THE SUPREME COURT

Watch Dog of Capitalism

by **ARNOLD PETERSEN**

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Introduction

In the first of his two brilliant lectures, published under the title *Two Pages from Roman History*, Daniel De Leon, foremost American Marxist and social scientist, described how The Colleges of Priests exercised the judicial power in the Roman State during the period 500 B.C. to about 400 B.C., as follows:

" . . . They did in this way: If a law or an election distasteful to the ruling class was forced through; if, for any one of the thousand and one causes apt to arise wherever actual oligarchic power is draped in the drapery of democratic forms, the ruling class of Rome found it prudent to yield in Forum and Senate Hall; in such case The Colleges of Priests would conveniently discover some flaw in the auspices, some defect in the sacrifices. That annulled the election or the law, as 'condemned by the Gods' . . . "

What made this possible was the acceptance of The Colleges of Priests by the Roman masses as a Sacrosanct body—a body most holy and sacred and, therefore, inviolable. Consequently, its decisions had the weight and effect of gospel and were accepted as such without question. They were immune to popular protest or challenge.

The Supreme Court of the United States, and the Courts generally, may be said to be The Colleges of Priests of capitalist society. To enhance their roles as defenders of capitalist private property and protectors of the interests of the owners of that property, the U.S. Supreme Court Justices down through the years have

been pictured as men of outstanding integrity, above politics, above class, above crass material interests. They have been cloaked in the garb of infallibility and "adorned with a halo of sanctity." And, as has been pointed out before, even their judicial robes suggest a priestlike character and role.

Despite this persistent effort to establish the U.S. Supreme Court as completely impartial, objective and incorruptible, there have been instances during the past 190 years when the Court was a center of controversy and the subject of acrimonious debate. Those controversies and debates have taken place during periods of social stress when the capitalist system was in some state of crisis. During such times the Court has had occasion to render decisions which, though they served the overall interests of the capitalist class, nevertheless were detrimental to, or even destructive of, the interests of one or more segments of that class. The Court thereby incurred their wrath and was subjected to bitter denunciation. For, as Marx observed, the individual capitalist is always ready to sacrifice the interests of his class for his own private interest.

An eloquent example of this is to be found in the vicious and prolonged attack upon the so-called Warren Court by the Southern bourbons and their ultrareactionary and racist supporters throughout the nation following the Court's 1954 decision outlawing racial segregation in the schools—a decision motivated in large measure by capitalist America's international material interests in a world where numerous Black states were emerging.

Needless to say, such attacks upon the Court tend to undermine the otherwise carefully nurtured illusion that

it is an impartial and objective body composed of apolitical men with a deep and abiding sense of justice, dedicated primarily and at all times to the defense of the liberties and freedoms guaranteed to all by the Bill of Rights.

In the ensuing essays, Arnold Petersen, former National Secretary of the Socialist Labor Party, keen scholar of American history and a foremost Marxist, places the United States Supreme Court in its proper political, economic and social perspective.

In the essay entitled, "The Supreme Court: Politico-judicial Arm of Capitalism," Petersen utilizes the controversy that was sparked by President Richard M. Nixon's effort to "pack" the Court with "mediocrities and ultrareactionaries" to illustrate and analyze the material incentives behind that effort. He demonstrates that—

> "The Supreme Court will continue to be the subject of acrimonious debate among the contenders for supremacy in capitalist America."

And he explains why

> "Each ruling-class segment will strive to fashion its [the Court's] composition after its heart's desire."

In the two essays, "The Supreme Court" and "The Supreme Court Again," Petersen adds depth and historic background to the reader's understanding of the Court and its function in capitalist America while analyzing the late President Franklin D. Roosevelt's abortive effort to "pack" the Court with justices favorable to his political and social philosophy by increasing its number from nine to fifteen.

Though the treatment of the Supreme Court in these

essays is relatively brief, considering the scope of the subject, the author has succeeded in cutting to the heart of the issues with broad yet incisive strokes of his pen. He not only makes clear the primary role of the Court as an instrument of class rule; he shows how the Court has usurped functions never intended for it by the Founding Fathers who framed the Constitution; and he demonstrates that the Court cannot serve working class interests.

In short, as Petersen sums it up, "the question of the Supreme Court is one that concerns those who wish to preserve the capitalist system." The question that concerns the working class is the social question. And that can be resolved only by a Socialist reconstruction of society. That Arnold Petersen makes crystal clear in these essays.

NATHAN KARP

June, 1971

Foreword

The Constitution drawn up by the Federal Convention of 1787 has been called "a bundle of compromises" and "a mosaic of second choices." When the document was laid before the people for ratification, George Washington said of it: "The Constitution that is submitted is not free from imperfections. But there are as few radical defects in it as could well be expected, considering the heterogeneous mass of which the Convention was composed and the diversity of interests that are to be attended to."

Notes kept by James Madison and a number of other delegates reveal that there were indeed heterogeneous views and diverse interests represented at the Convention. At times these clashed so sharply as to make it appear doubtful that the men assembled in Philadelphia would succeed in the task they had undertaken. On one such occasion, the venerable Benjamin Franklin admonished his fellow delegates that "we are sent here to *consult*, not to *contend*, with each other. . . . " On another, he moved that "henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business. . . . "

On the surface, the greatest division seemed to lie between the small and large states over the question of representation in the proposed national legislature. Madison, however, exposed the real, underlying division in the following statement to the Convention (as recorded by himself): "He admitted that every peculiar

interest whether in any class of citizens, or any description of States, ought to be secured as far as possible. Wherever there is danger of attack there ought be given a constitutional power of defence. But he contended that the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from the effects of their having or not having slaves. These two causes concurred in forming the great division of interests in the U. States. It did not lie between the large & small States: It lay between the Northern & Southern, and if any defensive power were necessary, it ought to be mutually given to these two interests."

Fortunately, the conflict of interests between the Southern slave economy and nascent capitalism in the North, though unmistakable, was not yet great enough to overweigh the eagerness of beneficiaries of both systems to secure their property rights from external and internal attacks. So their respective representatives persevered and, through reciprocal concessions and accommodations, finally hammered out a covenant for a strong national government.

While popular in spirit and form, the new government was fashioned to give the opposed groups of property holders defenses against hostile majorities as well as against each other. And its three coordinate departments were shrewdly counterpoised to block the assumption of undelegated powers by any of them.

But, as Robert Burns has imperishably put it, "the best laid schemes o' mice and men gang aft a-gley." Given the inevitable contest for political supremacy inherent in the situation, a contest destined to become

mortal under the explosive influence of geographic expansion and technological progress, sooner or later one of the rivals was bound to grasp some lever of decisive advantage. This happened in 1803 when, in its historic ruling in the case of *Marbury v. Madison*, the Supreme Court arrogated to itself the right to nullify an act of Congress and thereby asserted its ascendancy over the legislative and executive departments.

The author of the ruling, Chief Justice John Marshall, was throughout his 34-year tenure of the office an unwavering champion of the interests of commerce, finance and industry. With his decision in *Marbury v. Madison*, he laid the cornerstone for the transformation of the Supreme Court into what one writer has termed "a continuing constitutional convention . . . helping to construct a protective legal umbrella under which business enterprise could and did flourish." (Arthur Selwyn Miller: *The Supreme Court and American Capitalism*.)[1]

The political sword thus created could conceivably have cut two ways, but history records that it did not. For of the landmark court decisions between 1803 and 1860, that in *Dred Scott v. Sandford* alone exclusively favored the slave-owning class, and it only served to doom their cause by spurring the realignment of political forces that led to Lincoln's election to the Presidency, secession and the Civil War. Whereas, by expansive interpretations of the Constitution's commerce and contract clauses, the Supreme Court under Marshall and his successor, Roger Taney, powerfully furthered the formation of a unified national market and the growth of

[1] [The Free Press, New York, 1968.—*Editor*.]

capitalist corporations.

Once the economic and political opposition of the slave owners had been destroyed, ever more mighty capitalist enterprisers proceeded to complete their mastery over a nation whose borders soon reached the Pacific. And the Supreme Court continued to play a, vital role in facilitating this process via judicial opinions, which frustrated the efforts of farmers, petty capitalists and workers to protect their several interests against the rapacious power of swelling and concentrating capital.

Not that the capitalist corporate conquest of America was denied timely assistance from the other organs of government. When, however, popular pressures occasionally prompted state or national legislative attempts to interfere with the operations of capital—as in the instances of the Interstate Commerce and Sherman Anti-Trust Acts—the robed gentlemen occupying the High Bench could almost invariably be counted on to scotch or emasculate them. On the other hand, legislative and executive actions that *aided* capital, the judges found beneath their notice.

Students of the Court's post-Civil War behavior have noted that—particularly during the period from about 1890 to 1937—in the guise of expounding the Constitution, it actually laid down economic policy. For example, in 1924 John R. Commons ironically observed in his *Legal Foundations of Capitalism*[2] that the U.S. Supreme Court held "the unique position of the first authoritative faculty of political economy in the world's history." And in 1936, Morris R. Cohen, a philosopher deeply versed in law, stated: "We cannot pretend that

[2] [Macmillan, New York, 1924.—*Editor*.]

the United States Supreme Court is simply a court of law. Actually, the issues before it generally depend on the determination of all sorts of facts, their consequences, and the values we attach to those consequences. These are questions of economics, politics, and social policy. . . . "

There is, of course, no reason to be surprised that 'the legal pronouncements and economic doctrines handed down over the years by the Supreme Court have consistently benefited the owners of substantial property, and notably, after its rise in the latter 19th century, the capitalist plutocracy. The men who have composed the Court, even the most honorable and noble-minded among them, were necessarily imbued with the ideology of the dominant social elements of their times. All the more certainly so in view of the fact that Justices have been habitually chosen with a close attention to their ideological "reliability." An off-bench statement of Associate Justice Samuel F. Miller, who sat on the Court from 1862 to 1890, throws much light on this matter. Justice Miller said: "It is vain to contend with judges who have been at the bar the advocates for forty years of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest. All their training, all their feelings are from the start in favor of those who need no such influence."

The year 1937 marked an epoch in the Supreme Court's career. From 1934 to 1937, still animated by the spirit of *laissez faire*, it had invalidated such pivotal New Deal measures as the National Recovery Act and the Agricultural Adjustment Act. Then in 1937, shaken by Roosevelt's unsuccessful drive to "pack" it with more

cooperative appointees, the Court "saw the light" and bowed to Roosevelt's demand for reforms needed to preserve capitalism, initiating its shift to a "liberal" spirit by upholding the National Labor Relations Act and Social Security legislation.

The new spirit developed into a confirmed attitude which Arthur Selwyn Miller has summarized as follows in the work cited earlier: "No longer does the High Tribunal make the ultimate determinations in political economy; power over *those* decisions has been ceded to the political branches of government." Miller adds: "Further, the Court has stretched the economic clauses of the Constitution so as to validate their use for regulation of basically noneconomic matters, principally in the area of race relations. In other words, . . . Congress and the President could validly use their new *economic* powers to effect *social* changes [i.e., reforms] as well."

Having been obliged to cease using the power of judicial review assumed under Marshall back in 1803 to lay down economic policy, the Supreme Court—especially after Earl Warren's appointment as Chief Justice—undertook to use that power to effect reforms itself in areas which the avowedly political branches of government chose to neglect. But although its sphere of action had changed, the Court's basic motive had not: its aim was still to protect the capitalist interest in the context of altered circumstances. Thus the decisions issued since 1954 in cases involving civil rights and liberties, ostensibly benign in intent, were mainly inspired by a desire to enhance U.S. capitalism's prospects of survival by reducing social unrest at home while, at the same time, improving its image abroad. It

is, therefore, monstrously ironical that these decisions should have earned the Justices furious denunciations from purblind reactionaries, plus threats of impeachment and moves to hobble them through constitutional amendments.

Because he hopes to reap political gains by catering to the Bourbon clamor for a return to "strict construction" of the Constitution, and also because "strict construction" accords with his own industrial-feudal mentality, President Nixon is seeking to restore to the Court its former pronounced "conservative" bias. The opportunity presenting itself to appoint a Chief justice, he picked for the post a man who had been loudly critical of the Warren Court rulings and who, during his service on the District of Columbia Circuit Court of Appeals, had won the reputation of being a stern "law and order" judge as well as a "strict constructionist."

Yet Chief Justice Burger, in the first major case to come before him, concurred with his associates in ordering immediate and complete integration of the public schools of the state of Mississippi! Striking proof that even historically retarded servitors of plutocratic capitalism have apparently absorbed the owning class lesson uttered by Franklin Delano Roosevelt when he declared in 1936: "The true conservative seeks to protect the system of private property and free enterprise by correcting such injustices and inequalities as arise from it. The most serious threat to our institutions come from those who refuse to face the need for change. Liberalism becomes the protection for the far-sighted conservative."

Mr. Burger has now been joined by another conservative and strict constructionist jurist, Harry Andrew Blackmun. Others of their ilk may soon be

added. Whether they are or not is of no concern to the vast working class majority of this nation. For whatever its political complexion, be it "conservative" or "liberal," the Supreme Court can only be expected to go on functioning as the ultimate bulwark of private ownership of industry, as what the author of the essays which follow has aptly dubbed "the watchdog of capitalism."

