CRITICISM OF THE COURTS

On August 29, at Denver, before the Colorado Legislature, I made an address dwelling partly upon the necessity of good government, and specifically upon the need of more coherent work between the State and the National Governments, and of action on the part of the legislative, executive, and judicial officers of the country, both National and State, which would prevent the growth and extension of a neutral territory or borderland of ill-defined limits in which neither the Nation nor any State should be able to exercise effective control, especially over big corporations, in their relations to the public at large and to their own employees. I spoke in part as follows:

The courts occupy a position of importance in our Government such as they occupy in no other government, because, instead of dealing only with the rights of one man face to face with his fellow-men, as is the case with other governments, they here pass upon the fundamental governmental rights of the people as exercised through their legislative and executive officers. Unfortunately, the courts, instead of leading in the recognition of the new conditions, have lagged behind, and, as each case has presented itself, have tended by a series of negative decisions to create a sphere in which neither Nation nor State has effective control, and where the great business interests that can call to their aid the ability of the greatest corporation lawyers escape all control whatsoever. Let me illustrate what I mean by a reference to two concrete cases. I believe in States' rights wherever States' rights mean the people's rights. On the other hand, I believe in National rights wherever National rights mean the people's rights; and above all, I believe that in every part of our complicated social fabric there must be either National or State control, and that it is ruinous to permit governmental action, and especially judicial action, which prevents the exercise of such control.

The first case to which I shall refer is the

Knight Sugar Trust case. In that case the Supreme Court of the United States handed down a decision which rendered it exceedingly difficult for the people to devise any method of controlling and regulating the business use of great capital in inter-State commerce. It was a decision nominally against National rights, but really against popular rights, against the democratic principle of government by the people.

The second case is the so-called New York Bake-Shop Case. In New York City, as in most large cities, the baking business is likely to be carried on under unhygienic conditions, conditions which tell against the welfare of the general public. The New York Legislature passed, and the New York Governor signed, a bill remedying these unhealthy conditions. New York State was the only body which could deal with them; the Nation had no power whatever in the matter. Acting on evidence which to them seemed ample and sufficient, acting in the interest of the public and in accordance with the demand of the public, the only governmental authority having affirmative power in the matter, the Governor and the Legislature of the State of New York, took the action which they deemed necessary, after what inquiry and study were needed to satisfy them as to the conditions and as to the remedy. The Governor and the Legislature alone had the power to remedy the abuse. But the Supreme Court of the United States possessed, and unfortunately exercised, the negative power of not permitting the abuse to be remedied. By a five-to-four vote they declared the action of the State of New York unconstitutional, because, forsooth, men must not be deprived of their "liberty" to work under unhealthy conditions. All who are acquainted with the effort to remedy industrial abuses know the type of mind which may be perfectly honest, but is absolutely fossilized, which declines to allow us to work for the betterment of conditions among the wage-earners on the ground that we must not interfere with the "liberty" of a girl to work under conditions which jeopardize life and limb, or the "liberty" of a man to work under conditions which ruin his health after a limited number of years.

Such was the decision. The Court was of course absolutely powerless to make the remotest attempt to provide a remedy for the wrong which undoubtedly existed, and their refusal to permit action by the State did not confer any power upon the Nation to act. The decision was nominally against States' rights, but really against popular rights.

Much exception was taken in the East to this speech as an "attack" on the Supreme Court, some of the critics going so far as to call it an attack upon the judiciary as a whole, an incitement to riot, and an appeal to the passions of the mob. The gloom caused by the "attack" was naturally deepest in that section of the metropolitan press which is owned and edited in the shadow of Wall Street; but many good and honest people were misled into a feeling of uneasiness on the subject.

The address was not delivered before a mob, or indeed at a popular meeting. It was made by invitation to the two Houses of the Colorado Legislature assembled at the capitol of the State. In addition to the members of the Legislature there were present the Governor and various other State officers and various judges. There were some hundreds of spectators who had come by special invitation. The Speaker and Lieutenant-Governor presided, and the function was peculiarly dignified in character.

