

Our Highest Court

Horace Towner

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The Honorable the Supreme Court of the United States!

Nearly every week-day during the winter months, exactly at noon, these warning words, intoned in a resonant and solemn voice, may be heard by the visitor who chances to pass the doors of the Supreme Court Chamber in the Capitol of the United States. The visitor sees that others are entering those august portals, and so makes bold to step softly inside.

If he has not waited too long, he finds himself within the chamber in time to see the nine justices of our highest court, clad in long, black robes, file slowly into the room from an antechamber at the left.

Every one within the room has arisen, and all stand respectfully at attention, while the justices take their places. Then the voice of the court crier is heard again:

"Oyez, oyez, oyez! All persons having business with the Supreme Court of the United States are admonished to draw near and give their attention, for the court is now sitting."

Then, after a slight pause:

"God save the United States and this honorable court!"

The justices seat themselves; the attorneys at the bar and visitors do likewise. The Supreme Court of the United States, generally held to be the most powerful tribunal on earth, is in session.

The opening ceremonies which the visitor sees to-day have remained unchanged for more than one hundred and twenty-five years; but that period of a century and a quarter has marked an unparalleled and continuous growth in the power and influence of the court. It was on the first Monday in February, 1790, in the city of New York, then the seat of the national government, that the Supreme Court was first organized and began its sessions. Chief justice Jay, appointed by Washington, presided.

At that first session no cases were presented to the judges. They adjourned and met on a later day, but still there was no business. After six years of comparative idleness Chief justice Jay resigned, accepting as a promotion the Governorship of the State of New York. It is worthy of note that not long ago this precedent was reversed, when justice Hughes accepted an appointment as associate justice as a promotion from the Governorship of New York.

Of the contrast between the early days and the present commanding position of the court, Hampton Carson, the historian of the Supreme Court, writes:

Not one of the spectators then, though gifted with the eagle eye of prophecy, could have foreseen that out of that modest assemblage of gentlemen, unheard of and unthought of among the tribunals of the earth, a court without a docket, without a case, of unknown and untried powers, and of undetermined jurisdiction, there would be developed in the course of a single century a court of whom the ancient world could present no model and the modern world no parallel; a court whose decrees, woven like, threads of gold into the priceless and imperishable fabric of our constitutional jurisprudence, would bind in the cords of love, liberty, and law the members of our great republic.

It was largely through the work of Chief Justice Marshall, greatest of the occupants of that high office, that the court grew from its modest beginning to its present transcendent importance.

Marshall strove always, and strove wisely, to extend the power and jurisdiction of the Supreme Court, and the foundation he laid was so broad and lasting that after his death the growth and extension of the structure continued without interruption. This growth was, of course, partly due to the extension of the territory and population of the United States, but it was also largely due to the broad scope of jurisdiction which the work of Marshall secured for the court.

In 1890, when the Supreme Court had been in existence for a hundred years, the amount of business handled had grown out of all proportion to the expectations of the founders. The docket was crowded with hundreds of

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cases, litigants were compelled to wait for years after filing their suits before they could expect a decision, and many of them died before their cases were reached. In the following year Congress passed an act "for the relief of the Supreme Court of the United States," providing for a Circuit Court of Appeals which took a vast amount of the less important work from the shoulders of the nine justices. The Circuit Court now has more than thirty judges, and in most districts its docket is very full.

For a time after the new Circuit Court was established the Supreme Court kept up with its work; but of late years it has been falling behind again, and in many cases as much as three years has elapsed between the filing of a suit and its determination. This condition is again being relieved, however, under the energetic direction of Chief Justice White, and in February last, for the first time in a long while, the court took a recess because of lack of business. There were many cases pending, of course, but the attorneys were not ready to present them, and for a time the court experienced the novelty of waiting for the lawyers, instead of the lawyers waiting for the judges.

Nowadays the tendency of the Supreme Court is to restrict its own jurisdiction rather than to enlarge it. Under this policy, and with a gradual increase in the Circuit Court of Appeals, the present system will probably be adequate for all requirements as long as the government shall last.

THE SUPREME COURT CHAMBER

The room in which the court sits is an impressive chamber, although it is generally admitted to be too small. Until 1859 it was the Senate Chamber, the Supreme Court then occupying a room on the lower floor of the Capitol, where the law library is now located. The Senate outgrew its original abode and moved to new quarters in the north wing of the Capitol, bequeathing its former home to the Supreme Court.

