

Handout C: Franklin D. Roosevelt's Press Conference about the Composition of the Supreme Court, February 5, 1937

I have a somewhat important matter to take up with you today. And I am asking that this message of today be held in very strict confidence until the message is released in accordance with the wording of the release on the press copies that will be given to you in a few moments. It is also requested that nobody reveal what is said or the text of the material to any person outside of the employ, outside of those in your own organization, until the time of the release, until it is actually read in either the Senate or the House, whichever one reads it first. Copies will be given to you as you go out and don't anybody go out until that time...

As you know, for a long time the subject of constitutionality of laws has been discussed; and for a good many months now I have been working with a small group in going into what I have thought of as the fundamentals of the subject rather than those particular details which make the headlines.

In this review of the Federal Judiciary we have come to the very definite conclusion that there is required the same kind of reorganization of the Judiciary as has been recommended to this Congress for the Executive branch of the Government.

As a part of it, I have received from the Attorney General a letter which you will also get and of which I shall just touch the high spots. It is a part of the message.

My dear Mr. President:

Delay in the administration of justice is the outstanding defect of our federal judicial system. It has been a cause of concern to practically every one of my predecessors in office. It has exasperated the bench, the bar, the business community and the public.

He goes on and speaks of the fact that the litigant conceives the judge as one promoting justice through the mechanism of the Courts. He assumes that the directing power of the judge is exercised over its officers from the time a case is filed with the clerk of the court. He is entitled to assume that the judge is pressing forward litigation in the full recognition of the principle that "justice delayed is justice denied." It is a mockery of justice to say to a person when he files suit, that he may receive a decision years later. Under a properly ordered system rights should be determined promptly. The course of litigation should be measured in months and not in years.

Yet in some jurisdictions, the delays in the administration of justice are so interminable that to institute suit is to embark on a life-long adventure.

Many persons submit to acts of injustice rather than resort to the courts. Inability to secure a prompt judicial adjudication leads to improvident and unjust settlements. Moreover, the time factor is an open invitation to those who are disposed to institute unwarranted litigation or interpose unfounded defenses in the hope of forcing an

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adjustment which could not be secured upon the merits. This situation frequently results in extreme hardships. The small business man or the litigant of limited means labors under a grave and constantly increasing disadvantage because of his inability to pay the price of justice.

Statistical data—very carefully collected from every district—indicate that in many districts a disheartening and unavoidable interval must elapse between the date that issue is joined in a pending case and the time when it can be reached for trial in due course. These computations do not take into account the delays that occur in the preliminary stages of litigation or the postponements after a case might normally be expected to be heard.

The evil is a growing one. The business of the courts is continually increasing in volume, importance, and complexity. The average case load borne by each judge has grown nearly fifty percent since 1913, when the District Courts were first organized on their present basis. When the courts are working under such pressure it is inevitable that the character of their work must suffer.

The number of new cases offset those that are disposed of, so that the Courts are unable to decrease the enormous back-log of undigested matters. More than fifty thousand pending cases (exclusive of bankruptcy proceedings) overhang the federal dockets—a constant menace to the orderly processes of justice. Whenever a single case requires a protracted trial, the routine business of the court is further neglected. It is an intolerable situation and we should make shift to amend it.

Efforts have been made from time to time to alleviate some of the conditions that contribute to the slow rate of speed with which causes move through the Courts. The Congress has

recently conferred on the Supreme Court the authority to prescribe rules of procedure after verdict in criminal cases and the power to adopt and promulgate uniform rules of practice for civil actions at law in the District Courts. It has provided terms of Court in certain places at which federal Courts had not previously convened. A small number of judges have been added from time to time.

Despite these commendable accomplishments, sufficient progress has not been made. Much remains to be done in developing procedure and administration, but this alone will not meet modern needs. The problem must be approached in a more comprehensive fashion, if the United States is to have a judicial system worthy of the nation. Reason and necessity require the appointment of a sufficient number of judges to handle the business of the federal Courts. These additional judges should be of a type and age which would warrant us in believing that they would vigorously attack their dockets, rather than permit their dockets to overwhelm them.

