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THE JUDICIARY’S PART IN THE LIFE OF THE NATION*

“If the judiciary be struck from the system, what is there of any value that will remain; for government cannot subsist without it? It would be as rational to talk of a solar system without a sun.”

—WILLIAM WIRT.

New Hampshire, the first of the original thirteen states to set up a government wholly independent of the mother country, was the ninth state to approve the Federal Constitution. The ratification was at Exeter on June 21, 1788, and by a majority so close that a change of six votes would have defeated ratification. A new nation was born with this vote, the United States of America. This, because the Constitution, then a document of about four thousand words and less than a hundred sentences, provided that ratification by nine states should be “sufficient for the establishment of this Constitution between the states to ratifying the same.”

America’s Contribution to Science of Government

This Constitution, under which we live today, the guarantor and protector of our liberties, makes a unique contribution to the science of government in its portioning out all the powers of the government among three coordinate and independent departments, each of which can constitutionally exercise only the powers given to it, and no department of which can interfere with or control the discharge of their function by the other departments.

A distinguished student of government, Dr. Henry Campbell Black, observes that “law in its application to the individual presents itself in three aspects. It is a thing to be

*An address delivered at a meeting of the Alumni Association of the Phi Delta Phi Fraternity in Tuscaloosa, Alabama, on July 9, 1937.
ordained, a thing to be administered, and a thing to be interpreted and applied. There is, therefore, a natural threefold division of the powers and functions of the state in the idea of government by law. First, there is the power to ordain or prescribe the laws, which includes, incidentally, the power to change, amend, or repeal any existing laws. This is called the 'legislative' power. Second, there is the power to administer the laws, which means carrying them into practical operation and enforcing their due observance. This is denominated 'executive' power. Third, there is the power to apply the law to contests or disputes concerning legally recognized rights or duties between the state and private persons, or between individual litigants, in cases properly brought before the judicial tribunals, which includes the power to ascertain what are the valid and binding laws of the state, and to interpret and construe them, and to render authoritative judgments. This is called 'judicial' power."

Concentration of Power Invites Tyranny

The patriots who wrote the Constitution of the United States knew that it was unwise to place legislative, executive, and judicial authority in any one man, or body of men. They knew that to do this would be to invite tyranny. History had taught them that the safety of a state and of individual rights could be had only when the three powers of government were committed each to a separate department.

The Spirit of Laws

The Framers of the Constitution were widely read in history and philosophy. Most of them were familiar with one of the truly great works of all time, *The Spirit of Laws*, by Baron de Montesquieu, first published in 1748.

The writings of the great Frenchman had made a profound impression on the American constitution-makers. Indeed, John Randolph Tucker, in his great work, *The Constitution of the United States*, says:
“So great was the influence of this author that a distinguished writer (Sir Henry Maine) has declared that 'neither the institution of the Supreme Court, nor the entire structure of the Constitution of the United States, were the least likely to occur to anybody's mind before the publication of The Spirit of Laws.'”

**Montesquieu's Doctrine**

Montesquieu was deeply impressed with his study of the workings and philosophy of the English government. His ideas came in a large part from that system, and from *Treatises on Government* by the scholarly Englishman, John Locke, a work which is a classic in the “library of English constitutional law.” Certainly, of all the writers with whose works the Revolutionary Fathers were familiar the thoughts of no writer more profoundly affected them than those of Montesquieu.

Montesquieu's *The Spirit of Laws*, as James Bryce noted in *The American Commonwealth*, had won its way “to an immense authority on both sides of the ocean.” The doctrine of Montesquieu is that when all the powers of government—the power to make laws, the power to interpret them, the power to execute them—are lodged in one person, tyranny and oppression are sure to follow. He proposed to prevent arbitrary exercise of power by a system of checks and balances whereby the three natural functions of governments were each to be committed to separate departments.

