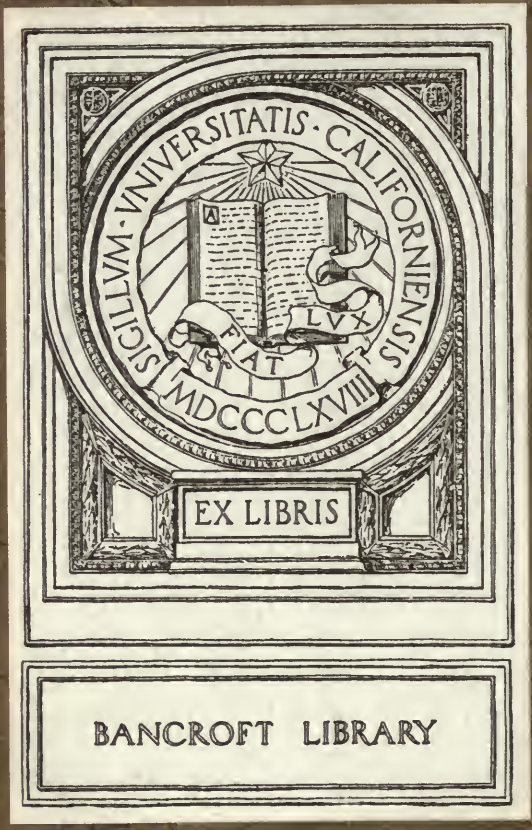

HABEAS CORPUS,

THE LAW OF WAR,

AND

CONFISCATION.

By S. S. NICHOLAS.

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HABEAS CORPUS.

The vindication of the President's side of this subject has at length fallen into the hands of most unquestionable legal ability. The venerable and eminent Horace Binney has published a carefully prepared pamphlet of fifty-eight pages in vindication of the President's right to suspend, or of his right to disregard the privilege of the writ of *habeas corpus*. In doing this, he is not merely personally discourteous towards Judge Taney, but quite free in imputation upon the character of Madison and the Congress of '92. He also imputes to those "men of great acuteness" who deny this right the biased influence of their "political opinions" in favor of democracy, and "an acquired prejudice against Presidential power, "because it carries power in that direction which is against the *gulf stream* of legislative authority, the great channel of the popular will of the moment." After such free invitation by example, he will neither be surprised or offended if his readers recollect or notice his frank showing of his own politics as some explanation of his own novel and most peculiar opinion. The pamphlet leaves no need for relying on popular imputation, that he is of that old school of ultra Federalists who looked upon Alexander Hamilton, if not with perfect reverence, at least with implicit confidence in his political infallibility. This, too, in despite his known predilections for the English Constitution as the very best that ever was or could be made; — and despite his attempt in Convention to give us in addition to a Senate for life, a President for life, with an absolute veto on all acts of Congress, and a suspending power over all passed acts; whilst the Governors of the different States were to be appointed by the General Government, with a negative or veto power on all State legislation. He speaks of the "greatly preponderant strength" of Congress over that of the President as "the vice of the Constitution." Whilst yielding it no word of commendation for supposed excellence, nor using towards it any expression of devotional affection, he obtrudes upon his reader a warm eulogium on the English Constitution. Does he not force upon his reader the surmise, that his bias in favor of strong government may have influenced this his effort so materially to enlarge the power of the executive? With due deference, this is not the proper mode to amend the Constitution. As said by Washington, "let there be no change by usurpation." What is alteration or amendment, not obtained in the regular mode, and merely through the insidious instrumentality of false construction, but usurpation?

The reader, however, can not fail to accord this new champion the tribute of admiration for intrepidity in thus periling so large a reputation in his effort to give us a stronger government.

"*The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.*"

The privilege mentioned in this clause of the Constitution is that of an imprisoned or detained person to be brought before a legal tribunal, to be discharged, bailed, remanded, or tried without arbitrary delay.

By which of the three departments of government the suspension may be made, Mr. Binney says "is the question of the day."

It is a question now for the first time raised, after the government has been in operation for more than seventy years. Heretofore it was so unanimously understood that the power belonged to Congress as to prevent even the mooting of any such question. This common opinion has been affirmed by the express declaration of the Supreme Court, by all the commentators, by all our jurists and statesmen who by action or otherwise ever intimated an opinion on the subject. It is also confirmed by the fact, that, after thorough research, those who dispute the opinion have not adduced the least intimation of even a contrary doubt heretofore expressed by any lawyer or statesman. Nevertheless, the apologists or defenders of the President who now venture to question the soundness of the opinion insist that it is still open for revision, and challenge discussion. It is the present purpose to present a brief, condensed view of the subject, sufficient, as is supposed, to answer this new champion.

There is a short process by which to eviscerate the very *gist* of the question, which seems not yet to have been applied, simple and obvious as is that process. Let us suppose the Constitution wholly silent on the subject, saying not one word about the writ or its suspension: where then would have been the power to suspend? No intelligent, candid man will pretend that it would not be clearly, indisputably with Congress, or that by any possible fair construction the power could be assigned to the President.

This conceded, then let it be remembered that the clause is a *restrictive*, not an *enabling* one. Without the restriction, Congress would have had plenary power, untrammeled discretion over the writ. It could have created the writ or not at its pleasure; suspended or wholly repealed it out of existence whenever and as often as it thought proper.

Here, then, this full power, this full discretion over the writ, was what had to be restrained to acomplish the plain purpose of the clause, that is, placing the citizen's privilege of using the protection of the writ upon a surer, more permanent basis than it stood in England, where it rests upon the untrammeled discretion of Parliament. Who, then, was intended to be restrained by this clause? Surely not the President, who, under such silence of the Constitution, would have had no possible control over the writ in any circumstances whatever. There could be no necessity to restrain his power when he would have none to be restrained. Full surely it must have been intended to restrain Congress, which alone and exclusively would have had the power.

If this plain view needed confirmation it could be found in a cotemporaneous discussion in the Virginia Convention. Patrick Henry contended that the restrictive or prohibitory clauses created by *implication* powers not specially given, contrary to the assertion of the advocates of the Constitution, that the government would have no power but what was specially granted. He referred to the *habeas corpus* clause, and said: "It results, clearly, that if it had not said so, they could have suspended it in all cases whatever." Governor Randolph, to whom the country is more indebted for the Constitution than to any other member of the Federal Convention except Charles Pinckney, answering Henry, said: "Gentlemen, suppose from the negative restrictions that Congress is to have powers by *implication*. I will meet them on that ground. I persuade myself that every exception here mentioned is an exception, not from general powers, but from the particular powers therein vested. To what power is the exception made to the importation of negroes? Not from a general power, but from a particular power expressly enumerated. This is an exception from the power given of regulating commerce. He asks where is the power to which the prohibition of suspending the *habeas corpus* is an exception. I contend that, by virtue of the power given to Congress to regulate the courts, they could suspend the writ. This is therefore an exception to that power." And so he goes on as to each of the restrictive clauses, showing it to be an exception to a specially granted power.

The clause must therefore be considered as addressed to Congress, and

to no other department, saying in effect you shall not exercise *your power* of suspending the privilege of the writ, unless when in cases of rebellion or invasion the public safety may require it.