STEPHEN EMERY

June, 1971

The Supreme Court: Politico-Judicial Arm of Capitalism

More than 30 years ago the United States Supreme Court had become the subject of violent political discussion among the capitalist politicians. The discussion centered on President Roosevelt's bold proposal to increase the membership of the Court from nine to fifteen, the purpose obviously being to afford him an opportunity to appoint judges friendly to his reform program, thus hopefully securing a safe majority favoring that program. It is questionable whether Mr. Roosevelt really expected to accomplish his purpose. To suppose that he seriously believed his "packing the court" plan would be adopted is to impute to him a degree of naiveté which was not part of his nature, and a crudeness alien to his crafty, designing character. That his plan would fail seemed a foregone conclusion, and of course it did fail.

As in 1937, now again the Supreme Court, its "functions, powers and limitations," currently has leaped to the fore as a dominant subject for political debate. In an odd and perhaps strained sense, the issue involved is basically similar to that of 1937. With Roosevelt the principle involved was primarily a matter of quantity; with his current successor it is primarily quality—quality, that is, in a negative sense. In other respects the two men shared the same goal whatever the current contentions—the preservation of class rule and the continued subjection of the working class to wage

slavery. Roosevelt, the aristocrat, warned the members of his class: "Reform if you would preserve." Nixon, the lawyer, has become the pet of the plutocracy whose interests he is serving so well. And in keeping with his all but openly pledged fealty to the plutocracy (and capitalism in general), he has launched a campaign to "pack" the Supreme Court with mediocrities and ultrareactionaries.

His first venture in this respect was his nomination for the Supreme Court of judge Clement F. Haynsworth Jr., a conservative and relatively unknown Southerner. He was rejected by the Senate mainly on the grounds of "conflicts of interests" (financial). Determined to appoint a Southerner who met his standards of conservatism, Nixon picked an obscure lawyer who, through political influence, had been elevated as a member of the U.S. Court of Appeals for the Fifth Circuit after having served for 11 years as federal judge in Tallahassee, Florida, one G. Harrold Carswell. The New York *Times*, Jan. 21, 1970, under the caption "From Obscurity to Unknown," commented on Nixon's nominee as follows:

"In naming judge G. Harrold Carswell to the Supreme Court, President Nixon has displayed more glaringly than ever a talent for seeking out undistinguished candidates for the high bench."

The *Times* continued: ". . . —Judge Carswell, only seven months on the appellate bench—is so totally lacking in professional distinction, so wholly unknown for cogent opinions or learned writings, that the appointment is a shock. It almost suggests an intention to reduce the significance of the Court by lowering the caliber of its membership."

Which, of course, is precisely what Nixon, "the gut

fighter," intended to do. Though for opposite reasons, he, like Franklin Roosevelt, wants a malleable and compliant Court that could be counted on to serve the interests of his plutocratic patrons, and equally his own political ambitions.

For nearly three months the struggle between the pro- and anti-Carswell contenders raged with mounting intensity and outspokenness as regards Carswell's qualifications as Supreme Court justice. The facts concerning his legal career and past judicial acts are of such a nature that ordinarily would probably have caused the withdrawal of his nomination, were the President someone other than Richard Nixon.

The first evidence concerning Carswell's unfitness to serve on the Supreme Court was found in a speech he delivered in 1948 as a guest of the American Legion, which he hailed as a "great patriotic organization." It was a typical rabble-rousing speech. Unblushingly he proclaimed himself a racist, sneeringly referring repeatedly to the Civil Rights Program as the "Civil Wrongs Program." With brazen effrontery he stated his credo in unmistakable language. Boasting of his Southern ancestry, he declaimed: "I believe that segregation of the races is proper and the only practical and correct way of life in our states. *I have always so believed, and I shall always so act. . . . I yield to no man as a fellow candidate or as a fellow citizen in the firm, vigorous belief in the principles of white supremacy, and I shall always be so governed.*" (Italics ours.)

When recently reminded of his racist speech in 1948, Mr. Carswell made a dramatic show of repudiating it. Appearing on a CBS news program, he exclaimed indignantly that he was not a racist, and that his 1948

speech was delivered in the heat of a campaign (!). These were his words:

"Specifically and categorically, I renounce and reject the words themselves and the thoughts that they represent. They are obnoxious and abhorrent [!] to my personal philosophy."

Carswell's record subsequent to 1948 belies his hysterical disclaimer, as proven by the documentary evidence uncovered. Included in the evidence that he has consistently revealed himself as a racist was his drafting in 1953 of the document granting a charter to a "university booster club" ("Seminole Booster Club"), sponsored by members of the Florida State University.

A certain Mr. Douglas B. Shivers, former law partner of Carswell, and still a member of his Tallahassee, Fla., law firm, was reported in the New York *Times*, Feb. 21, 1970, as having stated that "Mr. Carswell . . . listed as the sole qualification of membership that 'members shall be any white persons interested in the purposes and objectives for which this corporation [club] is created.'" One need have little doubt about what these "purposes" were! Incidentally, Mr. Shivers, still a personal friend, added that recently Mr. Carswell told him that "he does remember he drafted it."

Anthony Lewis, a *Times* columnist, reported on March 7, 1970, that in 1956, Carswell, then United States Attorney, "joined in a scheme to lease Tallahassee municipal golf course, built with $35,000 in Federal funds, to a segregated club for $1.00 a year." The racist "scheme" was widely publicized at the time. Yet recently Carswell stated that he was not aware that it was a segregation deal!

Much more could be cited to prove to the satisfaction

of the average intelligent person that the *Times* was right (from the standpoint of a capitalist spokesman) when it wrote that "Judge Carswell . . . is so totally lacking in professional distinction . . . that the appointment is a shock." But Nixon, the unscrupulous politician, remained unmoved and with increasing determination defended his choice. In his letter to Senator Saxbe (Ohio), he went so far as charging the Carswell Senate opponents with challenging his presidential prerogatives and his "power of appointment." Referring to his "responsibility . . . to appoint members of the Court," he asked "whether this responsibility can be frustrated by those who wish to substitute their own subjective judgment for that of the one person entrusted by the Constitution with the power of appointment." He followed this up with the whine that "if the Senate attempts to substitute its judgment as to who should be appointed [sic!] the traditional constitutional balance is in jeopardy and the duty of the President under the Constitution impaired"! (Nixon's power of appointment was never challenged!)

The arrogance of the man, his crude language bordering on illiteracy, is almost past belief. Actually it is the true and genuine Nixon "thing," as those who have followed the career of this upstart and one-time "pal" of the infamous Joseph McCarthy know only too well. As long ago as 1958, the then National Secretary of the Socialist Labor Party, in his report to that year's National Executive Committee Session, wrote:

"Roosevelt [Theodore] is dead these many years, but the tribe of Roosevelts abounds in the land. The crafty opportunist, Richard Nixon, is presently [1958] one of the outstanding ones. From being a pal of the repulsive

Joseph McCarthy, he has become the very paragon of civic virtue and preacher of social morality, as was his model, Theodore Roosevelt. *This unscrupulous politician* [*Nixon*] *needs to be watched.* As his recent record shows, he has acquired the knack of uttering words entirely devoid of importance in the manner and elocution of one who is giving voice to the profoundest gems of wisdom. The plutocratic press (in its organized attempt to build him up to resemble presidential timber) describes him as fearless and bold—a man of 'courage and candor.' His 'prowess' and 'authority' were manifested a few months ago when he declared that 'this [Eisenhower] Administration will not stand by and allow a recession to continue or unemployment to rise.' [Shades of King Canute!]

"The columnist Joseph Alsop attributed to a British Laborite this statement: 'It's a queer thing isn't it? But I really believe there's nothing wrong between Britain and the United States that three months of Nixon's vigor and realism couldn't cure.'"!

Well, as old Plato observed: "Time brings everything." Give the man time!

II

To return to the Carswell nomination: Considering the man's obvious lack of qualifications for any high or responsible office, especially the Supreme Court, his defenders had a hard time to justify Nixon's choice. The issue with most of them was purely political, and few, if any, could advance sound legal arguments to warrant approval. The most irrational plea was offered by Senator Roman L. Hruska of Nebraska. Starting with a

brave effort, claiming that Carswell was "well-qualified for the post . . . learned in the law . . . experienced . . . a man of integrity," he offered what seems destined to become a classic of its kind: "Even if [Carswell] were mediocre, there are a lot of mediocre judges and people and lawyers and they are entitled to a little representation, aren't they? We can't have all Brandeises, Frankfurters and Cardozos." How very true, but incredible as an argument favoring Carswell's appointment!!

Following a fruitless attempt by the opposition to have the nomination referred back to the Senate's Judiciary Committee, the question finally came to a vote on April 8, and to everyone's surprise it resulted in rejection of the nomination by the unexpected relatively large vote of 51 against and 45 in favor. The *Times*, which fought strenuously to have the nomination defeated, declared editorially on April 5 that the defeat "is a triumph of constitutional over political partisanship." This outstanding defender of capitalism added: "The rebuke to the Administration . . . will surely alert the President and his advisers to the savage toll exacted by the insensitivity of their political strategies as illustrated in the Carswell case."

The *Times*, despite its better knowledge, underestimated the Nixon character. Wasting no time he issued on the following day as vitriolic a denunciation of the majority of the Senate as has come from the White House in decades. (Mild was President Wilson's rebuke to those Senators who in 1917 voted against the war declaration he had presented to Congress. He referred to the opposing group, headed by Senator Robert LaFollette Sr. of Wisconsin, as "these willful men." But then, of

course, Mr. Wilson was a Southern gentleman!)

In unbridled fury, Nixon charged his opponents with "hypocrisy" and with having made "vicious assaults on their [his nominees'] intelligence, their honesty and their character," adding that "both [Haynsworth and Carswell] are distinguished jurists, both are among the finest judges. . . ," etc., etc. And this despite the overwhelming and irrefutable evidence to the contrary! In his petty and childish peeve he declared that "neither would have been rejected had he not been born in a Southern state." To which the reactionary Senator Ellender of Louisiana—an ardent supporter of Nixon-rejoined: "I don't give a damn where he [the nominee] comes from."

Continuing his vicious assault on the opposing Senators, Nixon vowed that "As long as the Senate is constituted the way it is today, I will not nominate another Southerner and let him be subjected to the kind of malicious character assassination accorded both judges Haynsworth and Carswell." This is clear notice that his failure to "pack" the Court will be used to attempt the defeat of as many as possible among the Senators of the opposition when their terms expire. There were those who doubted that Nixon would carry out his "promise," but he did nominate a Northerner, Harry Andrew Blackmun, of Minnesota, a member of the United States Court of Appeals from the Eighth Circuit, and reputedly "a scholarly and mildly conservative judge." His nomination has generally been received with cautious and reserved approval. The Senate panel has made it clear that judge Blackmun's record will be most carefully scrutinized before the nomination is submitted to the Senate for a vote. Already now, however, there are

rumors that his record may disclose instances of "conflict of interest," the main cause of judge Haynsworth's rejection.[3] In fact, the battle over the Supreme Court nominations has been essentially an exercise in politics. As Max Frankel, New York *Times* feature writer, wrote in his paper on April 9:

"Mr. Baker [Tennessee Senator] and others here have suggested that the Supreme Court was bound to, become the focus of political debate from which it has often been

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[3] A searching inquiry of Judge Blackmun's "judicial ethics" and possible financial connections with corporations was promised by Senator Birch Bayh of Indiana. The N.Y. *Times* (4/17/70) reported that Deputy Attorney General Richard Kleindienst had disclosed in a letter to the chairman of the Judiciary Committee that Judge Blackmun "had participated in three cases involving companies in which he owned stock."

According to the *Times*, "Mr. Kleindienst explained in his letter that Judge Blackmun purchased 50 shares of stock in the Ford Motor Company for about $2,500 in 1957, two years before he joined the United States Court of Appeals for the Eighth Circuit. In 1960 and 1964 he participated in cases involving minor damage suits against Ford." Subsequently he upheld two judgments against Ford amounting to $24,500 and $12,500, respectively. It was further reported that he owned shares of stock in American Telephone and Telegraph Company which he had purchased in 1963 and 1964. In 1967 "he joined in a ruling that upheld a trial judge's decision to dismiss a $35,000 suit against an A.T. & T. affiliate on the ground that the Federal Court did not have jurisdiction in the case." Etc. In all the cases it was emphasized that his financial interests were "relatively minor."

Despite these "minor" technical violations of the Federal statute that bars judges from ruling on cases in which they had an interest, he was cleared of the charge that he had "violated the canons of judicial ethics."

One is reminded of the case cited by Marx in which an unwed mother had given birth to a child and who was absolved on the ground that it was "only such a little baby"!

At any rate, Judge Blackmun was declared worthy of the high judicial office by the Committee, won the approval of the Senate, and was sworn in as Associate Justice of the United States Supreme Court on June 9. All concerned breathed happily, to the accompaniment of hosannas and hallelujahs from "liberal" and "conservative" camps alike!—*Author*.

spared in the past [?]. With the Court so deeply involved in the determination of social issues, it is felt, both the President and the Senate are bound to regard an appointment to the Court as a rare opportunity to influence an institution that sits in judgment on their performance and is otherwise out of the electorate's reach."