Montesquieu's doctrine is contained in these paragraphs from *The Spirit of Laws*:

“When the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty; because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

“Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
"There would be an end of everything, were the same man or the same body, whether of nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

Idea Embodied in State Constitutions

Quoting this doctrine, Mr. Bryce says that no general principle of politics laid such a hold on the statesmen of America in the formative days of the Republic as the belief that the separation of these three functions is essential to freedom. The idea, he says, "always reappearing in their writings; it was never absent from their thoughts." It had already been made the ground work of several state constitutions.

Separation of Powers Prevents Oppression

The lessons of history, of the struggles of men through century after century to govern themselves, teach that the safest way to secure the beneficial operation of good and honest government, and to secure for the people the broadest liberty possible, is to have a system of checks and balances. In a government where the powers are divided among separate and independent departments we find a method which provides that "power should be a check to power," and one branch of the government operate as a check and balance upon the appropriate powers of the other branches. Dr. William Paley, the English philosopher, observes that "the first maxim of a free state is that the laws be made by one set of men and administered by another; in other words, that the legislative and judicial characters be kept separate." When this is done the various powers of government are assigned to the departments which are best fitted to exercise them, and there is no dangerous lodgment of all power in one man, or body of men, with consequent tyranny.

Mr. Justice Blackstone, in his Commentaries, speaking of the separation of legislative and judicial powers, says that if the judicial powers were "joined with the legislative, the
life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law, which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive this union might soon be an over-balance for the legislative."

Jefferson said that "the first principle of a good government" is the distribution of powers.

**Government of Laws, And Not of Men**

The Constitution that was adopted in 1780 for Massachusetts was written by John Adams. In Section 30 of that Constitution you will find these words (and they are practically the same as the words of Section 43 of the Alabama Constitution of 1901):

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

The scholarly historian of the Supreme Court of the United States, Honorable Charles Warren, in an address delivered in 1928, said:

"John Adams was the first statesman to explain clearly to the people why, if they were to institute a republican form of government they must keep the three branches of government, the Executive, the Legislative, and the Judiciary, separate and independent. To have a republic, you must eliminate arbitrary power and unchecked authority. But, as Adams pointed out, any government in which one body (whether King or Legislature) both makes the laws and executes them is essentially an arbitrary government. It is the essence of a free republic, on the other hand, that no man or set of men shall ever have power 'to make the law, to decide whether it has been violated, and to execute judgment on the violator.' To preserve liberty to the people, there must be restraints and balances and separations of power."

If time permitted, it would be a happy privilege to examine in detail the functions of each of the three great depart-
ments of our government. I have, however, chosen for my subject, The Judiciary's Part in The Life of Our Nation, and must confine myself to that.

The Judiciary's Part

Coming to a consideration of the part which the judicial department plays in the life of this nation we find, in brief, that it enforces the will of the people against disregard by their representatives; interprets and construes the Constitution; preserves the boundaries of each of the great departments of government; administers justice; is the living voice of the Constitution; protects the citizen from arbitrary and unjust action by the government under which he lives; furnishes a nonpolitical forum where grave questions can be impartially debated and determined; maintains our dual system of government; maintains the constitutional rights of minorities; protects the contract rights of the people; and develops the law by reasoning.

Will of The People Enforced

The noblest function the judiciary performs in our system of constitutional government is the sacred duty of enforcing the will of the people as expressed in the Constitution, and maintaining that will against disregard by the representatives of the people in the legislative and executive departments of the government.

The great foundation-stone of our liberties is that the judiciary supports, maintains, and gives full force to the Constitution of the people against every act of their legislative or executive department which violates the will of the people.

In performing this lofty function the judicial department stands as "the final breakwater against the haste and passions of the people — against the tumultuous ocean of democracy." If the judicial department is to effectively enforce
the will of the people, as expressed in the Constitution, when the legislative department attempts to disregard that will by the passage of unconstitutional laws, then the judiciary must have the power to stay the arm of that department of government when it would pass beyond its appointed bounds and encroach upon the functions of the others. De Tocqueville, in *Democracy in America*, says that "the power vested in the American courts of justice, of pronouncing a statute to be unconstitutional, forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies."