The decorations are simple, but rich in design and very effective. The room is semicircular, with a low, domed ceiling. Half-way to the molding, along the walls of the semicircle, are set marble busts of former great justices. In the half-circle are the seats for the spectators, facing the long, straight bench where the judges sit. In front of the bench are tables for the lawyers, and at each side are desks for the reporters, court crier, marshal, and other functionaries.

The chief justice occupies the chair at the center of the bench, and at his right and left the associate justices are seated in the order of their precedence, determined by length of service. The justices always appear clad in the traditional black-silk judicial robes, although they have dispensed with the ancient wigs which were formerly used, and which still persist in England.

There is no law that requires the wearing of the robes, but it is a custom sanctioned, as the lawyers say, "from time immemorial," and there is no indication that it will ever be discontinued. It is said that President Lincoln made some of the justices very angry by comparing them, in their long black robes, to the long-winged black ants that used to fly out from under the bark of logs when he was splitting rails.

The light in the chamber is rather dim, and the ventilation is not good. Sometimes there is scarcely sufficient room behind the rail for all the lawyers who appear in an important case.

For many years there have been occasional attempts to secure new and larger quarters. One reason why this has not yet been done is because some of the justices are loath to change from a courtroom that has become hallowed by tradition. Another is the fact that the authority to provide new quarters lies with Congress, and it is considered beneath the dignity of the court to petition Congress for anything. While so many people are loudly and persistently petitioning Congress for so many things, the matter of procuring more adequate quarters for our highest court is passed by.

The sessions of the court are held every year from October to June. Each day except Saturday the court convenes at noon, and is in session until about two o'clock, when a recess is taken for luncheon. After this recess the session continues until half past four, when adjournment is taken promptly, even if it interrupts some famous lawyer in the middle of a sentence.

Saturday is "consultation day." Every Saturday, at noon, the nine justices assemble in the consultation-room, and behind locked doors discuss and consider the various motions, applications, and so forth.

When a decision is reached, the case is assigned by the chief justice to some particular member, who writes an opinion for the whole court. In closely contested cases, however, the court is sometimes unable to agree, and majority and minority opinions are filed. Monday is "opinion day," when the opinions are read by the justices to whom the various cases have been assigned, after which they are handed to the reporter and published in the Supreme Court reports.

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THE DIGNITY OF THE COURT

To match the somber black robes of the justices, custom requires that the attorneys who appear before the court shall be dressed in black. So far as can be ascertained, no attorney has ever had the temerity to appear in other than a black coat, though some have sported fancy waistcoats or bright cravats. On such occasions the very atmosphere of the room, as the moving-picture men would say, "registers disapproval."

The appearance of the court while sitting is extremely impressive. It is on record that at least one lawyer has fainted from sheer fright on first rising to address the court. Even attorneys of long experience say that they never rise before the tribunal without a momentary quail of stage fright.

It is but natural that such a court should inspire a feeling of awe, especially in the mind of a lawyer who realizes its tremendous power. It is often spoken of as the most powerful tribunal on earth. No other country has a bench with such broad jurisdiction. It is literally the court of last resort in the United States, and may even nullify the most solemnly considered acts of Congress.

Its summary power is well illustrated by a retort which is said to have been made by a brilliant young lawyer when he was corrected by one of the justices. The attorney was stating some legal proposition, when one of the judges leaned forward and said:

"But that is not the law."

"It was," replied the attorney with a bow, "until the court spoke!"

It must not be thought, however, that this elevation takes the justices out of touch with common humanity. Many stories are current in Washington which tell of eminently human qualities, and even weaknesses, of the members of the great court. One of these, which is, perhaps, old enough to be new to the present generation, concerns Chief Justice Marshall and his friend, Justice Story.

Neither Marshall nor Story maintained any domestic establishment at Washington, and the two judges lived together in bachelor quarters. Both were partial to a certain vintage of old Madeira wine, but, fearing that too frequent indulgence might interfere with their duties, they made it a rule that the Madeira should be opened only on rainy days.

One summer there came a long dry spell upon the capital city, and every morning the sun shone bright and hot. The two justices endured it for nearly a month without mentioning the Madeira; but as the weather became hotter and hotter their thoughts dwelt more and more on the cool beverage in the cellar. Finally, one morning, Marshall asked his friend to go to the window to see if it were not raining.

Story looked long and carefully, but could not even see a cloud. He reported this condition to his colleague. Chief Justice Marshall strode to the window, looked out over the Virginia hills, and remarked in his best judicial manner:

"It is true that there is no rain visible here. But this is only the District of Columbia. The jurisdiction of the Supreme Court extends over many thousands of miles of territory. May it not safely be assumed that somewhere in that vast jurisdiction it is raining?"

"It may," answered Story, and the Madeira was opened.

