Purging the Supreme Court

THERE can be little doubt that Mr. Roosevelt's attack on government by senility has been a brilliant tour de force. The right is dismayed by it. The left is confused. The country as a whole is puzzled and entertained. No wonder the President felt a bit pranksish when he read the message at his press conference. But the question of the adequacy of the proposal remains. Our answer will probably remind the reader of the Scottish jury that came back with the verdict, "Not guilty, but don't do it again." We by no means feel that the President has chosen the best plan—but along with a better plan it deserves support. The proposal is in the form of a reorganization of the federal judiciary. It finds the cause of the delays in justice in the failure of judges to retire at seventy. It proposes that for each judge who refuses thus to retire an additional judge shall be appointed to his court, provided that the size of the Supreme Court shall not exceed fifteen. There is every indication that the President is giving the Supreme Court judges a dose of their own medicine—legalism. He adopts the Supreme Court's method of disguising important changes in state policy behind a screen of innocent-seeming legality. It is unjust to accuse the President of duplicity. He is doing exactly what Justice Roberts did when he talked elaborately of states' rights and killed the processing taxes. Two can play at that game, and in the realm of high strategy the Supreme Court has met its master.

But it is not all play. What the President is proposing is to dynamite the reactionary judges into retirement. To effect this he uses the most convenient handle—old age. But it is a handle to a very real grievance, in the lower federal courts as well as in the Supreme Court. There are four sitting members of the Third Circuit Court of Appeals. Their average age is seventy-seven and one-half years. It is Judge Buffington of this court, over eighty-one, who has been holding up the Pennsylvania Greyhound case, involving the Wagner Labor Act, since 1935. With respect to the Supreme Court, the Roosevelt luck, it must be remembered, has not operated. No appointments have fallen to him. He has had to sit by helplessly and watch the years accumulate and men decay. He now presents the tormented judges with the bitterest hemlock cup any tyro has had to quaff. Six of the present court are over seventy, only one of them—Brandes—definitely a liberal. If they genuinely wish to keep the court from being "packed," they can hold the number down to nine by retiring. Whichever ones do not choose to retire must bear the responsibility of permanently increasing the court's number by that many.

One thing is clear. Mr. Roosevelt has been at least consistent. He has since the NRA decision steadily held that the Constitution needs no change if it is interpreted liberally. He has deftly sidestepped the three plans that have been most vigorously pushed—giving Congress the power to override the Supreme Court's veto, limiting the Supreme Court veto to at least a two-thirds' vote, giving Congress explicit power (by amendment) to regulate industry and agriculture. He has evidently considered that these "measure" would be at once too radical, since they would directly curb the judicial power or reestablish the supremacy of Congress, and also too dilatory, since each one might—by raising questions of constitutionality—have to be enacted finally as an amendment. His present plan does not touch the judicial power, and does not change the relation of the court to Congress. There can be no question of its constitutionality. It neither seeks to curb the court nor (despite the current impression) pack it, for if the judges retire there is no increase in numbers. Rather it purges the court by removing the infirm, and therefore (by a rough and imperfect logic) the least fit.

Where the President got the plan and why he should have sprung it just now are not entirely clear. Paul Ward points out in the Baltimore Sun that a similar technique was proposed in an 1869 bill in Grant's Administration, but failed of passage. The theory that he may have wished to influence favorably the Wagner Act cases seems untenable; if anything the proposal is calculated to freeze the judges into sheer immobility through rage. There may be some relation to the automobile strike and the power jam, as warnings to the business community that the President has trump cards which he is willing to play. But our own guess—and it is only a guess—is that Mr. Roosevelt wished to seize the occasion when public sentiment was ripe for action of some sort but before the movements for more radical curbs on the court had grown too strong to be stopped.

There are basic objections to the President's plan. It clearly does not meet the issue of the judicial power as an obstruction to democratic action. It does not go to the root of our judicial oligarchy, but by reorganizing it seeks rather to perpetuate it. There is a danger that, especially after the number of fifteen has been reached,
a justice will wait until he has a favorable President before resigning, thus creating a semi-hereditary caste. It can be used as effectively by a reactionary President as by a liberal, and ultimately it may produce simply a benchful of younger reactionaries—just as blind and stubborn in their fifties as in their seventies. Moreover, even a liberal President finds that there's many a slip between the nomination of a judge and his decisions: be it eternally remembered that McReynolds was appointed by Wilson. And certainly Mr. Roosevelt, judging from the names most mooted now, cannot be depended upon to choose more wisely than his predecessors.

