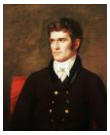

The Calhoun Review

Issue No. 1, Volume I, 2016 **The Calhoun Institute**

In this inaugural issue of *The Calhoun Review* we examine the topic of secession, particularly as it applies to contemporary political discussions in the US and internationally. In the standard narrative of US history, particularly as told over the last 30-40 years, Calhoun was the godfather of secession which lead to a war and was proven a flawed and illegitimate concept.

If we accept the common story that Calhoun was the godfather of secession, then his legacy is powerful indeed as numerous successful acts of secession occurred either in his lifetime or after and movements toward devolution continue around the world today. Texas seceded from Mexico, Finland from the USSR, the Balkan states from the USSR followed by several other SSR states, and Sweden from Norway, etc. Currently there are several secessionist movements, varying in popular support, active across the globe. Of course as powerful as the philosophy of Calhoun may be, his words are not the genesis of the entire concept; self-determination and self-rule might be traced as far back at 1648 with the idea that sovereignty belonged to the people, not the king (government). Calhoun merely articulated the concept of a right relation to the governed to their government within a representative republic in a Burkean style in his time and place. The fact that others since and still come to many of the same conclusions serves to point out that perhaps there was more validity to his words than what is taught currently in public schools and universities.

In this issue -

Rivka Weill in “Holey Union” points out the disparity between the interpretation of constitutional law and the implementation of said law. In the United States the implementation of law, as applied through legal realist jurisprudence and case law, have made the actual meaning of the Constitution incomprehensible to the ordinary, educated citizen; one cannot simply read the words, as plainly written, and understand what that document currently means.

Christine Bell in “International Law, the Scottish Independence Debate and Political Settlement in the UK”, discusses current interpretation of international law in support of and opposition to secession, specifically as applicable to Scotland.

Igor Calzada in “What Do We Talk About When We Talk About Political Innovation in the Age of Devolution?”, discusses devolution, specifically in Europe and more specifically in terms of city-states, in what he calls the “age of devolution”.

Edward Stiglitz in “Folk Theories, Dynamic Pluralism, and Democratic Values”, examines the relationship between electoral accountability and innovations relating to one such offensive institution -- the legislative veto -- in the context of the American states between 1950-2010.

Kalevi Holsti in *Introduction on the ‘State of the State’*, discusses the long list of civil wars, wars of secession, genocides, ethnic and religious armed strife, and politicides since 1945 is accounted for primarily by the relations between governments and the socially complex societies over which they rule.

Steven Wheatley in “Recognition and secessionist in the complex environment of world politics” questions whether the incoherence in the doctrine and practice on external self-determination is the result of international lawyers using the wrong conceptual tools.

Aziz Sheikhani in “Secession’s theory (Remedial Right Only Theories)” argues that to ease conflicts and nationalist tensions in the world, it should be taken that people have the right to have their own state.

Finally, James A. Bayard, a congressman from Delaware, provides explicit examples of what Weill describes in his argument.

Barry Lee Clark

Holey Union: The Constitutional Paradox of Secession

Rivka Weill

Radzyner School of Law - Interdisciplinary Center (IDC)

November 27, 2014

Abstract:

There are secessionist movements in all parts of the world, encompassing both democratic and non-democratic countries. It is typically thought that this important phenomenon is regulated by international law alone. But, this article argues that when looking anew at constitutional law through the lens of secession, democracies’ weak spots are revealed. While political actors and scholars traditionally believe that bans on political parties ('militant democracy') and constitutional eternity clauses (`unconstitutional constitutional amendment`) are used and justified to protect democratic values alone, they are in fact also used to fight against secession. Democracies have been able to conceal their fight against secessionists, by creating a large gap between “the law on the books” and “the law as practiced.” This raises paradoxes so extreme, the democracies begin to appear to be using the tools of authoritarian regimes.

In addition to exposing the facts on the grounds, the article also makes two normative claims: First, it argues that secession reveals the ways in which both doctrines—the ban and eternity clauses—are inextricably intertwined. This assertion is general and goes beyond the secession context. Second, the article argues that secession is helpful in revealing the intricate relationship between constitution-making and constitution-amending powers. Even those who hold that the power to amend the Constitution should be treated as equal to the constitution-making power may find that an exception is needed in the secession context. Secession may be regarded as an annihilation of the Constitution because it redefines the sovereign bodies. As such, secession necessitates extra-constitutional mechanisms. Contrary to the prevailing understanding that it is sufficient to garner the support of the seceding population, secession may require the independent deliberate consent of two new peoples—the seceding as well as the remaining population.

Studying the delicate dance of constitutional democracies and secessionist movements not only enables a better understanding of constitutional law but may also shed new scholarly light on assumptions that Constitutions are generally silent about secession and may even implicitly allow it.

Number of Pages in PDF File: 34

Weill, Rivka, Holey Union: The Constitutional Paradox of Secession (November 27, 2014). Available at SSRN:http://ssrn.com/abstract=2708859 or http://dx.doi.org/10.2139/ssrn.2708859

International Law, the Scottish Independence Debate and Political Settlement in the UK

Christine Bell

University of Edinburgh - School of Law

January 24, 2016

A. McHarg, T. Mullen, A. Page, and N. Walker (eds) The Scottish Independence Referendum: Constitutional and Political Implications, Oxford University Press, 2016, Forthcoming
Edinburgh School of Law Research Paper No 2016/02

Abstract:

This chapter examines the role that international law played in the Scottish independence debates. I argue that international law - perhaps surprisingly - played a central role. International law was used by both 'yes' and 'no' campaigns in strategically instrumental ways, to bolster their political claims as to the consequences of independence. The unusual centrality of international law to British constitutional debate signals just how important international law has become with respect to processes of political settlement globally. I suggest that the creation of an international law of polity formation is itself a fast-moving international legal development, illustrating a dynamic whereby the attempt to regulate polity formation by reference to international legal argument carries an extraordinary capacity to re-shape international law. I suggest that this was the case with the Scottish independence referendum.

Number of Pages in PDF File: 26

Bell, Christine, International Law, the Scottish Independence Debate and Political Settlement in the UK (January 24, 2016). A. McHarg, T. Mullen, A. Page, and N. Walker (eds) The Scottish Independence Referendum: Constitutional and Political Implications, Oxford University Press, 2016, Forthcoming; Edinburgh School of Law Research Paper No 2016/02. Available at SSRN: http://ssrn.com/abstract=2721286

What Do We Talk About When We Talk About Political Innovation in the Age of Devolution? Comparing 'Smartness' in Scotland, Catalonia and the Basque Country

Igor Calzada

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June 1, 2015

Abstract:

Nation-states are facing constant re-scaling and devolution demands from the strongest city-regional economies, whereas welfare policies are weakening due to the austerity policy implemented by national governments. However, nation-states, as international actors, depict difficulties to cope with this uncertain equilibrium between self-determination demands from the nationalists and a clear contestation to the political economic severe austerity policy. It is in this context where pervasive but disruptive political innovations could be taking place in some city-regional small nations, even beyond their nation-states.

Generally speaking, the nature of the nation-states has been understood so far as a static and presumably homogeneous entity, which requires an updated 'smart' comprehensive agenda of power relationships, shared sovereignty and policy implementation between nation-states and city-regional small nations. Such 'smartness' now involves being able to proceed with devolution between the two counterparts that play in the international arena. As a general trend, devolution is being increasingly included in the EU multilevel policy agenda, or at least, in the political debate of many member states, such as the UK, Spain, and Germany, among others. Nevertheless, there are remarkable differences not only in the way nation-states assume this current geopolitical trend, but also the strategies of city-regions aiming for more autonomy, devolution and independence. These are the cases of the UK and Spain, and also Scotland, Catalonia and the Basque Country.

This paper aims to explore two aspects: 1) the notion of what we mean when we talk about the Age of Devolution in the European context and 2) the evidence-based facts of the Political Innovation in selected cases of smart city-regional governance.

Therefore, this paper will present a comparative analysis of the Political Innovation 'smartness' in the three city-regional small nations of Scotland, Catalonia and the Basque Country.

Calzada, Igor, What Do We Talk About When We Talk About Political Innovation in the Age of Devolution? Comparing 'Smartness' in Scotland, Catalonia and the Basque Country (June 1, 2015). Available at SSRN:http://ssrn.com/abstract=2612860

Edward Stiglitz

Cornell University - Law School

February 25, 2016

Abstract:

Constitutional values often motivate separation of powers doctrine and doctrines in other areas of law. A jurist favors one doctrinal position over another because, under some implicit positive theory, it promotes a consequential value: for example, abstract liberty, rule of law, or democratic values. Yet this jurisprudential posture falters if theory is incomplete or inapt. As an object lesson into the perils of incomplete functionalism, I consider the relationship between the so-called unitary executive and democratic values. I first formalize a theoretical account of the unitary executive along the lines of the one that animates judicial decisions; I then show that, viewed in a more complete setting, judicial decisions seemingly promoting a unitary executive may engender pluralism and undermine the value of accountability. I empirically examine the relationship between electoral accountability and innovations relating to one such offensive institution -- the legislative veto -- in the context of the American states between 1950-2010. I find that the offending institution of the legislative veto is, if anything, associated with stronger, not weaker, executive accountability for administrative actions, questioning the soundness of democratic values as a motivation for pursuing a unitary executive. I conclude with thoughts on the role of courts in managing functionalist constitutional values.