The cost of additional personnel should not deter us. It must be borne in mind that the expense of maintaining the judicial system constitutes hardly three-tenths of one percent of the cost of maintaining the federal establishment. While the estimates for the current fiscal year aggregate over \$23,000,000 for the maintenance of the legislative branch of the government, and over \$2,100,000,000 for the permanent agencies of the executive branch, the estimated cost of maintaining the judiciary is only about \$6,500,000. An increase in the judicial personnel, which I earnestly recommend, would result in a hardly perceptible percentage of increase in the total annual budget.

This result should not be achieved, however, merely by creating new judicial positions in specific circuits or districts. The reform should

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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.

He then appends statistical information. The Attorney General then says, The time has come when further legislation is essential.

The statistical information shows, for example, that while we have added judges since 1913—we have increased them from 92 to 154—the criminal and civil cases other than bankruptcy have increased from 25,000 to 75,000, the average number of cases filed per judge from 276 per judge to 484 per judge. It has nearly doubled. The number of bankruptcy proceedings has increased from 20,000 to 60,000.

The second table gives the case load in the courts. The cases filed and terminated show that over the past six years we have made practically no progress in cutting down the number of cases, this back-log of cases in the Federal courts.

The message itself is fairly long, and has to be long on a subject like this. I will try to do a little high spotting as I go through it.

I have recently called the attention of the Congress to the clear need for a comprehensive program to reorganize the administrative machinery of the Executive Branch of our Government. I now make a similar recommendation to the Congress in regard to the Judicial Branch of the Government, in order that it also may function in accord with modern necessities.

The Constitution provides that the President “shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient.” No one else is given a similar mandate. It is therefore the duty of the President to advise the Congress in regard to the Judiciary whenever he deems such information or recommendation necessary.

I address you for the further reason that the Constitution vests in the Congress direct responsibility in the creation of courts and judicial offices and in the formulation of rules of practice and procedure. It is, therefore, one of the definite duties of the Congress constantly to maintain the effective functioning of the Federal Judiciary.

The Judiciary has often found itself handicapped by insufficient personnel with which to meet a growing and more complex business. It is true that the physical facilities of conducting the business of the courts have been greatly improved, in recent years, through the erection of suitable quarters, the provision of adequate libraries and the addition of subordinate court officers. But in many ways these are merely the trappings of judicial office. They play a minor part in the processes of justice.

Since the earliest days of the Republic, the problem of the personnel of the courts has needed the attention of the Congress. For example, from

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the beginning, over repeated protests to President Washington, the Justices of the Supreme Court were required to “ride Circuit” and, as Circuit Justices, to hold trials throughout the length and breadth of the land—a practice which endured over a century.

And I might add that riding Circuit in those days meant riding on horseback. It might be called a pre-horse and buggy era. That is not in the message.

In almost every decade since 1789, changes have been made by the Congress whereby the numbers of judges and the duties of judges in federal courts have been altered in one way or another. The Supreme Court was established with six members of 1789; it was reduced to five in 1801; it was increased to seven in 1807; it was increased to nine in 1837; it was increased to ten in 1863; it was reduced to seven in 1866; it was increased to nine in 1869.

This is all by statute.

The simple fact is that today a new need for legislative action arises because the personnel of the Federal Judiciary is insufficient to meet the business before them. A growing body of our citizens complain of the complexities, the delays, and the expense of litigation in United States Courts.

I then mention the letter from the Attorney General.

Delay in any court results in injustice.

Now we will take up the case of the lower courts showing delay:

It makes lawsuits a luxury available only to the few who can afford them or who have property interests to protect which are sufficiently large to repay the cost. Poorer litigants are compelled to abandon valuable rights or to accept inadequate

or unjust settlements because of sheer inability to finance or to await the end of a long litigation. Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.

Now we come to the next, the courts of appeal.

Delays in the determination of appeals have the same effect. Moreover, if trials of original actions are expedited and existing accumulations of cases are reduced, the volume of work imposed on the Circuit Courts of Appeals will further increase.

Then we come to the highest court:

The attainment of speedier justice in the courts below will enlarge the task of the Supreme Court itself. And still more work would be added by the recommendation which I make later in this message for the quicker determination of constitutional questions by the highest court.

