THE SUPREME COURT OF THE UNITED STATES.

Public attention is directed to the Supreme Court of the United States just now because Mr. Justice Henry G. Brown, after a long and honorable career on the bench,[1] has resigned, largely because of failing eyesight,[2] and a successor to take the place vacated by him in the Supreme Court is to be appointed. As the general public knows altogether too little about the Supreme Court, now would seem to be a good time to become better acquainted with its history, functions and method of dispatching business.

Under the old Articles of Confederation, there was no separate Supreme Court provided for the federated states, but to Congress fell nearly all the judicial as well as all the executive and legislative powers intrusted to the government.[3] The Congress of the Con federation did, to be sure, estabish in 1780 "The Court of Appeals in Cases of Capture,"[4] but that court had simply to do with disputes over vessels captured during the war on the high seas. There was no other separate court, except that certain of the justices of the highest courts and of the courts of admiralty of the different states were designated by ordinance to hear and try persons charged with piracies and felonies on the high seas.[5] All other cases—mainly disputes between states as to boundaries and between individuals and states as to land grants—were tried before Congress. The litigation was small—even the Court of Appeals in cases of capture disposing of but 118 cases,[6]—but there was just enough of it to awaken the minds of our forefathers to the need of a genuine Supreme Court.

The lack of a separate judiciary "constituted one of the vital defects of the confederation. Where there is no judicial department to interpret, pronounce and execute the law, to decide controversies and to enforce rights, the government must either perish by its own imbecility or the other departments of government must usurp powers for the purpose of commanding obedience, to the

1. Fifteen years as United States district judge and about the same length of time as associate justice of the United States Supreme Court.
2. 18 Green Bag, 330.
3. Articles of Confederation, Art. IX.
4. Carson, Supreme Court of the United States, p. 55.
5. Ibid, p. 65.
6. Ibid, p. 61.

destruction of liberty."[7] That lack was remedied by the constitutional convention of 1787, which inserted this provision in Art. III of the Constitution of the United States:

"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 ordain and establish. The judges both of the Supreme and inferior courts shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

Then the article went on to define the jurisdiction of the courts, that is, what cases should come before them, giving to the Supreme Court original jurisdiction, that is, the right to have suits begun in the Supreme Court, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party," but appellate jurisdiction only, that is, the right to determine matters only on appeal or error after trial in an inferior court, as to all other cases to which the judicial power of the United States extends.[8] The original jurisdiction is beyond interference by Congress,[9] but the appellate jurisdiction is expressly stated to be "with such exceptions and under such regulations as the Congress may make."[10]

Under the Constitution, Congress had to determine how many justices of the Supreme Court to have, what inferior courts to create, what salaries to pay, what appellate jurisdiction the Supreme Court should have, how cases should be brought to the Supreme Court, and in general to put the whole judicial machinery in motion. This matter was one of the first to engage the attention of Congress and under the Act of Congress of September 24, 1789, the courts

7. II Story on the Constitution, 5th ed., Sec. 1574. See also the following remarks of the late Justice Field at the Centenary Celebration of the United States Supreme Court in 1890: "The growing defect in the government under the Articles of Confederation was the absence of any judicial power; it had no tribunal to expound and enforce its laws."

"In no one particular was the difference between that government and the one which superseded it more marked than in its judicial department. . . . No government is suited to a free people where a judicial department does not exist with power to decide all judicial questions arising upon its constitution and laws." 24 Am. Law Rev. 358-9.

8. Art. III, Sec. 2, United States Constitution.

9. "And it is upon the principle of the perfect independence of this court that in cases where the Constitution gives it original jurisdiction the action of Congress has not been deemed necessary to regulate its exercise or to prescribe the process to be used to bring the parties before the Court or to carry its judgment into execution." Taney, C.J., in *Gordon v. U. S.*, 117 U. S. 697, 701.

