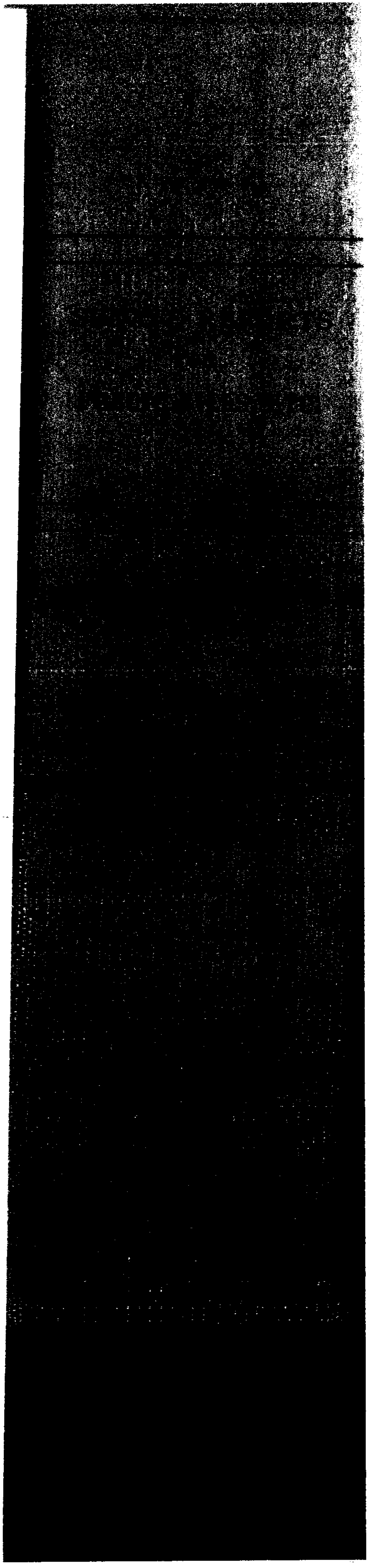

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REORGANIZATION OF THE FEDERAL JUDICIARY

JUNE 7 (calendar day, JUNE 14), 1937.—Ordered to be printed

Mr. MCCARRAN (for Mr. KING), from the Committee on the Judiciary, submitted the following

ADVERSE REPORT

[To accompany S. 1392]

The Committee on the Judiciary, to whom was referred the bill (S. 1392) to reorganize the judicial branch of the Government, after full consideration, having unanimously amended the measure, hereby report the bill adversely with the recommendation that it do not pass.

The amendment agreed to by unanimous consent, is as follows:

Page 3, lines 5, 8, and 9, strike out the words "hereafter appointed."

SUMMARY OF PROPOSED MEASURE

The bill, as thus amended, may be summarized in the following manner:

By section 1 (a) the President is directed to appoint an additional judge to any court of the United States when and only when three contingencies arise:

(*a*) That a sitting judge shall have attained the age of 70 years;

(*b*) That he shall have held a Federal judge's commission for at least 10 years;

(*c*) That he has neither resigned nor retired within 6 months after the happening of the two contingencies first named.

The happening of the three contingencies would not, however, necessarily result in requiring an appointment, for section 1 also contains a specific defeasance clause to the effect that no nomination shall be made in the case of a judge, although he is 70 years of age, has served at least 10 years and has neither resigned nor retired within 6 months after the happening of the first two contingencies, if, before the actual nomination of an additional judge, he dies, resigns, or retires. More-

over, section 6 of the bill provides that "it shall take effect on the 30th day after the date of its enactment."

Thus the bill does not with certainty provide for the expansion of any court or the appointment of any additional judges, for it will not come into operation with respect to any judge in whose case the described contingencies have happened, if such judge dies, resigns, or retires within 30 days after the enactment of the bill or before the President shall have had opportunity to send a nomination to the Senate.

By section 1 (b) it is provided that in event of the appointment of judges under the provisions of section 1 (a), then the size of the court to which such appointments are made is "permanently" increased by that number. But the number of appointments to be made is definitely limited by this paragraph. Regardless of the age or service of the members of the Federal judiciary, no more than 50 judges may be appointed in all; the Supreme Court may not be increased beyond 15 members; no circuit court of appeals, nor the Court of Claims, nor the Court of Customs and Patent Appeals, nor the Customs Court may be increased by more than 2 members; and finally, in the case of district courts, the number of judges now authorized to be appointed for any district or group of districts may not be more than doubled.

Section 1 (c) fixes the quorum of the Supreme Court, the Court of Appeals for the District of Columbia, the Court of Claims, and the Court of Customs and Patent Appeals.