So much for the setting of the speech. Now for the substance. Apart from simple misrepresentation or misquotation, my critics, as far as I can gather, take the view, first, that I have taken an action without precedent in questioning any decision of the Supreme Court; second, that I have used too strong language; and, third, that it is wrong ever to criticise a decision of the Supreme Court. I differ with them on all three points, and shall consider them consecutively.

First, the question of precedent. The central feature of Abraham Lincoln's famous series of debates with Douglas was his attack on the Supreme Court for its decision in the Dred Scott case and Douglas's criticism of him for making such an attack. Douglas spoke of him as follows:

He makes war on the decision of the Supreme Court. I wish to say to you, fellow-citizens, that I have no war to make on that decision, or any other ever rendered by the Supreme Court. I am content to take that decision as it stands delivered by the highest judicial tribunal on earth, a tribunal established by the Constitution of the United States for that purpose, and hence that decision becomes the law of the land, binding on you, on me, and on every other good citizen, whether we like it or not. Hence I do not choose to go into an argument to prove, before this audience, whether or not he [the Chief Justice] understood the law better than Abraham Lincoln.

If for Abraham Lincoln's name mine were substituted, this paragraph would stand with hardly an alteration as an exact summary of the attacks made upon me at

this moment for what I said about the Court in the two cases under consideration. Lincoln himself during the debates, not once in the heat of fury, but again and again, in speech after speech, from June, 1857, to October, 1858, stated what I hold to be not merely a proper view, but the only proper view, of the duty of the citizen when the Supreme Court has made decisions which he firmly believes to be against the interests of the country. The following are a few quotations from his speeches:

"We believe in obedience to, and respect for, the Judicial department of Government. We think its decisions on constitutional questions, when fully settled, should control not only the particular case decided, but the general policy of the country. . . . But we think [this] decision erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it.

"Judicial decisions are of greater or less authority as precedents according to circumstances. That this should be so accords both with common sense and the customary understanding of the legal profession."

"I now repeat my opposition to the decision. . . . I do not resist it. . . . We abide by the decision, but we will try to reverse that decision."

"I think that in respect for judicial authority my humble history would not suffer in comparison with that of Judge Douglas. He would have the citizen conform his vote to that decision; the Member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people, and all the departments of the Government. I would not. By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs."

"We oppose the Dred Scott decision in a certain way. We do not propose that when he has been decided to be a slave by the court, we as a mob will decide him to be free. We do not propose in any violent way to disturb the rights of property thus settled. . . . We propose so resisting it as to have it reversed if we can and a new judicial rule established upon this subject."

"I believe the decision was improperly made, and I go for reversing it."

He also stated that the decision was due to "apparent partisan bias," that it was "an astonisher in legal history," "a new wonder of the world," and "based upon falsehood in the main as to the facts."

I do not see how the case could be put more clearly or more strongly than it was thus put by Lincoln. As was right and proper, he used far stronger language in denouncing the Dred Scott decision than I did in speaking of the two decisions in question, for the Dred Scott decision was a very much worse decision than either of the two decisions in question, though these are also very bad. It should be clearly understood that all men who deny the right to take exception in proper language to the decisions of the Supreme Court on some fundamental question where they think the Supreme Court has gone wrong must condemn Lincoln far more unreservedly than they condemn me.

The second point raised by my critics is that I have used too strong language. Now, the critics who make this objection forget that, as regards both these decisions, as in the Dred Scott decision, dissenting opinions were given. In the end, the dissenting opinions in the Dred Scott case became the law of the land, and no one now for a moment justifies the action of the majority of the Court in that case. I believe that such will be the case as regards the two decisions I have mentioned above, and I hold that it is the duty of every good citizen to do as Abraham Lincoln advised in the case of the Dred Scott decision; that is, to abide by the decision but work for its reversal. My own language was by no means as strong as the language of the dissenting Justices in the two cases. In the Knight case, Justice Harlan says of the decision of the Court:

This view of the scope of the act leaves the public, so far as National power is concerned, entirely at the mercy of combinations which arbitrarily control the prices of articles purchased to be transported from one State to another State. I cannot assent to that view. In my judgment, the General Government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines, under the name of a corporation, to destroy competition, not in one State only, but throughout the entire country. . . . The doctrine of the autonomy of the States cannot properly be invoked to justify a denial of power in the National Government to meet such an emergency. . . . The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed,

cannot be adequately controlled by any one State. Its authority should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that Government is entitled, by the Constitution, to accomplish.

