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The Constitution and the Crisis State

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**THE COLLEGE OF WILLIAM AND MARY
IN VIRGINIA**

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An Address Delivered by

MAX LERNER

at

The College of William and Mary
in Virginia



THIRTEENTH LECTURE UNDER
THE JAMES GOOLD CUTLER TRUST

WILLIAMSBURG, VIRGINIA
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THE CONSTITUTION AND THE CRISIS STATE

By MAX LERNER

President Bryan, Ladies and Gentlemen:

Because American constitutional history has been crisis history the absence in the political and legal literature of any theory of constitutional crisis appears as striking as would the absence of a condemned man at his execution. One might speculate about what economics would be like without a crisis theory, or psychology without a body of material seeking to explain the growth and resolution of psychic tensions. To build such a theory in constitutional study is a perilous task: and where the Warrens, Corwins, Powells, and Boudins have feared to tread I do not propose to rush in. Yet I should like to set down in a tentative fashion some notes on the relation of constitutional crisis to the democratic state of today.

There have been three major types of constitutional crisis in our history. You get one type when there is a sharp discrepancy between the needs of effective government on the one hand and on the other the limits of tolerance imposed by the Supreme Court on the policy (generally economic policy) of the government. You can, if you wish, put it into somewhat Freudian terms: the *id*, or driving part of the governmental psyche, wants desperately to follow certain lines of action; the *superego*, or the censor in the shape of the Supreme Court, says No. If the cleavage between the two is acute enough, you get breakdown.

The second type of crisis, generally linked to the first, comes when there is a frontal attack (or counter-attack) on the judicial power, whether on the part of Congress or the

President, generally (although not necessarily) in order to make it more responsive to the popular consciousness of the time. In this sort of crisis the desire for a realignment of Supreme Court policy clashes with the sense of the need for retaining judicial independence of political change, and with the related sense of the Constitution as a basic protection of our liberties and of the Supreme Court as having a guardian-role toward the Constitution.

The third type comes when the Constitution, in emergencies, is actually stretched beyond its usual bounds, and where the unwonted stretching, necessary though it may be, raises questions of the breakdown of the whole constitutional fabric. This generally occurs in periods of military emergency, as during the Civil War, the World War, and the present one, and relates generally to the expansion of Presidential power.

In oversimplified terms, the first may be called an *economic* constitutional crisis, because its origin and occasion are economic change and economic policy. The second may be called a *judicial* constitutional crisis, because its origin and occasion are the expansion of judicial power and the threat to it. The third may be called a *war* constitutional crisis, because its origin and occasion are the demands that a war makes upon executive leadership, with all the dangers that it involves for civil liberties and political responsibility. All three are facets of the democratic crisis state.

I don't know whether it is subversive to use the term "crisis state" to apply to our democracy. I included it one summer in a catalogue description of a course I was to give at a university, and I received a polite little note saying that one of the university authorities questioned the wisdom of using that phrase. Wisdom or no wisdom, the reality of our crisis is a fact. It is not something that can be exorcised by verbal magic. We have on our hands a crisis democracy—one that must navigate through the shoals and scudding drifts dangerous to a democratic bark, one which seeks to use

every aid on its voyage but must cling to the difficult course of state power without state monopoly of thought or action, one which must contrive ever new strategies of economic control and create ever new administrative mechanisms, one which must somehow survive as a constitutional system while fighting its enemies without and within, one which must become a planned economy without destroying democratic responsibility and a military state without suppressing civil liberties. You can, if you will, refuse to use the term "crisis state." But our ancestors found they could not wipe out the fact of sex by calling a leg a limb.

We must start with the need for effective government. The greatness of the *Federalist* lies not so much, as has been thought, in the exposition of valid principles of political philosophy. It lies rather in the theme of a government effective enough to meet the problems it confronts. Many of the political attitudes of Hamilton, Madison, and Jay have been whittled down by time, and have been converted to the uses of minority rights rather than majority rule. But the *Federalist* remains one of the world's great books because, as in all great literature, its core theme is ever new. And that core theme is the need for adequate government.