**Noblest Features of Our System**

Dr. Timothy Walker, in his classic work, *American Law*, declares that this authority of the judiciary as the final arbiter is "one of the noblest features in our system. One cannot easily conceive of a more sublime exercise of power than that by which a few men, through the mere force of reason, without soldiers, and without tumult, pomp, or parade, but calmly, noiselessly, and fearlessly, proceed to set aside the acts of either government, because repugnant to the constitution."

It is difficult to see how any sound thinker, any impartial student of American institutions, or anyone who has carefully studied our form of government, can deny either the constitutional right or duty of the judiciary to disregard statutes which are repugnant to the Constitution.

This duty and this right are both plainly imposed upon the judiciary by Clause 2 of Article VI of the Federal Constitution, which declares:

"This Constitution ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

Quite often today we hear talk about the judicial department "nullifying" a statute; but a statute which opposes the
supreme law of the land is a “nullity” from its inception, and the judiciary could not pronounce a “nullity” what is already null and void.

Paralyzing The Constitution

It was clearly the intention of the makers of the Constitution that the judicial department should stand as the guardian of the Constitution against violation by either the executive or the legislative department, or by the State. If the judiciary had not the power to strike down statutes in conflict with the supreme law, “the paramount force of the Constitution would have been paralyzed, and the departments of government would have held practical supremacy of the supreme law of the land.”

Hamilton's Logical Argument

This duty of the judiciary was asserted by many of the ablest framers of the Constitution. A powerful and logical argument supporting this right is that of Alexander Hamilton in The Federalist. He argues:

"There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpreta-
tion of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

"Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

Only Effective Safeguard

The only effective safeguard which has been invented to annul unconstitutional legislation is the power of the judiciary to enforce constitutional limitations. The reasoning of Chief Justice Marshall, in *Marbury v. Madison,* has never been successfully combated. The great jurist, after calling attention to the fact that the Constitution organizes the government and assigns to the three departments the respective powers, says:

"The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

"Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other

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1 1 Cranch 137, 176, 177 (1803).
acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."

This was not a new doctrine because, as Mr. Beck says, "This great power to curb legislatures and executives, and therefore majorities, by resort to the paramount will of a written constitution, had been exerted for over one hundred and thirty years."

**Living Voice of The Constitution**

A great function that the judiciary performs in the life of our Nation is the work it does in expounding the Constitution. The Supreme Court of the United States, the highest court in our judicial system, is the final and authoritative interpreter of the Constitution.

Mr. Bryce, in *The American Commonwealth*, declares that "the Supreme Court is the living voice of the Constitution—that is, of the will of the people expressed in the fundamental law they have enacted. It is, therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law. It is the guarantee of the minority, who, when threatened by the impatient vehemence of the majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction."

The Constitution throws about the citizen the solemn protection of the law of the land. But the decisions of the Supreme Court, the living voice of the Constitution, give life and force to the words on the parchment of the original document now preserved for us in the Library of Congress. The declarations of its great Bill of Rights that you may worship according to the dictates of your conscience, that you shall have freedom of speech and trial by an impartial jury, that you shall be secure from unreasonable searches and seizures
—these were but words, vain words, on yellowed and withered parchment, but for that august tribunal which sits in the capital city of our Nation, a court whose judgments are today the living voice of the spirit of our Constitution.

An Impartial Forum for the Debate of Grave Questions

Still another useful service that the judiciary performs in the life of the nation is that the courts, in their temples of justice ("and the place of justice is a hallowed place, to be preserved without scandal and corruption") furnish a non-political forum in which constitutional understandings, and the intricate and delicate questions which come up in our national life, "may be impartially debated and determined."

In the courts of our land, away from the heat of the hustings, far from the excitement of public passions, removed from the vituperation and bickering of the political arena, the lawyer, in an atmosphere of dignity and patient deliberation, presents the causes of his client and his people to a tribunal that does not fear the face of man, and that administers justice according to the law of the land.

