In Answer to Mr. Beck

SIR: Mr. Beck and I agree that "an issue of public importance" is involved in this discussion. The public interest alone justifies it and should determine its scope. Therefore the school of red herrings which Mr. Beck has let loose must not be allowed to divert strict attention from the "issue of public importance." I leave to the judgment of his own professional conscience the resort, by a Solicitor-General, to atmospheric innuendoes.

So experienced a lawyer as Mr. Beck will, I am sure, readily assent to the importance of defining the issues of a discussion. This correspondence, I submit, raises at least three questions of public concern:

I. The fairness and accuracy of the Solicitor-General's summary of the situation, presented by the Mooney case, in his letter in the New Republic of October 12, 1921.

II. The fairness and accuracy of the statement now made by the Solicitor-General, as to "the facts" of the situtation presented by the Mooney case, after the Solicitor-General had made "an examination of the record."

III. The propriety of President Wilson's action in charging the President's Mediation Commission, in September, 1917, with the duty of inquiring into the circumsances attending the Mooney case; the propriety of the Commission's action in obeying the President's instructions; and the fairness of the methods of the inquiry and the report by the Commission upon the situation.

Fortunately, these issues do not lie in the realm of opinion. There are incontrovertible *facts* available, and by these facts the issues must be judged. Unfortunately the record relevant to this discussion cannot be printed in its entirety, since it would require at least a whole issue of the New Republic. I am, therefore, restricted to the pertinent and representative extracts. The professional reader will, I hope, turn to the full text of the documents to which references are made. The gravity of the issues is such that one feels justified in asking the closest attention to the documentation which is here made. For the controversy is not between Mr. Beck and me, but between Mr. Beck and the record.

I. The fairness and accuracy of the Solicitor-General's summary of the situation, presented by the Mooney case, in his letter in the New Republic of October 12, 1921.

Mr. Beck now refers to his "casual reference to the Mooney case in your issue of October 12, 1921." I do not know what implication Mr. Beck wishes to convey by "casual reference." I do know that the Solicitor-General of the United States devoted practically an entire paragraph of nearly two hundred words to a characterization of the Mooney case. I also know that the Solicitor-General now quotes only one sentence of that paragraph, and omits the vital portion of the paragraph, namely, his "inability to sit in judgment on a result in which twelve jurymen, a trial judge, a Supreme Court, and a Governor of a State alike concurred." This was the characterization of the Mooney situation, not by a layman, but by a distinguished lawyer now holding one of the highest offices open to a lawyer. When the Solicitor-General of the United States, wrote that "twelve jurymen, a trial judge, a Supreme Court and a Governor of a State alike concurred" on the "result" in the Mooney case, the natural meaning to be drawn, particularly by readers of a lay paper, was that all these agencies of law enforcement approved of the Mooney conviction on the merits of all the attending and relevant circumstances. How far Mr. Beck was so justified in characterizing the situation is the issue presented by his first letter. In order that the reader may have before him the exact issue, let him compare the Solicitor-General's complete original statement, and my comment thereon. How far the Solicitor-General's characterization was justified I shall then let the record answer.

Mr. Beck's statement in his letter to the New Republic, October 12, 1921, p. 189:

> I may frankly say that I do not even know what the Salsedo case is, and as to the Mooney case, I know little more than that it was tried before a jury, and the sufficiency of the verdict was reviewed not merely by the trial judge but also by the highest court of California, and then by the Governor of the state of California in considering the question of executive clemency. Having practised law for thirty-seven years, I have learned how futile it is for a man, through the newspaper reports, to pass judgment upon the result of a trial where the disputed issues were those of fact. A statement of facts may be very convincing in print, but one glance at the man who makes the statement gives you an immediate and generally a very accurate impression whether he is telling the truth or not. Not having had the advantage of attending the Mooney trial, or listening to the story of the witnesses and not having the omniscience of the New Republic, I confess my inability to sit in judgment on a result in which twelve jurymen, a trial Judge, a Supreme Court, and a Governor of a State alike concurred.

