

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES,

COMMUNICATING,

In compliance with a resolution of the Senate, a plan for the enlargement and modification of the judicial system of the United States.

MARCH 2, 1854.—Read, referred to the Committee on the Judiciary, and ordered to be printed.

To the Senate of the United States:

In answer to the resolution of the Senate of the 7th of December last, requesting me to present to the Senate the plan referred to in my annual message to Congress, and recommended therein for the enlargement and modification of the present judicial system of the United States, I transmit a report from the Attorney General to whom the resolution was referred.

FRANKLIN PIERCE.

WASHINGTON, March 1, 1854.

ATTORNEY GENERAL'S OFFICE,
February 4, 1854.

SIR: I have the honor to submit, herewith, suggestions regarding the judicial system of the United States, in compliance with resolutions of the Senate and of the House of Representatives, referred to me for this purpose.

The Constitution, with its amendments, contains the following provisions, necessary to be borne in mind, as the basis of all satisfactory consideration of the subject matter.

I. The Constitution.

"ART. III, Sec. 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.

"The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

"ART. III, Sec. 2. The judicial power shall extend to all cases in law and equity, arising under the Constitution, the laws of the United States and treaties made, or which shall be made under their author-

ity; to all cases affecting ambassadors and other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof, and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. 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.

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where such crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may, by law, have directed."

2. Amendment to the Constitution.

"ART. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb: nor shall he be compelled, in any criminal case, to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

"ART. VI. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have the assistance of counsel for his defence.

"ART. VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

"ART. XI. The judicial power of the United States shall not be considered to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

Such is the outline of the judicial system of the United States as defined by the Constitution. But these provisions do not designate the number of the judges of the Supreme Court, nor prescribe the organization of the inferior courts, nor the forms and limits, either of place or function, within which their various powers are to be exercised, nor the appointment and authority of the ministerial officers of the law, nor

many other things essential to the practical completeness of the system, the means of doing all which are to be sought in other provisions of the Constitution as follows :

"ART. I, Sec. 8. The Congress shall have power * * * * *

"To constitute tribunals inferior to the Supreme Court; * * * * *

"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.

"ART. II, Sec. 1. The executive power shall be vested in a President of the United States of America. * * * * *

"ART. II, Sec. 2. * * * * * He shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, or in the courts of law, or in the heads of departments."

In executing the powers which the Constitution has thus conferred on Congress, to provide by legislation for the details of the organization of the courts of the United States, that body has enacted numerous laws, which, while modifying the judicial system in important particulars at different periods, have invariably, from the beginning to the present time, assumed the following great elements of the system, namely :

1. A Supreme Court, consisting of a chief justice and associate justices, sitting periodically at the seat of government, with unity of constitutional power and jurisdiction, and exercised in definite forms prescribed by law throughout the United States.

2. The subdivision of the United States into judicial districts, each district consisting of a State or a defined part of a State, with a single district judge for each district, such judge being invested with admiralty and maritime jurisdiction; jurisdiction in certain seizures on land and suits for penalties and forfeitures; jurisdiction in certain suits by aliens, by the United States, and by and against consuls; jurisdiction to grant injunctions in equity, writs of *habeas corpus*, and to perform some other acts of miscellaneous judicial power; and jurisdiction of all crimes and offences, not capital, which are cognizable under the authority of the United States. Some of these powers are exclusive, some not.

3. The distribution of the judicial districts into a less number of judicial circuits, with circuit courts sitting periodically in each district, and consisting of a plurality of judges, the district judge of the district being one, which circuit courts have original jurisdiction, in some cases exclusive, in others concurrent only, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds a certain defined sum, and an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State; original jurisdiction in cases of equity of a certain amount where the United States are petitioners, and of all suits at common law

where the United States, or any officer thereof, shall sue under the authority of any act of Congress; original jurisdiction of crimes and offences against the United States; original jurisdiction in certain suits removed from the courts of a State, and in sundry miscellaneous matters of special provision under the patent, post office, and other laws; and appellate jurisdiction in certain cases by writ of error to, or direct appeal from, the district courts.