Knowing that the writ would have to be created by legislation, and that nothing but legislative power could repeal or suspend, that is, partially repeal such legislation, it must necessarily be the legislature that was intended to be controlled. Knowing that the President would have no legislative power or suspensory power over legislation, the clause could not have been intended to restrain him. If the intention had been to confer on him the suspending power, they well knew the indispensable necessity for doing so by a plain, unambiguous grant. Such grant would have been so contrary to popular opinion as to good government derived from English precedent, and to the whole theory of the Constitution, and it would have been such an anomaly in a government of separate departments, that the necessity must have occurred to every one for making the grant in the plainest language. The absence of any such language is ample disproof of any such intention.

When the negation of a power, but in an excepted case, carries with it *permission* to exercise the power in the case excepted, surely the permission results to him whose power is so restricted. When a specific abstraction is made from a Congressional power, it must retain all the power not abstracted. Or, if one of its powers is reduced to its exercise in a specified case, it necessarily retains its power to the extent of that case. Nothing but the plainest language could properly transfer the residuum to the President. There is absolutely nothing upon which to imply such grant to him. Even if there was some plausible basis for such implication, still, as said by the Supreme Court, "it is certainly against the general theory of our institutions to create great discretionary powers by implication." Gelston vs. Hoyt 3, Whean 246. Indeed, according to both the theory and letter of the Constitution, it is more than doubtful whether the President has any implied power properly so called, the whole class of incidental, inferential, or auxiliary powers, "necessary and proper for carrying into execution" "the power vested in him," being expressly given to Congress by the general clause of sec. 8, art. 1. This was fully proved by Webster, Calhoun, and others, in the debate on Jackson's protest. It has also been frequently so decided by the Supreme Court in reference to the vast jurisdiction conferred by the Constitution on the judicial department, none of which can be exercised but when and as Congress directs. A parity of reason makes all those decisions equally applicable to the executive department.

This plain view ought to settle the question satisfactorily to the plainest and most astute intellects. No amount of sophistry can cloud with the smallest doubt the process by which the result is attained.

Mr. Binney, whilst overlooking entirely this decisive view, contends, because it is not said distinctly, explicitly, who shall exercise the power, it must go to that department to which its exercise most appropriately belongs by the general scheme of the Constitution, and hence infers that "the power appertains exclusively to the President."

After an elaborate history of the writ, and of the adoption of this clause into the Constitution, he takes infinite pains to prove the superior trustworthiness of a President over Congress, and his better adaptation to the exercise of such power—thence inferring, because it ought to have been given to him, it must be construed to be so given in the absence, as he insists, of sufficiently manifested intention to the contrary. The whole of his argument to prove this superior fitness of a President, if it need answer, is fully answered by the only instance occurring in our history where there was a difference of opinion between Congress and the President as to the necessity of suspending the writ. It occurred during the time of President Jefferson, when Congress decided contrary to his opinion, that there was no need for a suspension, and the result proving that Congress was right and he was wrong. This only example in our national experience induces no undue confidence in presiden-

tial infallibility, for it will be a most rare accident that will ever give the nation a President of more eminent ability than Jefferson. But the argument needs no answer. It matters little what he or we may think as to which of the two was the more suitable depository of the power. What he had to prove was that the members of the Convention thought as he does, and then that would have afforded some semblance of an argument in favor of his new invented version. But this he does not even attempt. No one knows better than he the perfect truth of the constrained admission of Messrs. Lincoln and Bates, that the Constitution was framed in "special dread of the unity of power," that is, of executive power. This being so, he is not only deprived of all gain to his argument from that imputed superior fitness of a President, but the argument turns against him with peculiar force from the great importance he would evidently have attached to the fact if it had been really such as to suit him. That he knows the Convention did not participate in his predilections for executive power, but were governed by an opposite feeling—by "a special dread" of such power, is clearly inferrable from his pamphlet. He speaks of the "greatly preponderant strength" of Congress over that of the President as "the vice of the Constitution;" and cites with approval the opinion of the English novelist, Bulwer, that our government exhibits "the feeblest executive perhaps ever known in a civilized community." He even permits himself to say: "Jealously of that office during the earlier part of the Convention, and in certain States before the adoption of the Constitution, was a topic with those who did not wish any Constitution or Union; *but for sixty years, at least, it has been beyond any sensible man's power of face to profess it gravely.*"

Such an affirmation, from such a man, at such a juncture, ought not to go without an emphatic contradiction and refutation, though every "sensible man" may know, or fancy he knows, that it has not the slightest foundation in fact. Whilst a perilous warfare is waging against the Constitution, and a powerful conspiracy going on for accumulating all power into the hands of the President, the published sayings of such a man, having direct tendency to aid that warfare and conspiracy, ought not to be overlooked because of their harmlessness if uttered in other times, or only to men of intelligence.

It would be worse than tedious, it would be useless, to multiply proof in negation of his assertion. Let a few example specimens of the superabundant proof suffice. In 1826, when an annual disbursement of five or six hundred million and the patronage arising from a military and naval force of near seven hundred thousand men was anticipated by no one, a committee of the Senate, composed of such men as Benton and Van Buren, said:

"Patronage will penetrate this body, subdue its capacity of resistance; chain it to the car of power, and enable the President *to rule as easily and much more securely with than without the nominal check of the Senate.* We must look forward to the time when the nomination by the President can carry any man through the Senate, and his recommendation can carry any measure through Congress; when the principles of public action will be open and avowed: the President wants my vote and I want his patronage. What will this be but the government of one man; and what is the government of one man but a monarchy?"

In 1840, Webster in his Richmond speech said, that, in his judgment, "it has come to be true, in the actual working of our government, that the executive has increased its influence and patronage to such a degree that it may counteract the will of a majority of the people. I believe that the power and patronage of the executive not only has increased, is increasing, but *ought to be diminished.* * * * Perhaps it remains to be seen whether the framers of the Constitution had not better have given less power to the executive, and taken all the inconveniences arising from the want of it, rather than hazard the granting of so much as might *prove dangerous, not only to the other departments, but to the safety and freedom of the country at large.*"

During the same year, Clay, in his Hanover speech, said: "Modern democracy has reduced the federal theory of a strong and energetic executive to

practical operation. It has turned from the people and their immediate representatives, the natural allies of genuine democracy, to the executive; and, instead of vigilance, jealousy, and distrust, has given to that department all its confidence, and made to it a virtual surrender of all the powers of government. The recognized maxim of royal infallibility is transplanted from the British monarchy into modern American democracy, and the President can do no wrong. The new school adopts, modifies, changes, renounces, renews opinions at the pleasure of the executive. * * * The sum of the whole is that there is but one power, one control, one will in the State. All is concentrated in the President. He executes according to his pleasure or caprice the whole powers of the Commonwealth which have been absorbed and engrossed by him. One sole will commands and predominates this vast community. If this be not practical despotism I am incapable of defining it. The existence or non-existence of arbitrary government does not depend upon the title bestowed upon the chief of a State, but upon the quantum of power he possesses or wields. * * * How is it possible for public liberty to be preserved, and the constitutional distribution of power among the departments maintained, unless the executive career be checked and restrained."

