENERAL



file
private

PSF: Supplement
appet

Aug 11/
37

Dear Mr President!

The attached memo
is illuminating
over with looking over.

Drawings

PSF: Supreme Court
Oppk File

STANLEY REED - age 52 - Solicitor General - Kentucky

Education, Academic: Yale, 1906

Law: University of Virginia - Columbia

Winner of Bennett Prize - American History - Yale

Legal - General practice in Kentucky 1910-1929; wide experience in farm cooperatives, labor legislation, banking, and corporations.

Took part in organization of and acted as Chief Counsel for the Burley Tobacco Growers' Cooperative Association, a farm cooperative covering five States, with one hundred thousand members and twenty million annual business 1920-1929.

General Counsel for Federal Farm Board 1929-1932; as such supervised organization and operation of American Cotton Cooperative Association; Farmers National Grain Corporation; American Wool Growers Cooperative Association, as well as numerous smaller cooperatives. Intimately associated with managerial and legal problems of Dairymen's League; Land O'Lakes Creamery; Grange League Federation; Sun Maid Raisins Cooperative; New England Milk Producers' Association, etc., etc. Brazil - U.S. Coffee barter.

General Counsel R.F.C. - Dec. 1932-March 1935; Trustee, Export-Import Banks; Director, Commodity Credit Corporation, R.F.C. Director, National Bank of Detroit - handled legal phases of gold purchase plan, bank reorganization, industrial, construction, drainage, irrigation, mining and relief loans, R.F.C. Chinese, Russian and Cuban loans.

As Solicitor General has briefed and argued in the United States Supreme Court, among others -

U.S., R.F.C. et al. v. Bankers Trust Co. et al. for R.F.C.
(Private contracts, Gold Case)

U. S. v. Schechter et al. (N.R.A.)

U.S. v. Butler et al., Receivers Hoosac Mills (A.A.A.)

Ashwander, et al. v. T.V.A. (TVA)

Jones v. Securities & Exchange (S.E.C.)

Duke Power Co., et al. v. Greenwood Co. (P.W.A.)

Holyoke Power Co. v. American Writing Paper Co. (2d Gold Clause case)

Landis v. North American Co., et al. (Public Utility Holding Act)

Va. Ry. v. System, etc. (Railway Labor Act)

N.L.R.B. v. Jones & Laughlin (Wagner Labor Act)

U. S. v. Morgan Belmont (Russian cases)

Anniston Mfg. v. Davis (Processing Tax)

After Carter v. Carter (Guffey Coal Bill) personally handled in C.C.A. the Wagner Act case of F.L.R.B. v. Freuhauf Trailer, lost in C.C.A., carried to and eventually argued and won in U.S. S.C. (one of Wagner Act industrial cases).

Assisted in drafting legislation - Wage and Hour, R.R. Retirement, Processing Tax, Windfall Tax, et als.

Miscellaneous: Addresses since Solicitor General on constitutional topics before State Bar Associations of Ohio, Kentucky, Tennessee, Virginia, Maryland, New York, Georgia; Institute of Public Affairs; Chautauqua Institution, et als.

Member, General Assembly Kentucky, 1912-1916; where introduced and sponsored Child Labor Act. Supported Workmen's Compensation Act, and other liberal legislation. Represented successfully groups in favor of Kentucky Workmen's Compensation Act in State and Supreme Courts. 183 Ky. 529; 187 Ky. 538; 254 U.S. 613. Active in farm cooperative work.

Delegate, Democratic Conventions 1920 and 1936.
Presidential Elector - State at Large (Kentucky) 1924.
Campaigned for Democratic National ticket 1928 election.
Mrs. Reed was State Chairman for Women (Kentucky)
Chairman, Young Men's Democratic League of Kentucky, 1912-1916.
Campaigned under Democratic National Committee 1936 in Ohio, Pennsylvania, West Virginia, Maryland and Delaware.

Member: American Law Institute; House of Delegates;
American Bar Association; Kentucky Bar Association; American Legion;
Executive Committee, American Red Cross; Federal Board of Hospitalization.

PSF: Supreme Ct.

PERSONAL

August 11, 1937.

My dear Judge Davis:-

I am grateful to you for your letter, and it is heartening to know that you, with your long experience, believe that the judicial processes can be greatly improved. I have been "in and out" of the law for thirty years - practicing at times, serving as a legislator, serving in the Navy Department with its many legal problems, serving as Governor and now as President - and in all these years I have viewed with growing concern the chasm between the people on the one hand and the courts and the Bar on the other. It is, therefore, that I have felt more strongly, with the passage of years, that someone in authority had to make a public issue, with the objective of restoring the courts and the Bar to a closer and more friendly relationship with the people as a whole.

It is not enough for us to say that we in the United States are a litigious people or that we love to pass a multitude of laws for the sake of passing them. Seeing thousands of people in every walk of life as I do, I must acknowledge that the courts and lawyers are unpopular - unpopular principally because of the delays and the high cost of justice.

[PSF, Supr Ct]

RECEIVED

UNITED STATES CIRCUIT COURT OF APPEALS
THIRD JUDICIAL CIRCUIT

JUDGE DAVIS

TRENTON, N. J.

The original bill was, of course, pretty drastic, but at least it served to focus attention on real needs. The bill passed the other day by the Senate is a tiny step in the right direction, and when you get a chance to read it I think you will agree with me that it is a very small step.

Nevertheless, the problem is presented, and will continue to be presented. As a firm believer in an independent judiciary, I want to strengthen that judiciary in the confidence of our people and make it more than it has been for generations — an integral and truly honored part of our system of governing.

It looks now as though the Congress will pass a bill, if any, if passed, in my opinion the original bill was the best and was right. I believe every experienced judge who knows the facts would say the same thing if unbiassed by personal or political considerations. I further believe that if the matter were put to a vote at large and every citizen could vote upon it, your original bill would be heartily endorsed by a large majority.

I, too, wish you were a member of the United States Senate. I was majority leader of the New Jersey Senate under President Wilson, when I was a state and know some little about the United States Circuit Court of Appeals, Third Judicial Circuit, Trenton, New Jersey. Whatever may be done in the way of judicial reform, I believe that the rank and file of the people of the country are with you.

The fight is not over and for the good of the courts and the country, I wish you success.

Yours sincerely,

Warren Davis

UNITED STATES CIRCUIT COURT OF APPEALS
THIRD JUDICIAL CIRCUIT

CHAMBERS OF
JUDGE DAVIS

TRENTON, N. J.

August 4, 1937

Honorable Franklin D. Roosevelt,
President of the United States,
Washington, D. C.

My dear Mr. President:

It looks now as though the Congress will not pass the Judiciary bill proposed by you. Whatever it may do and whatever kind of bill, if any, it passes, in my opinion the original bill was the best one and was right. I believe every experienced judge who knows the facts would say the same thing if uninfluenced by personal or political considerations. I further believe that if the matter was submitted to the country at large and every citizen could vote upon it, your original bill would be heartily endorsed by a large majority.

This is one time that I wish I were a member of the United States Senate. I was majority leader of the New Jersey Senate under President Wilson, when he was Governor of this state and know some little about legislatures. Nothing would give me more pleasure than to help you in your fight. Whatever may be done in the matter of Judicial reform, I believe that the rank and file of the people of the country are with you.

The fight is not over and for the good of the courts and the country, I wish you success.

Yours sincerely,

J. Horace Davis

PSF: Supreme Ct.
file

THE ATTORNEY GENERAL
WASHINGTON

August 21, 1937.

My dear Mr. President:

A few days ago I sent you a report expressive of my views in the matter of H. R. 2260, which is the revamped Court Bill. It was an analysis of the bill concluding with a brief statement of reasons for its approval.

Enclosed herewith you will find some material which may be helpful in connection with any public statement you may desire to make when you come to act on the bill.

Sincerely yours,

Wm. Taft

The President,
The White House.

Notes for statement to be issued by the President upon signing
the bill dealing with JUDICIAL REFORM.

I have today approved of H. R. 2260, which is a bill effectuating
certain changes in Judicial procedure.

On the fifth day of February, I brought to the attention of the
Congress the necessity of a careful and thorough-going reformation of our
Judicial processes and submitted a tentative plan outlining essential ob-
jectives, ~~some of these having to do with matters of substance and others~~
~~with methods of procedure.~~ (Insert A)

The present bill deals, in a very limited way, with a reform of
procedure. Measured against the objectives which I endeavored to outline,
it is but a meagre performance. The challenge to which it is open is not
that it contains provisions of an objectionable character, but that it deals
with an important and insistent problem in a manner which is feeble and
ineffective. Nevertheless, it contains meritorious provisions and registers
a moderate and limited advance into a field which must, later on, be more
completely explored.

For instance, it leaves entirely untouched any method of relieving
the burden now imposed upon the Supreme Court. It provides no increase in
the personnel of the lower Courts, confessedly necessary if we are to have a
judicial system that is to function promptly and efficiently. It provides no
effective means of assigning Circuit and District Judges to pressure areas;
nor does it set up any flexible machinery, with methods of administration
which may be readily adapted to needs as they arise. It also leaves entirely
untouched the crowded condition of the dockets in our lower courts, the need
of new blood in the judiciary, and the problem of aged and infirm judges who

fail to take advantage of the opportunity accorded them to retire or resign on full pay. These matters and related problems still remain to be solved.

On the other hand, the bill provides that the Attorney General shall be given notice of the pendency of constitutional questions in private litigation and accords the Government the right to present evidence and to be heard so that it may be afforded an opportunity to defend the constitutionality of the law of the land; and not be required to stand idly by, a helpless spectator, while acts of Congress are stricken down by the Courts. It expedites appeals to the Supreme Court in such matters.

It deals appropriately with the intolerable situation created by the reckless and improvident granting, by the lower courts, of injunctions to restrain activities of government officials and the operation of Federal statutes; and it tends slightly to relax the rigid system of assigning District Judges to congested areas.

All of these provisions possess merit, and are either part of or consistent with the plan originally submitted to the Congress. I have, therefore, approved the bill.

This administration has long been committed to a program of judicial reform. The numerous bills sponsored by the Department of Justice dealing with the criminal menace have marked a great advance in that field. The bill advocated by the Attorney General, with my full approval, and adopted by the Congress ^{and approved by me} June 19, 1934, authorizing the Supreme Court to make uniform rules of practice and procedure for District courts, in civil cases, supplied an improvement that had been needed for more than a generation. The bill I have just signed moves in that same general direction, but we must proceed much farther if our country is to have a judicial system consistent with its dignity and importance.

I have long felt that the faults of our judicial system constituted one of our major problems. ~~I have viewed with concern the widening chasm between the people on the one side and the courts and the bar on the other. This tendency has been recognized and deplored by many of our ablest and most enlightened judges and lawyers. It can hardly be doubted that our people are reactive under the slow and uncertain processes of the law.~~ This is not a wholesome situation and it must be remedied. We have been through a very trying period when it has seemed that a veritable conspiracy existed on the part of many of the most gifted members of the legal profession to take advantage of the technicalities of the law and the conservatism of the courts to render measures of social and economic reform sterile or abortive. It has been truly said that the law is the right arm of statesmanship, but it would be a tragic loss to America if that arm should atrophy or become palsied.

In order to achieve its legitimate purposes the government must necessarily act through the processes of law, and if we are to preserve the inward unity of America, which is indeed a precious thing, we must achieve a higher degree of co-operation amongst the three co-ordinate branches of our government.

After all the law and the judicial process are not the masters of human conduct, rather are they the servants of human need, and if we are to progress as a people, and are to preserve our form of civilization, ~~we must make our governmental machinery function with efficiency and serve the necessities of a great and growing nation. I speak, therefore, for an up-building process that shall not only preserve the independence and the integrity of the judiciary, but also reinforce it, strengthen it, and maintain it as an essential and honored part of our institutions.~~

H.R. Court Bill.

States in a proceeding in which the United States

is MEMORANDUM CONCERNING JUDICIAL REFORM. per-

mitted to intervene and become a party for presenta-
tion of evidence and argument on the question of
jurisdiction. While it will have the effect of
bringing the Government into the case for a proper pre-
sentation of the facts and law bearing on the constitutional
question, it will not give the Government the right of
intervention in any case in which the Government has no
particular interest.

The President's plan, embodied in his message to
Congress, which was accompanied by a letter from the
Attorney General and by a tentative bill, called at-
tention to the need of Judicial Reform and set forth
a series of objectives which it was desirable to at-
tain. These objectives were as follows:

1. That the Attorney General be given notice
of the pendency of a constitutional question in any
litigation before the Federal courts, and that he be
accorded the right to present evidence and to be
heard, so that decisions holding acts of Congress
invalid should not be rendered in suits between pri-
vate individuals without giving an opportunity to the
Government to defend the constitutionality of the law
of the land. Will permit direct appeals to the Supreme

N.B. The measure recently passed ~~by the Senate~~ in
achieves this result. It requires that notice be
given to the Attorney General whenever the constitu-
tionality of any Act of Congress, affecting the public
interest, is challenged in any court of the United

States in a proceeding to which the United States is not a party. The United States is to be permitted to intervene and become a party for presentation of evidence and argument upon the question of constitutionality. While it will have the rights of a party, to the extent necessary for a proper presentation of the facts and law bearing on the constitutional question, it will have no liabilities of a party except as to court costs. The Conference Committee struck out the requirement contained in the Senate bill, that in order to intervene, the United States would have to show that it has a legal interest or that it may have a probable interest.