10. U. S. Const., Art. III, Sec. 2.

were organized.[11] The details of that act are unimportant here, except that the Supreme Court was to consist of a chief justice and five associate justices, it taking four out of the six justices to constitute a quorum and was to hold two terms of court a year, one commencing the first Monday of February and the other the first Monday of August.[12]

Under the Act of September 24, 1789, the Supreme Court of the United States organized in New York city, then the seat of the federal government with John Jay as chief justice. As there was not a quorum, February 1, 1790, the court did not sit until February 2.[13] The grand jury for the United States celebrated the day of the first sitting by giving a dinner to the justices.[14] That dinner was the chief business transacted by the court, which, without having a single case come before it, adjourned until August.[15]

The business done by the court was for a number of years insignificant. "From 1790 to 1800, only six cases were decided in which were involved questions of constitutional law. Marshall, upon his elevation to the Supreme bench (in 1801) found only ten cases awaiting adjudication."[16] There was so little business that the chief justice varied his duties by running for governor of New York in 1792, by spending a large part of a year negotiating with Great Britain what is known as Jay's treaty of November 19, 1794, and finally in 1795 resigned as chief justice to become governor of New York. It was not indeed until after John Marshall became chief

11. 1 Stats. at Large, 73. "In the last judicial paper from the pen of Chief Justice Taney," the Chief Justice says, "the Supreme Court does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution and represents one of the three great divisions of power in the government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. . . . The existence of this Court is as essential to the organization of the government established by the Constitution as the election of the President or members of Congress. It is a tribunal which is ultimately to decide all judicial questions confided to the government of the United States. No appeal is given from its decision, nor any power given to the legislative or executive departments to interfere with its judgments or process of execution. The position and rank, therefore, assigned to this Court in the government of the United States differ from that of the highest judicial power of England, which is subordinate to the legislative power, and bound to obey any law that Parliament may pass, although it may, in the opinion of the Court, be in conflict with the principles of *Magna Charta* or the Petition of Rights." 117 U. S. 697, 699-700.

12. Under the present act the Supreme Court holds only one term, beginning the second Monday in October, and lasting until May or June. The present term will be known while it lasts as October Term, 1906.

13. Carson, Supreme Court of the United States, p. 150.

14. Ibid, p. 151.

15. Ibid, p. 152.

16. Willoughby Supreme Court of the United States, p. 85.

justice that the court was even respected. It had previously made itself unpopular by holding that it had jurisdiction to entertain suits by a private citizen of one State against another State.[17] A decision which resulted in the Eleventh Amendment to the United States Constitution.

Certain facts attendant upon Marshall's appointment as chief justice are of sufficient importance to dwell upon. When it was seen that Jefferson had been elected president of the United States the federalists determined to fill all the offices they could, so that Jefferson would have as few as possible to fill. Marshall's appointment as chief justice was proper enough—he took his seat in the court February 4, 1901, at the very first session of the court ever held in Washington—but it was followed so closely by the Act of February 13, 1801,[18] creating a number of new federal courts, and by President Adams' so-called "midnight" appointment in which Marshall who, though chief justice, continued to act as Secretary of State until Adams' term ended, took part, that it is not strange that Jefferson felt bitter against Marshall.[19] The Act of February 13, 1801, gave additional cause for bitterness because, further to tie Jefferson's hands as to judicial appointments, it provided that after the next vacancy in the Supreme Court the court should consist of only five justices, one chief justice and four associate justices. The Act of February 13, 1801, was repealed by the Act of March 8, 1802,[20] and the Supreme Court continued to consist of six justices till the Act of 1807 increased the number to seven; but the Act of April 29, 1802,[21] suspended the session of the United States Supreme Court until February, 1803, by cutting out the August term for 1802 after the February term had been adjourned. That suspension of the Supreme Court, growing out of the ill-feeling of the time, is one of the significant things in the court's history.