Number of Pages in PDF File: 47

Stiglitz, Edward, Folk Theories, Dynamic Pluralism, and Democratic Values (February 25, 2016). Available at SSRN: http://ssrn.com/abstract=2737997

Introduction on the ‘State of the State’

Authors Kalevi Holsti

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Abstract

My book *The State, War, and the State of War* concluded that the main source of armed conflict in the contemporary international system in not in the relations between states, but problems within states. The long list of civil wars, wars of secession, genocides, ethnic and religious armed strife, and politicides since 1945 is accounted for primarily by the relations between governments and the socially complex societies over which they rule. This section of the book explores these critical relationships and locates some of the sources of state failure.

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Holsti, Kalevi. "Introduction on the 'State of the State'." In *Kalevi Holsti: Major Texts on War, the State, Peace, and International Order*, pp. 89-90. Springer International Publishing, 2016.
http://link.springer.com/chapter/10.1007/978-3-319-28818-5_6

Recognition and secessionist in the complex environment of world politics

Steven Wheatley

Abstract: The focus of this paper is the external aspect of the right: the right to Statehood and secession. The paper questions whether the incoherence in the doctrine and practice on external self-determination is the result of international lawyers using the wrong conceptual tools. In particular, it asks whether a variant of systems theory known as 'complexity theory' might allow for the development of a more effective way of conceptualizing the emergence of States in world society.

Wheatley, Steven Michael. "Recognition and secession in the complex environment of world politics." (2015): 135-144. http://eprints.lancs.ac.uk/78211/2/Fribourg_Paper_FIN_2014_09_29.pdf

Secession's theory (Remedial Right Only Theories)

Aziz Sheikhani University of Tampere, Finland

Journal of Advances in Political Science Vol. 2. No. 3.

Abstract This article investigates the right of people to secede from their rulers. The ending of the Cold War gave more chances for the emergence of new states. The society of states does not provide the opportunity for the creation of a new state without specific condition. In other words, withdrawing a territory and its population from an existing state is not a simple issue. However, self-determination and the right to secede cannot be ignored for a long time. In addition, both of them are the normative issues at the heart of nationalism. The fact is that some people want to become an independent country. What kind of people can be seceded from their host states, and how can it be done? Allen Buchanan launched a debate on the criteria and morality of secession and made it more visible. According to Buchanan there are Primary Right Theories and Remedial Right Only Theories. According to the second type of mentioned rights, the right to secede is necessary to remedy an injustice such as the violation of people, genocide, occupation of territory etc. In the light of the Primary Right Theories certain groups can have a (general) right to secede in the absence of any injustice. The Kurdish people have a right to secession within the limits of Remedial Right Only theory. However, there is a need to distinguish between nations and other groups because the international system does not tolerate that all kind of groups demand to secede from their states. In any case, to ease conflicts and nationalist tensions in the world, it should be taken that people have the right to have their own state.

Sheikhani, Aziz. "Secession's theory (Remedial Right Only Theories)."*Journal of Advances in Political Science* 2, no. 3. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.671.2583&rep=rep1&type=pdf

Executive Usurpation

Mr. President, during the special session of the Senate in March last, when seven States had withdrawn, by the action of their people, from the Federal Union, disclaimed all allegiance to the Government, and organized a separate common government, I took occasion, before the public mind had become excited, to express fully my views of the structure of our Government, and the unhappy condition of the country; and also to indicate the course of action which I believed most conducive to our happiness and prosperity in the future. I then thought, after the most anxious and gravest consideration, and actuated by no earthly motive but the good of my country, that the only alternative which remained was an assent to the revolution by which the Gulf States had left us, or civil war. That though the secession of a State was an act of revolution, it was an event not provided for by the Constitution, and could only be met by war or peace. That the power to coerce a State by the General Government by arms, having been expressly refused by the framers of the Constitution, we had no other resource left but war against them for a breach of the compact upon which the Federal Government is founded, or peace and the recognition of the common government which they had organized.

I did not doubt that the right of judgment as to peace or war-rested in Congress; but I was unable to see how any plea of executing the laws or retaking the public property justified the use of the. military power as a primary power, for that purpose, within the intent of the Constitution and the powers conferred by it on Congress or the Executive. Believing, also, that the withdrawal of those States did not subvert our Government, but left us a great and powerful nation, I thought a peaceful separation preferable to what I consider the greatest curse which the providence of God can inflict upon a nation—civil war. I also indulged the hope, and now believe that hope would have been realized, that by conciliation those States might be restored to the Union, and expressed the opinion that an attempt at coercion would drive other States out of the confederacy; and in this, at least, subsequent events have shown that I was not in error. The Executive, as I deem most unfortunately, adopted the policy of coercion, and collision followed. An appeal by proclamation was made to the people for volunteers, which, involved of necessity coercion by arms and war, and four more States withdrew from the Union, and joined the Confederate States. The convention of Virginia had shown by repeated votes that a majority exceeding seventy existed in that body deeply attached to the Union, anxious to retain the State in the Union, and to settle the causes of difficulty which had arisen among us. On the President's proclamation, that convention seceded from the Union, and by an overwhelming majority of the people of Virginia their action has been ratified. Tennessee, which a brief time before had refused by thirty thousand majority to call a contention, immediately, by the action of her Legislature, left the Union, and her people ratified the act by sixty thousand majority. North Carolina withdrew with entire unanimity, though she had voted down a convention a short time before; and Arkansas,, which had from her love to the Union postponed any consideration of the

question of secession till the fall; in order that so eventful a matter should be fully discussed before her people, and its effects gravely weighed before determination, also left us, as consequent upon the proclamation.

Much as I deplored the loss of the Gulf States, I was then willing, to use the language of Burke, in 1777, in relation to our„own Revolution:

"To part with them as a limb, but as a limb to save the body; and I would have parted with more, if more had been necessary; anything rather than a fruitless, hopeless, unnatural civil war."

Sir, I am as deeply attached to the Union as any man who claims a seat in this body. I would have saved it in its integrity by conciliation and compromise; and it is my consolation that, in my past life, no word or act of mine ever encouraged a sectional feeling among my countrymen. Nay, more, if any sacrifice on my part, involving property or even life itself, could now end this unhappy struggle, and restore and preserve the Union, with the fraternal feeling and national sentiment in which it was founded by our forefathers, that sacrifice would be readily and cheerfully made. I could leave no richer or prouder inheritance to my children than the reflection that their father, had sacrificed himself for the prosperity and welfare of his country.

But the passions of the nation have become excited, and the cry now is, "unconditional submission and the crushing out of rebellion," without the first step having been taken for the purpose, of conciliation. States are to be reduced to provinces, and the military power to become the dominant power in a representative republic. Even a servile insurrection is threatened, should it prove necessary, for the purpose of conquest and subjugation.

"Unconditional submission, and the crushing out of rebellion" was the language of the Crown and ministers of Great Britain in the struggle in which our ancestors achieved our liberties. No terms should be offered to armed rebels; the sword and the bayonet were the only admissible arguments. The Government was to be strengthened, and the Colonies to be subdued.
The *habeas corpus* act was suspended in America and on the high seas, and those who sailed under letters of marque issued by the United States Congress were denounced as pirates. Let me read the answer to this course of policy of Mr. Burke, which imbodies the general sentiment of the greatest statesmen and truest patriots of England in that day. I read from his letter to the sheriffs of Bristol, in April, 1777, less than a year after our independence had been declared; and for its general truths, as applicable to the present struggle, the whole letter might be read with profit by every well-wisher of his country:

"It is said that, being at war with the colonies, whatever our sentiments might have been before, ail ties between us are now dissolved; and all the policy we have left is to strengthen the hands of the Government to reduce them. On the principle of this argument, the more mischief we suffer from. any administration, the more our trust in it is to be confirmed. Let them but once get us into a war, and then their power fs safe, and an act of oblivion is passed for all their misconduct. But is it true that Government is always to be strengthened with the instruments of war, but never

furnished with the means of peace? In former times, ministers, I allow, have been sometimes driven by the popular voice to assert by arms the national honor against foreign powers. But the wisdom of the nation has been far more clear when those ministers have been compelled to consult its interests by treaty."

Further:

"This mode of yielding would, it is said, give way to independency without a war. But if it had this effect, I confess that I should prefer independency without war to independency with it; and I have so much trust in the inclinations and prejudices of mankind, and so little in anything else, that I should expect ten times more benefit to this kingdom."

The United States, Mr. President—

"from the affection of America,"—

The South—

"though under a separate establishment, than from her perfect submission to the Crown and parliament"—

The Federal Government—

"accompanied with her terror, disgust, and abhorrence.

"Bodies tied together by so unnatural a bond of union as mutual hatred, are only connected to their ruin."

Could we, Mr. President, if after a desolating war we succeeded in subjugating the South, bind her to us by any other bonds of union than mutual hatred, and is it not true that such a bond of union would involve the ruin of both the North and the South?

