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The Supreme Court and Abraham Lincoln

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THE SUPREME COURT AND ABRAHAM LINCOLN

At the request of the President of our Association, I am pinch hitting for him in this number on his page, and have selected the above title because President Lincoln's criticism of a decision of the Supreme Court of the United States in the famous case of Dred Scott vs. Sanford, has been frequently referred to as indicative that he did not have a high regard for judicial authority in cases where it ran counter to popular will. In support of this contention reference has been made to a speech made by Mr. Lincoln at Cincinnati, September 17, 1859. In the speech he said: "The people of these United States are the rightful masters of both Congresses and Courts"; and it has been contended that the words quoted indicate a belief on the part of Lincoln that the popular will should be held superior to the decrees and judgments of judicial tribunals. This view is not, however, supported by the evidence. No man entertained a higher regard for judicial authority than did Mr. Lincoln. It is beyond dispute that he severely criticised the judges of the Supreme Court of the United States who concurred in the majority opinion in the Dred Scott case. He believed it to be the result of the pro-slavery views of Chief Justice Taney and the associate judges who united with him in the decision. While he admitted its binding force in the particular case in which it was rendered, he insisted that it should not be regarded as a final settlement of

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the question involved, and that therefore it should not be followed as a rule of political action. But our friends who favor President Roosevelt's proposals did not quote Mr. Lincoln's full statement in his Cincinnati speech, and the part of the sentence left out changes his whole meaning. The whole sentence was as follows: "The people of these United States are the rightful masters of both Congress and Courts, NOT TO OVERTHROW THE CONSTITUTION, but overthrow the men who pervert the Constitution". And in his Springfield speech he defined his position with reference to the Supreme Court of the United States in the following language:—"Judicial decisions have two uses — first, to absolutely determine the case decided; and secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use they are called "precedents" and "authorities". We believe as much as Judge Douglas (perhaps more) in obedience to and respect for the judicial department of the Goernment. We think its decisions on constitutional questions, when fully settled, should control not only the particular cases decided but the general policy of the country, subject to be disturbed only by amendments to the Constitution as provided in that instrument itself. More than this would be revolution."

Mr. Lincoln never said anything from which it can be inferred that he favored any policy, which would curtail, even in the slightest degree the independence of the judiciary, and in another speech at Springfield he said: "I think that in respect for judicial authority my humble history would not suffer in comparison with that of Judge Douglas. He would have the citizen conform his vote to that decision; the member of Congress his; the President his use of the veto power. He would make it a rule of political action for the people and the departments of the government. I would not. By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs."

Other utterances of Mr. Lincoln's might be cited, which show that he regarded the independence of the judiciary as of supreme importance under the American system of Government.

More than seventy-five years ago, DeToqueville, in his "Democracy in America" wrote: "I am aware that a secret tendency to diminish the judicial power exists in the United States—I venture to predict that these innovations will sooner or later be attended with fatal consequences and that it will be found out at some future period, that the attack which is made upon the judicial power has affected the democratic republic itself." In recent years these attacks have become more formidable than ever in the history of the country and have generally assumed the form of a demand for the recall of judges by popular vote, but now President Roosevelt proposes to secure the same result by packing the Court. Nor has it ever been claimed by anyone that Mr. Lincoln either suggested or approved of any method of compelling submission by the Judges to the popular will. It seems to me that his record upon substantially the same subject as that now under consideration, wherein he strongly condemned the action of the

Legislature of Illinois, for enacting a law which had the effect of recalling all of the Circuit Judges of the state, adding five new judges to the Supreme Court and imposing upon the judges of the latter court the performance of the duties which had theretofore been performed by circuit judges can well be cited here. A protest signed by Mr. Lincoln (then a member of the Legislature) and others was presented to the Legislature, condemning the action of the majority of that body by whose votes was passed the act in question, and giving the reasons for this disapprobation, among which were the following:

> It violates the great principles of free government by subjecting the judiciary to the legislature.
>
> It is a fatal blow at the independence of the judges and the constitutional term of their office. . . . .
>
> It will give our courts a political and partisan character, thereby impairing public confidence in their decisions.
>
> It will impair our standing with other states and the world.
>
> It is a party measure for party purposes, from which no practical good to the people can possibly arise, but which may be the source of immeasurable evils.

In notes for a speech or debate with Judge Douglas about October 1st, 1858, in referring to the law adding the five judges to the Supreme Court of Illinois, he said: "I remind him of a piece of Illinois history about Supreme Court decisions—of a time when the Supreme Court of Illinois, consisting of four judges, because of one decision made, and one expected to be made, were overwhelmed by the adding of five new judges to their number; that he, Judge Douglas, took a leading part in that onslaught, ending in his sitting down on the bench as one of the five added judges. I suggest to him that as to his questions how far judges have to be cathecized in advance, when appointed under such circumstances, and how far a court, so constituted, is prostituted beneath the contempt of all men, no man is better posted to answer than he—."

These statements, it seems to me, should forever set at rest any ideas that Mr. Lincoln might have approved of the proposals now made by President Roosevelt.

THE CONSTITUTION—GUARANTEE OF THE BILL OF RIGHT

As promised in the last issue I now call to your attention for consideration, on the President's proposals, the Bill of Rights embodied in the Constitution, and one may wonder whether the guaranties of the Bill of Rights would continue to be "guaranties' 'or be anything more than mere admonitions or "counsels of perfection", if the Supreme Court, which was designed to be, and through the century and a half of its existence, has been their vindicator, should be made subservient to either the President or the Congress. These guaranties are as follows: