PATHFINDER

FEBRUARY 20, 1937: 1

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The President Urges Historic Changes

THE Attorney General's letter to the President of the United States began abruptly: "Delays in the administration of justice is the outstanding defect in our Federal Judicial system . . . It has exasperated the bench, the bar, the business community and the public . . . 'Justice delayed is justice denied' . . ."

This was the jumping-off place—the springboard for President Roosevelt's leap last week into one of his greatest legislative battles. To prod slow moving justice, but infinitely more, to turn the eyes of justice from the past to the present and future, the President delivered an historic message to Congress. He put it this way:

"Modern complexities call . . . for a constant infusion of new blood in courts . . . 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."

PROPOSALS: To strengthen the "old glasses," to infuse the "new blood," the President offered specific recommendations and attached to his message a suggested bill for Congress to carry out his proposals. These were his points:

(1) If justices of the Supreme Court do not retire within six months after they have reached 70 years of age, one new and younger justice will be added to the court for each judge over 70 on the bench. However, the number of justices in the high court is not to exceed 15.

(2) The same age provision is to apply to all inferior Federal courts, with the President to appoint not more than 50 judges to these courts.

(3) Appeals from lower courts on all cases involving constitutional questions are to go directly to the Supreme Court.

(4) Before any injunction against an act of Congress may be granted in a lower court, government attorneys must be given the chance to state the government's side of the case.

(5) The Chief justice of the Supreme Court may temporarily assign a U. S. circuit court judge to any appellate circuit and a district judge to any district whenever clogged dockets warrant such action.

(6) The Supreme Court may name an administrative assistant, to be known as a "proctor," to advise it on the condition of the lower Federal courts and the spots where extra judges are needed.

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These were the ingredients of the presidential bombshell that took the nation and almost the entire government by surprise. Bolstering his two main arguments — speedier judicial action and a modern, more liberal outlook on cases brought for review—the President cited these two sets of figures:

¶ Of 867 cases presented in a year to the Supreme Court for review, the court refused to hear 717.

¶ Of the 237 permanent judgeships of life tenure in all Federal courts, 25 are now held by judges over 70 years of age, although they are eligible to retire on full pay.

Although not mentioned by name, six Supreme Court justices obviously would be affected by the bill, which was immediately introduced into Congress—in the House by Representative Maury Maverick of Texas and in the Senate by Senator Henry F. Ashurst of Arizona, chairman of the Senate Judiciary Committee.

AGE LIMIT: Chief Justice Hughes was 74 last April 11. Associate Justice Van Devanter was 77 last April 18; McReynolds, 75 last February 3; Brandeis, 80 last November 18; Sutherland will be 74 on March 25 and Butler will be 70 March 17. Justice Stone is 64, Roberts is 61 and Cardozo is 66.

Hardest hit of the President's recommendations was the point having to do with age limits for the Supreme Court. This, charged opponents of the plan, was "packing"—an attempt to place enough members representing administration views on the bench to insure the passage of New Deal legislation. The President anticipated such objections. With persuasion, statistics and references to historical precedent, he presented his case. And, as he stirred the ashes of history, the glow of former disputes, between Congress and Court, as well as between President and Court, flared and was vivid again.

Roosevelt pointed to the debates in 1869. Then, the same formula—additional justices to supplement those who refuse to leave the high bench at 70—was invoked. The House of that day approved the plan but it was killed in the Senate.

But the tug-of-war for power between the arms of government goes back further than that, and it went on after 1869. Among the Presidents to find themselves in the battle were Jefferson, Jackson, Van Buren, Lincoln, Johnson and Theodore Roosevelt.

THE BEGINNING: The year 1800

Ashurst Introduced It In the Senate

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witnessed the first real tussle since the founding of the government 12 years before. The presidential electoral vote was a tie between Jefferson, father of the Democratic party, and Aaron Burr. President Adams, a Federalist, had been eliminated. The House chose Jefferson to succeed and Burr became vice-president.

Shortly before Adams was to retire from office, Congress passed Adams' "Midnight Judges" act which was to cut the Supreme Court personnel from six to five and establish six new circuits with 16 new judges. Behind the plan was a deliberate effort to stop Jefferson from naming a man to a vacancy expected on the high bench. Adams signed the measure the night before he went out of office.

On taking office, the angry Jeffersonians repealed the legislation. Then, to postpone expected adverse action on the validity of the repealer, Congress abolished the next two sessions of the Supreme Court. But, ironically enough, when this Federalist high court did meet, it upheld the repeal measure after all.

Then, in 1803, Jefferson struck at the Court once more. Cause of his indignation was the revolutionary doctrine stated by Chief Justice John Marshall in the Marbury vs. Madison case wherein Marshall pronounced the right of the Court to rule acts of Congress unconstitutional. Marshall's vital words, accepted by all succeeding justices as guiding principles, were: ". . . the legislative body is limited by the Constitution and it is the duty of the Supreme Court to act as arbiter."