What were the encroachments, usurpations, and developments of presidential power so loudly complained of by Webster and Clay in comparison to those we are now daily witnessing? Yet this venerable writer has the "face" to say, "it is beyond any sensible man's power of face to profess gravely any jealousy of the presidential office." It may require no special "power of face" for an old fashioned Federalist to avow his predilection for a strong government, but it ought to require no little to impute to all those among the fathers of the republic, who professed jealousy of the presidential office, a want of friendship for the Constitution and the Union. The probability is, that fully nine-tenths of the nation felt that jealousy. It ought not to give offence to any of the living to express the belief as to those dead fathers, that such was their devoted attachment to the Constitution and the Union, that few or none of them would ever have attempted to alter the Constitution by false construction. That none of them would ever have proved so disloyal to the Union as to aid in the destruction of that Constitution which constitues its chief value. They would not have encouraged latitudinous construction at a moment of popular frenzy, when public sentiment sets so strongly against all barriers to the accumulation of presidential power. Their fealty to party creed, or theory of best government, would have yielded to loyalty to the Constitution and the Union. They certainly never would have given aid and comfort to the destructives whilst the Constitution is in a death agony under their gigantic clutch, and when there is apparently neither moral or physical power in the nation to loosen their grip.

Mr. Binney contends that the power and duty of making arbitrary arrests pertains to the executive during the suspension of the writ, and that therefore there is a peculiar fitness in his having also the power to suspend. Though it seems not to have occurred to him, yet it will to all his intelligent readers, that his assumed fact furnishes the most conclusive reason against his construction. The office of the writ is to protect the innocent against arbitrary arrests by any one, which proves in practice, in accordance with rational presumption, almost exclusively — nine cases in ten at least, a protection against executive abuse of power. How preposterous then, how contrary to all the analogies of the Constitution, to suppose it to have been intended to leave it to executive discretion to remove this, to him, obnoxious restraint upon his power. In England, they trust to the king an absolute veto, the power of war and peace, the appointment of all officers, and the creation of an unlimited number of hereditary legislators, but do not trust him with discretionary power over the sacred protection of this writ— it is confided to Parliament alone. The framers of our Constitution, influenced by "special dread" of executive power, and by a still higher appreciation of the value of that protection, and uninfluenced by English example, would not trust an unrestricted discretion

over it to any one, not even the legislative department. Influenced by such high appreciation of the protection, and such manifest jealousy of all officials in regard to it as to prohibit its suspension except in time of invasion and rebellion, and only, then, even "*when the public safety may require it*," it could not have been intended to give the power of determining when the public safety did so require to one, the very one, the only one of the whole nation who would be under the personal bias of deciding in his own favor and relieving his own power from an irksome restraint. That, as Daniel Webster would have expressed it, "would be placing the sacred kid under the paw of the lion." Who dare impute such worse than folly to the framers of the Constitution!

So rife was the jealousy of the executive power in the national mind, that the Congress of '92, composed in large part of members of the Convention, would not trust even to Washington to determine when a rebellion had become too strong for the civil authorities, but required that fact to be first determined by a United States Judge before the President was allowed to use the militia in its suppression. Such also is believed to be the almost uniform tenor of State legislation on the subject, as it has also been of English legislation.

According to the theory of our written constitutions, it belongs to the legislature, generally, to determine what ought to be done and command what shall be done, and to the judicial and executive departments to carry the command into effect. A power in the executive to determine that the privilege of the writ ought to be suspended, and to order its suspension, is subversive of this fundamental principle. It would be the introduction of a discordant anomaly. The avoidance of such an anomaly is strong reason against implying or presuming intention to grant such power.

Another reason against the lodgment of such power in the President is that he might be a sympathizer with the rebels, if not an instigator of the rebellion. The fact may not, probably has not actually occurred, but it is notorious that the last President was strongly suspected, and if Congress just before the expiration of his term had suspended the writ, the power of doing what was to be done would not have been confided to him or his subordinates, but to the judiciary and its subordinates. The Constitution gives the power to confer the appointment of "inferior officers" upon the Courts, and to those inferior officers would have been assigned the defined duty of doing whatever was intended should be done under the suspension. The President has, ex-officio, no power of arrest, nor any power whatever towards suppressing rebellion except such as Congress chooses to give, and the whole of which Congress can at any moment take away. The writer's challenge, made months ago, for the production of a single instance before the advent of President Lincoln of even an attempt by any President or State Governor to exert the power of arrest, has not been answered. Most probably it never will be answered, as the attribution to the President of any ex-officio power of arrest is a thing altogether new and of very recent invention. At common law, in certain cases of notorious felony, every citizen had a right to arrest for the purpose of carrying the accused before the nearest magistrate for commitment, and if our constitutions have not abrogated this right, the President has it as a citizen, but not, ex-officio, as part of his official functions. He can, as an officer, only exercise the power when and as Congress shall direct.

Mr. Binney, if correctly understood, contends that the Constitution itself suspends the writ, or, which is the same, permits it to be treated as suspended upon the happening of the concurring facts of a rebellion and of a peril to public safety requiring its suspension. This is a most obviously illogical conclusion from the mere words of the clause, and there is certainly nothing elsewhere in the Constitution to aid that conclusion. The clause is restrictive, with a sort of negative pregant exception to its prohibition, carrying an implied permission to suspend. This implied permission unavoidably involves the idea that something has to be done to carry out or act upon the permis-

sion. That is, something besides the Constitution will be required to create a suspension. Otherwise, if the intention was that the Constitution itself should make the suspension upon the happening of the contingency, it would have plainly said so, by adding to the clause some such words as these —"and thereupon the privilege of the writ shall stand suspended." The permission given is unequivocably to suspend, not to treat it as suspended, consequently it could not have been supposed that the Constitution itself made the suspension in *presenti*, to be carried out in *futuro*. So far as the permissive power of the clause goes, in saying the privilege shall not be suspended except on a named contingency, it says nothing more or less than would follow the equivalent words, "*the privilege may be suspended*" upon the named contingency. Yet, if the latter had been the words used, the most caviling criticism could not deny that they referred to something *de hors* the Constitution, which must be done to create the suspension. What that something was could admit of no doubt with the Convention. There being neither writ nor the privilege of the writ when the Constitution was made, they had to be given by legislation, and as the legislature alone can repeal or suspend a legislative act, they knew that the suspension could only be made by Congress. Unless, indeed, they really meant to confer a dispensing power on the President. But they knew that such power was held in abhorrence by the nation, its usurpation having cost the head of one English king and the throne of another, and therefore could not have so intended. If they had so intended, then every dictate of common sense prudence would have induced the making the grant of such power in the plainest, least ambiguous terms. They never would have left such an obnoxious power, such an inevitable cause of contention to rest on any doubtful construction.

A power to disregard the privilege of the writ is a very different thing from a power to suspend the privilege. The former, if permitted, might be exercised by the executive; but the latter can not, because it involves the exercise of legislation. The distinction is so obvious, that, if the former had been intended, the Constitution would have plainly said that in the given case "the President may disregard the privilege of the writ."

It is agreed on all hands that the clause is a *prohibition* on Congress, except in case of necessity, against *permitting* any disregard of the privilege of the writ. What sense can there be in such *prohibition* if the Constitution itself gives that *permission* to the President? Yet that absurdity is involved in the attempt to deduce a grant of power to him from a clause not even naming him, and which is merely a restraint upon or an exception from congressional power. That the suspending power is a joint concurrent power in Congress and the President is an absurdity, involving a probable if not necessary conflict of jurisdiction of which the Constitution is no where guilty. Both departments can not at the same time have a purely discretionary power over any subject, without the result in practice being a mutual nullification to greater or less extent, or at least without very certain collision.