In any case, Nixon needs his Southern ultrareactionary confederates to support his obvious schemes for hastening the Republic on the march toward the fascist dictatorship clearly indicated by his previous acts and his "contructionist" philosophy. In this determination he is vigorously supported by (among others) the man, he appointed as United States Attorney General, John, N. Mitchell, whose recent acts foreshadow him as. chief of the police in a potential police State. (Incidentally, Mr. Mitchell's wife, a hidebound Southern reactionary, in a telephone message to the editor of the Arkansas *Gazette* furiously assailed Senator Fulbright—who voted against Carswell's nomination—in these terms: "It [the Carswell rejection] makes me so damn mad I can't stand it. . . . I want you to crucify Fulbright and that's it." (New York *Times*, April 10.)

"We shall find no fiend in hell can match the fury of a disappointed woman."—(Colley Cibber, English Poet-laureate, 1671–1757).

III

There is no mistaking the trend toward absolutism in the United States. It was here before Richard Nixon ripened as the full-blown personification of the trend.

His election as President was in the nature of a fluke and was in the main made possible by the financial support he received from the Wall Street sector of the plutocracy and other reactionary elements, including Southern capitalist interests and politicians in general. His so-called "Southern strategy," of which the Haynsworth-Carswell nominations are typical, is in part a payment of the debt he owed this stronghold of reaction whose continued support, as said, he desperately needs. But the Supreme Court hassle was but a skirmish in his purpose to condition his "silent majority" to the real object of his long-range campaign. The reputation of the Supreme Court, good or evil, actually means little to him in and by itself, except as a means to further his plans.

However, the Founding Fathers of the Republic were very much concerned about the character and personnel of the Supreme Court. The question was fully discussed by some of them in *The Federalist*. In essence the discussion amounted to an epistolary debate between Madison, the fourth President, John Jay, the first Chief Justice of the United States, and Alexander Hamilton, the first Secretary of the U.S. Treasury. Hamilton was by far the chief contributor (quantitatively) to the discussion in *The Federalist*. A man of outstanding ability, he embodied and foreshadowed the plutocratic spirit of today. Though the comparison is odious, he would in some respects have been a man after Richard Nixon's own heart. In *The Federalist* he observed:

"Those who have themselves reflected upon the subject, or who have attended to the observations made in other parts of these papers in relation to the appointment of the President, will, I presume, agree to

the position that there would always be great probability of having the place supplied by a man of abilities at least respectable [vide Haynsworth and Carswell!] . . . In the act of nomination his [the President's] judgment alone would be exercised, and as it would be his sole duty to point out the man who, *with the approbation of the Senate*, should fill an office, his responsibility would be as complete as if he were to make final appointment. There can, in this view, be no difference between nominating and appointing. The same motive which would influence a proper discharge of his duty in one case would exist in the other, and as no man could be appointed but on his previous nomination, every man who might be appointed would be, in fact, his choice." (Our italics.)

The following seems to read as if addressed to Nixon:

"The possibility of rejection would be a strong motive to [exercise] care in proposing. The danger to his own reputation, and . . . to his political existence [would inhibit him] from betraying a spirit of favoritism or an unbecoming pursuit of popularity. . . . He would be both ashamed and afraid [not Nixon!] to bring forward for the most distinguished or lucrative stations candidates who had no other merit than that of coming from the same State to which he particularly belonged [or which he wanted to favor], or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure." Hamilton concluded on this point:

"To this reasoning it has been objected that the President, by the influence of the power of nomination, may secure the complaisance of the Senate to his views."

Hamilton dismissed the possibility by the moralistic observation that "The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude." Obviously Hamilton had not yet encountered a specimen like our modern unscrupulous and unprincipled politicians!

Hamilton's observations on the subject of presidential power of nomination and its limitations sound very much as if they were written as comments on the efforts and debacle of Nixon's move to "pack" the Supreme Court with men of his personal "philosophy"!

IV

In recent decades the Supreme Court has increasingly revealed itself as an instrument frequently invoked by capitalist corporations to protect their interests, especially in cases involving strikes and other class-struggle manifestations. Of course, other cases involving social questions in general were presented to the Court, especially in recent times, but they were and are relatively subsidiary to the issues directly projected by the class struggle.

Columnist Anthony Lewis of the New York *Times* recently asked the question: "Does anyone care about the Supreme Court?"—meaning its supposed reputation for dispensing "even-handed justice." The columnist is evidently one who does care, and presumably for good reasons. He is a believer in the capitalist system, though apparently recognizing some of its serious shortcomings. Like others among the "liberal" elements he wants the capitalist "game" to be played according to the rules,

requiring a superior and supposedly impartial authority to formulate the rules and decree their enforcement regardless of the individual capitalist's political and economic status, even to the point of some of them going to jail, as a few of them do occasionally.

The answer, then, to Mr. Lewis's question is that the capitalist class collectively do indeed "care about the Supreme Court" at this stage, and for good reasons. The Court's primary capitalist "mission" is two-fold: (1) To ensure that the rules of the "game" are observed, and (2) to serve as "watchdog of capitalism"—as guardian of collective capitalist interests which, as said, often means that, if warranted, the Court must render judgment against powerful capitalist offenders. It does not necessarily follow that the justices act consciously or in venality as "watchdogs" of collective capitalism, but rather that instinctively they reason and logically act from their premise and conviction that capitalism (despite its obvious defects) is the best of all possible social systems—a system which to its upholders embodies all the virtues and verities regularly chanted by capitalist apologists, especially politicians, venal or otherwise. The aggregate of the noble concepts—democracy, liberty, equity, justice, etc.—is the mask behind which is concealed the ugly face of the capitalist jungle beast, currently at its savage worst.

If considerable attention has been paid to the case of the hitherto obscure and petty Southern judge, it is mainly because it has served to lift the mask a bit,. and reveal the real character of the Supreme Court as essentially a political instrument of long-term collective capitalist-class interests, for the control of which each segment of that class is desperately striving. And that

mask will be needed until the day arrives when the plutocracy feels strong and secure enough to cast aside all the mummeries it is now compelled to employ; or if, in the absence of the might of Socialist Industrial Union organization, there is a bloody mass uprising (already now foreshadowed) resulting in a full-fledged state of social anarchy against which all laws, courts and judges—even the Supreme Court—would prove vain. As Daniel De Leon observed many years ago: "In view of the dread apparition [of social anarchy] society, instinctively alarmed for its safety, ever flies to the other extreme—absolutism. The move ever proceeds from the ruling class." If, or when, that day arrives, naked brutal force by the ruling class takes over.

Those who would reject as preposterous the idea of a bloodbath perpetrated on a rebellious working class might reflect on the recent remarks by that ultrareactionary—and not too intelligent—present Governor of California, ex-actor Ronald Reagan. The New York *Times* in its April 19, 1970, issue, quoted Reagan as having stated at a farmers' convention in Yosemite that "'if it takes a bloodbath' to deal with campus demonstrators 'let's get it over with.'" When questioned about his amazing remark, he dismissed it flippantly. Subsequently, before a meeting composed of a group of Chamber of Commerce executives, he embellished his previous remark by saying "that to solve some problems 'I could advocate another bloodbath.'" His meaning was obviously quite clear to his plutocratic audience, for reportedly they laughed and roundly applauded him. Had such a remark been made by a "left-leftist," he would undoubtedly have been indicted for inciting to bloody violence and probably sent to jail by a

compliant court for at least 20 years! But not the redoubtable Ronny Reagan, who apparently considers a bloodbath suitable punishment to fit the crime. His remark is one of the many straws in the wild winds that are blowing through the capitalist jungle.

The Supreme Court (as well as the inferior courts) is an arm of the political State, which is to say a weapon in the class struggle. As De Leon has pointed out, it is the "twin" of the de facto two "States" comprising the "executive committee" of the capitalist class. In the words of De Leon:

"The capitalist State—once a body in which the political and economic power held combined sway—has, like a ripe pod, split in twain. Today, the capitalist political State has to deal with a capitalist economic State. No longer the power it once was, the capitalist political State now has to 'compromise' with its capitalist economic twin—a body now powerful enough to rob and then bully it into 'settlement.'"

As the politico-judicial arm of the capitalist State, the courts in general, the Supreme Court leading, are (in the phrase of De Leon) ever and anon "bullied" into carrying out the unspoken wishes or instructions of the superior masters, the plutocracy. This is best illustrated by the issuing of injunctions against workers on strike or threatening to strike, whenever the need for such arises in behalf of powerful corporations in vital sectors of the national economy, as, for example, the railway industry. This industry has a long record of having secured from the courts injunctions to crush strikes, and this, of course, always in "the public interest," this fraudulent claim of the corporations being invariably echoed by the courts. Probably the most important, or certainly one of

the most important injunctions issued against workers on strike, was in the so-called Pullman strike in 1894—a strike, incidentally, which made Eugene V. Debs a hero in the eyes of his admirers. (Debs's conduct in that strike does seem to justify the acclaim and adulation bestowed on him then.) John Swinton, the well-known American journalist, recorded this strike (and other similar events) in his massive work entitled *Striking for Life*. . . .[4] He wrote in part:

"On the seventh day of the [Pullman] strike the Federal Military power was supreme in Chicago, and in Illinois, and in all of the states where the boycott had been applied. The situation was one of gravity not unlike that of martial law. The regular army took control of things, despite the urgent remonstrances of State authorities [particularly Governor Altgeld of Illinois, who, for his denunciation of the Court (among other courageous acts), earned the hatred of the plutocracy]. The Federal judges, Wood and Grosscup, issued in Chicago the most sweeping injunction ever issued by a Federal Court in a time of peace, one which the first named of these men described as a 'Gatling gun on paper.' It absolutely enjoined the officers of the American Railway Union from the further prosecution of the boycott and even from 'persuading' any person to take part in it. . . . It [the injunction] has been characterized as 'one of those peculiar legal instruments that punishes an individual for doing a certain thing, and is equally merciless if he refrains from doing it.'"

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[4] [John Swinton, *Striking for Life: Labor's Side of the Labor Question; The Right of the Workingman to a Fair Living*. American Manufacturing and Publishing Co., 1894.—*Editor*.]

This injunction was issued against "President Debs and all others," etc., on July 2, 1894, involving workers on 22 railroads! Its length bars it from reproduction here in full, but its terms and language are all that Swinton claimed, and earned for it the opprobrium "The Infamous Injunction."

Praising the men who led the strike, Swinton apostrophized the spirit of the strikers and their officers as follows:

"When the time comes, if it does come, for the displacement of the barbarity of capitalism, to make way for humane conditions, it will be accomplished by men whose heads are as cool as their hearts are warm."

Grover Cleveland, the then President of the United States, was the chief instrument in crushing the strike and sending Debs and others to jail for defying the injunction. As a consequence of having served his plutocratic masters so well, Cleveland earned their undying gratitude, and remains to this day a hero in their eyes, hailed as an upholder of "Law and Order," "Protector of the Flag," "Defender of Free Enterprise," "The Decalogue," etc., etc.

It is of interest to note that John Swinton reproduced an editorial from *The People*, probably written by De Leon. The first paragraph reads:

"The mountains have heaved in the great social center of Chicago and have brought forth, not, this time, a ridiculous mouse, but a new, a portentous era, for the Social Revolution in America."[5]

The closing paragraph repeats this forecast, concluding:

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[5] [Daniel De Leon, "A New Era," *The People*, July 22, 1894.—*Editor*.]

"This era will be the last. May it be short. The times are ripe. The capitalist social system can no longer buckle its distempered cause within the belt of reason."

V

This was written 76 years ago, but it reads as if it had been written yesterday. For despite the vast external changes, despite the world-wide upheavals, the collapse of political and economic empires, capitalism remains basically unchanged, as witness particularly the strikes that are exploding almost daily, some of them with international impact. The workers are rebelling—not only against their capitalist employers, but also against the State and (not the least important) against their so-called leaders, capitalism's labor lieutenants, to use Marx Hanna's descriptive phrase. They include teachers, postal workers, truckers, air-traffic controllers, and the railroad workers—"white collar" and "blue collar" alike. Even the workers in the newspaper field are threatening to strike against mass-circulation newspapers, including such giants as the New York *Times*, the very propaganda agencies of capitalist interests, ceaselessly lying or distorting the facts concerning the reasons for strikes. Recently the *Times* published an editorial under the caption "Why Workers Rebel." "From truck drivers to answering services," the editorial begins, "rebellious unionists are striking at the foundation of collective bargaining by upsetting agreements negotiated in good faith by their union leaders. . . . One such example was supplied in Washington this week when United States District judge George L. Hart, Jr. found the Professional Air Traffic Controllers Organization guilty of contempt

for its 'sick-out' . . . ," that is, strike!

The railroad workers are the latest to face the threat of jail and/or heavy fines if they strike, which, if eff ected, will promptly be denounced as illegal, a viola tion of the sacred contract, as a threat to the "national economy," and all the rest on capitalism's calendar of "labor crimes." Recently, at the behest of the President, Congress passed a bill providing for the imposing of a contract for settlement on terms not acceptable to the workers. It seems likely that the "impositions" will be rejected and that the workers will strike on a national scale in defiance of court injunctions and all threats. Such a strike on a national scale could prove catastrophic to the economy and create a situation of un paralleled social anarchy, with all the consequences readily envisioned.