It has been said that if we let these States go in peace we yield to the right of secession at will by a State, and that such a principle will lead to the entire disintegration of the Union. But we do not yield to the right of secession by recognizing revolution. I admit that were a single State to secede—even a large State—restriction and coercion, (not by arms,) coupled with conciliation, might well be used, and would be successful in restoring her. Such was the course of our ancestors in the adoption of the Constitution to the small State of Rhode Island and the larger State of North Carolina, one of which remained out of the Union after the organization of the Federal Government for one year, and the other a year and a half. I admit, also, that secession is revolution, and that we have the right of war in such a case, if Congress so decides. But the object of the war ought to be the restoration of the State to the Union, and, as against a single

State, the menace of war would in all probability, from the superior power of the Federal Government, effect its object without bloodshed.

I dismiss, therefore, all apprehensions from my mind arising from the recognition of a revolution inaugurated and carried on by a large section of the country by the collective action of its people, as conceding the right of secession or leading to the future disintegration of the Union. Sir, in the Revolution of 1776, Massachusetts was the colony that first embarked in resistance to the mother country. Does any gentleman suppose that revolutions must not be dealt with according to their magnitude? Can there be a doubt that the mistake which Great Britain made then, was in attributing the spirit of resistance to the leaders alone, when the hearts of the people were in the contest? Governor Gage issued his proclamation in Boston, in which he offered to all the inhabitants of the colony entire protection and amnesty, with the exception of John Hancock and Samuel Adams, if they would lay down their arms and submit to the Government; but the offer was of no avail. Does any gentleman suppose that the colony of Massachusetts alone could have resisted the power of the British Government, unless the sympathies of the people of the other colonies had been enlisted, and they had made common cause with her? Having a common interest, they united to resist an exercise of power which, if submitted to by one colony, would in the end be crushing to the liberties of all. Had those ministers not been blind to the general sentiment of the people of the colonies, they would not have held and acted upon the mistaken idea which is now so rife in relation to the seceding States, that it was the leaders alone, and not the people, whose hearts were in the cause, and Great Britain would probably in the first instance, have parted with her colonies in peace, or retained her general authority by concessions, saving herself a debt of more than a thousand million dollars, and also carrying on with them a commercial intercourse far more profitable to her than would have existed if the powers which she claimed over an unwilling people had been enforced by subjugation. Revolution by a large section of country, composed of eleven States, with singular unanimity on the part of their people, cannot be met by war, if the object be the restoration of the Union and its preservation as a representative republic.

Sir, on this subject let me show you what are not merely my opinions of the impracticability of a single republic over so extensive a country as ours without the existence of the internal governments of separate independent States, bound together by one common government over communities separate among themselves and constituting us a nation as regards the world at large; but the opinions universally entertained at the time the convention sat which framed the Federal Constitution. No abler man, with rare exceptions, at least, if any, than Mr. Wilson, of Pennsylvania, was found in that convention. His name appeared as an active participator in all its debates. He was one of the framers of the Constitution, peculiarly entitled to our gratitude, and one of its most ardent supporters, both in its original formation and in its adoption by his own State. I read from a speech which he made in favor of the adoption of the Constitution by the people of Pennsylvania, in the convention of that State, and I read it in order to show the danger of consolidation into a single government, which is inevitably incident to the subjugation of the southern States by the military power:

“The United States may adopt any one of four different systems. They may become consolidated into one Government, in which the separate existence of the States shall be entirely absolved.

They may reject any plan of union or association, and act as separate and unconnected States. They may form two or more confederacies. They may unite in one federal republic. Which of these systems ought to hare been formed by the convention? *To support with vigor a single Government over the whole extent of the United States would demand a system of the most unqualified and most unremitted despotism.* Such a number of separate States, contiguous in situation, unconnected and disunited in government, would be at one time the prey of foreign force, foreign influence, and foreign intrigues, at another the victims of mutual rage, rancor, and revenge. *Neither of these systems found advocates in the late convention. I presume they will not find advocates in this."*

After, discussing .the relative merits of a union of two or more republics, or into one, he speaks of "the remaining system," which was' adopted, "as a union of them into one *confederate* republic." No man can doubt that the words "confederate" and "federal" are synonymous, and when applied to this republic, or any other, imply, from the force of the words, a common government over separate independent communities.

I have read it, sir, to warn gentlemen that the system of government adopted in 1787 is inconsistent with the prosecution of war for the subjection of the South; and yet you cannot execute the laws, as you claim to do, within the Confederate States without their entire conquest and subjugation. You must, if successful, convert, and it has been threatened by many leading papers, and by at least one leading member of the administration, that you will convert this Government into a single Government, and absolve all State lines. In answer to such a purpose, and as an all-sufficient objection to it, I give you the great general truth enunciated by Mr. Wilson, that a government of that kind, to exist over the extent of this country, must be "a system of the most unqualified and unremitting despotism."

Sir, I would preserve the Union. Why? To preserve the liberties of my country. If the Union is to be made the means of prostrating those liberties, then it is far better that the Union should be abandoned than that free institutions should be abolished. I value and cherish it, not merely because it gives us a powerful Government, but because its power secures and protects the individual liberty of the citizen, and because the Union, under a Federal Constitution, will perpetuate republican institutions, and preserve self-government by the people.

By war you may subjugate and devastate the Southern States; but the large army you must permanently maintain to keep them in subjection will inevitably, in the end, subvert our own institutions and convert a republic into an autocracy. It is easier to organize than to disband a large army; and more difficult still to disband a dictator when you have yielded to him the power of the sword and the purse, and subordinated the civil to the military power.

But have Senators reflected on the effects of civil war upon the character and habits of the people, and its demoralizing influences? Let me give you the portraiture of those effects and influences, in the language of the same great statesman; because the truth is general and as applicable to our times as to the day in which he lived. "Civil wars," said Mr. Burke—

"Civil wars strike deepest of all into the manners of the people. They vitiate their politics; they corrupt their morals; they pervert even the natural taste and relish of equity and justice. By teaching us to consider our fellow-citizens in a hostile light, the whole body of our nation becomes gradually less dear to us. The very names of affection and kindred which were the bonds of charity whilst we agreed become new incentives to hatred and rage when the communion of our country is dissolved. We may flatter ourselves that we shall not fall into this misfortune ; but we have no charter of exemption that I know of from the ordinary frailties of our nature."

If the language of the statesman will not convince you, take .the corroboration in the experience of the soldier:

"It has been my fortune to have seen much of war, more than most, men. I have been constantly engaged in the active duties of the military profession from boyhood until I have grown gray. My life has been passed in familiarity with scenes of death and suffering. Circumstances have placed me in countries where the war was internal—between opposite parties in the same nation—and rather than a country I loved should be visited with the calamities which I have seen, with the unutterable horrors of civil war, I would run any risk, I would make any sacrifice, I would freely lay down my life. There is nothing which destroys property and prosperity and demoralizes character to the extent which civil war does. By it the hand of man is raised against his neighbor, against his brother, against his father; the servant betrays his master, and the master ruin his servant."

Such was the experience of the great Duke of Wellington, and I pray God we may profit by that experience before it is too late. Sir, it may be that I have a more vivid imagination, or that my nerves are less firm than those of my brother Senators; but I confess, that when I think of the blood that must flow in this contest, this unnatural contest, of the devastation that must ensue, of the human lives that must be sacrificed, a shudder runs through my frame, and my heart sickens with despair. I am for peace, an armistice and negotiation, whether by a general convention or by treaty, or in any other mode; I care not for the mode, if civil war can be terminated, and peace come to my country. I would receive the proposals of those who have at least been once our brethren. I would yield nothing which I thought degraded the United States, or subverted our form of government; but I would, by compromise, restore them to the Union if possible. If that were impracticable, I would part with them in peace, on a just and equitable settlement. We know that they claim their independence, and offer to account for all the public property which they have taken; that they have neither invaded us, nor expressed any intention to invade us, but claim their own right of self government, founded on "the consent of the governed." If their terms of settlement be unjust, reject them, and continue the war until they submit to just terms and an equitable adjustment. But you must receive their offers before you can decide on their admissibility, unless, indeed, unconditional submission be, like the demand of Great Britain from our ancestors, your absolute determination. Those ancestors owed allegiance to the crown of England, and rebelled; the government of England said without cause. Eleven States have revolted by the collective action of their people against the Federal Government, and you say without cause. Admitting that they have exaggerated their causes of complaint; admitting that they were precipitate in their action, and that their sense of insecurity to their property and social institutions under the Federal Government has been entirely over-estimated; yet I tell you that it is a truth which the records of history will not gainsay, that "such an event as the disaffection and

revolt of a whole people never took place without some considerable errors of conduct observed towards them."

