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SOME OBSERVATIONS ON THE SIGNIFICANCE OF THE AMERICAN BILL OF RIGHTS

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Bills of Rights are like New Year's Resolutions. The discipline they impose is self-imposed. It is also usually imposed in a period of sobriety in the fond hope that the conditions which brought forth excesses in the past will not do so in the future. And, more often than not, the history of nations like that of individuals teaches that while the spirit may be willing the flesh is weak.

The flesh is weak because solemn declarations of good intention may have no roots in past performance—the history of the people may have developed no institutions providing an earnest that the good resolutions can be kept. They remain so many pious words abstracted from the character of the people for whom they are made. In the case of the American Bill of Rights this is happily not the case. There is practically nothing in our bill of rights which had not already been hammered out on the anvil of the English common law. There is hardly anything which does not presuppose the institution of courts and procedures on the common law model. In fact, I may go further and state as part of my thesis that the formal language of the first eight amendments to our federal Constitution (usually called our Bill of Rights) has been only a convenient peg upon which our courts have hung a common law version of individual liberties.

This is not a startling proposition to be sure, but it has had to meet opposition from two extremes and I ought to outline these other propositions in order to distinguish my own. On the one hand, the ideologists of human liberty have always had a curious faith in words. These persons derive profound satisfaction out of an aspect of the American constitution which leaves me quite unmoved. I mean its formal, written, legislative, character, replete with properly placed commas and periods, colons and semi-colons.

Tom Paine was one of those typical 18th century libertarians. He was a great publicist, enthusiast, and exhorter. And Tom, you may recall, scornfully charged that the British had no constitution because they had no one divine document to serve as a blue-print for Utopia. This was in his great literary debate with Burke. Burke dared to prefer English liberties over French revolutionary liberties and Paine made great rhetorical point of the fact that Burke could not cite him chapter and verse in any British constitution for any of these English liberties.

Tom had no sense at all of the background of concrete remedies and institutions which have in fact afforded the British subject far more substantial liberty than the French. And we have continued to produce modest editions of Tom Paine, the Prophet of Political Reform,

from that time to this. The starting point of these people is always some abstraction supposed to generate principles of freedom by a sort of spontaneous combustion. For this purpose the "sovereignty of the people" has served as well or as ill as the "natural rights of man." But neither formula will produce the kind of Bill of Rights I am talking about.

But there is another extreme point of view with which I must disassociate myself. There have always been those whose skepticism about words as meaningless abstractions leads them to emphasize the personal motives and interests of judges as the real generative force behind constitutional interpretation. The Bill of Rights, say these people, is what the judges say it is. And this perfectly sound proposition is then so manipulated as to make it clear that they mean the judges as individuals conditioned by such things as what they had for breakfast.

The judges, indeed, put life into the law. Even more, I will admit that they make the law—if you will permit me to add that they "make" it as representatives of an institution which consistently discourages the use of much discretion in this function. They "make" it under peculiar conditions which require that the judge shall fit both the method and substance of his decision into an institutional pattern of precedents stretching back (as the older judges liked to say in the case of the common law) to a time "since the memory of man runneth not to the contrary."

So I come back to my original point that our bill of rights must never be taken in abstraction from this institutional background. Only those propositions which had some fixed common law meaning have been given full force and effect. The others—and I can think of only two others—were either disregarded or watered down to common law comprehension. And perhaps I can best make my point about the essential nature of our Bill of Rights by taking up these two orphan propositions in more detail.

The propositions I have in mind are those supposed to insure freedom of religion, and freedom of speech and the press, respectively. As for freedom of religion, Article I of the Amendments begins as follows: "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof . . ."

Religious freedom against the state you say. And, I think, quite rightly so far as the intent of the framers was concerned. They did have in mind—if only in a certain nebulous and inspirational fashion—the nation of a sphere of freedom for the individual against state interference. They assumed the natural right of a man to worship God in his own way—in short a liberty to follow God in the things which did not belong to Caesar. But the common law had not then absorbed, nor has it yet absorbed, anything of this natural rights doctrine. The

common law does not teach that there are any limits to the rightful claims of the state on the allegiance of its citizens due to the importance of religion. Quite the contrary: the common law absorbed ideas of toleration founded upon reasons of state and not reasons of conscience. The point of view of the common law remains substantially that of Elizabethan statecraft when the Spanish Armada threatened England: a man's religious affiliations are unimportant as compared to his political affiliations. We are Englishmen first, Catholics or Protestants a poor second.