Section 1 (d) provides that an additional judge shall not be appointed in the case of a judge whose office has been abolished by Congress.

Section 2 provides for the designation and assignment of judges to courts other than those in which they hold their commissions. As introduced, it applied only to judges to be appointed after the enactment of the bill. As amended, it applies to all judges regardless of the date of their appointment, but it still alters the present system in a striking manner, as will be more fully indicated later.

Circuit judges may be assigned by the Chief Justice for service in any circuit court of appeals. District judges may be similarly assigned by the Chief Justice to any district court, or by the senior circuit judge of his circuit (but subject to the authority of the Chief Justice) to any district court within the circuit.

After the assignment of a judge by the Chief Justice, the senior circuit judge of the district in which he is commissioned may certify to the Chief Justice any reason deemed sufficient by him to warrant the revocation or termination of the assignment, but the Chief Justice has full discretion whether or not to act upon any such certification. The senior circuit judge of the district to which such assignment will be made is not given similar authority to show why the assignment should not be made effective.

Section 3 gives the Supreme Court power to appoint a Proctor to investigate the volume, character, and status of litigation in the circuit and district courts, to recommend the assignment of judges authorized by section 2, and to make suggestions for expediting the disposition of pending cases. The salary of the Proctor is fixed at $10,000 per year and provision is made for the functions of the office.

Section 4 authorizes an appropriation of $100,000 for the purposes of the act.

Section 5 contains certain definitions.

Section 6, the last section, makes the act effective 30 days after enactment.

THE ARGUMENT

The committee recommends that the measure be rejected for the following primary reasons:

I. The bill does not accomplish any one of the objectives for which it was originally offered.

II. It applies force to the judiciary and in its initial and ultimate effect would undermine the independence of the courts.

III. It violates all precedents in the history of our Government and would in itself be a dangerous precedent for the future.

IV. The theory of the bill is in direct violation of the spirit of the American Constitution and its employment would permit alteration of the Constitution without the people's consent or approval; it undermines the protection our constitutional system gives to minorities and is subversive of the rights of individuals.

V. It tends to centralize the Federal district judiciary by the power of assigning judges from one district to another at will.

VI. It tends to expand political control over the judicial department by adding to the powers of the legislative and executive departments respecting the judiciary.

BILL DOES NOT DEAL WITH INJUNCTIONS

This measure was sent to the Congress by the President on February 5, 1937, with a message (appendix A) setting forth the objectives sought to be attained.

It should be pointed out here that a substantial portion of the message was devoted to a discussion of the evils of conflicting decisions by inferior courts on constitutional questions and to the alleged abuse of the power of injunction by some of the Federal courts. These matters, however, have no bearing on the bill before us, for it contains neither a line nor a sentence dealing with either of those problems.

Nothing in this measure attempts to control, regulate, or prohibit the power of any Federal court to pass upon the constitutionality of any law—State or National.

Nothing in this measure attempts to control, regulate, or prohibit the issuance of injunctions by any court, in any case, whether or not the Government is a party to it.

If it were to be conceded that there is need of reform in these respects, it must be understood that this bill does not deal with these problems.

OBJECTIVES AS ORIGINALLY STATED

As offered to the Congress, this bill was designed to effectuate only three objectives, described as follows in the President's message:

1. To increase the personnel of the Federal courts "so that cases may be promptly decided in the first instance, and may be given adequate and prompt hearing on all appeals";

2. To "invigorate all the courts by the permanent infusion of new blood";

3. To "grant to the Supreme Court further power and responsibility in maintaining the efficiency of the entire Federal judiciary."

The third of these purposes was to be accomplished by the provisions creating the office of the Proctor and dealing with the assignment of judges to courts other than those to which commissioned.

The first two objectives were to be attained by the provisions authorizing the appointment of not to exceed 50 additional judges when sitting judges of retirement age, as defined in the bill, failed to retire or resign. How totally inadequate the measure is to achieve either of the named objectives, the most cursory examination of the facts reveals.

BILL FAILS OF ITS PURPOSE

In the first place, as already pointed out, the bill does not provide for any increase of personnel unless judges of retirement age fail to resign or retire. Whether or not there is to be an increase of the number of judges, and the extent of the increase if there is to be one, is dependent wholly upon the judges themselves and not at all upon the accumulation of litigation in any court. To state it another way the increase of the number of judges is to be provided, not in relation to the increase of work in any district or circuit, but in relation to the age of the judges and their unwillingness to retire.