Immediately upon the resumption of the sessions of the Supreme Court came the decision of *Marbury v. Madison*,[22] where Marshall

17. *Chisholm v. Georgia*, 2 Dall. (U. S.) 419.
18. 2 Stats. at Large, 89.
19. Marshall seems to have signed commissions as Secretary of State till the very moment when Jefferson's term began. Morse's Jefferson, p. 209. If he did so, Jefferson's bitterness is fully explained.
20. 2 Stats. at Large, p. 132.
21. 2 Stats. at Large, p. 156.
22. 1 Cranch, 137. Carson suggests that Marshall's way of dealing in *Marbury v. Madison* was due in part to the fact that he "smarted under a sense of wrong growing out of the suspension of the sessions of the Supreme Court by legislative artifices." Carson, Supreme Court of United States, p. 206. It may well be that he wanted to serve notice on Jefferson that such suspension was illegal and while tolerated in the one instance would not be allowed to be carried to an extreme.

first announced the doctrine that the Supreme Court could declare an act of Congress to be unconstitutional. The era of constitutional decisions by Marshall had begun.

It is not the purpose of this paper to deal with the constitutional or other decisions of the Supreme Court of the United States. But the political character acquired by the court as a result of those decisions needs emphasis.

From the time of *Marbury v. Madison* the Supreme Court of the United States has stood as the conservator of the United States Constitution. Whether rightly or wrongly the court has affirmed the right to declare null and void all laws, state as well as national, which it regards as clearly inconsistent with the federal constitution. It is this right to declare laws unconstitutional which caused Sir Henry Maine to write that "the Supreme Court of the United States is not only a most interesting but a virtually unique creation of the founders of the Constitution,"[23] and that "the success of this experiment has blinded men in its novelty. There is no exact precedent for it either in the ancient or in the modern world."[24] As De Tocqueville points out "whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate, but it gives rise to immense political influence."[25] What keeps the political influence of the Supreme Court from being so apparent is that the court never passes upon the constitutionality of a statute except in an actual case pending before it. In 1793, during the controversy with the French Minister Genet, over the right claimed by him to refit as a privateer at an American port a captured English ship, President Washington, by the advice of his cabinet, asked the United States Supreme Court justices questions about the true interpretation of the treaties with France, but the justices declined to answer on the ground that they could decide only questions growing out of some case actually before them.[26] That early stand of the Supreme Court of the United States, ever since adhered to by that court, has been the means of keeping the Supreme Court an essentially judicial and

23. Maine's popular Government (Henry Holt & Co., 1886 ed.) p. 217. See Hannis Taylor's heading "Supreme Court of the United States has no prototype in history." Taylor's Jurisdiction and Procedure of the United States Supreme Court, Sec. 1.

24. Maine's Popular Government, p. 218.

25. De Tocqueville, Democracy in America (Longmans, Green & Co., 1889, ed.) Vol. I, p. 94.

26. Marshall's Life of Washington, V, 433, 441; Baldwin's American Judiciary, pp. 32-3.

only indirectly a political body. Because an American judge cannot attack legislation openly and directly, but must wait for a case to be brought before him to attack it, and because when a case calling for a law to be declared unconstitutional, comes before him, he cannot refuse to decide it,[27] the political effect of his decision is regarded by the public as accidental and the judicial nature of his work thus obscures the political.[28]

But the Supreme Court of the United States shares this kind of uniqueness with the other federal courts and with the state courts.[29] The state courts may declare laws to be unconstitutional, not only because they violate the state constitutions, but also because they are inconsistent with the federal Constitution. The latter document is "the supreme law of the land and the judges in every State shall be bound thereby."[30] The state courts, therefore, perform this political work; but as to the federal Constitution, the Supreme Court of the United States is the final arbiter.

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27. The American judge "is brought into the political arena independently of his own will. He only judges the law because he is obliged to judge a case. The political question which he is called upon to resolve is connected with the interest of the suitors and he cannot refuse to decide it without abdicating the duties of his post." De Tocqueville's Democracy in America, Vol. I, p. 99.