2. That direct appeals to the Supreme Court be permitted in cases in which any court of first instance determines a constitutional question.

N.B. The bill permits direct appeals to the Supreme Court in cases to which the Government is a party or in which it has intervened and become a party, and in which the decision is against the constitutionality of an Act of Congress.

3. The President called attention to the intolerable situation created by the reckless and improvident granting of injunctions by the lower courts restraining the operation of Federal Statutes.

N.B. The bill attempts to deal with this matter by adopting a provision which was not specifically a part of the President's plan, but is in accord with its general purposes. It is to the effect that no injunction or restraining order based on the ground of unconstitutionality of an Act of Congress shall be granted against any Government officer by any court of the United States, except by a three-judge court. A temporary restraining order, however, may be granted by a single judge until the matter is heard by a three-judge court, if irreparable loss or damage would otherwise result. Direct appeals to the Supreme Court from decisions of three-judge courts are to be permitted.

4. The establishment of a flexible system by which district and circuit judges may be more readily moved from place to place to assist in the disposition of congestion in court dockets as it arises. As an

incident to the plan the President proposed the appointment of a proctor by the Supreme Court of the United States, charged with the duty of continuously keeping informed as to the state of Federal judicial business and of assisting the Chief Justice in assigning judges to pressure areas. The plan contemplated the creation of a mobile force of judges, available for service in any part of the country, at the designation and direction of the Chief Justice.

N.B. The bill passed by the Senate deals with this matter in half-hearted fashion. While recognizing the need of greater flexibility, it preserves existing machinery, so that temporary shifts of judges within a circuit remain within the control of the senior circuit judge, and assignments of judges outside of their home circuits may be made by the Chief Justice only on the recommendation of the two circuit judges concerned. No provision is made for a proctor or any other administrative officer to keep abreast of the times and in touch with the various districts, so that the work of assigning judges where needed might be well organized and effective. All that can be said.

The lower courts and to accelerate the consideration
of litigation.

about this provision is that it is a recognition of the serious evil to which the President called attention and is a gesture pointed in the right direction.

5. The Conference Committee struck out the provision contained in the Senate bill increasing the per diem subsistence allowance of judges when serving away from their home districts from \$5 per day to \$10 per day. This action is unfortunate, as that provision was the only motive power contained in the bill to induce judges to accept such assignments.

6. A right to Supreme Court justices to retire voluntarily on full pay, upon reaching the age of 70, after ten years of service on the bench.

N . B. The President's message approved a proposal then pending to extend this privilege to Supreme Court Justices. A bill to this effect has been passed and is now a part of the law of the land. The opportunity thus accorded Supreme Court justices has been taken advantage of by Mr. Justice Van Devanter.

7. An increase in the number of judges in order to relieve congestion, both chronic and temporary, in the lower courts and to accelerate the consideration of litigation.

N.B. The bill recently passed by the Senate makes no provision to meet this need. The report of the Committee, however, recognizes the existence of the evil that must be remedied, and suggests that the Attorney General be requested to make a survey, in collaboration with the Judicial Conference, and submit recommendations to the Congress at its next session as to the circuits and districts for which the appointment of additional judges should be authorized.

8. An infusion of new blood in the judiciary by providing for the appointment of additional judges in all Federal courts in which there are incumbent judges of retirement age who do not choose to retire or to resign. The President's plan included reasonable limitations on the number of judges that might be thus appointed.

N.B. The President called attention to the problem arising out of the continuance in office of aged or infirm judges, in some instances to the point of embarrassment of all concerned, as well as to the desirability of a constant infusion of new blood in the courts. This is the provision of the President's plan that drew the greatest opposition, especially in view

of its effect on the Supreme Court. The Senate bill makes no attempt to deal with the situation and contains no provision for the appointment of additional judges, either in accordance with the formula suggested by the President or by any other method.

GENERAL OBSERVATIONS

It may fairly be said that the Senate bill carries out some of the President's recommendations in a modified degree. Amendments made to the bill on the floor of the Senate and in Conference have relieved it of a few of its absurdities and of some of its manifest and obvious faults, thereby giving rise to the question as to whether it would not be more desirable to approve the bill, with an explanatory statement, than to reject it in toto. Should the measure become law, it could be made the basis of further reforms at some future session of the Congress. Intensive study could be given to the subject, with a view to determining what further improvements are needed, especially along the following lines:

1. The Supreme Court.
2. An increase in the judicial personnel of the Circuit Courts of Appeals and the District Courts.

3. The problem of aged and infirm judges who fail to take advantage of the opportunity accorded to them to retire or resign on full pay.
4. Increased flexibility in assigning circuit and district judges to pressure areas, with efficient machinery for administration.

PSF: Supreme Court

file 9

THE ATTORNEY GENERAL
WASHINGTON

October 7, 1937.

THE WHITE HOUSE

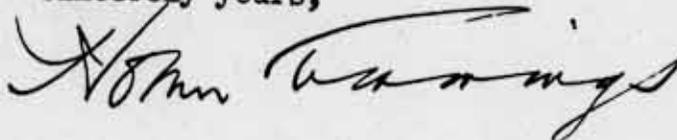
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My dear Mr. President:

I thought you might be interested in the enclosed resume of the judicial appointments you have made since March 4, 1933. The list does not include territorial judges, of whom you appointed twenty-six, and the judges of the Municipal and other local courts in the District of Columbia, of whom you appointed nine.

Sincerely yours,



The President,
The White House.

The following list shows the number of presently sitting life tenure judges on active duty on the United States Courts:

	<u>Appointed prior to March 4, 1933</u>	<u>Appointed since March 4, 1933</u>	<u>Total</u>
United States Supreme Court	8	1	9
Circuit Courts of Appeals (Including judges of the U. S. Court for Appeals for the District of Columbia)	31	17	48
United States District Courts (Including judges of the District Court for the District of Columbia)	118	47	165
Court of Claims	5	0	5
Court of Customs and Patent Appeals	5	0	5
United States Customs Court	8	1	9
	<hr/> 175	<hr/> 66	<hr/> 241

PSF: Supreme Court

THE ATTORNEY GENERAL
WASHINGTON

file
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October 7, 1937.

My dear Mr. President:

Enclosed herewith you will find
a resume of the significant cases involving
important litigation pending in the Supreme
Court, and in which the Government is
interested.

Sincerely yours,

Norman Thaw

The President,

The White House.

PENDING CASES INVOLVING IMPORTANT LITIGATION

of the United States to compel them to pay gold dollars out of the United States Treasury in redemption of Liberty Bonds. The Court of Appeals for the District of Columbia held in favor of the Government.

I.

To be argued in the Supreme Court.

Gold Clause: Smyth v. United States, No. 42, and Dixie Terminal Co. v. United States, No. 43. Whether a call for redemption of Liberty Bonds issued on October 12, 1933, after the passage of the Gold Clause Resolution of June 5, 1933, was effective to stop the running of interest on the bonds. The Court of Claims held in favor of the Government, and the Supreme Court granted certiorari on the petition of the bondholders to resolve a conflict with the Machen case, now pending on the Government's petition, No. 198.

P.W.A.: Alabama Power Co. v. Ickes, et al, Nos. 84-86. Whether the Power Company has standing to challenge the validity of proposed loans and grants of P.W.A. funds to municipalities for the construction of electric distribution systems; and if so, whether the proposed loans and grants are valid exercise of the spending power. The Court of Appeals for the District of Columbia held in favor of the Government on the first question and did not discuss the second.

H.O.L.C.: Kay v. United States, No. 61. Whether an indictment charging violations of the criminal provisions of the Home Owners Loan Act charges offenses against the United States. The petitioner attacked the validity of the Act. The Government, while maintaining the validity of the Act, asserts also that in any event Congress has power to punish fraud in connection with de facto undertakings of the Federal Government.

II.

Pending on Petitions for Certiorari in the Supreme Court.

T.V.A.: Georgia Power Co. v. Tennessee Valley Authority, Nos. 69, 70. Whether the District Court in Georgia had power to enjoin the Georgia Power Company from further proceedings in the suit subsequently filed by it and 19 other utilities in Tennessee involving substantially the same issues. The C.C.A. 5th held in favor of the Government.

H.O.L.C.: Home Owners Loan Corporation v. Central Market, No. 111. Whether the Home Owners Loan Corporation is subject to garnishment for the purpose of reaching the salary of an employee to satisfy a personal judgment obtained by a third party against the employee.

Gold Clause: Ogden v. Morgenthau, No. 148. Whether suit may be maintained against the Secretary of the Treasury and the Treasurer

of the United States to compel them to pay gold dollars out of the United States Treasury in redemption of Liberty Bonds. The Court of Appeals for the District of Columbia held in favor of the Government. Our opposition to the petition for certiorari is based principally on the ground that this is a suit against the United States to which the United States has not given consent.

United States v. Machen, No. 198. This case, like the Smyth and Dixie Terminal cases now awaiting argument, involves the validity of a call for redemption of Liberty Bonds containing a gold clause. The C.C.A. 4th held against the Government and we have petitioner for certiorari.

P.W.A.: Duke Power Co. v. Ickes, et al, No. 397. This case, like the Alabama Power Co. cases, supra, involves the validity of loans and grants to municipalities for the construction of electric systems. The C.C.A. 4th held in favor of the Government. In view of the pendency of the other cases, we did not oppose certiorari in this case.

Commodity Exchange Act: Moore v. Chicago Mercantile Exchange, No. 209; Bennett v. Board of Trade of Chicago, No. 235; and Board of Trade v. Milligan, No. 282. These cases involve the validity of the Commodity Exchange Act in various applications, namely, as applied to future trading in butter, eggs, and Irish potatoes, and as applied to the handling of customers' money. The C.C.A. 7th and C.C.A. 8th held in favor of the Government. We are opposing petitions for certiorari.

S.E.C.: Jarvis v. United States, No. 170. Petitioner seeks to raise the question of the validity of the Securities Act of 1933, under which he was indicted, with respect to the making of false representations through the channels of interstate commerce. We have opposed the petition, pointing out, inter alia, that the conviction may be supported under the mail fraud statute in any event.

Martin v. Hull, No. 335. This is a civil suit against "dummy" directors for misrepresentations in a registration statement. The Court of Appeals for the District of Columbia sustained a verdict for the defendant directors on the ground that there was evidence that the plaintiff himself knew or should have known the falsity of the statements. The Government is not a party to the case and has filed no brief on the petition for certiorari.

Ryan, et al v. Newfield, et al, Nos. 353-355. Whether certain subpoenas issued by the S.E.C., directing two telegraph companies to turn over to the Commission certain generally described communications, were unreasonable searches and seizures infringing the rights of the petitioners as senders or recipients of the messages. The C.C.A. 5th held in favor of the Government. In a similar case from the Second Circuit, McMann v. S.E.C., certiorari was denied at the last term.

N.L.R.B.: Myers, et al. v. Bethlehem Shipbuilding Corporation, Nos. 181-182. Whether the District Court had jurisdiction to enjoin a hearing by the Labor Board. The C.C.A. 1st held against the Government and we are petitioning for certiorari.

N.L.R.B. v. Pennsylvania Grayhound Lines, No. 413. Whether the Board has power, in addition to ordering the employer to cease its domination of a company union, to order the employer also to withdraw all recognition from the organization and to post notices stating that the organization is disestablished and that the employer will refrain from recognizing it. The C.C.A. 3rd held against the Government and we have petitioned.

N.L.R.B. v. Delaware-New Jersey Ferry Co., No. 425. Whether an order of the Board directing an employer to bargain collectively with a certain labor organization continues to be enforceable when the employer, after issuance of the order, by coercive measures brings about the formation of a committee of employees and enters into a collective agreement with such committee. The C.C.A. 3rd held against the Government and we have petitioned.

Newport News Shipbuilding Co. v. N.L.R.B., No. 305. This case, like the Bethlehem case, supra, involves an attempt to enjoin a hearing. The C.C.A. 4th held that an injunction was rightly refused. We have opposed the petition on the ground that the decision is clearly correct.

Jeffery-Dewitt Insulator Co. v. N.L.R.B., No. 268. Whether the protection of the Act extends to employees who were on strike at the time of its passage. The C.C.A. 4th held in favor of the Government. We have opposed the petition.

PSF: Supreme Court

file
Mason
Cummings
(S) Draeger 1-37.



Office of the Attorney General
Washington, D.C.

October 11, 1937

My dear Mr. President:

While the Supreme Court resumed its sessions for the 1937 term on Monday last, October 4th, it did not announce its decision upon the petitions for writs of certiorari which had accumulated during the summer until today. Of the twenty-seven petitions by the Government upon which the Court acted, nineteen were granted and eight denied, a percentage of 70. Of the seventy-four petitions filed by opponents, only thirteen were granted, a percentage of 18. If there be eliminated six petitions in which the Government did not oppose the granting of certiorari, nine per cent were granted.

