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"THE SUPREME COURT"

ADDRESS

BY

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From decade to decade in our history, the Supreme Court has been the center of storms of controversy and sectional rancor. Out of every tempest, it has emerged with enhanced prestige, the most highly esteemed judicial tribunal in the world.

At times, the Court has been accused of being too reactionary; at other times, too radical. And there have been periods during which it has been simultaneously the target of both the conservative and liberal groups in our nation. It is important at this time for all of our people, and particularly for our lawyers, to view the role of the Court in its proper perspective.

At the time of the adoption of the Constitution, our founding fathers sought to charter a government which would not be so all-powerful as to threaten individual liberty or desirable local autonomy, and yet be strong enough to foster our growth, well-being and eminence as a great nation.

In order to strike the right balance by which these two objectives could be achieved, the Constitution granted certain powers to the Executive, Legislative and Judicial Branches of the Government which would constitute checks and balances upon each other. It reserved the balance to the States. By these means, it was hoped to prevent undue concentration of governmental power in the hands of any one segment--the first step to despotism.

Those of us who attend ball games know that there is one man on the field who is never a favorite with anyone. He is the umpire of our national pastime. Every time he "calls a close one," he is "panned" by one team or the other, and by the fans, no matter how right he may be. How true this is of our Supreme Court. It is the national umpire of all great legal controversies.

The history of our nation is reflected in about 350 volumes of the United States Supreme Court Reports. It contains the story of struggles

for power between state and federal governments; the contests between centralization and local rule; the conflicts between creditor and debtor classes; the tugs between economic concentration and individual enterprise; the reconciliation of the nation's security, safety and man's liberties.

There have been many periods in our history where, regrettably, sectionalism and self interest have so befogged the real issues that the importance of the Court's decisions to the strength and growth of the country have been temporarily obscured.

The earliest attack against the Supreme Court was directed by Jefferson, because the Court had undertaken to pass upon the constitutionality of a Congressional act. In Marbury v. Madison, Chief Justice Marshall laid down the principle that it was "the province and duty of the judicial department to say what the law is", and that, if a statute of Congress and the Constitution collide, the former must yield since the Constitution is the supreme law of the land. There were no precedents for such a holding in this country. It was contrary to English law where Parliament was almost omnipotent. Men like Jefferson felt that each department of government should pass on its own exercise of authority. They were critical of the decision of the Court in Marbury v. Madison as a despotic usurpation of power.

Today, we recognize that there would be little, if anything, left of our constitutional rights, if the Court was precluded from holding that laws repugnant to the Constitution are void. Our right to freedom of speech, press, religion, our right to a fair trial, the right not to be deprived of property without due process, and all other cherished rights would be in constant jeopardy, if the Supreme Court did not have the last word over the constitutionality of statutes--federal or state.

The attack against the Supreme Court's power to pass upon constitutionality of State statutes also came during Marshall's day. Under Section 25 of the Judiciary Act of 1789, the Supreme Court was given appellate jurisdiction to review State statutes, or the judgments of State courts involving the validity of a treaty or statute of the United States. State courts and legislatures, jealous of their authority, promptly denied the jurisdiction of the federal courts to review State court decisions. Granting a writ of mandamus in United States v. Peters, a Pennsylvania case, the Court, through Chief Justice Marshall, said:

> "If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights under those judgments, the Constitution itself becomes a solemn mockery; and the Nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals."

Pennsylvania called out its troops to prevent service of the Federal Writ. The United States Marshal deputized a posse of 2,000 men to enforce it. President Madison was asked to withdraw the posse, but he refused. Only then did the Pennsylvania legislature agree to satisfy the judgment. Shortly thereafter the general of the Pennsylvania militia and several of his men who obstructed the service of the Federal Writ were indicted and convicted. An enraged Pennsylvania legislature called for an amendment to the Constitution establishing an impartial tribunal to determine disputes between the federal and state governments, but the proposal received little support from the other states. Among these states stood Virginia which declared that the Supreme Court was "more eminently qualified * * * to decide the dispute * * * in an enlightened and informed manner, than any other tribunal which could be created." But a few years later, in 1816, the Virginia Court of Appeals refused to obey a mandate of the Supreme Court, claiming that Section 25 of the Judiciary Act was unconstitutional, and that the highest state courts were not inferior to the Supreme Court of the United States.