The learned Justice then continues to apply to the judgment of the Court a quotation running in part as follows: "'Powerful and ingenious minds may, by a course of well-digested but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived.'"

In the Bake-Shop case, Justices Harlan, White, and Day, dissenting, spoke as follows:

There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State, and to provide for those dependent upon them.

If such reasons exist, that ought to be the end of this case, for the State is not amenable to the judiciary, in respect to its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its Legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good. We cannot say that the State has acted without reason, nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all-sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. Let the State alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a State are primarily for the State to guard and protect.

Justice Holmes spoke as follows:

I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this Court that State Constitutions and State laws may regulate life in many ways which we as legislators might think as injudicious or, if you like, as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post-Office, by every State or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's "Social Statics."... I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work.

A glance at these dissenting opinions will satisfy any one that I have not used language as strong as that used by the learned Justices who dissented from the two decisions.

Third. Now as to the question whether it is ever proper to criticise a court. My views on this point have been set forth at length in the Message I sent to Congress when I was President, on December 3, 1906, which runs in part as follows:

All honor cannot be paid to the wise and fearless judge if we permit the growth of an absurd convention which would forbid any criticism of the judge of another type, who shows himself timid in the presence of arrogant disorder, or who on insufficient grounds grants an injunction that does grave injustice, or who in his capacity as a construer, and therefore in part a maker, of the law, in flagrant fashion thwarts the cause of decent government. The judge has a power over which no review can be exercised; he himself sits in review upon the acts of both the executive and legislative branches of the Government; save in the most extraordi-

nary cases he is amenable only at the bar of public opinion; and it is unwise to maintain that public opinion in reference to a man with such power shall neither be expressed nor led.

The best judges have ever been foremost to disclaim any immunity from criticism. This has been true since the days of the great English Lord Chancellor Parker, who said: "Let all people be at liberty to know what I found my judgment upon; that, so when I have given it in any cause, others may be at liberty to judge of me." . . . There is one consideration which should be taken into account by the good people who carry a sound proposition to an excess in objecting to any criticism of a judge's decision. The instinct of the American people as a whole is sound in this matter. They will not subscribe to the doctrine that any public servant is to be above all criticism. If the best citizens, those most competent to express their judgment in such matters, and above all those belonging to the great and honorable profession of the bar, so profoundly influential in American life, take the position that there shall be no criticism of a judge under any circumstances, their view will not be accepted by the American people as a whole. In such event the people will turn to, and tend to accept as justifiable, the intemperate and improper criticism uttered by unworthy agitators. Surely it is a misfortune to leave such critics a function, right in itself, which they are certain to abuse. Just and temperate criticism, when necessary, is a safeguard against the acceptance by the people as a whole of that intemperate antagonism toward the judiciary which must be combated by every right-thinking man, and which, if it became widespread among the people at large, would constitute a dire menace to the Republic.

I cannot state my position now more clearly than I stated it then. I continue to uphold the doctrine enunciated fifty-three years ago by Abraham Lincoln as regards criticism of the action of the courts. I feel most strongly that the decisions to which I object, and which I hope will be reversed, are wrong, for the reasons set forth so admirably and with such convincing clearness by Justices Harlan, White, Day, and Holmes. If I am not right in my position as to these decisions, then I err in company with these four Justices of the Supreme Court. If I am not right in exercising the liberty to question these decisions, and as a result to endeavor to form a popular opinion which shall directly or indirectly secure their reversal, then I err in common with Abraham Lincoln.

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