But an "Imposed Rail Contract," as one newspaper headline has it—what sort of a "contract" is that? Has such a thing ever been seen on land or sea? Webster's International Dictionary defines a contract as follows: "An *agreement* between two or more persons to do or forbear something, especially such an *agreement* that is legally enforceable; a bargain; a compact; a covenant." (Our italics.)

The words "*impose*" and "*contract*" are a contradiction in terms, obviously mutually exclusive. It seems clear that an attempt is being made to "impose" a new definition of "contract," heretofore a well-defined word. (But what's in a name—"A rose, etc.") Yet let there be no mistake about it. The attempt obviously is to circumvent the Constitution of the United States, Article XIII, which in unmistakable terms declares: "Neither slavery nor involuntary [imposed] servitude, except as a punishment

for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction."

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[Subsequently the idea of an "imposed contract" was abandoned-at least temporarily. A month after the President had urged this "imposition," "Congress reaffirmed its traditional distaste for arbitration and voted instead a 37-day moratorium for further bar gaining." (N.Y. *Times*, 4/7/70) However, following the expiration of the 37-day "cooling off period," with no settlement in sight, the Senate reluctantly did pass the "emergency" legislation of an imposed "contract" by a vote of 88 to 3, and subsequently passed in the House by a voice vote.

According to the *Times*, "critics said that the forced contract [!] was of 'doubtful constitutionality' and warned that it could touch off wildcat strikes."

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The following front page headline appeared in the New York *Times* of July 8, 1970:

> "Firemen Strike 3 Big Rail Lines;
> Nixon Calls Halt.
> He Issued Orders as Walkout on Major
> Roads Disrupts Traffic in 16 States . . .
> Judge Also Forbids a Tie-up." (Our emphasis.)

Commenting at some length on the presidential ukase, the *Times* article reveals that "The industry has moved swiftly in its appeal for intervention by the President and the Courts. But it had also served notice that if neither of those steps served to block the strike,

the nation's railroads would shut down and lock out their employees rather than let three railroads [Baltimore & Ohio, Louisville-Nashville and Southern Pacific] suffer individually."

Finally, from the *Times* report:

> "Both the [pro-capitalist] union and the industry indicated that they would cooperate [!] with the order."

Just so! A perfect demonstration of ruling class solidarity—an "overgrown executive" and the politico-judicial arm of capitalism, in harmonious cooperation with the plutocracy and its compliant labor-lieutenants, beating down exploited workers "striking for life," in the phrase of John Swinton!]

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The right of workers to strike has been considered unchallengeable in the United, States prior to the rise of the vast economic power of the plutocracy. Abraham Lincoln spoke uncompromisingly, and in simple terms, when he said in a speech delivered in New Haven, Conn., on March 6, 1860:

"Another specimen of this bushwhacking—that 'shoe strike.' Now, be it understood that I do not pretend to know all about the matter. I am merely going to speculate a little about some of its phases, and at the outset I am glad to see that a system of labor prevails in New England under which laborers can strike when they want to, where they are not obliged to work under *all circumstances*, and are not tied down and obliged to labor whether you pay them or not. *I like the system which lets a man quit when he wants to, and wish it might prevail everywhere*." (Our italics.)

On the preceding day he had spoken in Hartford, and his speech was reported in part as follows:

"Mr. Lincoln then took up the Massachusetts shoemakers' strike, treating it in a humorous and philosophical manner, and exposing to ridicule the foolish pretence of Senator Douglas—that the strike arose from 'this unfortunate sectional warfare.' Mr. Lincoln thanked God that we have a system of labor where there can be a strike. Whatever the pressure, there is a point where the workman may stop." (Our italics.)—Abraham Lincoln, *Complete Works*, Volume One.

It is a far cry from the noble Lincoln to the current petty politicians who would impose involuntary servitude on workers who strike in defiance of court injunctions that violate Articles XIII and XIV of the Constitution.

Most strikes are for higher wages to keep pace with the soaring cost of living. In arguing against granting increased wages the spokesmen for capitalism (notably the press) contend that it is higher wages that cause increases in commodity prices, a contention they have reduced to what they call the "wage-price spiral." The contention is false, and patent nonsense. It was John Stuart Mill who long ago exposed the nonsense concisely when he wrote:

"General low wages do not cause low prices, nor high wages high prices. . . . There is no mode in which capitalists can compensate themselves for a high cost of labor [power], through any action on value or prices. *It cannot be prevented from taking its effect in low profits*. If the laborer really gets more, that is, gets the produce of more labor [i.e., higher wages], a smaller percentage

must remain for profit."[6] (Italics ours.)

That's the nub of it all!

In short, it is soaring prices that naturally cause the workers to demand higher wages, and not the other way around.

In a recent featured *Times* article, April 2, there appeared this amazing item:

"Last winter both President Nixon and Labor Secretary George P. Schultz suggested that labor should moderate its wage requests or it might price itself out of the market place."

Comments are hardly required on this gem of capitalist thinking, except to note that nothing is said about moderation being exercised by the capitalist exploiters in their ceaseless gluttonous quest for ever mounting profits!

The attempt of Nixon and capitalist spokesmen. in general to urge the workers to exercise moderation in their justifiable demands for higher wages comes. with poor grace from those who enjoy fabulous incomes far in excess of their "natural" requirements. Take Nixon's case, for example. This politician receives as compensation for services rendered capitalism the nominal sum of $200,000 per annum, plus "emoluments." The nominal "wage" is mere peanuts compared to the over-all total he receives in various forms. *The World Almanac* lists the following:

" . . . an expense allowance . . . of $50,000 to assist in defraying expenses resulting from his official duties [spent at his personal discretion]. Also there may be

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6 [John Stuart Mill, *Principles of Political Economy*, Book III, Chapter XXV.—*Editor*.]

expended not exceeding $40,000, nontaxable, a year for travel expenses and official entertainment. Congress in 1958 provided lifetime pensions of $25,000 a year, free mailing privileges, free office space, and up to $65,000 a year for office help for ex-Presidents and $10,000 a year for their widows."

But that is not yet all. The President also enjoys the luxury of three retreats from Washington-one at Camp David, Md., another a castle at Biscayne, Florida, and the third a mansion in California, the staggering maintenance cost of which is paid by the government.

According to the *Wall Street Journal*, April 10, 1970, the "costs of the Presidency are put at 70 million dollars," an amount that staggers the imagination! Yet, even that is but a small fraction of the fantastic over-all total cost of operating such a socially useless and utterly outdated monstrosity as the political State!

Nixon's extravaganza, personal and governmental, apparently stirred up great dismay and considerable criticism, as suggested by the angry letters received at the White House. As the *Wall Street Journal* reported some weeks ago:

"Behind the fear of a public outcry if the actual cost of the Presidency [repeat: *Seventy million dollars!*] should come to light is a strong suspicion among some White House men that many Americans resent the idea of a high-living President. Mr. Ziegler's [President's press secretary] disclosure, for example, that it cost $250,000 to set up a suite of offices next to Mr. Nixon's California home resulted in a flurry of angry letters."

Well, "Nixon is the one."

The supposed evaluation of Nixon's services to capitalism in dollars and cents contrasts sharply with

Abraham Lincoln's idea of what such "services" are worth. In a speech on "Internal Improvements," delivered June 20, 1848, he said:

"An honest laborer digs coal at about seventy cents a day, while the President digs abstractions at about seventy dollars a day. The coal is clearly worth more than the abstractions, and yet what a monstrous inequality in the prices."

"Monstrous" is the word!

And these parasites on the body politic have the unmitigated effrontery to demand of the only useful class in society that it exercise moderation!

VI

Returning now to the main subject of these reflections—the Supreme Court: In their rage over the rejection of Carswell as Justice of the Court (who since has resigned his Federal judgeship to run for the Senate), the supporters of this self-acknowledged racist (his subsequent "repudiation" notwithstanding) have commenced a vengeful witch-hunt campaign reminiscent of the sainted Joe McCarthy. Their immediate object in this campaign is Supreme Court Justice William O. Douglas, whose outspokenness in his unorthodox criticism of the "Establishment," and his exposure of the countless defects in capitalist society, has outraged the ultrareactionaries. Their purpose is nothing less than to seek his indictment and removal from the Supreme Court, on the ground (among other "crimes") of his alleged advocacy in his recently published book, "Points of Rebellion," of violent revolution! Leading in this campaign is the Republican House leader, Gerald Ford

of Michigan. According to newspaper reports, Douglas is supposed to have directed his alleged threat of "revolution" against an all-powerful "American Establishment which is indifferent to the problems of the poor." The charge of advocating "violent revolution" is as stupid as it is ridiculous. How ridiculous it is was emphasized in an April 29, 1970, *Times* editorial. Referring to the "guerrilla theater of the absurd" on the part of the "extreme right" and the "extreme left," the paper observed: "A Justice of the United States Supreme Court wrote in a recent opinion:

"'Radicals of the left historically have used those tactics to incite the extreme right with the calculated design of fostering a regime of repression from which the radicals of the left hope to emerge as the ultimate victor. The left in that role is the provocateur. . . . The social compact has room for tolerance, patience and restraint, but not for sabotage and violence.' The author of these words is William O. Douglas."

Mr. Douglas is a man who no doubt sincerely desires to reform capitalist society to make it more tolerable for the American people. But revolution in its real sense—hardly! Mr. Douglas does use the word revolution several times in his book, as does almost everybody today who merely resents this or that particular evil of decaying capitalism, without affecting, adversely its basic principles.

Mr. Douglas best illustrates his conception of revolution in the following passage:

"George III was the symbol against which our founders made a revolution now considered bright and glorious. George III . . . and his dynasty had established and nurtured us. . . . *But a vast restructuring of laws*

and institutions was not forthcoming and there was a revolution."

In short, though the Founders did not realize it, they were laying the foundation for the present capitalist society.

Justice Douglas continued:

"We must realize that today's Establishment is the new George III. Whether it will continue to adhere to his tactics, we do not know. If it does, the redress, honored in tradition, is also revolution."

In other words, what Douglas seems to hope for, though not explicitly advocating it, is the kind of civic society which emerged after the American Revolution and which prevailed relatively tolerably until some time before the outbreak of the Civil War. Only an economic illiterate could impute to the Justice a concept of revolution such as the Socialist Labor Party conceives it, a social revolution based on the principles of Karl Marx and Daniel De Leon.

In the last two paragraphs of his book he makes his position still clearer:

"This means we must subject the machine—technology—to control and cease despoiling the earth and filling people with goodies merely to make money. . . . The search of the youth today is for ways and means to make the machine—and the vast bureaucracy of -the corporation State and of government that runs that machine—the servant of man."

The idea that "the vast bureaucracy" and "the corporation State" could be made the "servant of man" is strictly utopian, having nothing whatever to do 'with a fundamental change in social relations.

The quartet, Nixon, Agnew, Mitchell and Ford, and

their plutocratic patrons, need have no fear for the safety of their precious capitalist system so long as its critics content themselves with mere tinkering with effects and externals—though undoubtedly they are greatly annoyed by the futile reformers who speak out bluntly against their excesses. It is, however, refreshing and sometimes useful to have men such as justice Douglas speak out against the incurable evils of capitalism, in whose fundamental principles they otherwise profoundly believe.

Justice Douglas was correct when in his book he stated that advocacy of revolution in America "is honored in tradition." Indeed it is! And it was none other than the chief founder of the Republican party (which the Fords, past and present, have denigrated to its present ultrareactionary status) who sanctioned revolution in America if and when necessary. It was President Lincoln who spoke these meaningful words in his First Inaugural Address (1860):

"This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, *they can exercise their constitutional right of amending it, or their REVOLUTIONARY RIGHT to dismember or overthrow it*." (Our emphasis.)

This important and uncompromising declaration was not uttered by a rabble rouser but spoken in a solemn message to the American people by a thoughtful and calm man occupying the highest office in the land, and discharging his sworn duty to respect and defend the Constitution, itself a legitimate fruit of REVOLUTION.

If impeachment proceedings are to be launched against anyone, the finger would point straight at the

President of the United States for his violation of the country's Constitution. He is continuing a war in Southeast Asia, 10,000 miles from the American mainland, a war initiated by his predecessors, notably former President Lyndon B. Johnson. He is conducting this war without the express approval of the United States Congress, which *alone* has the power and authority to declare wars. This authority, conferred *solely* on Congress, reads briefly as follows:

["The Congress shall have power"] "*To declare war*, grant letters of marque and reprisal, and make rules concerning capture on land and water." (Article 1, Section 8, U.S. Constitution, our italics.)

The specific reference to the war declaration power is brief—three words—as if to emphasize it as a supreme edict, not to be disregarded under any circumstances. And it is well that it is emphasized, considering the fateful potential consequences to countless millions of human beings. Such usurpation of power by a President is, or should be, regarded as a criminal act of the first order—not only as a violation of the Constitution per se, which a President must swear to uphold, but as a capital crime against humanity—genocide. But despite all this, the President persists in the pursuit of this criminal war even to the point of escalating it (as did his immediate predecessor), with prospects of extending it into neighboring states.

