

command of the approaches to the Gulf of Mexico. If the Straits remain open, any Western naval power can attack Russia where she is most vulnerable. It goes without saying that no government of Russia, communistic, republican or monarchist will endure such a menace indefinitely. Sooner or later the Imperial Russian ambition for the control of the Straits will reassert itself. If the Allies are sincerely desirous of peace in the Near East they ought to seek a less provocative formula for the disposition of the Straits.

UNTIL we have details of the kind that never get on the cables, it will be too early to reach any large conclusions about the capture of Tsingtao and surrounding territory by Chinese bandits just as the Japanese were about to evacuate. The coincidence of foray and impending evacuation is the point of the affair, and it may not be entirely coincidence. The details may reveal that the bandits had long enjoyed immunity under Japanese protection and that they were equipped with Japanese arms. Two years ago that would have been the inescapable conclusion. Such was the regular Japanese procedure whenever about to evacuate under pressure territory Japan was illegally occupying. Then the government could say that only Japanese troops could maintain order. The apparent change in Japan's attitude, as shown in Siberia and Shantung, militates against such a conclusion now. In both places Japan seems to have lived up to her pledges in spirit as well as letter and there may be injustice in imputing sinister motives.

THE arms incident in Siberia, however, gives ground for doubt. The Japanese did clear out of Siberia, but just as they were leaving it was disclosed that a large supply of arms, held over from the inter-Allied expedition, had been slipped out of Vladivostok, some going to the White Guards and some to Chang Tso-lin in Mukden. The latter is Japan's dummy in Manchuria and has acted before as intermediary between the Japanese military and reactionary Russians in Japanese pay. If there are any of the latter left who have not had their fill of counter-revolutions under Japanese auspices they will have a storehouse from which to draw supplies. In answer to Japanese public indignation, the War Office has made a lame explanation, blaming the wrongful disposal of the arms on a minor staff officer, one Major Hara. How a single officer of low rank could make away with a huge quantity of munitions undetected was not explained, but Major Hara came forward manfully with a confession, was court-martialed, sentenced to two

years' imprisonment and sentence suspended. This is not the first time that a subordinate officer has consented to act as scapegoat in the name of patriotism, as the Japanese General Staff sees patriotism, and nobody in Japan pretends to be deceived. Coming after the Siberian incident, the Tsingtao bandit raid has all the appearances of a parallel. The Japanese may be evacuating both Shantung and Siberia with reservations. Healthy as are all the latest signs in Japan, it is too early to say more than that while the militarists sit less easily in the saddle they are far from unhorsed.

THOSE of us who have declared ourselves friends of the Irish Free State have had this friendship put to a severe test. The execution—why not call it murder?—of O'Connor, McKelvey, Mellowes and Barrett as a reprisal for the murder—or assassination—of Deputy Sean Hales shakes one's faith in the Free State government. President Cosgrove's explanation and justification of the killings is bloody and vindictive talk. Terror will be met with terror. The decision was taken "not in anger but after the coldest of cold discussion." One wonders if the decision was not affected by fear, one sees no reason why this fear should not grow, nor anything to prevent the ratio of four dead men for one dead man being increased. Does the Free State government, because it is attacked by what Mr. Mulcahy, the Minister of Defence, calls "forces more vicious and insidious than Britain had ever employed" feel justified in making reprisals crueller than any made by the British?

## Pierce Butler and the Rule of Reason

PRESIDENT HARDING is not himself a stupid man, but in appointing Mr. Pierce Butler an Associate Justice of the Supreme Court, he has perpetrated from his own conservative point of view an extraordinarily stupid mistake. He has jeopardized in the minds of a large and increasing body of his fellow countrymen the good faith of an institution which is for many reasons peculiarly dependent for its sufficient functioning upon general popular confidence. He has jeopardized it so flagrantly and yet so unnecessarily that sheer stupidity is the kindest explanation of the mistake. He simply does not and cannot understand what has happened and is threatening to happen to the traditional distribution of economic and sectional power in American life. He does not understand how essential a moderate and statesmanlike Supreme Court is to prevent the redistri-

bution of economic and social power from becoming an occasion for violence or a provocation of it. If the President, his associates and successors continue to commit such serious mistakes, they will in the end provide an excuse, on the part of the sections and classes, which are suffering from the existing distribution of economic power and are denied the legal method of changing it, for the very appeal to force which all sensible and humane people are most anxious to avoid.