Senators, I am well aware that the administration and an overwhelming majority of Congress do not and will not assent to my views; that you regard force and war as the true and only mode of preserving the Union, whilst I have a confident belief that the continuance of war will inevitably subvert the republic, and substitute a military government for civil liberty and a government of laws. I am satisfied that you have determined on war. I impugn no man's motives, though I dissent from your judgment, and condemn your policy of war. Resistance, however, to the will of such a majority, I know to be futile and hopeless, and I mean to embark in no factious opposition to your practical measures; your practical legislation, therefore, has met, and will meet, no cavils or objections from me; except, indeed, bills should be introduced, palpably violating the Constitution of my country. "With you rests the responsibility and as I cannot conscientiously support a course of action which is against my conviction, nor wisely contend with a majority which I know to be irresistible, I shall await that change in public sentiment which I feel confident will take place, when the hour of passionate excitement has passed, and the blighting influences of civil war have awakened what Fisher Ames well called "the second sober thought of the people."

Much as I dissent from the President's message in its mode of stating facts, its arguments, and its omissions, I forbear even a single comment, open as I believe it to just criticism. I leave that task to others, by whom, in my opinion, it has been well performed. But I have some hope, some faint hope, that you may be induced to refrain from passing the resolution now before the Senate, which involves no practical legislation, unless indeed there is an intent—which I do not suppose—to suspend, by indirection, the writ of *habeas corpus* in the future. I proceed now to the consideration of the resolution.

The joint resolution imports not merely an approval of the acts of the President, but a declaration that all the acts enumerated in the preamble are to be in all respects legal and valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States. As regards four of those acts, it would be very immaterial whether you passed this resolution or not; as regards the other two, it is of the last importance to the liberty of every man in the United States that you should not pass it.

The preamble recites the act of the President in calling volunteers into the service on the 15th of April; to the act of blockade of certain ports on the 19th of April, and of other ports on the 27th of April, by executive authority, when no law authorized the executive to exert such a power. The fourth act recited relates to the suspension of the writ of *habeas corpus*, and the delegation of the power to suspend it to a subordinate officer under the President; the fifth to the proclamation increasing the army of the United States, and calling additional volunteers into service; and the sixth to a further suspension of the *habeas corpus* act. The first three and the fifth are all provided for by laws which you have passed, or will pass at this session. You have provided for the volunteers that were called out on the 15th of April. That sanctions the act, as

far as you can sanction it, and provides for the payment of the men. I do not dispute your right to do that. You have passed a bill to authorize a blockade of the ports of certain States in the future; and though on your theory, I consider that Congress has no authority to institute or authorize such a blockade, yet, on mine, I do not deny the constitutionality of the act, if it is passed by virtue of the warmaking power, for that is in the absolute discretion of Congress. And , what is blockade but a belligerent right? Whoever heard of it under any other aspect, or by any other name? If you are at war, you can declare a blockade; and to be at war, it is not necessary that you should formally declare war against those States; but if by your acts you recognize a state of war with them, beyond all question war exists as between these United States and the confederate States. You have done so by many acts; you will do so by more. I do not, therefore, dispute your right of blockade, though I deny that within the intent of the Constitution, you could blockade a port of a State still in the Union in consistence with that provision of the Constitution which inhibits Congress from giving a preference to the ports of one State over those of another. I do not mean to enter into that argument, because I admit your authority under the war power, and I know that we are now in a state of civil war; and you have actually recognized a war between these eleven States and the United States Government, though you have not formally declared 'it.

Mr. President, what is the rule as among nations? During our last war with Great Britain, she had possession of a portion of our territory in the State of Maine, Eastport and the surrounding country. The courts of the United States decided that the laws of the United States were suspended within that territory in the possession of a foreign enemy during the time that it was so in their actual possession; and precisely the same principle applies to civil war that the laws of the United States are suspended where the possession is in the party at war with the Government—call them by what name you please— rebels, revolutionists, or enemies. The doctrine in England always was, that the laws were suspended, the *habeas carpus* act and all, within that portion of the territory where the king's court could not be opened. I do not deny that the President may exercise military powers there;' but I deny that in the States which belong to the Union, in which the courts are open, in which justice can be administered between man and man, the military can be made predominant over the civil power, either by Congress or by the President, without a gross violation of the Constitution.

I come next to the question of the army. No man could pretend to affirm that the President had authority to, increase the army of the United States without a precedent law. No one for a moment could affirm that the power to raise and increase the army is not vested in Congress. You have approved the increase in the only mode in which you can legitimately sanction such an act. You have approved it by passing a bill providing for the organization of that army, and for the present and future pay of that army. I do not deny your right to do that. The-measure is perfectly legitimate when you have determined on war, and if you choose to sanction the conduct of the President by appropriate legislation, I shall offer no vain opposition to your measures, because I differ with your policy, when I find the majority here determined on that policy.

But, sir, the suspension of the writ of *habeas corpus* has a very different aspect if approved by Congress. If you think that the state of the country and the public exigency require that the writ of*habeas corpus* should be suspended, do it openly in the face of the country; do it by your legislation; but do not attempt to do it indirectly; do not an act which you will hereafter regret,

which will strike the most fatal blow at the liberties of this country which has ever yet been stricken, by the affirmation of the power in a President of the United States—a single man—to suspend the writ of *habeas corpus* whenever in his discretion he may think such such suspension advisable. Such is the effect of your resolution. The resolution is improper, because, if you think the writ ought to be suspended, you can suspend it by your own action. You have a right, under that action, to designate the States in which it which it shall be suspended, and to limit the time for which it shall be suspended. That is the course which has always been adopted in Grnat Britain for the last two hundred years, whenever it was necessary under any emergency to suspend the writ of *habeas corpus*, the great writ of right, which is the sole remedy of the subject to secure his right of personal liberty and personal freedom—which is the sole remedy for freedom of the citizen here. It has been done by act of Parliament always; and no king of England in two hundred years past has ever ventured to suspend the writ of *habeas corpus*, though, until the judiciary became independent of the Crown, his judges sometimes evaded the issuance of the writ. Still less did any king of England ever claim the power of delegating such a high discretionary authority to any subordinate officer. Sir, the power is incapable of delegation, whether it is in the President of the United States or in the Congress of the United States; and yet the President of the United States, according to his order as given, and I believe correctly given, in the newspapers, though I have not seen it elsewhere, and according to the recital of this resolution, did not himself decide that the state and condition of any part of the country required that the writ should be suspended, and the remedy for the civil liberty of the citizen thrown aside, but delegated the right of decision upon the political exigency which might justify and require the suspension of the sole remedy for the liberty of every citizen of the United States to military and subordinate officers. If the right exists in him, he had no power of delegation. If the right exists in us, it was palpable usurpation; and yet you propose, not only to approve, but to affirm the validity of an act directly in the face of the Federal Constitution.

The President in his message claims that the power is vested in him as the executive, to suspend the writ of *habeas corpus* in his discretion. In the message, he alluded to the opinion of the Attorney General which has since been furnished to Congress. In that opinion the Attorney General, by an argument the most extraordinary which ever came from the pen of a lawyer, attempts to sustain the same doctrine. If the Congress of the United States not only approves the act but affirms its validity and legality, I ask where is our Government ? The whole power of the purse and the sword you have given to him; the unlimited command of men and money. You have voted $500,000,000 and five hundred thousand men; and you now, by the indirect action of affirming an unconstitutional act, propose to yield to him the right to arrest any citizen of these free United States on suspicon, without proof of guilt, and without process of law.

Sir, can it be that the Senate will pass such a resolution as this without striking out these clauses, at least? Strike them out, and I care little for the resolution. In the case of blockade, I am willing to leave it to the courts. You cannot legalize a past act by your now determination, where it involves a forfeiture; and therefore, if the President had no right to declare a blockade—if a vessel was intercepted before your law passes, and the case comes before the courts— the courts will decide, without reference to your resolution, whether the President had authority to institute the blockade; for if he had not, of course there could be no forfeiture under it. To pass such a law and make it retroactive, is clearly to pass an *ex post facto* law. It involves a penalty arising out of

an act made criminal, by subsequent legislation, which was not criminal or prohibited by the law at the time when the act was done; that is, the attempt of any vessel to sail from or enter into any of the ports of the seceded States. On what principle can you, in the face of the Constitution, affirm by legislation such action as that? You are not vested with judicial power; the judicial power is, by the Constitution, given to the Supreme Court and the subordinate courts that you have established. If you arrogate to yourselves judicial powers, you are departing plainly from the mandate of the constitution; and you are destroying the Government, which is made a free Government by a division of the powers of government between separate and co-ordinate departments—the judiciary being by far the weakest of them all. But if, in addition to sanctioning a blockade instituted without color of law, the Congress of the United States chooses to vest in the President, by indirect action, judicial power to determine when the citizen's liberty shall be taken from him for any extent of time, at his discretion, it is perfectly certain that you are establishing a mere absolutism, and that you have abandoned your form of government altogether.

Sir, I do not propose to enter into any long discussion about this writ of *habeas corpus*. The decision of the Supreme Court of the United States, (which, differing from the learned Attorney General, I consider does settle principles and not merely decide cases,) made more than fifty years ago, held that the suspension of the writ was a legislative and not an executive power; and I consider the decision of the Chief Justice in the case of Merryman so utterably unanswerable, that it would be an idle attempt on my part to expect to reach or to change the opinions of a man who could read it and remain unconvinced. It has gone to the people of the country. I think the people of the country will appreciate the force and power of the opinion when the time of excitement has passed; and I trust it is passing rapidly.