The aspect of our first amendment which has received judicial sanction is therefore the prohibition against the *establishment* of religion—against official discrimination between sects. Congress may not, to be sure, appropriate public funds for the beenfit of this or that religious group. It may not set up religious tests for office or voting. Nor may it provide for chaplains in the Army or Navy out of proportion to the number of communicants in the armed services. But there is no limitation on the power of the legislature to disregard religious convictions entirely in providing for the maintenance of order or defense of the state. Conscientious objectors to war have no constitutional protection whatever against enforced military service. They may not even become citizens of the United States if Congress says that such a mental attitude is inconsistent with citizenship. And the Supreme Court has recently held that the religious sensibilities of a particular sect are not important enough to be made the basis for a valid exercise of local police power.

If, therefore, we look to the facts of constitutional interpretation we find that our bill of rights testifies to the unimportance of religious conviction not to its importance *vis a vis* political allegiance. I do not mean to say that there are no advantages to the devout individual in this attitude. But it is best not to confuse a constitutional guarantee against religious discrimination with a constitutional guarantee of religious freedom. The government may not enforce uniformities of conduct upon us in the name of religion, but it may enforce any uniformities it likes in the name of politics.

Freedom of Speech and the Press offers another contrast between the words of the document and the facts of constitutional interpretation. Here too the framers of the amendment no doubt had certain inchoate ideas about assuring the citizen freedom to criticize his government. But actually the common law afforded no basis for this belief. Not that there were no liberal features in the common law attitude toward the problem. Censorship—the imposition of previous restraints on publication—was definitely out of favor with the law. This was primarily because censorship operated to give effect to executive d e te r m i n a t i o n of private right without recourse to the courts. The institution of courts and juries was effectively "by-

passed" if the executive could simply prevent objectionable things from being said instead of having to prosecute individuals for having said them.

But the common law had no prejudice against the infliction of any penalty, no matter how severe, for past utterances. Nor had it any criterion whatever by which an innocent utterance could be distinguished from a guilty one. Or, perhaps, it would be more suggestive to say that the criterion the common law did have was more likely to protect an inept government from effective criticism than to protect the honest citizen in making that criticism. While the framers of the first amendment were talking about freedom of speech the common law was laying it down that, in cases of seditious libel, "the greater the truth the greater the libel."

This does not mean, I hasten to say, that the common law had nothing to contribute to the liberties of the citizen. He was guaranteed a hearing by independent judges according to the forms of law even though the law itself was willing to recognize a wide discretion in the government of the day. More than this, the popular institution of the jury was called into play to determine the guilt or innocence of a defendant in seditious libel cases. So one may say that a very substantial kind of liberty was assured the subject. But again it would be a grave mistake to confuse this liberty with freedom of speech in the popular sense. No sphere of free criticism of public officers can be defined in advance. The only rule which can be stated is the rule of Reason—the sense of reasonableness and fair play embodied in the system of common law adjudication. Without this system free speech vanishes into thin air.

I am fully aware that there have been brave attempts by our courts to achieve a substantive definition of free speech, and I don't want to be understood to say that these have been utterly abortive. The point nonetheless is that the solid ground for constitutional interpretation here is the slow evolution of the law of seditious libel, the law of blasphemous libel and the law of obscene libel in the hands of judges. Free speech is what remains after these bases for punishment have been considered. And when this is analyzed it will be found that the rock-bottom guarantee to the citizen lies simply in his recourse to the methods of law and not in any libertarian doctrines of that law.

The same dependence of our Bill of Rights on the legal institution, instead of upon declarations of political aspiration, may be shown in other ways. Some of them are the fairly obvious staple of the constitutional lawyer. For example, the Supreme Court interpreted the 14th Amendment provision prohibiting the states from depriving any person of life, liberty, or property without due process of law, to include corporations. And it expanded the meaning of due process of

law to include, not only the methods of enforcing the police power against individuals, but the substance of the police power. Thus our bill of rights has been interpreted to prevent such things as wholesale price-fixing and wage control as well as such things as infliction of the death penalty without jury trial.

But I don't intend to burden you with a discussion of these stock examples. Instead of this I shall refer to two other less well known situations in which the law has, so to speak, cut its own channel without too much dependence on political or legislative declaration.