In the second place, as pointed out in the President's message, only 25 of the 237 judges serving in the Federal courts on February 5, 1937, were over 70 years of age. Six of these were members of the Supreme Court at the time the bill was introduced. At the present time there are 24 judges 70 years of age or over distributed among the 10 circuit courts, the 84 district courts, and the 4 courts in the District of Columbia and that dealing with customs cases in New York. Of the 24, only 10 are serving in the 84 district courts, so that the remaining 14 are to be found in 5 special courts and in the 10 circuit courts. (Appendix B.) Moreover, the facts indicate that the courts with the oldest judges have the best records in the disposition of business. It follows, therefore, that since there are comparatively few aged justices in service and these are among the most efficient on the bench, the age of sitting judges does not make necessary an increase of personnel to handle the business of the courts.

There was submitted with the President's message a report from the Attorney General to the effect that in recent years the number of cases has greatly increased and that delay in the administration of justice is interminable. It is manifest, however, that this condition cannot be remedied by the contingent appointment of new judges to sit beside the judges over 70 years of age, most of whom are either altogether equal to their duties or are commissioned in courts in which congestion of business does not exist. It must be obvious that the way to attack congestion and delay in the courts is directly by legislation which will increase the number of judges in those districts where the accumulation exists, not indirectly by the contingent appointment of new judges to courts where the need does not exist, but where it may happen that the sitting judge is over 70 years of age.

LOCAL JUSTICE CENTRALLY ADMINISTERED

Perhaps, it was the recognition of this fact that prompted the authors of the bill to draft section 2 providing for the assignment of judges "hereafter appointed" to districts other than those to which commissioned. Such a plan, it will not be overlooked, contemplates

the appointment of a judge to the district of his residence and his assignment to duty in an altogether different jurisdiction. It thus creates a flying squadron of itinerant judges appointed for districts and circuits where they are not needed to be transferred to other parts of the country for judicial service. It may be doubted whether such a plan would be effective. Certainly it would be a violation of the salutary American custom that all public officials should be citizens of the jurisdiction in which they serve or which they represent.

Though this plan for the assignment of new judges to the trial of cases in any part of the country at the will of the Chief Justice was in all probability intended for no other purpose than to make it possible to send the new judges into districts where actual congestion exists, it should not be overlooked that most of the plan involves a possibility of real danger.

To a greater and a greater degree, under modern conditions, the Government is involved in civil litigation with its citizens. Are we then through the system devised in this bill to make possible the selection of particular judges to try particular cases?

Under the present system (U. S. C., title 28, sec. 17) the assignment of judges within the circuit is made by the senior circuit judge, or, in his absence, the circuit justice. An assignment of a judge from outside the district may be made only when the senior circuit judge or the circuit justice makes certificate of the need of the district to the Chief Justice. Thus is the principle of local self-government preserved by the present system.

This principle is destroyed by this bill which allows the Chief Justice, at the recommendation of the Proctor, to make assignments anywhere regardless of the needs of any district. Thus is the administration of justice to be centralized by the proposed system.

MEASURE WOULD PROLONG LITIGATION

It has been urged that the plan would correct the law's delay, and the President's message contains the statement that "poorer litigants are compelled to abandon valuable rights or to accept inadequate or unjust settlements because of sheer inability to finance or to await the end of long litigation." Complaint is then made that the Supreme Court during the last fiscal year "permitted private litigants to prosecute appeals in only 108 cases out of 803 applications."

It can scarcely be contended that the consideration of 695 more cases in the Supreme Court would have contributed in any degree to curtailing the law's delay or to reducing the expense of litigation. If it be true that the postponement of final decision in cases is a burden on poorer litigants as the President's message contends, then it must be equally true that any change of the present system which would enable wealthy litigants to pursue their cases in the Supreme Court would result only in an added burden on the "poorer litigants" whose "sheer inability to finance or to await the end of long litigation" compels them "to abandon valuable rights or to accept inadequate or unjust settlements."

Of course, there is nothing in this bill to alter the provisions of the act of 1925 by which the Supreme Court was authorized "in its discretion to refuse to hear appeals in many classes of cases." The President has not recommended any change of that law, and the only amendment providing an alteration of the law that was presented to

the committee was, on roll call, unanimously rejected by the committee. It is appropriate, however, to point out here that one of the principal considerations for the enactment of the certiorari law was the belief of Congress that the interests of the poorer litigant would be served and the law's delay reduced if the Supreme Court were authorized to reject frivolous appeals. Congress recognized the fact that wealthy clients and powerful corporations were in a position to wear out poor litigants under the old law. Congress was convinced that, in a great majority of cases, a trial in a nisi prius court and a rehearing in a court of appeals would be ample to do substantial justice. Accordingly, it provided in effect that litigation should end with the court of appeals unless an appellant could show the Supreme Court on certiorari that a question of such importance was involved as to warrant another hearing by the Supreme Court. Few litigated cases were ever decided in which the defeated party thought that justice had been done and in which he would not have appealed from the Supreme Court to Heaven itself, if he thought that by doing so he would wear down his opponent.