Even at the present time the Supreme Court is laboring under a heavy burden. Its difficulties in this respect were superficially lightened some years ago by authorizing the court, in its discretion, to refuse to hear appeals in many classes of cases. This discretion was so freely exercised that in the last fiscal year, although 867 petitions for review were presented to the Supreme Court, it declined to hear 717 cases.

That is a tremendously important fact. As you know, any litigant seeking to appeal to the Supreme Court takes it there on certiorari. That is a certiorari process and out of 867 cases the Supreme Court last year turned down 727. It declined without an opinion even to hear them.

If petitions in behalf of the Government are excluded, it appears that the court permitted private litigants to prosecute appeals in only 108 cases out of 803 applications. Many of the refusals were doubtless warranted. But can it be said that

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full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 percent of the cases presented to it by private litigants.

That is an amazing statement.

It seems clear, therefore, that the necessity of relieving present congestion extends to the enlargement of the capacity of all the federal courts.

In other words, let us apply the same rule from top to bottom.

A part of the problem of obtaining a sufficient number of judges to dispose of cases is the capacity of the judges themselves. This brings forward the question of aged or infirm judges—a subject of delicacy and yet one which requires frank discussion.

In the federal courts there are in all 237 life tenure permanent judgeships.

There are a very small number of judges whose places are not to be filled when they die. They are really temporary judges.

Twenty-five of them are now held by judges over seventy years of age and eligible to leave the bench on full pay. Originally no pension or retirement allowance was provided by the Congress. When after eighty years of our national history—That was in 1869—the Congress made provision for pensions, it found a well-entrenched tradition among judges to cling to their posts, in many instances far beyond their years of physical or mental capacity. Their salaries were small. As with other men, responsibilities and obligations accumulated. No alternative had been open to them except to attempt to perform the duties of their offices to the very edge of the grave.

I am talking about 1869.

In exceptional cases, of course, judges, like other men, retain to an advanced age full mental and physical vigor. Those not so fortunate are often unable to perceive their own infirmities. “They seem to be tenacious of the appearance of adequacy.”

That is a quotation from a very important justice. It is in quotes. You will have to find out who said it. I am not going to tell you.

The voluntary retirement law of 1869 provided, therefore, only a partial solution. That law, still in force, has not proved effective in inducing aged judges to retire on a pension.

This result had been foreseen in the debates when the measure was being considered. It was then proposed that when a judge refused to retire upon reaching the age of seventy, an additional judge should be appointed to assist in the work of the court. The proposal passed the House but was eliminated in the Senate.

With the opening of the twentieth century, and the great increase of population and commerce, and the growth of a more complex type of litigation, similar proposals were introduced in the Congress. To meet the situation, in 1913, 1914, 1915 and 1916, the Attorneys General then in office—I will end the suspense by saying that it was McReynolds and Gregory—recommended to the Congress that when a district or a circuit judge failed to retire at the age of seventy, an additional judge be appointed in order that the affairs of the court might be promptly and adequately discharged.

In 1919 a law was finally passed providing that the President “may” appoint additional district and circuit judges, but only upon a finding that the incumbent judge over seventy “is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character.” The discretionary and

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indefinite nature of this legislation has rendered it ineffective. No President should be asked to determine the ability or disability of any particular judge.

The duty of a judge involves more than presiding or listening to testimony or arguments.

And I go on and talk about the complexity of the modern average case, that it has increased tremendously in the last twenty or twenty-five years.

Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business. A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.

We have recognized this truth in the civil service of the nation and of many states by compelling retirement on pay at the age of seventy. We have recognized it in the Army and Navy by retiring officers at the age of sixty-four. A number of states have recognized it by providing in their constitutions for compulsory retirement of aged judges.

Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments: it was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world.

It is obvious, therefore, from both reason and

experience, that some provision must be adopted, which will operate automatically to supplement the work of older judges and accelerate the work of the court.

Now, some recommendations.

I, therefore, earnestly recommend that the necessity of an increase in the number of judges be supplied by legislation providing for the appointment of additional judges in all federal courts, without exception, where there are incumbent judges of retirement age who do not choose to retire or to resign. If an elder judge is not in fact incapacitated, only good can come from the presence of an additional judge in the crowded state of the dockets; if the capacity of an elder judge is in fact impaired, the appointment of an additional judge is indispensable. This seems to be a truth which cannot be contradicted.