Even if Justice Douglas had been guilty of advocating violent revolution (as the stupid witch-hunters claim), it would be as nothing compared with their conducting of the criminal, illegal war in Southeast Asia.

VII

The Supreme Court will continue to be the subject of acrimonious debate among the contenders for supremacy in capitalist America. Each ruling-class segment will strive to fashion its composition and course after its heart's desire. One of the nation's outstanding Presidents, the scholarly Woodrow Wilson, devoted much time and thought to an analysis of what he conceived to be its purposes and functions. He did so particularly in his work, *Constitutional Government in the United States*. One of his main theses was that laws and courts are of no avail unless they are administered and staffed by honest and dedicated men. As he put it: "No part of any government is any better than the men who administer it."[7] This is one of those half-truths which explains nothing, and is but a variant of the "golden rule" precept. It is not good men who make or unmake social institutions. It is the economic forces in society that do so, and in the process affect man's thinking and transform his ideas of what is ethical and moral in general, etc., etc.

That the Supreme Court is basically a political institution is tacitly, if not forthrightly, admitted by most who are familiar with the history of the Court in its gradual development from the relatively simple status as a forum which it originally was. On this point Wilson observed:

" . . . It is true that their [the Court's] power is

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[7] [Woodrow Wilson, *Constitutional Government in the United States.* Columbia University Press, New York, 1908.—*Editor*.]

political, that if they had interpreted the Constitution in its strict letter, as some proposed, and not in its spirit, . . . it would have proved a strait-jacket, a means not of liberty and development, but of mere restriction and embarrassment."

Here Wilson, the scholar, took direct issue with, and lectured, his current politician-successor who, in his vicious comment on the Senate's rejection of Carswell, wrote:

"They [Haynsworth and Carswell] have been falsely charged with being racist, but-when all the hypocrisy is stripped away, the real issue was their philosophy of *strict construction* of the Constitution—a philosophy that I share— . . . "

In short, a strait-jacket philosophy, to repeat President Wilson's phrase!

Wilson was not unaware of the fact that the Supreme Court has been the subject of political intrigue, exemplified by the Roosevelt-Nixon attempts to "pack" the Court.

"The Constitution provides, indeed," he wrote, "that all judges of the United States shall hold their offices during good behavior, but Congress [or the President] could readily overcome a hostile majority in any set of courts, even in the Supreme Court itself, by a sufficient increase in the number of judges and an adroit manipulation of jurisdictions, and could, with the assistance of the President, make them up to suit its own purposes. . . . Congress and the Executive may, in fact, if they choose, manipulate courts to their own ends without *formal* violation of any provisions of the fundamental law of the land."

Despite Wilson's earlier observation regarding the

Supreme Court's satisfying the need for a "non-political forum," the sum and substance of his analysis of the Court amounts to a recognition of the patent fact that it is, indeed, the very essence of an arm of the capitalist political State, all wishful thinking to the contrary notwithstanding. And as such it will continue to serve whenever the purposes of the ruling class require it, and as long as the political basis of society survives.

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That capitalist America has entered the period of social revolution few observing, intelligent and more or less objectively thinking persons seriously doubt, though not all fully comprehend or accept its implications at this early stage. Even the word "revolution" no longer frightens the timid, mainly, perhaps, because actually the "revolution" talked so much about at present has no genuine kinship to social revolution, that is, the pending *Marxian Socialist revolution*. Signs abound pointing to the fact that we are fast approaching the stage of inevitable alternatives—genuine democratic Socialism or feudo-industrial despotism.

Fate seems to have so contrived that the ultra reactionary Nixon Administration should have arrived at this juncture of supreme crisis. Its current manifestations are in some respects strongly reminiscent of the two great revolutions of modern times, the French and the Russian. One of the characteristics of these revolutions is the utter contempt in which the ruling classes held and hold the "subject" class. The case of Marie Antoinette symbolizes this contempt when she was told about the demand of the starving poor for

bread. She supposedly answered: "Why don't they eat cake?"

In Russia, during the last years of the Czarist regime this manifestation of contempt for the mass of the people-primarily the proletariat-has been brilliantly described by the distinguished American social scientist, Daniel De Leon. In one of the numerous editorial essays he wrote concerning the then pending Russian Revolution, in answering "the plaint" that "the working class of America is dumb and numb," he said: "Not so," and continued:

"The hitherto 'dumb' and 'numb' Czared and Cossacked Russian people is illustrating. the point. The temporary numbness and dumbness to outrage on the part of a class, designated by its economic interests as the bearer of the revolution next in order, is a necessary contribution to revolutionary conditions. Revolutionary conditions are not ripe until the respective ruling class and candidate for overthrow has acquired so ingrained a contempt for the class below that it considers the same not only unfit for aught but slavery, but also incapable of aught but submission. . . . "

Concluding, De Leon wrote:

"The perfidy of a revolutionary class, in inspiring contempt for itself, and thereby confirming its despots in their habits of despotism, is an unconscious act that, proceeding from the revolutionary class, turns its oppressor himself into a midwife for the revolution. At periodically recurring epochs in the history of the human race, the singular fact assumes control. . . . "[8]

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[8] [Daniel De Leon, "The Perfidy of Revolutionary Classes." *Daily People*, February 14, 1905.—*Editor*.]

The utter brazenness with which Nixon has shown his contempt for those who have opposed his reactionary schemes tends to confirm De Leon's analysis, though the present circumstances, of course, do not in detail fully parallel the periods immediately preceding the French and Russian Revolutions. But the contempt is unmistakably there. Outstanding examples are his campaign promises, most of them blandly ignored now and not the least so his promise of ending the Vietnam war which he has now expanded; another example was his letter to the opposing Senators, insultingly reprimanding them for rejecting Carswell—a brazen letter, replete with distortions, misstatements and disproved claims, etc. Yet another is his reckless spending of public funds used for his personal comfort and conveniences (the latest of which is the added expenditure relating to his "western White House" in San Clemente, Calif., reportedly ordered by the justice Department, that is, his close associate, John Mitchell, U.S. Attorney General, the reason for this added huge expenditure of $100,000 being "crowd control"!).

Many more examples could be cited, but each observing reader of the daily newspapers can supply his own examples.

In Nixon's display of contempt for the mass of the people he is ably supported by his voluble lieutenant, Vice President Agnew, whose crude and contemptuous language has become a byword everywhere. A recent *Times* editorial underscored the fact when it said: "Terrifyingly new, however, is the Administration's open exploitation of fear and discord. Verbal excesses and insinuations, apparently condoned by the President himself, have rendered suspect the government's

reaction to dissent and even to high-level disagreement on the part of the loyal [!] opposition. Vice President Agnew not only rails against 'the whole damn zoo' of 'deserters, malcontents, radicals, incendiaries, the civil and uncivil disobedients,' but also hints darkly that Senator Muskie, in challenging the Administration's arms policies, is playing Russian roulette with U.S. security."

The *Times* added this significant comment to its observations on the contempt for the majority manifested by Nixon and Company, and which clearly reflects that "ingrained contempt of the ruling class" De Leon spoke of:

"Other administrations have been vexed by the intemperate language of their detractors, but there is a disturbing appeal to the nation's lowest instincts in the present administration's descent to gutter fighting."

"Gutter fighting" by the "gut fighters"

*

Periodically in the history of the race, at moments of painful travail and tumultuous struggles for new light and hoped-for life-renewal, men take stock of what is wrong and what to do to right it. Mankind faces such a moment now, and on us, on the SLP champions of the oppressed and exploited working class, is laid the task of aiding in the fundamental revolutionary transformation of society and social relations that shall ensure for humanity, now and forever, the blessings made possible by the genius of the age in a society of freedom in abundance, and happiness in universal fraternity. The present may be dark, but the prospects are bright, all appearances to the contrary. Well may we say in this

fateful hour, paraphrasing Hamlet:

> "The time is out of joint:
> O blessed sight
> That ever we were born to set it right."

Postscript

Since the foregoing was written, the analyses and facts presented have been amply confirmed by the latest shocking and world-shaking events. The brutal murder of four young students on the Kent (Ohio) State University campus has set in motion strong currents running against the President, his supporters and allies. The unconstitutional invasion of Cambodia illustrates once again the rawboned totalitarian tendency of Richard Nixon.

It will tax all the President's cunning, cheap rhetoric and double-talk to cope with the effects of the fate-freighted events of the past few weeks. Being utterly contemptuous of domestic and world opinion, he will probably manage to brazen it out.

James Reston, in a recent New York *Times* column, had some pertinent comments on Nixon's arrogance and egomania. With reference to his Cambodia adventure, he quoted him as having said at his recent press conference:

"I knew the stakes that were involved. I knew the division that would be caused in this country. I also knew the problems internationally. I knew the military risks. . . . I made this decision. I take the responsibility for it. I believe it was the right decision. I believe it will work out. If it doesn't then I'm to blame. . . . "

"I, I, I," *ad infinitum, ad nauseam*!

Reston's comment on this outburst of an inflated ego was: "But what about everybody else concerned? In a world of atomic weapons . . . , this is a startling assertion of personal authority: Never mind the

Congress, never mind the division of the country. 'I knew the stakes I know the division I know the risks I believe it will work out. If it doesn't . . . ' Let us pray!"

("Upon what meat doth this our Caesar feed,
That he is grown so great?")

That Nixon will persist in pursuing his present course may be taken for granted. Whether he fully realizes it or not, that course leads straight toward what Thomas Jefferson once called an "elective despotism." ("An elective despotism is not the government we fought for. . . . ") He is not, of course, the primary architect of the fashioning of this potential despot ism. He is but promoting this tendency, born of social and economic forces beyond his control. The Nixons are in reality nothing but the flotsam drifting in the stormy social sea. Yet their temporary effect on the developments cannot be wholly disregarded. (Vide Hitler.) In his incredible arrogance, he may believe that he controls events. If he survives long enough in the Presidency, he may discover that events control him. Above all he is a politician, who eats, drinks and breathes politics. And politicians, as Lincoln once pointed out, are "a set of men who have interests aside from the interests of the people, and, who, to say the most of them, are . . . at least one long step removed from honest men."

The revolutionary fathers were much concerned about the possibility of the emergence of a dictatorship in America. They were scholars who had closely studied ancient regimes where one despot followed another in succession. Their own experience with the British crown had taught them bitter lessons. The specter of the "man on horseback" was ever before them. Thus Madison at

the Constitutional Convention said:

"A standing military force, with *an overgrown Executive*, will not long be safe companions to liberty. The means of defense against foreign danger have been always the instruments of tyranny at home. Among the Romans it was a standing maxim to excite war whenever a revolt was apprehended." (our italics.)

"An overgrown Executive" describes Richard Nixon to perfection!

With the unconstitutional Vietnam war in mind, its illegality compounded by the outrageous invasion of Cambodia, Madison's further comments on wars, militarism and an "overgrown Executive," are of special interest. In his collected works, Volume IV, he made these observations:

"Of all the enemies to public liberty war is, perhaps, the most to be dreaded. . . . War is the parent of armies. . . . In war, too, the discretionary power of the Executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied, and all the means of seducing the minds are added to those of subduing the force of the people. . . . No *nation could preserve its freedom in the midst of continual warfare.*" (Our italics.)[9]

These comments by the fourth President of the United States are peculiarly applicable to our present "overgrown Executive" and his contempt for the mass of the people.

Accordingly, the specter of an American despotism is

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9 [*Letters and Other Writings of James Madison, Fourth President of the United States*, Vol. IV (New York: R. Worthington, 1884), pp. 491–492.—*Editor*.]

not new. One hundred and thirty years ago there was published a book under the title *Despotism in America*, by Richard Hildreth, American historian and diplomat.[10] It is quite possible that Lincoln had read this book and had been impressed by it. More than a century ago he warned against what he visioned as a threatening despotism in America. In his annual message to Congress, Dec. 3, 1861, he said, almost prophetically:

"In my present position I could scarcely be justified were I to omit raising a warning voice against the approach of returning despotism. . . . Let them [the workers] beware of surrendering a political power which they already possess, and which, if surrendered, will surely be used to close the door of advancement against such as they, and fix new disabilities and burdens on them, till all of liberty shall be lost."

May the workers of America heed this solemn warning by one of the Reviled Great, by hearkening to the emancipation message formulated by that other Reviled Great, Daniel De Leon, and as yet proclaimed only by the Socialist Labor Party of America.

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10 [Richard Hildreth, *Despotism in America; Or an Inquiry into the Nature and Results of the Slave-Holding System in the United States* (Boston: Whipple and Damrel, 1840)—*Editor*.]

The Supreme Court

> The American Revolution, the name that our bourgeois revolution goes by, was the most liberal until then experienced. Dry-as-dust dogmatists, whose Socialism goes by rote, deprive the gorgeous Morgan-Marxian theory regarding the Materialist Conception of History of much of its splendor, incisiveness and many-sided luminousness by denying the Revolutionary Fathers of America all sincerity in their fervid proclamations of freedom. Not only is the Materialist Conception of History nowise done violence to-on the contrary, it receives marked demonstration from the sincere, however fatuous, belief of the Revolutionary Fathers that they had established freedom on permanent foundations. . . .
>
> Of course the belief was fatuous. The economic social laws that underlie the private ownership of the necessaries for production—land and tools—and which started into activity since that great primal revolution which overthrew the [ancient] communal system, could not choose but be latent in the young bourgeois American Republic. Nor were these laws slow to assert themselves, and, in so asserting themselves, to shake and then shatter the card-house of the Revolution's illusions concerning freedom.—*Daniel De Leon.*

I.

