PROCEEDINGS IN COMMEMORATION OF THE 200TH ANNIVERSARY OF THE FIRST SESSION OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, JANUARY 16, 1990

Present: CHIEF JUSTICE REHNQUIST, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY.

THE CHIEF JUSTICE said:

The Court is convened today in special session to commemorate the 200th anniversary of its first sitting. We have the privilege of having three distinguished speakers here today to take note of this event. We begin with the former Chief Justice Burger.

Chief Justice Burger:

In a matter of days it will be 200 years since this Court first undertook to meet. On the day set, only three of the six Justices who had been confirmed were present. There being no quorum they met the following day when the fourth Justice arrived. The fifth did not make it at all and the sixth, Justice Harrison, declined the appointment partly on the grounds of health and probably influenced by the reality that riding circuit, with the primitive conditions of travel in that day, was a burden that only a Justice in robust health could undertake.

As we know, this first session was held in a small room on the second floor of a commercial building in New York City

across the street from the Fulton Fish Market near the waterfront. A bronze plaque was placed at this site by the American Bar Association in 1976.

Although the subject of Article III was extensively discussed at Philadelphia and in the ratification conventions, it did not receive the close attention, in some respects, that the other parts of the Constitution were given by the Committee on Style, where it might well have noticed that there was no reference to "Justices" in Article III but simply "judges." That was not consistent with the reference to the Office of Chief Justice in Article I assigning the duty to preside over impeachment trials. In the Judiciary Act of 1789, largely drafted by Senator Oliver Ellsworth, who would become the third Chief Justice, the office is described as "Chief Justice of the United States."

The structure of the federal system included a court of appeals to review the district courts, but it provided no judgeships for that court. It provided that those courts for each of the three circuits be made up of two Supreme Court Justices and one District Judge. Within a few years, the requirement of two Justices was reduced to one, but this required Justices to ride circuit under great hardships of primitive travel and housing. In 1791, Chief Justice Jay urged that judgeships be provided for the courts of appeals and the Congress did so in 1800 but then reversed itself after the election of Thomas Jefferson and the new Congress repealed the Act in 1801. In that day there seemed to be an attitude in the Congress that if the Justices of the Supreme Court were kept busy riding circuit they would be less troublesome to the other branches of government. The history of that early period shows that in a good many instances judges of the state courts declined appointments to the Supreme Court largely because of the circuit riding burden. John Marshall had declined appointment several years before becoming Chief Justice.

Congress finally did respond to the urgings of Chief Justice Jay and his successors by providing judges for the Court of Appeals and eliminating circuit riding burdens, but that was

done, to borrow a phrase from the English equity law, "with all deliberate speed." It was done in 1891.

There being no business before the Court in the first few sessions it undertook housekeeping matters; it appointed a "cryer," adopted a seal for the Court and later appointed a clerk. At its second session it admitted some lawyers, and over the next two years it mainly waited for the pipeline to bring some cases from the lower courts.

In the Court's first 10 years there are less that 70 cases reported in the U. S. Reports of that day. I suspect that members of the Court would like the docket to move in that direction—but without circuit riding.

The precise number of cases and opinions of the Court is not clear because apparently officers of the Court and those compiling the Reports may have decided that a record of some cases was not worth preserving. The records of those early years were not carefully kept and, of those that were kept, some were lost as the Court moved from New York to Philadelphia and then to Washington, and also some were destroyed probably by the British when they occupied Washington in the War of 1812. About 15 years ago the Court and the Historical Society joined in a project to reconstitute those records.

But it would be a mistake to assume that no important cases were decided in that first decade of the Court's history. Often overlooked, but possibly one of the most important, was the case of *Ware* v. *Hylton* argued in 1796 while the Court was sitting in Philadelphia, the only case John Marshall ever argued in this Court. The records indicate that the argument lasted about six days. *Ware* v. *Hylton* is important because it can be read as foreshadowing the holding in *Marbury* v. *Madison* nine years later. The Court held, as we know, that a treaty between the United States and England terminating the war and requiring the payment of debts owed by Americans to British creditors be paid not in state currency but in the equivalent of "gold."

John Marshall lost the case in a unanimous holding of the Court with Justice Samuel Chase writing the lead opinion

and the other Justices, writing separately, following the English custom.

As a judge I think Marshall would have decided *Ware* v. *Hylton* as the Court did. The best argument he could make was that the 1783 treaty did not apply and control the state legislative act because the debts were incurred before the Revolutionary War and before the Constitution. The holding that under Article VI, the treaty prevailed over a legislative act, surely gave some hint of *Marbury*, but the opinion in *Marbury* v. *Madison* does not cite *Ware* v. *Hylton*. Whether that was because he wanted to forget about losing the case we have no way of knowing, but surely that great mind of his must have had in mind that if one clause of the Constitution controls over a legislative act the result in *Marbury* v. *Madison* was quite simple.