As contended by Mr. Binney, the mere fact of rebellion is of such public notorious character as to permit its ascertainment by almost any functionary. But the rebellion must be of such perilous character to the public safety as to require a suspension of the writ, and that is a matter about which there may well be difference of opinion among even the wisest and most disinterested. English precedent, the national feeling of the day, as also that of the members of the Convention, all concurred in pointing to Congress as the only safe and appropriate depository of the trust for determining that question, and in pointing to the executive as the least trustworthy or appropriate. Such was the popular prejudice against any control over that sacred, cherished privilege, that the people of Virginia declared in their Constitution: "The privilege of the writ of habeas corpus shall not *in any case* be suspended."

The result is, that the long established construction is the true one, and that Congress alone has the power to suspend the writ. When Congress

exercises that power, it is to be hoped that it will carefully say for how long the suspension shall last, what powers shall be exercised during the suspension, and by whom they shall be exercised, conforming as near as may be to the requirements of the Constitution for protecting the citizens against arbitrary or vindictive persecution. Since the publication of the writer's review of the Attorney General's opinion, he has met with nothing in print sustaining the ground of that opinion requiring special notice, and there is, therefore, no need for his prolonging the discussion. It is due to Mr. Binney to say that he has done nothing to damage his high character, professional and private, by any direct approval of the Attorney General's opinion, or by seeking from the law of war any aid to his own construction.

THE LAW OF WAR.

"When your country is actually in war, whether it be a war of invasion or a war of insurrection, Congress has power to carry on the war, and must carry it on according to the laws of war; and by the laws of war an invaded country has all its laws and municipal regulations swept by the board, and martial law takes the place of them. * * * When a country is invaded, and two hostile armies are met in martial array, the commanders of both armies have power to emancipate all the slaves in the invaded territory."—*Speech of J. Q. Adams in* 1842.

Shortly after the delivery of this speech the present writer publicly denounced its "extraordinary doctrine as fit only to be met and buried under an universal national execration. * * * A grosser absurdity surely never entered the mind of an intelligent man, educated under a government having a written Constitution."

This denunciation, and the argument made in its vindication, Mr. Adams from his seat in Congress promised to answer, but from some unexplained cause he never made the attempt. It was predicted at the time that "these ravings of Mr. Adams" would hereafter be "quoted as authority on Constitutional law," and so it has turned out. Among the many so using those ravings my attention has been very recently called to a pamphlet written by a law professor in a Massachusetts college, who has the bold frankness to tell his employers and the public that he so uses them before his class. He also quotes the clause of the Massachusetts Constitution, saying that except "by authority of the Legislature" "no person can in any case be subjected to the law martial" but those engaged in the military service, and intimates the opinion that, notwithstanding this clear provision, martial law would prevail in time of war, and the commander of the State militia would have the rightful power to disregard the State Constitution. In other words, or rather the effect of this is, that the people of this country have not the right of self-government, not having the privilege of making a Constitution to suit themselves. This is not merely folly; it is wickedness. It is treason against civil liberty and the Constitution; it is moral treason against the government. A college is somewhat of a nuisance which permits the inculcation upon our young men of such debasing, anti-republican principles so destructive of every enlightened sentiment of civil liberty. We may cease to wonder at the decay of that devotional fealty to the Constitution which was formerly common to nearly all educated Americans. He seems to think that whatever "might be subversive of the efficiency of military operations" cannot be secured against military power by the people in their constitutions; he deeming the efficiency of military operations the *summum bonum* of national existence. How differently do these degenerate sons of Massachusetts think of the necessity and safety of military supremacy from their revolutionary fathers. Those men of the Revolution held military sway in utter abhorrence, whilst their degenerate sons deem military supremacy so indispensable to the State that the people themselves are not competent by anything they may say

or do, to take that supremacy from the military. The Federal and State Constitutions are all made in the spirit of utter repugnance to military rule, and have done everything that written words can do to keep down military supremacy at all times, under all circumstances. For instance, they all say in effect what that of New Hampshire expresses in the following words: "In all cases and at all times the military ought to be under strict subordination to and governed by the civil power." There is no single purpose more distinctly legible throughout those Constitutions than that of keeping the military in subordination and never allowing them an occasion or pretext for asserting in their own behalf a power above the law. Unlike this Professor, the framers of those Constitutions deemed that subordination an infinitely greater State necessity than any other that could occur, far greater than the mere "efficiency of military operations." The Constitution of Massachusetts is the only one that seemingly permits the introduction of martial law even by legislative authority.

The learned Professor is graciously pleased to admit that if "martial law is the will of the commander-in-chief," "it cannot exist in this country consistently with the Constitution, for it would be utterly subversive of the Constitution for the time being. Neither the President or Congress can constitutionally proclaim or authorize such a power." But he seems to think that if he had the defining of martial law, he could devise something efficient, without trenching on the Constitution. Unfortunately, however, he having no such privilege, and the will of the commander being verily the only martial law of which we have any knowledge or of which the law books give any information, the nation must be deprived of his proffered services as a lawgiver.

Still the Professor claims for military commanders power not only to do nearly everything that may appear to them to be required by military necessity, but to do so free from personal responsibility to the law, with a total exemption from personal arrest, civil or criminal, during military operations. To prove the necessity for this exemption from arrest, he supposes a sheriff with his posse for the purpose of arrest assaulting the commander's army in the rear whilst the enemy are fighting him in front. This supposed case could never occur, for there is not a sheriff in the whole Union fool enough to attempt an arrest under such circumstances, and if such a one there is he could not find five men in any State fools enough to join him in the attempt. That and such like supposed cases, invented for furnishing a plausible reason for subverting a fundamental principle of the Constitution, only serve to bring in doubt the sanity of the supposer. Why not with equal propriety suppose hundreds, nay thousands, of unoffending citizens, men, woman, children, wantonly murdered under the rule of martial law, or with their houses burnt and their property destroyed, turned out in the mid winter of a severe climate to perish with cold and hunger. If the public press speaks truth, the possibility, if not the actuality, of the latter supposition is being proved under the operations of martial law in Western Missouri. In full corroboration there might be cited the three wanton massacres committed without punishment or rebuke in the streets of St. Louis by German soldiers upon unoffending men, women, and children.

The correspondent of one of the northern papers says that the President never reads newspapers. The probability that he has not time to do so gives this assertion some plausibility. Is there no humane citizen, having access to the President, who will call his attention to these manifold atrocities? Gentlemen of first respectability, who have known him long and well, still insist that his heart is in the right place and of the right make, that it is most kindly and humane. If such things can be done under such a President, we have little temptation for violating the Constitution to let in the rule of martial law.

By way of legal authority or precedent in his support, this Professor cites the *obiter dicta* of Judge Taney in the Rhode Island case, and in that of Mitchell *vs.* Harmony, 13 Howard, 115. The first of those cases has already

been commented on in a previous pamphlet. The other case was a suit brought to recover the value of goods seized or lost by the alleged illegal conduct of an officer during the invasion of Mexico by one of our armies. The Court decided that there was no actual necessity for the seizure, and, after so deciding, it was *coram non judice* to say what would have been the liability if there had been such necessity. The opinion *extra* judicially says: "There are, without doubt, occasions in which private property may lawfully be taken by a military officer for public use. In such cases government is bound to make full compensation to the owner, but the officer is no trespasser." This is in seeming contradiction to what the opinion afterward says: "It can never be maintained that a military officer can justify himself for doing an unlawful act by producing the order of his superior. The order may palliate, but it cannot justify." How much more in harmony with this principle would it have been if the opinion had said, that when an officer chooses to recognize supposed necessity as superior authority and obey its command, such command may palliate, but not justify—necessity not being recognized as a lawful authority in a Republic.