James M. Beck, discussing the provision in the Constitution for a Supreme Court, in The Constitution of the United States, said:

"It was possibly the greatest forum of intellectual debate of which civilization has any knowledge. There had been great courts before, but none had this peculiar and extraordinary function of determining the very form of government whose laws it was interpreting. It was in truth a super-Senate. The principles of government were to be developed, not in the heated atmosphere and selfish conflict of political strife, but in the serene air of a court of justice, after full debate by the greatest lawyers and by judges who acted not as partisans but as the sworn interpreters of constitutional liberty."

Justice Makes the Nation Endure

A sacred duty resting on the judiciary is to administer justice under the law of the land, giving to every man his own.
As Justice David J. Brewer of the United States Supreme Court once said, "It is true that it is written by the finger of Almighty God upon the everlasting tablets of the universe that no nation or state can endure or prosper into whose life justice does not enter, and enter to stay."

It is in the courts of the judicial department of the nation that justice is administered. Here, where the judges and juries of the land sit, the individual may come and have redress for his wrongs. No matter how poor and humble he may be the courts of the land are open to him to hear and decide his cause. The Constitution of Alabama 2 decrees "that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay."

It is in the courts of the land that this constitutional guarantee is made effective and justice administered.

*How Judiciary Can Best Play Its Part*

Every good American concerned with the welfare of our people knows that if our government is to endure the judiciary must not only perform the functions suggested, but it must discharge its duties effectively and be independent of the other departments.

So for a few minutes, let us consider some of the essential things to be done if the judiciary is to perform well its lofty functions.

*Independence of The Judiciary*

It is of supreme importance in the administration of the law that a judge should be independent—free from the influence of power, no matter from what corner, whether from the government itself, or from the mob. He should owe allegiance neither to the poor nor to the rich, neither to the low nor to the high. His only purpose should be to

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administer justice without respect to persons, and to do equal right to the poor and to the rich. The power of the strong should not awe him, and the weakness of the lowly should not sway him from justice. But he should be able to exclaim in the impressive language of the Caliph Omar:

"By God! He that is weakest among you shall be in my sight the strongest until I have vindicated for him his rights; but him that is strongest will I treat as weakest until he complies with the law."

Our constitutional system, which preserves our liberty, cannot live unless the judiciary is independent and courageous. Lessen the independence of the judiciary, and you weaken the foundations of the Republic.

The makers of the Constitution, particularly Alexander Hamilton and James Wilson, realized that the complete independence of the judiciary is absolutely essential in a limited constitution.

The Voice of The Law and Justice

James Wilson expressed the opinion of his day when he said:

"But how can society be maintained — how can a state expect to enjoy peace and order, unless the administration of justice is able and impartial? Can such an administration be expected unless the judges can maintain dignified and independent characters? Can dignity and independence be expected from judges who are liable to be tossed about by every veering gale of politics, and who can be secured from destruction only by swimming dexterously along with every successive tide of party? Is there not reason to fear that in such a situation the decisions of courts would cease to be the voice of law and justice, and would become the echo of faction and violence?"

Alexander Hamilton, in The Federalist, stressed the need for making the judiciary independent. He pointed out that the executive department dispensed the honor and held the sword of the community; and that the legislative department controlled the purse and laid down the rules by which the duties and rights of citizens were regulated. "But," said he, "the judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the
strength or the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. . . . This simple view of the matter suggests several important consequences. It proves, incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."

Woodrow Wilson's Solemn Words

Woodrow Wilson, in his great essay, *Government Under the Constitution*, wrote these powerful words against changing decisions of the judiciary by the appointment of those who have given their judgment and promise in advance:

"It is within the undoubted constitutional power of Congress, for example, to overwhelm the opposition of the Supreme Court upon any question by increasing the number of justices and refusing to confirm any appointments to the new places which do not promise to change the opinion of the court. Once, at least, it was believed that a plan of this sort had been carried deliberately into effect. But we do not think of such a violation of the spirit of the Constitution as possible, simply because we share and contribute to that public opinion which makes such outrages upon constitutional morality impossible by standing ready to curse them."

To impair the independence of the judiciary by letting the executive and legislative branches of the government overrule it is to destroy that system of checks and balances which is the safeguard of American liberties.