The general system, thus cursorily sketched, has now stood the test of the controversies and criticism of two generations; its practical working has become familiar to the whole community; the adjudications of a long succession of eminent judges have regulated its forms and imparted precision to its action; and no other theory of judicial system presents itself, which promises any advantages commensurate with the experimental uncertainties which a radical change of organization would introduce into the administration of justice throughout the Union. The district courts, with jurisdiction limited by the boundaries of the respective States; the circuit courts, with concurrent jurisdiction, or with original, superior, and appellate jurisdiction; and the Supreme Court, with its constitutional power, seem together to constitute a judicial system of inherent adaptation to the federative political system of the United States.

Accordingly, while Congress has in its wisdom seen fit, as occasion seemed to require, to make changes in secondary matters, such as the number of the judges of the Supreme Court, or the number and limits of the several circuits, or the personality of the circuit courts, or the quality or degrees of the relative or absolute jurisdiction of the district and circuit courts,—it has left the great monumental parts of the system as they were constructed by the same wise men who framed the Constitution.

Modifications of the judicial system, within the limits indicated, especially when the number of States is more than twice what it was at the time of the adoption of the Constitution and the organization of the government under it, and when the interests of our society have outstripped, in the ratio of their exigencies, even the vastly augmented territorial extent of the country,—are imperatively demanded, not merely to give to the system completeness according to the present number of States, but to enable it, though but partially, yet at all, to discharge its appropriate functions.

At the very foundation of the government, with but thirteen States in the Union, and comparatively small subject territory, the Supreme Court was made to consist of a chief justice and five associate justices. The number has been at successive periods increased by the addition of three other justices. If the duties of these judges did not go beyond their function as members of the Supreme Court, the present number would undoubtedly suffice, nay, is more than the public interest requires, because, in proportion to the increase of the number of judges constituting a court, is its tendency to lose its proper judicial, and to acquire instead a deliberative, character.

But the great difficulty in this respect is in the present organization of the circuit and the district courts in their relation to the Supreme Court.

By the law as it now stands, the districts, with exceptions hereafter indicated, are distributed into nine circuits, and the circuit court sits, according to the theory of the law, in each district, periodically, and is composed of the district judge of that district and of one of the judges of the Supreme Court.

I say, according to the theory of the law; for, in the existing magnitude of the country, it becomes physically impossible for the judges of the Supreme Court, compatibly with their proper constitutional duties, to transact the circuit business of all the districts of the United States. Thus it happens that the entire States of California, Florida, Iowa, Texas, and Wisconsin, and districts of some other sub-divided States, remain wholly outside of the system, the entire circuit duty there being performed by a district judge. It needs no argument to show that this anomalous condition of things is in plain violation of the true spirit of the Constitution, which pre-supposes absolute equality of political right, of government and of its advantages, among all the sovereign members of the Union.

Besides which, in some of the districts, which are, by law, within the system, the amount of circuit business exceeds the powers of a single judge of the Supreme Court, and thus the contemplated and theoretical benefits of the system are but imperfectly enjoyed even there.

It seems to be self-evident that there ought to be such a reformation of the circuits as to have them embrace all the States.

To accomplish this indispensable object, the exigency for which disturbs the interests of society more seriously, perhaps, than any other federal question of mere government organization, several plans have been considered.

One is, to provide an additional number of judges of the Supreme Court; a part of them to transact the business in bank, at the seat of government, and a part to be detailed for circuit duty. But as all the justices, so appointed, would possess an equality of right as such, and as the power of the Supreme Court is a constitutional power, it is not easy to see how a distinctive classification could be established by law, so as to exclude any of them from the regular business of the Supreme Court. And, if such a classification could be permanently enacted, or any means of compulsory self-classification provided, the result would be a fluctuating tribunal, and all the evils of unsettled decision. Besides which, if such a plan were adopted and found impracticable, it would be impossible to recede from it without leaving an excessive number of judges of the Supreme Court; because those judges are not removeable by legislation. But the constitutional objection to this plan seems insuperable. Congress may, undoubtedly, enact a quorum of the court, of any number, however small; but it cannot exclude a member of it from participation in its action under the Constitution.