The only Government petition of particular importance which was denied was that in United States v. Chicago, Burlington & Quincy R. R. Co. In this case the Government sought review of a decision holding that the railroad company was entitled to compensation for future damages to portions of the railroad's property not actually taken, which would be caused by operation of a Government dam which is a part of the Upper Mississippi River nine-foot channel project. A similar petition by the United States was denied at the last term. The Government persisted in its request for review because of the large amounts involved and stressed in its petition the importance of the question and the evident unsoundness of the decision. Suggestions from many sources were incorporated in the Government's petition in an effort to present the strongest possible case.

Of the Government petitions which were granted, only the following need be mentioned. In Myers et al. Regional Officers of the National Labor Relations Board v. Bethlehem Shipbuilding Corporation, Ltd. the question presented was whether a district court possessed jurisdiction to grant an injunction against a hearing and other proceedings by the National Labor Relations Board acting under the National Labor Relations Act. In United States v. Machen the question presented was whether the respondent, as owner of a First Liberty Loan bond, containing a gold clause, was entitled to recover the amount of an interest payment for the period June 15, 1935, to December 15, 1935, the bond having been the subject of a notice of call for redemption on June 15, 1935. In Helvering, Commissioner

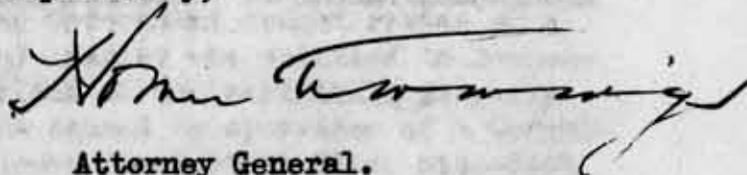
of Internal Revenue v. Charles E. Mitchell the question presented was whether the respondent's acquittal upon an indictment for wilfully attempting to evade and defeat his income taxes was a bar to assertion by the Commissioner of Internal Revenue of a 50% additional deficiency by reason of fraud with intent to evade tax.

A cross-petition by Charles E. Mitchell was denied in which he contended that his acquittal in the criminal proceedings constituted a complete bar to the collection by the United States of both the tax due and the 50% fraud deficiency.

The Court also denied petitions by opponents challenging the constitutionality of the Commodity Exchange Act in the cases of Moore v. Chicago Mercantile Exchange et al, Bennett et al v. Board of Trade of the City of Chicago et al, and Board of Trade of Kansas City, Mo. et al v. Milligan.

The only other decisions of particular interest were those denying the motions of Albert Levitt and Patrick H. Kelly questioning the right of Mr. Justice Black to sit as an Associate Justice of the Court.

Respectfully,



Attorney General.

The President,
The White House,
Washington, D. C.

PSF: Supreme Court
file

Mci

I see no reason for seeing
Chairman Summers.

F.D.R.

THE WHITE HOUSE
WASHINGTON

file

12/8/37

MEMORANDUM FOR THE PRESIDENT

I have read this very casually but
it looks interesting enough to bother you with it.
Chairman Summers is displaying a
(House Judiciary Committee)
Mem xpp 7 4925
keen desire to come down and talk with you. He
even asked Steve to speak to me about it on our
return.

After reading this you may want to
see him.

MHM

December 3, 1937

MEMORANDUM FOR COLONEL MCINTYRE

x101
x419

Mindful of the undeserved criticism directed at the Administration from some quarters because of the fact that the Court Bill and other legislation was drafted by the Executive Branch of the Government and transmitted to the Congress, rather than merely recommending legislation and leaving it to the Congress to draft its own bill or bills, I had a brief survey made of the files of this Department. The purpose was to determine whether this was a practice originating in the present Administration, or one of long standing.

For example, when I came to Washington in 1933 as Special Assistant to the Attorney General, it was for the specific purpose of studying and recommending a method by which the Federal Government, particularly the Department of Justice, could be of assistance in the suppression of crimes of violence throughout the nation. In that work, after

Joseph R. Keenan

many Senate Committee meetings had been held, public and private, and after a good deal of exhaustive research, remedial legislation was embodied in twelve bills. Every one of these bills was drafted in this Department under my direction and submitted by the Attorney General to Hatton Summers as Chairman of the Judiciary Committee of the House and to Senator Ashurst as Chairman of the Judiciary Committee of the Senate, with the request that they be introduced by the said Chairman with the recommendation that they be enacted into law. Some of these bills were passed without any change whatsoever; in fact, most of them were so passed. Others were revised in slight particulars.

I am enclosing herewith the result of an examination of the records of the Department, which I think you will find of interest. It runs from 1851 down to March, 1935, and indicates that the practice referred to is an old established one, hallowed by tradition and usage.

Sincerely,

Joseph B. Keenan.

THE INITIATION AND DRAFTING OF LEGISLATION
BY OFFICIALS OF THE EXECUTIVE BRANCH
OF THE GOVERNMENT

1. An early example of the initiation (the drafting) of legislation by officials of the Executive Branch of the Government is found in 5 Op. 504, 506, where Attorney General Crittenden, under date of December 31, 1851, writes to the Secretary of War:

" * * * I herewith send you a bill, to supply the defect in the existing law. * * *."

Mr. Crittenden had advised the Secretary of War in an opinion of November 11, 1851, (5 Op. 412, 443), that certain actions of trespass brought in the state court by a Mr. French against certain officers of the United States at Fort Monroe, Virginia, be removed to the Federal court. The District Attorney, however, expressed doubt that the cases could be removed under then-existing law and suggested that the passage of an Act of Congress might be necessary. The Attorney General adopted this suggestion and sent the Secretary of War a draft of a bill to carry it into effect.

2. During the 61st Congress (1909-1911) Senator Clark, Chairman of the Senate Judiciary Committee, at the request of Attorney General Wickersham, introduced several bills which had been drafted in the Department of Justice (See F. 84381-28, in which these bills are referred to by Senator Clark). The specific nature of the several bills is disclosed by reference to the respective Departmental files, as follows:

On September 13, 1909, Senator Clark acknowledged Attorney General Wickersham's letter of March 23, transmitting a "copy of a proposed amendment to Section 486 of the Code of the District of Columbia," so as to make it possible for the Government to take possession without delay of land condemned in the

District of Columbia, in cases where a controversy arises among claimants to title to the land condemned (F. 142568-16).

In his Annual Report to Congress of 1909, Attorney General Wickersham recommended the enactment of legislation to reduce the minimum penalty for violation of the banking laws.

On February 12, 1910, Attorney General Wickersham asked Senator Clark whether he would be willing to introduce a bill prepared to carry out this recommendation (F. 126095-4). Senator Clark replied that he would be very glad to introduce the Attorney General's bill, a draft of which was thereupon sent to him (F. 126095, Serials 7 and 8). At the same time, a copy of the draft was sent to Chairman Parker of the House Judiciary Committee, with a letter in support of the recommendation for its enactment (Serial 9).

On February 11, 1910, Attorney General Wickersham sent to the Chairmen of the Judiciary Committees of Congress a draft of a bill to authorize the issuance of search warrants for stolen or misappropriated government property (F. 50498-6).

On February 11, 1910, Attorney General Wickersham sent to the Chairmen of the Judiciary Committees of Congress a draft of a bill to give the government the same right of review, on writ of error, as the defendant in a criminal case possessed, in all cases where a second jeopardy was not involved (F. 72868, Serials 5 and 6).

On February 11, 1910, Attorney General Wickersham sent to the Chairmen of the Judiciary Committees of Congress a draft of a bill to authorize the United States Circuit Courts of Appeals, on remanding certain cases reversed on the ground that the evidence does not justify a verdict in favor of the plaintiff below, to direct that the case be dismissed instead of ordering a new trial (F. 72868-6 2/4).

The bill, S. 10312, 61st Congress, was a measure proposing to amend the United States Commissioners' Fee Bill. An identical bill (H.R. 13847) was introduced in the House. These bills were drafted in the Department of Justice (F. 123112-1).

On December 19, 1910, Attorney General Wickersham sent to the Chairmen of the Judiciary Committees of Congress, with the request that it be enacted, a draft of a bill providing that appeals from the United States District Court in Puerto Rico run to the United States Circuit Court of Appeals for the Third Circuit, instead of to the United States Supreme Court, as then provided by law (F. 112205, Serials 19 and 20).

On January 5, 1911, Attorney General Wickersham sent a draft of a bill to Congress, and earnestly recommended its enactment, to authorize chief office deputy marshals to act as disbursing officers in cases of emergency (F. 25422-1).

On January 9, 1911, Attorney General Wickersham sent to Senator Clark, Chairman of the Senate Judiciary Committee, and to Chairman Parker of the House Judiciary Committee, for introduction and enactment, a draft of a bill to authorize the advance of money to witnesses on behalf of the United States (F. 155048, Serials 1 and 2).

3. The first mention in our files of legislation to incorporate, under Federal law, corporations engaged in interstate commerce is in a letter dated February 6, 1908, from Senator Knute Nelson to Attorney General Bonaparte (F. 146108-Sec. 1), transmitting a copy of a bill (S. 4874) introduced by Senator Nelson on February 3, 1908 in the 60th Congress, "For the incorporation and regulation of corporations engaged in interstate commerce." Senator Nelson sent this bill to the Attorney General for his inspection, adding: "The bill, such as it is, is wholly my own work."

At the time Senator Nelson drafted his bill, the subject of Federal Incorporation was apparently strongly in the official mind, executive as well as legislative. In a

memorandum dated March 10, 1936, addressed to Attorney General Cummings by Assistant Attorney General John Dickinson, writing as a member of a committee designated at the request of the President to study the subject of "Federal Incorporation," appears the following:

"The subject of Federal Incorporation, at the beginning of the century, was widely acclaimed. President Roosevelt and President Taft both recommended legislation."
(F. 146108-Sec. 6)

The Departmental files show that Attorney General Wickersham gave a great deal of time and thought to the subject of Federal Incorporation and, on February 4, 1910, Mr. Wickersham sent to Senator Clark, Chairman of the Senate Judiciary Committee, and to Chairman Parker of the House Judiciary Committee, a draft of a bill "For the formation of corporations to engage in interstate and international trade and commerce, in the form in which I think it may be properly introduced" (F. 146108-56). In a letter to William Draper Lewis of November 17, 1911, Mr. Wickersham refers to this bill as "The Federal Incorporation Act, which I drew" (F. 146108-117).

It appears, therefore, that independently of any bills that may have been drafted elsewhere on the subject of Federal Incorporation, the executive branch of the Government, represented by the Chief Executive and his Attorney General, formulated its own draft of such legislation and transmitted it to the Congress for introduction.

4. On February 11, 1910, Attorney General Wickersham drafted, and sent to the Congress with a request that it be enacted, a bill to authorize the presence of stenographers in grand jury rooms (F. 150371-2).

Like action was taken by Mr. Wickersham's successors down to and including Attorney General Cummings and such a bill finally became law May 18, 1933 (48 Stat. 58).

5. On February 11, 1910, Attorney General Wickersham caused to be drafted and sent to Congress, with his recommendation

that it be enacted, a bill providing that no person should be excused from testifying in any proceeding on behalf of the United States on the ground that to do so might tend to incriminate him; but that no person so testifying could be prosecuted on account of anything concerning which he might so testify. The bill also proposed to repeal Section 860 R.S., which gave immunity to a witness, if he testified voluntarily to incriminating matter, but did not compel him so to testify (F. 84381-11). Section 860 R.S. was repealed (36 Stat. 352) but the other provisions of the bill were not enacted and Mr. Wickersham on January 4, 1911, renewed his recommendation for the enactment of a general statute to compel testimony but granting immunity from prosecution as the result of compulsory incriminating testimony (F. 84381-23, 24, and 28).

6. On March 2, 1910, Attorney General Wickersham sent to the Chairmen of the Judiciary Committees of Congress a draft of a bill prepared in the Department of Justice to amend Section 819 R.S., which relates to peremptory challenges of jurors and asked that the Chairman "introduce and advocate" it (F. 150629-4).

7. On March 29, 1912, Attorney General Wickersham prepared a bill providing that criminal trials shall be had in the division (of the judicial district) where the crime was committed, unless, on the application of defendant, the court shall order the cause transferred to another division of the district, with the proviso that any grand jury sitting in any division may present indictments for offenses committed anywhere within the district, and then that the indictment shall be transferred for trial to the division in which the offense was committed, unless upon the defendant's application the trial be had in some other division (F. 159434-26).

8. On February 23, 1916, Attorney General Gregory caused to be drafted, and sent to Congress with the request that it be enacted, a bill making it a penal offense for officers of United States courts wrongfully to convert moneys coming into their possession by virtue or under color of official authority (F. 179973-1). The bill was introduced in the Senate in the

65th Congress but no action was taken on it. On October 2, 1919, Attorney General Palmer called attention to this bill and secured its re-introduction in the Senate in the 66th Congress (F. 179973-6 and 7) and its introduction in the House (F. 179973-9). The bill became law, May 29, 1920 (41 Stat. 630).

9. On July 2, 1918, Attorney General Gregory sent to the Chairmen of the two Judiciary Committees of the Congress, a draft of a bill prepared in the Department of Justice to amend Section 53 of the Judicial Code "so that any grand jury sitting in any division of a district may present indictments for crimes or offenses committed anywhere within the district itself." He asked that the bill be introduced and urged its early consideration and passage (F. 159434-89).