No precedent or authority is cited to sustain this dictum, and it is confidently believed that none could have been cited. The whole opinion reads much more like the *rescript* of a Roman emperor than the decision of a court. There is no argument used to sustain the position, and it is contrary to all proper usage of courts to dispose of so important a principle without either argument or citation of authority. In both these cases Judge Taney has betrayed, in the free use of his dicta, rather too much alacrity of leaning in favor of strong government. Since so high an example has been set for tracing legal opinions to imputed political bias, it may not be invidious to suggest that Judge Taney is also an Old School Federalist, and to intimate that these leaning *dicta* may perhaps be ascribable to his bias in favor of strong government.

There is a principle or maxim of the common law that private right of property must yield to public necessity. The principle has been adopted or ratified by our constitutions, but it has been *sub modo* only. They all recognize the universal principle of eternal justice involved in the sanctity of private property, and expressly prohibit its being taken for public use without compensation. The adoption of the principle at all results entirely by implication from this prohibition. Judge Taney admits that "the government is bound to make full compensation." But how is it bound? The Constitution gives no remedy against the government. Congress, though it ought to have done so, has given no such remedy. The government, therefore, is under only an honorary obligation, which in practice most generally proves near of kin to no obligation at all. Indeed, the delays and difficulties in obtaining an act of Congress are such as to preclude the prosecution of a small claim altogether. This could not have been the kind of compensation, or the remedy for compensation, contemplated by the Constitution in giving its implied sanction to the arbitrary taking of private property for public use, that forcing individuals to contribute an undue share towards the wants of the government. The Constitution must have meant to give the owner a much more substantial protection and remedy. Till Congress shall give a direct, available remedy against the government, justice forbids, the true intent of the Constitution forbids, exempting from personal responsibility the officer who makes the forcible seizure. His responsibility is the only available avenue to redress for humble citizens residing remote from the capital. The superior influence and information of the officer afford him a far better chance of obtaining indemnity through the slow and uncertain process of an act of Congress. Besides, his personal responsibility will make him observe a proper caution in the exercise of his arbitrary discretion in making seizures. Such caution is of great value to the government, and sound policy, for its protection, requires the question to be settled in the way best calculated to ensure the exercise of

such caution—the perpetual apprehension of being imposed upon by claims for collusive seizures and excessive seizures is a main reason why Congress manifests such reluctance and dilatoriness in the adjustment of such claims. The interests of both the government and the owner concur in requiring the Constitution to be so construed as not to allow a taking of private property for public use without compensation actually made, which renders the officer personally liable in the first instance, compelling him, instead of the owner, to look to the government for indemnity. Such it is hoped and believed will be the ultimate decision of the Supreme Court upon full and fair reconsideration. Adherence to this dictum requires a false construction, in violation of the words and whole spirit of the Constitution. If Congress wishes constitutionally to exercise the permitted right of eminent domain or sovereign power over private property, it must pay in advance, or give the owner a direct, available remedy against the government; otherwise, its officers must remain personally liable till compensation is actually made.

It is only by a most liberal stretch of the powers of construction that even proper adequate remedy can be allowed to stand in lieu of actual compensation by pre-payment. The bill recently passed the Senate attempting to authorize the seizure for national use of railroads and telegraph lines gives no such proper adequate remedy, and is therefore unconstitutional under any allowable construction. Instead of assessment of compensation, to be made under judicial supervision with direct recourse upon the treasury for the amount, it directs that three commissioners of the President's appointing shall make the assessment for the information of Congress, with whom it will still be discretionary whether to pay or not. It is absurd to suppose that the court will consider this as adequate remedy in lieu of just compensation pre-paid.

Another section of this bill authorizes the *impressment* into the nation's military service of all the employees of the roads and lines so seized, subjecting them also to the pains and penalties of the rules and articles of war. Congress probably has the power to compel the militia to stand a draft for a term of military duty, but it is doubtful whether it can recruit the regular army in that way. But even if it could, there would still be reason for more than doubts whether that would authorize this summary impressment of a particular class of citizens, whilst all other citizens remain exempt from such oppression. There may be no specific clause expressly prohibiting the exercising of such tyrannical power; but what is equally efficacious, such power is repugnant to republican government and the whole spirit of the Constitution, which requires the burthens of government to be distributed with something like fairness and equality among our citizens. This is in strict analogy with those adjudications and repeated declarations of our most eminent jurists, that, even if the Constitution had not prohibited the taking of private property without compensation, it could not be done, because such oppression is so repugnant to the eternal principles of justice that it could not be allowed in a land of liberty boasting a republican government. But if specific prohibition must be found against this mode of legislation for taking whole classes of citizens from under the protecting guaranties of the Constitution, it is believed that the prohibition against bills of attainder may well be applied for that purpose. It is no light penalty to make a soldier of a citizen without any fault in him and against his consent, whilst his neighbors are exempt from such arbitrary usage. If this view be correct, if this indeed be punishment, however light, the bill is to every intent a bill of attainder. The government can with no more propriety use punishment of the innocent as a means of promoting the public interest, than it can take private property for public use without compensation.

The discussion of this bill in the Senate is a marked feature of the times, showing by what an attenuated thread the liberties of the nation are now suspended. Senators of first respectability and intelligence, whilst proclaiming their unalterable determination not to go beyond the Constitution for pow-

er to carry on the war, expressed their undoubted belief that the President already has all the power attempted to be conferred by this bill.

All this, however, is wandering somewhat from the main purpose of this chapter, which was to make a comment upon the text extracted from the speech of J. Q. Adams.

The pretence that the Constitution was made for peace and not for war is a new invention of the enemy. It was formerly thought that if the bill of rights was made more particularly for either, it was for time of war or rebellion, because those would be the times when men's passions would be aroused and majorities would persecute minorities. The old Federalists, who disbelieved in popular self-government, who derided our government for its alleged feebleness, who said it might do for the halcyon days of peace but would not answer for the stormy times of war, did not pretend that it was intended to operate only during peace, but complained that being made for war as well as peace it was too feeble for the former. Their complaint was that an undue trust in the people, and an undue jealous distrust of government, had emasculated it in all its departments, especially in its executive department; that war could not be properly carried on or rebellion suppressed with such inefficient powers. Their complaint was that there could be no enlargement of those powers during war or other emergency of great State necessity; that an over jealous solicitude for the preservation of liberty had deprived the government of necessary efficiency. They never consoled themselves with the belief, nor dared make the assertion, that there was an inherent principle or one lurking in the Constitution, which, whenever an emergency arose, would, by the law of necessity, "sweep the Constitution by the board" and substitute the law of war in its place. Such an assertion would have sounded badly in the ears of the men of the Revolution, who in their Declaration of Independence had made it one of the principal grounds of complaint against the King, that "he has affected to render the military independent of and superior to the civil power." Against that military superiority they had successfully fought out the Revolution, and in making their Constitutions they were specially careful to give it no countenance or foot-hold.

There is not, there never can be, in this country, a law of war different from the constitutional law of the land. There is, there never can be here, any other law of war other than that which Congress has created or may create within the limits of its constitutional power. The usages of civilized warfare, derived from the law of nations, come to us entirely by Congressional adoption, express or implied, and are necessarily limited within the range of Congressional power. They are adopted in mitigation, not as an enlargement of military power.

