

## THE LOSS OF A GREAT PUBLIC SERVANT

Mr. Justice Moody's retirement is a tragedy from the private, and a real calamity from the public, standpoint. It is the literal truth to say that there is no public servant whom, at this particular time, the public could so ill afford to lose. He is a man in the very prime of his life, in the flower of his intellectual strength, who has lived long enough to develop his powers and his usefulness to the utmost, but not so long as in any way to impair either; and just at the moment when he was entering upon a great career of service to the people, he is stricken down and forced to leave the Bench. We feel for him, personally, the deep sympathy we would naturally feel for a gallant officer who, having done admirable work until he reaches the highest position, is almost immediately thereafter, when the need for him is sorest, the chance for him greatest, stricken in his high position and forced to abandon his work while on its threshold.

To those of us whose signal good fortune it has been to be intimately associated with Justice Moody his loss from the Bench and from active life causes a keen pang of personal grief; but, after all, our chief regret is for the public, for the people, for the Nation as a whole. Under our form of government no other body of men occupy a position of such far-reaching importance as the Justices of the Supreme Court. Neither the executive nor the legislative branch of the Government, under ordinary conditions, does as much in shaping our Constitutional growth as the Supreme Court. This is not true of any other country. In every other country the judges, though they exercise a great and decisive influence in civil contests between individuals, have little or no power to shape the governmental course of development—that is, the course of national development, the course of affairs that affect the people not individually but as a whole. In our country, however, a number of causes which were not in evidence during the first decade after the establishment of the Constitution have combined to render the Supreme Court in many ways the most important governmental body in the land,

and to give it a position which places it infinitely above any other court in the entire world. Power so great is, of course, because of its very greatness, equally capable of working harm and of working good; and exactly as he is no true patriot who fails to uphold the judge who is a far-seeing and fearless public servant, so he is no true patriot who hesitates to point out the facts when the judge does not serve the people. Ours is a Government of the people, and no man has a right to be in public life who is not in a high and true sense the servant of the people; and the doctrine that there shall not be honest, fearless, and temperate criticism of any judge is not only unworthy of being held by any free man who respects himself, but is a betrayal of the cause of good government; for only thus can there be proper discrimination in the public mind between the wise judge who serves the people and his equally honest brother who, because he lacks the statesmanlike qualities or clings to outworn (that is, to fossilized) political theories, does damage to the people.

A glance at the past history of the Supreme Court will prove this beyond possibility of cavil to any man of intelligence who is not afraid to face facts. The Supreme Court during the first third of the nineteenth century, while it was under the domination of the great Chief Justice Marshall, rendered a service to the country greater than at that time was rendered by any President or by Congress. Marshall was in a real sense one of the founders of our Constitution. He deserves a place beside the greatest of the early Presidents, beside the greatest of the men who wrought out the Constitution and secured its adoption. The Court in his time, and while it responded to his teaching, was the most vital governmental element in our National growth.

There succeeded a time in which the Court was under the dominion of another Chief Justice, Chief Justice Taney, when its members shared the views of Chief Justice Taney. The Court then became, not the leader in sound governmental growth, but the most formidable obstacle to sound governmental growth. It was the decision of the Court at this time in the Dred Scott case which marked the

climax of the then governmental attitude towards slavery, and which gave Abraham Lincoln his opportunity to rise into National prominence by the vigor of his opposition thereto and of his assault upon the Court for what it had done. During the Civil War the Supreme Court, under Chief Justice Taney, so far from being an aid to the forces of union and liberty, was their enemy, and, as a condition of successfully carrying on his warfare on behalf of the American people, Abraham Lincoln was obliged to take an attitude of disregard of, and at times of open antagonism to, the Supreme Court; an attitude which neither could nor would have been taken save that the vital need of the Nation, at the moment when it was facing revolution, rendered such a course imperative. All sober and serious statesmen and publicists, and all leaders of the people, when they deal with the Supreme Court, should remember not only the incalculable service it rendered under Marshall, but the menace it was to the Nation under Taney, and the way in which it then forced Abraham Lincoln and all far-seeing patriots to antagonize it. There is no reason for supposing that Marshall and Taney differed in ability as lawyers or in sincerity and loftiness of private character. But one was a great, far-seeing statesman who builded for the future, the other was a man who clung to outworn theories (I use the word "outworn," as some sensitive people seem to regard this word as preferable to the word "fossilized"), and who in consequence worked for the detriment of the country as surely as if it had been his conscious purpose so to do.

We are now entering on a period when the vast and complex growth of modern industrialism renders it of vital interest to our people that the Court should apply the old essential underlying principles of our Government to the new and totally different conditions in such fashion that the spirit of the Constitution shall in very fact be preserved and not sacrificed to a narrow construction of the letter. Much of the future of this country depends upon the direction from which the judges of the Supreme Court approach the great Constitutional questions that they will have to decide. It is impossible to overesti-

mate the services which may be rendered on this Court by the judge who is really a far-sighted statesman, who has the modern type of mind, who is fully alive to the great governmental needs of the time and to the far-reaching importance which the decisions of the courts may have, and who in dealing with the problems that confront him never forgets that in addition to being a lawyer on the Bench he is also an American citizen in a place of the highest responsibility who owes a great duty not only to the people of this country to-day, but to the people of this country to-morrow.

This was exactly the type of judge that Mr. Moody was. It is the universal testimony of all who knew him that as Justice he grew and developed with extraordinary rapidity. As District Attorney of Massachusetts, as Congressman, as Secretary of the Navy, and as Attorney-General he had rendered signal service to his country; indeed, his record as Attorney-General can be compared without fear with the record of any other man who ever held that office. Much was rightly expected of him when he was made Justice of the Supreme Court; but what he did and the attitude he took during his lamentably short term of office showed that these expectations would be far more than realized. He was not a man who was misled by a formula. His clear eye always saw into the heart of things. No devotion to the theory of National power prevented his deciding in favor of the rights of any State wherever it was obvious that through the exercise of its rights by the State lay the only chance of securing the rights of the people. On the other hand, no theory as to the rights of the States caused him to refrain from giving effect to a just expression of the popular will when that popular will could find effective expression only by the exercise of the powers of the Federal Government. It is not a difficult thing to find an upright man who as judge will do justice between individuals; but it is a very difficult thing to find the far-seeing statesman who on the Bench will with wisdom and firmness shape the course of governmental action so that the National and State governments shall completely cover the whole field of governmental action in order that

there shall be left no neutral ground wherein astute men, protected by contradictory judicial decisions, may work wickedness uncontrolled by either State or Nation. Mr. Justice Moody was one of these men. He rendered noteworthy service to the country even during his short term on the Bench, and had he been able to continue on the Bench he would have rendered such service as hardly any other man now in public life can hope to render.

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