The young Supreme Court did not enjoy the prestige that it has today. It was not regarded as a co-equal branch, and some questioned whether it could survive. Even Chief Justice Jay, one of the greats among our founding fathers, did not see much of a future for the Court. He resigned after about six years to become governor of New York. After Adams was defeated in the election of 1800 and Chief Justice Ellsworth resigned on the basis of health, Adams then offered the appointment to Jay. In declining he wrote that he would rather be governor of New York and, in any event, the Supreme Court as a tribunal would never amount to very much.

It was then that John Adams, the lame duck President, turned to his Secretary of State, John Marshall, and invited him to take the appointment. Although Marshall had previously declined an appointment to this Court, he did accept and the year of 1801 began a great epoch in the history of this Court and of this country.

As we take note of this important anniversary of this Court—and of the country—it comes at the close of the decade when people all over the world are demanding the kinds of freedom this Court has been foremost in protecting for 200 years. Our history is their hope, and our hope for them

must be that whatever systems they set up in place of the tyranny they have rejected will include a judiciary with authority and independence to enforce the basic guarantees of freedom, as this Court has done for these 200 years.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Chief Justice. Mr. Rex Lee.

Mr. Lee: MR. CHIEF JUSTICE and may it please the Court:

I am honored to participate in this bicentennial commemoration, and specifically to make some comments concerning the work of the Supreme Court bar over the 200 years of the Court's history.

The clerk's familiar incantation, swearing new members of the bar as "attorneys and counselors" is rooted in some interesting history. Originally, there was a distinction between the two. The first rules of the Court, adopted on Thursday, February 5, 1790, provided that "counsellors shall not practice as attornies nor attornies as counsellors in this court." Historians tell us the difference was that attorneys could file motions and do other paperwork, but only counselors could "plead a case before the Court."[1] The distinction lasted for eleven and one-half years, until by rule adopted on August 12, 1801, the Court ordered "that Counsellors may be admitted as Attornies in this Court, on taking the usual oath."[2]

Over the two centuries of this Court's existence, there have stood before this podium—or its equivalent in other parts of this town, in Philadelphia and New York—some very able and prominent "attorneys and counsellors." It is not surprising that appearances before this Court during its early years were dominated by Attorneys General of the United States; until the creation of the office of the Solicitor General

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[1] 2 U. S. (2 Dall.) 399 (1790); 1 *The Documentary History of the Supreme Court of the United States, 1789–1800* 177, n. 18 (M. Marcus & J. Perry eds. 1985).

[2] *Documentary History, supra,* at 177, n. 18.

in 1870, it was the Attorney General who was responsible for representing the United States before this Court. What is surprising is that the most notable and most frequent appearances of those early Attorneys General were not on behalf of the government but in representation of private clients. This was true of the first Attorney General, Edmund Randolph, the second, William Bradford, the seventh, William Pinkney, and the ninth, William Wirt. Indeed, William Wirt, one of the greatest Supreme Court advocates of all time and the man who holds the record for years of service as Attorney General, confessed that "my single motive for accepting the office was the calculation of being able to [obtain] more money for less work."[3] Things were a little different then.

Edmund Randolph, our first Attorney General, was the most active of this Court's early practitioners. He appeared as counsel in the very first case (which came up during the February 1791 Term) *Van Staphorst and Van Staphorst* v. *Maryland*. He also argued the first landmark case, *Chisholm* v. *Georgia*. Indeed, he was the only person who argued in that case. The State of Georgia refused to appear, and at the conclusion of Randolph's argument which lasted two and one-half hours, the Court's minutes reflect that "the Court, after remarking on the importance of the subject now before them . . . expressed the wish to hear any gentlemen of the bar who might be disposed to take up the gauntlet in opposition to the Attorney General. As no gentlemen, however, were so disposed, the Court held the matter under advisement . . . ."[4] It would appear that the rules governing oral argument by *amici* were a bit more liberal in those days.

The same is true of divided arguments, time limits, and questions from the bench. Representing the two sides in the oral argument in *McCulloch* v. *Maryland* was perhaps the greatest collection of prominent advocates in the history

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[3] J. Robert, *The Hon. William Wirt: The Many-sided Attorney General*, Sup. Ct. Hist. Soc'y. Y. B. 1976, at 55.