The Supreme Court divides with the executive and legislative branches of the government the responsibility of actually exercising the sovereignty which is legally and morally vested in the whole American people. It does not itself initiate government, but it is supposed to prevent legislatures and administrators from forgetting the necessary and desirable limitations of their authority. It is the balance wheel of the Constitution as an operative mechanism, and as the balance of the American social and economic body is at present dependent upon the persistence of balance in the operation of the Constitution, its part in preserving the morale of American government is decisive and preponderant. The Constitution sets up a most delicate and complicated system of state and federal political instruments, and it defines and elaborates an even more complicated and overwrought system of state and popular rights. The automatic articulation of these instruments one with another is impossible. They need a special organ of mutual adjustment. It is no less impossible to prevent the governmental instruments from encroaching on the reserved rights of the states or the people without bringing in a court of ultimate decision from whose opinion there shall be no appeal. The Supreme Court is intended to be the conscience and the reason of the American body politic, but a conscience and a reason which is only called in to arbitrate or adjust ultimate conflicts among the more active, special and responsive members of the political body.

The setting up of a committee of men whose opinions upon questions involving the exercise of governmental power and the welfare of millions of people are supposed to be ultimate is the most distinctive and perhaps the most valuable feature of American government. No other sovereign power except the American people has ever voluntarily divided up its sovereignty and allowed such a large fraction of it to be exercised by a group of citizens who are responsible only to the precedents of their predecessors, to a necessarily ambiguous body of law and to the partially arbitrary dictates of their own conscience and reason. This group of men are as completely free from

direct popular control as it is possible to free them in a democracy. Yet they are allowed to declare what in practice the sovereign democracy may and may not do; and in many conceivable cases the only way in which a very considerable majority of the people in the democracy can overcome one of their vetoes would be by discharging them and refusing to obey their orders. Obviously it is of the utmost importance that the justices of the Supreme Court, in addition to being learned and enlightened lawyers, should also be reasonable, statesmanlike men — the kind of men who are, whenever possible, ready to construe the principles and truths embodied in the American Constitution in the light of the living ideals and the practical necessities of an evolving American society. They are the custodians not only of the ark of the Constitution but also of the confidence and the welfare of their fellow-countrymen. It would be a gross betrayal of trust if the Supreme Court should reward the consent which the American people have bestowed upon the institution and the faith which they have reposed in the Court itself by using a warped or doubtful interpretation of the Constitution to prevent a persistent popular majority from undertaking some promising experiment in the redistribution of economic power.

The appointment of Mr. Pierce Butler is a piece of crass stupidity, because he is the kind of man who would assuredly use a warped or doubtful interpretation of a phrase in the Constitution to prevent needed experiments in economics and government. The testimony against him in this respect is conclusive. As Regent of the University of Minnesota he behaved during and after the war in the manner of a blind and bumptious bigot. He had none of the tolerance, none of the good humor and worldly wisdom, none of the mere gentlemanly decency which would prevent him from treating learned men, whose only offence was the expression of opinions different from his own, as suspects and traitors. He did not even show that respect for orderly process and that scrupulous desire to give an accused man his day in court which is supposed to belong to the spirit of Anglo-American law. President Harding has placed a man who has not scrupled to suppress opinions by the use of violence in the one position in which violence of disposition, even when placed at the disposal of a sound judgment, can do the maximum damage; and he has placed Mr. Butler there in spite of the opposition of the fellow-townsmen who know him best and have had reason to dread his intolerant and headstrong disposition. A Supreme Court composed of justices of that description could not administer rules of

law which were also rules of reasonable political adjustment. As well ask some clerical heresy-hound to sit on a commission to adjust the Athanasian Creed to the requirements of modern science.