Once again in the history of this country the question of the functions, powers and limitations of the Supreme Court leaps to the fore as a dominant subject for political debate. During the last campaign the Republican party politicians tried to make of it an outstanding issue, but that agile and nimble-minded politician, Franklin D.

Roosevelt, adroitly sidestepped the issue. Now that the election is long past, and Mr. Roosevelt safely seated in the Presidential chair for four more years, he has himself revived the issue, but in keeping with the practice of politicians he has chosen to do so by indirection. In fact, Mr. Roosevelt's suggestion to increase the number of Supreme Court justices changes precisely nothing, except for the present moment. The plan proposed by Mr. Roosevelt leaves unanswered the clamor that was set up by the reform camp for changes in the Constitution respecting the *proper* functioning and limitations of the Supreme Court. The proposed changes by Mr. Roosevelt will probably aid him in his attempts to harass the plutocracy, but the reform itself may readily produce a set of plagues that will cause *the President's present problems to appear as the simplest and most pleasant of diversions compared to the problems that can and probably will result with the enlargement of the court. For, as has been well observed, the judges appointed by Presidents have not always heeded the voice of him who placed them on the bench. One of the supreme ironies, as a case in point, is the appointment of Roger B. Taney to the post of Chief justice of the Supreme Court by President Andrew Jackson. Jackson had violently denounced the court (under Chief Justice Marshall) on the score of usurping power. The Chief justice he appointed (Taney) was the gentleman who rendered the opinion in the famous Dred Scott case—a decision which more than any other single act precipitated the Civil War.

The argument of those who oppose "tampering" with the court is, in effect, that the Supreme Court is the last bulwark of "our" liberties, the final protection against

"an overgrown Executive," and against a "wild" Congress, etc. The present nine venerable gentlemen (not elected nor responsive to the people's will), who meet every now and then in solemn conclave, are supposed to protect "the people" against-the people's elected representatives! The ancient Senator from Idaho, Wm. E. Borah, recently emitted a veritable Cassandra wail because of the danger which, he says, threatens the Supreme Court by reason of proposed or suggested amendments to curb the court. Mr. Borah's wail is strongly reminiscent of the plaintive cry uttered on the identical subject by Daniel Webster one hundred and seven years ago in the United States Senate. Which is one more reason for Mr. Borah's seeming so very ancient.

In reality, those who protest against efforts made to restrict the powers of the Supreme Court have very little, if any, interest in the rights and liberties of the "oppressed poor," i.e., the exploited workers. They look to the Supreme Court for protection of their private property against what they consider confiscatory legislation, whether it be in the matter of taxation or so-called labor laws, etc. And seldom, if ever, has the court failed them. The law is primarily designed to protect private property, the overwhelming amount of litigation being over matters growing out of property rights. "Laws," said Rousseau, "are always useful to those who possess, and vexatious to those' who have nothing." That fairly sums it up. We are living in a society based on private property rights, with from 80 per cent to 90 per cent of the people without property, and, in the phrase of Madison, "without the means or hope of acquiring it." The wealth of the nation is in the hands of a numerically

small class, but powerful beyond the dreams of the Caesars. Through their ownership of the socially operated means of wealth production they *compel,* under pain of starvation, the mass of the people (the wage workers) to slave for a mere subsistence wage, in factories, mills, etc., where *absolute autocracy prevails.* We have, then, this anomaly: a supposed political democracy but conditioned entirely upon, and finally rendered ineffective by, an industrial autocracy! It is obvious that those who possess wealth are loath to leave the fate of their possessions to what they sometimes call "the caprices of the popular fancy." "Democracy" is all right, but—beware of "pure democracy," which is the polite term for what, in a more candid, or less guarded, mood, they also call mob rule!

This contradiction, engendered of a class-divided society, wherein, nevertheless, theoretic equality and political freedom prevail, is the explanation for most of the concern of the ruling class over "tampering" with Constitutions, the Supreme Court, etc. Ever distrustful of the propertiless, i.e., the mass of the people, the entrenched plutocracy erects as many barriers as possible between their possessions and the "popular will." Among these barriers, or bulwarks, are the bicameral legislatures, with the upper house (in this country the Senate) usually so constituted that it is not readily, or at one time, in its entirety directly affected by the popular will. And another such bulwark, and one of the most important ones in this country, is the Supreme Court. Despite the halo of sanctity with which propertied interests have sought to adorn it, the Supreme Court is essentially a political body, as in the nature of things it must be. The pretense of being otherwise, however, is

fairly successfully maintained during periods of comparative social tranquillity. In times of storm and stress, of social upheaval, the real character of the Supreme Court is fully revealed. We then find it, almost instinctively, responding to the cry for help which issues from the camp of the reactionary property-holding class, even when merely threatened with such minor encroachments as are exemplified in the mild reform program of the Roosevelt Administration—encroachments, that is, to the short-sighted ones. For those with a long-range capitalist view ought to consider the Rooseveltian reform measures as necessary aids to their continued existence, rather than encroachments. That the Supreme Court is expected to do what normally is expected of a crass—and blindly conservative—President and Congress is unwittingly admitted by the editors of the plutocratic magazine *Fortune,* in the current (February) issue. Speaking of the absence of an effective opposition to Mr. Roosevelt, the magazine observes that "the courts [have become] the only effective forum of the [plutocratic] opposition," and that the Republican party opposition in Congress will be wholly ineffective "if the interests formerly [?] associated with the Republican party have decided that their *only forum* is the courts. . . . "

That outstanding capitalist apologist, Walter Lippmann, discussing the same point, laments: "And so, because the legislative branch has ceased to be a deliberative body, and has lost the balance [!] normally provided by an effective opposition, the judicial branch is being burdened with a responsibility it ought never to have to bear." What—never? That *is, hardly* ever!

II.

And so, because Mr. Roosevelt intends to use the Supreme Court for his reform purposes, exactly as in the past it has been used for the purposes of the plutocracy, a terrific howl is set up by the plutocratic press, and the eminent "statesmen" who at heart envy the President for his political skill and adroit maneuverings. "Striking at the roots," moans the New York *Herald Tribune!* "Packing the court," shrieks the dull, and almost indecently reactionary New York *Sun!* And down through the corridors of time come the faintly resounding echoes: "Striking at the roots-Packing the court!" The fact is that the power of nullifying legislation assumed by the Supreme Court constitutes sheer usurpation, and the foremost men of the Republic, since the days of Jefferson, have successively denounced the court for its usurpatory arrogation of power in language that makes Roosevelt's lecturing and verbal castigations of the court sound like the soft whisperings of a crooning "mammy," as we shall presently discover.

The possibilities of conflicts between the three branches of the government were visualized from the very beginning of the existence of the Republic. They came to the surface, again and again, at the Constitutional Convention of 1787. The delegates to that Convention, though honorable and fine-spirited gentlemen, were for the most part men of substantial wealth, hence naturally much concerned with the protection and preservation of property. And property was spoken of as something normal to the average person, and rightly so. For there was land aplenty, and

practically no limit to opportunities for accumulating wealth. But the Fathers had before them the specter of Europe, and visualized the possibility of this country developing a similar situation, and against this they desired to provide safeguards. And in any case there were always at any time a considerable number who were without property (however transitory that status might normally be) or possessed very little of it, and the f-ear of what these might do to propertied interests haunted them. "The evils we experience flow from the excess of democracy," said Mr. Gerry, of Massachusetts. The term "pure democracy" had evidently not yet been invented! But there is nothing really strange or ignoble in such fears as were expressed, considering the social conditions at, the time. Only crack-brained anarchists and Anarcho-Communists could be guilty of saying, as one of them did in the recent campaign, that "After the *counter-revolution* engineered by Alexander Hamilton had been victorious and established itself under *the Constitution* in 1787, a period of reaction set in." Such imbecile drivel and asinine phrase-mongering merely indicate a complete lack of understanding of the Materialist Conception of History, and complete ignorance of what constitutes revolutions and counter-revolutions.

However, the delegates to the Constitutional Convention wrestled earnestly with the problem of coordinating the three branches of the government, and yet keep each independent of the other. Madison was in favor of giving the judiciary equal power with the executive in framing laws, but this was rejected. The motion rejected was reintroduced later, and in discussing it Mr. Wilson of Pennsylvania observed,

"Laws may be unjust, may be unwise, may *be dangerous, may be destructive, and yet may not be so unconstitutional as to justify the judges in refusing to give them effect."* (Italics ours.) But so fearful were the delegates of giving the judiciary any power in the making of law that for the third time it was voted down. Later Madison offered a compromise providing that "all acts before they become laws should be submitted to both the Executive and Supreme judiciary Departments, that if either of these should object, two-thirds of each house, if both should object, three-fourths of each house, should be necessary to overrule the objections and give the acts the force of law." In other words, if this motion had been adopted, and maintained and respected, the Supreme Court would never have been able to declare any legislative act invalid, since the final decision would have rested with the Congress. The motion, however, was voted down—not because the majority feared to *restrict* the "revisionary" power of the judiciary, but because they feared to give it too much power!

Throughout all the writings of the Revolutionary Fathers, and outstanding Presidents and statesmen, such as Jackson, John Randolph, Lincoln, Seward, et al., recurs the same note of rejection of the idea that the Supreme Court possessed (or should possess) the power to declare invalid any act adopted by the legislature. Repeatedly the court was reminded that its functions were advisory, and that if Congress and the executive failed to heed the rulings of the Supreme Court, the matter was up to the sovereign power, *the people,* to decide. In a number of letters written to various persons, Jefferson iterates and reiterates, again and again, that for the Supreme Court to nullify laws would be to usurp

power, and to set at naught the people's will as represented in Congress. In a letter to John Adams, dated September 11, 1804, Jefferson said:

"You seemed to think that it devolved on the judges to decide on the validity of the Sedition Law. But nothing in the Constitution has given them a right to decide for the Executive, more than the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because the power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, were bound to remit the execution of it, because that power had been confided to them by the Constitution."

Nothing could be clearer. Let our modern "Jeffersonians" chew on that a bit!

Again, in a letter to a Mr. Jarvis, dated September 28, 1820, Jefferson wrote:

" . . . You seem, in pages 84 and 148, to consider the judges as the ultimate arbiters of all constitutional questions—a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is, *'boni judicis est ampliare jurisdictionem,'* and their power the more dangerous as they are in off ice for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that, to whatever hands confided, *with the corruptions of time and party, its members would become*

despots. It has more wisely made all the departments co-equal and co-sovereign within themselves." (Italics ours.)

Note that Jefferson declares unqualifiedly that for the Supreme Court to do what, for example, it has been doing during the "New Deal" Administration, is to follow "a *very dangerous* doctrine," and that the court's (usurpatory) acts would thereby become "the despotism of an oligarchy." One can almost perceive the trembling of the venerable Chief justice's whiskers! And one wonders what the *Herald Tribune,* the *Sun*, Herb Hoover or Walt Lippmann would say about that!

Still vehemently denouncing the attempts of the Supreme Court to usurp power, Jefferson, in a letter to one judge Roane, dated September 6, 1819, argued:

"In denying the right they usurp in exclusively explaining the Constitution, I go further than you do, if I understand rightly your quotation from *The Federalist,* of an opinion that 'The Judiciary is the last resort in relation to the other departments of the Government, but not in relation to the rights of the parties to the compact under which the Judiciary is derived.' If this opinion be sound, then indeed is our Constitution a complete *felo de se.* For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone the right to prescribe rules for the government of the others, and to that one, too, which is unelected by and independent of the nation . . . . The Constitution, on this hypothesis, is a mere thing of wax, in the hands of the Judiciary, which they may twist and shape into any form they please. It should be remembered, as an eternal truth in politics, that whatever power in any government is

independent, is absolute also; in theory only at first, while the spirit of the people is up, but in practice as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law. My construction of the Constitution is very different from that you quote. It is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action, and especially where it is to act ultimately and without appeal."

And to one Thomas Ritchie, on December 28, 1820, he trenchantly observed:

" . . . The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our Constitution from a co-ordination of a general and special government to a general and supreme one alone."

And stressing the insidious, "noise-less" process of encroachments, and undermining of the sovereign power of the people, Jefferson hammers away on his favorite subject, to the discomfort (?) of the modern Jeffersonians a la Liberty Leaguers (du Ponts), etc., in these two letters, addressed and dated, respectively, to C. Hammond, August 18, 1821, and judge Johnson, March 4, 1820:

"It has long, however, been my opinion, and I have never shrunk from its expression, that the germ of dissolution of our Federal Government is in the constitution of the Federal Judiciary—an irresponsible body, working like gravity by night and by day, gaining a little today and a little to-morrow, and advancing its

noiseless step, like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the Government of all be consolidated into one."