[4] 1 C. Warren, *The Supreme Court in United States History* 95 (1924) (quoting Dunlap's *American Daily Advertiser*, Feb. 21, 1793).

of this Court's bar. Arguing for the bank were William Pinkney, William Wirt, and Daniel Webster. And representing Maryland were Luther Martin, Joseph Hopkinson, and Walter Jones. The entire argument, by all six counsel, lasted nine days; Thomas Edison's birth was still 28 years away, and there were no red nor white lights. Those were the days when there were no questions; both the commentators and the advocates themselves referred to their arguments as speeches, which they would rehearse for days. Charles Warren relates that "the social season of Washington began with the opening of the Supreme Court term,"[5] and some of those early lawyers, particularly Webster and Pinkney, apparently responded by paying as much attention to the gallery as to the Justices.

Pinkney's argument alone in *McCulloch* lasted for three full days. It was a performance which Professor Warren has said "was to prove the greatest effort of his life. . . ." Pinkney was described by Chief Justice Marshall as "the greatest man [he] had ever seen in a court of justice"; by Chief Justice Taney as one to whom there was "none equal"; by Justice Story as having "great superiority over every other man [he had] ever known"; and by Francis Wheaton as the "brightest and meanest of mankind."[6]

Pinkney had the distinction of serving as Attorney General of both the United States and also the State of Maryland, as a member of both Houses of Congress, and minister to Great Britain and Russia. But whichever of these was paramount, it was in Pinkney's view a distant second to his one consuming passion: advocate before this Court. It was an endeavor to which he gave his life, both figuratively and literally. Following the completion of the last of his 84 arguments, in *Ricard* v. *Williams*—in 1822 with Daniel Webster on the other side—he suffered a collapse. He was carried to his home, where he died a few days later.[7] Incidentally, he lost

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[5] 1 C. Warren, *The Supreme Court in United States History* 471 (1924).

[6] S. Shapiro, *William Pinkney: The Supreme Court's Greatest Advocate*, Sup. Ct. Hist. Soc'y. Y. B. 1988, at 40, 44.

[7] *Id.* at 45.

Ricard v. *Williams*, an unpleasant experience for any lawyer, but one that is well-known to those who are seasoned.

Walter Jones holds the record number of oral arguments with 317. It is a record which, given today's realities, is surely safe for all time. For Mr. Jones, there will be no Roger Maris or Hank Aaron. Daniel Webster is in second place, and it would appear that John W. Davis is third, and Erwin Griswold fourth. But the record number of landmarks, in my opinion, belongs to William Wirt, whose biographer has accurately observed that "he appeared in virtually all of the landmark cases of the first third of the nineteenth century."[8] These included *Dartmouth College* v. *Woodward*, *McCulloch* v. *Maryland*, *Cohens* v. *Virginia*, *Gibbons* v. *Ogden*, *Brown* v. *Maryland*, *Ogden* v. *Saunders*, *Worcester* v. *Georgia*, *Cherokee Nation* v. *Georgia*, and *Charles River Bridge* v. *Warren Bridge*. Wirt was described by Chief Justice Chase as "one of the purest and noblest of men" and by another contemporary as "the most beloved of American advocates."[9]

In four of these landmarks, *Dartmouth College*, *McCulloch*, *Cohens* v. *Virginia*, and *Gibbons* v. *Ogden*, Wirt appeared with Daniel Webster. They argued *Dartmouth College* and *McCulloch* just three weeks apart. He was the Attorney General at that time, and though in *McCulloch* he was arguing to sustain the power of the federal government, he received a substantial fee from the Bank of the United States.[10]

Daniel Webster, though he won slightly less than half of his cases, probably had the greatest influence on the Court and its work of any nineteenth century advocate—perhaps the greatest influence of any advocate in the Court's history. S. W. Finley has observed that "Webster and Chief Justice Marshall shared the same basic constitutional philosophy, and together with Justice Joseph Story they constitute a fortuitous triumvirate in establishing the fundamentals of

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[8] J. Robert, *supra*, at 52.

[9] *Id.*

[10] *Id.* at 56.

American federalism in the first four decades of the nineteenth century."[11]

The twentieth century, of course, is not yet complete, but it is already clear that during the Court's second hundred years, advocates to match the stature of Pinkney, Wirt, and Webster have stood at this podium. Comparisons are difficult because of changes in circumstances and rules, but quite clearly the Court's jurisprudence during this century has been influenced by people such as John W. Davis, Robert Jackson, Thurgood Marshall, and Erwin Griswold, just as it was during earlier times by Pinkney, Wirt, and Webster. And our century also has had its equivalent of *McCulloch*'s battle of the giants when, for example, *Briggs* v. *Elliot*, a companion case to *Brown* v. *Board of Education*, pitted John W. Davis against Thurgood Marshall.