I also recommend that the Congress provide machinery for taking care of sudden or long-standing congestion in the lower courts. The Supreme Court should be given power to appoint an administrative assistant who may be called a Proctor. He would be charged with the duty of watching the calendars and the business of all the courts in the federal system. The Chief Justice thereupon should be authorized to make a temporary assignment of any circuit or district judge hereafter appointed—

This would not apply to the members of the bench at the present time, only the new ones—in order that he may serve as long as needed in any circuit or district where the courts are in arrears.

I attach a carefully considered draft of a proposed bill, which, if enacted, would, I am confident, afford substantial relief. The proposed measure also contains a limit on the total number of judges who might thus be appointed and also a limit on the potential size of any one of our federal courts.

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That bill, I might add, as I explained to the Chairmen of the Judiciary Committees of the House and Senate just now, is merely something for them to work on, as in any other case when any bill goes in. It is simply something for them to work on to save them trouble of trying to put the language together.

These proposals do not raise any issue of constitutional law. Some of you may, perhaps, realize why I said what I did in my annual message of January sixth.

They do not suggest any form of compulsory retirement for incumbent judges. Indeed, those who have reached the retirement age, but desire to continue their judicial work, would be able to do so under less physical and mental strain and would be able to play a useful part in relieving the growing congestion in the business of our courts. Among them are men of eminence and great ability whose services the Government would be loath to lose. If, on the other hand, any judge eligible for retirement should feel that his court would suffer because of an increase in its membership, he may retire or resign under already existing provisions of law if he wishes so to do. In this connection let me say that the pending proposal to extend to the Justices of the Supreme Court the same retirement privileges now available to other federal judges, has my entire approval.

You know what the situation is there. Any Circuit or District Judge may retire on full pay. A Supreme Court Justice can resign and get full pay. The only difference is that if he resigns and gets full pay, he is subject to changes in the income tax laws and things like that. This recommendation, would put him on the same status as the judges in the other courts.

One further matter requires immediate attention.

This is the other important one.

We have witnessed the spectacle of conflicting decisions in both trial and appellate courts on the constitutionality of every form of important legislation.

This is concerned primarily with constitutional questions.

Such a welter of uncomposed differences of judicial opinion has brought the law, the courts, and, indeed, the entire administration of justice dangerously near to disrepute.

A federal statute is held legal by one judge in one district; it is simultaneously held illegal by another judge in another district. An act valid in one judicial circuit is invalid in another judicial circuit. Thus rights fully accorded to one group of citizens may be denied to others. As a practical matter this means that for periods running as long as one year or two years or three years- until final determination can be made by the Supreme Court—the law loses its most indispensable element— equality.

Moreover, during the long processes of preliminary motions, original trials, petitions for rehearings, appeals, reversals on technical grounds requiring re-trials, motions before the Supreme Court and the final hearing by the highest tribunal—during all this time labor, industry, agriculture, commerce and the Government itself go through an unconscionable period of uncertainty and embarrassment. And it is well to remember that during these long processes the normal operations of society and government are handicapped in many cases by differing and divided opinions in the lower courts and by the lack of any clear guide for the dispatch of business. Thereby our legal system is fast losing another essential of justice—certainty.

Finally, we find the processes of government itself brought to a complete stop from time to time by injunctions issued almost

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automatically, sometimes even without notice to the Government, and not infrequently in clear violation of the principle of equity that injunctions should be granted only in those rare cases of manifest illegality and irreparable damage against which the ordinary course of the law offers no protection. Statutes which the Congress enacts are set aside or suspended for long periods of time, even in cases to which the Government is not a party.

In the uncertain state of the law, it is not difficult for the ingenious to devise novel reasons for attacking the validity of new legislation or its application. While these questions are laboriously brought to issue and debated through a series of courts, the Government must stand aside. It matters not that the Congress has enacted the law, that the Executive has signed it and that the administrative machinery is waiting to function. Government by injunction lays a heavy hand upon normal processes; and no important statute can take effect—against any individual or organization with the means to employ lawyers and engage in wide flung litigation—until it has passed through the whole hierarchy of the courts. Thus the judiciary, by postponing the effective date of Acts of the Congress, is assuming an additional function and is coming more and more to constitute a scattered, loosely organized and slowly operating third house of the National Legislature.