Let us first take up the problem of whom private rights are available against, and whom they are available to. In other words, let us assume for the moment that the legal institution and political aspiration are at one as respects the content of rights. In general, that is, law and politics agree that the content of our private rights is the common law rights of Englishmen and not the natural rights of man. But are we going to generalize the common law rights of Englishmen to apply to every one—citizens and non-citizens—or are we going to limit them in some fashion to those who have a permanent stake in the country? And are these common law rights to be available against all agencies of government, or only against particular ones, and dependent on circumstances at that?

On these questions I think there has been some divergence between political declaration and legal exposition. In general, the political understanding of our bill of rights identifies them with rights of citizens. And political understanding also regards them as good against any agency of government in all circumstances. The common law, on the contrary has never shown any disposition to limit private rights to an *elite* whose loyalties to the state can be attested by the fact of citizenship. As applied to American conditions, however, it has had a good deal to say about differences between the agencies of government from the standpoint of private rights.

It is, for example, judicial and not legislative or political doctrine, that we do not have the same rights against the federal and state governments. The first eight amendments to the Constitution are good against Congress alone. Moreover, the general language of the 14th Amendment requiring the states to observe due process of law does not cover all the specific rights enumerated in the first eight amendments. It follows that there is no *federal* guarantee against our being brought to trial before a *state* court on a criminal charge without previous indictment by a grand jury. This guarantee applies only to federal prosecutions.

It would also appear to be judicial, as distinct from political, doctrine which lies behind the rule that even Congress is not bound by such procedural requirements of the Bill of Rights when legislating for our outlying territories and possessions. These territories are not

"incorporated"; so it follows that one can be brought to trial before even a federal court in Puerto Rico, for instance, without an indictment by a grand jury.

On the other hand, the courts have generalized the class of those to whom private rights belong much beyond legislative or political intent. It is primarily due to the courts that our private rights are rights of *all* persons irrespective of citizenship. So far as political or legislative intent is concerned, citizenship might well have been taken as the touchstone of private rights. For example, the 14th amendment referred to United States citizenship as if it were a source of basic private rights: no state is to make any law which shall abridge the "privileges or immunities of citizens of the United States." But the Supreme Court preferred to work with a constitutional system in which distinctions as to rights were implied from the source from which interference came, rather than from the status of persons to which they applied. Accordingly, that particular clause in the Constitution is pretty much a dead letter. There are no especially significant rights involved in United States citizenship. It is only when a citizen goes abroad that he finds himself equipped with any rights peculiar to that status.

There is an exception to this attitude of the law toward citizenship which has some special importance for us on the Pacific Coast. The right to own land may be confined to citizens on good common law precedents. Accordingly, no state would find itself in conflict with the due process clause of the federal Constitution should it limit land ownership to that class. And a few Western states have made use of this privilege to bar aliens ineligible to citizenship from acquiring these rights except where guaranteed by treaty. It is also true that many states have discriminated against non-resident aliens when it comes to succession to property. On the whole, however, it is accurate to say that our common law is highly cosmopolitan in its ideas about who is entitled to the private rights of the bill of rights. At any rate, it is more cosmopolitan than the political agencies which have formally announced the rights.

Very much the same thing may also be said about the comprehensiveness of citizenship. The law has helped to make citizenship so comprehensive that even were it accepted as a significant category for private rights it would not exclude many persons from their protection. What I have in mind here is the Supreme Court's interpretation of the 14th Amendment to confer citizenship on all persons born in the United States regardless of parentage or character of residence here. This was in the great case of Wong Kim Ark in which the citizenship of a child born of Chinese parents was confirmed even though the existing naturalization law clearly prevented the parents from ever becoming naturalized.

Let me pass now to another aspect of the Bill of Rights which also reflects the character of the legal institution that nourishes it more than it reflects the political aspiration that sired it. This aspect brings us back again to the quality of the Bill of Rights and is widely regarded by liberals as a distinctly "non-liberal" aspect. The law is supposed to be more solicitous for *property* rights than the personal or *"human"* rights. Is this true, and, if so, is it a reproach to our system?