Today a new *Federalist* could be written, recounting the changes and chances of our national life, and the new requirements of effective government. It has been remarked that the Supreme Court is an adjourned session of the Constitutional Convention. There is a sense in which this carries an ironic freightage. But the irony is not, as we have tended to suppose, merely in the reference to judicial law-making. There have been ample instances of a proper place for interpretative creativeness by the Court. "We must never forget," John Marshall said, "that it is a *Constitution* we are expounding." The irony lies in the fact that the Court has more often used its great power for sterilizing than for fertilizing the materials of American growth. And the irony lies

also in the fact that the Court has claimed for itself alone the creative potential. The fact is that in every crisis we must govern with the freshness of eye and the largeness of spirit of a Constitutional Convention. There are times when we must act like the Founding Fathers or commit national suicide.

*If we really want to live, we'd better start at once to try;
If we don't, it doesn't matter, but we'd better start to die.*¹

Part of the problem of democratic survival is constitutional, much of it is political and economic. We cannot continue to draw the sharp boundaries between the two realms that we have drawn in the past. The fact is that in a constitutional democracy, whatever the reality of the forces involved in the struggle over direction, the rhetoric that the minority groups will use in opposing changes is always the rhetoric of constitutionalism. There is an interesting comparison to be drawn here between the situation a half-century ago, in the days of the triumph of Mr. Justice Field, and the situation today. The conservative Court majority at that time formed an idea of a rigid economic system that was best off left alone and that could not be violated; it alone was identified with constitutionalism. The enemy they were fighting was "socialism," and anything was socialism that did not fit into their accustomed economic scheme. The constitutional crisis of 1935-1938 was the final term in the proportional sequence of their reasoning. Today a similar group in the country has fetishized a rigid political system. To our amateur constitutional lawyers in Congress and out, that alone is constitutional. The enemy they are fighting is "dictatorship," and anything is dictatorship that does not come within their accustomed view of administrative function, presidential power, and the shaping of foreign policy. Fifty years ago this group stood for inaction in the sphere

¹ W. H. Auden, *Poems*, p. 42, New York, Random House, 1934.

of the government of industry. Today it adds inaction in the fashioning of foreign policy.

The issue is still the adaptability of our constitutional framework, its adequacy to meet the demands laid upon it. There are, however, differences between the two situations. Except in an indirect sense, the struggle today is not one over economic organization, although it is likely to become so when the question of the organization of a war economy reaches—as it may reach soon—a constitutional phase. Thus far the struggle is mainly over the limits of political action and the lines of the distribution of power. Another difference is that the force obstructing effective government is no longer the Supreme Court, which with its present personnel and in its current doctrinal phase is reasonably ready to give the green light to expansive programs for domestic and foreign policy. The obstructive force has come to be located mainly in Congress, and in areas of the press and particular interest groups.

But if the accidental factors have changed, the essential problem of effective government remains. And the aspects of constitutional crisis in which this problem has at various times been clothed are worth reviewing.

Some day the full and rounded story of the New Deal constitutional crisis may be written. To say that, may of course, be only a pious hope. For the full and rounded story even of the Jefferson-Marshall constitutional crisis has not been written, despite the zeal of many of our historians. We have had accounts of Jefferson's attack on the Court, and accounts of the Court's attack on Jefferson and states' rights. But we have had no detailed account of each attack in relation to the other, of both in relation to the economic factors of a developing industrialism, the political factors of a new federal structure, and the psychological factors of the clash between old and new symbols; and finally of all these factors in the context of an international climate of opinion

that had been created by the world's revolutions of the eighteenth century.