CONSERVATISM OF THE COURT

It is well known that the judicial temperament tends toward settled habits and abhorrence of innovations. Employees about the Supreme Court say that the justices are extremely regular in their habits. Most of them order the same thing for luncheon every day. The writer cheerfully violates the confidence of a gentleman in a position to know by divulging that the former justice Hughes—who either will or will not be President-elect Hughes when this article appears—invariably ate two lamb-chops for luncheon while he was on the bench. Presidential aspirants may well take note of this, as a precedent to be either followed or avoided.

Chief Justice White is very fond of walking, and foots it to the Capitol practically every day, even when the weather is inclement. He lives on Rhode Island Avenue, and is usually joined on his way by justice Van Devanter, who lives on Connecticut Avenue, and also believes in pedestrian exercise. So regular are these two justices that very seldom does either have to wait more than a minute for the other at the meeting-place.

In the court-room itself innovations are very rare. The same procedure is followed that was followed a hundred years ago. To this day freshly cut quill pens are laid daily on the tables reserved for the lawyers. When a new carpet was needed a few years ago, great care was taken that it should be of exactly the same shade and pattern as the old one, lest the justices might be shocked by any change. The furniture is all very old, and from

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time to time it is reupholstered with the same fabric and pattern as that originally used.

Aside from the migration of 1859, which has been mentioned, it is said that there have been only four substantial innovations in matters connected with the court since its foundation.

One of these, tradition says, was due to a lack of reverence exhibited by Henry Clay. Formerly the judges sat at a bench which was on the same level with the bar where the lawyers stood. While Clay was arguing a case, one of the justices placed his snuff-box on the bench, where it would be handy in case its contents were needed to aid judicial ponderings. Clay reached over, helped himself to a pinch, and remarked:

"I see your honor sticks to Scotch."

He then calmly continued his argument. Nothing was said, but shortly afterward the bench was elevated to its present position, so as to be out of the reach of irreverent attorneys.

Another change is that now a recess for luncheon is taken at two o'clock in the afternoon, whereas formerly the court sat without interruption from noon until half past four. Before this alteration the justices snatched any time that was convenient to leave the chamber and take luncheon, as do Senators and Representatives to this day. The change was made because the lawyers complained that their arguments were interrupted, and their most important points were often missed by one or more of the judges.

The third innovation was a concession to the ubiquitous newspaperman. Formerly no one in the chamber was allowed to take any notes, or even hold a paper in his hand, during the sessions of the court. Now, however, reporters are allowed to take notes of the proceedings. When important decisions are rendered, a whole corps of reporters may be seen on the left side of the room with pencils busy.

The fourth change was the admission of women lawyers to practise before the court. Mrs. Belva Lockwood had the honor of being the first of her sex to secure this privilege, and she argued the cases in which she was retained so skilfully that there has been no objection since that time to the admission of qualified feminine pleaders.

Perhaps the next innovation will be the admission of a woman who shall take her place on the bench itself as one of the justices; but this does not seem imminent.

SOCIAL STATUS OF THE JUSTICES

In Washington's complicated system of social precedence the Supreme Court takes a high place. Tradition has it that President Washington, at his first state dinner after the appointment of Chief Justice Jay, said:

"The chief justice of the United States will sit at my right."

Ever since that time the justices have taken rank next to the President and the Vice-President in Washington society, and their wives make first calls only at the White House and the Home of the Vice-President. There has been much contention, on the part of Senators and Cabinet members, as to the right of the Supreme Court to this preferment, but the justices refuse to take part in any controversy so undignified. It is their custom to solve such problems by remaining away from any function where embarrassing questions of precedence might arise.

Each justice has a negro messenger, or body-servant, as they were formerly designated. These privileged retainers are old negroes who have grown gray in the service, and their positions seem to be no less permanent than those of the justices themselves, who are appointed for life. When a justice dies or retires from the bench, his messenger goes to his successor, and of these old servants it may be truly said, as was once said of Cabinet ministers, that "few die, none resign."

When Justice McReynolds was appointed, two years ago, he caused a great commotion among the messengers by insisting upon naming his own servitor, instead of accepting the one who had served his predecessor.

The messengers have charge of the "robing-room," an anteroom near the court chamber. On each day when the court is in session, the justices repair to the robing-room shortly before noon. There the long, black gowns are hanging on a series of pegs, arranged in the order of their owners' precedence. The judges remove their hats and coats in the order of precedence, and each is in turn robed by his messenger. Then they are ready for the solemn entry into the court-room.