There are so many angles to these questions that I hesitate to attempt categorical answers. There are, I think, certain rather obvious considerations which can be gotten out of the way first before treading on controversial ground. For example, it is certainly *not* true that personal rights *which are consistent with the scheme of property in all its capitalistic forms* have been slighted under our Bill of Rights. No one doubts that our law offers an excellent remedy against the arbitrary imprisonment of any person. The writ of *habeas corpus* is one of the outstanding glories of the common law. Neither will anyone question that the law has always been adamant against chattel slavery. In fact, the common law was ready to afford remedies against slavery before public sentiment in this country had crystallized in that direction.

On the other hand, if one means by human rights freedom from injury to one's dignity, pride, or reputation, it is equally obvious that the common law is a materialistic system: the kind of rights which it is equipped to recognize are those which can be estimated in money. It is not as sensitive as it very well might be, to mental anguish disassociated from commercial considerations. Or, to put it another way, the law would be much quicker to appreciate the mental anguish of a landowner if you trespassed on his land than the mental anguish of a law-abiding citizen whom you insulted on the street. I daresay that the typical common law attitude toward a possible claim by Roland Hayes for damages due to indignities sustained at the hands of Georgia police authorities might well be "no bones broken."

But these observations hardly touch the real animus behind the assertion that the law pays attention to property rights instead of human rights. The human or personal rights being referred to in this context are rights which are not consistent with the capitalist system. The typical human rights to be protected are rights which seriously prejudice a creditor's ability to realize something on the debt out of admitted assets of a debtor, or an employer's ability to hire and fire whom he chooses according to the terms of the labor contract. More generally, these human rights may be subsumed under the heading of *security* to distinguish them from the *liberties* of the old system which they are very definitely intended to undermine.

Does our Bill of Rights interpose obstacles to securing these modern rights? I think it does. There is nothing in our Bill of Rights which hints of economic democracy. It does not suggest any social responsi-

bilities of property, nor does it contemplate an active campaign by government to secure the economic freedom of the individual.

Do these things constitute a fair basis for reproach? That depends on who is doing the reproaching. What I mean is this: One who criticizes the system of property rights under the impression that the private right system as a whole can be preserved without them is wrong. One who criticizes property while understanding that the defects are indigenous to the whole system of rights may be right. I do not believe there is much chance of preserving any individual rights without maintaining the core of private property. One who wants to preserve individual rights is estopped, as the lawyer says, from cavilling against certain necessary characteristics of the system. He must take the bitter with the sweet. One who is ready to give up a system of rights in favor of a system of governmentally enforced duties has an arguable case although I shall not pursue the argument here. It is much more important that people shall understand the alternatives confronting them than be persuaded which alternative is the better.

What I am concerned to demonstrate now is that the great battle of security versus property can not be resolved in favor of security without sacrificing an independent legal institution. And I think I have said enough about our Bill of Rights to indicate how its fate is tied up with that of an independent legal institution.

From a standpoint of this legal institution nothing could be more incongruous than to say that the regime of private rights might call for an unlimited increase in the functions of government. So-called social legislation creates legal advantages of a type which the legal institution can do nothing to conserve. In other words, they are advantages dependent immediately and at all times upon the largesse of the government of the day. Administrative judges may and do enforce such rights in the course of executing changing policies. But the law as constitutional restraint speaks not at all or else only very feebly through administrative judges. In short, if legal advantages are to be effective as instruments of the traditional judicial process they must become vested advantages and this means that they must be turned into property.

Of course, the question how much social legislation can be absorbed by the existing system is not easy to answer. Certainly, I do not wish to be understood as saying that all social legislation is a bad thing for the legal institution, or that property rights must be maintained at any given degree of potency. We all know that if a powerful drug is administered with discretion it may have positive therapeutic effects. So, in the case of the legal institution. A really good political doctor could probably say how much socialization the patient could

stand. All I pretend to know is that at some point the dose is likely to become poisonous.

The conclusion which I suggest, therefore, is this: It is an error to believe that we can simply substitute personal rights for property rights. The real substitution involved is that of a system of direct and complete government control of conduct in place of a balance between property and government with the courts calling the tune. In a completely socialized economy there is practically nothing for courts (as we understand their function) to do.

Of course it may be said that, under such circumstances, the courts could still apply guarantees of intellectual freedom such as religion and speech, even though there were no other freedom to be maintained against the government of the day. But it seems extremely unlikely that the judicial tradition could subsist with so little business. Quite apart from the fact that one whose day-to-day livelihood is dependent upon bureaucratic disposition can be coerced pretty effectively in all things by that bureaucracy, it is hard to see how a complaint of violation of free speech could be properly approached by the court. How could a body of men completely imbued with the administrative viewpoint through their ordinary work be expected suddenly to assume a sympathetic attitude toward the individual?