The Duties of A Judge

Many years after Hamilton, John Marshall, soldier of the Revolution, lawyer, legislator, and great jurist, speaking in the Virginia Convention, said:

"Advert, Sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting; between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance, that in the exercise of these duties, he should observe the utmost fairness. Need I press
the necessity of this? Does not every man feel that his own personal security, and the security of his property, depend on that fairness? Is it not, to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon a sinning people, was an ignorant, a corrupt, or a dependent judiciary."

When we observe the work of the courts, we realize that the actions of a judge come home to every man's fireside. The judgments he renders affect the life, the liberty, the property, the reputation — the all — of the citizen. All men and all their possessions in life are at some time touched by the hand of the judiciary. The judges of the land "exert a more immediate influence upon individual happiness, than any other public functionaries."

Tenure and Compensation

The framers of the Federal Constitution felt that an independent judiciary could best be secured by a permanent tenure of office and the fixing of compensation which could not be diminished while the judge was in office. The Federal Convention was practically unanimous that federal judges should hold their offices during good behavior. Chief Justice Hughes, speaking of this tenure, in The Supreme Court of the United States, says:

"The justices of the Supreme Court dealing so largely with constitutional questions of the gravest sort may address themselves to their work with freedom from anxiety as to their future and unembarrassed by suspicion as to their motives."

Hamilton, in the greatest of all his articles in The Federalist, declared for the permanent tenure of judicial office, "since nothing will contribute so much as this to that independent expression of the judges which must be essential to the faithful performance of so arduous a duty." He felt that periodical appointments would be fatal to judicial independence.
Hamilton declared that next to tenure of office during good behavior nothing could "contribute more to the independence of the judges than a fixed provision for their support." And he added, "In the general course of human nature, a power over a man's subsistence amounts to a power over his will."

The Courts As Business Institutions

The courts can not well play their part in the life of our nation unless they can perform their functions promptly and efficiently. If they are handicapped by having to work under laws which make for delay in the administration of justice, and which prevent the giving of justice in an efficient manner, then the courts can not play their part well.

A great Canadian judge expressed the idea in these forceful words: "We regard the courts as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money. . . . We cannot afford to waste either time or money." Especially is it important that we have a prompt dispatch of business in the criminal courts, for laxity in the disposition of criminal cases has subtle consequences on the moral sway of law in the community.

No Unreasonable Delays

The judge should see that cases are tried without unreasonable delay. A man who has a just claim is entitled to have it passed upon without undue loss of time. And a citizen who is charged with violating the law is entitled to a fair and speedy trial. And the state, against whose laws he offends, has the right, too, to have her peace and dignity vindicated without undue delay. The judge should also remember that litigants, witnesses and jurors have rights and that their time is of value and should not be needlessly consumed in attending court, but that they should not be detained any longer than is reasonably necessary to dispose of the matters in which they are concerned.
Technicalities Cast Disrepute on The Law

Too often meaningless technicalities and hair-splitting distinctions work injustice. Too often through blind and mechanical application of the rules of procedure we permit a perversion of justice by our slavish adherence to rules for the sake of rules merely. The day must come in our country when it will not be possible for any honest litigant to be denied his rights by any mere technicality, any slip in his pleading, any mistaken step in his litigation, unless it is shown that the defendant was actually prevented from having a fair trial by the defect.

Put Emphasis on Right and Justice

As pointed out by Woodrow Wilson, in his address The Lawyer In Politics, America lags far behind other countries "in the essential matter of putting the whole emphasis in our courts upon the substance of right and justice." And, continued this great statesman: "If the bar associations of this country were to devote themselves, with the great knowledge and ability at their command, to the utter simplification of judicial procedure, to the abolition of technical difficulties and pitfalls, to the removal of every unnecessary form, to the absolute subordination of method to the object sought, they would do a great patriotic service, which, if they will not address themselves to it, must be undertaken by laymen and novices. The actual miscarriages of justice, because of nothing more than a mere slip in a phrase or a mere error in an immaterial form, are nothing less than shocking. Their number is incalculable, but much more incalculable than their number is the damage they do to the reputation of the profession and to the majesty and integrity of the law." If our courts are to play their parts rightly, they must ever keep in mind these words of the great Mansfield: "To be sure on the form of the plea, the defendant must fail. But I never like to entangle justice in matters of form, and to turn par-
ties round upon frivolous objections where I can avoid it. It only tends to the ruin and destruction of both.”