So too with the New Deal constitutional crisis. We have had in Alsop and Catledge's *The 168 Days*, an account of the legislative battle in a popular vein written from the bias of critics of President Roosevelt's Court proposal. And former Attorney General (now Mr. Justice) Jackson has given us, in his *Struggle for Judicial Supremacy*, a survey of the Court's behavior before and after the legislative fight. Justice Jackson's book reads a little like the testimonial of a man who is sure that the medicine made all the difference in the world between the feeling before and the feeling after, but is a little ashamed—being a doctor himself—of being beholden to what may have been, after all, a somewhat slickly concocted patent remedy. But we have not yet had, and it may be a long time before we get, a history of the crisis which sees it steadily and sees it whole—which relates it to economic changes, to the class-structure of our society, to the struggle for political power, to the world crisis, to the psychological roots of fear and insecurity.

What I set down here is no history: merely a sequence of reflections on the course and the meaning of a particular constitutional crisis. Before we can understand the New Deal crisis, we must understand that it followed on two developments. One was a revolutionary situation in the world at large, which produced and was produced by economic dislocation, and which put an enormous strain on our economic and political invention and our national will. The second was a felt need for decisive action in the economic realm, for a sort of legislative *Blitzkrieg*, and the development of administrative strategies so considerable that the past decade may well go down in American history as most significantly that of our administrative revolution.

It was some dim knowledge of the revolutionary situation in the world at large, and of its bearing on American history, which impelled the Administration to make its rela-

tively vigorous attempt to seek a solution of the problem of production and employment by new economic strategies and administrative controls. It was the unwillingness of the Supreme Court majority to recognize the nature of world economics that led to their following the one tradition of seeing the Constitution as an inflexible verbal testament, rather than the other tradition of seeing it as a tool for effective government.² Out of this clash between the action of the Administration and the opposition of the Court, an irresistible force and an immovable object, came the constitutional crisis.

Or perhaps I should put it somewhat differently. We start with economic breakdown. The Administration makes a decisive attack on the problem in terms somewhat novel for America, economically and administratively. The Court answers not by an attack on the problem—insists, in fact, that it is quite unconcerned with that—but by an attack on the attackers. This course was taken, as is fairly clear now, not because of the inherent inelasticity of the Constitution, or the inevitability of the particular tradition of constitutional interpretation that was chosen, but primarily because of the inflexibility of the majority's social philosophy. The struggle was joined between effective government and judicial supremacy.

And yet again, in stating it thus, the truth is likely to prove elusive. It would be a mistake to view the Supreme Court's role wholly in terms of inertia. While the social philosophy of the majority was a quietist one, their judicial philosophy was decidedly activist. Their attack on the New Deal program of social legislation was vigorous in the extreme. (It is worth nothing, in contrast, that while the economic and social philosophy of the current Court majority is a dynamic one, its judicial philosophy is quietist—that of judicial tolerance of legislative action.) If we premise some sort of equilibrium in the attitude of the people, between

² For the terms used here I am indebted to B. H. Levy, *Our Constitution: Tool or Testament?* New York, Alfred A. Knopf, 1941.

their attraction to the idea of necessary legislative change and their clinging to the traditions of necessary judicial guardianship of individual rights, we may say that the violence of the Court's attack threw it off its keel, so far as the delicate balance of public opinion was concerned. The President, reinforced in public opinion by his election for a second term, sensed this and counter-attacked the Court with his proposal for reorganization. But the President too attacked more violently than he could afford to. He too was thrown off his keel. And he left himself vulnerable to an onslaught that, using the Court plan as the immediate target, went far beyond that target. The varied forces that had been generating opposition, for one reason or another, to the social philosophy or the political tactic of the Administration were polarized around this issue. Especially was this true of many of the liberals, who, while supporting the New Deal, had unquiet doubts about its seemingly erratic course and the crudity of its energies: they now had a chance to release those doubts of a general character under the guise of opposition to a specific break with tradition. And in the course of the turmoil, over the President's plan, his opponents—liberals, conservatives, and reactionaries alike—were able to reach deep to the basic fears of the people. For what finally defeated the President's plan was the sense of fear that we were breaking loose from our moorings in the Constitution and setting sail for shores unknown. The result is history