But, sir, there are some things connected with this writ that it is necessary I should advert to. My objection relates to your affirmance of the validity of the power of the President to suspend the writ of *habeas corpus* whenever, in his discretion, he thinks the circumstances justify it; that he is to be the judge of the political exigency which requires the suspension of the writ. Such is his claim. This resolution, if passed, affirms that claim, and approves and declares the suspension of the writ to be a power vested in the executive and capable of delegation. The language of your resolution is, that the suspension is declared to be "in all respects legal and valid," and you embody in that resolution no denial of the claim of power; and where, then, stand the people of the United States in the future? A single man becomes a despot; he has the power of the purse and the sword, and you give him the absolute control over the liberty of every citizen in the United States, to be exercised by himself or any subordinate officer to whom he may see fit to confide its exercise, in the absolute discretion of either the President or the subordinate.

The Attorney General has given an opinion in support of this power in the executive; and I purpose commenting on, at most, two of his conclusions. First, let me make a short statement in reference to the writ of *habeas corpus*, and read one or two authorities in connection with it. The clause of the Constitution which restricts the suspension of the writ of *habeas corpus*, except in cases of rebellion or invasion, merely secures the remedy of the citizens against illegal imprisonment, and the only remedy which the laws provide. The right to liberty, and freedom from imprisonment, without due process of law, is secured by the Constitution of the United

States beyond your power to violate, as well as beyond the power of the President, unless you mean to trample upon that Constitution. What is the lauguage of the fifth article of the amendments to the Constitution? That no person shall "be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty," or property, without due process of law." If you arrest him and confine him, do you not deprive him of liberty? Is it by "due process of law," if the arrest is made by.the military power without oath, without judicial investigation, without evidence of probable cause founded upon oath? The words "due process of law," have their own settled meaning, which no lawyer has ever doubted. They come from Magna Charta, "the law of the land," and "due process of law" meaning one and the same thing. If you want the exposition of their meaning, you have but to turn to Coke's Second Institute in order to find it. Magna Charta restricted the power of the crown, because the contest then was between the crown and the barons, representing themselves and the people of England; but in our country, and'in all the States, as well as in the Federal Constitution, the restriction and the protection it secures to the liberty of every citizen, applies to all'departments of the Government—the legislature, the executive, or the judiciary. A man's right to his personal liberty, unless on a warrant issued for a civil debt, or on due process of law for a criminal charge founded on probable cause, substantiated by oath, is secured in the constitution of every State of this Union, and in the Constitution of the United States; and Congress has no power of suspending the right, even in case of rebellion, insurrection, or war, though it may suspend the remedy by habeas corpus, in cases when, from rebellion or invasion, the public safety requires such suspension. The only exception to the invasion of the citizen's right of liberty, without due process of law, is "in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger." I admit that in those States in which by war the laws are suspended, the right and the remedy are suspended, and you may exercise in them the rights of a belligerent; but in the States in the Union, if the *habeas corpus* act were suspended by Congress, the President would have no right to arrest by military power. He could only lawfully arrest the citizen not found in arms against the Government by the civil power, and for probable cause of guilt, founded upon oath. It is true, though, that if you take away the only remedy which the law gives for a judicial investigation, if the arrest is made, the party is entirely helpless; and therefore it is that the suspension, of the remedy has been often confounded with the suspension of the right. The right stands beyond your power, without a violation of the Constitution. The remedy—and the only remedy—which secures the right, you may suspend in certain conditions, of the country, where the public safety requires it; but the discretion to suspend is vested in Congress, and riot in the executive branch of the Government.

We have derived this remedy by *habeas corpus* from the common law. We have also derived the great principle that the citizen shall not be deprived of his personal liberty, except by "due process of law" from the common law, and have incorporated it into our fundamental law, as the inviolate right of every American citizen. Let us recur to the law as it existed in England when these States were colonies, for by such reference only can we reach a correct construction of the intent with which these clauses in relation to "due process of law" and the writ of *habeas corpus* were inserted in the Constitution.

No one doubts that by the law of England since Magna Charta, if not before, no subject could be deprived of his liberty without "due process of law," and was entitled of right to the writ

of *habeas corpus* for the purpose of a judicial investigation into the cause of his confinement. Yet in practice the crown frequently invaded the personal liberty of the subject, and disregarded the writ, and there was a long struggle between the Commons and the crown for this great remedy, because without the remedy the right was a nullity, and the subject was at the mercy of the crown; and his liberty could be invaded at pleasure, without "due process of law," by arbitrary and unlawful arrest and confinement.

To show the character of this writ, and demonstrate that the authority to suspend it was always a legislative and not an executive power, I will read from an entry on the Commons' Journal, made on the 3d of April, 1628, during the reign of the Stuarts, in which the law is declared, while the contest for the liberty of the subject against arbitrary arrest by the crown was still in progress between the Cominons of England and, the crown:

"*Resolved upon question*, That the writ of *habeas corpus* may not be denied, but ought to be granted to every man that is committed or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other, he praying the same—without one negative."

That is the resolution of the British House of Commons without dissent in 1628. I find, further, on turning to the Lords' Journal in February, 1704, privileged as they were and hereditary as was their rank, thtat they valued the civil liberty of their countrymen:

"*Resolved*, That every Englishman who is imprisoned by any authority whatsoever, has an undoubted, right, by his agents or friends, to apply for and obtain a writ of *habeas corpus*, in order to procure his liberty, by due course of law."

Again, sir, on a representation made to the crown on the 15th of March, 1704, by the Lords, it is said with great distinctness:

"It has been allowed, by the known common law, it is the right of every subject under restraint, upon demand, to have the writ of *habeas corpus*, and thereupon to be brought before some proper court, where it may be examined whether he be detained for a lawful cause."

Such was the law of England long before our Revolution, when we were colonies of England; such is the principle that was meant to be embodied in the Constitution of the United States by that restriction against the suspension of the writ of *habeas corpus*—a restriction, not on the power of the President, for he never had it; but an exception to the powers granted to Congress; and the effect is to make it mandatory on Congress to pass a law providing for the issuance of the writ by the judiciary, because the issuing of the writ and the execution of the writ are judicial matters from beginning to end, and always have been. It belongs to that department of our government in which the Constitution vests the judicial power of the country. Congress have the right to suspend it in certain cases, but that very right of suspension renders it compulsory on

them, if they do not mean to violate the Constitution, to provide by law, in such courts as they see fit to establish, the power and impose the duty to issue and enfore this great writ. They did make such provision by law, in 1789, among the first acts after the organization of the Government under the Constitution. The fourteenth and fifteenth sections of the judiciary act give to the Supreme Court and its judges, in all cases of commitment, the power, and impose the duty, to inquire into the cause of commitment, by and through the writ of *habeas corpus*. The power is there by law, and the law has not been suspended. On what principle is it that any President of the United States can suspend or disobey a law of the United States? The great doctrine proclaimed has been that it was his duty to execute the laws in the seceding States. Is he to execute the laws by violating the laws, as a first step of action, in the States which have not seceded? What power has the President of the United States to suspend a law of the land? What king of England can do it, unless it is expressed in the law itself that he has such discretionary power? No such discretion is given, and the fourteenth and fifteenth sections of your judiciary act require the court to issue this writ, on application, whenever a party is confined, and determine whether the commitment is legal. If the imprisonment is not lawful, it is the duty of the court or judge to discharge him.

If Congress mean to affirm that this power is in the President of the United States, I want it to go forth to this nation that they have virtually suspended the writ of *habeas corpus*, not by law, but by affirmative resolution, exercising a judicial authority which is not vested in them—an affirmation declaring that the President, in this country, can trespass upon the liberty of the citizen in a manner which would have cost any king of England his crown for the last two hundred years, if he had dared to exercise such a power.

I submit, therefore, that if the President had the power, being the exercise of a high discretion founded upon the condition of the nation, of course it would be incapable of delegation. If, as I believe, the power exists in Congress, neither can Congress delegate it. If the exigencies of this country and the public safety, in your opinion, require that you should now suspend the *habeas corpus* act, you may, as they do in England, describe the States or parts of States into which the writ shall not run during the time limited in the law. In England, I can find not a single instance on record where the suspension has ever been for more than one year. During the contest with her colonies, the attempt was made to suspend the writ of *habeas corpus* by legislation, with provisions which would have involved the suspension in England as well as here; but the opposition, after discussing the question, forced the ministers to abandon that portion of the bill, because they found that the majority of the lawyers supporting them were opposed to so extended a suspension. The bill was, therefore, modified so as to suspend the writ in the rebellious colonies and on the high seas; that is, they authorized the apprehension of persons on suspicion in the rebellious colonies and on the high seas, and their confinement, at the discretion of the king, until the 1st of January, 1778, not quite a year from the passage of the bill. Here it is not the passage of a bill; it is not the exercise of a high discretion where, after full consideration, you decide that the public safety requires this great remedy—which is the only remedy to preserve the liberty of the citizen—shall be suspended, and where and for what length of time it shall be suspended; but you affirm an act of the President, done in his discretion, not in yours, in the past, which is clearly unconstitutional, and which you have not the power to affirm. By affirming his act as he claims the power, you are virtually assenting, on the part of the

legislature, to the claim of power on the part of the President; and thus the constitutional division of powers, which is the security of our Government as a free Government, is to be abandoned.