Whilst conducting war in a foreign country, our *whole* government is under no check or responsibility but that of the enlightened censure of Christendom, though the Executive is under the control of Congress. It is otherwise when the war is conducted on our own soil, whether in defense against invasion, or defensively or aggressively against rebellion. Here the Constitution has full and direct sway, acts as it proclaims itself to be the supreme law of the land, and is to every intent *the law of the war*. It permits the law of nations, or its rules of civilized warfare, to be the *law* of such a war so far as it applies to foreign enemies or to avowed rebels, but never to our own non-combatant citizens; for that would, *pro tanto*, be an abdication of our national supremacy within our own domain—the intervention of foreign law for the government of our own people. It would, *pro tanto*, be an abrogation of the solemn national declaration, that the Constitution "shall be the supreme law of the land."

In express negation of any other hypothesis, we find the Constitution, in full view of all the exigencies of military power in time of war, carefully saying: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, *except in cases arising in the land or naval forces, or in the militia when in actual service*

in time of war or public danger; * * * nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

If it had been desired or contemplated that the "life, liberty, or property" of a citizen not engaged in "the land or naval forces," or in actual rebellion, should be brought under arbitrary military power "in time of war or public danger," the Constitution would have said so, and placed us all on the same footing with the militiaman "when in actual service in time of war or public danger." Such militiamen, together with that of "cases arising in the land or naval forces" and armed rebels, are the only exception to the comprehensive protection with which we are all panoplied, against the deprivation of "life, liberty, or property without due process of law," at all times and under all circumstances.

The assumption by our military commanders of power, under the pretended law of war, as something different from the constitutional law of the land, to deprive a non-combatant citizen of "life, liberty, or property without due process of law," is pure usurpation. The only law of war for their guidance and government is that from which they derive their commissions, together with their whole power—that is, the Constitution and the constitutional acts of Congress.

Influenced by the pernicious example of General Jackson, and the still more pernicious precepts of Mr. Adams, some of our modern commanders have fallen into the great mistake of supposing that upon the breaking out of the war of this accursed, most detestable rebellion, that the law of war as applicable to an invasion by us of a foreign country is transplanted and applicable here within our own territory. Under this idea one of them has collated from some military treatise a long string of rules deduced from that law, and attempts by his mere military order to apply them to all the citizens of Missouri; and among the rest he proclaims them to be under the comprehensive rule of martial law, be that what it may. What it is under his own latitudinous interpretation he has given repeated illustrations. He arrests, incarcerates, or banishes from the State whoever he pleases. He suppresses newspapers at pleasure, and has placed all published in the State under military surveilance, directing a copy of each emission to be sent to head-quarters under the penalty of suppression. He makes out a proscription list of three hundred of the men and women of St. Louis who he suspects of disloyalty, appoints three or five persons, as a board to select sixty from that list upon whom an assessment of ten thousand dollars is to be levied in proportion to their respective degrees of suspiciousness and ability to bear the burthen. If any of the sixty claim to be loyal and fail to prove their loyalty to the satisfaction of the board, he or she is to be assessed ten per cent additional. If any fail for a week to pay the assessment, they incur an additional penalty of twenty-five per cent. If any resist the levy, they are to be dealt with by a military commission. The money thus raised to be applied to the relief of such Union people as had been driven from their homes by the rebels. No case of actual resistance occurring, we are left to conjecture how an offender would be dealt with by his military commission. But one of the proscribed sought protection from the law by suing out a writ of replevin for his goods. He was immediately seized and banished from the State, with a very significant intimation that if he dared return he would be shot. The president and professors of a college, the directors of a commercial library and of a chamber of commerce, are to be removed and others appointed.

This amiable General, at the inauguration of his own dictatorship over the people of Missouri, was a stranger in St. Louis, who could have known but little of its inhabitants, he having been but recently picked up somewhere in California and put in charge of that military department; and consequently, in making out his proscription list, must have been wholly indebted to that exemplary class so loved and admired everywhere, the class of spies and in-

formers. Those of them to be found in St. Louis were peculiarly trust-worthy, from the notorious fact, that none of our other cities have ever been near so much afflicted with those virulent party strifes which engender such long enduring, bitter personal animosities.

Whence the power for these acts? How degrading the surmise, that national necessity compels resort to such petty, despicable tyranny! Is this, too, part of the law of war, of a great, imperative, overruling State necessity which throws aside the Constitution and lets in the arbitrary will of a military commander as the supreme law of the land. His intelligent countrymen will laugh at his ridiculous folly, but they cannot fail to pay the extorted tribute of admiration for his super-superlative impudence. Can it be that he is so ignorant as not to know that his sales of property will be treated by the Courts with nothing but contempt, except so far as to fix personal responsibility upon himself and his subordinates? If not, then how does he escape the imputation of an attempted swindle upon the confiding ignorant who may make purchases at his sales. He may disregard such imputation, and trust to the present Congress for indemnity against his personal liability. But some one should tell him that the personal responsibility will come hereafter, when the present ruling party may not have the majority in Congress; that party majorities are precarious things, and that any new party coming in upon the overthrow of that now dominant would let him rot in jail rather than appropriate a dollar towards relieving him from the effects of his atrocious impudence and folly.

The beneficent influence of military rule, and the necessity for its interposition as a power above law and Constitution, may be further illustrated by the opposite fates of Missouri and Kentucky under the national troubles. Both were impelled by every motive of interest, patriotism, and love for both sections to keep out of the war as long as possible, in order that they might perform the office of mediators in bringing about peace and a restoration of the Union. Missouri, with a larger population, had only half as many slaves as Kentucky, and being clasped on three of her sides by free States she had a decidedly stronger interest in preserving the Union than Kentucky. The votes of their people proved that they thought so. Only two-thirds of the voters of Kentucky voted a decided predilection in favor of maintaining the Union, whilst three-fourths of those of Missouri voted in that way. Kentucky has been treated with kindness and conciliation; no martial law, no military oppression, but slight abuse even of military power. So soon as she was compelled to take sides in the war, she frankly, cordially, ranged herself on the side of the government, and though a fourth of her territory was under the domination of invading rebels, has sent more volunteers into the field than any other State in proportion to her whole population. Under some malign, misguiding influence operating upon the Administration, Missouri was treated very differently. Without going into particulars, suffice it to say that she was treated with rigor. Whatever benefit is derivable from the application of the law of war or martial law was fully tested. The result we all know. Thousands of atrocious murders perpetrated on both sides, and at least one-third of the State desolated of both population and property; whilst in Kentucky there has been but few murders and comparatively very little destruction of private property. What amount of volunteers Missouri has sent to aid the government the writer's information does not enable him to state, but it is notorious that, first and last, at least fifty thousand of her sons have turned out in aid of the rebellion, or in home resistance to what was deemed unconstitutional oppression. Whilst, for the rest of this war, it will require full twenty thousand men in Missouri to keep her in subjection, the government need not have a man in Kentucky to keep her in loyalty.

The opposite results from these two opposite courses of policy must, to say the least, forever leave it in grave doubt whether in this country it will aid, or rather, whether it will not prejudice the government's efficiency by resorting to unconstitutional measures of coercion.

An illustration can be given which will serve to make New Englanders at least appreciate the beauties of martial law. Gen. Jackson said in a letter, and frequently asseverated in conversation, that he would have hung the leaders of the Hartford Convention if he had been commander of the military district in which it sat. It was notorious, or at least it was generally believed, that the purpose of that Convention was to bring about the secession of New England from the Union. So prevalent was this belief, that if General Jackson had actually hung those leaders under his idea of his military power, or under martial law, a large majority of the inconsiderate part of the nation would have applauded the act. What would have been the consequence? Would that have silenced the opposition in New England? So far from that, it would have been the signal for an unanimous revolt that would have permanently carried New England out of the Union. It would have furnished a justification or apology for a revolt and secession which otherwise would have been without just cause or plausible excuse.