Another plan is to relieve the judges of the Supreme Court of their circuit duty; to reduce the number of the judges of that court as vacancies occur; to re-arrange all the districts of the United States in proper circuits; and to appoint a circuit judge for each circuit.

This plan has the advantages of simplicity and of involving little or no change in the forms of legal business, and the times and places in which it is to be conducted.

This plan is, undoubtedly, also more conformable than the present arrangement to the spirit and theory of the Constitution; because the Supreme Court is created by the Constitution, while the circuit courts are of those "inferior courts" which Congress has the power to ordain and establish; for which reason it has been much questioned whether the two things be not constitutionally incompatible; and the judges of the Supreme Court are only appointed and commissioned as such.

On the other hand, it is forcibly urged that contemporaneous exposition of the Constitution, the practice under it, and long acquiescence in that practice, have served to sanction the existing law in this respect; that *nisi prius* duty is valuable as mental discipline to a judge; and that it is exceedingly inconvenient, in a political sense, to separate the judges from immediate intercourse with the people of the respective States.

Another plan has, therefore, been proposed, which is to re-arrange the circuits so as to comprehend all the districts in all the States; to enlarge the jurisdiction of the district courts relatively to the circuit courts, and that of the circuit courts relatively to the Supreme Court; to have a circuit court holden at one place only, in each circuit, for all the districts composing it; and to constitute that circuit court of one judge of the Supreme Court and all the district judges within it.

This plan supposes, moreover, that all the original civil jurisdiction of the circuit courts, whether concurrent or exclusive, be taken away from them, and vested in the respective district courts; and thus all the criminal business be confined to the district courts, because of the provisions of the Constitution, which require the trial of crimes to be in the State and district where the crime shall have been committed.

To this idea it is objected that it will greatly increase the expenses of litigation in all the States, except those few in which the court is holden; that it will, as to many of the circuits, give rise to insoluble controversy concerning which State shall be the seat of the circuit court; that the judges of the district courts have not been appointed as for the unaided exercise of all the present original jurisdiction of the circuit courts; that the proper performance by them of the proposed new duties will, especially in the maritime States, interfere with their appropriate admiralty and other district duties; and that, in other respects, the plan will disturb the interests, and affect, inconveniently, the sensibilities of the different States.

A fourth plan is, after re-arranging the circuits, to leave the circuit courts to be holden as at present in each district with a justice of the Supreme Court as a member by law of the circuit court, devolving the whole of the original business of that court, whether civil or criminal, upon the district judge as in the third plan, and all the appellate business in equity and fact, and requiring only writs of error, exceptions and appeals in matter of law to be heard in presence of the justice of the Supreme Court.

This plan is subject, in a still greater degree, to one class of the objections to the preceding one, namely, that of augmenting unduly the labor and responsibility of the district judges, who were not appointed in view of such large and exclusive functions.

Besides which, each of these two last named plans, while enlarging the geographical range of the circuit duty of the judges of the Supreme

Court, would not in reality give them correspondent relief in other respects, which the public interest requires, in order that they may have time for the discharge of the higher inevitable duties of the Supreme Court.

This consideration acquires additional weight from the fact that the new territories, which the United States have acquired by treaty with foreign powers, devolve, of late years, a vast amount of special duty on the Supreme Court, in the adjudication of land claims from the former provinces of Louisiana and Florida, and especially from California.

In regard to California, and the three other States at least, which are soon to exist on the Pacific side of the Union, it is difficult to see how any plan is to be carried into effect, requiring judges of the Supreme Court to hold circuit courts there; and very grave objections arise to the maintenance of a peculiar and anomalous organization of the courts in the Pacific States, and the continued exclusion of them from the general judicial system of the Union.