I shall read one or two extracts from judicial decisions to show the uniform construction by judicial exposition. There can be no question that, in the case of Bollman and Swartout, the Supreme Court decided, in distinct terms, that the power was in the legislature, and the legislature not having exercised any power to suspend the writ, even though insurrection existed, the court were bound to execute the law, and the evidence not being sufficient, they discharged the prisoners. They positively affirmed the power to be in the legislature ; and I had never heard, until the claim was made by the present Executive, of a solitary lawyer in the United States who ventured to doubt that the power was in Congress, and not in the President. In my judgment, a received construction of more than half a century, and a settled opinion of the profession, is always strong evidence of what the law really is.

The essential requisites for the lawful deprivation of the liberty of the citizen, are clearly and distinctly stated by the Supreme Court *ex parte* Buford, 3 Cranch, 451:

"The judges of the court are unanimously of opinion that the warrant of commitment was illegal for the want of stating some good cause certain, supported by oath."

Where, let me ask, would be the liberty of the citizen, if the President can arrest at his discretion, and refuse to obey the writ of *habeas corpus?* Who is to decide whether there is a good cause certain, supported by oath?

It is absolute power. This is not a land of freedom and free institutions longer, when you have passed the resolution now before you.

The history of the *habeas corpus* act and its uses are well stated by the court in Watkins's case, Judge Marshall delivering the opinion, after stating the existence of the right at common law, says:

"The English judges being originally under the influence of the crown, neglected to issue this writ where the government entertained suspicions which would not be sustained by evidence; and the writ, when issued, was sometimes disregarded or evaded, and great individual oppression, in consequence of delays in bringing prisoners to trial. To remedy this evil, the celebrated *habeas corpus* act of 31 Charles II was enacted," *&c* 3 *Peters*, 203.

That writ is the writ to which the court refer as securing to the people a judicial investigation; a writ of right which cannot, in the language of the House of Commons, two hundred and fifty years ago, be lawfully denied, though the arrest be by the command of the king. That right is to be abandoned in the republic of the United States, in the face of an express provision in the

Constitution limiting your legislative powers, which prevents you from suspending it, except in a political exigency of invasion or rebellion, where the public safety requires it; of which you are to be the judges, and you alone. As to the meaning of the words "due process of law," as securing the rights of the citizen, I might refer to the opinion of a very able and distinguished judge of our own country, Mr. Justice Curtis, who, in a case which had no political bearings whatever, gave an exposition of the meaning of the words "law of the land," as existing in the constitution of Rhode Island, which is analogous to " due process of law" in our own Constitution.

Now, sir, let me notice for a moment some one or two of the somewhat singular views presented in the extraordinary opinion of the Attorney General. On page 5 of the opinion, he says:

"As to the first question, I am clearly of opinion that, in a time like the present when the very existence of the nation is assailed by a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity."

Here is a strange confusion of ideas. Every lawyer knows what "probable cause" means. Probable cause is something more than suspicion. It is a state of facts established upon oath, from which*prima facie* an inference of guilt can be rationally made. Who ever heard before of the term " probable cause" applied to mere suspicion, and not to the fact of guilt itself? There must be probable cause of guilt, and without that supported by oath, the court will discharge. There must also be authority for the arrest and commitment, or the court will discharge. If an offense be not charged, if there is no oath, or the oath does not show probable cause in support of the charges, as in the case of Swartout and Bollman, the court will discharge.

I might ask, further, in connection with this idea of probable cause, who is to decide it? What is the writ of *habeas corpus*? Is the President to execute it, because it is his duty to see that the laws are executed, or is it a judicial function? As I have read to you from the representations to the crown, made in 1704, in the British House of Lords, the party is to be taken before some court, in order that the matter may be inquired into, and if no probable cause of guilt is shown, he must be discharged. The matter is to be judicially inquired into, and by your Constitution the judicial power is vested in the courts of the United States, and not in the Executive. Who, then, is to determine the existence of probable cause? The tribunal, the authority to investigate and decide, seems to have been lost sight of by the learned Attorney General.

The learned Attorney General, after giving his opinion on the first point, assumes that the President has the legal discretionary power to arrest and imprison persons who are guilty of holding criminal intercourse with men in a great and dangerous insurrection, or persons suspected, "with probable cause," of such criminal complicity; and writes the words with marks of quotation to show that it is their legal meaning in which he uses them, "persons suspected with 'probable cause' of such complicity." Is there, I repeat, a lawyer in the land who does not know

that probable cause is more than suspicion; that it implies prima facie evidence of guilt sufficient to hold the party for trial according to the law of the land, and that it stands contradistinguished from suspicion; that suspicion is no ground whatever for commitment upon arrest, unless sustained by an affidavit showing probable cause, not of suspicion, but of guilt? What is suspicion, Mr. President? Opinion, no more. Lord Bacon has well said: "Suspicions among thoughts are like bats among birds; they always fly in the dark." The suspicion of an administration, or of any man, can never be just ground for depriving a citizen of his liberty. In this country there must be probable cause of guilt, of offense against the laws, and shown by affidavit with sufficient certainty, in order to justify the incarceration of his person; and we have no free country when that ceases to be the law. Either enmity or timidity will suspect without cause, and power, too, will suspect where it wishes to crush an opponent. Unhappy, indeed, is the country where personal vengeance and political animosity can satiate itself by the imprisonment of its object upon suspicion.

Let me ask what constitutes the difference between the *letter de cachet* in the reign of Louis XIV and an arrest by the President of the United States, because he chooses to declare there is a state of insurrection, and, arrest at his discretion, or at the discretion of any subordinate officer, on suspicion of guilt? What constitutes the difference between the Bastile and Fort McHenry or any other fort of the United States? Louis XIV said "*l'etat c'est moi*" and he exercised the power of committing any subject of Prance to the Bastile to lay there in a dungeon for one year or ten, at his discretion. The individual might be forgotten, or he might be the subject of personal animosity, and it was so most frequently. But, at least, the act of arbitrary power had this restriction: it was always done under the immediate order of the sovereign. The President of the United States claims a similar power, not only to be exerted by himself, but by any subordinate to whom he chooses to delegate the authority; not only to suspend the *habeas corpus* act, but to arrest and incarcerate on suspicion at discretion; and the difference in the place of incarceration is, that Fort McHenry and your other forts may have no dungeons, but the restraint upon the liberty of the party is just as arbitrary and unlawful. The restraint, too, is claimed as discretionary in the duration of imprisonment. The punishment is the same, though it may not be characterized by the same brutality in the mode of confinement! If a man can be arrested and imprisoned at discretion, without proof of any criminal act—I mean *prima facia* proof, legal proof sufficient to hold him for trial—and can be held in prison for an indefinite time without being brought to trial, (which he can be if this great writ of right is suspended,) there is no remedy for him whatever. I ask, where is the liberty remaining to a single American citizen with such an exercise of authority by the President, sanctioned by the legislative power of the Union?

Mr. President, there is no other distinction between the condition of France under Louis XIV and present condition of these United States if this resolution be passed. The Bastile had its dungeons; the forts have none. Louis XIV alone issued his *letters de cachet*; but the President of the United States delegates a general power to one or ten different officers to arrest and imprison guiltless men, whenever the office chooses to suspect them of criminal complicity, and all this is to be sanctioned and continued in the face of a Constitution which we had supposed gave us, as citizens of a free country, free institutions, in contradistinction to the absolutism which reigned in France under Louis XIV.

Sir, there are other singular *dicta*, shall I call them, or propositions contained in this opinion, and it will be a celebrated opinion hereafter of the learned Attorney General. He even undertakes, from the form of the oath, to infer the grant of additional powers to the Executive —a singular inference indeed for a lawyer to draw in reference to a written Constitution and frame of government consisting of specially delegated powers. If the proposition were correct, inasmuch as the oath which is administered to us and to the judges of the Supreme Court is one and the same—that is, to support the Constitution of the United States—it would be difficult to define and distinguish our respective powers. There is, at least, the merit of novelty in the idea, that the powers granted under a written instrument are to be either enlarged or decreased by the mere form of the oath to be administered to the party to support that instrument and perform his duties under it. It is such loose doctrines that lead to arbitrary power.

He further uses the argument that this writ of *habeas corpus* is in the nature of an appeal, and that therefore, as far as concerns the President, it would be an assumption on the part of the judicial power to overrule his decision. Not so, Mr. President; the principle is perfectly familiar to every lawyer. The courts have decided that were a court of general jurisdiction, having jurisdiction of the particular offense, convicts the party, or commits him on proper process, it is not for them to revise and correct the irregularity of the judgment by an appeal on the writ of *habeas corpus*; but that is because it is the judgment of a court of justice having competent jurisdiction. Where, however, there is defect of jurisdiction, and the arrest is an excess of authority, it belongs properly to the judicial power on the writ of *habeas corpus* to correct the excess and guard the citizen against unlawful imprisonment. An act done in excess of authority by any department or officer is merely void, and it is a judicial question under the Constitution to determine the extent of authority. A justice of the peace has a special jurisdiction under the Constitution, and so has the President a special jurisdiction. Where ten justices of the peace committed a man on insufficient grounds, the Supreme Court, without hesitation, after sentence, as the justices had not pursued their authority, discharged the party on a return to the writ of *habeas corpus*. It was a conviction for non-payment of militia fines. The books are full of similar illustrations.