On January 26, 1923 (F. 223559-IX), Assistant Attorney General Holland sent to the Chairman of the House Judiciary Committee two bills prepared in the Department of Justice and asked that they be enacted:

10. One was to amend Section 284 of the Judicial Code so as to authorize a grand jury to continue to sit during the term following that for which it was called.

11. The other was to amend Section 1025 R.S. so as to authorize the presence of stenographers in grand jury rooms.

These bills were repeatedly re-drafted and sent to subsequent Congresses with the request that they be enacted.

12. On April 26, 1926, Attorney General Sargent sent a draft of a bill to Congress, and recommended its enactment, to amend Section 33 of the Judicial Code, which authorizes the removal to the Federal courts of civil or criminal proceedings commenced in state courts against revenue officers and officers of United States courts, so as to "make that section applicable to proceedings instituted against all officers of the United States" (F. 182329-3).

13. On January 17, 1927, Attorney General Sargent sent to Congress, with the request that it be enacted, a bill to re-enact a temporary amendment of the law, which had expired, under which, in any suits brought by the United States against more than one defendant, the Government was permitted to proceed in any district whereof any one of the defendants was an inhabitant and process against any defendant in such a proceeding was authorized to run in any district and service to be made in any district in which such defendant might be found (F. 125982-29). (The foregoing was recommended by Mr. Holtzoff, to extend or renew the amendment to Section 51 of the Judicial Code, which had expired.)

14. On January 14, 1931, Attorney General Mitchell caused a bill to be prepared, and sent to the Congress with the recommendation that it be enacted, to require every corporation doing business in any state to stay in the state courts in litigation with residents of that state, without regard to the state in which the corporation is organized - that is, the corporation would not be allowed to go into the Federal court on the ground of diverse citizenship (H.R. 16344, 71st Congress). Mr. Mitchell again urged the enactment of this bill in the 72nd Congress (H.R. 10594; S. 937). (F. 125982-subsec. 2)

15. In the First Session of the 69th Congress (1925-1926), eight bills were drafted in the Department of Justice and introduced in Congress upon the recommendation of Attorney General Sargent but were not enacted during that session. In his Annual Report for 1926 (pp. 1 and 2) Mr. Sargent urges the enactment of these bills and lists them as follows:

H.R. 11767. This bill would enlarge the provisions of Section 33 of the Judicial Code, which authorizes the removal from the state to the Federal court of any proceeding brought against Federal Revenue Officers or officers of United States courts or of either House of Congress, while engaged in the performance of their official duties. The bill proposed to extend this right of removal to all officers, agents and employees of the United States against whom

proceedings might be instituted in a state court on account of anything done by them in pursuance of their lawful duties.

H.R. 8835. This bill proposed to allow the United States marshal for the District of Columbia to charge a fee for each return on process, whether or not service was actually made. The existing law provided for a fee only in case service was actually made.

H.R. 12105. This bill would amend Section 1022 R.S. so as to empower United States attorneys to enforce the attendance and testimony of witnesses or the production of documentary evidence as a basis for determining whether they should initiate prosecutions upon criminal information.

H.R. 12104. This bill proposed to amend Section 284 of the Judicial Code so as to authorize grand juries to continue to sit during not to exceed two terms in addition to the term for which summoned, solely to finish business begun by such bodies.

H.R. 12106. This bill proposed to amend Section 1025 R.S. so as to authorize the presence of a stenographer in the grand jury room for the purpose of reporting the proceedings.

S. 4041. This bill was designed to obviate delay in the removal of a criminal defendant to the judicial district in which he was indicted from any other judicial district in which he might be found. It provided that criminal warrants issuing out of Federal courts might be addressed to any marshal or deputy marshal of the United States and be executed in any place within the limits of the United States by arresting the person named therein and removing him forthwith to the district wherein the indictment or information against him might be pending.

H.R. 12753. This bill would make it a Federal offense to kill or forcibly resist, oppose, impede, intimidate, or interfere with any civil officer or employee of the United States while engaged in or on

account of the performance of his official duties. Under then-existing law it was a criminal offense to resist or interfere with or to assault, beat, or wound any officer or any other person duly authorized while serving or attempting to serve or execute process of the United States courts. Other officers and employees of the United States had no such protection.

H.R. 10437. This was a bill to provide a fee for clerks of the United States District Courts for entering orders of dismissal or of discontinuance by consent, in civil cases. Under the law as it then existed, the clerk could collect a fee only for entering judgment in such cases.

16. On February 29, 1932, President Hoover sent a special message to the Congress in which he made the recommendation, among others, that the Supreme Court be authorized to prescribe rules of practice and procedure in criminal cases to cover all proceedings after verdict, in the lower courts and in the Circuit Courts of Appeals. On March 4, 1932, Attorney General Mitchell sent to the Chairmen of the Judiciary Committees of the Congress a bill drafted in the Department of Justice to carry this recommendation into effect, and urged its enactment (F. 123106, Sec. 3). The bill was introduced in both Houses and the Senate Bill (S. 4020) became law (Act of February 24, 1933, 47 Stat. 904). Subsequently, the Attorney General transmitted, with a letter to the Chairmen of the Judiciary Committees of Congress, dated January 16, 1934, a bill drafted in the Department of Justice to clarify the said Act of February 24, 1933. This bill was introduced in the Senate as S. 2461 and became the Act of March 8, 1934 (48 Stat. 399).

17. On March 1, 1934, Attorney General Cummings sent to the Chairmen of the Judiciary Committees of Congress a draft of a bill prepared in the Department of Justice to empower the Supreme Court to prescribe rules to govern the practice and procedure in civil actions at law in the District Courts of the United States and in the Courts of the District of Columbia and urged its enactment (F. 123106, Sec. 3). The bill was introduced in both Houses and the Senate Bill (S. 3040) became law (Act of June 19, 1934, 48 Stat. 1064).

18. Crime bills sponsored by Attorney General Cummings:

S. 1582. This was a bill to permit the presence of stenographers in grand jury rooms (F. 150371). On May 3, 1933, Attorney General Cummings caused a bill to be drafted and sent to the Chairmen of the Judiciary Committees of Congress. The bill was introduced in the Senate and became the Act of May 18, 1933 (48 Stat. 58).

H.R. 5091. On June 15, 1933, Attorney General Cummings recommended that the President approve this bill, the purpose of which was to bring the so-called criminal conformity act down to date (F. 123106). This bill was drafted in the Department of Justice and sponsored by the Attorney General. It became the Act of June 15, 1933 (48 Stat. 152).

H.R. 5208. This was a bill to amend the probation law so as to facilitate the re-taking of probation violators who have fled the jurisdiction in which they were placed on probation (F. 4-5-5-01). It was drafted in the Department of Justice and was sent by Attorney General Cummings to the Chairmen of the Judiciary Committees of Congress on April 3, 1933. The bill was introduced in both Houses and the House Bill (H.R. 5208) became the Act of June 16, 1933 (48 Stat. 256).

H.R. 7748. On January 3, 1934, Attorney General Cummings re-submitted to Congress, with the recommendation that it be enacted, a bill (H.R. 10638) which had been drafted in the Department of Justice and introduced in the 72nd Congress but not enacted (F. 235077). This bill was designed to prevent delays in criminal proceedings due to attacks on indictments based on the alleged disqualification of grand jurors. It was introduced in both Houses in the 73rd Congress and the House Bill (H.R. 7748) became the Act of April 30, 1934 (48 Stat. 648).

S. 2460. On January 17, 1934, Attorney General Cummings sent to the Chairman of the Senate Judiciary Committee a bill drafted in the Department of Justice to limit the operation of the statute of limitations

in certain cases (F. 27506, sec. 2). This bill was introduced as S. 2460 and became the Act of May 10, 1934 (48 Stat. 772).

S. 2080. On January 3, 1934, Attorney General Cummings in a letter to the Chairman of the Senate Judiciary Committee, renewed the recommendation, previously made on several occasions by the Department of Justice, that it be made a Federal offense to assault or kill a Federal officer while engaged in, or on account of, the performance of his official duties. He requested that a bill, drafted in the Department of Justice and which had been introduced in the 72nd Congress, be re-introduced and urged its enactment (F. 125-01, Sec. 2). The bill was introduced as S. 2080 and became the Act of May 18, 1934 (48 Stat. 780).

S. 2575. On January 30, 1934, Attorney General Cummings sent to the Chairmen of the Judiciary Committees of Congress, a bill drafted in the Department of Justice to make Federal crimes of certain acts and omissions of Federal Prison Employees and others and urged its enactment (F. 99-01). This bill was introduced as S. 2575 and became the Act of May 18, 1934 (48 Stat. 782).

S. 2841. This bill was sponsored by Attorney General Cummings and drafted in the Department of Justice. It proposed to make it a Federal offense to rob any bank operating under the laws of the United States or a member bank of the Federal Reserve System (F. 29-100-01, letter from the Attorney General to Senator McGill, dated April 20, 1934). It was introduced in the Senate as S. 2841 and became the Act of May 18, 1934 (48 Stat. 783). Subsequently, Attorney General Cummings caused to be drafted and sponsored a bill (H.R. 5900, 75th Congress) to extend the operation of this Act to larceny and burglary (F. 29-100-01, letter to Speaker Bankhead dated March 17, 1937). This bill became the Act of August 24, 1937, Public No. 349, 75th Congress.

S. 2845. This bill proposed to make it a criminal offense to transport in interstate or foreign commerce any stolen property of the value of \$5,000 or more and also knowingly to receive or conceal such property. It was drafted in the Department of Justice and was a part of Attorney General Cummings' program of criminal law legislation and was introduced at his request (F. 122-01-, letter from the Attorney General to the President, dated May 22, 1934). The bill became the Act of May 22, 1934 (48 Stat. 794).

H.R. 7353. This bill proposed to give the consent of Congress to agreements between two or more states for mutual cooperation in the prevention of crime. It was one of the measures included in the legislative program of Attorney General Cummings, designed to aid in the suppression of crime (F. 95-01-7, -see the Attorney General's letter to the President, dated June 4, 1934), and was drafted in the Department of Justice. The bill became the Act of June 6, 1934 (48 Stat. 909).

H.R. 8912. On March 23, 1934, Attorney General Cummings transmitted to the Chairmen of the Judiciary Committees of the Congress a draft of a bill prepared in the Department of Justice to amend Section 35 of the Criminal Code so as to prohibit wilful injury to and depredations against Government property wherever situated (F. 52-01-2-). The bill was introduced in the House as H.R. 8912 and became the Act of June 18, 1934 (48 Stat. 996).

H.R. 9476. This bill proposed to empower the Director, the Assistant Directors, Agents, and Inspectors of the (then) Division of Investigation of the Department of Justice to serve warrants and subpoenas issued under authority of the United States; to make seizures under warrant for violation of the laws of the United States; and to make arrests without warrant in certain cases; also to carry firearms. The bill was drafted in the Department of Justice and was introduced at the request of Attorney General Cummings (F. 222316, - letter from the Attorney

General to the President, dated June 18, 1934), and became the Act of June 18, 1934 (48 Stat. 1008).

H.R. 9741. Attorney General Cummings, early in 1934, caused to be drafted and sent to the Chairmen of the Judiciary Committees of Congress a bill to regulate the dealing in firearms (F. 80-01, Sec. 3, letter of Senator Logan to the Attorney General, dated April 3, 1934, and the Attorney General's reply, dated April 6, 1934; also letter from the Attorney General to Senator Copeland dated May 23, 1934). This bill was never introduced in the House, but its submission to Congress led to the introduction of a later bill (H.R. 9741), which became the "National Firearms Act" of June 26, 1934 (48 Stat. 1236).

S. 2421. On March 27, 1935 Attorney General Cummings sent to the Chairman of the Senate Judiciary Committee a draft of a bill prepared in the Department of Justice to amend the so-called "Federal Kidnaping Act" so as to make it a Federal crime to receive, possess, or dispose of ransom money, and urged its enactment (F. 109-01-, see letter from the Attorney General to Senator Ashurst, dated March 27, 1935). This bill became the Act of January 24, 1936 (49 Stat. 1099).

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Office of the Attorney General
Washington, D. C.

December 13, 1937

PSF: Supreme Court

File
Personal

My dear Mr. President:

The principal decision rendered by the Supreme Court at its session today was that in the cases of Smyth v. United States, Dixie Terminal Co. v. United States and United States v. Machen. In these cases a majority of the Court held that Liberty Loan Bonds had been validly called for redemption by the Secretary of the Treasury in 1934 and 1935, and that suit could not be maintained on interest coupons maturing after the designated redemption dates. The calls for redemption were attacked upon the theory that the bonds could not be validly redeemed unless payment was tendered according to their terms, and that under the decision in Perry v. United States, 294 U. S. 330, a different payment was due than that which actually had been tendered. Justice Cardozo, speaking for the Court, held that the calls for redemption operated to subject the United States to full liability to pay the bonds as required by law; that they were therefore effective to stop the running of interest, regardless of the sufficiency of the payment actually tendered; and that the bondholders' only remedy, if they were not satisfied with that payment, was to bring suit upon the principal amount of the bonds. Justice Black concurred expressly in this opinion. Justice Stone concurred only in the result. In his view, the validity of the calls depended upon the sufficiency of the payment tendered. He therefore found it necessary to hold that the Joint Resolution of June 5, 1933 was constitutional as applied to United States bonds — a point which the majority expressly refrained from considering. Justices McReynolds, Sutherland and Butler dissented, invoking both the Constitution and the Eighth Commandment. The majority opinion also rejected a contention that the Secretary of the Treasury could not call the bonds for redemption without further authority from Congress than was conferred by the statutes under which the bonds were issued. It rejected likewise a contention that the Act of March 18, 1869 forbade the calling of the bonds. From the holding on these two last points there was no dissent.