Nevertheless, it is the task of progressives to support the measure—with an open-eyed awareness of its shortcomings. It will clear the blockage of New Deal legislation—at least for the immediate future. Meanwhile it will have delivered a blow to the sanctity of the Supreme Court from which the court will never wholly recover. If the court can be defeated once, it can be defeated again—and that is a lesson from which the people will profit. While logically the plan is leaky, psychologically it is sound. For talk as we may about educating the common man on the judicial power, the thing that sticks in his mind is that the men who exercise it are old men and therefore probably behind the times.

But for progressives to support this measure does not mean that they should stop there. *Purging the Supreme Court does not preclude curbing it*. A movement for a constitutional amendment must be launched now, so that when the rejuvenated Court again grows ossified, we shall not have to fight the same battle all over again. But to refuse support to Mr. Roosevelt's measure and to hold out for "an amendment or nothing" is now—whatever it may have been before—playing into the hands of the reactionaries. They will inveigh against "packing" the Court, grow hysterical about the supposed blow to the independence of the judiciary, and insist that the only method of change is through an amendment. Do not be trapped by them. The only thing they value in an amendment is the delay it would involve and their hope finally of being able to beat it. And without Roosevelt's support for an amendment, that hope would be a reality. With his support it is possible to push on the campaign for constitutional reform, viewing the present proposal merely as the opening gun in a battle that will be protracted and fiercely disputed. In such a battle what the progressives have chiefly to overcome is the myth of Supreme Court divinity. When they have conquered that, they can move on to achieve democracy.

Our program is, then, for progressives to support Roosevelt's proposal if he will support them in simultaneously launching an amendment. In that spirit we present, in the box on the previous page, our candidates for the six new posts. We have omitted members of the present Congress, since they would be barred until the end of their term from occupying posts they had themselves created. This has made it necessary to exclude several excellent choices. We submit the list with the earnest reminder that what value there is in the plan will be completely sacrificed unless genuine liberals are chosen.

**Thanks, General Franco**

Our sincere gratitude goes out to General Franco. All anti-fascists are indebted to him for his self-revealing replies to the questions put to him by Roy W. Howard of the Scripps-Howard press.

"The new Spain" which Franco thinks he will establish after his expected victory "will progress along the lines of a totalitarian state." Moreover, as Franco understands Spain's "vigorous national characteristics," the Spanish people want no voice in their form of government. "Nor should the immediate concern of the citizens of Spain," he telegraphs, "be the choice of the particular regime that is to govern them." He declares that "our soldiers fight for liberty of conscience and respect of religious beliefs and for national traditions" in "Catholic Spain." "Our soldiers" are the Moslem Moors and the troops from Nazi Germany who respect neither liberty of conscience nor the Catholic church nor any other church. Franco, nevertheless, will not separate church from state. The dark tradition of illiteracy and bigotry must remain unbroken.

The Generalissimo, however, has decided views about certain aspects of the future. "The family and the workshop will be the basis for a new Spanish society." This is very exciting, very different, and very new. "Franco's Spain will banish class hatred"—just as in Germany. These are not vague promises. Things are already being done in the midst of a war that is taxing all of Franco's energies. "We are improving the housing conditions of the lower classes," he says. The General probably makes this claim with justice. He has killed off so many members of the lower classes who protested against his regime that those who remain undoubtedly have access to more living space. Franco does not have to tell us what he would do if he won. The Francos have been ruling Spain for centuries, and the result is a miserably poor, unprogressive economy, millions of peasants living in a permanent state of undernourishment.

Nevertheless, Franco is not so confident of victory as he once was. To be sure, he enjoys the "moral support lent to us by Germany and Italy." But these airplanes, submarines, cannons, machine-guns, and rifles are not sufficient to enable him to win, and he has been stuck at Madrid ever since the first week of November. "When do you expect the capture of Madrid?" Mr. Howard asked him. Franco did not answer. Franco has not been so reticent in the past. He prophesied that he would take the city on October 12 to commemorate the "Day of the Race," the day Columbus discovered America in Spanish ships. Then he publicly prophesied that he would enter the city on November 7, just to celebrate the Bolshevik revolution. Later he broadcast to the world that his Islamic soldiers would occupy Catholic Madrid on Christmas Day. The Spanish military love to announce long in advance what their armies are going to do. Suddenly now Franco is silent. We wonder whether he realizes at last that the stirring defense of Madrid by the loyalist forces and the harried civilians of the city is slowly but perceptibly destroying his military strength.