"I cannot lay down my pen without recurring to one of the subjects of my former letter, for, in truth, there is no danger I apprehend so much as the consolidation of our Government by the noiseless, and therefore unalarming, instrumentality of the Supreme Court. This is the form in which Federalism now arrays itself."

These letters, which reflected the attitude of the real Revolutionary Fathers, prove beyond the shadow of a doubt that the Supreme Court, as now constituted, is something entirely different from the tribunal erected by the "founding fathers." If anyone had had the temerity to propose such a body, with such powers over the people, in the Constitutional Convention of 1787, there would have been a roar of disapproval, and the thing would have been rejected with little or no debate. Yet, the servile scribblers of the plutocracy, their sycophants and editorial lackeys denounce attempts at bringing the court into line with its original purpose as a desecration of the founding fathers and their work!

John Marshall was the third Chief Justice, and has been credited with having turned the Supreme Court, from an advisory and revisionary body, into the actual ruling power in the United States. As one historian Put it: "All of Jefferson's political ideas and plans were upset and uprooted by Marshall's decisions, which forced into practice the very opposite of Jefferson's doctrines. . . . For the next thirty-four years [Marshall was appointed in 1801 by the then outgoing President, John Adams], Marshall was, in point of actual sovereignty, the ruler of the United States, and by force

of decisions handed down by him, has, it may be safely said, ruled the courts (which rule the United States) ever since." No wonder, then, that Jefferson hated Marshall bitterly, considering him a dangerous foe to liberty. This is reflected in this brief extract from a letter written by Jefferson on June 12, 1820:

"The practice of Judge Marshall, of traveling out of his case to prescribe what the law would be in a moot case not before the court is very irregular and very censurable."

John Randolph of Roanoke, Va., warned:

"But, Sir, if you pass the law, the judges are to put their veto upon it by declaring it unconstitutional. Here is a new power, of a dangerous and uncontrollable nature, contended for."

And Andrew Jackson, in his message to the twenty-second Congress, vetoing the bill for rechartering the Bank of the United States, said:

"If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court, must each for itself be guided by its own opinion of the Constitution. Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the supreme judges, when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress

over the judges; and, on that point, the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

Later, following the Dred Scott decision, Lincoln gravely warned the people of the United States against the danger residing in the finality of decisions of the Supreme Court:

"At the same time [said Lincoln in his First Inaugural] the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

In 1858 Lincoln's Secretary of State, Seward, then Senator from New York, thundered against the Dred Scott decision and the alleged collusion between members of the Supreme Court and agents of Southern slave owners. He said, in part:

"The Supreme Court can reverse its judgment more easily than we can reconcile the people to its *usurpation*. . . . Whether it recedes or not, we shall reorganize the court, *and thus reform its political sentiments and practices, and bring them into harmony with the Constitution [!] and the laws of nature."* (Italics ours.)

III.

Apparently Mr. Roosevelt will find ample precedent for his intention to remold the Supreme Court nearer to his heart's desire. But what he will do with the power given him (if a majority of the judges remain compliant, or in harmony with the President's views) is another question. It is certain that he can put it to the most reactionary uses and turn the executive into the despotism which the Supreme Court now, de facto, is. But even so, this may, to those who are agitated about such matters, be preferable to having the absolute and final power reside in the judiciary, since the former is, while the latter is *not,* responsive to the popular will. However, unless the Supreme Court is to serve as a bulwark of ruling class material interests, it has no really important function to perform—least of all in our day. When it was originally constituted there was, as already noted, no propertiless class (apart from the slaves) in any real sense. It cannot be too strongly emphasized that (barring exceptional cases) those who for the moment might be without property, or without substantial property, constituted a transitory group. On the whole, then, relations between, and difficulties among, the citizens (and that means substantially all the people) were those that involved settlements and adjustments between peers. And it was precisely for this that the Supreme Court was designed—advising, counselling, clearing up doubtful points of law, and *determination of law in specific property litigations, among citizens who, in all essential respects, were peers.* And that, largely, is the function of the court today,

outside the field of legislation—that is, outside the functions which it has arrogated to itself since the "founding fathers" set it adrift on the social sea.

Apart from its usurped powers, then, it is clear that the matters which require its judicial consideration are matters that do not directly concern the mass of the people-that, at most, concern only from 10 per cent to 20 per cent of the people, i.e., the exploiters. Without desiring to be flippant, but in order to put it concisely, graphically and truthfully, it might be said, then, that the Supreme Court (denied the right to invalidate legislation) would have no other function than that exercised by the umpire of thieves-that is, to decide, in all cases of serious dispute, *who* shall possess (or repossess) *how much* of what the whole gang robbed the workers originally!

However, it is extremely doubtful that President Roosevelt really wants to deprive the Supreme Court of its power to serve as a brake on "mob rule"—that is, on the attempts at securing from the plutocracy a larger share (for the benefit of "the people") of the wealth originally expropriated from the working class. It is much more likely that Roosevelt (himself a member of the propertied class) will desire to preserve all necessary prerogatives of the ruling class, but with such concessions as to him seem obviously needed in order to prevent a breaking up of the entire game of exploitation.

At any rate, the Supreme Court has from its very inception, and particularly since the advent of Chief Justice Marshall, served as an instrument of propertied interests against the propertiless, or those not so amply blessed with property. In the nature of things the Supreme Court *had* to line up with the ruling property

interests. The logic of events, in many instances in the past, left little or no choice between favoring plutocratic interests, and inducing or encouraging chaos. There was a continent to develop. Capitalism happened to be the agency of social evolution through which to encompass the conquest of the continent, harnessing and developing its resources. The momentum of private property interests (long after they have ceased to serve a useful social purpose) carries them on in the same groove, irrespective of changed conditions and relations. Hence, it may reasonably be expected that the Supreme Court will remain essentially what it has been during the greater part of the existence of the United States—a bulwark of the propertied class against the propertiless.

By the same token, however, the Supreme Court is of no value whatever to the working class, and of no interest to the workers are its acts and decisions, except in so far as they directly interfere with the unquestioned ,constitutional rights of the workers. But whatever the court may, or may not, do, in so far as its doings affect matters of direct working class concern, there is, and can be, no remedy within the capitalist system. The Supreme Court is a creature of private property. It has grown to be an instrument, essentially, of corporate, or plutocratic, property interests. As an organ it will not, and cannot, serve in the interests of the working class, either now, or in relation to the projected working class revolution. The working class must build its own governmental machinery and the germ of that resides in the Socialist Industrial Union. While we certainly mean to hold to constitutional procedure, availing ourselves to the fullest extent of our political rights, and while we intend to utilize, to the fullest extent possible, the

amendment clause in the Constitution, we have no undying illusions concerning these matters. The change which working class emancipation from capitalist wage slavery implies is a *revolutionary change*. There is no use in pretending that it is otherwise. It is a situation, not of our choosing, any more than the fact of childbirth is a matter for determination, discretion or control on the part of the midwife or physician. As workers who have no interest in perpetuating capitalism, who, indeed, have every interest and reason for desiring to put an end to capitalism, it is our duty and function to organize, or *help* organize, the means necessary to that end. We salute the institutions of capitalism in so far as they have been aids to social progress in the past, but we decline to delude ourselves, or to worship outworn institutions, however useful at one time. In the language of Mark Twain, "The country is the real thing, the substantial thing, the eternal thing; it is the thing to watch over, and care for, and be loyal to; institutions are extraneous, they are its mere clothing, and clothing can wear out, become ragged, cease to be comfortable, cease to protect the body from winter, disease, and death. To be loyal to rags, to shout for rags, to worship rags, to die for rags—that is a loyalty of unreason, it is pure animal; it belongs to monarchy, was invented by monarchy; let monarchy keep it."

The new suit needed is an *industrial* suit—the political suit having been worn out, and in any case rendered useless. What the times call for is SOCIALIST INDUSTRIAL UNIONISM. This is 20th Century Americanism, and this alone will solve our problems. And in the process of organizing that union-that is, the governmental, or administrative, agency of the

future—the Supreme Court can, obviously, perform no useful function. The Supreme Court is an issue only with those who wish to perpetuate capitalism. Our motto—the motto of the working class—*must* be: *Capitalism Must Be Destroyed!*

ALL POWER TO THE SOCIALIST INDUSTRIAL UNION.

The Supreme Court Again

> The Constitution of the United States was the first to provide for its own amendment. The Constitution of the United States thereby recognized, or, rather, legalized revolution, to use the language of a celebrated man in this country. In the language of Washington, our people hold the government in the hollow of their hand. The time has come for the oppressed in this country to make use of that Constitution's Amendment clause, and put an end to the capitalist social system. As Socialists, as men who stand upon the international principles of Socialism, as men who recognize that the Political State is rotten-ripe for over throw, we organize the Industrial Unions to seize the reins of future government, and enforce the fiat of the ballot should the reactionists, the Bourbon-Copperheads of this generation rise against it. . . .
>
> We certainly do propose to use the ballot for all that it is worth. We are children of the twentieth century, and as such we propose to deport ourselves.—*Daniel De Leon*.

I.

The debate on the Supreme Court is raging violently, and the reformers and so-called liberals are desperately trying to get the working class to believe that it is its fight. However, so far a great deal more heat than light has been applied to the question. This is understandable. If at the time the Constitution was being framed (1787) there was much confusion as to the intent and purpose of the functions and authority of the respective branches of the government, what may be expected now, one hundred and fifty years later, under

conditions which, in many fundamental respects, are the direct opposite of those prevailing then? The constitutional fathers were building a government suited to a country largely agricultural, with no fundamental or permanent class divisions (leaving out of account slavery), and with a fairly wide distribution of property, and almost unlimited possibilities for the vast majority to acquire and accumulate wealth. Today the same Constitution (with changes made in it, to be sure, but without important relevancy to the profound change and growth effected in the country's economy) is expected to fit a country now overwhelmingly industrial, with *deep* and *permanent* class divisions, with property accumulated in the hands of a comparative few, and the vast majority of the people being without property and, by the operation of inexorable economic law (inexorable, that is, under capitalism), being daily despoiled of the product of their labor, less a bare subsistence wage, and unable (save in exceptional cases) to rise out of their wage slave status-unable, therefore, to rise out of a *propertiless* and *dependent* state into a *propertied* and *independent* state. The time has arrived (in absolute contrast to 1787) when, in the language of Madison, "the majority shall be [is] without landed or other equivalent property and without the means or hope of acquiring it."

Again and again, in Madison's journal of the constitutional convention, the point is noted that such and such a motion passed (or was rejected) in confusion, or was attended by "rather confused conversation on the subject." If, we repeat, in the comparatively simple setting of 1787 confusion surrounded the questions of inter-governmental relations, what may we not expect today in a complex and fundamentally different society,

where, moreover, the subject must be discussed on the basis of legal and economic fiction? Where the fiction of equality, and the false assumptions of equal opportunities for all, must be maintained, it obviously becomes impossible to discuss realistically matters affecting these fictitious and false assumptions. Hence, the clamor, the utter confusion on the part of those who have a real interest in the question of the Supreme Court, and the present indifference of the mass of the people (i.e., the working class) toward this same question.

II.

As was to be expected, the organs of the plutocracy are loudest in their protests against what they call the attempted Presidential usurpation, "the flight from democracy," "the seizure of the court," and what have you. One hysterical female columnist on one of these plutocratic journals shrieks against "the audacity of the President," suggesting that the "American people" should let out "a yell to high heaven." This comment and suggestion fairly describe the chaos, consternation and panicky hysteria of the plutocrats and their spokesmen. That usually "well-balanced" capitalist spokesman, Walter Lippmann (who can produce such fine-spun arguments that often no one—himself included—knows the precise point he desires to establish, nor whether he is saying yes or no, or both) has given indication recently of having lost his "balance" on the exciting topic of the Supreme Court, and of trying desperately to rationalize himself through to some definite conviction on the subject. The latest in his cerebrations consist of a series

of three articles wherein he makes some startling observations, mostly at odds with the facts of history as far as they relate to the attitude of the founding fathers on the power of the Supreme Court. As usual he commences by making certain concessions to "the enemy": He admits "that the American constitutional system is in certain important respects seriously out of joint." And he reminds us that "ever since 1912 [1912 was the year in which Mr. Lippmann was beginning to find the "Socialist party," of which he was a prominent member, too bourgeois, or reformistic and compromising, with particular reference to the Schenectady administration of the Socialist party Mayor Geo. Lunn—whose secretary he was—now a Democratic party politician]—ever since 1912 (when) I first began to realize what the Supreme Court was doing to social legislation in the states. . . . " And he adds cautiously that it then "seemed" to him "that something was wrong." Well, it took him a long time (just a quarter of a century!) to find out what he *thinks is* wrong! And he is bitterly opposed to *rushing* into conclusions as to what might be done about it. But, then, what is a quarter of a century to one enjoying an annual income of some $60,000!

