Sesquicentennial of the Supreme Court of the United States

Addresses of Chief Justice Hughes, Attorney General Jackson, and President Beardsley, of the American Bar Association

THE Federal Judiciary Act which became a law on September 24, 1789, provided for a Supreme Court to consist of a Chief Justice and five associate justices, thirteen district courts, and three circuit courts composed of two Supreme Court justices and a district judge. The act further fixed the jurisdiction of the inferior federal courts and provided for appellate jurisdiction from the state courts in certain cases presenting federal questions.

The Act provided that the Supreme Court should be organized on February 1, 1790. On that day, which fell on a Monday, the Supreme Court met in New York City in the Royal Exchange, a building located at the foot of Broad street. "The court room at the Exchange was uncommonly crowded," said the newspapers of the day.

According to contemporaneous accounts referred to in Charles Warren's well-known work on the Supreme Court, "The Chief Justice and other Judges of the Supreme Court of this State, the Federal Judge for the District of New York, the Mayor and Recorder of New York, the Marshall of the District of New York, the Sheriff and many other officers, and a great number of the gentlemen of the Bar attended on the occasion." (*The Supreme Court in United States History*, 1928 ed., vol. I, p. 46.)

But on this day only three members of the Supreme Court were present, Chief Justice Jay, of New York, Associate Justice Wilson, of Pennsylvania, and Associate Justice Cushing, of Massachusetts. The Court, thereupon, was adjourned to the next day, February 2, at one o'clock. When the Court convened, accordingly, the Chief Justice and Associate Justices Wilson, Cushing, and Blair, the last-named of Virginia, were in attendance.

It is recorded that, as no business appeared to require immediate attention, the Court again adjourned.

A contemporaneously published record of the ceremony on February 2, 1790, was as follows:

> Proclamation was made and the court opened. Proclamation was made for silence, while the letters patent of the justices present were openly read, upon pain of imprisonment; whereupon letters patent under the great seal of the United States bearing test on the 26th day of September last, appointing the said John Jay, Esq., Chief Justice;

letters patent bearing test the 27th day of September last, appointing the said William Cushing, Esq., an Associate Justice; letters patent bearing test the 29th day of September last, appointing the said James Wilson, Esq., an Associate Justice; and letters patent bearing test the 30th day of September last, appointing the said John Blair, Esq., an Associate Justice of this court were openly read.

At the first session of the court the judges were attired in robes described as "party-colored." Warren states that they were probably black and red. At all events, a considerable impression appears to have been made on the public by the costumes of the justices, for a Philadelphia newspaper commented that "the elegance, gravity and neatness (of the robes of the justices) were the subject of remark and approbation with every spectator."

William Allen Butler, in an account of the centennial celebration in 1880 of the organization of the federal judiciary, stated that Chief Justice Jay's robe of black silk had salmon-colored facings. This, according to family tradition, was the gown of a doctor of laws of the University of Dublin, which had conferred a degree on Jay. Butler also stated that the associate justices, when the court met for the first time, wore plain black robes.

Such was the Court's beginning. Concerning its intervening century and a half, volumes have been written. On the first day of last month, by impressive ceremonies, held in its beautiful new building at Washington, the Court's arrival at the sesquicentennial of its establishment was fittingly observed.

The principal addresses were delivered by Chief Justice Hughes, Attorney General Jackson, and Charles A. Beardsley, President of the American Bar Association. There was present a large and distinguished gathering.

These addresses were so eloquent, patriotic, and appropriate to the occasion as to deserve the permanent record, each in juxtaposition to the other two, of which they are assured in the pages of NEW YORK LAW REVIEW.

Attorney General Robert H. Jackson spoke as follows:

Mr. Chief Justice and Associate Justices of the Supreme Court of the United States:

The Bar of the Supreme Court, including those who here represent the executive branch of the government, desires to observe with you the one hundred fiftieth anniversary of this Court's service. We do so in a spirit of rededication to the great principles of freedom and order which come to life in your judgments.

The Court as we know it could hardly have been foreseen from its beginnings. When it first convened, no one seemed in immediate need of its appellate process, and it adjourned — to await the perpetration of errors by lower courts. Errors were, of course, soon forthcoming. The Justices who sat upon the Bench, although not themselves aged, were older than the Court itself. The duration of an argument was then measured in days instead

of hours. All questions were open ones, and neither the statesmanship of the Justices nor the imagination of the advocate was confined by the ruling case. Some philosophers have so feared the weight of tradition as to assert that happy are a people who have no history. We, however, may at least believe that there was some happiness in belonging to a bar that had little occasion to distinguish precedents or in sitting upon a Court that could not be invited to overrule itself. Few tribunals have had greater opportunity for original and constructive work, and none ever seized opportunity with more daring and wisdom.