Beginning in 1819 the Supreme Court was the subject of another series of bitter attacks. Its decisions in McCulloch v. Maryland, invalidating the state law taxing the Bank of the United States aroused great opposition. It was claimed that the decision dealt a deadly blow to the sovereignty of the states. A similar decison involved the State of Ohio which had adopted a resolution refusing to be bound by McCulloch v. Maryland, and reasserting the famous nullification resolutions of Kentucky of 1798 and 1799. Next, Virginia was provoked by the Court's decision in Cohens v. Virginia, which upheld the supremacy of the federal court in criminal as well as civil cases where federal questions were involved. South Carolina joined in the assault when Mr. Justice Johnson, himself a South Carolinian, held unconstitutional a State statute dealing with the entrance of free negroes. Kentucky complained that the Supreme Court had wrongfully declared unconstitutional its laws for the protection of landowners and judgment debtors. The Court held the Steamboat Monopoly under New York laws to be invalid. There were few states whose acts escaped reversal; criticism of the Court became almost nation-wide.

During this period, various plans were advanced for curtailing the Court's powers. One plan would have transferred appellate jurisdiction to the Senate in cases involving conflict between the Constitution and laws of the United States and of the several states. Another would have required the concurrence of two thirds of the members of the Court in any case involving a constitutional question. Still another would have required concurrence of five of the seven judges in decisions invalidating State statutes. There were also attempts to pack the Court.

As we look back upon the Supreme Court during the 34 year period that Marshall was Chief Justice, it would appear that it seemed to be going from one crisis to the next, but always rising to the challenge on each occasion.

Consider for a moment the consequences, if Marshall's court had capitulated and the Court's power to decide these great constitutional questions had been taken away.

Consider, for example, the benefit to the country resulting from the Court's decision in McCulloch v. Maryland. In upholding the powers of the National Bank, Marshall gave impetus to more conservative banking, to stabilization of the national currency, and to facilitation of sounder trade and exchange practices throughout the country. The decision setting aside the New York Steamboat monopoly set a precedent enabling the government to avoid commercial wars and trade barriers affecting our interstate commerce. These were precisely the defects of the league of states that the framers of the Constitution had intended to avert. Our vast interstate and foreign commerce now knows no state barriers, border duties, or retaliatory measures such as have hindered commerce abroad all these years.

In 1836, Roger B. Taney replaced Marshall as Chief Justice on the Court. Criticism of the Court did not abate with Taney's appointment--it merely came from different directions.

The Dred Scott case, you will recall, was one of Taney's early decisions. It aroused great hostility in the North.

The decision was savagely assailed by anti-slavery Congressmen and Senators and by the anti-slavery press. The Court was described as "a citadel of slavery."

Yet, although Lincoln was critical of the opinion, he was most careful not to impugn the integrity of the Court. In a debate with Douglas in 1857, Lincoln declared:

> "We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous."

Instead of urging defiance of the decision, Lincoln said:

> "We know the court that made it, has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it."

In debate a year later, Lincoln reaffirmed the importance of compliance with the Court's decisions saying:

> "The courts are the tribunals prescribed by the Constitution and created by the authority of the people to determine, expound and enforce the law. Hence, whoever resists the final decision of the highest judicial tribunal, aims a deadly blow to our whole Republican system of government--a blow, which if successful would place all our rights and liberties at the mercy of passion, anarchy and violence."

Another famous case of the day involved the State of Wisconsin. One Booth, an abolitionist editor, was convicted in a Federal Court of violating the federal fugitive slave law. In a vigorous exposition of the law, Chief Justice Taney sustained the supremacy of Federal jurisdiction under

the Constitution. Taney declared that "local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals."

There were other fundamental principles laid down in this case which are all too often forgotten. Taney declared that the judicial power is "indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachment upon their reserved rights by the Federal Government." He said also that, if the Court had not been established as the final arbiter of controversies between the United States and the States, "internal tranquility could not have been preserved." If these conflicts were left to be resolved by force, he warned, "our Government, State and National, would soon cease to be Government of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions."

Now, it was the Wisconsin Courts and its Legislature that adopted the policy of nullification. Finally, however, the anger subsided and the Wisconsin Court accepted the judgment of the Federal Court.

During and after the Civil War, attacks upon the Court continued. In 1864, Salmon P. Chase succeeded Taney as Chief Justice. The Milligan decision in 1866, freeing a citizen who had been tried by a military court while the civil courts were open, provoked another assault. The Court's opinion laying down "a law for rulers and people, equally in war and in peace" was

referred to then as "twaddle." It was urged that the Court should be reorganized by the addition of judges who would be responsive to the views of the people on the subject of reconstruction. A bill was introduced taking away the Court's appellate jurisdiction. Today, this decision is regarded as one of the bulwarks of American freedom.