He finally comes to a consideration of what he calls "the so-called Madison plan," which, incidentally, he misquotes. (It was quoted correctly in the article, "The Supreme Court," *Weekly People*, February 20.) However, commenting on the "Madison plan," he shudders and says: "This would make Congress the final interpreter of the Constitution." That to him is a horrible thought. Mr. Lippmann no doubt knows his old Testament, but perhaps he has forgotten the Biblical saying: "In the

multitude of counsellors there is safety." Or perhaps he disagrees, and would amend that to read: "In a few counsellors alone is there safety." For apparently he considers it more logical to have the final "interpretation" made by a body of nine elderly or old men, not responsive to the electorate, than to a body of some four hundred men, directly responsive and amenable to the "popular will." But he suddenly becomes speculative, and wonders whether a certain consideration which he mentions may be one of the reasons "why the 'Madison plan' was not adopted by the convention and was more or less forgotten by everyone, including Madison, . . . " If Mr. Lippmann had taken the trouble to study the question, he would soon have discovered that the reason for rejecting the "Madison plan" was the direct opposite of what he guessed it was. The "Madison plan" (which included provision for joint action by the Executive and judiciary) was introduced as an intended check on the judiciary, and it was rejected because the delegates feared to give the Supreme Court too much power. Mr. Pinckney, of South Carolina, argued against the Madison motion because he "opposed the interference of the judges in the Legislative business: it will involve them in parties, and give a previous tincture to their opinions." Mr. Mercer, of Maryland, heartily approved the motion, and said, in part, that he "disapproved of the Doctrine that the judges as expositors of the Constitution should have authority to declare a law void." And Mr. Dickinson of Delaware, supporting Mr. Mercer, argued that the judiciary should not possess power to invalidate legislation. "The judiciary of Arragon," he observed, "became by degrees the lawmakers." Mr. Morris, of

Pennsylvania, went so far in his fear of the judiciary that he suggested "the expedient of an absolute negative in the Executive."

Mr. Lippmann says that Madison's "plan" was "more or less forgotten by everyone, including Madison." That is sheer nonsense. The Madison motion was twice before the convention. Having been voted down once, it was re-introduced by Mr. Wilson, of Pennsylvania, as an amendment to resolution No. 10, it that the supreme National judiciary should be associated with the Executive in the Revisionary Power." The motion was finally voted down, the prevailing opinion being that the judiciary should not be permitted to interfere with, or unduly influence, law-making. It cannot be emphasized too strongly that the "Madison plan" was a compromise measure, intended to satisfy the two extreme views represented in the convention, and that its being voted down was not, as Mr. Lippmann erroneously assumes, because objection was made to making Congress the supreme and final authority in regard to validity of laws, but *because the delegates emphatically refused* to *give such power, even partially, to the Judiciary.*

III.

Mr. Lippmann presents a most amazing argument in opposition to the idea of giving Congress power to validate laws by a two-thirds majority. He says:

"For what is there in his scheme [the "Madison plan"] which would prevent the two-thirds majority from unseating the minority. . . . Nothing whatever. Mr. Ernst may say that there is an appeal to the people at the next election. But what is there to prevent a two-

thirds majority from declaring that there will be no next election?"

This is so naive as to be almost infantile. We might ask: "What is there to prevent a majority of the Supreme Court from declaring that there will be no next election?" However, answering Mr. Lippmann, we can say that there is, of course, nothing to prevent a two-thirds majority of Congress from doing what he says they might do. But does he mean to say that if things came to that pass, it would make any difference whatever what the Supreme Court did one way or the other? Suppose it was the Supreme Court which ruled that there shall be no "next election." That would be illegal, but no more so than if Congress should so decide. But what would the Supreme Court do if its ruling were ignored, as it probably would be, unless the country was already *de facto* in the grip of a dictatorship? It could do nothing about it, lacking physical force to enforce its decrees.

Obviously, Mr. Lippmann is begging the entire question when he poses the supposititious question as to the arrogation of power, clearly unconstitutional. In the circumstances visualized by Mr. Lippmann, the question has ceased to be one merely of distribution of power among the three branches of government. It has become a question of continued political democracy, and the question would then be prompted, not by reason of this branch encroaching upon that branch, but by *reason of the collapse of the capitalist system;* by reason, particularly, of the absence of the requisite revolutionary machinery to take over powers of government of, by and for the useful producers, i.e., the working class. For if the working class fails to organize its power, and, failing in this, fails to take control of the situation, society will

INEVITABLY retrograde into absolutism, and it is immaterial whether it be called fascism, industrial feudalism, or what not, and it is of no moment whether it be done through usurpation of power by the Executive, the Legislature, or the Judiciary.

There is, in Mr. Lippmann's argument, an implication that Madison was opposed to the legislature's being given final authority with respect to validating legislative acts. The implied contention is not warranted by fact. It is true that Madison later modified his views somewhat, but whether he did so because of changed convictions, or because he expected through compromise to attain something of what he hoped for, is not quite clear. His argument on a motion made by Mr. Pinckney (upon reconsideration of a previous act of the convention) is illuminating. Mr. Pinckney moved "that the National Legislature should have authority to negative all laws which they should judge to be improper." Certainly, this motion admits of no misunderstanding: it is clearly and unmistakably designed to leave final decision with the legislature, and to prevent the judiciary from passing upon the validity of laws. The Madison *Journal* says that "Mr. *Madison seconded the motion"!* In view of that fact can there be any doubt as to the intent of the "Madison plan"? And is it not clear that Mr. Lippmann's speculations, assumptions and fine-spun arguments are completely shattered and refuted?

Madison, in support of his second to Mr. Pinckney's motion, said in part:

"He [Madison] could not but regard an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect System. . . . "

The motion, of course, was lost, but the problem remained. As a development of the question of the Judiciary invalidating acts of Congress, there was finally presented to the convention a motion to vest an absolute negative in *the Executive*. Note this carefully: The convention was absolutely opposed to giving the Supreme Court any power to invalidate legislation, but it was willing to give, and *did* give a qualified veto power to the Executive! It might be noted here, parenthetically, that originally a motion had been adopted to give the Executive power to veto legislation, requiring a three-fourths majority to override the veto. Later Mr. Williamson, of North Carolina, moved a reconsideration of that act, urging that a two-thirds majority of Congress should be required to set aside the Presidential veto. He was of the opinion that a three-fourths majority "puts too much in the power of the President." Mr. Mason, of Virginia, favored the change, and observed that "his leading view was to guard against too great an impediment to the repeal of laws." Madison also favored the change, and made the interesting suggestion that "it was probable that in doubtful cases the policy would soon take place of *limiting the duration of laws so as to require renewal instead of repeal."* The motion to require a two-thirds majority, as we know, finally prevailed.

IV.

Much has been said about implied powers in the Constitution. In part the claims for the alleged implied power of the Supreme Court to invalidate laws rest on the absence of any mention in the Constitution of a Supreme Court veto power, that is, power to invalidate

laws. The reasoning that, therefore, it is implied that the Supreme Court does, or should, possess such power, is false. Power not expressly given is power denied. Moreover it is elementary logic that if a motion to grant certain power is defeated, *that power is thereby, de facto, expressly forbidden unless or until, by subsequent contrary action (through Constitutional amendments), such power is then expressly given.* In giving the Executive qualified veto power, and denying such to the judiciary, the Constitutional fathers thereby definitely declared that the Supreme Court should not have the power to declare invalid any law passed by the legislature, and approved by the Executive. Mr. Lippmann's elaborate structure of speculation, assumption, sophistry and surreptitious injection of premises, collapses. Without doing open violence to the precise language, to the clearly expressed intent of the Constitutional fathers, and unless one completely ignores their voting down motions designed (as compromise measures) to give the judiciary some fraction of power to pass on the validity of laws, it is impossible to present a case for historical justification of the power now exercised by the Supreme Court in regard to invalidating acts of the legislature. By the same token, the powers thus assumed by the Supreme Court constitute, incontestably, sheer usurpation.

V.

As we have said before, the question of the Supreme Court is fundamentally one that concerns those who wish to preserve the capitalist system. The Supreme Court is a bulwark against "pure democracy." Fear of

what the majority may or will do is the moving spring of the action and plans of the plutocracy. The plutocracy obviously does not believe in democracy. Its power in industry, in the workshop, is despotic, and it is natural that it wishes for the same thing in the field of political government. If, because of surviving "old-fashioned notions" about majority rule, the plutocrats cannot have their way directly, they will seek to achieve their objectives by indirection. But, in any case, they distrust the mass-in fact, they hold the mass of the people in absolute contempt. Alexander Hamilton is their real national hero, and no one in the history of the United States ever expressed himself with greater contempt for the mass of the people than Hamilton. "The People, your People, sir," he is quoted as having said, "is a Great Beast." This expresses the feeling of the plutocracy which despises, but also fears, this "beast." Mr. Lippmann reflects this attitude in all he writes. He does not even hesitate to falsify recent history in order to make his point. Referring, undoubtedly, to the sham elections in Nazi Germany, he says: "We have seen majorities elected in moments of hysteria and crisis who voted away their rights." That is not true. By fraud, by intimidation, by Nazi-ignited Reichstag fires, and by other fake devices, an unprincipled and unscrupulous *minority* succeeded in getting a stranglehold on the mass of the people in Germany. Unless or until the workers in the United States can organize their forces, they will be reduced to abject slavery. *But that will happen regardless of Constitutional guarantees.* It is dishonest and foolish to argue that a thoroughgoing social crisis can be averted by merely referring the matter to the Supreme Court. Mr. Lippmann, of course, is not so

childish as to believe that. Certainly, his masters do not. It is not what is going to happen *in the future to* the people's rights, etc., that worries them. *It is what is going to happen now to their own private property, and other class privileges, that troubles them so much.*

Basically the problem of the Supreme Court cannot be solved within the capitalist system-and when capitalism has joined feudalism at "the museum of history," the Supreme Court will no longer be needed. For the modern revolutionist to attempt to regulate, improve or make it workable is as if the rising bourgeoisie would have labored to save the feudal court (e.g., the *curia regis),* or to make it serve the purposes of the rising capitalist system. Obviously, this it could not do. The legal relations which the *curia* were to regulate and settle were inextricably bound up with feudal property relations, with the obligations of vassals to the lord, etc., etc. With the disappearance of the economic basis which had given rise to these legal relationships, and which the *curia* dealt with, the *curia* was rendered superfluous, except as a last bulwark of feudal prerogatives and privileges, and finally yielded to the modern bourgeois judicial system, with its contractual relationships, private property rights in land, etc., etc. Though the cases are not entirely parallel (since Socialism precludes private property rights—barring, of course, strictly personal effects), they are close enough to serve as illustration. The problems which the Supreme Court handles are, overwhelmingly, problems growing out of property, and inextricably bound up with the basic nature of capitalism. It is as absurd, in short, to try to make the Supreme Court serve progress at this time, as it would have been to try to make the feudal *curia regis*

serve the needs of the rising bourgeoisie. The Supreme Court can serve the reaction only—with possible rare exceptions, and purely incidentally. And then solely because the proletariat would be too weak to assert itself and establish and maintain its own and, socially speaking, superior rights.

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In his third article Mr. Lippmann advances a "solution." He does so, seemingly, with bated breath, as one who has made a profound and startling discovery. His naiveté is incredible—so incredible that one suspects a sinister motive underlying the seeming simplemindedness, His "solution" is to provide for two kinds of amendments, one kind that would require the present slow and cumbersome method of requiring a three-fourths concurrence of the states, and the other kind requiring "only" ratifications by "specially elected state conventions within six months." This is, indeed, delicious! To simplify the method of amending the Constitution, the *Herald Tribune* boy-wonder wants to make it more complicated! It is evident (if we are to accept him at face value) that he does not reason things out, but proceeds, in jumps and fitful spurts, from one bright idea to the next one. In his third article such phrases as the following recur again and again: "It does not seem necessary. . . . "; "I do not believe. . . . "; "What has always stumped me"; "It struck me. . . . "; "It then occurred to me"; "This led me to the idea. . . . "; "I gradually realized that I was of two minds on the subject [!]"; "My idea then is. . . . "; think [!] I mean simply a speedier method have no pet scheme. . . . ," etc., etc.

The mountain labored and brought forth a wee

mousie! How very flat is our bourgeois world that such as Walter Lippmann are considered mountains of intellect

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Gentlemen of the Plutocracy: Let us have done with, hypocrisy. You are in desperate straits. You would fain throw the Constitution in the ash barrel and rule through an industrial junta of your own corporate creation. Very well, make your attempt to organize your autocracy, but do it without "the base alloy of hypocrisy," as Lincoln used to say. Meanwhile, we of the working class will organize our Industrial Unions as a preliminary to the founding of our Industrial Union Government. Tamper with your Supreme Court, pr leave it alone. 'Tis all one to us. But we will resist your encroachments on our right to organize to put an end to this nightmare of capitalism when enough of us are ready. And while we can do so, we will use the Constitution for all it is worth. We will particularly use the Article V, amendment clause, as far as we are able to do so, and "amend" away your legal rights to the things produced by us, of which you have despoiled us. We will repossess ourselves of the country which we have built, and which you, through the aid of usurping Supreme Court justices, and other means and agencies at your disposal, have stolen from us. In short, we will do, as soon as may be, what our Revolutionary fathers did in 1776, and what the Lincoln democracy did in 1865. We will destroy the tyranny of our day, and terminate the present wage slavery, as they destroyed the tyranny and slavery of their day. And our watchword is:

All Power to the Socialist Industrial Union!