EARLY HISTORY OF THE FEDERAL SUPREME COURT

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CONTENTS

FOREWORD

We owe much to the marvelous courage and to the prophetic faith of the justices of our early Supreme Court; we owe much to the statesmanship and to the courage of our judges of to-day. There was a danger that the struggle for independence would be a mere revolt; Washington and Hamilton made it a revolution. There was danger that it would be a mere throwing off the restraints of the past and that it would result in civil war and in anarchy. The justices of the Supreme Court laid the foundation for "a land of settled government" and for a progressive but at the same time a permanent democracy. It was their vision of America and it was their great courage in asserting their powers, which made the United States a self-contained and virile nation rather than a feeble federation of jealous and warring states. It was they who gave us a government of law and not of men and who laid the foundation for and who made possible the far-flung battle line of our great but cosmopolitan democracy.

To many in those early days all that appeared necessary to a social and industrial millenium was to abolish the restrictions of the past. They had protested against the navigation acts, the trade monopolies, the continental system and the abuses of the royal prerogative; they had insisted upon their personal rights; they were

pioneers and the children of pioneers, and the pioneer is always an individualist; many of them were protestants and the children of protestants, and the protestant was always opposed to centralization. There was a danger that our fathers would be satisfied with talking of liberty and would desire it only for themselves; that they would guarantee the freedom of the states and of the individual but would leave it to the states and to the individual to enforce the rights which had been guaranteed. There was a danger that there would be a league of peace rather than a lasting guarantee of peace; that the Supreme Court would be an American Hague Tribunal with no right or power to enforce its decisions, and that, like the treaties and the international law of the old world, the Federal Constitution would be deemed to contain more recommendations of conduct and mere declarations of rights which a well-organized and militant minority or a temporary majority could at any moment repudiate and set aside.

Judicial control in America has not, as some would have us believe, been an autocracy, but the world's most wonderful illustration of a triumphant democracy. The faith of our judicial fathers was a democratic faith. They believed that we intended to say what we had actually said, that we intended that the guarantees of the Constitution should be enforced, that we really desired a government of law and not of men, and that when we created a democ-

racy we believed in a democracy. They believed that democracy would vindicate itself. They had the courage and the democratic faith to act upon the supposition that the sense of law and of order would be so strong among us that even sovereign states would obey judicial decrees. Though their seven members were individually powerless, though they had no army and no power to raise an army, they not only believed but acted upon the belief that the common sense, the democratic comradeship and the sense of law and of order of the people as a whole would expect and would insist that their judgments should be obeyed, and that, if the occasion ever arose, an unorganized nation would organize to enforce obedience. They had the faith which at the beginning of the World War was the faith of Belgium. Belgium believed in a government among nations of law, and not of the heaviest battalions; she believed in the supremacy of treaties and of international law, and above all she believed that the sense of law and order and of right and justice was so strong in the civilized nations of the earth that, in case of a flagrant violation of treaty rights and of international law, the world's unorganized democracy would take up arms. The Prussian hierarchy believed that there could be no government by law unless there was immediately at hand and always existing an organized force to enforce it. Belgium believed that the people of the earth would insist

that God was God and the law was law and that democracy could and would organize. This is the faith of America; this was the faith of our fathers.

How fortunate it was that our early judges had time for deliberation! How fortunate it was that there were no cases to be decided at their first and second sessions, and that at the third only one case came up for discussion! They were able to think and to plan, to survey the whole field, to consider the construction they should place upon the Constitution, to consider the limitations and the scope of their powers, and they were able to gradually sense the popular mind and the popular sense of law and of order. They were able to scan the field of the common law and to determine how much was applicable to our new world and to a young and evolving democracy. They were able to develop sanely and thoughtfully a common law of their own.

Many think that the Constitution was the work of a moment and that the jurisdiction of the Supreme Court of the United States was hastily and arbitrarily assumed. Gladstone no doubt said that the American Constitution was the most wonderful document that had ever been written by the hand of men at one time, but he didn't say that it was the work of the moment, or the result of the thought of the moment. He realized as every thoughtful man realizes, but so many of our newer citizens and

social enthusiasts do not realize, that back of it was the thought and the experience of the ages. We need to realize how carefully our earlier judges, and as a matter of fact the judges of our later day, have felt their way, how anxious they have been to retain the present popular support, but how courageous they have been in hazarding that support when the irresistible logic of events and the overwhelming fact of nationality has required that hazard. The courage that was evidenced by the decision in Chisholm v. Georgia was magnificent, and so to-day is the courage that is shown in every decision of the United States which settles the controversies of sovereign states, or which holds the hands of tens of thousands of citizens. All government in the last analysis is founded upon force, the question is ever present whether after all the sense of law and of order is so strong in the community or in the nation that men and women will obey a court's decree and that, if need be, the unorganized electorate will take up arms and will support it.

The history of the Supreme Court of the United States is a marvelous record. Its decisions have controlled sovereign states and its decrees have settled controversies which in Europe would have meant civil war. Without it there could have been no nation.

It is well for us in these later days to ponder over the beginnings of America, to realize how difficult was the problem but how sure were the