In this relation, there is another important class of considerations.

When Congress came to perform, as regards the judicial system, the legislative duty devolved upon it by the Constitution, it established proper subdivisions of the system, and organized them fitly upon the subsisting facts, but did not so arrange the details as to be fully capable of adaptation to successive changes in the amount of judicial business and in the number of the States.

At first, two judges of the Supreme Court were to attend each circuit court. But this arrangement was very soon found to be impracticable, and only one justice of the Supreme Court was required to attend. This also proving inconvenient, circuit judges were appointed; but that plan failed, by reason, in part, of the new judges being appointed in the last moments of an expiring administration; and the pre-existing arrangement was restored. But in doing this, Congress felt itself compelled to provide that either of the judges, namely, the justice of the Supreme Court alone, or the district judge alone, might hold the circuit court; but, if held by the district judge alone, he could not decide a case of writ of error or appeal from the district court; and all such cases have had to go over until another term and the attendance of a justice of the Supreme Court. Here, therefore, the system began to lose its unity and symmetry of proportions, even before the occurrence of any considerable augmentation of the number of States. But, when these began to increase, the system broke down altogether; and it became necessary to erect district after district, excluded altogether from the circuit organization. Thus we have the complicated evil, first of many circuit courts which are so in name only and not in truth, consisting of the district judge sitting alone in the absence of a justice of the Supreme Court; and of many districts in which there is no circuit court proper. This anomaly must grow more grievous every day in presence of the great expansion recently impressed on the Union.

On the other hand, if circuit judges be appointed, then the adaptation of the system to new States becomes an easy and an ordinary fact. As each new State comes in, it has only to be adjoined to a circuit; or

where a group of new States shall have been formed it may be readily constituted into a new circuit. Thus the judicial system would expand itself naturally with the increase of the number of the States, without leaving any of the present gaps or breaks in the system, or producing the slightest disturbance of interests in any other part of the Union.

The present elements of organization, maintained in their present proportions, are incapable of adaptation to the old States, in which the augmentation of business, acting both on the Supreme Court and on the circuit courts, renders it materially impossible that the present duty of both should be performed by the present justices of the Supreme Court. Thus comes necessary violation in fact of the legal theory as to the relative jurisdiction of both circuit and district courts, the aggregate amount of that violation increasing daily with the population and wealth of the old States.

The same elements are also incapable of adaptation to the new States even as they now are, and that incapacity of adaptation becomes more flagrant every day as these States grow in population and wealth, and it is aggravated with each accession to the Union of an additional new State.

The consequence is, the gradual but sure development of two distinct judicial systems in the country, with a broad line of demarcation between them: one, in which a justice of the Supreme Court intervenes, either actually or nominally, in the business of the circuits, and the circuit courts dispose of more or less of the appeals from the district courts; and another, in which no justice of the Supreme Court appears on the circuit, either by the letter of law or in fact, and appeals go directly from the district courts to the Supreme Court, swelling of course the amount of business in the latter. These consequences are mischievous in practice, besides marring the hypothetical excellence of the system in its political relation to the States.

To avoid these evils, and to provide for the equal administration of justice in all parts of the Union, and to have the circuit business everywhere, both in fact and in law, in the present or in any other form of organization, performed by justices of the Supreme Court unaided and alone, and to expand the system from time to time as the Union expands by the aggregation of new States, to effect all these combined results, continual additions must be made to the number of the justices of the Supreme Court, which thus becomes transformed irresistibly from a court into a senate.

On these premises, the considerations of public welfare, and of regard for the equal rights of the States, involved in the question of so modifying the details of the judicial system of the United States as to give it universality of application, and uniformity and efficaciousness in all parts of the Union, far outweigh any possible objections to such modification.