**The Lawyer's Part**

The judiciary cannot perform its role in the life of the Nation without the help of an intelligent, honest and courageous bar. A lawyer is an officer of the court. He is part and parcel of the judicial administration, a minister in a holy temple that is reared and maintained to the end that justice may be done between man and man, and between the state and man.

The lawyer stands in his place, not as a hired servant or employee, interested solely in accomplishing the ends of his client, but he stands before the court as the instrument of a Higher Power, serving before an altar dedicated to the advancement of truth and justice. The client is not the keeper of his lawyer's conscience. The lawyer is a member of an honored profession, with all its great duties and responsibilities. He is not a tradesman or a shop-keeper. Commercialism has no place in the profession.

The thing that sustains our courts today is the confidence of the people. They can not have that confidence unless the conduct and motives of its officers “are such as to merit the approval of all just men.” High moral principles are the only safe guide.

In the field of constitutional law it is especially needful that the bar sense the gravity of issues raised by constitutional controversies, and have such understanding of them as to properly assist the courts in correctly solving constitutional problems, problems whose right solutions mean so much to the welfare and happiness of our people.

**Judges Come From The Bar**

All of the great offices in the judicial department are filled by those who have followed the profession of law. If we are

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to have a good bench, then we must have a good bar — a bar made up of lawyers who understand that they are members of a profession and not a trade, a bar which is steeped in the philosophy of the law, and a bar which, as President Wilson once expressed it, feels that it is "the custodian of the honor and dignity of a great social order, an instrument of humanity, because an instrument of justice and fair dealing and of all those right adjustments of life that make the world fit to live in."

If the lawyer is to help the great department of government, of which he is an honored and respected member, to perform its duties, then he must be at all times an independent instrument of society, he must be the helper and inspirer of statesmen, and he must be one who understands and can interpret the common life of the people.

**Lawyers and Moral Obligations**

Judicial administration in this country, and under our Constitution it is largely government itself, depends for its purity and efficiency upon three things: honest and intelligent juries, able and fearless judges, and a bar of high moral principles and a good knowledge of the law.

The lawyer who would measure up to the noblest standards of his profession "must not only be learned in jurisprudence, but must be ever alert to encourage, and even to urge upon his clients, the recognition of moral obligations, as well as a compliance with statutes as interpreted by decisions. The lawyer who knows only the law, and not the principles of righteousness and justice upon which law should be founded, fails to realize that with intellect, but without conscience, he can not discharge his duty as a member of that profession which peculiarly requires a clear conception of the great fundamental distinctions between right and wrong, whenever a moral question is involved," says Judge Edwin L. Garvin.  

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Our Country Needs a Democratic Bar

While no one would war with the effort to raise the standards of the bar, particularly as regards admission to the bar, yet we must not, under the guise of higher standards destroy a democratic bar. We are in great danger of bringing things to such a pass that after a while only the sons of the very rich can hope to be admitted to the bar.

Our country is a representative democracy. It is a great nation today because it has always had for one of its cardinal principles that there shall be open and equal opportunities for the sons of all men, regardless of the accident or condition of their birth. It should make little difference where a man gets his learning, or how he has trained his mind to efficient thought, if his mind is really so trained. No system of admission to the bar is either American or democratic which shuts the door in the face of any worthy and honest youth "who in his own way, and on his own time, and by his own energy and sacrifice seeks to enter the legal profession through avenues other than the institutions of the high school, the college, and the law school."

In order for the bar to help the courts to perform their high functions the personal relation of a particular lawyer to a particular client and case must continue.

We must beware of "the so-called standardization of legal business," and legal work must not be turned out "as if it were the standardized production of a factory."