Mr. Frankfurter's reply to Mr. Beck in the New Republic, October 19, 1921, p. 215:

> Clearly Mr. Beck is wholly misinformed as to the salient *record* facts in the Mooney case, although those facts (insofar as they had at that time developed) were made the basis of a report by the President's Mediation Commission, which it will take Mr. Beck about ten minutes to read. (Official Bulletin, January 28, 1918, pp. 14-15.) Mr. Beck is not asked "to sit in judgment on a result in which twelve jurymen, a trial judge, a Supreme Court, and a Governor of a State alike concurred." So to summarize the situation presented by the Mooney case is flagrantly to pervert the facts. There was no such concurrence; the record is quite otherwise. *After* conviction by the twelve jurymen, the most damaging testimony against Mooney was completely discredited (a); after this disclosure the trial judge, instead of "concurring in the result," which had been reached by the jury before this disclosure, formally declared that "right and justice demand that a new trial of Mooney should be had," but found himself powerless to grant such a new trial because of a jurisdictional difficulty (b); the Attorney-General of the State, instead of "concurring in the result," basing his action upon the request of the trial judge, petitioned the Supreme Court, to which the case had gone in the meantime, for a return of the case to the trial court for a new trial (c); the Supreme Court, in its turn, by reason of the technical re-

quirement of the California code, found itself without power to consider facts which led the trial judge and the Attorney-General to urge that "right and justice" demanded a new trial, and, therefore, was compelled "to concur in the result" by shutting its legal eyes to the most important fact about the Mooney case, namely the discrediting of the State's chief witness (d); finally, the Governor of the State, instead of "concurring in the result," and allowing Mooney to be hanged, commuted Mooney's sentence solely because of the doubts against the conviction engendered by the new evidence although, with amazing illogic, he saw nothing strange in incarcerating a man for a lifetime despite those doubts. (e)

(a) The controlling factor which has made the Mooney case "an issue of public importance" was the disclosure of uncontested evidence affecting the credibility of Frank C. Oxman, "the chief witness" against Mooney. After Mooney's conviction and after the denial of a new trial, there came to the attention of the trial judge letters written by Oxman before his testimony against Mooney, the plain purport of which was to urge one Rigall to come from his Illinois town and corroborate Oxman. Rigall confessedly had not been within a thousand miles of San Francisco when the events to which he was to testify had occurred. The essence of the controversy turns upon the discrediting of Oxman after the conviction and after the case had left the trial court. Mr. Beck now quotes the testimony of the foreman of the Mooney jury to the effect that the verdict did not rest solely upon the testimony of Oxman, the chief witness of the prosecution. But Mr. Beck fails to state that this was said on the night of the conviction and long before the disclosures about Oxman. This quotation, therefore, does not state that the jury would have convicted if Oxman's credibility and story had been impeached at the trial, as it has been since. Mr. Beck thinks it relevant to quote the foreman of the jury *before* Oxman was discredited, but does not think it relevant to quote the opinion rendered by the trial Judge as to the meaning of Oxman's testimony in the light of the discrediting disclosures. In a letter to the Governor of California, under date of November 18, 1918, Judge Griffin, who presided at Mooney's trial, thus set forth the meaning of the Oxman disclosures:

> In the trial of Mooney there were four witnesses, and four only that connected Mooney with the explosion which occurred at Steuart and Market Streets. They were John MacDonald, Frank C. Oxman, Mrs. Edeau and her daughter Sadie. Of these Oxman and MacDonald placed Mooney at the scene of the crime, and the Edeaus testified to his presence at 721 Market Street. Oxman was by far the most important of these witnesses. His testimony was unshaken on cross-examination, and his appearance bore out his statement that he was a reputable and prosperous cattle-dealer and land-owner from Oregon. There is no question but that he made a profound impression upon the jury and upon all those who listened to him on the witness-stand, and there is not the slightest doubt in my mind that the testimony of Oxman was the turning point in the Mooney case, and that he is the pivot around which all the other evidence in the case revolves. It was because of the extreme importance of this witness and his naïve simplicity on the witness-stand that when the disclosure of the letters he had written to Rigall and his mother, which are before you, was made, I deemed it my duty to address the Attorney-General as I did. . . .
>
> The situation of Mooney is that he stands condemned to death upon evidence, concerning the truth of which, to say the least, there has arisen a very grave doubt. Since his trial facts and circumstances have come to light which seriously reflect upon the credibility of three of the four witnesses who linked him with the crime of Preparedness Day and which shake the very foundation of the case upon which the people rely for his conviction. (Letter of Judge F. A. Griffin to Governor Stephens, dated November 19, 1918.)