28. "The success of the Supreme Court of the United States largely results from its following this mode of deciding questions of constitutionality and unconstitutionality. The process is slower, but it is freer from suspicions of pressure and much less provocative of jealousy than the submission of broad and emergent political propositions to a judicial body; and this submission is what an European foreigner thinks of when he contemplates a court of justice deciding on alleged violations of a constitutional rule or principle." Maine's Popular Government, 223-4.

29. The United States Supreme Court does have some features peculiarly its own, however. Under the Judiciary Act it is given authority to review and set aside any decision of the highest court of a state which, in its judgment, infringes the Constitution, laws and treaties of the United States. United States Rev. Stats., Sec. 709. Moreover, having original jurisdiction of controversies to which a state is a party, the Supreme Court of the United States may summon a sovereign state of the union before its bar. The exercise of these powers over states by the United States Supreme Court, so astonishing to foreigners, has become an everyday affair with us.

30. U. S. Const., Art. VI. "And here it is appropriate to say that the duty of expounding the Constitution of the United States has not devolved alone upon the courts of the Union. From the organization of our government to the present time that duty has been shared by the courts of the states. Congress has taken care to provide that the original jurisdiction of the courts of the Union of suits at law and in equity arising under the Constitution and laws of the United States or under treaties with foreign countries shall be concurrent with that of the courts of the several states. This feature of our judicial system has had much to do with creating and perpetuating the feeling that the government of the United States is not a foreign government, but a government of the people of all the states, ordained by them to accomplish objects pertaining to the whole country, which could not be efficiently achieved by any government except one deriving its authority from all the people." Mr. Justice Harlan in Carson's United States Supreme Court, p. 723.

Before we leave the political nature of the Supreme Court, a word should be said about the service of some of the justices of that court on the Hayes-Tilden electoral commission. That commission consisted of five members chosen by the United States Senate, five members chosen by the National House of Representatives, and five justices of the Supreme Court of the United States. The result was a bad thing for the Supreme Court. As Mr. Woodrow Wilson points out: "Unfortunately, however, every vote of the commission was a vote upon partisan lines. It contained eight republican and seven democratic members, and in each case all disputed questions were decided in favor of the republicans by a vote of eight to seven. . . . Even the members of the Supreme Court had voted as partisans."[31]

Because of the political nature of the United States Supreme Court, a word is necessary about the appointment of justices. The appointments to the Supreme Court of the United States have naturally been made along party lines, though in 1893 President Harrison, a republican, appointed Howell E. Jackson, a democrat, as associate justice of that court. Mr. Justice Jackson was an able judge,[32] but the precedent set by his appointment will seldom, if ever, be followed. The appointees of that court hold for life, the design of the framers of the Constitution being thereby to render them independent of the legislative and executive departments,[33] and the political power of the Supreme Court is far too great and too certain to be called upon during the life term of an appointee for presidents to be willing to appoint justices of opposite political faith to their own. It must not be supposed, however, that a Supreme Court justice remains a deliberate or even an extreme partisan on the bench. To the layman it is hardly comprehensible, but to the lawyer it is perfectly obvious that the ermine tempers the man.[34] It has been truly

31. Wilson's Division and Reunion, 1829-1889, pp. 285-6.

32. See Mr. Justice Harlan's appreciative remark in 30 Am. Law Rev. 902.

33. Hamilton in the Federalist (Lodge's edition) No. LXXVIII, p. 483; Bryce's American Commonwealth, Vol. I, p. 229-30.

34. The most conspicuous instance of non-partisanship on the bench was that of Chief Justice Salmon P. Chase. He had been a strong political partisan and stepped from the cabinet to the chief justiceship; but "from the first moment he drew the judicial robes around him, he viewed all questions submitted to him as a judge in the calm atmosphere of the bench and with the deliberate consideration of one who feels that he is determining issues for the remote and unknown future of a great people." (Mr. Justice Clifford in 16 Wall, p. 15). It fell to his lot to review as judge his acts as Secretary of the Treasury in issuing legal tender paper money and to insist in the capacity of judge that his acts in the capacitv of Secretary of the Treasury were wrong; and he maintained his insistence, although the Supreme Court, after the appointment of Justices Bradley and Strong, differed from him. Though we now think that he was right as Secretary of the Treasury and