The course that the constitutional crisis ran is now fairly clear, and has been given some precision in Mr. Jackson's narrative. There were four phases. The first, in 1933 and 1934, was when the Court "hesitated between two worlds," upholding some of the state reform legislation but giving no clear indication of what it would do with the national program. The second was the "nullification" period in 1935 and 1936, in which the Court used its axe freely on national legislation. The third was the President's reorganization plan, the struggle over it, and its legislative defeat. And the

fourth was the new line of decisions by the Court, indicating a changed orientation, and eventually the formation of a new majority.

Certain questions arise. Could the crisis have been avoided? The answer must be clearly in the affirmative, unless we premise on inevitable and determinist relationship between capitalist economic crisis and a quietist social philosophy on the part of the Court majority which the later history of the Court does not bear out. Need the crisis have been as acute as it was? This is more difficult of answer. One thing is clear: once the Court acted with the extremism it did, and once the President's dramatic plan was announced, compromise became extremely difficult. Many who had been disquieted by the Court's decisions found it necessary now to suppress their doubts about the Court in their zeal for the defense of judicial independence. And many who were disquieted about the particular plan of the President found it necessary to suppress their doubts in their zeal for some sort of judicial reform. Once the battle was joined, the alternatives for both groups became absolute. For one group it became a question of either complete judicial supremacy or judicial subordination. For the other it became a question of either the President's plan or no judicial reform at all. In the clash of power politics the desirable direction was transformed into an ideological absolute which had either to be defeated as a whole or accepted as a whole. Everything intermediate was squeezed out.

I turn now to a crucial question. How was the constitutional crisis resolved? In answering it we must seek a different answer from what it would be were our question, How was the political struggle over the Court reorganization bill resolved, and who was the victor in the legislative battle? For the resolution of a constitutional crisis involves not the determination of victor and vanquished, but the clearing of the obstacles that stand in the way of effective government. Thus there was a shift in judicial philosophy on the Court

from one militantly opposed to the Administration to one tolerant of its efforts to resume its attack on the basic economic problems. And that change, as Mr. Jackson tells us, took place even before the active changes in the personnel of the Court through resignation and replacement. The change was made partly as a tactical matter, to help persuade Congress to vote against the Court bill.

Yet, it would be wrong to say, as Jackson does, that therefore the ultimate change in the Court's attitude was not due to a change in personnel. For without the actual changes in personnel that followed, the balance of power would have remained in the hands of Justice Hughes and Roberts, and the victory for the New Deal, represented by the Court's shift in orientation, could not have been consolidated. The first period of uncertainty and hesitation that opened the constitutional crisis might have been repeated. And it is significant that the recent Supreme Court policy indicates that what change there has been in the judicial philosophy of Justices Hughes and Roberts has not been so essential as to take them out of the category of frequent dissenters from the current Court majority on economic cases.

Thus the crisis was resolved in two stages: first, when the threat of Court reorganization resulted temporarily in a shift of judicial attitude in the balance-of-power group; and later, when the way was cleared for changes in the personnel of the Court. As a result of both there was a return to the more flexible of the Supreme Court traditions of constitutional interpretation.

There are several other observations that may be worth making, and I am the less disinclined to make them because I have not seen adequate emphasis on them in the literature. They have to do with the resolution of the crisis. But their emphasis is not with the legislative struggle or the court personnel or the doctrine or philosophy of the judges: rather with popular consciousness and class tensions in our society.