Respectfully,

Attorney General.

The President,
The White House,
Washington, D. C.

RECONSTRUCTION FINANCE CORPORATION

John
Private
"Black"
PSF: Supreme Court

Tom:

Hugo asked me to pass
this letter on to you.

He said he would like
to call on the President
if the President wants to
see him. Has been hesitating
about doing so because
of publicity but thinks
the storm has quieted
sufficiently for it to be o.k.

Told Pres. before he
went to Europe that he
would call on his return
and wants him to under-
stand that the only reason

RECONSTRUCTION

RECONSTRUCTION FINANCE CORPORATION

the bank close so is because of the press fight on him.

He wants the Pres. to know, however, that he is now writing an opening which the press may charge was influenced by the Pres. if he calls before the open is delayed.

Hugo wants to make any engagements through you and not the White House Secretaries.

B.J.D. (Clifton Durr Black's

brother in law)

probably the P.W.A power plant (Duke Power.) case - the first of the 3 promised utility decisions

BECOME

PSF
Supreme Court
Sub. File

G. C. BRITTAIN
TREASURER CALHOUN COUNTY
ANNISTON, ALABAMA

December 18, 1937

18 Dec '37

Hon. Hugo Black,
Washington, D. C.

Personal and confidential

Dear Sir:

I hope you will pardon the liberty that I am taking in writing you and that you will understand the spirit in which I am writing. I know that you are completely removed from all politics and I do not want or expect even an acknowledgment of this letter.

I feel that you must have a close personal interest in any situation that has to do with the people of Alabama. As you know we are now confronted with the Senatorial primary of January 4th. Unless a change occurs between now and that date Mr. Heflin looks like a sure winner. He has the support of the Republicans, the Hoover supporters of 1928, the disgruntled and dissatisfied of all parties and many misguided Democrats. You will realize this can easily mean more than fifty per cent of these who will cast their vote on January 4th.

While Lister Hill has been attending the sessions of Congress Mr. Heflin has been making 2 to 3 speeches every day throughout the State. The fact that they see and hear him and do not see Mr. Hill has made the developments extremely dangerous. The attack on Mr. Hill is centered mainly around the wage and hour Bill. The State has been flooded with misinformation and misrepresentation. The propaganda is misleading thousands of voters. The same fight from the same source is being made on Lister Hill that would have been made on you had you been a candidate for re-election to the U. S. Senate next Spring.

A Heflin victory will be hailed all over the Country as a repudiation of the Roosevelt Administration. The fight is in reality a Roosevelt and Anti-Roosevelt fight. If Heflin wins you will see a revival of Republican hopes from that moment and the forces of greed will be encouraged as never before in their effort to regain control of our Government.

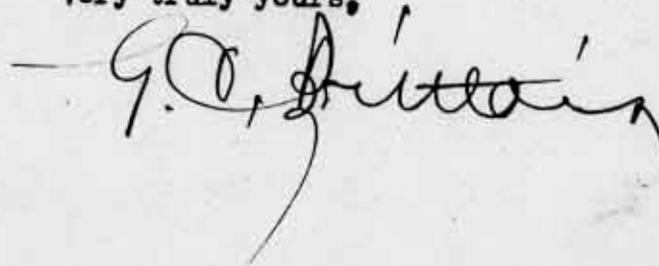
I understand Lister Hill is coming to Alabama to-day. The hour is growing late. He cannot possibly cover the State with time out for the Christmas Holidays. In my opinion the one thing that will save the day is a revival of Roosevelt sentiment in Alabama. The slowing down of business, low price of cotton and unemployment has caused that sentiment to be quite dormant just at this time. I notice President Roosevelt did not go to Warm Springs during Thanksgiving. If he would make a visit there during

the Christmas Holidays and make a side trip over in Alabama and thereby show an interest in the condition of the farmers of the State, in unemployment and in business generally then the effect might be such as to cause a revival of Roosevelt sentiment and go a long way toward saving the day for his cause in Alabama and prevent the sure cry that will be made by all enemies of the Administration everywhere that the solid South is broken and that the Country is turning away from the New Deal.

You have many close friends in Alabama who are in position to do effective work. I hope you can see a way to arouse their interest and activity.

I again express the hope that you will understand the spirit in which I have written you so freely and frankly. It is prompted by an interest in those principles and policies that have been sponsored and supported by you and that are now the main issue in the Senatorial primary of January 4th.

Very truly yours,

A handwritten signature in cursive script, appearing to read "G. O. Pittman". The signature is written in dark ink and is positioned below the typed closing "Very truly yours,". There is a horizontal line drawn through the signature.

Nation not ~~whom~~ ^{PSF: Subject File: Supreme Ct.}

1937?

THE WHITE HOUSE
WASHINGTON

Ind.
Independent
Supreme
Court
1937

Bowling letter -

Duty of Pres. to preserve
privilege of lang to discuss

Objections: Constit. not
to block social & economic
reform necessary to nation
under general welfare
objections.

1 Nation now Constit. minded
& trust minded.

2 Great gains - Problem of
maintenance of ~~system~~

R-2-31

MEMORANDUM

*This is strictly confidential
but the author thought you
might like to see it -
E.R.*

To: Sidney Hillman

From: ~~_____~~

Subject: Suggested procedure for the Congress to exercise its legislative authority over the jurisdiction of the Supreme Court and lower courts, and to define the word "commerce" as used in the Constitution.

The Congress has the responsibility of drafting and enacting legislation to carry into effect policies of the administration which have been approved by decisive vote of the people. Many previous Acts of Congress to effectuate these policies have been condemned by the Supreme Court as unconstitutional. Whether we take up legislation on labor, commerce or other social and economic subjects, the hostile attitude of the Court remains to be met. It has assumed to say that agriculture, manufacture and mining are not commerce.

How to meet this is a question of procedure. To attempt to amend the Constitution is both impractical and unnecessary. It is not probable that an amendment could be adopted without years of effort. If an amendment were adopted, without challenging the Court's usurpation of power, the Court would continue to pass upon legislation under the amendment.

Powers of Congress

But the Congress has ample legislative powers under existing provisions of the Constitution. There are two simple and practical courses, either of which the Congress can take. But first let us glance a moment at the powers of Congress and the Supreme Court as defined in the Constitution.

Article I of the Constitution creates the law-making branch of government and "all legislative powers herein granted shall be vested in a Congress of the United States..."

What are these powers? They are specified in Section 8 of Article I: "to lay and collect taxes"; "to provide for the common defense and general welfare"; "to borrow money"; "to regulate commerce"; "to coin money and regulate the value thereof"; "to raise and support armies"; "to provide and maintain a navy"; and many others, including this broad blanket of powers: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof".

Article II creates the executive power, which is vested in the President.

Article III creates the judiciary: Section 1, "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish".

Except the Supreme Court, all federal courts are created by act of Congress. Consequently they have only such powers and jurisdiction as Congress may give them.

But this is part only of the provisions establishing the courts. The Supreme Court is given independent original jurisdiction only (Section 2) "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party,..." Section 2 also provides that "In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make".

So, we find that the Constitution makes the Congress supreme, and not the Court, as to what appellate jurisdiction the Court may have to try and decide cases. Congress may give or it may take away jurisdiction to pass upon an Act of Congress, or to try any other kind of case on appeal.

Procedure

I, therefore, suggest that the Congress stand squarely on its own unqualified powers and use them. This can be done in either of two ways, or courses of procedure. Either will be definitely effective to curb the unconstitutional actions of the Supreme Court and the lower courts in nullifying the will of the people as expressed in Acts of Congress.

The Congress, exercising the powers expressly granted it by Article III, Section 2, may pass an act amending its own Judiciary Acts, which govern the courts. By appropriate provisions it may:

First, take away from the lower or trial courts all jurisdiction to try and decide cases in which the constitutionality of an Act of the Congress on any subject enumerated in Article I, Section 8, is raised or challenged;

Second, take from the Supreme Court appellate jurisdiction to try and decide, on appeal, any case in which the constitutionality of an Act of Congress on any subject enumerated in Article I, Section 8, is raised or challenged;

Third, authorize and direct federal district courts to exercise jurisdiction and by appropriate decrees and writs give effect to such Acts of the Congress against attempted judicial or legislative interference or restraints by the states.

This will protect such legislation as the National Labor Relations Act and the Social Security Act from further court action on cases now pending. Such procedure by the Congress will safeguard future legislation on the legislative subjects defined in Article I, Section 8.

An effective alternative course or procedure would be for the Congress to include in each act on these subjects a safety-clutch provision taking from trial courts and from the Supreme Court jurisdiction to try and decide any case in which the constitutionality of the particular act is questioned or challenged.

Amending the Judiciary Acts is clearly the way to most effectively and comprehensively, by one act of Congress, dispose of this conflict between the Congress and the courts. But the alternative course suggested would also safeguard the powers of the Congress.

Precedent is not needed for such action by the Congress; the Congress is not governed by precedent. Its authority is found in the plain and easily understood provisions of the Constitution. These are expressed in language of rare simplicity and brevity. But, if a precedent is desired, it exists. In a very important case the constitutionality of an Act of Congress was questioned. It went to the Supreme Court. While it was pending for decision in that Court, the Congress acted to protect its own legislation. It passed an act taking away the Court's jurisdiction to pass on the question. The Supreme Court recognized the superior powers and authority of the Congress and bowed to its action by dismissing the case.

Such action by the Congress will in no manner affect the civil liberties provisions of the Constitution. They are not legislative subjects. The Congress is expressly forbidden to abridge these rights. They are beyond the reach of the Congress, the courts and the President, except that the Executive and the courts are responsible for their enforcement.

It would also be a wise and practical procedure or practice for Congress in its enactments on social and economic subjects to declare public policy, not on an emergency basis, but for fundamental reasons. Such declarations by the Congress should contain direct references to the constitutional provisions under which it acts, such as the commerce, general welfare or other provision. Nor need an act necessarily be based on a single provision. Obviously, for example, the National Labor Relations Act and some others are authorized by both the commerce and welfare clauses. Another such instance is the AAA.

It is a mistake to believe that the Constitution created a judicial power superior to legislative and executive powers. It did nothing of the kind. But the courts have misled many into believing this by a process of interpretation based upon the Marshal doctrine of judicial supremacy. But this is a mere doctrine. It has no constitutional sanction.

Division of Powers

The President's executive powers are independent of the Congress and the courts.

The Congress in its final powers is independent of the Executive and the courts. The Constitution placed only one limitation on the powers of the Congress to legislate on subjects specified in Section 8 of Article I. It gave to the President, not to the Supreme Court, a veto power. But even this limitation is qualified and may be lifted in any instance of presidential veto by a two-thirds vote of the Congress.

The Supreme Court, however, possesses no such broad independent position, except only in cases involving "ambassadors, other public ministers and consuls, and those in which a state shall be a party,..." The Court has no jurisdictional powers or authority in any other class of cases except such as the Congress may give it.

The Congress is also final judge of the qualifications of Supreme Court judges. It confirms, or refuses to confirm, on its own sole discretion, nominations by the President of the members of the Court. The Congress alone has power to impeach and remove these judges. It may also impeach a President.

Obviously the Constitution intended, as it actually provides, that the Congress, elected by the people, shall have all legislative powers, and shall also have the exclusive authority to remove, on constitutional grounds of course, the heads of the other two branches of government.

Interpretation of constitutional and statutory law is of three kinds:

- a. Legislative
- b. Executive or administrative
- c. Judicial

When exclusive powers have been expressly granted to a branch of the government, that branch has exclusive authority to interpret those powers with which it has been entrusted.

The Congress, for example, has sole power and responsibility to provide for the common defense. What is necessary provision to insure the common defense is for the Congress to decide. How that defense is provided the Congress determines. The Congress interprets its own powers and exercises its own discretion. That discretion is final. So it is with other legislative powers, such as the power to tax, to coin and regulate the value of money, to regulate commerce and to provide for the general welfare.

The President interprets those executive powers which have been granted to him by the Constitution. These powers cannot be taken from him by interpretation placed on them by the Congress or by the Court.

The same rule applies to the Supreme Court. In cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party, the Court is given exclusive authority by the Constitution. It interprets its own powers in such cases, even though in all other cases it has only such jurisdictional powers, and consequently only such powers of interpretation, as the Congress may grant to it.

Not even an abuse of its constitutional powers and discretion by one branch of the government will authorize either of the other two to usurp or review that authority and discretion. Neither the President nor the Court has any legislative authority. The Congress and the Court have no executive powers. Nor have the Congress and the President any judicial powers. The constitutional powers separately granted to each branch are distinct, exclusive and final.