fortunate for the country that since the time of Marshall an appointment to the Supreme Court of the United States has always been regarded as an ultimate ambition by appointees, for that has made it possible for us to say of the court that the hope of personal political preferment has never shaped one of its decisions. But while the judicial ermine ennobles the man it covers, the fact remains that the era of Marshall in the Supreme Court was of a different tenor from that of Taney and that of Taney of a different tenor from the period during which Chase, Waite and Fuller have successively presided over the court, the differences being explainable only by the political proclivities of the justices of each period. It goes without saying that "in none of these three periods can the judges be charged with any prostitution of their functions to party purposes. Their actions flowed naturally from the habits of thought they had formed before their accession to the bench, and from the sympathy they could not but feel with the doctrines in whose behalf they had contended."[35] Yet the general result is decidedly unfavorable, and properly so, to the appointment of justices from other than the party in power.[36] What a president should try to do is to get the ablest judicial minds of his own party, and while precedent enables him, if he chooses, to take his appointees from his own cabinet, his choice should be so governed as not to impair the confidence of the people in the reasonable impartiality of the court. Of late years, there has been no danger of any president neglecting this duty.[37]

The business of the Supreme Court of the United States was light down to the Civil War. During the first few years of Marshall's term there were only twenty-four cases a year. From 1826 to 1830 the cases averaged about fifty-eight a year. "In 1836 when Roger B. Taney succeeded Marshall as chief justice the number was only thirty-seven. From 1830 to 1850, the increase was also very gradual. Within the five years ending with 1850 the number of

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wrong as judge, all must admire and honor him for that high ideal of judicial duty which forced him to condemn his own previous acts, even though the majority of the court of which he was a member ultimately approved those acts.

35. Bryce's American Commonwealth, Vol. I, p. 274-5.

36. Judge Simeon E. Baldwin in writing of the Hayes-Tilden episode says: "The country could not fail to see that judges, as well as other public men, may be insensibly influenced by their political affiliations and regarded the whole matter as a new proof of the wisdom of separating the judiciary from any unjudicial participation in the decision of political issues." Baldwin's American Judiciary, p. 51.

37. Only once has an attempt been made to impeach a justice of the Supreme Court of the United States, and that attempt—the impeachment of Justice Samuel Chase in 1804—resulted in an acquittal.

appeals brought into the court, including those docketed and dismissed without argument, was three hundred and fifty-seven, or an average of seventy-one each year. The court was then able to dispose of its entire docket during a session of three months."[38] It is doubtless well for the country that in the formative period of our constitutional law the justices had plenty of time to weigh their decisions carefully. After the Civil War the business of the court was greatly increased and the court finally got so behind in its work[39] that the Act of March 3, 1891,[40] was passed creating the United States Circuit Courts of Appeals with final jurisdiction on appeal and error in certain cases.[41] Since then the Supreme Court has kept pretty well up with its docket.[42]

Though the business of the court was small at the time, the number of the justices of the Supreme Court was raised in 1807 from six to seven[42½] and in 1837 from seven to nine.[43] Nine the number remained until by the Act of March 3, 1863, it was increased to ten.[44] But the Act of July 23, 1866,[45] passed to prevent President Johnson from making objectionable appointments, provided that no vacancies in the Supreme Court should be filled until the number of associate justices should be reduced to six and thereafter the court should consist of a chief justice and six associate justices. When President Johnson had been succeeded by President Grant the Act

38. "The Needs of the Supreme Court" by Mr. Justice Strong, 132 No. Am. Rev. 437.