Two years later, the Court was called on in Texas v. White to decide a significant case involving the status of the seceding states. Texas brought suit to enjoin payment of certain bonds owned by the State prior to the war and negotiated by the Confederate State Government. A primary question was whether Texas, having seceded and not yet represented in Congress, was still out of the Union and therefore lacking in capacity to sue. The Court ruled that under the Constitution Texas had always remained a State of the Union. This was so, Chase declared, because "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

This opinion by Chase, an appointee of Lincoln's, helped to reunite a nation which had been divided by civil war. It gave the Southern States their just standing as States at a critical point in the Reconstruction period. The decision was not free from criticism. Thaddeus Stevens and others in Congress lashed out at it, because they considered Congress could treat the seceding states as it chose, without regard to constitutional restraints.

In the Reconstruction period the Court fared no better. The Legal Tender Acts were passed during the Civil War to enable the Union to finance the war effort through issuance of paper money. Under these Acts, creditors were required to accept these debased paper dollars in discharge

of outstanding debts. The validity of the acts was soon challenged by creditors, and when the matter first reached the Court in 1870, they were held invalid by a four to three decision.

The decision evoked a storm of protest from thousands of debtors. At the time there were two unfilled vacancies in the Court.

On the day the decision was handed down, President Grant sent to the Senate the names of William Strong and Joseph P. Bradley to fill the two vacancies. The Senate promptly confirmed and, in less than a week, the Attorney General petitioned the Court to reconsider the decision. The Court agreed, and a year later reversed itself and upheld the Act, five to four, upon the ground that the power to use legal tender notes to finance the war was implied from the power to wage war and to preserve the Union.

Now it was the creditors who denounced the Court. President Grant was accused of "packing" the Court and of making it a political instrument subservient to him. While historians reject this view, claiming that the decision to nominate Bradley and Strong had been reached before the first Legal Tender decision was decided, it was not believed at the time, and the Court's standing was damaged. Yet the soundness of the later decision has never been questioned and is now beyond dispute.

The Court's decisions in the next twenty years had profound significance in the field of civil rights. The Slaughter House Cases in 1873 held that it was not the purpose of the Fourteenth Amendment to transfer to the Federal Government and bring within the control of Congress the area of civil rights which theretofore had been exclusively the subject of State regulation. In the Civil Rights Cases decided in 1883, the Civil Rights Act of 1875, with respect to equal enjoyment of inns, public conveyances and places of amusement, was held invalid. These decisions were condemned in the North as making a mockery of the Fourteenth Amendment. In the South, they were commended for their soundness and supported as preserving the substance of our dual form of government. As each unpopular decision was rendered, those dissatisfied called for a drastic revision of the Court's power.

For lack of time we must skip over half a century. In the 1920's, came new proposals to restrict the Court's powers. One was advanced by Senator Borah. He proposed that seven out of nine judges should be required to concur in pronouncing any Act of Congress invalid. Senator LaFollette had a more extreme plan. Under it, no inferior Federal judge could set aside a law of Congress on the ground that it was unconstitutional, and if the Supreme Court should do so, Congress could, by repassing it, nullify the action of the Court. Both of these plans were denounced by leading members of the Bar as destroying an important check upon arbitrary legislative action, and finally were abandoned.

Recently, the Court again has been the subject of a torrent of criticism because of its decisions in the Segregation Cases. Its critics have also seized on recent decisions invalidating state law and state judicial action as indicating a trend of judicial encroachment on the sovereignty of the states.

These decisions, like those already discussed, make clear what must be evident now to every student of law and history--that the States Rights issue is inherent in our form of government and is bound to recur again and again.

Nineteen Senators representing 11 states, and 77 House Members representing a considerable number of states have filed with the Congress a document entitled "Declaration of Constitutional Principles." In this Declaration, commonly known as the "Southern Manifesto," it is asserted that the decision of the Court in the Segregation Cases is a "clear abuse of judicial power"; and that "it climaxes a trend in the Federal Judiciary undertaking to legislate in derogation of the authority of Congress, and

to encroach upon the reserved rights of the States and the people."

This is not the place to reargue the Segregation Cases. Every contention which the Manifesto asserts was exhaustively treated in lengthy briefs and carefully considered by the Court. It would be superfluous to add to what was so eloquently and persuasively said by the Court. It would be well, however, to review the course of action taken by the Court in these cases.

The Segregation decisions were reached only after the greatest care and consideration. No issue could have received more deliberate treatment by a Court. The matter was argued and reargued. After reargument, the Court in a unanimous opinion rendered on May 17, 1954, outlawed racial segregation in the public schools of the United States.