The Constitution does provide remedies for abuse of powers granted to each of the three branches of government. For abuse of legislative powers the remedy is a review by the electorate, at frequent elections. For abuse of executive powers the remedy is also a review by the electorate at frequent elections, and in a proper case by impeachment. For abuse of judicial powers the Congress may impeach the judges. These are the only remedies, but they are quite adequate. These separated legislative, executive and judicial powers are essential to a balanced government by democratic processes.

The Congress is the sole legislative body; its members are elective and responsible only to the electorate. It is the instrument by which the people exercise the democratic process of law-making. Stoppage of this process by courts or otherwise is to substitute arbitrary unconstitutional acts for constitutional democratic authority.

Definition of Commerce

Another step the Congress should now take is to interpret and define the word "commerce" as used in the Constitution, for legislative purposes. Notwithstanding academic definitions, the question as to what constitutes "commerce" is finally a

question of fact. Book definitions of the word are broad; they were comprehensive when the Constitution was adopted and time has not narrowed them. Only the courts have trimmed and limited the meaning of the word. "Commerce" means, of course, "trade", "exchange of goods and property". It also means "reciprocal transactions", "association", "intercourse". These definitions obviously include every kind of mutual business transaction, purchase of materials and contracts of employment in production, as well as in the transportation and distribution of products or commodities. These transactions are commonly understood to be, and in the actual business life of the nation are, commerce. Nevertheless the Supreme Court has said that the function of production by manufacture, agriculture and mining is not commerce.

Production is a process which occurs by combining and using capital, labor, materials, power and management. The employment of all these elements or factors in manufacture, agriculture and mining is necessary and constant. Moreover commerce characterizes every step and act in the employment of these things. The object of their combination and use in production is commerce. Production flows from transactions which in themselves are commerce and from acts which, whether manual or mechanical or both, depend upon one or more commercial transactions. Commerce generates production, from which flows ever-increasing streams of new commerce, transportation and distribution to serve consumption and use.

Who shall find and declare the fact as to what constitutes "commerce" as the word is used in the Constitution? Congress is the sole authority under the Constitution to legislate on that subject. If doubt has been cast on the meaning of the word, the Congress should make a finding as to what acts and facts constitute "commerce", and interpret and define its meaning, just as it interpreted and defined the meaning of the words "intoxicating liquors" under the prohibition amendment. That amendment applied to "intoxicating liquors" but did not define them. Congress did define them, and the courts accepted the definition. The Constitution does not give the courts any legislative authority over commerce, but does vest that power solely in the Congress. The Congress should, therefore, make a finding of fact and a definition of the word for legislative purposes, and forbid the courts to review it.

I suggest a definition which follows closely, with some expansion of the language, a definition proposed by Mr. Maurice Leon, and which has been the subject of quite wide publication and comment:

"Commerce among the several states, under Section 8, Article I of the Constitution of the United States, is hereby defined to apply to and include every transaction relating to the production (including but without limitation agriculture, manufacture or mining), processing, refining, transportation and distribution of any commodity or merchandise of any kind, use of which is not limited to the state in which it is produced, or use of which occurs in more than one state, whether or not such transaction takes place within one or several states."

The proposed definition may need expansion or revision. It is suggested as one form of definition. The Congress may act by joint Senate and House resolution.

The President last year in a message to the Congress observed that it has the power to preserve its own prerogatives. Since then he has said that the New Deal legislative program can be carried out within the framework of the Constitution. That is a sound constitutional position. It remains for the Congress to act in some such manner as I have indicated, for the issue is not between the President and the Court but between the Congress and the Court.

Legislation which attempts to meet and satisfy the Court's views must conform to the Court's quite unconstitutional and impractical legal philosophy. Such acquiescence will defeat the flexible, comprehensive and practicable provisions of the Constitution and sound public policy.

Nor will such action as is suggested infringe "states rights" or stop the continued operation of the "due process" clause of the Constitution.

The Constitution does not reserve to the states any rights which they are powerless to exercise effectively. Wage rates, hours of work, child labor, living standards, farm markets, trade practices, all affect the national economy. They are nation-wide in the scope of their daily influence upon the nation's markets, credit and economic stability.

The "due process" clause is a procedural provision. The Congress, by legislation, defines due process procedure and the form of action to be observed to obtain "due process". If complaint is made by a citizen or corporation that he has not had "due process", then, and only then, does the Court act. And its function should be strictly limited to finding whether there has been "due process", i.e. statutory procedure. The Court's function is judicial, not legislative. "Due process" has been distorted by judicial interpretation into a legal refuge for many uneconomic and destructive financing and managerial abuses.

PSF: Supreme Ct.

Court Proposals

File
Personal

REVISED DRAFT OF SECTION I

1937

(Matters to be omitted in linetype;
matters to be added underlined)

PSF

SEC. 1. Section 215 of the Judicial Code of the United States is hereby repealed and reenacted to read as follows:

Section 215. The Supreme Court of the United States shall consist of a Chief Justice and eight associate justices, any six of whom shall constitute a quorum; provided, however, the number of justices may be temporarily increased by the appointment of an additional justice in the manner now provided for the appointment of justices, for each justice, including the Chief Justice, who at the time of the nomination has passed reached the age of seventy-five years, but not more than one appointment of an additional justice as herein provided shall be made in one for each calendar year, whether or not the nomination or appointment be actually made in said calendar year and when such additional justice, or justices, shall have been so appointed no vacancy shall be filled caused by the death, resignation or retirement of a justice, except the Chief Justice, unless the filling of such vacancy is necessary to maintain the number of members at not less than nine, or, unless, immediately prior to such death, resignation or retirement, the number of justices on the court who have reached seventy-five years of age is larger than the number of justices by which the Court then exceeds nine. The number of temporary appointments so made shall not, at any time, increase the total number of justices by more than two-thirds of the permanent membership of the Court. If the number of members of the Supreme Court is in excess of nine not less than two-thirds of the membership shall constitute a quorum. As used in this section, the term "justice" shall not include a justice who has retired from regular, active service.

PSF: Supreme Ct

EXPLANATION OF THE REVISED DRAFT OF SECTION I

Certain amendments in the proposed draft are necessary to ensure that section 1 will carry out the purposes intended. These amendments are interlined in the attached draft. These suggested amendments briefly provide:

(a) The insertion of the words "at the time of the nomination" makes it clear that there is no need for the appointment of additional justices unless justices over 75 still continue on the Court at the time the nomination is made.

(b) The expression "has reached the age of seventy-five years" is used to avoid the ambiguity in the expression "has passed the age of seventy-five years." It might possibly be argued that a justice has not passed 75 until he becomes 75 and a half years or possibly 76.

(c) The insertion of the words "for each calendar year (whether or not the nomination or appointment actually be made in said calendar year," makes it clear that an additional appointment shall not be lost because the confirmation of the appointment is delayed or because the nomination is not actually made in the calendar year in which the appointment was first authorized. The nomination of an additional justice might be unavoidably delayed beyond the calendar year because the Congress might not be in session or because a justice may only have become 75 in the last month or two of the calendar year. The President should not be under the pressure of haste in the making of appointments, nor should the Senate be in a position to make an appointment lapse by delaying its confirmation.

(d) It is necessary to make the insertion "unless immediately prior to such death, resignation or retirement from the court, the number

of justices who have reached seventy-five years of age is larger than the number of justices by which the court then exceeds nine" for the following reason. Without such qualification the advantages secured by the appointment of the additional justice may be lost. For example the additional justice may die a month after his appointment, and no successor could be appointed, although the court is composed exactly as it was before the additional justice was appointed. Or some other justice under 75 may die in the same calendar year, and no successor could be appointed, although the proportion of justices over 75 would then be as great as it was prior to the appointment of an additional justice. Or if a liberal justice over 75 like Mr. Brandeis should die, resign or retire, no successor could be appointed, and the liberal elements on the Court would be weakened.

(e) It is necessary to provide that "the term 'justice' shall not include a justice who has retired from regular, active service." Without such language it may be argued under the decisions of the Court that a retired justice is still a justice.

MEMORANDUM ON FEATURES OF PROPOSED PLAN

This plan will not add to the opportunity to liberalize the bench by filling normal vacancies through death, retirement or resignation. The effect of its provisions for shrinking back to nine in the present condition of the Court will probably work out practically as merely substituting one appointment a year under the "age principle" for the normal expectancy of one appointment a year by filling vacancies occasioned through resignation, retirement or death.

This raises very real practical risks over the next two years in view of the following facts:

(1) The cases which will come before the Court in the next and the succeeding year will be power cases (on which the present Court showed its teeth on the last decision day) and labor cases (Wagner Act and Black-Connery Bill) which the new statute providing for direct appeal will bring to the Court a year earlier than heretofore.

(2) After the passage of a Supreme Court statute, Hughes and Roberts will have no further incentive for shot-gun liberalism and are far more likely to be actuated by impulses of revenge.

(3) After any new judges have been appointed by this Administration, the Court will have become the Administration's "packed court" -- beyond criticism by the Administration.

Under such circumstances, the present form of the proposed provisions for shrinking the Court back to nine make them exceedingly dangerous because they may make it impossible to appoint a successor on the death, resignation or retirement of (a) "an additional justice" and/or (b) Brandeis, Cardozo,

Stone, or the successor to Van Devanter.

How real the risk is can be estimated from looking at an all too-likely hypothetical situation over the next two years.

With the appointment of Van Devanter's successor the Court will stand as follows:

Conservative

Hughes
Roberts
McReynolds
Sutherland
Butler

Liberal

Brandeis
Cardozo
Stone
Van Devanter's successor

That means that the addition of "additional justice number 1" before October 1st will only balance the court until January 1, 1938. With the pressure for shot-gun liberalism removed from Hughes it will not give the liberals a working majority.

Now suppose that in the interval from the opening of Court on October 1st to January 1, 1938, any one of Brandeis, Stone, Cardozo, Van Devanter's successor or "additional justice number 1", dies, resigns or retires. Under the language proposed his place could not be filled prior to January 1 -- and there will be a conservative majority on the Court.

Suppose no deaths, retirements or resignations happen until January 1, 1938. The Court will then stand:

Conservative

Hughes
McReynolds
Roberts
Sutherland
Butler

Liberal

Brandeis
Cardozo
Stone
Van Devanter's successor
additional justice #1
additional justice #2

The Court will then have a working liberal majority of one. But if either one or two of the liberals die, resign or retire their places cannot be filled and the Court goes back either to balance or a working conservative majority because the Court shrinks back to nine without allowance for the number of members still over 75, and no further justices can be appointed until additional justice #3 is appointed on January 1, 1939.

Even if Mr. Justice Sutherland should retire during 1938 there would thus be no assurance of a liberal majority during that 1938.

It seems very important that:

(1) The Court should reach its maximum liberal strength as quickly as possible because the crucial years for decisions under the New Deal are the next two when the statutes passed this year will be under adjudication.

(2) Because of the accusations of a packed Court and the necessity for public confidence in the new decisions, the liberal majorities should be as wide as possible as soon as possible.

Under such circumstances, it would seem that the Administration's supporters in Congress intended that the idea of one new judge a year for each judge over 75 should not be in substitution for but additional to the normal filling of vacancies in the Court occasioned by the death, retirement or resignation of any justice whether or not over 75.

PSF: Supreme Court
Robinson Draft
File
Personal

SEC. 1. Section 215 of the Judicial Code of the United States is hereby repealed and reenacted to read as follows:

Section 215. The Supreme Court of the United States shall consist of a Chief Justice and eight associate justices, any six of whom shall constitute a quorum; provided, however, the number of justices may be temporarily increased by the appointment of an additional justice, in the manner now provided for the appointment of justices, for each justice, including the Chief Justice, who has passed the age of seventy-five years, but no more than one appointment of an additional justice as herein provided shall be made in one calendar year, and when such additional justice, or justices, shall have been so appointed no vacancy shall be filled caused by the death, resignation or retirement of a justice, except the Chief Justice, unless the filling of such vacancy is necessary to maintain the number of members at not less than nine. The number of temporary appointments so made shall not, at any time, increase the total number of justices by more than two-thirds of the permanent membership of the court. If the number of members of the Supreme Court is in excess of nine not less than two-thirds of the membership shall constitute a quorum.

As soon as may be, and, in so far as possible, the territory of each circuit court of appeals shall have at least one member of the Supreme Court who, at the time of his appointment, shall be a bona fide legal resident of such territory. No appointment

PSF: Supreme Ct

of an additional justice, or to fill a vacancy, shall be made from the territory of any circuit court of appeals having a member of the Supreme Court who was a bona fide legal resident of such territory at the time of his appointment unless the number of members of the Supreme Court shall exceed the number of circuit courts of appeals.

SEC. 2. That Section 345 of Title 28 of the Code of Laws of the United States (section 238 Judicial Code) be amended to read as follows:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:

- (1) Section 29 of Title 15.
- (2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.
- (3) Section 380 of this title.
- (4) So much of section 47 of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.
- (5) Section 217 of Title 7. (Mar. 3, 1891, C. 517, section 5, 26 Stat. 827; Jan. 20, 1897, c. 68, 29 Stat. 492; Apr. 12, 1900, c. 191, section 35, 31 Stat. 85; Apr. 20, 1900, c. 339, section 86, 31 Stat. 158; Mar. 3, 1909, c. 269, section 1, 35 Stat. 838; Mar. 3, 1911, c. 231, sections, 238, 244, 36 Stat. 1157; Jan. 28, 1915, c. 22, section 2, 38 Stat. 804; Feb. 13, 1925, c. 229, section 1, 43 Stat. 938.)"