The learned Attorney General also contends that the writ of *habeas corpus* could not be directed to the President personally, where a citizen is unlawfully arrested by his order, and infers therefore that it may be disobeyed by the officer who has executed the order, and has the custody and control of the party arrested. It is a sufficient answer to say that an unlawful arrest by order of the king or privy council could always be remedied by this writ, nor could the officer executing the order refuse obedience to it.

In England he would be compelled to make return to the writ, and produce the person in his custody at the time of its service, with the cause of detention, and the court would discharge, if there was either defect of authority, or insufficient cause of detention shown. I have yet to learn that the courts of justice in the United States have less power to protect the liberty of the citizen against the arbitrary order of a President, than the King's Bench has to protect the liberty of the subject in England against unlawful arrest by the order of the monarch. There are other fallacies in this opinion which, from want of time, I forbear to notice.

Let me pass to the consideration ofv the dangers incident to such a claim of power in the executive, if admitted. Honorable Senators on the other side may think little of affirming this claim now; but nations, as well as individuals, are governed by habits, and habits fetter both the nation and the individual quite as effectually, and render them as helpless as Gulliver, when bound down by the little, pack threads of the Liliputians. Precedents which strike at great and fundamental principles, and violate the Constitution and the laws in times of high excitement, may be established by the party in power to-day. Rely upon it, if they live somewhat longer, in the progress of events, they will find that in the future they may become subject to the same dangers themselves to which now they are exposing all who are opposed to the policy and measures of this administration. The law is made, not for the protection of those who hold power, but for the protection of those who stand opposed to existing power; and no country has a Government of laws, no country is a free country, unless the law will protect them; and in that consists the distinction between a republic or a limited monarchy as a Government of laws, and a mere Government of will, which is a despotism. Sir, I quote again from Mr. Burke:

"Parties are too apt to forget"—

Referring to a bill for the partial suspension of the writ of *habeas corpus*—

"their own safety in their desire of sacrificing their enemies. People without much difficulty admit the entrance of that injustice of which they are not to be the immediate victims. In times of high proceeding, it is never the faction of the predominant power that is in danger, for no tyranny chastises its own instruments. It is the obnoxious and the suspected who want the protection of law."

The whole distinction between a government of will and a free government consists in this: That a man cannot be condemned, cannot be deprived of his personal liberty or his property, except according to the law of the land; or, in the language of Justice Curtis, without the right of contest, of being heard, and of having a judicial decision and a verdict of a jury affirming the evidence of his guilt. Sir, let me test this doctrine of suspicion in this way, and see how absurd it becomes. The Constitution of the United States, and the constitution of every State of this Union, prohibit any man from being deprived of his liberty, except by due process of law, and they secure him against conviction in criminal cases, unless on indictment and by verdict of his peers establishing his guilt. Now, sir, if he can be punished on suspicion, then to be suspected of an offense must be punishable as a crime. Is suspicion an offense against the law, or can it be made an offense? Can the suspicion of one man, however strong or however probable to him, constitute guilt which would justify, in natural right or in reason, the punishment of another? Yet you do punish when you arrest upon suspicion, because to imprison is to punish. Whether you imprison beforehand for an indefinite time by arbitrary power, or whether you imprison after a verdict of guilt, it is punishment. The difference is, that in one case the punishment is legal, as the result of crime judicially ascertained; in the other it is lawless and tyrannical, for it is founded upon the mere will of existing power.

Suppose an act were framed and passed, declaring that whenever any citizen in the State of Maryland, or, if you please, of the city of Baltimore, was found guilty of being suspected of crime by the administration, or any head of a department, on conviction thereof he should be sentenced to so many years imprisonment and so much fine: how long would the people of the United States submit to such legislation? And yet, sir, where is the difference? You would have under such a law, at least, the benefit of a verdict of a jury, and the publicity incident to a trial. The sense of shame arising from public exposure might restrain a prosecution without, at least, some plausible suspicion; but where the arrest and incarceration on suspicion is without trial, and at will, there is no liberty. If you cannot create such a crime, and punish the party after conviction, when you have ascertained judicially that he has been suspected—plausibly suspected on the part of the executive, or some of his subordinates—on what principle is it that you can punish him by imprisoning him indefinitely at the will of the President, without hearing, and without any charge against him other than suspicion, arising generally from the insinuations and whispers of personal enemies, and not unfrequently from the excited passions and distorted vision of political opponents?

Mr. President, there can be no security for personal liberty—there will be none remaining in this country—if Congress sanction, by this resolution, the President's claim of power at discretion, not only for himself, but through any of his military commanders, to suspend the great writ of *habeas corpus*, and take away the remedy which secures a right you cannot deny fo any citizen of the United States, that an offense against its laws shall be charged upon oath with probable cause, not of suspicion, but of guilt, and that he shall have a right to a fair and speedy trial, and only be punished upon conviction in a court of justice. Sir, I intend to make no imputation upon the motives of the President of the United States; but I must utter my disapproval of the view he takes of the Constitution, and of the mode in which he has exercised a power not delegated to him. I arraign not his intention, because I have lived long enough to know that the best men, with right intentions, have too often, from wrong judgment, perpetrated the greatest and the foulest wrong. But I take his acts—and I judge from what has passed of what will pass—when you have removed the lingering doubt that appears on the face of his message, and have affirmed that his claim of discretionary power to suspend the writ of *habeas corpus* is rightfully made, and that all the acts which have been done under that claim of power in the past have been rightfully done.

Merryman was arrested in the city of Baltimore—for what? For past acts, as far as we know or as was alleged. He has since been indicted for these acts—which were past acts at the time of his arrest— treason against the United States. He has been handed over to the civil power for trial, and has given bail, after having been kept in confinement by unauthorized authority for many months; and whether it was a month or three months or a week, the imprisonment was none the less an utter violation of the Constitution. But the President did not stop there. The city of Baltimore was then quiescent; the mob which existed there, (and it was a mob) was put down by the civil power of the city; order was entirely restored; and the courts of the United States have been always open. Long after, a new actor appears in the arena; and another officer of the United States, under the authority of the President, not only arrests on suspicion, without charge on oath, the chief of police of Baltimore, but without even the allegation of suspicion, he supercedes in their functions the police commissioners of that city existing under the laws of Maryland, and

having the control and safeguard of its municipal protection. They were superseded without even the semblance of a suspicion charged or stated. Is such an act within the authority of the President of the United States, or of his military commanders? When these commissioners protested against this course of action, and refused to delegate to others powers intrusted to them by the legislature of Maryland solely for municipal purposes, he arrested them, too; and they are still imprisoned in Fort McHenry, without charge, without suspicion, without anything but the failure of implicit obedience to the military despot of the particular district. Not thrown into a dungeon; not manacled, that we know of; but certainly unlawfully incarcerated. The treatment, however, of these or any other prisoners confined in your forts unlawfully, must depend upon the humanity or inhumanity, the likes and dislikes, of the officer in command of the prison.

You propose to affirm all these acts by your resolution. You propose to keep these men in prison at the will of the Executive, in the face of the Constitution, for no cause stated in the proclamation of the officer who ordered the arrest having the semblance of justification. Their sole offense consisted in a refusal to delegate the powers intrusted to them by the laws of Maryland to a military commander of the United States, and yield implicit obedience to his will. Such is the course of military power always. It is an arbitrary power, and despotic in its nature. I make no particular charge against the officer who issued that order, because, I understand, he issued it under the direction of the War Department. I impugn nobody's motives; but I state the facts; and I state the facts as a gross violation of the Constitution of the United States—as an outrage upon the personal liberty of the citizen which, though it falls upon Mr. Gatchell and his associates to-day, may be brought home, gentlemen, to yourselves at a future period, if you affirm this power, because the judicial authority has been put at defiance, and the civil authority trampled upon, by military violence, and the answer is, that the writ of *habeas corpus* has been suspended by the President. Affirm the legality of that suspension, and of course the same answer will be given in the future; and, we all know that the military power, sustained by the Executive and by the vote of Congress, will be irresistible unless the whole people of the United States should arise *en masse*against such despotism.

Ardent as may be a man's views in favor of this war, harshly as he may think of the rebels, and determined as he may be to prosecute it to its utmost extent, until the South unconditionally submits, if he cherishes the principles of civil liberty, he cannot sustain this action of the President which violates the laws of the land, and abolishes all security for personal liberty to every citizen throughout what are called the loyal States, while it conduces, not in the slightest degree, to the subjugation or submission of the South. It touches not you now, who support and advocate the course and measures of existing power, but touches only those who are opposed to these measures; but by your approval, you take the first step for the subversion of a republican form of government, and it is the first step only which costs. The future progress toward absolutism will be rapid. Where is the necessity for the exercise of such a power, except in those States that have seceded? There I concede to you that having suspended the laws by civil war, they must take the consequences of the action of military power, if you choose to declare or recognize war. The laws of the United States are suspended in those States, and the courts are closed; but can the civil be justly and constitutionally subordinated to the military power in other States because of opposition or disaffection to the Government? Do you suppose that, by suspending the writ of *habeas corpus*, and authorizing the seizure of the person of an individual

on suspicion, that you will ever reach the right man? You may drown all open opposition; but is the man who boldly speaks out in opposition to the measures of an administration the man who is to be feared as a conspirator?