We are inclined to forget that the substance of even these personal freedoms was worked out by the courts in a property system. The privileges of the feudal baron are the legitimate antecedents of practically every constitutional right we possess. It is extremely dangerous to kick away the lowly scaffolding of liberty until you are quite sure that you have something to take its place. Perhaps democracy, the doctrine of majority rule, is that something; but it would be a good plan to test it out a little more thoroughly before trusting it to take the weight of civil liberties alone and unaided by a legal institution based on property.

I have already spent too much time on private rights in normal times and I want to pass now briefly to a discussion of that contingency, which subjects constitutional rights to the greatest strain, *i. e.*, war. War and domestic strife are often the occasion for complete and frank abdication of law. A declaration of suspension of constitutional guarantees or of a state of siege is within the province of the executive according to some constitutional systems. And this means not only that the usual remedial processes of courts are unavailable but that no kind of responsibility can ever attach to what was done during the emergency.

Our Bill of Rights is not exposed to any such abrupt shutdown in times of stress. There is no authority in Anglo-American public law literature for anything quite so radical. But this has not saved

us from facing the fact that many peacetime liberties must give way to military necessity at these times. The most liberal and optimistic view of the restrictions upon individual rights permissible in war time is based on a number of propositions which I shall try to organize for systematic presentation although you had best take it with several grains of salt.

In the first place, it is held that the only constitutional guarantee which can be explicitly suspended is the privilege of the writ of *habeas corpus*. Technically, this means that it becomes a sufficient return to the writ to answer that the prisoner is being held under authority of the United States. No judicial inquiry into the cause of detention is then possible and a man may be held prisoner indefinitely without judicial trial. Suspension of the writ does *not* mean, however, that the prisoner can be tried and punished by the military, or other than by the routine procedures of the common law. Nor does it mean that the imprisonment itself is in all respects lawful. The jailer is not liable to contempt proceedings, but he may be liable in damages to his prisoner if a court later decides that the original imprisonment was not justified by the emergency.

There are also certain subsidiary questions about suspension of the writ which the liberal doctrine disposes of as follows: First, it is Congress and not the President who may authorize suspension of the writ. This is clear enough in the opinion of Chief Justice Taney back in 1861. Lincoln, having seditious Baltimore in mind, undertook to authorize the suspension of the writ at any point on the military line between Philadelphia and Washington. The writ was issued on behalf of one Merryman held at Fort McHenry. Taney, being then on Circuit, held the return insufficient and the marshal was instructed to attach the General in command for contempt of court. Of course the judicial process wasn't executed but the opinion of Taney has since been generally accepted as stating the law.

It is also part of liberal doctrine that Congress must authorize suspension of the writ *for the particular occasion* and not as a part of a general investment of power. In other words, no executive officer is supposed to have this authority in virtue of his office alone. But on December 7th last the Governor of Hawaii *did* make use of such authority conferred in the Organic Act of 1900 setting up the government of the territory. Subsequently, a petition for *habeas corpus* was sued out on behalf of an American citizen being held by the military on suspicion of subversive activity. The district judge said that in his opinion the writ ought to issue but that he would not issue it because it would be in clear defiance of the military authority.

There is finally an extreme liberal position on *habeas corpus* to the effect that the courts may pass on the general need for suspension

of the writ by Congress. In other words, the question whether the public safety demands it may become a judicial question when properly presented. This sounds completely unrealistic to me but it is hardly necessary to the liberal position anyhow.

Beyond the suspension of the writ of *habeas corpus* the liberal makes certain other concessions to military necessity. For example, it is readily conceded that the amount of force needed to preserve order depends on the force to be overcome. The military may accordingly operate alongside the regular constabulary in coping with exceptional violence. And the menace involved would justify "shooting first and asking questions afterwards." Enforcement of the law is still, however, under civil auspices. There is no military regime which the ordinary citizen has to take into account. There is simply a pitched battle between law breakers and law enforcers which he would do well to avoid.