(6) When any judge, or court, of the United States issues any restraining order, decree, judgment or injunction prohibiting any Federal official, or employee, or Federal agency, or any other person or agency from carrying out the provisions of, or acting under the provisions of any Federal law, a motion may be made by the United States in the United States Supreme Court, or an appeal may be taken by the United States directly to the United States Supreme Court to dissolve, modify, reverse or affirm, as the case may be, such restraining order, decree, judgment or injunction. Reasonable notice of such motion, or appeal, shall be given the opposing party, or parties, in such action, or proceeding, by causing to be served upon him, or them, a notice of such motion, or appeal, and the notice with certificate of an officer authorized to execute it contained thereon shall be filed with such motion or appeal. Such motion, or appeal, shall be filed within ten days from the date of the entry of the restraining order, decree, judgment or injunction by the inferior court. When such motion, or appeal, is filed in the Supreme Court it shall be the duty of the clerk of that court to forthwith notify the clerk of the inferior court to forward immediately to the Supreme Court the entire record in the case. When the motion, or appeal, has been disposed of upon request by the inferior court the original papers shall be returned to the clerk of that court. When such motion, or appeal, is filed in the Supreme Court it shall be given preferential consideration over all other causes not of like nature. The right to make such motion, or take such an appeal, shall apply to restraining orders, decrees, judgments or injunctions heretofore, or hereafter, entered or rendered.

SECTION 3. (a) An additional judge of a court of the United States may be appointed, in the manner now provided by law, and to the same court, for each judge, appointed to hold his office during good behavior, who has passed the age of seventy-five years.

(b) The number of judges of any such court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. No more than judges shall be appointed thereunder, nor shall any judge be so appointed if such appointment would result in (1) 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 (2) 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) Three-fifths of the judges of each of the following courts shall constitute a quorum thereof: the United States Court of Appeals for the District of Columbia, the Court of Claims and the United States Court of Customs and Patent Appeals.

(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.

(e) As soon as may be the membership of each circuit court of appeals shall consist of one judge from each State included in the circuit and in the appointment of additional judges as herein provided, or in the filling of vacancies, no appointment shall be made from any State having a member of the court who is a bona fide legal resident of such State unless the number of judges exceed the number of states composing the circuit.

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; (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. 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,

(b) 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 in any territory or insular possession.

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

T.S.F. Supreme Court

B
Two years ago the welfare of all our citizens in every section of the United States was endangered by increasing bankruptcies and bank failures. In the short space of the previous three and one half years the purchasing power of the dollar had increased about sixty percent. This meant that debtors of all kinds, individuals, associations, institutions, corporations, municipal, county, state governments and the Federal Government itself, were being called on to pay their creditors in currency worth sixty per cent more in purchasing power than the money which had been loaned to them.

When the debts were originally incurred, the lender expected to get back the same kind of dollars with approximately the same purchasing power that he had loaned. The borrower expected to pay back the same kind of dollars with approximately the same purchasing power that he had borrowed. That was the essential understanding in every contract for the repayment of money loaned.

But on the day of my inauguration, any attempt to collect in substance one hundred and sixty cents for every dollar owed would have brought universal bankruptcy.

Page two.

During the past twenty-three months we have moved rapidly toward establishing and maintaining a dollar of stable purchasing power. We have brought about present dollar value which is within twenty percent of what it was when the majority of debts, private and governmental, were incurred. All of our legislation of the past two years has been aimed at creating a currency of sound and standard purchasing power and then maintaining it.

In working toward our broad objective, the American currency was first taken off what is commonly known as the Gold Standard. Later, by Act of Congress and by Presidential Proclamation, it was restored to a gold standard on a different weight of gold. ξ

The decisions of the Supreme Court are, of course, based on the legal proposition that the exact terms of a contract must be literally enforced.

Let me for a moment analyze the effect of the present decision by giving a few simple illustrations:

First, in the case of the railroad bonds: Regardless of whether maturing bonds are owed by a bankrupt railroad or a solvent railroad, the bondholder is by this decision entitled to demand that the railroad pay

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him back, not the \$1000. which he paid for the bond, but - \$1690. Yet when he bought that bond he did not expect to get a clear net profit of \$690 in addition to the sum of \$1,000 which he had invested.

It is unconscionable, not only for the individual investor to reap such a wholly unearned profit, but also to impose such a burden on shippers, travelers and stockholders. In fact, if the letter of the law is so declared and enforced, it would automatically throw practically all the railroads of the United States into bankruptcy.

Second: The principle laid down today in the railroad case applies to every other corporation which has gold bonds outstanding; driving many another huge enterprise into receivership! It must be applied likewise to the obligations of towns, cities, counties, and states; and these units of government, now working bravely to meet and reduce their debts, would be forced into the position of defaulters.

Third: Consider the plight of the individual who is buying a home for himself and his family and paying each month a specified sum representing interest and reduction of the mortgage. If there is a gold clause in his mortgage - - and most mortgages contain that clause - - this decision would compel him to increase his payments 69% each month from now on, and

Page four.

perhaps to pay 6% more on some payments already made. Home owners, whether city workers or farmers could not meet such a demand.

Consider now the other two decisions relating to government obligations on gold notes, gold certificates and gold clause bonds. An old lady came to see me the other day. She is dependent heavily on the income from government bonds which she owns; and her total income is about \$800 a year. She owns \$10,000 of government gold clause bonds. Under this new decision she would be entitled to ask the Treasury for \$16,900. Being the right type of citizen, she volunteered to tell me that she does not consider herself entitled to more than the \$10,000 which she had saved and invested.

The actual enforcement of the gold clause against the Government of the United States will not bankrupt the Government. It will increase our national debt by approximately nine billions of dollars. It means that this additional sum must eventually be raised by additional taxation. In our present major effort to get out of the depression, to put people to work, to restore industry and agriculture, the literal enforcement of this opinion would not only retard our efforts, but would put

Page five.

the Government and 125,000,000 people into an infinitely more serious economic plight than we have yet experienced.

Finally, I again call attention to the fact that the total of debts secured by contracts containing a gold clause amounts to at least one hundred billion dollars which is a very large proportion of our total property value of all kinds. To meet this contract debt, there exists in the United States a total of about eight and one half billion dollars of gold and in all the rest of the world -- Europe, Asia, Africa, Australasia and the Americas -- there is not more than twelve billions of dollars in gold.

I do not seek to enter into any controversy with the distinguished members of the Supreme Court of the United States who have participated in this (majority) decision. They have decided these cases in accordance with the letter of the law as they read it. But it is appropriate to quote a sentence from the First Inaugural Address of President Lincoln:

"At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal".

Page six.

It is the duty of the Congress and the President to protect the people of the United States to the best of their ability. It is necessary to protect them from the unintended construction of voluntary acts, as well as from intolerable burdens involuntarily imposed. To stand idly by and to permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion would so imperil the economic and political security of this nation that the legislative and executive officers of the Government must look beyond the narrow letter of contractual obligations, so that they may sustain the substance of the promise originally made in accord with the actual intention of the parties.

For value received the same value should be repaid. That is the spirit of the contract and of the law. Every individual or corporation, public or private, should pay back substantially what they borrowed. That would seem to be a decision in accordance with the Golden Rule, with the precepts of the Scriptures, and the dictates of common sense.

In order to attain this reasonable end, I shall immediately take such steps as may be necessary, by proclamation and by message to the Congress of the United States.

Page seven.

In the meantime, I ask every individual, every trustee, every corporation and every bank to proceed on the usual course of their honorable and legitimate business. They can rest assured that we shall carry on the business of the country tomorrow just as we did last week or last month, on the same financial basis, on the same currency basis, and in the same relationship of debtor and creditor as before.

file

PSF: Supreme Court

THE NEW COURT BILL

The original court bill (S. 1392) was recommitted to the Senate Committee on the Judiciary with instructions to that Committee to report a bill for the reform of the judiciary within 10 days. The country awaited with bated breath the results of the Committee's labors, assuming that we would have before us for consideration some definite proposals which would materially improve the organization of the Federal judiciary, eliminate some of the technicalities and delays, expedite the transaction of business, and help do away with congestion.

When the new measure was reported out, after everyone was given to understand that epoch-making reforms were being drafted behind the closed doors of the Committee, we immediately turned to the examination of the outcome of its labors. The puny product that resulted from the prodigious efforts of this group was a grave disappointment and convinced everyone that the members of the Committee are either unwilling or unable to devise real improvements.

In his message to Congress, the President on February 5th recommended the adoption of measures to eliminate congestion of the calendars of the Federal courts; 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; to furnish the Supreme Court practical assistance in supervising the conduct of business in the lower courts; and to eliminate the inequality,

uncertainty and delay now existing in the determination of constitutional questions involving Federal statutes. The Attorney General in his letter to the President which was annexed to the President's message pointed out that "delay in the administration of justice is the outstanding defect of our Federal judicial system." He further stated:

"The evil is a growing one. The business of the courts is continually increasing in volume, importance, and complexity. The average case load borne by each judge has grown nearly 50 percent since 1913, when the District courts were first organized on their present basis."

The Attorney General further called attention to the fact that the mere creation of new judicial positions in specific circuits or districts would not be satisfactory. He said:

"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."

The Attorney General concluded by stating that "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."

Let us now turn to the bill framed by the Committee. In form it is in the nature of an amendment to the so-called Summers Bill (H. R. 2260) which would have permitted the Attorney General, as a matter of right, to be heard in private litigation involving the constitutionality of acts of Congress. The amendment wipes out the Summers Bill and substitutes a different measure dealing with the following points:

- (1) A provision for direct appeals from the district courts to the Supreme Court in certain cases involving the constitutionality of acts of Congress.
- (2) A provision for three-judge courts in suits to enjoin the enforcement of Federal statutes on the ground of alleged unconstitutionality.
- (3) A provision for an increase in the subsistence allowance of judges when away from their home circuits or districts to \$10.00 a day.
- (4) A provision whereby the Attorney General, in certain instances and under certain limitations may intervene in cases involving the constitutionality of acts of Congress.
- (5) A provision for slight, insignificant changes in the present law permitting assignment of district judges away from their districts.

The first three points require but little discussion and may be quickly disposed of.

The first provision would permit the Government in all cases to which it is a party, or to which it has been permitted to become a party and in which an act of Congress has been held unconstitutional, to appeal directly from the district court to the Supreme Court, skipping the circuit court of appeals. On this point, the Bill would restore the law as it existed prior to the Act of February 13, 1925.

The second provision prescribes three-judge courts for the determination of suits to enjoin the enforcement of a Federal statute on the ground of its alleged unconstitutionality. This is no novelty, for three-judge courts are now provided for the determination of such cases involving the constitutionality of a State statute.

All that would be required is to interpolate in the existing statute on the subject (U. S. C, Title 28, sec. 380) the words "or the United States" after the word "state" on each occasion in which it occurs in the first sentence of the Act.

The third provision is to increase the subsistence allowance of Federal judges when on duty away from their home circuits or districts. No one objects to this.

The heart of the bill is in the fourth and fifth points. The fourth relates to permitting the Government to be heard under certain conditions in private litigation involving the constitutionality of Federal statutes.

The reform which the President's ^{was} plan proposed involved the granting to the Government of the absolute right to be heard in private litigation in which the validity of a Federal statute was challenged. It was deemed of the highest importance that private

litigants, as they have frequently done of late, should not be permitted to litigate the constitutionality of the law of the land with the Government standing by as an idle and helpless spectator. The President's plan required that in such instances the Attorney General be notified and that the Government be authorized, without becoming a party to the suit, to be heard, to present evidence and to make arguments.

The Committee Bill approaches this difficult problem in the most extraordinary fashion. The heart of Section 1 of the Bill is found in these words:

"The Court shall upon a showing by the Attorney General that the United States has a legal interest, or may have a probable interest, permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the sole question of the constitutionality of such Act. In any such suit or proceeding the United States shall be subject to the applicable provisions of the law, have the rights and liabilities of a party to the extent necessary for a proper presentation of the facts, and law relating to the constitutionality of such Act."

It will thus be seen that the amendment completely devitalizes and defeats the original purpose of the ~~President's~~ plan. It further appears that in order to secure a hearing, the Attorney General must make "a showing" that the United States "has a legal interest or may have a probable interest, etc." The slightest reflection indicates that this does not give the Government any right whatsoever that it does not already possess. Indeed the Government or any private individual, under existing law, has a

right to approach the Federal Court and ask to be made a party upon the showing that it has "a legal interest or may have a probable interest" in the matter under consideration.

The difficulty heretofore has been that in questions involving the validity of a statute raised in litigation in which the Government was not a party, it was impossible to show a legal interest which the courts would recognize. For this reason the President's plan made it mandatory that the Government should have the right to be heard, to present evidence where the constitutionality of a statute was involved, upon the theory that the Government is deeply interested in the maintenance of the laws enacted by the Congress and that such laws should not be stricken down by any court without a hearing granted to the Government.