(b) Ordinarily no one is better entitled to a judgment as to the course of a trial or the significance of a witness than the judge who presided at the trial. As soon as Oxman's credibility and story on the witness stand were thus impaired, Judge Franklin A. Griffin, wrote to the Attorney-General of California, requesting him to take such action as would secure a retrial of the case:

> As you will at once see they [the Oxman letters] bear directly upon the credibility of the witness and go to the very foundation of the truth of the story told by Oxman on the witness stand. Had they been before me at the time of the hearing of the motion for new trial, I would unhesitatingly have granted it. Unfortunately the matter is now out of my hands jurisdictionally, and I am, therefore, addressing you as the representative of the people on the appeal, to urge upon you the necessity of such action on your part as will result in returning the case to this court for retrial. The letters of Oxman undoubtedly require explanation and so far as Mooney is concerned, unquestionably the explanation should be heard by the jury which passed upon the question of his guilt or innocence. I fully appreciate the unusual character of such a request, and I know of no precedent therefor. In the circumstances of this case, I believe that all of us who were participants in the trial concur that right and justice demand that a new trial of Mooney should be had in order that no possible mistake shall be made in a case where human life is at stake. (Quoted in Report of President's Commission, Official Bulletin, January 28, 1918, p. 15.)

(c) Acting upon this request of Judge Griffin, the Attorney-General, on July 30, 1917, applied to the California Supreme Court, to which the appeal had gone, requesting that the judgment "heretofore entered" by the trial court, "be reversed and the case remanded for a new trial." The facts upon which the Attorney-General acted are thus stated in the San Francisco Chronicle for July 31, 1917:

> Webb acted on the request of Superior Judge Franklin A. Griffin, who sentenced Mooney to be hanged.

Judge Griffin demanded a confession of error and a new trial for Mooney after the condemned man's attorneys produced letters in which Oxman, the principal witness for the state, apparently attempted to induce F. E. Rigall to come from Grayville, Illinois, to San Francisco to testify against Mooney.

Requesting a new trial, Webb said: 'It is as important to the people as to the defendant that such an opportunity be afforded.'

The Attorney-General's stipulation points out that Oxman testified at the trial of Mooney that he saw both the Mooneys at Steuart and Market streets the day of the explosion; that Oxman's testimony was pertinent in the case of Mrs. Mooney; that it could have been introduced; that is was not introduced, and that Mrs. Mooney was acquitted.

'In view of these facts and of these statements and requests made by the Judge who tried this case,' said Webb's formal consent, 'it would seem proper to act in accordance with his suggestion.'

The Supreme Court of California thus summarized the legal theory upon which the Attorney General acted:

> The sole reason for this action on the part of the attorney-general, as is shown by the writing filed herein by him, is that since the motion for new trial was denied, the judgment pronounced, and the appeal taken, certain evidence has been discovered which leads him and the judge of the trial court to believe that, in the interests of justice, a new trial should be had. (People vs. Mooney, 176 Cal. 105, 106).

It is pertinent to note that after the report by the President's Mediation Commission, Attorney-General Webb reaffirmed his position, urging a retrial for Mooney. (See San Francisco Chronicle, January 28, 1918.)

(d) The Supreme Court, however, found itself without power to consider the facts which led both the trial court and the Attorney-General to urge that "right and justice" demanded a new trial. At the time of writing my first letter, I was away from books and fell into an error, to which Mr. Beck rightly calls attention, in stating that the jurisdiction of the Supreme Court was limited by the California Code, when in fact, the Supreme Court held it was so limited by the Constitution. But for our present purposes the distinction is wholly irrelevant, for I in no wise criticized the court for stating it had no jurisdiction to consider matters not appearing in the record of the trial, but occurring subsequently. The nub of the matter is that Mr. Beck stated that the Supreme Court "concurred" in the result of the Mooney case, whereas I stated and repeat that the Supreme Court was compelled "to concur in the result" by excluding from consideration the fact which led both the trial judge and the Attorney-General to demand a new trial for him, namely, the subsequent discrediting of the prosecution's chief witness. The Supreme Court itself was very careful not to express an opinion as to the significance of the disclosures affecting Oxman:

> We have not considered the reasons stated by the Attorney-General for his conclusion that a new trial should be had, and are not to be understood as expressing any opinion as to their sufficiency. That, as we have endeavored to show, is a matter not within our province. (People vs. Mooney, 176 Cal. 105, 109.)

(e) Undeniably the Governor of California did commute the death sentence of Mooney. Let the Governor himself state the grounds for his action:

> I have carefully reviewed all the available evidence bearing on the case. There are certain features connected with it which convince me that the extreme sentence should not be executed. Therefore, and because of the earnest request of the President for commutation and conscious of the duty I owe as Governor of this State to all its people, I have decided to commute Mooney's sentence to life imprisonment. In doing so I accept full responsibility for the wisdom and justification of the action.
>
> The record of the trial in the Superior Court was reviewed by the Supreme Court of our State, and it found no reason for upsetting the judgment of the lower court.
>
> However, there has remained for me to consider in addition, certain developments following the conviction that could not be considered by the Supreme Court. It is because of this new evidence that I find justification for commutation of sentence. In arriving at this conclusion, I have exercised that caution which must be observed in weighing evidence presented outside of established legal procedure. (San Francisco Chronicle, November 29, 1918).