From the very beginning the duties of the Court required it, by interpretation of the Constitution, to settle doubts which the framers themselves had been unable to resolve. Luther Martin in his great plea in *McCulloch* v. *Maryland* was not only an advocate but a witness of what had been and a prophet of things to come. He said: "The whole of this subject of taxation is full of difficulties, which the Convention found it impossible to solve, in a manner entirely satisfactory." Thus, controversies so delicate that the framers would have risked their unity if an answer had been forced were bequeathed to this Court. During its early days it had the aid of counsel who expounded the Constitution from intimate and personal experience in its making. They knew that to get acceptance of its fundamental design for government many controversial details were left to be filled in from time to time by the wisdom of those who were to follow. This knowledge made them bold.

The passing of John Marshall marked the passing of that phase of the Court's experience. Thereafter the Constitution became less a living and contemporary thing — more and more a tradition. The work of the Court became less an exposition of its text and setting and purposes and became more largely a study of what later men had said about it. The Constitution was less resorted to for deciding cases, and cases were more resorted to for deciding about the Constitution. This was the inevitable consequence of accumulating a body of judicial experience and opinion which the legal profession would regard as precedents.

It would, I am persuaded, be a mistake to regard the work of the Court of our own time as either less important or less constructive than that of its earlier days. It is perhaps more difficult to revise an old doctrine to fit changed conditions than to write a new doctrine on a clean slate. But, as the underlying structure of society shifts, its law must be reviewed and rewritten in terms of current conditions if it is not to be a dead science.

In this sense, this age is one of founding fathers to those who follow. Of course, they will reëxamine the work of this day, and some will be rejected. Time will no doubt disclose that sometimes when our generation thinks it is correcting a mistake of the past, it is really only substituting one of its own. But the greater number of your judgments become a part of the basic philosophy on which a future society will adjust its conflicts.

We who strive at your bar venture to think ourselves also in some measure consecrated to the task of administering justice. Recent opinions have reminded us that the initiative in reconsidering legal doctrine should come from an adequate challenge by counsel. Lawyers are close to the concrete consequences upon daily life of the pronounce-

ments of this Court. It is for us to bring the cases and to present for your corrective action any wrongs and injustices that result from operation of the law.

However well the Court and its bar may discharge their tasks, the destiny of this Court is inseparably linked to the fate of our democratic system of representative government. Judicial functions, as we have evolved them, can be discharged only in that kind of society which is willing to submit its conflicts to adjudication and to subordinate power to reason. The future of the Court may depend more upon the competence of the executive and legislative branches of government to solve their problems adequately and in time than upon the merit which is its own. There seems no likelihood that the tensions and conflicts of our society are to decrease. Time increases the disparity between underlying economic and social conditions, in response to which our Federation was fashioned, and those in which it must function. Adjustment grows more urgent, more extensive, and more delicate. I see no reason to doubt that the problems of the next half century will test the wisdom and courage of this Court as severely as any half century of its existence.

In a system which makes legal questions of many matters that other nations treat as policy questions, the bench and the bar share an inescapable responsibility for fostering social and cultural attitudes which sustain a free and just government. Our jurisprudence is distinctive in that every great movement in American history has produced a leading case in this Court. Ultimately, in some form of litigation, each underlying opposition and unrest in our society finds its way to this judgment seat. Here, conflicts were reconciled or, sometimes, unhappily, intensified. In this forum will be heard the unending contentions between liberty and authority, between progress and stability, between property rights and personal rights, and between those forces defined by James Bryce as centrifugal and centripetal, and whose struggle he declared made up most of history. The judgments and opinions of this Court deeply penetrate the intellectual life of the nation. This Court is more than an arbiter of cases and controversies. It is the custodian of a culture and is the protector of a philosophy of equal rights, of civil liberty, of tolerance, and of trusteeship of political and economic power, general acceptance of which gives us a basic national unity. Without it our representative system would be impossible.

Lord Balfour made an observation about British government, equally applicable to American, and expressed a hope that we may well share, when he wrote:

"Our alternating Cabinets, though belonging to different parties, have never differed about the foundation of society, and it is evident that our whole political machinery presupposes a people so fundamentally at one that they can afford to bicker; and so sure of their own moderation that they are not dangerously disturbed by the never ending din of political conflict. May it always be so."