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Supreme Court in the American Constitutional System: Introductory Statement

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INTRODUCTORY STATEMENT

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It is a rare privilege for me to participate with such distinguished and erudite educators in discussing so fundamental and timely a subject as the role of the Supreme Court in the American Constitutional System. I do not profess to be an expert on constitutional law but as an active practicing attorney serving on the periphery of its axis, I am vitally interested in preserving its integrity as an institution of our republican form of government. It is my fervent hope that what is said here today will promote that objective.

The average American is a blunt, outspoken individual. If he does not like the way the government is conducting its affairs, he says so. That is his privilege guaranteed by our Constitution — a precious right which is the *sine qua non* of a democracy.

It is therefore inevitable that the Supreme Court should receive its fair share of Joe Citizen's attentions. The issues upon which the Court passes are the serious concern of all Americans and its decisions have implications which are too far-reaching to be ignored.

Indeed, from the time of its creation the Court has never been regarded by the people as sacrosanct, and the mythical ivory tower in which its justices are presumed to be isolated has frequently been turned into a goldfish bowl. As early as 1793 the Court was subjected to a blistering attack by reason of its decision in *Chisholm v. Georgia*[1] wherein it sustained the right of the federal judiciary to summon a state as defendant in a suit by a citizen of another state.

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1 2 U.S. (2 Dall.) 419 (1793).

People today view Senator Jenner's proposal to whittle down the Court's jurisdiction with alarm, and yet, that is exactly what the Congress of that day did when by the 11th Constitutional Amendment, ratified by the requisite number of states in 1798, they deprived the Court of the jurisdiction to determine suits instituted against one state by the citizen of another state or of a foreign government.

So down through the years the judgments of the Court have aroused public clamor, oftentimes deep resentment. The attacks against it have taken the form of urging impeachment of its judges, diluting of its jurisdiction, changing the method of selecting its members, and increasing its number. (In 1869, Congress increased the Court to 9).

But the state of the nation until recently was such that there was never more than one great overriding issue at any given time. The Court of John Marshall was concerned primarily with establishing the Court's position in the constitutional system; under Chief Justice Roger Taney, the states' rights theory of President Jackson absorbed the attention of the Court culminating in 1857 with its decision in the *Dred Scott* case.[2] The reconstruction days following the Civil War saw the issue of civil liberties rise to prominence on the Court's docket, featuring the case of *Ex Parte Milligan*[3] branded by Thad Stevens as "more dangerous" than that of the *Dred Scott* case.

But I must not usurp the province of those who are to follow me by reciting at length the history of the Court. Suffice it to say that generally the pattern continued the same through the latter part of the 19th century and the first half of the 20th century with the controversy over the Court revolving around a particular issue on which the country was fairly divided.

This history is in sharp contrast with the situation confronting the Court today under Chief Justice Earl Warren. The United States today has suddenly been thrust into a new role. Whereas formerly we were concerned with problems which were parochial in nature, our assumption of the leadership of the free world has caused vast changes, not only with respect to our relations to other nations, but internally as well. No longer does the Supreme Court treat one or two major issues. The nature of our society is such that within a single term the Court is required to render decisions which have cut across political

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2 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
3 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

party lines and sectional boundaries. They have had a far-reaching impact upon powerful business and professional interests. They have covered a wide variety of subjects, touching emotionally and economically upon millions of our citizens.

It is not surprising that a storm of protest from all over the country has followed in the wake of the decisions restricting the operations of the F.B.I., the rights of bar associations to pass upon qualifications of attorneys, and the rights of school boards to discharge teachers. It is not surprising that the *DuPont* case[4] extending the application of the Clayton Act to vertical combinations created a furor in business circles, or that the segregation cases aroused strong feelings in the South. The case of the west coast communists reversing their convictions under the Smith Act[5] could not help but excite those who are dedicated to preventing the expansion of communist influence in this country. The antagonistic reaction of Congress to the *Watkins*[6] case restricting the use of its contempt remedy was certainly to be anticipated.

Collectively, these various cases, having been decided within a relatively short period, were bound to cause public agitation. This agitation has taken varied forms. It has ranged from proposals in certain Southern States for revival of the Calhoun doctrine of nullification to the introduction in this last session of the Congress of the Jenner Bill[7] which would deprive the Supreme Court of the jurisdiction to hear appeals in five classes of cases involving communism.

Criticism of the decisions of the Court is healthy. Indeed our whole system of separate opinions is based upon the fact that unanimity is not required. But there is a difference between the sound criticism of the work of the Court and the nonsense reported in the "SPX Research Associates" document submitted at the hearings of the Internal Securities Committee of the Senate Judiciary Committee which charges the Court with following the communist line and rendering aid and comfort to our enemy.[8]

With the eyes of the public thus focused at the moment on the Court, it behooves the bar of the nation to stand steadfast in its defense. Lawyers are best fitted by training and experience

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4 United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1956).
5 70 STAT. 623 (1956), 18 U.S.C.A. § 2385 (Supp. 1957).
6 Watkins v. United States, 354 U.S. 178 (1957).
7 S. 2646, 85th Cong., 1st Sess. (1957).
8 SPX Research Associates.

to appreciate the necessity for the Court as a balance wheel in our scheme of government. It should not, to them at least, be any more unusual for as few as four justices to have in their hands the balance of power under certain circumstances than it is for a strong executive to control the destinies of our people or for a few outstanding leaders in the Congress to shape up legislation having a far-reaching influence on their lives and fortunes. It was after all the bar of the nation which in 1937, arising almost to a man, fought courageously and successfully to prevent the enactment of the court-packing legislation sponsored by the late President Franklin D. Roosevelt. Now that the pendulum has swung in the other direction, it is equally as essential that they unite in defending the Court as an institution. By a resolution adopted at its recent midwinter meeting the American Bar Association has done just that, as Dr. Elliott will point out more in detail in a later paper. I call upon the lawyers of America to rally to the Association's banner in this cause.

The Court has withstood public criticism in the past and I am confident that despite the fears and pressures of the moment, which too often are expressed in unfortunate legislative proposals, it will withstand the furor now. In a country which is undergoing violent change because of internal and external factors, the Court is perhaps the most stable of our American heritages. The essence of the genius of our Constitutional System is its flexibility and adaptability to change within its own framework. When the final count is taken by future generations reflecting upon the work of this Court, I think they will find that the constitutional law structure has not been altered so violently as the critics would have us believe. Rather, its decisions will prove to have been an adaption of the charter under which we operate to the conditions of our time without having uprooted the basic concepts of our national judicial system.

To paraphrase Professor Alfred North Whitehead, the eminent philosopher — as the key to any science of values is found in aesthetics, so the Supreme Court can best be defined as seeking the aesthetic satisfaction of bringing the Constitution into harmony with the activities of modern America.

And now to our distinguished panel I will leave the burden of completing in color and detail the painting of the Supreme Court which I have but barely outlined with broad brush-strokes.