If the Court bill had been passed and we had in that way (through the forced substitution or addition of judges) achieved our present Court liberalism, it would have been difficult for the country to accept that liberalism with the lack of social tension that now characterizes our attitude toward the Court. The Big Industry groups would have felt it to be an unparalleled exercise of arbitrary power. Even the large majority mass would have found it difficult to accept the results, however these results might have comported with the effective government they wanted. For even the majority fears to get the right things in the wrong way. And enough of it had by that time become convinced that the Court plan was the wrong way.

As it happened, the Big Industry groups were stopped from the sort of vociferous and active resistance which they would have offered to the decisions of the new Court if, in their minds, judicial independence had been destroyed through the "packing" of the Court. So, in a deep sense, it was well that while the Administration got the brunt of popular attention in 1933-1935, and the Court's decisions got it in 1935, it was what happened between Congress and the President that got the brunt of attention in the 1938 days. The (at least outward) victory of Congress deflected attention from the actual resolution of the constitutional crisis through the play of power politics upon doctrine. The popular mind, which had been stirred to the depths by the events of the Court fight, and in which allegiance to effective government had been aligned against allegiance to judicial independence, was now allowed to go back to its traditional channels. The people could have their cake and eat it too. As for Big Industry, it could not eat its cake, but it also could scarcely protest: for it was *its* cake, was it not? It had won the fight against the Court plan. Even Mr. Willkie, in the campaign for his nomination, was not able, through his well known *Saturday Evening Post* article on the new Court orientation, to stir up

resentment against a too-liberal Court that had after all *not* been "packed."

Thus what might have meant a more or less serious impairment of the prestige of the Constitution and Court has been averted. And this has happened largely because the settlement was accomplished within the constitution rather than outside it. What a theme here for a Thurman Arnold on the way in which everything turns on the decorous observance of symbols—were not Mr. Arnold himself far too busily engaged these days in the decorous observance of symbols to write about them.

But perhaps because of the very fact of the observance of symbols, the central problem of judicial supremacy has been left unaffected. For if and when we again get a court which believes that social policy must be shaped by a process of litigation we shall run into another major judicial constitutional crisis.

I have spoken thus far of an episode in recent American history which presented an example of an interlocked constitutional crisis, which was in its first great phase economic and its second judicial. It is moreover an instance of a completed crisis cycle—one that has run its course, although it has left a residue of effects.

I turn now to a different type of crisis—what I have termed the war constitutional crisis. The democratic crisis state, after weathering pretty well its first (domestic) storm, is now facing its second (international) storm. It was inevitable, as we entered into the phase of severe international strain, that constitutional difficulties should arise. The need for extraordinary pace and decisiveness in action necessarily placed strains on the constitutional limits of the state. But it was also to be expected that those strains would apply not to the relations between the Administration and the Court, but between the Presidency and Congress, and that they would be fought out not in Court decisions but in Congressional debates and the channels of opinion formation.

That is happening now. I do not consider that we are at present in a state of serious constitutional crisis. I do think that we are in a state of constitutional expansion which has crisis elements and potentials. I shall speak later of the broadening by the present Court of the limits of tolerance for social legislation both of the federal government and the states. Yet while some of our constitutional troops are thus employed in consolidating their victory, the real spearhead of constitutional expansion must be sought elsewhere—in the Presidency in wartime.

You will undoubtedly have noted the important new Presidency books that have been published this year by Laski, Corwin, Herring.³ This concentration on the Presidency represents a sound instinct, born of a dual outlook: first, a sense of the need for great leadership in America's hour of decision; and second, a sense of the difficulties that will be (and have already been) encountered in the reaching out for Presidential effectiveness.

I shall not present an analysis of the constitutional aspects of the Presidency. That has already been done with considerable sharpness and in great detail by Corwin. Again I want only to set down some reflections on aspects of our constitutional system in wartime.