This being the record, I leave it to the judgment of lawyers and the public generally, whether the Mooney situation is fairly and accurately to be characterized, and above all, by the Solicitor-General of the United States, as "a result in which twelve jurymen, a trial judge, a Supreme Court, and a Governor of a State alike concurred."

II. The fairness and accuracy of the statement now made by the Solicitor-General as to "the facts" of the situation presented by the Mooney case, after the Solicitor-General had made "an examination of the record."

This issue is easily disposed of. The material for judgment is before the reader. It calls for a close comparison between "the facts" as the Solicitor-General presents them and the record of the documents here set forth.

I am convinced that any fair-minded reader who thus compares "the facts" as set out by Mr. Beck with the full record, is bound to reach the conclusion, however reluctantly, that the document to which the name of the Solicitor-General is signed, is an incredible combination of suppression, distortion, and reckless quotation. Do not let me be misunderstood. I do not say, nor can I believe, that the Solicitor-General suppressed, distorted, and recklessly quoted. The mystery is to be explained by the probability that Mr. Beck asked someone in his office to brief the case, and this amazing farrago was served up for Mr. Beck's signature. I shall briefly particularize:

(a) *Suppression.*

(1) Mr. Beck's letter quotes what the foreman of the jury said at the night of the verdict *before* Oxman was discredited, but he fails to state what the trial judge wrote, as quoted above, to the Attorney-General of the state *after* the disclosures, on the strength of which he requested the case to be sent back for retrial.

(2) Mr. Beck's letter fails to mention the application by the Attorney-General of the state to the Supreme Court for reversal of the judgment and the remanding of the case for a new trial because of the disclosures following the

trial, it being according to Attorney-General Webb "as important to the people as to the defendant that such an opportunity be afforded."

(3) Mr. Beck's letter fails to refer to the letter of Judge Griffin under date of November 19, 1918, which was before the Governor when he commuted Mooney's sentence on November 28, 1918, in which the trial judge expressed himself, *inter alia,* as follows:

> It was my judgment and opinion that Mooney should receive a new trial upon the Oxman letters alone. In that judgment and opinion I was not alone, for upon examination of the record the attorney general concurred therein and stipulated in open court that the case should be reversed. The Supreme Court of the state held, however, that is was without power to act upon such a stipulation in a criminal case.
>
> Since the Oxman revelation many other circumstances, these few of which I have vainly attempted to skeletonize, have arisen, which have strengthened and made more firm my belief that to carry into execution the judgment now against Mooney would be a travesty upon justice and a blot upon the administration of justice which this state cannot afford to bear. . . .
>
> I have not touched upon the many circumstances which today are matters of common knowledge and public notoriety, and which add enormously to the total of doubt and uncertainty now surrounding the result of Mooney's trial, but have merely dwelt upon these indisputable outstanding facts, themselves now matters of public record, and I can only say, as I said to General Webb. . . .
>
> Right and justice demand a new trial for Thomas J. Mooney, in order that these facts, so material and of such importance to the issue of his guilt or innocence, and unavailable to him at the time of his trial, may be presented to a jury for consideration and determination.

(b) *Distortion.*

The quotation which Mr. Beck makes of the Governor's reason for commuting Mooney's sentence, the reader may compare with the full text out of which this portion was lifted.

From Mr. Beck's letter: quoting Governor Stephens

> . . . the Governor himself says that he commuted the sentence "because of the earnest request of the President for commutation."

He was further actuated by the fact, as stated by him, that "by commutation to life imprisonment Mooney's case will be in the same status as that of Warren K. Billings, who was convicted of the same crime and received a sentence to life imprisonment."

From Governor Stephens' statement:

> I have carefully reviewed all the available evidence bearing on the case. *There are certain features connected with it which convince me that the extreme sentence should not be executed. Therefore,* and because of the earnest request of the President for commutation, and conscious of the duty I owe as Governor of this state to all its people, I have decided to commute Mooney's sentence to life imprisonment. In doing so, I accept full responsibility for the wisdom and justification of the action.
>
> The record of the trial in the Supreme Court was reviewed by the Supreme Court of our State, and it found no reason for upsetting the judgment of the lower court.
>
> However, there has remained for me to consider in addition certain developments following the conviction that could not be considered by the Supreme Court. *It is because of this new evidence that I find justification for commutation of sentence.* In arriving at this conclusion I have exercised that caution which must be observed in weighing evidence presented outside of established legal procedure.
>
> By commutation to life imprisonment, Mooney's case will be in the same status as that of Warren K. Billings, who was convicted of the same crime and received a sentence to life imprisonment. (Italics mine.) San Francisco Chronicle, November 29, 1918.