The South and the Supreme Court

Speaking here today, before a Southern audience, let me remind you that the judicial department, represented by the United States Supreme Court, gave the friendly protection of that great tribunal to the South and her people when the Stars and Bars were forever furled at Appomattox, and the long and cruel night of Reconstruction came upon us, in that horrible decade that aptly has been called "The Tragic Era."
At the close of The War, Missouri wrote it into her constitution, in effect, that no person could hold any office, practice as an attorney at law, or act as a teacher or a clergyman, unless he could take an oath that he had not opposed the government of the United States. No Confederate could, of course, take the oath. Thus all of them were disqualified from holding an office, teaching, or preaching. It was a constitutional decree of perpetual exclusion of Confederates from the rights mentioned. It inflicted punishment without a judicial trial.

Test Oaths Struck Down

A Roman Catholic priest was convicted and fined because he held church services without first taking the test oath. The Supreme Court held the law unconstitutional both as a bill of attainder and an ex post facto law.5

The Supreme Court made a similar decision, in the noted case of Ex parte Garland,6 when it annulled an act of Congress which prohibited an attorney from practicing law unless he took an oath that he had not served the Southern Confederacy.

The Civil Rights Cases

When Congress in 1866 passed the Civil Rights Act and attempted to fix by law “a perfect equality of the white and black races in every State in the Union,” the law being enacted over the veto of President Andrew Johnson, the Supreme Court declared the law contrary to the Constitution.7 This momentous decision prevented a situation fraught with danger and unhappiness to the South. President Johnson knew, to quote one of his biographers, Judge Winston, that “Congress was engaged in overturning a proud and self-contained civilization, one which had produced Washington,

5 Cummings v. State of Missouri, 4 Wall. 277 (1866).
6 4 Wall. 333 (1867).
7 Civil Rights Cases, 109 U. S. 3 (1883).
Marshall, Jefferson, Henry, Madison, Andrew Jackson and Robert E. Lee.” President Johnson warned Congress that this Act would engender “a hatred between the races, deep-rooted and ineradicable, preventing them from living together in a state of mutual friendliness.”

The Supreme Court by that decision sustained the local laws of the Southern States and avoided a condition so serious that one dislikes to think of it.

Nor should we forget that the decisions of the Supreme Court sustain our White Primaries, and our laws for the separate accommodation of the White and Black races on railroad cars.

_Giving Up the Watchdog for the Wolf_

The decision of the Supreme Court pronouncing the test oaths null and void so enraged Congress that there was talk of a constitutional amendment to “defy judicial usurpation,” as the Radicals called it, by the abolition of the Supreme Court itself.

In connection with this scheme there comes to my mind the fact that ancient Rome had magistrates, called “tribunes of the People,” whose specific function was to protect the plebeian citizen from the arbitrary action of patrician magistrates. A lot of demagogues, whose purpose had been thwarted by the tribunes, urged the Romans to do away with them. We are told in history that the people were brought to a wise determination of the question by the relation of a fable.

“‘Once upon a time,’ said the tribunes, ‘the wolves advised the sheep to get rid of their watchdogs because they interfered with the sheep going where they pleased, and were really the only obstacle to a perfect understanding between forest and fold.’” When afterwards, the Roman people forgot this fable, and gave up their tribunes, they lost their liberty, and they never got it back until they got their tribunes back.
The watchdog may annoy the sheep and may restrain them against their impulses, but he is their security and the protector of each one of them. Let the flock think twice before it exchanges the watchdog for the wolf.

**Attempted Confiscation of General Lee's Home**

Let us remember also that it was the judicial department of the Federal Government which prevented the confiscation of Arlington, the last home of Robert E. Lee. This historic place was taken from the family of the great Southern military chieftain by force and violence and was detained by the strong hand of United States troops. The contention was made by the government that because the officers who held the property were agents of the United States, and were using General Lee's home for lawful public uses, a military burying ground, no suit would lie to prevent the confiscation of the property. In an able opinion by the great Associate Justice, Samuel F. Miller, the Supreme Court of the United States held that the court could give a remedy "when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation," even though the President of the United States ordered it and his officers possessed the property.