The Constitution provides for one Supreme Court (sec. 1, art. III) and authorizes Congress to make such exceptions as it deems desirable to the appellate jurisdiction of the Supreme Court (sec. 2, art. III). One obvious purpose of this provision was to permit Congress to put an end to litigation in the lower courts except in cases of greatest importance, and, also, in the interest of the poorer citizen, to make it less easy for wealthy litigants to invoke delay to defeat justice.

No alteration of this law is suggested by the proponents of this measure, but the implication is made that the Supreme Court has improvidently refused to hear some cases. There is no evidence to maintain this contention. The Attorney General in his statement to the committee presented a mathematical calculation to show how much time would be consumed by the Justices in reading the entire record in each case presented on appeal. The members of the committee and, of course the Attorney General, are well aware of the fact that attorneys are officers of the Court, that it is their duty to summarize the records and the points of appeal, and that the full record is needed only when, after having examined the summary of the attorneys, the court is satisfied there should be a hearing on the merits.

The Chief Justice, in a letter presented to this committee (appendix C), made it clear that "even if two or three of the Justices are strongly of the opinion that certiorari should be allowed, frequently the other judges will acquiesce in their view, but the petition is always granted if four so vote."

It thus appears from the bill itself, from the message of the President, the statement of the Attorney General, and the letter of the Chief Justice that nothing of advantage to litigants is to be derived from this measure in the reduction of the law's delay.

QUESTION OF AGE NOT SOLVED

The next question is to determine to what extent "the persistent infusion of new blood" may be expected from this bill.

It will be observed that the bill before us does not and cannot compel the retirement of any judge, whether on the Supreme Court or any other court, when he becomes 70 years of age. It will be remembered that the mere attainment of three score and ten by a particular judge does not, under this bill, require the appointment of another. The man on the bench may be 80 years of age, but this bill will not authorize the President to appoint a new judge to sit beside him unless he has served as a judge for 10 years. In other words, age itself is not penalized; the penalty falls only when age is attended with experience.

No one should overlook the fact that under this bill the President, whoever he may be and whether or not he believes in the constant infusion of young blood in the courts, may nominate a man 69 years and 11 months of age to the Supreme Court, or to any court, and, if confirmed, such nominee, if he never had served as a judge, would continue to sit upon the bench unmolested by this law until he had attained the ripe age of 79 years and 11 months.

We are told that "modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business." Does this bill provide for such? The answer is obviously no. As has been just demonstrated, the introduction of old and inexperienced blood into the courts is not prevented by this bill.

More than that, the measure, by its own terms, makes impossible the "constant" or "persistent" infusion of new blood. It is to be observed that the word is "new", not "young."

The Supreme Court may not be expanded to more than 15 members. No more than two additional members may be appointed to any circuit court of appeals, to the Court of Claims, to the Court of Customs and Patent Appeals, or to the Customs Court, and the number of judges now serving in any district or group of districts may not be more than doubled. There is, therefore, a specific limitation of appointment regardless of age. That is to say, this bill, ostensibly designed to provide for the infusion of new blood, sets up insuperable obstacles to the "constant" or "persistent" operation of that principle.

Take the Supreme Court as an example. As constituted at the time this bill was presented to the Congress, there were six members of that tribunal over 70 years of age. If all six failed to resign or retire within 30 days after the enactment of this bill, and none of the members died, resigned, or retired before the President had made a nomination, then the Supreme Court would consist of 15 members. These 15 would then serve, regardless of age, at their own will, during good behavior, in other words, for life. Though as a result we had a court of 15 members 70 years of age or over, nothing could be done about it under this bill, and there would be no way to infuse "new" blood or "young" blood except by a new law further expanding the Court, unless, indeed, Congress and the Executive should be willing to follow the course defined by the framers of the Constitution for such a contingency and submit to the people a constitutional amendment limiting the terms of Justices or making mandatory their retirement at a given age.

It thus appears that the bill before us does not with certainty provide for increasing the personnel of the Federal judiciary, does not remedy the law's delay, does not serve the interest of the "poorer litigant" and does not provide for the "constant" or "persistent infusion of new blood" into the judiciary. What, then, does it do?