Undoubtedly it is desirable, so far as it is materially possible, to have the justices of the Supreme Court continue to be radicated, by local residence and by official relation, in the respective States. The general sense of this it is which has obstructed the introduction of proper improvements in the judicial system. It seems to me that the

time has arrived to meet the question frankly, rather than to continue an organization of the circuits which goes on by temporary expedients, imperfectly applied to the newly arising wants of the public service; an organization in which the circuit courts are, by theory but not by law, required to be held by some person other than the district judge, or in which though the presence of some judge other than the district judge is contemplated by law, it is of course imperfectly had, in consequence of the increased amount of that portion of public business which must by constitutional necessity be discharged by the Supreme Court.

A change is felt on all hands to be desirable, if not necessary. And there is a form of experimental change which can easily be made, and easily returned from if it fail to receive the public confidence on trial; which, in my judgment, unites most of the advantages, and avoids the disadvantages of either of the other plans; which does not involve any complex legislation; and which is respectfully proposed as a solution of the problem.

It is to have, at present, nine, and prospectively, ten circuits; to rearrange the existing nine circuits, so as to comprehend within them all the judicial districts except those of California; to appoint nine assistant circuit judges, one for each circuit; to preserve unimpaired the jurisdiction of the circuit courts, in all the districts, as well those now within the circuits as those without; to withdraw the circuit powers from the district judges, and re-vest them in the proper circuit court exclusively; to have the ordinary circuit court holden as it is in each judicial district, and composed of the justice of the Supreme Court residing in the circuit, as now, but to associate with him an assistant circuit judge, so that the court shall be holden by a justice of the Supreme Court and the assistant circuit judge, or either of them, instead of the district judge, the latter being left to his proper district duties, and there being a real and effective circuit court even in case of the necessary occasional absence of the justice of the Supreme Court.

This plan furnishes the additional personal force requisite for the prompt dispatch of the enlarged judicial business of the country. It does not, so far as the suitors, and the public at large, are concerned, derange any of the relations of judicial business. It calls for no present enlargement of the number of judges of the Supreme Court. It secures unity of system by giving a proper circuit court to all the districts. It retains untouched the place of business of the circuit courts and of the district courts, each to be holden, as now, within their appropriate States. It makes competent provision to have the circuit business performed in fact, as well as in theory, by a circuit judge, and thus effectually cures the great defect of the existing organization. It continues the justices of the Supreme Court in the practice of immediate contact with the people of the States, but relieves them by law from the disagreeable necessity of seeing themselves constrained, from time to time, either to leave much of the circuit business unperformed or performed only by the district judge, or else to fail in the complete discharge of the proper duties of the Supreme Court.

This plan leaves California only with a mere district organization, and assumes that at a day not distant a tenth circuit shall be constituted of Pacific States.

The innovation proposed is the least possible; beyond the restoration as far as may be of the normal functions of the respective courts, which is reparation rather than change, it consists of nothing but the provision of more persons to do the work necessary to be done, by the appointment of assistant circuit judges to divide the circuit business with the judges of the Supreme Court.

Permit me, in conclusion, in order to corroborate the opinion that some change should be attempted, to call to mind the trite, but not less cogent, consideration, that the general interests of society at large, in time of peace, are but indirectly or lightly affected by the political action of government; while its judicial action is vital, actually or contingently, to the interests of all men. Their property, their honor, their lives, are constantly dependent on the wisdom and the virtue of the courts of justice. To guard and preserve these our dearest rights, we need, not only a magistracy of competent character, but also one of competent organization. And certain it is, that the existing judicial organization is altogether insufficient for the obvious necessities of the people even of the present United States.

I have abstained from remark as to the courts of the Territories and of the District of Columbia, which are established under other clauses of the Constitution than those herein considered, and which are not presumed to be within the purview of the resolutions of the two houses. It may, however, be not improper to say here, that the legal condition of the District of Columbia, still regulated by the laws of Maryland as they stood half a century ago, without material legislative improvement during that period of time, and with recognized defects in its judicial organization, calls loudly for some action on the part of Congress.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

To the PRESIDENT.