The New Republic protests against Mr. Pierce Butler's appointment not because we dislike and disbelieve in the preservation by the Supreme Court of its existing political functions but because we believe in them and would much prefer to see them continued. The Supreme Court has, we think, frequently abused the discretion which under our existing practice it exercises in reviewing legislation. It has repeatedly declared invalid by the narrow margin of one or two votes state or federal statutes whose unconstitutionality was at least extremely questionable. But the exercise of that power by some branch of the government is essential to the operation of a system of checks, balances and rights, such as the American fabric of government is, and we would rather see it exercised by a court than by the federal legislature. If the judicial review of legislation is abandoned, the American people will abandon an ingredient of unique value in their own polity and in their own human relationship to that polity. They will abandon an institution which is intended to submit important controversies, after they have been fought out in other regions of government, finally to the rule of reason derived from accepted formulations of political truth. The abandonment of the existing rule of reason, unreasonable as its expressions sometimes are, will render them much more exposed to the substitution for the rule of something resembling reason the rule of something resembling violence. We trust they will not have to adopt the revolutionary expedient of putting congressional in the place of judicial interpretation of the Constitution, but adopt it they will, if the Supreme Court is to be packed with Pierce Butlers. For in the hands of warped men of this kind the Court will itself deny the rule of reason. It will become a medium of obscurantism, immobility and implicit violence rather than of enlightenment, progress and constructive consent.

## The Meaning of the Message

**A** PRESIDENT'S message may mean much or little. What a strong President, working in close cooperation with the legislative branch, may have to say will be scrutinized closely by every citizen. His message offers a rough forecast of the course of legislation. Mr. Harding is not a strong President, and his relations with Congress have never been those of effective co-

operation. Only by accident will any of his recommendations even receive serious consideration. As a public document his message means nothing at all.

Nevertheless, the message is worth close study. What the President has to say in his message after a great upheaval like the last election is significant from the point of view of party politics. When the nature of the election results became known, everybody wanted to know what effect they would exert on the President and the group, in the Cabinet and outside of it, upon which he depends for suggestion and advice. Would the administration try to readjust itself to the new conditions and to assert leadership of the new forces released by the election? Or would it assume that the progressive victories represented only a momentary aberration from traditional principles, a passing storm best weathered by remaining below the deck? Is Harding going to attempt a compromise which will hold the Eastern and Western wings of the party together, or will he permit the lines of division to be more deeply drawn, with the inevitable result of a serious struggle in the Convention, of a possible bolt and the formation of a new party?

The message goes a long way toward answering these questions. All through it there runs a refrain of stand-pattism. We are prospering pretty well, as matters are. We're not through our post-war readjustments, and we still suffer from the fact that "everyone, speaking broadly, craves readjustment for everybody but himself." This is apparently a covert allusion to the fact that labor has not accepted deflation in the spirit that the President and Mr. Mellon could have commended. We should be doing much better than we are if it had not been for the railway and coal strikes, "which had no excuse for their beginning, and less justification for their delayed settlement." The only suggestion the President is able to offer is the old one of compulsory arbitration by an impartial tribunal representing the public alone, instead of a body like the Railway Labor Board giving representation to the parties at interest. Certainly Mr. Harding does not advance far toward progressive leadership with a program like that.

Neither does he make progress by his handling of the immigration problem. To him it is not an industrial problem at all, but a problem of bolshevism and illiteracy. By some process of reasoning we cannot follow, Mr. Harding convinces himself that aliens would be drawn toward literacy and Americanism if they could only be registered and kept continually under the government's