When a messenger becomes too old for his duties, he is transferred to a place as doorkeeper, or to some similar light service, and remains on the pay-roll until death comes. When he dies, it is the kindly custom of the judges to attend the funeral in a body.

Each justice is also provided with a private secretary. A trained young lawyer is usually selected for this position, and the secretary takes a great deal of routine work from the shoulders of the hard-worked judges.

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PERSONNEL OF THE SUPREME BENCH

As has been noted, the justices sit on the bench in strict order of precedence, the chief justice in the center. On his immediate right is the first associate justice in length of service, on his left the second, and so on, alternating down the four chairs on each side.

Chief Justice White now occupies the position of honor, and his massive frame and stately mien well befit the place. On his right, in order, are seated Justices McKenna, Day, Pitney, and Brandeis; on his left are justices Holmes, Van Devanter, McReynolds, and Clarke.

Of the chief justice it was once remarked by an admiring yet flippant visitor:

"No one could possibly be as wise as Justice White looks!"

He is a man of large frame, weighing more than two hundred pounds, and tall enough to carry the weight well. White was born in Louisiana in 1845. He is a Democrat, and served in the Confederate army. President Taft appointed him chief justice in 1910, promoting him from an associate justiceship.

Joseph McKenna, who sits on the right of the chief justice, was born in Pennsylvania in 1843, but moved at an early age to California, from which State he was appointed in 1898, after serving in Congress and as Attorney-General in McKinley's first cabinet. With Van Devanter, who is from Wyoming, he ably represents the great West in our highest court.

Oliver Wendell Holmes, the third justice in order of precedence, is a native of Boston, a graduate of Harvard, and a son of the famous Autocrat of the Breakfast Table. He was born in 1841, and appointed to the Supreme Court by Roosevelt in 1902. Holmes is a veteran of the Union army, where he attained the rank of colonel, and was several times wounded. It is noteworthy that this Northern officer now sits by the side of the chief justice, who fought for the South.

Next to Holmes comes William R. Day, a native of Ohio, appointed by Roosevelt in 1903. He was born in 1849, the son of a member of the Supreme Court of Ohio, and studied at the University of Michigan. Day is the smallest man, physically, on the bench, but he is by no means insignificant mentally. Before he was appointed to the Federal bench he was Secretary of State under McKinley, which position he resigned to head the commission that negotiated a treaty of peace with Spain in 1898.

Willis Van Devanter, fifth on the list, was born in Indiana, but later moved to Wyoming. He was appointed a Federal circuit judge by President Roosevelt, and was elevated to the Supreme bench by President Taft in 1910.

Justice Mahlon Pitney is the sixth member. He is a New Jersey man, and was a classmate of President Wilson at Princeton. He was appointed by Taft in 1912. Pitney is the champion golf-player of the court, but it must be admitted that his legal attainments overshadow his excellence in the Scottish game.

James Clark McReynolds, the seventh justice, is a native of Tennessee, where he was born in 1862. He was promoted from the Attorney-Generalship of the United States to the Supreme Court by President Wilson in 1914. He is the only bachelor among the justices.

Louis D. Brandeis, eighth in rank, was born in Louisville, Kentucky, in 1856. He is a graduate of Harvard, and for many years practised law in Boston, gaining wide fame as "the people's attorney." He was appointed by President Wilson in 1916, and confirmed by the Senate after a controversy which the reader will no doubt remember.

The ninth place was made vacant when Justice Hughes resigned to accept the Republican nomination for the Presidency; Brandeis, who had occupied that seat for only one day, moving up to eighth place, while Van Devanter succeeded to Hughes's place as fifth. The vacancy was filled by the appointment of John H. Clarke, formerly a leading lawyer of Cleveland, Ohio, and for two years a Federal district judge in Ohio.

A few years ago there was a general tendency to find fault with the Supreme Court for its alleged conservatism and bias in favor of "things as they are." It is no part of our purpose to discuss whether or not such allegations are justified; but it may be noted that recently this critical tendency has been dying out. Undoubtedly, with its present personnel, the court is keeping well abreast of modern thought, as was evidenced by its decision on the income-tax case.

It should be remembered, also, that it is no part of the duty of such a court to lead in radical thought. Its proper function is rather that of a stabilizer in the councils of the nation. There is no reason why every patriotic American should not breathe a fervent "Amen!" when the stentorian voice of the crier rings out with the impressive call:

God save the United States and this honorable court!

THE PERFECT JEWEL

A noble thought within the mind
Is like a gem unset,
Whose beauty rare but unadorned
Doth lack completeness yet.
But when this noble thought be writ
In noble words, behold—
A very gem of poesy,
A jewel set in gold!

Bell Rumford