The Court ordered still another argument on the form of relief and invited the attorneys general of all the states requiring or permitting school segregation to present their views. Finally, on May 31, 1955, the Court again unanimously rendered its judgment. This was more than three years after the case had been docketed. Even then, the action taken by it was a moderate one! It directed the lower courts to enter "such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." The Court thereby established a reasonable method by which the transition to integration could take place. This was done in full recognition of the delicate social adjustments to be made. However, the Court made it clear "that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

The Manifesto is critical of the Court's opinion upon the ground that neither the original Constitution mentions education—nor the 14th Amendment —nor any other amendment.

This cannot be denied. For that matter the Constitution does not refer to agriculture. Does that mean that the Congress may not provide price supports for cotton, soy beans or wheat? Obviously not. Nor does the Constitution refer to an air force, flood control, grants-in-aid, social security, kidnapping victims across state lines, and countless other objects which are the subject of consideration by the Congress. As Judge Learned Hand once wrote: "Constitutions can only map out the terrain roughly, inevitably leaving much to be filled in."

The Constitution was made for an undefined and expanding future. To be effective, it could not be fixed or static in its construction. It had to speak in generalities like "due process," and the "equal protection of the laws," if it were to be flexible enough to cope with social changes and the demands of a modern society. And precisely because of this characteristic, the Courts have been able to extend the domain of law to the irrefutable facts of life during all the years of this country's great history. As if it had a built-in gyroscope or other self-righting mechanism, the Court adjusts, qualifies, extends and overrules judicial precedents, and in doing so, tends to stabilize and reconcile the counteracting social, economic, and other forces that erupt in each new era.

In my opinion this decision will stand the test of time. In a great many communities, where racial segregation in public schools had been the accepted custom for many years the people have already responded as typical Americans and are following the Court's decision. How heartening it is to

see responsible officials in these communities headed towards making their public school systems comply with the law of the land. The Federal District Courts have also carried out their responsibilities by making short shrift of those sporadic and ill-conceived efforts to evade the decision of the Court.

If there is any lesson to be learned from the Court's history, it is simply this: It does not have one rule for the North and a different rule for the South, East or West. Its scales of justice are not set one way for the rich or exalted, and another way for the poor or humble. Its judgment book is not kept one way for labor and another for management; one way for the federal government and another for the states. It is free from favor to any section, any interest, any person. All are equal before the law -- none above it. As Chief Justice Hughes has said: "The officer of government, the State itself, is subject to the fundamental law that the humblest may invoke."

The Judicial Branch is not above criticism, any more than the Executive or Legislative Branches. It has its imperfections like every other institution. It not only tolerates but thrives on its own dissents. As human beings, judges may err like any other persons. All we may expect of them is that they strive to perform their functions as best they can in the advancement of justice. It is wholesome and in the public interest to have free criticism of any official, institution, or agency in government. But the criticism should be fair, responsible and informed if it is to be respected. It should not be an invitation to defy the rulings of the Court. For anyone who tears the Court down does as much harm as tearing down the Congress, the Executive Branch and for that matter, all government as well. Any attempt to wantonly discredit the Court is a disservice to freedom itself.

Those who appreciate the precious value of law and order, and of security for the individual in his rights--not for a day but for all time, for their

children and childrens' children--must know that it can only be gained and preserved by a court removed as far as possible from the passion of the moment, from politics, from partisanship, from prejudice, from personal or sectional interest of any kind whatever.

And, in the Supreme Court, one finds just such an impartial tribunal insofar as it is possible.

Our liberties in the days ahead will depend largely on the esteem and attachment with which the Court is held by the people--upon the spirit of moderation with which its decisions are accepted by them. Public confidence in the soundness of the Court's decisions and in its integrity is the foundation of authority. In turn, the common fate of the people, their common aspirations in the dignity and rights of the individual, hinge on whether the Court shall continue to be the country's symbol of orderly, stable, and just government.

As attorneys and officers of the Court, we have an important stake in the independence of the Court and a greater duty to it. The Court relies on us for assistance. We must give it our support by our own example. We must do everything possible to preserve its reputation. We can stir fuller recognition of the Court's distinguished role in our government, in our history, and in our development as a leader among nations.

The independence of the Supreme Court will be secure only so long as it is sustained by the confidence of the public and the bar. And so long as the Supreme Court is independent, the people may be assured of equal justice under law. These are the mighty interacting forces by which we may strengthen in the hearts of all, pride, honor, and reverence for the Constitution of the United States-- the most treasured legacy that good fortune ever bestowed upon a free people.