Arbitrary, despotic measures can never be politic measures to use against Americans for bringing them under obedience to the law, especially if those measures are tainted with illegality or usurpation. The exercise of usurped despotic power over an enlightened American agonizes every fibre of his moral sensorium. There is nothing he holds in greater abhorrence. The celebrated Edmund Burke, in his memorable denunciation of arbitrary power, declared that the people themselves could not even by their own voluntary compact be rightfully subjected to arbitrary power — that such a compact would be void. The people of Kentucky fully adopted this sentiment, and gave it a sort of consecration by the following clause of their Constitution: "*That absolute, arbitrary power over the lives, liberty, and property of freemen exists no where in a republic — not even in the largest majority.*"

CONFISCATION.

"*All legislative powers herein granted shall be vested in Congress. The Executive power shall be vested in a President. The Judicial power shall be vested in one Supreme Court,*" &c.—[Con. U. S.

"The powers of the government are divided into three distinct departments and confided to separate bodies of magistracy. It is of the last importance to the purity of our institutions that this division of powers should be preserved and this barrier against the encroachment of one department upon another should be properly kept up." Gaines vs. Buford 1, Dana 505, decided in 1833. So also has it been held by the Supreme Court and all the State Appellate Courts.

"To enjoin what shall be done or what left undone, and to secure obedience to the injunction by prescribing appropriate penalties, belongs exclusively to legislation. To ascertain a violation of such injunction and inflict the penalty, belongs to the judicial function."

"So far as the act in question undertakes to divest Gaines of his title and vest it in the State, it is a legislative infliction of the penalty; it is an assumption to that extent of judicial magistracy without affording the accused the benefit of those forms and guards of trial which are his constitutional right whenever a citizen is sought to be punished either in his person or by forfeiture of his property, for alleged violations of the penal enactions of the State. The right to forfeit is merely an incident of the power to punish guilt. Without the guilt the forfeiture cannot be incurred. The guilt cannot be ascertained by the Legislature, nor otherwise than by a direct criminal procedure of some sort and a judicial determination thereon."—1 Dana 506, 510.

"*No bill of attainder shall be passed.*" "*No State shall pass any bill of attainder.*"—Con. U. S.

"*Bills of attainder* are said by Woodson, in his lectures, to be acts of the supreme power pronouncing capital sentences where the Legislature assumes judicial magistracy, and *bills of pains and penalties* those which inflict milder punishments. But it is believed that *bill of attainder* is a generic term, comprehending both description of acts. Such, at least, is believed to be its true signification, as used in our constitutions. Thus it is said by the Supreme Court in Fletcher vs. Peck, 6 Cranch, 138: 'A bill of attainder may affect the life of an individual, or may confiscate his property, or both.' So, also, it is said by Judge Tucker in his edition of Blackstone, vol. 1, page 292: 'Bills of attainder are legislative acts passed for the especial purpose of attainting particular individuals of treason or felony, or inflicting pains and penalties beyond or contrary to common law.' That the term should be received in the large sense thus given to it, is consonant with the true republican character of our institutions. A condemnatory act of the Legislature inflicting upon an individual, or class of individuals, pains and penalties is as much

within the reason of the prohibition as if it inflicted capital punishment. They are both equally hostile to the principles of civil liberty and the spirit of our written constitutions. They are equally engines of tyranny and oppression—equally unsuited to the government of a free people."—1 Dana, 509.

"Bills of attainder have generally designated their victims by name, but they may do it also by classes, or by general description fitting a multitude of persons. Either mode is equally liable to moral and constitutional censure. Nor will these suggestions be answered by the obvious difficulty if not impracticability of enforcing forfeiture by direct criminal proceedings against such a host of unknown delinquents. If the power attempted to be assumed is a wholesome one, and was wisely, equitably executed in this instance, it will be a matter of regret that other and higher considerations induced the framers of the Constitution to withhold from the Legislature the power of giving such wholesale, summary redress. If on the contrary the existence of such power would be noxious to the common weal and in this instance its exercise was oppressive, unwise, and unjust, then it will be matter of gratulation that the wisdom of the Constitution has secured the community against such extensive oppression, and that the very extent of the evil intended is a security against its perpetration. But with this we have nothing to do. The validity of the act must be tested without regard to those qualities."—1 Dana, 510—512.

Judge Story, 3 Com. 211, speaking of bills of attainder, says: "The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods at which all nations are liable (as well the free as the enslaved) to forget their duties and to trample on the rights and liberties of others. During the American Revolution this power was used with a most unsparing hand; and it has been a matter of regret in succeeding times, however much it may have been applauded *flagrante bello*."

This view of justice and policy has received our national corroboration, and the repugnance of enlightened modern legislation to confiscation in punishing crime has been amply illustrated. Congress has never yet so used its power to punish treason, and it is believed that every one of our States has abolished that forfeiture of estate which was the common law incident to attainders for every other sort of felony. Vengeance, not policy, must be the ruling motive in any attempt to confiscate the estates of five millions of rebels.

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; *nor shall any person be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use without just compensation."—Con. U. S.

Without due process of law, or the equivalent phrase, *by the law of the land*, means, according to Lord Coke, 2 Inst. 50, "so that no man be taken, imprisoned, or put out of his freehold without indictment or presentment of good and lawful men," &c., &c. "Against this ancient and fundamental law of Magna Charta," says he, "I find an act of Parliament made, that justices without any presentment or finding of twelve men, upon a bare information, should have power to hear and determine all offences committed against any statute. By color of which act, shaking this fundamental law, it is not credible what horrible oppressions and exactions, to the undoing of infinite numbers of people, were committed throughout England by Justices Empson and

Dudley." Such, also, is the signification given to those phrases by the most eminent American jurists. See 2 Kent's Com. 10—3 Story's Com. 661, and 1 Tuck. Bl'k. 304. The inference is, that no man can be divested of the right or title to his property by mere legislative action, without the co-operation of a regular judicial investigation and condemnation. It being the unanimous concession heretofore of all parties, abolitionists alone excepted, that Congress has no power of emancipation within a State, it would be doubtful whether Congress could in any mode affix emancipation as a penalty for the treason of a slave owner; but even if Congress had such power, when pursued in a legitimate manner, it would still also follow that its sole action, *proprio vigore*, without judicial co-operation, could never emancipate the slaves of rebels or traitors.

Another reason why Congress cannot emancipate slaves: It has always been conceded that Congress cannot interfere with the municipal regulations of a State, at least with such of its laws as define what shall be property, or direct how it shall be conveyed or managed. All the slaveholding States have very special regulations as to emancipation, built upon the policy of preventing an undue increase of free and pauper negroes. This policy the Federal Government can in no way interfere with. If it becomes the owner of slaves, as it legitimately may in various ways, it must hold as all other owners of property do, subject to the law of the State, which precludes the emancipation of slaves otherwise than in the mode pointed out for other owners of such property. This is practically illustrated by the requisition uniformly made of a renunciation by the State of its right to tax any real estate the Federal Government is about to buy for national use. Whether the policy be right or wrong, which restrains a slave-owner's right of emancipation, because the unfettered right might cause a public nuisance or injury to similar property of other owners, Congress in the management of its slave property can have neither power or right to violate that policy.