THE BILL APPLIES FORCE TO THE JUDICIARY

The answer is clear. It applies force to the judiciary. It is an attempt to impose upon the courts a course of action, a line of decision which, without that force, without that imposition, the judiciary might not adopt.

Can there be any doubt that this is the purpose of the bill? Increasing the personnel is not the object of this measure; infusing young blood is not the object; for if either one of these purposes had been in the minds of the proponents, the drafters would not have written the following clause to be found on page 2, lines 1 to 4, inclusive:

> *Provided*, That no additional judge shall be appointed hereunder if the judge who is of retirement age dies, resigns, or retires prior to the nomination of such additional judge.

Let it also be borne in mind that the President's message submitting this measure contains the following sentence:

> If, on the other hand, any judge eligible for retirement should feel that his Court would suffer because of an increase of its membership, he may retire or resign under already existing provisions of law if he wishes to do so.

Moreover, the Attorney General in testifying before the committee (hearings, pt. 1, p. 33) said:

> If the Supreme Court feels that the addition of six judges would be harmful to that Court, it can avoid that result by resigning.

Three invitations to the members of the Supreme Court over 70 years of age to get out despite all the talk about increasing personnel to expedite the disposition of cases and remedy the law's delay. One by the bill. One by the President's message. One by the Attorney General.

Can reasonable men by any possibility differ about the constitutional impropriety of such a course?

Those of us who hold office in this Government, however humble or exalted it may be, are creatures of the Constitution. To it we owe all the power and authority we possess. Outside of it we have none. We are bound by it in every official act.

We know that this instrument, without which we would not be able to call ourselves presidents, judges, or legislators, was carefully planned and deliberately framed to establish three coordinate branches of government, every one of them to be independent of the others. For the protection of the people, for the preservation of the rights of the individual, for the maintenance of the liberties of minorities, for maintaining the checks and balances of our dual system, the three branches of the Government were so constituted that the independent expression of honest difference of opinion could never be restrained in the people's servants and no one branch could overawe or subjugate the others. That is the American system. It is immeasurably more important, immeasurably more sacred to the people of America, indeed, to the people of all the world than the immediate adoption of any legislation however beneficial.

That judges should hold office during good behavior is the prescription. It is founded upon historic experience of the utmost significance. Compensation at stated times, which compensation was not to be diminished during their tenure, was also ordained. Those comprehensible terms were the outgrowths of experience which was deep-

seated. Of the 55 men in the Constitutional Convention, nearly one-half had actually fought in the War for Independence. Eight of the men present had signed the Declaration of Independence, in which, giving their reasons for the act, they had said of their king: "He has made judges dependent upon his will alone for their tenure of office and the amount and payment of their salaries." They sought to correct an abuse and to prevent its recurrence. When these men wrote the Constitution of their new Government, they still sought to avoid such an abuse as had led to such a bloody war as the one through which they had just passed. So they created a judicial branch of government consisting of courts not conditionally but absolutely independent in the discharge of their functions, and they intended that entire and impartial independence should prevail. Interference with this independence was prohibited, not partially but totally. Behavior other than good was the sole and only cause for interference. This judicial system is the priceless heritage of every American.

By this bill another and wholly different cause is proposed for the intervention of executive influence, namely, age. Age and behavior have no connection; they are unrelated subjects. By this bill, judges who have reached 70 years of age may remain on the bench and have their judgment augmented if they agree with the new appointee, or vetoed if they disagree. This is far from the independence intended for the courts by the framers of the Constitution. This is an unwarranted influence accorded the appointing agency, contrary to the spirit of the Constitution. The bill sets up a plan which has as its stability the changing will or inclination of an agency not a part of the judicial system. Constitutionally, the bill can have no sanction. The effect of the bill, as stated by the Attorney General to the committee, and indeed by the President in both his message and speech, is in violation of the organic law.

OBJECT OF PLAN ACKNOWLEDGED

No amount of sophistry can cover up this fact. The effect of this bill is not to provide for an increase in the number of Justices composing the Supreme Court. The effect is to provide a forced retirement or, failing in this, to take from the Justices affected a free exercise of their independent judgment.

The President tells us in his address to the Nation of March 9 (appendix D), Congressional Record, March 10, page 2650:

> When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress and to approve or disapprove the public policy written into these laws * * *.
>
> We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our courts we want a government of laws and not of men.

These words constitute a charge that the Supreme Court has exceeded the boundaries of its jurisdiction and invaded the field reserved by the Constitution to the legislative branch of the Government. At best the accusation is opinion only. It is not the conclusion of judicial process.