(c) *Reckless Quotation.*

Mr. Beck seeks to discredit those who are interested in the Mooney case, not for Mooney's sake, but for the law's sake. The obvious device, of course, is to tar them with the Russian stick. I shall deal in the concluding point with his treatment of the report of the President's Mediation Commission; but the motif which plays about Mr. Beck's letter goes back to a statement which it attributes to me. According to Mr. Beck's letter, I gave a "statement to the press which contained the destructive admission that 'a desire to appease the Liberal element in Russia was paramount in the minds of the Commission.'" Even Mr. Beck "would, under ordinary circumstances, be loath to believe" that I "could have been guilty of the incredible ineptitude" of this admission. Now he does not find it necessary even to verify an alleged newspaper statement which ordinarily he would regard as "incredible." The fact is that no such statement was ever made by me. Mr. Beck puts into my mouth, as an admission, what District Attorney Fickert uttered against the President's Mediation Commission, as an accusation. Let me again put side by side a statement which Mr. Beck's letter attributes to me, and a statement by District Attorney Fickert:

From Mr. Beck's Letter:

> When the Commission's report was published, Mr. Frankfurter gave the statement to the press, which contained the destructive admission that "a desire to appease the Liberal element in Russia was paramount in the minds of the Commission."

From District Attorney Fickert's Reply to the Findings of the Federal Mediation Commission on the Mooney case:

> . . . it is suggested in their [the Commission's] report that a desire to appease the Liberal element in Russia was paramount in the minds of the Commissioners. (C. M. Fickert's Reply, April 9, 1918)

An argumentative accusation in a partisan pamphlet by District Attorney Fickert is transmuted by the Solicitor-General into a "naïve admission" by me.

III. The propriety of President Wilson's action in charging the President's Mediation Commission, in September, 1917, with the duty of inquiring into the circumstances attending the Mooney case; the propriety of the Commission's action in obeying the President's instructions; and the fairness of the methods of the inquiry and the report by the Commission upon the situation.

Mr. Beck challenges not merely the methods of the inquiry of the President's Mediation Commission into the Mooney case and the basis of its report. On constitutional grounds he challenges the propriety of the President's inquiry into the case. What are the facts? Time dims memory, but it ought not to be difficult to bring the reader's mind vividly back to the spring and summer of 1917. Certainly this was one of the crucial periods of the war. Certainly the maintenance of an effective morale was one of its dominant problems. Certainly one of the profoundest interests of Allied statesmanship, and particularly of this country, was to maintain the fighting fervor of the Russians. Senator Root, with the acclaim of the whole country, was sent to Russia for that purpose. To a less degree disquietude was making itself felt among the peoples of other Allied countries. With public opinion in this sensitive state, the Mooney case made its public appearance. Manifestations against what was deemed to be an injustice to a "radical" because of his "radical" views, developed in the spring and summer of 1917 both in Russia and in Italy. That the basis of the feeling aroused abroad may have been unjustified by the facts is wholly irrelevant, in considering the effect of that feeling upon the fighting morale of Allied peoples. So strong was this feeling abroad and so threatening in its influence, that news of the case first reached Washington through dispatches from abroad as to these manifestations. It is essential to keep in mind that we are dealing with war feelings at a crucial period of the Great War. Mr. Beck talks much about Lenin and Trotsky. He is silent about Prince Lvov and Kerensky. They were our zealous allies; and it was during *their* régime—long before the Bolsheviki came to power—that the Mooney case began to affect "the liberal sentiment of Russia." *That* was "the liberal sentiment" with which those in charge of the conduct of the war was concerned.*

About this time the President was dispatching to the West, a Commission, headed by the Secretary of Labor, to inquire into and adjust serious industrial difficulties affecting war production west of the Mississippi. So profoundly had the President been impressed with the havoc that the Mooney case was raising abroad, that he charged the Commission, as one of its tasks, with the duty of inquiring into the circumstances attending the Mooney case. In other words, he sought dependable knowledge in order to deal with a matter which, whether one likes it or not, *did* affect our foreign relations. But just because the President was not unmindful of the fact which every tyro knows, namely, that the final disposition of Mooney's case was a matter for state action, and was anxious to respect to the utmost the susceptibility of state feeling and at the same time to discharge his constitutional duty in the executive conduct of foreign relations, he instructed his Commission to inquire into the situation "informally and without publicity." With this short statement of the facts leading up to the appointment of the Commission let us consider the issues that Mr. Beck raises in regard to the appointment of the Commission and its work.