39. In October, 1890 term, the Court had 1816 cases on its docket and disposed of 617 (See 140 U. S. Appendix). In October, 1891 term, the new appellate cases were reduced by the new act, so that the Court had only 1582 cases on its docket and it disposed of 496 of those (See 145 U. S. Appendix). In those days it took three years to reach a case for argument.

40. 26 Stats. at Large, 826.

41. Since the creation of the Circuit Courts of Appeal the Supreme Court has jurisdiction of appeals from the Circuit or District Courts only in the following cases: "In any case in which the jurisdiction of the Court is in issue. . . . From the final sentences and decrees in prize causes. In cases of conviction of a capital crime. In any case that involves the construction or application of the Constitution of the United States. In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question. In any case in which the constitution or a law of a state is claimed to be in contravention of the Constitution of the United States." 1 U. S. Comp. Stats. (1901) p. 549. In all other cases the appellate jurisdiction is in the Circuit Courts of Appeals.

42. Under date of September 27, 1906, the Clerk of the Supreme Court writes: "At the last term there were 768 cases on the docket of this Court, of which 463 were disposed of, leaving 305 at the adjournment of the Court in May last; 104 cases have been filed since, making a total of 409 cases on the docket to-day for the October term, 1906."

42½. 2 Stats. at Large, 421.

43. Act of March 3, 1837, 5 Stats. at Large, 176.

44. 12 Stats. at Large, 794.

45. 14 Stats. at Large, 209.

of April 10, 1869,[46] increased the number again to nine, any six to constitute a quorum. Nine the number still remains.

In this changeable number of the Supreme Court justices lies a great danger. It has often been charged that the appointments made by President Grant under the Act of April 10, 1869, were for the deliberate purpose of assuring a decision upholding the Civil War issue of legal tender paper money.[47] What the real facts are will probably never be known and every historian ought to do what the lawyer necessarily does, and that is, give President Grant and the Supreme Court the benefit of the doubt. That Justices Bradley and Strong, President Grant's appointees, men of unquestioned ability, decided the way they believed cannot be denied, and if President Grant selected them because he knew they would decide as they did and without pre-arrangement of any kind with them, he did what, as executive, he had a perfect right to do. But though we now believe that the Supreme Court of the United States was not "packed," in any objectionable sense of the word, with reference to the legal tender cases,[48] the fact that at any time the number of the Supreme Court justices can be increased and new appointments made for the express purpose of overturning Supreme Court decisions is full of grave import. With that fact must be considered the temporary legislative "suspension" of the sessions of the court in Jefferson's time and the power of Congress to restrict and regulate the appellate jurisdiction of the Supreme Court. The latter power, which has been exercised to save the court from overwork, has also been used to keep the court from considering a *habeas corpus* case,[49] and dur-

46. 16 Stats. at Large, 44.

47. Carson insists (Supreme Court of the United States, p. 449, note 2), that the charge is disproven by showing that the nominations of Justices Strong and Bradley were sent to the Senate on the very day that the original legal tender case—*Hepburn v. Griswold,* 8 Wall. 603—was decided, which was February 7, 1870; but the original report of the case shows that the case was decided in conference November 27, 1869 (8 Wall. 626), and on January 29, 1870, the majority opinion was directed to be read (Ibid), so that if knowledge of the situation had accidentally leaked out, as could well be the case without intentional blame on anybody's part, President Grant might have selected judges whom he knew would favor upholding legal-tender paper money. George S. Boutwell who was Grant's Secretary of the Treasury when the cases were decided states that Chief Justice Chase told him of the conclusion of the Court in *Hepburn v. Griswold* "two weeks in advance of the delivery of the opinion" Boutwell's Sixty Years in Public Affairs, Vol. IV, p. 209.

48. Whether earlier judicial appointments and the increase of justices in 1837 were determined upon in the interests of slavery, as Von Holtz intimates, will doubtless never be known. Willoughby, Supreme Court of the United States, pp. 96-99.