Closely connected with this right to meet violence with corresponding violence is the admitted right to take and destroy private property on the scene of invasion or insurrection. This may be done without compensation and without preliminary judicial hearing. It is probable that property may *not* be commandeered for use without compensation, and in any event, the circumstances of the seizure may later be reviewed by the courts to determine whether the emergency really justified the acts.

The liberal position also concedes that military law—the disciplinary law for the armed forces which is meted out by courts martial—may encroach upon civil law in wartime. Under peace time conditions the soldier is subject to two laws, the law that governs all citizens as well as the law of the service. In wartime however, he may be completely freed of any responsibility to a civil court. The military law claims him for its own—and, incidentally, permits him to thumb his nose at the civil authorities. But in all this there is still no direct subjection of the civilian population to the military regime.

We come pretty close to this, however, in the last liberal concession to emergency conditions: There is such a thing as military government in wartime which does substitute completely for the civil authority. The clearest example of this is in the case of occupied enemy territory. Here the military is supreme in all things, and, unless and until a treaty of peace makes that territory American territory, not even Congress will be heard to legislate for it.

There is also such a thing as military government in home territory —friendly territory, but the important thing to emphasize here from the liberal standpoint is that military government does not supersede civil authority as a matter of law. It comes into being only because the area concerned has become the scene of actual battle and the

civil authorities are not performing their functions. If civilians do remain on the scene under such circumstances (which isn't likely) they automatically become subject to the only law which exists, namely the orders of the military commander on the spot.

Such authority over civilians also ceases at the moment the civil authorities can be reestablished. Moreover, complete responsibility before the ordinary law for any acts taken during the emergency is supposed to be then enforceable against the officers who performed them or ordered their performance.

Even in the case of this sort of military government it will therefore be seen that the liberal common law view does not recognize any situation in which military authority ever supersedes civil authority *within the realm* by any sort of *formal declaration* or legal act. A state of martial law is not within the competence of any one to order. Or, to put it more accurately, a declaration of martial law is a gratuitous thing. The executive or a military commander may warn the community in which troops have been assigned to operate, that disorder will be sternly dealt with. But the declaration adds nothing to their power.

Over and against the liberal view I have been talking about there is another view, which, in England at any rate, seems to be the modern view. This view *does* recognize martial law, *i. e.*, a military government for threatened areas in the home territory. Instead of mere suspension of the writ of *habeas corpus*, it is assumed that the courts may be required to honor (a) military orders and (b) the judgments of military courts convened to try and punish civilians for violation of these orders. Furthermore, the authority to authorize such military government is supposed to be that of the chief executive, not Congress. In other words it flows from his inherent powers of office, not from any express powers nor from Congressional delegation.

Of course, those constitutionalists who so recognize martial law do not say that either its original declaration, or the validity of particular acts done in the course of executing it, are free from judicial review. A civil court is supposed to look at the broad outlines of a situation to be sure that there *is* an emergency. And the civil court is afterwards supposed to ask whether there was jurisdiction on the part of the military to execute such and such a sentence.

The difficulty under this theory is that, once the validity of martial law is recognized, the courts will treat these questions as essentially political, *i. e.*, they will not question the judgment of the executive as to the emergency. For this reason it is not to be denied that the validity of martial law is a dangerous proposition. On the other hand, a good many of the presumptions of the liberal view no longer hold good. Today we cannot assume the fixity of battle fronts nor even

their obvious character as battles. Such things as parachute troops, to say nothing of bombing raids, mean that the scene of "battle" is hard to predict. There is, in fact, no battle line which civilian and civil processes can withdraw from. And in addition to this there is the fifth column front—a front which oftentimes materializes from within the country as part of a deliberate campaign of infiltration.

It is pretty obvious that these changes demand a reexamination of the older liberal position. It is also obvious that we are preparing to act on the more conservative theory. Military Commissions to try civilians for breaches of military orders have already been set up in Hawaii. The President has already authorized the military to evacuate civilians from the threatened areas of the Pacific Coast, and they have been evacuated. It is true that this has been carried out under somewhat baffling constitutional auspices. There has been no formal suspension of the writ of *habeas corpus*—far less a declaration of martial law. But the courts have acted on the whole as if the President could declare martial law if he wanted to. And they have consequently indicated an unwillingness to interfere at any point with the program. What we have left to fall back on is the doctrine of responsibility of the military to the civil courts for what they do in the exercise of such wide discretion. Happily there is nothing yet to indicate that the military is disposed to be arbitrary or the courts neglectful.