One of the difficult but exciting things about the democratic crisis state is that it must carry on under democratic forms in a world that is abandoning them. And this paradox becomes particularly acute in wartime. Although I shall not discuss our foreign policy from the angle of its merits, it is important to note that we are today committed to full aid to the anti-Nazi nations. What does that mean in governmental terms? It means we must fulfill the conditions of modern warfare to survive, just as in the domestic crisis we

³ Harold J. Laski, *The American Presidency*, New York, Harper, 1940; E. S. Corwin, *The President: Office and Powers*, New York University Press, 1940; E. P. Herring, *Presidential Leadership*, New York, Farrar & Rinehart, 1940.

had to fulfill the conditions of modern economic and administrative strategy to survive. War today is of a dual nature: it is a war of factories and a war of morale. To organize our armament power to aid Britain requires the delegation of vast powers to the Presidency. To mobilize our factory power will raise further questions of war-industries control. To deal with morale will raise problems of civil liberties. But the exacting thing about our situation is that everything we do in our defense effort is geared to the pace and scope of the efforts of the fascist powers. In effect—and here is the paradox—although not yet at war, we are having to operate as if we were fighting a war. Yet, since we have not declared it, our officials do not have either the legal or the psychological powers they would otherwise have.

The problem here, as in the crisis of 1935-1938, is again one of the dominant need of governmental effectiveness if we are to survive, as against an inflexibility of governmental doctrine and machinery. But the differences are important. The struggle is not primarily in the economic but in the political realm. The difficulties do not center in the Supreme Court but in the relation of the President to Congress and sections of public opinion. The ideological minus-symbols that are in use are not those of (economic) socialism but of (political) dictatorship; and the opposite plus-symbols are not judicial authority but civil liberties and political survival.

The institution of the American Presidency is confronting the severest test of its whole history. For no matter what happens in world affairs, the path ahead of us is likely for some time to be as difficult and stumbling as any we have taken. And the Presidency will have to bear the brunt of the burden. For while Congress will have its path cut out to subject the acts of the President and the administrative and military arms of the government to the pitiless test of discussion, and the Court will have to draw a perilous line between public need and private wrong, the great shaping and forma-

tive work must be the President's. That has always been true in times of crisis in America, but it will be particularly true in a war crisis of the world era of totalitarianism.

Have we a conception of the Presidency adequate to this need? Here too, as in the case of the scope of the judicial power, there are several alternative traditions we can draw upon. One starts with Jefferson but has generally been associated with the weaker Presidents and the laissez faire executive doctrines: that the President dots the i's and crosses the t's for Congress, and acts as a sort of *tabula rasa* on which "the laws of economics" are written. The other starts with Jackson and Lincoln and includes Cleveland, Theodore Roosevelt, Wilson, and Franklin Roosevelt. I should like to submit that a conception of Presidential leadership adequate to our needs would have to be based on a conception of a militant and affirmative democracy. It would draw upon the second list of names and examples I have mentioned, but it would set them in the international context of today.

What is that international context? It may seem a far cry from a discussion of world forces to the American Constitution: but the latter will not be either workable or intelligible from now on except in that context. It is a context of changing technologies of diplomacy and war. It is a context in which national isolation or neutrality are no longer possible. It is a context of the breakup of the international order we have known. It is a context in which only the strong and affirmative state can survive.

In the light of this the Presidency in the democratic crisis state is likely to extend its power in four areas—first, the military forces, over which the President is already commander-in-chief. Second, the organization of the war industrial structure. Third, the further extension and co-ordination of the administrative agencies. Fourth, the shaping of foreign policy.

Of these, the President's control of the military forces is the least likely to be called in question. Yet this is exactly

the point where Lincoln exceeded his powers by taking upon himself in the early stages, without Congress, the responsibility of getting the country ready to fight a civil war. That contingency is not likely to arise again unless a Nazi victory over England should align against each other the groups that want to bring our institutions into the orbit of Hitler and the groups that would fight such an eventuality to the bitter end. And yet the President, because of the anomaly of our being at war yet not at war, is today having friction with Congress in regard to the disposition of the armed forces. The difference is that what the President as Commander-in-chief could have done under a state of war now has to be done more laboriously as part of the shaping of foreign policy. Yet even here recent events have shown the President has broad enough range in negotiations to commit the nation step by step to a definite foreign policy.

