

Address by Justice V. Before Bar Association
of 11th Judicial District at Marion, Indiana
April 8, 1930.

I am deeply grateful for the opportunity to participate in this meeting. The community of feeling between members of our profession is such that gatherings of this type are interesting and instructive to those in judicial service as well as to those in practice. This alone would cause me to be grateful for your invitation; but I have further reasons. Marion, where you meet, is my birthplace and was the theatre of most of my activities until I was twenty-five. It was here that I came to the Bar and entered the practice. It was here that my father came to the Bar 33 years before and pursued his professional work for fifty years. It is here that my mother, always to me a guardian angel and an inspiration, is now enjoying an unusual span of life. And it was on the spot where you now are meeting that my maternal grandparents lived and always made me more than welcome. Thus the surroundings have a special appeal to me. Residence and activities elsewhere, even though for a long period, have neither altered my attachment for Marion nor dimmed my interest in the Bar of this county or that of this State.

The saying "Born a Hoosier, always a Hoosier" expresses a practical truth. Let one native of the State meet another, whether on the Pacific Coast, in the Rocky Mountains or on the Atlantic Seaboard, and they soon will be on terms of amity and voicing their attachment to the native heath.

In expressing gratitude for your invitation and for your generous reception, I am not unmindful that your purpose in

both is primarily to honor the institution of which I am a member, and secondarily to extend to me some evidence of your friendship and good will.

You well understand that there is propriety, on an occasion like this, in my avoiding matters which are controversial, even though of present interest and admitting of discussion by others. After thinking of possible subjects, I have concluded to speak of the Supreme Court of the United States. I shall attempt no eulogy, but shall prefer to speak briefly of the creation of the Court, its function in our system of government, its present jurisdiction and how its work is done.

The distinguishing features of our national constitution are, first, that it contemplates a dual system of government - one national and the other state - each with a distinct sphere and supreme within that sphere; and, secondly, that it vests the three great powers of the national government - legislative, executive and judicial - in separate departments, each relatively independent of the others. Particularly does it evince a purpose to clothe the judicial department with the largest possible measure of independence. The need for this is admirably reflected in the following statement of Woodrow Wilson in his book on constitutional government:

"It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preser-

vation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some non-political forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it judged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitute political liberty."

The view entertained by Thomas Jefferson in the beginning is reflected in two of his letters. In one to James Madison, written March 15, 1789, he said: "The executive in our government is not the sole, it is scarcely the principal, object of

by jealousy. The tyranny of the legislature is the most formidable threat at present, and will be for many years. That of the executive will come in its turn, but it will be at a remote period". And in one to A. Stuart, written December 23, 1791, he said: "Render the judiciary respectable by every possible means. * * * This branch of the government will have the weight of the conflict on their hands, because they will be the last appeal to reason".

Alexander Hamilton's view is shown in the following excerpt from one of his papers:

"The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; * * * 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; that 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.

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specific exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

The Constitution, although enumerating the powers of the national government and thereby recognizing that all other powers are left with the several States or with the people, distinctly anticipates that the national legislature may exceed its authority and also that state legislatures may disregard national laws; for it prescribes that the Constitution, and the laws of the United States made "in pursuance thereof" and all treaties made "under the authority of the United States" shall be "the supreme law of the land", anything in the "constitution or laws of any State to the contrary notwithstanding". In other words, a national statute or treaty becomes part of the law of the land only where it

is made in virtue of a national power; and a state enactment, or even a provision in a state constitution, can have no force where it conflicts with the national constitution or with a national statute or treaty made in virtue of a national power.

By way of providing appropriate tribunals for the determination of controversies arising out of situations such as have been described, and other controversies of national concern, as also cases arising under the penal laws of the United States, the Constitution makes provision for a system of national courts. One section declares that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time establish. Another section provides that the judicial power shall extend to all cases in law or equity arising under the Constitution, laws or treaties of the United States; - to all cases affecting ambassadors, other public ministers and consuls; - to all cases of admiralty and maritime jurisdiction; - to controversies to which the United States shall be a party; - to controversies between two or more states; - between one state and citizens of another, if the suit be brought by the state; - between citizens of different states; - between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens or subjects. And still another section declares that in all cases

affecting ambassadors or other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction; and in all of the other cases before mentioned that court shall have appellate jurisdiction, with such exceptions and under such regulations as the Congress shall make.

The provision defining the original jurisdiction of the Supreme Court is self executing; and that jurisdiction can be neither enlarged nor diminished. But in other respects it rests with Congress to distribute among the national courts, the jurisdiction which is possible under those provisions. If Congress remains silent respecting any class of cases there described that class for the time being falls without the cognizance of the national tribunals and may be dealt with only in the state courts. Not only so, but, under the clause declaring that the appellate jurisdiction of the Supreme Court shall be subject to such exceptions as Congress may make, it is within the power of Congress to contract that jurisdiction by eliminating cases falling within some of the classes described and thereby giving final effect to the decisions of state courts and subordinate federal courts in such cases.