49. "A man named McArdle of Mississippi obtained a writ of *habeas corpus* from a circuit judge to the military commission trying him. Failing of release, he appealed to the Supreme Court of the United States. The case,

ing the Civil War an attempt was made to "regulate" the appellate jurisdiction by an act requiring the concurrence of two-thirds of the members of the whole court before an act of Congress could be declared invalid.[50] All of these incidents show the extent to which the president and Congress, acting in unison, could tie the hands of the Supreme Court and even through the addition of new justices determine its decisions. It makes the Supreme Court unable to defeat the permanent will of an aroused and reckless people; and renders it possible to see a faint resemblance between the Supreme Court's relation to the other departments of the United States government and the relation of the British House of Lords, which may be overwhelmed at any time by the creation of enough new peers for the purpose, bears to the British House of Commons. Fortunately the American people have never been reckless with reference to the Federal Judiciary. All must agree with Mr. Bryce, however, that the incident of the legal tender decisions "disclosed a weak point in the constitution of the Supreme Court tribunal which may some day prove fatal to its usefulness."[51]

While the Supreme Court of the United States suffered in public estimation from the Dred Scott decision,[52] from the legal tender episode cases,[53] from the Hayes-Tilden Commission incident, and from the income tax case reversal,[54] it is deservedly strong in the estima-

however, did not reach decision, for Congress, fearing the action of the Court upon the reconstruction governments, the constitutionality of which was involved in the case, passed a law taking away the right of appeal in such cases." (Willoughby Supreme Court of the United States, pp. 101-2.) See Act of February 5, 1867, in 14 Stats. at Large, 385, providing for appeals in *habeas corpus* cases, the last clause of which reads: "This act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States charged with any military offense, or with having aided or abetted rebellion against the government of the United States prior to the passage of this act."

50. Willoughby, Supreme Court of the United States, p. 102.

51. Bryce's Am. Com., Vol. I, p. 270. Right here we should notice that the judiciary is necessarily weaker than the legislative and executive departments of the government. Hamilton stated this proposition fully in the Federalist (Lodge's Ed. LXVIII, p. 483) and the late Justice Miller of the Supreme Court put it in these words: "The judicial branch of the government . . . has no army, it has no navy and it has no purse. It has no patronage, it has no officers except its clerks and marshalls and the latter are appointed by the President and confirmed by the Senate. They are the officers to whom its processes are sent for the enforcement of its judgments, but they may be removed at any time by the executive. . . . The judges themselves are dependent upon appropriations made by the legislature for the payment of the salaries which support them while engaged in the functions of their office," and he adds: "It must rely upon the confidence and respect of the public for its just weight and influence." Miller on the Const. of U. S., p. 417-18.

52. *Scott v. Sanford,* 19 How. 393.

53. *Hepburn v. Griswold,* 8 Wall. 603; *Knox v. Lee,* 13 Wall. 457.

54. *Pollock v. Trust Co.,* 157 U. S. 429; *Hyde v. Trust Co.,* 158 U. S. 601.

tion of the people of the United States just now and it rests with us to see that it remains so. We must always remember that the only thing which in the time of excitement will stand in the way of a "packing" of the Supreme Court of the United States is the politician's "fear of the people, whose broad good sense and attachment to the great principles of the Constitution may be generally relied on to condemn such a perversion of its form. . . . To the people we come sooner or later; it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend."[55]