Another critic was Andrew Jackson whose contempt for the Court was frank and open. An ardent advocate of States' rights, his views were forthrightly made known when he refused to carry out a Supreme Court order against the State of Georgia. Jackson's since-famous words were: "John Marshall has made his decision. Now let him enforce it."

CENSURE: In his 1823 message to Congress, President Martin Van Buren sharply criticized a decision of the Supreme Court upholding a verdict of the District of Columbia circuit court permitting the issuing of writs of mandamus against government officials.

Another celebrated decision to bring down wrath on the Supreme Court was delivered in the Dred Scott case in 1857. Chief Justice Roger Taney handed down the verdict that a slave did not become a freeman in free territory and added that slavery could not be abolished in the territories because the Constitution did not outlaw slavery. As a result, there was more talk of a reorganized Court. Republicans were furious at the decision and the Democratic ranks split, with the result that Lincoln became president.

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Lincoln, in turn, had his disputes with Taney and the Court. These arguments revolved around the issue of whether the requirements of emergency in wartime were supreme.

When Andrew Johnson was President, the Supreme Court ruled that a civilian could not undergo a military trial when the civil courts were functioning. There followed talk of impeachment of justices. One congressman urged abolition of the Court, another called for more judges to give the administration a majority. A measure which would have required unanimous decisions by the Court was introduced but got nowhere.

Instead, a reduction in the number of justices was voted by Congress to prevent Johnson from naming new members. A bill requiring two-thirds majority decisions of the Court passed in the House but died in the Senate.

ALTERATIONS: As was pointed out by President Roosevelt in his message, the numerical strength of the high court has been altered several times. It was established with six members in 1789; reduced to five in 1801; increased to seven in 1807; increased to nine in 1837; increased to ten in 1863 when one justice, a Confederate, was absent; reduced to seven in 1866, and increased to nine in 1869.

The year 1869 marked the adoption of the Judicial Reform act and the last alteration in the membership of the Court. It arose from the Legal Tender Act of 1862 which had been overruled by the court until President Grant appointed two new justices; whereupon the Court reversed its previous decision.

Then, until the administration of Theodore Roosevelt, the hatchet was buried. With the advent of the fiery "T. R.", the war was on again. He condemned the courts as obstacles to progress and suggested the overriding of judicial decisions by the vote of the people.

President Taft, later to be chief Justice, argued for the compulsory retirement of justices at 70 in his book "Popular Government."

Joseph C. McReynolds, now a Supreme Court justice, when he was Attorney General in 1913, recommended the same idea for all courts except the Supreme Court, saying: "This will insure at all times the presence of a judge sufficiently active to discharge promptly and adequately the duties of the court."

LOWER COURTS: Not to be overlooked in the Presidential message but more or less buried in the greater storm over the Supreme Court is the fact that the points are intended to apply to the entire Federal judiciary system. However, with respect to the inferior courts, the rights of Congress are expressly set forth in the Constitution.

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And Maury Maverick In the House

According to Article 3 of the Constitution, the circuit and district courts are dependent on Congress not only for the exercise of powers but also for their very existence. Congress once abolished the district courts entirely and 25 years ago eliminated the circuit courts. These acts were recognized as lying well within the powers of Congress. A Supreme Court decision in 1922 recognized the "will

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passage of legislation to embody all his suggestions except the highly controversial court increase only after a long conference with House leaders. Before the conference, however, the Sumners bill permitting Supreme Court Justices over 70 to retire at full pay was passed. It was hoped that this measure might lead to a compromise on the Roosevelt plan. In the Senate the outcome was still less certain. An opposition Senate bloc took shape around such men as Glass (D. Va.), McNary (R. Ore.), Vandenberg (R. Mich.), Byrd (D. Va.), King (D. Utah), Burke (D. Neb.), Clark (D. Mo.), Bailey (D. N. C.), George (D. Ga.), Connally (D. Tex.), Borah (R. Idaho), and Johnson (R. Calif.).

Meanwhile, the members of the court were silent. While the storm blew heavily about them, they gave no expression to their thoughts. Within a few days, hints of compromise were heard, one suggestion calling for the voluntary resignation of two justices.

Loud as the opposition was, however, and determined as it seemed to maintain the Court as it is now constituted, President Roosevelt was not likely to yield. His message, carefully written and planned, called emphatically for "young blood" and a

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fresher, more liberal judicial vision. To achieve this, he was no less determined than those of his opponents who struck out bitterly against what they called a "clever" effort to "pack" the court and scrap the "wisdom" and "experience" of age.

As the fight thus developed, it seemed probable that there would be little or no dispute over the minor changes urged by the President—indeed, many of these were unanimously hailed as needed reforms. The real battle centered on the issue of age limit and the addition of new justices to the Supreme Court. Acccording to those upholding things as they are, it is only in this court that the last bulwark of American conservatism and traditional American democracy can be found. If it is changed, they hold, then the Roosevelt administration will travel a path that is not their path.