Under the President's plan the Government would have a right to intervene. Under the substitute plan the Government has no right to intervene unless it is able to make a showing, which manifestly it is unable to make. The bill is a heartless betrayal of a vital interest of the people of our country.

The section referred to goes still further and proceeds, by implication at least, to cut down the power of the Government rather than to extend it because it provides that if the Government is fortunate enough to be able to participate in such a litigation it may present evidence and argument "upon the sole question of constitutionality of such Act." Under existing law, if the Government is able to become a party to the litigation it would be entitled to be heard

not only on the constitutionality of such Statute, but upon any other question affecting the rights or interest of the United States.

The futility of the Bill in this respect may be demonstrated by a consideration of the proceeding brought in the Federal Court of Baltimore to test the constitutionality of the Public Utility Holding Company Act. Government counsel was permitted to appear in the capacity of amicus curiae and was able to expose the collusive character of the litigation, thus demonstrating the existence of what may properly be called a conspiracy to secure an adjudication from the courts on the constitutionality of a statute in a case where both parties were friendly and there was no real opposition between them. In that case eminent counsel, retained to argue in support of the unconstitutionality of the statute, formally represented a client whom he had never met until he was introduced to him in the court room upon the argument. All this was shown by Government counsel as amicus curiae. This bill, however, would limit Government counsel, in such cases as they were permitted to intervene, to present evidence and argument upon the sole question of constitutionality. The Committee in dealing with these matters has shown a complete disregard of the issues involved, and its action constitutes a complete failure to recognize and cure the evil which it has sought to correct.

The fifth branch of the present proposal relates to assigning district judges temporarily away from their home districts. No such provision is included in respect of circuit judges in spite of the fact that the circuit courts of appeal are frequently in need of

similar relief. Under existing law (Section 13 of the Judicial Code, U. S. Code, Title 28, Se. 17) the Senior Circuit Judge may assign a district judge of any district within the circuit to act temporarily as district judge in any other district in the same circuit. The Chief Justice of the United States may assign a district judge to hold district court in another circuit with the consent of the Senior Circuit Judges of both circuits concerned. It is proposed to re-enact this law with hardly any change, in spite of the fact that it has never proved adequate in practice. No one person has been charged with the duty of keeping in touch with the various Districts to determine whether or not they need assistance and to ascertain what judges were free to serve temporarily outside of their districts. Many judges have not been disposed to accept such assignments. The assistance gained from the operation of this law has been but sporadic and inadequate.

If you will turn to pages 4 and 5 of the report of the Committee, ironically termed the "Reform of Judicial Procedure" you will find the section in question. It is a verbatim reprint of Section 13 of the Judicial Code except in the following particulars.

- A. The word "necessary" appearing before the word "absence" has been deleted.

Under the existing Judicial Code, therefore, the section was applicable whenever any district judge, by reason of "any disability or necessary absence" is unable to perform his duties. Under the revision, the word "necessary" disappears and apparently any absence, whether necessary or unnecessary, brings the statute into being. The far sweep-

ing consequence of this change may well be imagined.

B. The word "may" as appears in two places in the existing law, has been deleted and the word "shall" inserted.

In one place the original language was that

"the Senior Circuit Judge may, if in his judgment the public interest requires", designate a district judge to serve temporarily away from his home district elsewhere within the circuit.

In another place the original law provided that

"the Chief Justice may, if in his judgment the public interest so requires", assign a district judge to serve temporarily in a district located in another circuit.

In each instance the word "shall" has been substituted for the word "may".

What effect the deletion of the word "may" and the substitution of the word "shall" was supposed to have we leave to the Committee to explain.

Under existing law the Judge may do a certain thing if in his judgment the public interest so requires, and under the alteration he shall do a certain thing if, in his judgment, the public interest so requires. It is, of course, manifest that the two sentences mean precisely the same thing. In other words, the change is not a change at all. It alters a word but leaves the meaning unaltered.

C. The only other change is at the end of the Section where it is required that any assignments and designations made under the Statute shall be filed in the minutes of the Supreme Court, —

a perfectly innocuous provision.

The net result of all the foregoing falderal is that we are just where we started ~~is~~ and not a peg's advance has been made. Not a problem has been solved. Not a thing has been done except to recommend the re-enactment of existing law. If the whole performance was not so preposterous, it would be laughable in the extreme.

The necessity of a real flexibility in our judicial system to meet the needs of the various localities as they arise is totally ignored. Even the alleged understanding between certain members of the Committee has not been carried out, for one of the objects was to provide for an increase in the judicial personnel where need exists. Instead of meeting the need, we are told in the Report of the Committee that the Attorney General in collaboration with the Judicial Conference is to be requested to report to the Congress at its next session as to the state of the dockets at the places where additional judges

are needed. The Committee says that "it is not, at the present time, in possession of sufficient information as to the conditions of the dockets, or the congestion of business in the various districts and circuits throughout the United States, to provide in a single bill, for the creation of such necessary additional judges as conditions may warrant or authorize."

Full information as to the state of the dockets in each of the districts is in the possession of the Department of Justice, and is available to the Congress for the asking. Last March one of the members of the Judiciary Committee sent out a letter to the senior judge of each district and gathered information on this subject on his own account. If sufficient information is not now available, it never will be. And yet we are told that needed additions to the judicial personnel must be postponed for another year.

The defect in the existing system which the President's plan sought to meet, had to do with congestion in the Federal courts. It is acknowledged that congestion exists. It has always been known and only extremists have denied it. It is refreshing to find that the Committee Report acknowledges that here is an evil to be dealt with. The President's plan proposed to recognize the obvious fact that congestion is a variable factor. It may exist for a time at one place and then be cleared up, only to reappear in another. It is manifestly unscientific to appoint a permanent judge to clear up a temporary congestion. In some districts congestion is habitual, in others it is temporary. If a judge is appointed for life to clear up a temporary condition, what function will he perform, after that purpose is achieved? What is needed is flexibility. What is needed is to be able in some effective, administrative

fashion to shift judges from the places where they are inactive to the places where the business of the courts is accumulated. To state this proposition is to state a proposition so obvious, so self-evident that it is amazing that any intelligent person has been found to deny it. The President's plan dealt with this question in very effective fashion, - it provided for a flexible system. It made provisions for the moving of judges from one place to another, so that the business of the Federal courts might be promptly attended to. It safe-guarded these measures by providing for a Proctor, who would study the condition of judicial business, keep constantly abreast of the situation, and advise the Chief Justice who was to have the power to issue the necessary orders. The system was understandable, reasonable, and received the approval of the American Bar Association in its referendum vote on the question. The Committee, however, abandons the simple and workable proposal and hands us, as if it were new, an already existing provision of the law reenacted and unmodified in any essential manner.

The suggestion has been made that any attempt to alter the report of the Committee would be a breach of faith in view of the alleged understanding that someone had with somebody. It is inconceivable, however, that any one, at any time, could have contemplated or foreseen such a wretched performance as the Committee bill. Even if the understanding existed, it must have been an understanding that there would be tangible results and not such a preposterous product as has been put forward with the claim of compliance with an understanding.

There is said to be in existence a memorandum made by a Senator reading as follows:

"No change in the Supreme Court. No Proctor. No roving judges. New judges on the basis of need, not age."

The product of the Committee is a complete violation of the alleged agreement, even if it existed. It does not deal at all with new judges on the basis of need, or any other basis. It side-tracks the entire question. It is inept and ineffective, even to the point of being ludicrous.

The Committee does not favor a blanket bill for additional judges. It prefers the old way of appointing them and so postpones the whole matter to the next session of the Congress. This is an amazing conclusion in view of the fact that the Court Bill was under consideration by the Senate Judiciary Committee for a period of five months. The Committee had available to it, not only the reports of the Judicial Conference, but an abundance of material concerning congestion of the various courts prepared by the Attorney General.

Manifestly the Committee, in dealing with this subject, if it thought upon it at all and that is to be assumed, ran into the difficulties which are always inherent in providing a number of additional judges for specified districts and circuits. Practical difficulties in such matters immediately accumulate. Jealousies and differences of opinion arise and great difficulties are encountered.

All of this the President's plan easily avoided by making the appointments automatic whenever certain given conditions arise. It was one of the merits of the President's plan that it avoided the very difficulty which has now bogged down the work of the Committee. The report of the Committee as a whole is a pitiable fiasco and should not receive the approval of the Senate.

The mountain labored and brought forth a mouse. The entire nation awaits much needed reform in our judicial system. The people ask for bread and we give them a stone. Better no bill at all than this abortive attempt to introduce a few minor detailed improvements in judicial procedure in answer to a demand for real reform.

Sen. Robinson's new bill

PSF: Supreme Ct.
For Mr. Roosevelt
care of Miss Bur and.

PSF Supreme Court

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SEC. 1. Section 215 of the Judicial Code of the United States is hereby repealed and reenacted to read as follows:

Section 215. The Supreme Court of the United States shall consist of a Chief Justice and eight associate justices, any six of whom shall constitute a quorum; provided, however, the number of justices may be temporarily increased by the appointment of an additional justice, in the manner now provided for the appointment of justices, for each justice, including the Chief Justice, who has passed the age of seventy-five years, but no more than one appointment of an additional justice as herein provided shall be made in one calendar year, and when such additional justice, or justices, shall have been so appointed no vacancy shall be filled caused by the death, resignation or retirement of a justice, except the Chief Justice, unless the filling of such vacancy is necessary to maintain the number of members at not less than nine. The number of temporary appointments so made shall not, at any time, increase the total number of justices by more than two-thirds of the permanent membership of the court. If the number of members of the Supreme Court is in excess of nine not less than two-thirds of the membership shall constitute a quorum.

As soon as may be, and, in so far as possible, the territory of each circuit court of appeals shall have at least one member of the Supreme Court who, at the time of his appointment, shall be a bona fide legal resident of such territory. No appointment

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of an additional justice, or to fill a vacancy, shall be made from the territory of any circuit court of appeals having a member of the Supreme Court who was a bona fide legal resident of such territory at the time of his appointment unless the number of members of the Supreme Court shall exceed the number of circuit courts of appeals.

SEC. 2. That Section 345 of Title 28 of the Code of Laws of the United States (section 238 Judicial Code) be amended to read as follows:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:

(1) Section 29 of Title 15.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 300 of this title.

(4) So much of section 47 of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7. (Mar. 3, 1891, c. 517, section 5, 26 Stat. 827; Jan. 20, 1897, c. 68, 29 Stat. 492; Apr. 12, 1900, c. 191, section 35, 31 Stat. 85; Apr. 20, 1900, c. 339, section 86, 31 Stat. 158; Mar 3, 1909, c. 269, section 1, 35 Stat. 838; Mar. 3, 1911, c. 231, sections, 233, 244, 36 Stat. 1157; Jan. 23, 1915, c. 22, section 2, 38 Stat. 804; Feb. 13, 1925, c. 229, section 1, 43 Stat. 933.)"

(6) When any judge, or court, of the United States issues any restraining order, decree, judgment or injunction prohibiting any Federal official, or employee, or Federal agency, or any other person or agency from carrying out the provisions of, or acting under the provisions of any Federal law, a motion may be made by the United States in the United States Supreme Court, or an appeal may be taken by the United States directly to the United States Supreme Court to dissolve, modify, reverse or affirm, as the case may be, such restraining order, decree, judgment or injunction. Reasonable notice of such motion, or appeal, shall be given the opposing party, or parties, in such action, or proceeding, by causing to be served upon him, or them, a notice of such motion, or appeal, and the notice with certificate of an officer authorized to execute it contained thereon shall be filed with such motion or appeal. Such motion, or appeal, shall be filed within ten days from the date of the entry of the restraining order, decree, judgment or injunction by the inferior court. When such motion, or appeal, is filed in the Supreme Court it shall be the duty of the clerk of that court to forthwith notify the clerk of the inferior court to forward immediately to the Supreme Court the entire record in the case. When the motion, or appeal, has been disposed of upon request by the inferior court the original papers shall be returned to the clerk of that court. When such motion, or appeal, is filed in the Supreme Court it shall be given preferential consideration over all other causes not of like nature. The right to make such motion, or take such an appeal, shall apply to restraining orders, decrees, judgments or injunctions heretofore, or hereafter, entered or rendered.

SECTION 3. (a) An additional judge of a court of the United States may be appointed, in the manner now provided by law, and to the same court, for each judge, appointed to hold his office during good behavior, who has passed the age of seventy-five years.

(b) The number of judges of any such court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. No more than judges shall be appointed thereunder, nor shall any judge be so appointed if such appointment would result in (1) 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 (2) 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) Three-fifths of the judges of each of the following courts shall constitute a quorum thereof; the United States Court of Appeals for the District of Columbia, the Court of Claims and the United States Court of Customs and Patent Appeals.

(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.

(e) As soon as may be the membership of each circuit court of appeals shall consist of one judge from each State included in the circuit and in the appointment of additional judges as herein provided, or in the filling of vacancies, no appointment shall be made from any State having a member of the court who is a bona fide legal resident of such State unless the number of judges exceed the number of states composing the circuit.

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; (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, stationary, 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,

(b) 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 in any territory or insular possession.

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