One of the strongest claims of the United States Supreme Court to public respect and confidence lies in the thoroughness with which it does its work. After every case is submitted, whether with or without argument, each justice goes over the records and briefs. Then, at a conference of the justices, the case is discussed. Following the discussion the roll is called and the justices vote. Following the roll call, the chief justice, without consulting anyone, assigns the writing of the opinion to one of the justices. The latter prepares the opinion and it is privately printed and sent to all of the justices. Each justice scrutinizes it and makes suggestions for changes. All changes not agreed to are considered in conference and voted upon. After all changes are agreed upon and the opinion expresses the final conclusions of the court, it is printed and is announced in the regular way. "When you find an opinion of the court on file and published," says Mr. Justice Harlan, "the profession has the right to take it as expressing the deliberate views of the court based upon a careful examination of the records and briefs by each justice participating in the judgment."[56] Such loose practice as is shown by the early case of *Holliday v. Brown*[57] where the Supreme Court of Nebraska declared that it was bound only by the head notes of its own opinions, would not be tolerated in the United States Supreme Court. Each justice of the United States Supreme Court "examines every case and passes his individual judgment upon it. No case in the Supreme Court is ever referred to any one justice or to several of the justices to decide and report to the others. Every suitor, however humble, is entitled to and receives the judgment of every justice upon his case."[58]

55. Bryce's Am. Com., Vol. I, 276.
56. 30 Am. Rev. 904.
57. 34 Neb. 232.
58. Mr. Justice Field in Carson's U. S. Supreme Court, p. 713. It may be well to note here that the compensation paid to the Supreme Court justices has been a gradually increasing one. Under the Act of February 12, 1903, (32

While the justices of the Supreme Court of the United States have been painstaking and conscientious, the lawyers that have appeared before them have been of high rank. It was great, but deserved, praise which Mr. Justice Harlan gave those lawyers when he said: "Whatever of honor has come to that court for the manner in which it has discharged the momentous trust committed to it by the Constitution must be shared by the bar of America."[59] This matter is mentioned because there is a growing belief among lawyers that they are falling in public estimation,[60] and it behooves them to see that the courts are not injured thereby. The Supreme Court of the United States is one institution of which we lawyers are justly proud and no injury must come to it through us.

It was in 1895 that Sir Frederick Pollock first suggested in an address at Harvard[61] that some plan be devised whereby the Supreme Court of the United States and the British House of Lords, or the Supreme Court of the United States and the English Privy Council, might co-operate so as to reach the same decision in those matters of general commercial principle in which the Supreme Court of the United States properly declared that "a diversity in the law as administered on the two sides of the Atlantic is greatly to be deprecated." Since Sir Frederick Pollock's suggestion no steps have been taken looking towards its adoption, but much that he had in mind is being accomplished by uniform state law enactments on commercial subjects based on English models. After all, the Supreme Courts of our different states are more concerned with purely judicial questions than is the Supreme Court of the United States, and it is doubtless due to the fact that the United States Supreme Court's main business is deciding questions in American constitutional law with which the English are unconcerned that has kept Sir Frederick Pollock's suggestion from being carried out. When the cry for uniform state legislation has been satisfied, we may recur with enthusiasm to his plan, and may yet find the highest judicial tribunals in the world of English law assisting one another, as he urges that they should, "in matters of great weight and gene-

U. S. Stats. at Large, p. 825) the associate justices get $12,500 a year each and the chief justice $13,000. Any United States judge who has held his commission at least ten years, and has attained the age of seventy years, may resign his office, but continue during the rest of his natural life to draw the same salary which was by law payable to him at the time of his resignation. U. S. Rev. Stats., Sec. 714.

59. Carson's Supreme Court of the U. S., p. 721.

60. See an interesting address by Mr. Edward M. Shepard in 18 Green Bag 601.

61. 29 Amer. Law Rev. 601-3.

ral importance to the common law." Mr. Justice Nelson served on the Alabama Claims Commission; Mr. Justice Harlan was arbitrator in the Behring Sea Dispute; and Mr. Justice Brewer was a member of the Venezuelan Boundary Commission; and it certainly is not too much to hope that some day we shall see justices of the United States Supreme Court, individually if not collectively, exchanging opinions on litigated cases with the highest courts in England, and thus bringing nearer the day of an international judicial tribunal of real dignity and power.

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