Sir, the conspirators, if such there be, under professions of adhesion, ardent adhesion to existing power, will cloak the conspiracy by which they mean to destroy it. The slightest knowledge of human nature must lead to this conclusion. The conspirator enters into no open opposition to the Government. With the nearly unanimous support that you have, for the present at any rate, throughout all the States that have not withdrawn from the Union, you have nothing to fear, because there may be opposition to your measures, or there may be, if you please, disaffected men in all the States. Your Government is not so weak that the disaffection of a few can overturn it if supported by the people.

Look back to our own experience in history. During the revolutionary war there were Whigs and Tories, but the writ was never suspended. During Burr's conspiracy in 1807, though a single military officer arrested persons without law in New Orleans, he did not undertake to suspend the writ of *habeas corpus*. The Executive never approved his conduct, or claimed this power in himself. Of the three arrested, two had been sent off to the North before the writ was served; and the court in New Orleans, as to those two, held the answer sufficient that they were no longer in his custody; the third was discharged in the court there. Two were brought here, Bollman and Swartout. The President immediately handed them over to the judicial authorities with the affidavits to sustain the charge against them. The circuit court committed them for trial for treason, and on a *habeas corpus* before the Supreme Court, that court on revision held that the charge was not shown with sufficient certainty in the affidavits, and discharged them. Mr. Jefferson never recommended, as has been said here, that the *habeas corpus* law should be suspended. There is not a line or a word in his message recommending such action. He stated the fact that he had committed these men to judicial custody, and that he left to Congress to devise such measures as in their judgment they thought proper under the exigencies of the case. The Senate of the United States, in secret session—no one knows how; no one can tell what influences operated upon them, for there is no record of any debate—passed in one day, through its three readings, a bill to suspend the writ of *habeas corpus*; but when it came into the House of Representatives, the House of Representatives, to mark its view of the outrageous character of such an act, rejected it on its first reading, after a long debate, by a vote of 113 to 14! Yet there was a wide-spread conspiracy then, and it was in that part of the country where the Government was weakest; but no man at that day ventured to claim for the President, nor did he himself claim, the right to exercise such a power.

Then came the war of 1812. Was there no opposition or disaffection to the Government then? Was there not opposition to a very large extent during that war? Was, there not great disaffection during that war? Did the Congress of the United States suspend the writ of *habeas corpus*? Did the President of the United States undertake to arrest citizens and hold them in confinement at his will, claiming the right that, because war existed and communications were known to have been made to the enemy by persons disaffected to the government, therefore he might lawfully arrest any citizen on suspicion, without proof of probable cause, and detain him in prison indefinitely? No, sir, civil liberty was too much cherished in that day. Our immediate ancestors, even, knew

too well what were the benefits of free government, and how insidious were the approaches and how great the curse of a despotism, to break down the Constitution under an imaginary necessity, when the Government was quite strong enough to subdue all treason, or all offenses against its laws within all the States in Which the courts were open for the prosecution of offenses, without resorting to this arbitrary exercise of power. Yet in that war we were contending against a formidable enemy, and there was serious disaffection; and the nation and the Government not half so powerful as it now is. It seems that power now too readily converts convenience into necessity.

Mr. President, human nature is the same in all ages and in all countries. Power always tends to corruption, and especially when concentrated in a single person; and it is that tendency which requires, in all free governments, the division of power among separate and independent departments, for the prevention of its abuse—legislative, executive, and judicial—and it is only by maintaining the balance between these depositories of power that a government of laws can be perpetuated. Could you suppose a god to descend upon earth for its government, it would be wiser to submit to his government than to attempt to govern ourselves; but, while humanity has its inherent frailties, the experience of mankind has vindicated the great truth that, by the concentration of power in the hands of the one or the few, a government of laws—which alone is a free government—must degenerate into a government of will. When a discretionary power over not only the property but the liberty of the citizen or subject is vested in or can be exercised by one man, uncontrolled by fundamental laws for their preservation, capable of enforcement by a separate and independent department, freedom no longer exists; and whether the person who exercises that discretionary power be called a monarch, a dictator, or a president, the government is equally a despotism. A despot may happen to have sufficient intelligence and virtue to consult the general interest of his subjects, and may govern with justice and equity, but, with the corrupting influence of power, the security is but frail for continued good government. I speak with no allusion to the present President, who may be as little affected by the possession of discretionary power as any man; but to no man, and under no emergency, should a free people ever trust uncontrolled discretionary power over their personal liberty. The power to imprison at discretion, by military force, vested in one man or a few men, is incompatible with republican institutions, be it'a dictator or a Council of Ten, the end is either despotism or oligarchy.

An honorable Senator has told us that he would be willing at this time to yield almost unlimited power to the executive. Sir if you pass this resolution, you give unlimited power to the President of the United States; you take away the last remnant of liberty in this country. You abandon to him the great judicial right which protects the liberty of the citizen, in the face of the Constitution, without judging of the exigency for yourselves, or avowing to the people, by direct legislation, that you have parted with that right. Suppose that Abraham Lincoln was a man of great force of will, of great military talent, great ambition, and with sufficient capacity as a statesman to govern and discreetly control the career of his ambition in the pursuit of permanent power. I ask you, if a Cromwell or a Bonaparte were invested with the powers you now propose to place in the hands of the President of the United States, if the liberties of this country would not lie at his feet? Sir, for one, without regard to the man, I will look upon any one in reference to the grant of such unlimited power, as a Cromwell or a Bonaparte. I cannot expect from the

past history of humanity, that the next eighteen centuries will produce the equal of George Washington.

Sir, are there not dangers if this power is entrusted to the executive, apart from the idea of any attempt to obtain supreme and permanent command? Everyone knows that opposition is not readily brooked by power. We have seen that the citizen has been arrested, on mere suspicion, and without even the charge of suspicion in some cases as I have shown you. Will not the next step be to destroy the liberty of canvassing with freedom the measures of the administration; a right which is secured by our Constitution? Will not the press die under the discretionary power of arrest? If that is not sufficient, and there should be a lingering few in this chamber who venture to question any one act of the existing administration, may not the power be applied to them, and not only rebellion be crushed out in the seceded States, but the last hope of liberty crushed out, by destroying the right of the Representative of the people to boldly question the acts of power, be they those of a President, a judge, or a Congress?

Sir, I could dilate on this subject to a much greater extent; but can see that few honorable Senators opposed to me have listened to my warnings, nor will they probably have read my remarks until they pass this resolution. I suppose I must give up the faint hope I entertained, that this resolution, so utterly unnecessary to have been introduced, even on your own theory, can or will be defeated. It will pass; but, in my judgment, when you pass it, you prostrate the liberties of this country and destroy the rights of its citizens as free citizens. You must carry with you the fact that you have no condoning power, no pardoning power. You may declare an act to be legal or constitutional; but if it is not, you cannot make it so; you may legalize for the future many acts which have been done, you cannot for the past.

You cannot vest power legally by a resolution, under the Constitution, where the Constitution does not vest it. You have no judicial authority so to decree; but you may, in the face of the Constitution, by bringing the legislature into accord with the Executive in the assertion of an unconstitutional power, subvert the liberties of your country. No one has asked you—and we know we are powerless for that purpose—to censure the President of the United States; but I tell you frankly, when the people of this country pass from the state of excitement which now exists, as your resolution cannot condone any act which may have been done in violation of the Constitution by the Executive, a subsequent Congress can deal legally with this question, by the action of the House of Representatives as an impeaching body, and the action of the Senate in deciding on that impeachment. I may not then be a member of this body, and I trust I shall not. I will not attempt to predict what the action of a subsequent Congress may be on those extraordinary acts of the President which you now not only determine to approve but declare to be valid. But the very face of your resolution implies that you think they are not within his constitutional powers. By specific legislation, you may give effect to all the acts mentioned in the approving resolution, except in the case of the suspension of the writ of *habeas corpus*; and in regard to that, you do not venture to declare to the people of this country by open legislation the effect and object of your resolution, be it enacted by the authority of the Senate and House of Representatives, that the writ of *habeas corpus* shall be suspended within certain limits prescribed in the law and for a certain duration of time. Yet that is the only legitimate mode of

legislation when the necessity arises, and the only constitutional mode in which such a power can be exercised.

About James A. Bayard

James A. Bayard (1799-1880) was a United States Senator from Delaware. His father, James A. Bayard, cast the deciding vote in the 1800 presidential election, and his grandfather, Richard Bassett, signed the Constitution. His brother, son, and grandson also served in the United States Senate. Bayard was one of the lone voices of opposition to the Lincoln administration during the War. via The Abbeville Review http://www.abbevilleinstitute.org/review/executive-usurpation/