1. Mr. Beck asks what right I had "to sit in judgment upon the judiciary of California?" This question is a variant of the classic inquiry, "Have you stopped beating your wife yet?" Neither the President's Commission, nor I, as its counsel, ever "sat in judgment" upon the judiciary of California. Mr. Beck cannot find any expression or intimation of criticism by the Commission or by me upon the judiciary of California. The report and the recommendations of the Commission recognized the "jurisdictional limitations" imposed upon the Supreme Court of California, and therefore pointed out the need for executive action with the cooperation of the prosecuting attorney, in securing a new trial for the determination of guilt or innocence free from discredited testimony. But if Mr. Beck means to ask by what right the President's Mediation Commission inquired into the circumstances of the Mooney case, the short answer is by virtue of the duty imposed upon it by the President of the United States. If it be the contention of the Solicitor-General that when the President of the United States in time of war, in the execution of his responsibility for the conduct of foreign relations, charges American officials with the task of inquiry into the circumstances of a case, local in its nature, but in its repercussions affecting the foreign relations of this country, it is the duty of such officials to dispute the constitutional power of the President and to read him a lecture on the dual nature of our government, I respectfully dissent from the Solicitor-General. My conception of duty under these circumstances is to obey the President of the United States.

2. As to the methods of the inquiry pursued by the Commission, and the merits of its report, let Mr. G. S. Arnold's accompanying letter speak. Mr. Arnold is a California lawyer, well and favorably know in San Francisco and in Washington. As a lawyer of ability, of tried public service and disinterestedness, the Commission turned to him to make an investigation and a compilation of the documentary data in preparation of the Commission's visit to San Francisco. Through him, also, interviews were arranged in San Francisco between various California officials and the counsel of the President's Commission. At most of these meetings Mr. Arnold was present. He speaks, therefore, with intimate knowledge of the facts. Little needs to be added to his statement.

(a) The first act of the Commission, after reaching San Francisco, was a long and detailed interview, in Mr. Arnold's office, with District Attorney Fickert and Assistant District Attorney Ferrari as to the scope of the Commission's inquiry, the procedure to be followed, and the persons to be interviewed. The policy of the whole inquiry, the procedure by which it was pursued, and the persons who were seen, all, were in accordance with the program approved by District Attorney Fickert.

(b) Nevertheless Mr. Beck repeats as his own, the charge of Mr. Fickert that "the Commission did not even have the fairness to consult the men whose official acts it was about to discredit." There is no other way to characterize this statement than to say that it is without

* By the time the President's Commission reported to him the Soviet government had begun its rule. But that was all the more reason for avoiding causes for dissatisfaction among other Allied peoples.

a scintilla of justification. The falsity of the charge was exposed in great detail in a letter of Mr. Arnold, under date of April 15, 1918, to the Governor of California. There has never been, as he points out, a denial by Mr. Fickert or by the District Attorney's office of the true facts set forth by Mr. Arnold. But, to use Leslie Stephen's figure, an error will continue to live long after its brains are knocked out. In addition to the available documentary evidence the following is a list of the important people who were consulted, for the Commission in San Francisco, as especially conversant with the Mooney case: District Attorney Fickert, Assistant District Attorney Ferrari, Maxwell McNutt, counsel for Mooney, (Mooney himself was seen), Attorney-General Webb, United States Attorney Preston, Chief Justice Angellotti and the Associate Justices of the Supreme Court, with whom the case was discussed a whole forenoon, ex-Judge F. W. Henshaw, then a member of the Supreme Court and widely regarded as one of the influential advisors of District Attorney Fickert, with whom I discussed the case at length on several occasions, and Archbishop Hanna.