The reasons for permitting cases affecting ambassadors, other public ministers and consuls to be originally brought in the supreme court arise out of the special status of these

foreign representatives; but there are very few cases of this class. The reasons for permitting suits in which a state is a party to be originally brought in the supreme court arise out of the fact that it does not comport with the dignity of a state either to subject itself or to be subjected to the jurisdiction of a court of another state. Cases of this class usually present important questions and at times are difficult of solution. But there are not many of them - probably four or five are begun each term. I recall two that were argued three times before a final decision was given. Another involved a controversy over a boundary, the area in dispute being within an extensive oil field. The controversy had become acute before the suit was brought, each state in turn having driven out of that area all persons claiming under the other state. For the better protection of all who were concerned the court appointed a receiver of the area in dispute and through him conducted the oil operations until it could be determined to which state the area belonged and who was entitled to the proceeds of the oil operations. The proceeds of the oil taken out by the receiver amounted to upwards of thirteen millions and after a decision was given were paid to those who were found entitled to them.

The appellate jurisdiction of the Supreme Court as now defined enables it to review final decisions in the courts

of last resort of the several states in all cases involving federal questions; decisions of the several Circuit Courts of Appeals, of which there are ten; decisions of the district courts in limited classes of important cases; decisions of the Court of Customs and Patent Appeals, the Court of Appeals for the District of Columbia, the Court of Claims, and the Supreme Court of the Philippines.

The time originally fixed for seeking an appellate review in the Supreme Court was five years. We now would regard that as a very liberal provision. In 1872 the time was reduced to two years; and in 1925 it was reduced to three months in all cases, excepting those coming from the Supreme Court of the Philippines and as to them it was fixed at six months. An additional sixty days may be allowed in some cases, but otherwise the limitation is unescapable. You may be interested to know that since the shorter limitation has come to be widely understood it is working well. Litigants conform to it and there are relatively few applications for additional time under the sixty days clause.

Up to 1914 judgments of state courts of last resort could be reviewed in the Supreme Court only where a federal right asserted in the state court was denied by it, but in that year the statute was so changed that a review could be had as well where the right was sustained as where it was denied.

For a long period the prescribed modes of obtaining a review in the Supreme Court were by writ of error and appeal - a writ of error in all cases coming from state courts and in actions at law coming from the subordinate federal courts, and an appeal in equity and admiralty cases coming from the latter. Recently the writ of error has been abolished and an appeal operating in precisely the same way has been sub-

stituted in its place. The change is in name only, not in substance. But it has advantages in that it relieves litigants from disastrous dismissals which formerly attended a mistake in taking an appeal where the appropriate process was a writ of error.

Now there are but two modes of obtaining a review in the Supreme Court. One is by appeal and the other by petition for certiorari. An appeal from a state court of last resort may be had only where there is drawn in question in that court the validity of a treaty or statute of the United States and the decision is against its validity, or where there is drawn in question the validity of a state statute because of repugnance to the Constitution, treaties or laws of the United States and the decision is in favor of its validity. In other cases involving a federal right a review can be had only upon petition for certiorari, and for the purposes of that mode of review it is enough that the federal right is involved and is determined by the state court, and is immaterial whether the decision is in favor of the right or against it.

Judgments and decrees of the Circuit Courts of Appeals may be reviewed on appeal in the Supreme Court in cases where the validity of a state statute is drawn in question because of repugnance to the Constitution, treaties or laws of the United States and the decision is against its validity. In

other cases a review may be had only upon petition for certiorari.

A review upon direct appeal from a district court to the Supreme Court may be had in a limited class of cases usually involving important questions and in some instances requiring the participation of three judges in the hearing in the district court. Otherwise judgments and decrees of the district courts are reviewable only in the Circuit Courts of Appeals, save as the Supreme Court upon petition for certiorari may grant a further review. Decisions of the Court of Appeals of the District of Columbia, the Court of Customs and Patent Appeals, the Court of Claims and the Supreme Court of the Philippines are reviewable only upon certiorari.

Where an appeal is admissible it may be allowed by a single judge - either a judge of the court rendering the decision or a justice of the Supreme Court; but a petition for certiorari can be allowed only by the Supreme Court.

The use of a petition for certiorari as a mode of invoking a review in the Supreme Court originated in a limited way with an act of 1891. Other acts from time to time enlarged that use, and an act of 1925 brought it to its present enlarged field of operation. The older modes were clogging the docket with cases which in reason should not be there, either because they obviously were rightly decided by the courts from which they came or because they were plainly outside the jurisdiction of the Supreme Court. This clogging of the docket tended to defer the consideration of cases rightly calling for consideration and also to encourage resort to appellate process merely for purposes of delay and of embarrassing successful litigants in enforcing faultless judgments and decrees. It was to obviate these faults in the older modes that the new one was brought into play.