In two of the other three areas there is likely to be a good deal less friction before a declaration of war and more after it. In the area of industrial organization, while the crucial problems will not immediately be constitutional, we have learned that questions of property have a way of converting themselves into questions of constitutional power. In the area of administrative control enough has been done in an experimental way during the New Deal (for example, the recent Acheson report) to attenuate the potential difficulties during the war years. But it is in the area of the shaping of foreign policy, that the great difficulties have already cropped up and will continue to do so.

There are already many who fear this expansion of power as dictatorship, and others who welcome it as a departure from the cumbersomeness of a leaderless democracy. But surely we need not accept either position. Our task is neither to whittle away the necessary power nor to submit blindly to arbitrary power. Rather is it to give the President the powers he needs, but encircle them with institutional safeguards, and build into them, in the fashioning and execution

of policy, those who represent various groups with a real stake in the fight against totalitarianism.

This will still leave knotty problems—of civil liberties, of labor's claim, of the competition of political ideas and political policies. Once more the Supreme Court will have to wrestle with the "clear and present danger" doctrine, in its application to untried situations.

I say, there will be knotty problems, for several basic reasons. For first, a war or defense emergency brings closer to each other the political and economic structures of a nation. The imperatives of production become political imperatives. The scope of labor choice and bargaining and organization become questions fraught with immense political importance. At what point labor is being asked, like any other group, to serve the nation's interest and at what point it is being victimized, under the guise of the national interest, by dollar-a-year men in the government and by army-men who sometimes have no sympathy for labor—those too may be tough and intricate questions. The safest general course is again to apply the rule of participation—to ask whether labor has had a hand in administering the machinery to which it is being subjected. Second, a war or defense emergency whittles away the line between utterance and action, between private right and public responsibility, between conscience and constraint. And third, a war or defense emergency brings various local communities together in common and more or less standardized sentiments; and while it infects them with a central tension, it has rarely the machinery for keeping their potential vigilantism in check. It is in these local areas, I think, rather than in the action of the national government, that most of the civil liberties cases will arise. And here too the only possible defense against them is the persistent attempt to spread a sense of the rule of law and the fabric of equality.

I have said above that these will be knotty problems for the Supreme Court to solve. I have relatively few fears about

the quality of their solution. It is not only that I consider our present Court a great and technically proficient one. It is also that through all the crises of the past decade—economic, political, constitutional, international—our democracy has retained the essential fabric of legality, the patient education of opinion by the government and the responsiveness of the government to opinion.

This deserves a word. For we have allowed our thinking about democracy and dictatorship to become thin, smug, and superficial. We judge them in quantitative terms, as if we were grocers weighing our potatoes. Dictatorship means great power, we say; democracy, little power. Dictatorship means concentrated power, democracy, safely dispersed and divided power. But to say and think that is to fall victim to the great tragic fallacy of our age. For it is not true that to survive a democracy must be weak. In any form of government, power must be adequate to the tasks placed on it. And in any form of government, power must be concentrated as far as may be necessary for survival.

The crux of the problem must be sought in legal, political, and economic responsiveness. The Nazi war-lords must by their very nature be lawless, because if they once admitted a system of law to which their power would be subject, by which it would be measured and its arbitrariness checked, their whole house of cards might fall. The only law they recognize is the law they declare, just as the only international order they recognize is the order they can enclose within their iron ring of coercion and terror. And what goes for legal responsiveness goes also for political and economic. So long as we can keep our leaders in office or turn them out at will, so long as jobs are not dependent on state or party, so long as we can keep open the channels for the competition of ideas, the democratic crisis state can be at once decisive and constitutional, strong without sacrificing the liberties of its people.