(c) The suggestion running through Mr. Beck's letter is that the report of the President's Commission involved an attack upon the courts of California. An examination of the report will quickly dissipate this wholly erroneous assumption. The following paragraph in the report, explaining and commending the normal American judicial process in criminal cases, will serve to convey the attitude of the report:

> 8. The convictions of Billings and Mooney followed trials in accordance with the established course of American procedure. It is familiar to students of jurisprudence that no system of criminal administration in the world hedges such safeguards around an accused as does an American trial. The conviction, in other words, was based on evidence narrowly confined to the specific issues. Furthermore, proof of guilt had to be established beyond a reasonable doubt, and established to the unanimous satisfaction of a jury of 12 persons selected from among the people. Conviction by an American jury is guilt determined by a very democratic institution. There is no question but that the jury acted in good faith upon the evidence as it was submitted. It is because of subsequent developments that doubt is based upon the justice of the convictions. Following the trials of Billings and Mooney there was a change in the evidence which not only resulted in the acquittal of Mrs. Mooney and Weinberg, but also cast doubt upon the prior convictions of Billings and Mooney. (Official Bulletin, January 28, 1918, p. 14.)

Doubt has been cast upon Mooney's conviction by two different sets of circumstances, (1) the so-called Oxman letters, and (2) circumstances which challenge the good faith of the prosecution. Neither the Commission's report, nor I, in my earlier letter to the New Republic, refer to these latter circumstances. The Commission based its report upon "one factor of controlling importance"—the Oxman letters. I have similarly restricted myself.

The Commission planted itself upon the insistence of the trial court that "right and justice demand that a new trial of Mooney should be had." In other words, instead of attacking the courts of California, we urged respect for the pronouncement of that court of California which knows most about the Mooney case, namely, the trial court.

(d) Mr. Beck seeks to dispose of the pertinence of the Oxman letters upon two grounds. Neither is pertinent.

(1) "Unfortunately for the Commission's findings, Oxman was subsequently tried for subornation of perjury, and acquitted." If by "subsequently" Mr. Beck means subsequently to the report of the Commission's findings, a reading of the Commission's report will here again clear the situation. For the Commission stated:

> It is true that Oxman was tried for attempted subornation of perjury, and acquitted, but this is beside the present consideration. The fact is that he did write letters which tend completely to discredit any testimony he might give, and no testimony from Oxman in the light of these letters would receive the credence necessary to lead to conviction. . . . When Oxman was discredited, the verdict against Mooney was discredited. (Official Bulletin, *supra*, p. 15.)

Surely no one knows better than Mr. Beck that testimony which may wholly discredit a witness, may yet, for one reason or another, not lead to his conviction for subornation of perjury. And, therefore, with full knowledge of Oxman's acquittal for subornation of perjury, the trial court and the Attorney-General of California have persistently urged a new trial for Mooney because of the Oxman letters.

(2) "The matter was then taken to the polls," writes Mr. Beck, "on a vote to recall the District Attorney, and the people of San Francisco vindicated him by an overwhelming vote." Does Mr. Beck mean to suggest that the re-election of Mr. Fickert has any bearing upon the significance of the Oxman disclosures? Mr. Fickert was re-elected in 1917, but he was defeated in 1919. Is this subsequent defeat proof that the new evidence in support of Mooney was sustained, or that the charges of misconduct were justified? Of course not. Fickert's defeat proved the *mala fides* of his prosecution of Mooney as little as his prior re-election proved the *bona fides* of Oxman.

(e) Finally, there is a suggestion running through Mr. Beck's letter, that the report of the Commission sought to minimize the horror of the crime with which Mooney was charged, or to exculpate Mooney. The Commission was at least as drastic as Mr. Beck in the characterization of the San Francisco preparedness murders, and Mr. Beck himself admits that the report adequately stated Mooney's past complicities. Does Mr. Beck feel that a report, which in part differs only in rhetoric from his own statement of the facts, and in all other matters wherein it differs from his statement, it so differs by the inclusion of the most important facts which Mr. Beck omits, more particularly, the opinions of the trial judge and the action of the state's Attorney-General, is fairly characterized by the Solicitor-General of the United States as an effort "to stifle the cry for justice of cruelly murdered children?"

And where, in the Commission's report, does Mr. Beck find the slightest word calculated to secure the release of Mooney, or to exculpate him an any way whatever? The

Commission, just as Mr. Beck, disavowed any opinion as to Mooney's guilt or innocence:

> It was not deemed the province of your Commission to establish the guilt or innocence of Mooney and his associates. We conceived it to be our duty merely to determine whether a solid basis exists for a feeling that an injustice was done or may have been done in the convictions that were obtained, and that an irreparable injustice would be committed to allow such a conviction to proceed to execution. (Official Bulletin, *supra,* p. 14.)