In actual practice the petitions for certiorari with supporting and opposing briefs, all of which are required to be filed within stated reasonable periods, are regularly submitted to the Court through the Clerk. These papers are then examined by the several members of the Court, each being supplied with a set for the purpose, and at the Saturday conference each case is called and discussed and by a vote of the conference the petition is granted or denied. If the case presents questions which are either new or debatable

and the case be otherwise within the Court's jurisdiction the petition is granted so that the questions may be heard at the Bar. But if it plainly appears that the case is not within the Court's jurisdiction or that the decision below is plainly right the petition is denied. Doubts where there are such are resolved in favor of granting the petition. In this way much delay and expense is saved to litigants, the docket is kept free from cases which have no place there, other cases requiring the Court's attention are heard and determined with reasonable promptness, and the tendency to resort to appellate proceedings for mere purposes of delay is discouraged. The new system with its enlarged scope has been in operation since 1925 and by reason of its advantages the Court is now more nearly current with its work than it has been at any time in many years. Without advancement cases are now reached for argument within about six months after they are docketed. The members of the Court are all agreed that the new system is a great improvement over the old and that it works to the real advantage of litigants.

I turn next to the consideration in conference of cases in general on the merits. Every judge goes to the conference prepared to express his views and to vote. Cases are separately called and discussed. The discussion begins with the Chief Justice and is continued by the others in turn. The discussions are full, frank and open and all that is said is given attention. Nothing requiring attention is neglected. At the conclusion a vote is taken to determine what the judgment shall be. On the evening following the cases voted on are assigned by the Chief Justice to the several judges for the writing of opinions, save that where there is a division and the Chief Justice is in the minority the assignment is made by the senior Justice in the majority. When the opinions are prepared they are put in printed form by the court printer and then distributed among the members for criticism and suggestion. The result is reported to the next conference and if the opinion be approved the Justice writing it is instructed to deliver it on the succeeding Monday. If any Justice expresses a wish to dissent opportunity is given. All opinions are subjected to careful scrutiny, and criticism is both welcomed and considered. As with other men, the judges are not infallible, but they strive to do their work well. Unanimity of opinion is very desirable and is always sought, but never at the sacrifice of strong conviction. Whatever may be the

effect upon public opinion at the moment, freedom to dissent is essential, because what must ultimately sustain the court in public confidence is the character and independence of the judges.

When we consider the 140 years of the court's activities, the thousands of its decisions, the difficult and complicated questions with which it has dealt, the fact that it is carrying the heaviest burden of severe work that falls to any institution in the country, and the fact that it has come out of periods of criticism with its integrity thoroughly recognized and with a high standing in public confidence, we must realize that this is due to the impartial manner in which the work is done and to the freedom of the judges from political entanglements, as well as to their learning as judges.

The Supreme Court has had among its members many great jurists, among them the late Chief Justice Taft, who in recent years has been the most loved citizen in the land. But none has been greater than John Marshall. He became Chief Justice in 1801 and served in that high office until 1835, a period of 34 years.

At the time of his selection the government under the Constitution had been in existence but 12 years. That system was new in the science of government, and so was the provision for the Supreme Court. As yet only three cases involving the construction of the Constitution had engaged the attention of the Court. That subject remained practically an open field. To some the new system appeared discordant and unworkable; and predictions that it must be given up were not infrequent. The situation called for the selection of a master mind to head the Court. Marshall was chosen, not accidentally, but because he was specially equipped for the task. He had witnessed the distressing conditions which followed the Revolution; had seen the Confederation of 1781 rise and approach dissolution; had participated in the debates which resulted in the ratification of the Constitution; and believed that it was not a temporary expedient to meet the particular needs of that day, but a great charter framed by earnest and far-seeing patriots, deliberately

satisfied, and designed to establish an enduring representative form of government. Difficult as the task appeared, Marshall yielded to the President's call.

The result is now a matter of history. Judges, lawyers and laymen unite in praising his work and in according to him the first place in the judicial annals of the country. In a series of opinions spread over his 34 years of service, and marked by superior lucidity of statement and irresistible logic, he expounded the Constitution in a manner which displays it as a concordant and workable charter of government happily adapted to our changing situation and needs - a charter which recognizes the respective spheres of the Nation and the several States, forbids encroachment by either on the sphere of the other, accords equality of right before the law to all regardless of station or creed, protects persons and property against all purely arbitrary governmental action, whether national or state, secures to every citizen the largest measure of liberty consistent with orderly government and the rights of others, and lodges in the national government ample power to suppress domestic insurrection, repel invasion and secure respect abroad.

A discussion of the decisions of the great Chief Justice would detain us too long. But it should be said that the composite of his work has withstood the tests of almost a

century of experience and reflection, and now commands almost universal admiration and respect.

In the period which has intervened the country's progress and development have been marvelous. Would that he could behold them! At the conclusion of his service there were 24 States in the Union; now there are 48. The population then was 15 millions; now it is 120 millions, excluding insular possessions. These changes are but typical of others. With the changes there has come a great increase in the work of the Court which he so much adorned. During his 34 years of service the reported decisions filled 30 volumes; while the decisions in the last 20 years fill 79.

A study of the career of this great man discloses that he revered - aye, loved - the Constitution. He called it a sacred instrument. It was this reverence which led him to accept the Chief Justiceship and inspired and sustained him in expounding the provisions of the Constitution and displaying its merits. He gave his best energies to the work, put his very soul into it; and he did this to the end that the Constitution might be preserved as the charter of a representative government, both stable and free. I am sure you join me in believing his affection was deservedly bestowed and his energies rightly put forth.