Answering the argument that the Lee heirs were without remedy, he said: "If such be the law of the country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim of well-regulated liberty and the protection of personal rights." The court ordered justice done the Lee heirs.

**Judiciary Protects Jefferson Davis**

Do not forget that it was the judicial department of the government which stood between Jefferson Davis and his

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persecutors — those who put a price upon his head, those who cruelly held him in prison, demanded a trial by a military commission, and would have hanged him on the gallows because he was the proud leader of a proud people. But for the ancient writ of habeas corpus Jefferson Davis would have met the fate of Nathan Hale.

**Trial By Jury Denied**

Let us also recall the great case of *Ex parte Milligan,* 9 decided by the Supreme Court of the United States in 1866, a case that will ever be a land mark of human liberty. This case denied the right of Congress to suspend trial by jury when a court was sitting. If the Supreme Court had permitted the conviction and death sentence of Milligan by a military commission to stand, then the birthright of every American citizen charged with crime to a trial by jury would have been taken from him. It is interesting to note that this case forever fixed in America the supremacy of the civil power over the military.

The *Milligan* case brought a storm of abuse on the Supreme Court from the republicans and radicals of the North. *Harper's Weekly* proposed that the court be “swamped by a thorough reorganization and an increased number of judges.” Thad Stevens declared that the “decision has unsheathed the dagger of the assassin and places the knife of the rebel at the breast of every man who dares claim himself a Union man.”

**The Judiciary, The Defender of Our Liberties**

The will of the people, expressed in the Constitution, the supreme law of the land, has made the judicial department “the final breakwater against the haste and passions of the people — against the tumultuous ocean of democracy.”

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9 4 Wall. 123 (1866).
The judicial department is indispensable to liberty, and the great part that it plays in the life of our nation is to support, maintain, and give full effect to the Constitution against every act of the legislative or executive departments that violates the supreme will of the people.

It is a field worthy of any man’s ambition, as noted by Joseph H. Choate, to battle for constitutional rights: “To maintain constitutional rights against all violence, whether by the executive, or by the legislature, or by the resistless power of the press, or worst of all, against the ruthless rapacity of an unbridled majority.”

And so today as we consider the part which the Constitution has assigned to the judicial department of the government, let us firmly resolve that we will stand steadfast for an independent judiciary, a judiciary controlled by no other considerations than those of right reason and fidelity to the Constitution, and without any other purpose than that of declaring what the law is, and not what some people want it to be.

Let us ever keep an abiding faith in the integrity and final sober judgment of the people; and believe that the course of this Nation will continue onward and upward so long as we do not remove the ancient landmarks, and trample in the dust the tried and true principles of free government — the most useful and the noblest of which are the separation of the powers of government, and a completely independent judiciary, the American invention for the maintenance of individual rights and liberty.

Strong Not to Yield Our Principles

As we face the future of our country, on which rests the hopes and fears of humanity, let us recall the heroic invitation which Tennyson, in his moving poem, Ulysses, ascribes to Homer’s great warrior:
“Come, my friends,
'Tis not too late to seek a newer world.
Push off, and sitting well in order smite
The sounding furrows; for my purpose holds
To sail beyond the sunset, and the baths
Of all the western stars, until I die.
It may be that the gulfs will wash us down:
It may be we shall touch the Happy Isles,
And see the great Achilles, whom we knew.
Tho' much is taken, much abides; and tho'
We are not now that strength which in old days
Moved earth and heaven; that which we are, we are;
One equal temper of heroic hearts,
Made weak by time and fate, but strong in will
To strive, to seek to find, and not to yield.”

If the people of our Nation will be “strong in will” “not to yield” the principles of the separation of the powers of government and the independence of the judiciary, we need not fear that the “gulfs” of time “will wash us down”—will wash our democratic republic into oblivion. Indeed, on the contrary, we may believe with sure and certain faith that in the long and stormy journey of our government, the people of the United States some day

“shall touch the Happy Isles,
And see the great Achilles, whom we knew.”

Walter B. Jones.

Montgomery, Alabama.