Mr. Chief Justice, we the members of the bar of this Court are proud of the institution whose two hundredth birthday we celebrate, proud of what it has meant and what it has done for our country and its people, and proud of the contribution that the members of the bar have made to the Court and its accomplishments over its 200-year history. We recognize that we are more than attorneys and counselors. As officers of the Court, we are charged not only with the responsibility of vigorously representing our clients but also assuring that our representation is objective, fair, even-handed, and contributory to the Court's performance of its duties. We are mindful of the institution before which we practice, and the role that it has played from 1790 to 1990 in securing individual rights and providing stable government. We are pleased to offer our continuing services as we enter the Court's third century.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee. Mr. Solicitor General Kenneth W. Starr.

Solicitor General Starr:

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[11] S. W. Finley, *Daniel Webster Packed 'Em In*, Sup. Ct. Hist. Soc'y. Y. B. 1979, at 70.

Almost half a century after this Court's opening session, Alexis de Tocqueville, the French observer of democracy in the new Republic, turned his eye back to the Founding and saw in that remarkable generation the finest minds and noblest characters ever to have graced the New World.

And the wisest, ablest minds of that generation were well represented in the membership of this Court. As we have been reminded, the docket may not have been especially demanding, and the rigors of office may have been daunting, but the Court nonetheless boasted among its members not only its distinguished Chief Justice, John Jay, author along with Madison and Hamilton of *The Federalist Papers*, but also several delegates to the Constitutional Convention itself. Like the Nation's first Attorney General, Edmund Randolph of Virginia (whose successor is here today), Justices Rutledge of South Carolina, Wilson of Pennsylvania, and Blair of Virginia, had served as members of the Convention. Other Justices of the 1790's, including Iredell of North Carolina and Cushing of Massachusetts, had played pivotal roles in their respective States in securing ratification.

To these individuals, along with their counterparts in the political branches, fell the task of forming a workable government. It was John Jay who articulated the basic structural insight:

> "Wise and virtuous men have thought and reasoned very differently respecting Government, but in this they have at length very unanimously agreed. That its powers should be divided into three, distinct, independent Departments—the Executive legislative and judicial."

As Providence would have it, in our system of separated powers, it fell in no small measure to the Court to serve as an instrument of achieving the Madisonian and Hamiltonian vision of a vast commercial republic. That was not without difficulty, since this was to be the branch where, as Hamilton put it, judgment, not will, was to be exercised.

The fundamental importance of the judgment of the judiciary was made manifest early on. That our constitutional

democracy, by virtue of the status of the Constitution as supreme law, would include the power of judicial review was evidenced in the judicial literature as early as 1792 in *Hayburn's Case*. If not before, the decision of *Hylton* v. *United States* in 1796, upholding the constitutionality of the federal Carriage Tax, powerfully foreshadowed *Marbury* v. *Madison*. In short, although the judiciary was to be the least dangerous branch, it was nonetheless to be a truly co-equal, co-ordinate branch with the Legislature and the Executive.

In view of the Court's role, friction between the federal judiciary and the several States was inevitable, just as leading Anti-Federalists such as George Mason had pessimistically predicted. Quite apart from *Chisholm* v. *Georgia*, other decisions of that first decade now dim in the national memory made clear that the national power in its proper sphere extended to and ultimately controlled the States. This was important to be said, and the Court did not flinch from saying it.

These formative principles—of the legitimacy as well as the limits of judicial power, and of the need to vindicate the primacy of the Nation in its appropriate sphere over narrow, parochial interests—provided important grist for the early judicial mill. Along with Washington's stewardship of the Executive power, and the wisdom of the first Congress—graced by Madison himself, who turned his hand to fashioning the Bill of Rights—the leaders of the Nation in all three branches brought to life in 1789 and 1790 what the Framers had envisioned—a balanced government, destined to stand the test of time.

The Nation has endured and prospered. The structure of government has endured. The Court has endured. And with the long-sought abolition of slavery, the promise of legal equality—embodied in the 14th Amendment—took root and grew so that the original vision of the Declaration and the Constitution's vision of a more perfect union, preserved out of bitter conflict, and a true constitutional democracy for all our citizens came fully to life. It was in large measure these events—so important for the work of this Court over the past

century—that brought the Department of Justice into being in the wake of the Civil War.