This state of affairs has come upon the nation gradually over a period of decades. In my annual message to this Congress I expressed some views and some hopes.

Now, as an immediate step, I recommend that the Congress provide that no decision, injunction, judgment or decree on any constitutional question be promulgated by any federal court without previous and ample notice to the Attorney General and an opportunity for the United States

to present evidence and be heard. This is to prevent court action on the constitutionality of Acts of the Congress in suits between private individuals, where the Government is not a party to the suit, without giving opportunity to the Government of the United States to defend the law of the land.

That sounds like common sense.

I also earnestly recommend that in cases in which any court of first instance—That is the District Court—determines a question of constitutionality, the Congress provide that there shall be a direct and immediate appeal to the Supreme Court—It does not take away any right of any lower court to pass on constitutionality, but it provides for an immediate appeal to the Supreme Court, and that such cases—take precedence over all other matters pending in that court. Such legislation will, I am convinced, go far to alleviate the inequality, uncertainty and delay in the disposition of vital questions of constitutionality arising under our fundamental law.

My desire is to strengthen the administration of justice and to make it a more effective servant of public need. In the American ideal of government the courts find an essential and constitutional place. In striving to fulfill that ideal, not only the judges but the Congress and the Executive as well, must do all in their power to bring the judicial organization and personnel to the high standards of usefulness which sound and efficient government and modern conditions require.

This message has dealt with four present needs:

First, to eliminate congestion of calendars and to make the judiciary as a whole less static by the constant and systematic addition of new blood to its personnel—That is the first need—second, to make the judiciary more elastic by providing for temporary transfers of circuit and district judges to those places where federal courts are most

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in arrears; third, to furnish the Supreme Court practical assistance in supervising the conduct of business in the lower courts; fourth, to eliminate inequality, uncertainty and delay now existing in the determination of constitutional questions involving federal statutes.

If we increase the personnel of the federal courts so that cases may be promptly decided in the first instance, and may be given adequate and prompt hearing on all appeals; if we invigorate all the courts by the persistent infusion of new blood; if we grant to the Supreme Court further power and responsibility in maintaining the efficiency of the entire federal judiciary; and if we assure government participation in the speedier consideration and final determination of all constitutional questions, we shall go a long way toward our high objectives. If these measures achieve their aim, we may be relieved of the necessity of considering any fundamental changes in the powers of the courts or the constitution of our Government- changes which involve consequences so far-reaching as to cause uncertainty as to the wisdom of such course.

As to the bill itself, so that you will get a practical idea of the bill—most of it is technical—I will only go over the high lights:

When any judge of a court of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy years and has held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and within six months thereafter has neither resigned nor retired—In other words, when he gets to be seventy years and six months old and has neither resigned nor retired—the President, for each such

judge who has not so resigned or retired, shall nominate, and by and with the advice and consent of the Senate, shall appoint one additional judge to the court to which the former is commissioned.

Is that clear?

The number of judges of any court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. No more than fifty judges shall be appointed thereunder, nor shall any judge be so appointed if such appointment would result in (1) more than fifteen members of the Supreme Court of the United States, (2) more than two additional members so appointed to a circuit court of appeals, the Court of Claims, the United States Court of Customs and Patent Appeals, or the Customs Court, or (3) more than twice the number of judges now authorized to be appointed for any district or, in the case of judges appointed for more than one district, for any such group of districts.

Then Section 2 relates to assignments by the Chief Justice of any judge hereafter appointed to any other district or circuit.

The rest of the bill, that is Section 3, relates to the appointment of the Proctor, whose duty is to get information for the court in regard to the volume and status of litigation in all the courts of the United States, the need of assigning District Judges to congested areas or methods for expediting cases pending on the dockets. The Proctor, we suggest, should get a salary of \$10,000 a year.

That is about all in the Act. The rest is technical.

And that is all the news.