And the Commission stood upon the recommendation of the trial judge and the action of the state's Attorney-General in making its own recommendation:

> Your Commission, therefore respectfully recommends in case the Supreme Court of California should find it necessary (confined as it is by jurisdictional limitations) to sustain the conviction of Mooney on the record of the trial, that the President use his good offices to invoke action by the governor of California and the cooperation of its prosecuting officers to the end that a new trial may be had for Mooney whereby guilt or innocence may be put to the test of unquestionable justice. This result can easily be accomplished by postponing the execution of the sentence of Mooney to await the outcome of a new trial, based upon prosecution under one of the untried indictments against him. (Official Bulletin, *supra,* p. 15)

I disbelieve in doctrines of force, and believe in constitutional methods for securing the needs of a modern industrial democracy, as strongly as does Mr. Beck. But for that very reason I deem the process of law vital in the case even of those who themselves have no faith in it. Mooney, the individual, means as little to me as he does to Mr. Beck. Law means as much to Mr. Beck as it does to me. Mr. Beck will agree that the reign of law in the last analysis depends upon the confidence in law by the great body of people. Logically or not, the Mooney case has long been and remains a disturbing element to faith in the adequacy of our legal procedure to rectify a serious charge of miscarriage of justice. This aspect of the Mooney case is not urged by so-called "radicals." It is urged by all those to whom law, as the very basis of our society, is dear. Typical of this attitude is an expression by the New York Tribune in stronger language than I should employ:

> The case of Mooney is important because it involves the honor of our judicial system. Never must there be even plausibility to the radical charge that our courts are respectors of persons and amenable to improper influences. This is true conservatism. Because there is doubt of the integrity of the case against Mooney, the country has intruded on California's business to urge a clearing away of the doubt. (New York Tribune, February 9, 1921.)

Let Mr. Beck dismiss this correspondence from his mind. Let him also dismiss the bogey of Russia as a deterrent to the interest, if not the duty, of a leader of the Bar to ascertain the basis for a widely felt belief of miscarriage of justice in a case of persistent prominence.

If the Mooney case had not a single other protagonist, it would be entitled to the opinion of Mr. Beck on the merits of the claim for a new trial. Law is vindicated only by law. Not for Mooney's sake, but for the sake of the majesty of the law, to which even outcasts of society may appeal, I ask the Solicitor-General to make an independent investigation of the facts surrounding the Mooney case and to state publicly whether or not he agrees with the judge who presided at the Mooney trial that "right and justice demand a new trial for Thomas J. Mooney, in order that these facts, so material and of such importance to the issue of his guilt or innocence, and unavailable to him at the time of his trial, may be presented to a jury for consideration and determination."

FELIX FRANKFURTER.

Cambridge, Massachusetts.

Mr. Arnold Corroborates Mr. Frankfurter

SIR: In Mr. James M. Beck's Reply to Mr. Frankfurter of November 12th, 1921, occur a number of statements, some of which lead to incorrect inferences, and some of which are untrue. Mr. Beck usually gives the authority upon which he makes his statements, and it will be understood that in offering the following corrections I mean no offence toward him.

1. Mr. Beck states: "The Commission [Mediation Commission] did not even have the fairness to consult the men whose official acts it was to discredit." The fact is that at the commencement of its investigation in November, 1917, Mr. Frankfurter, secretary and counsel of the Commission, in behalf of the Commission requested me to arrange a conference for him with the District Attorney, Mr. Charles M. Fickert. This I did. The consultation occurred in my office, 1020 Merchants Exchange Building, San Francisco, between Mr. Frankfurter, for the Commission, and the District Attorney, Charles M. Fickert, and Assistant District Attorney Ferrari. The Mooney case was discussed at great length. How many other interviews Mr. Frankfurter and Mr. Fickert, Mr. Ferrari and other members of the District Attorney's office had I do not know, but at this one I was personally present. Thereafter, also at the request of the Commission, I was present at an interview between the Attorney General of the State, Honorable U. S. Webb, and other members of the Attorney General's office, and Mr. Frankfurter. These facts were published in April, 1919, in San Francisco, and have never been denied by the District Attorney's office. Under these circumstances it is difficult for me to see how Solicitor General Beck can make the statement credited to him, or can quote an earlier statement by the District Attorney stating that there was no consultation with "anyone in authority" in connection with the prosecution. The District Attorney and the Attorney-General were the only people in authority in connection with the prosecution, and with both of them the Commission, through its secretary and counsel, consulted.

2. Mr. Beck says: "Before the District Attorney could make reply, as he sought opportunity to do, the Mediation Commission had left San Francisco. His telegrams to the Mediation Commission asking an opportunity to be heard were left, according to the District Attorney's