This was what Tocqueville had seen so clearly, peering as he did into the future, looking at us with prophetic vision. Social equality, as Tocqueville put it, was what America ultimately promised through the emergence of democratic institutions. This was, he felt, the will of God. From the American experience, purified by slavery's inevitable eradication, Tocqueville believed that Europe could learn and morally profit. This was a new order of the ages. Out of the mouths of babes in the New World, truths about what the twentieth century moral imagination of T. S. Eliot would call, simply, the permanent things, would emerge—the moral vision of equal justice under the rule of law. This was, as demonstrated by events now unfolding across the globe, a powerful vision destined to capture the moral imagination of the entire family of mankind.

For that vision brought to life in the judiciary's daily, steadfast service to the law, those of us privileged to serve in the Department of Justice, under the stewardship of the officer whose office was created by the Judiciary Act of 1789, salute the courts of justice and the tribunal ordained in Article III of our beloved Constitution as "one supreme Court." As Lincoln put it so simply at Gettysburg, only seven years before the birth of our own Department, it is entirely fitting and proper that we should do this.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Starr.

Chief Justice Burger, General Starr, Mr. Lee: your felicitous remarks have shown how the Supreme Court of the United States got off to what was indeed a slow start in New York two hundred years ago, but eventually picked up the necessary speed to evolve into a truly co-equal branch of the federal government.

Half a century ago the Court held a ceremony similar to this one, commemorating the one hundred and fiftieth anniversary of its first session. Attorney General Robert H.

Jackson—soon himself to become a member of this Court—addressed the Court on that occasion saying:

> "[T]his age is one of founding fathers to those who follow. Of course, they will reexamine the work of this day, and some will be rejected. Time will no doubt disclose that sometimes when our generation thinks it is correcting a mistake of the past, it is really only substituting one of its own . . . . I see no reason to doubt that the problems of the next half-century will test the wisdom and courage of this Court as severely as any half-century of its existence."

None of us here today can doubt the accuracy of Robert Jackson's assessment of this Court's succeeding half-century. All of us realize how significantly—indeed, how dramatically—the interpretation of the United States Constitution has changed in the past fifty years. And yet, we, too, must realize that our work has no more claim to infallibility than that of our predecessors. Daniel Webster said that "Justice is the great end of man on earth"—a statement which attests his wisdom not only as a statesman but as a theologian—and the motto inscribed on the front of this building—"Equal Justice Under Law"—describes a quest, not a destination.

But if we look at the temporal context of the ceremony here in this room fifty years ago, it was vastly different from the one today. The gathering storm of war had burst a few months earlier with the German invasion of Poland. A few months later the German breakthrough in the Ardennes would knock France out of the war, leaving Great Britain and her commonwealth allies fighting alone against the dictators. The fate of constitutional ideals such as self-government and the rule of law seemed to hang in the balance of war.

How different it is today. The allies won the Second World War, and the worth of western values was re-established. In February, 1940, when this Court celebrated its one hundred and fiftieth anniversary, it was virtually the only constitutional court—a court whose existence was based on a written constitution which had the authority to invali-

date legislative acts—sitting anywhere in the world. But after the Second World War, the idea of such a court found favor with nation after nation.

The written Constitution drafted by the Framers in Philadelphia in 1787 incorporated two ideas which were new to the art of government. The first is the system of presidential government, in which the executive authority was separated from the legislative authority. This idea has found little favor outside of the United States, and countries just as committed to democratic self-government as we are have preferred the parliamentary system.

The second idea was that of a constitutional court which should have authority to enforce the provisions of a written constitution. It is this second idea which has commanded itself to country after country following the Second World War. Today its momentum continues. Less than a decade ago Canada adopted a charter of rights to be enforced by its Supreme Court. In countries today which do not have a full-scale constitutional court—Great Britain, Sweden, Australia—proponents of change are engendering lively debate. I do not think that I overstate the case when I say that the idea of a constitutional court such as this one is the most important single American contribution to the art of government.

As we look today towards eastern Europe, where a curtain which had been drawn for nearly half of a century has been lifted only with the past year—it may not be too much to hope that these nations, too, will see fit to reshape their judiciaries on the American model.

The three Justices who gathered in New York City on February 1, 1790, could not possibly have foreseen the future importance of the Court upon which they accepted the call to serve. I am confident that even those who gathered here fifty years ago could not have foreseen the changes and developments in the law which would come in the next half-century, nor the influence that this institution would have outside its borders during that time. And surely the same is true of those of us who have gathered here today to commemorate the bicentennial of the Court's first sitting.

We have no way of knowing with certainty where the quest for equal justice under law will lead our successors in the next half-century. If at times our labors seem commonplace or even unavailing, let us hark to the words of Arthur Hugh Clough:

> "And not by eastern windows only
> When daylight comes, comes in the light;
> In front the sun climbs slow, how slowly!
> But westward, look, the land is bright!"