"Congress shall have power to declare the punishment of treason, but no *attainder* of treason shall work corruption of blood or *forfeiture*, except during the life of the person attainted."—Con. U. S.

Congress having been forbid to pass any bill of attainder, this clause must have exclusive reference to judicial attainder. In that sense it precludes Congress from all power to prescribe a forfeiture, in any mode, beyond the life estate of the offender, in any description of property, as a penalty for treason. Consequently Congress can under no view of its power emancipate a slave by way of forfeiture for longer than the lifetime of its owner, and so to exercise the power would be obviously unjust, because of the injury that would thereby be inflicted on the ultimate owner.

Judge Story, in commenting on this clause (3 Comm. 172), gives thus the reason for this limitation of the power of forfeiture: "It is surely enough for society to take the life of the offender, as a just punishment for his crime, without taking from offspring and relatives that property which may be the only means of saving them from poverty and ruin. The history of other countries abundantly proves that one of the strong incentives to prosecute such offences as treason has been the chance of sharing in the plunder of the victims. Rapacity has thus been stimulated to exert itself in the service of the most corrupt tyranny; and tyranny has thus been furnished with new opportunities of indulging its malignity and revenge, of gratifying its envy, and of increasing its means to reward favorites, and secure retainers for the worst deeds."

The restriction of the power of Congress as to extent of forfeiture is confined to attainder for treason, as such is the fair construction of the clause, unless by liberal intendment the kindred offence of sedition be also included. But that intention is also to be inferred from the fact that Congress is not so restricted as to the other crimes it is expressly authorized to punish. The fear of the power being abused by a dominant party for the purpose of persecution did not apply to any crime but that of treason and its cognates.

As all loyal Union men look forward to the day when the present execrable rebellion will be suppressed and the law restored to its supremacy, it is obviously worse than idle to resort to any mode of confiscation or forfeiture which the law, when so restored, will not recognize as legal and valid.

The proclaimed emancipation of three million of slaves is equivalent to the proclamation of exterminating war against all the men, women, and children of the South, without regard to a million of the white population against whom no political fault can properly be alleged, except from circumstances which they could not control, and of which they have been made the victims. It will also bring probable destruction upon most of the negroes, who are free from all fault towards the Government.

The adoption of such a policy would, in the estimation of all Christendom, rule the North out of the pale of civilized States, and place the war out of the rules and usages of warfare among civilized nations. So says our Declaration of Independence, than which there can be no higher authority among Americans. There never was a people so craven as not to meet such a measure with the severest retaliation. The war would be carried on by both sides under what is termed the black flag. That pretext, if not justification, which England and France are apparently so eagerly seeking for, would be afforded them on the score of humanity, as was done in the war between Turkey and Greece.

The power to inflict such terrible calamity on the nation—such an indelible stigma on its character, is claimed as part of the law of war. The power to wage the war is derived exclusively from the acts of Congress, the power to pass which is derived exclusively from the Constitution. What Congress cannot do directly it cannot accomplish indirectly through the agency of the army. Congress having no abolition power, it can institute no measure, however indirect, which has abolition for its object—such as enticing slaves to our camps, or otherwise exciting servile war. If that object cannot be attained *directly* for the great purpose of philanthropy, national peace, and prosperity, most surely abolition cannot be used *indirectly* as a means for attaining any other purpose—such as aid in carrying on the war.

It cannot be pretended that the Constitution expressly sanctions or contemplates the employment of such means in suppressing rebellion. Its framers had recently been rebels—had achieved their freedom by rebellion, and could not have held rebellion in such abhorrence as to contemplate such inhuman, sanguinary means for its suppression. Such presumption would be foul calumny on their virtue, their humanity, and their intelligence. They explicitly said what entirely negatives any such idea, and what impliedly forbids the employment of such means. They made it the express duty of the Federal Government to suppress slave insurrection. Nothing could be more absurd than to suppose permission to incite such insurrections, when as soon as they occur the Government is bound to suppress them.

The Constitution gives power to Congress "to make rules for the government of the land and naval forces," that is, to govern the war. Every officer, from the President down, would readily admit that he is bound to obey the rules and articles of war established by Congress. Now suppose that all the clauses of the Constitution, protecting the personal liberties and private property of citizens, were embodied in the rules and articles of war by Congress, no man, not even a soldier, would doubt that they must be obeyed. Yet without any such Congressional adoption, those clauses are to every intent parts of the rules and articles of war so far as they apply, and on every score are entitled to better obedience, stricter observance, than those enacted by Congress. What doubt then that the Constitution is *the law of the war?* This utterly extinguishes all idea of the Constitution being made for time of peace and not for war.

The power of emancipation is also claimed under the law of necessity; but neither does that law allow it, even according to the construction given to it

by the higher law men themselves. They admit there must be an actual, not a mere fictitious necessity for the intervention of their law and the shoving aside of the Constitution. Such necessity does not exist, nor even its semblance. That the present causeless, infamous rebellion is hard to put down cannot be denied. But that the existence of the people of the loyal States, or that of their Government, is in any sort of peril from the rebels, is what no truthful man will considerately affirm. We are in round numbers twenty million against five. When we consider our greater condensation of population, our greater facility of railroad and water transportation, our exclusive naval power, our greater pecuniary and other resources for the equipment and maintenance of armies, this disparity of mere numbers should be doubled in estimating the comparative military strength of the two sections, and upon a very low estimate the ratio fixed at eight men to one. It is merely absurd to surmise that the eight can be conquered by the one, though the one in a defensive war may long keep the eight at bay. What will merely expedite or facilitate putting down the rebellion falls far short of the requirement of the higher-law problem of necessity.

But we are told the expense of the war is so enormous—a million and a half a day—as to render its speedy termination an actual necessity. That enormous expenditure is not at all necessary, not more than the third of it for the safety of our people or their Government—it is the result of a foolish effort to do what is impracticable, with any amount of expenditure, any aid derivable from emancipation proclamations: that is, the sudden suppression of the rebellion and the submission of the traitor States. Time will be required for that. It is unavoidably a slow protracted process that ever brings all that about. A million of men, with a daily expenditure of two million of money, cannot accomplish it without the aid of time. With that aid it no doubt can be and will be ultimately accomplished, unless there should happen some one of several causes for its prevention.

Prominent among these would be a course of policy inducing a servile war, with its accompaniment, a war of mutual extermination, justifying and ensuring European intervention. Or without a servile war, a law of general confiscation of all Southern property, accompanied by a military success which will drive the South to desperation, and cause the buying of French protection, by the cession of Louisiana and Western Florida, and even, if absolutely necessary, of Texas also. Or by the bankruptcy of the Government.

This last may happen during the present year. Waiving all discussion for the present of the two former, let us consider a little the chance of the latter calamity.

It would be rash criticism which should venture to censure the course of the very intelligent Secretary of the Treasury without knowing what he knows, and without seeing affairs in the light with which it is presumable that he sees them. But if such criticism were allowable, to the uninitiated it might be respectfully suggested that he made a great mistake in not using every effort from the first to obtain a European market for our bonds. There is not now in this country, nor will there be for half a century, dormant, unemployed capital enough to absorb the enormous amount of bonds he will have to sell during the present year, to say nothing of next year. There is not now, and probably will not be this year, enough such capital seeking permanent investment in those bonds to the amount of even a third of what he will need. Whatever he may do towards forcing or coaxing the bonds into the hands of those who cannot permanently hold them, will only serve to force them upon the market and precipitate their fall, possibly as low as sixty cents to the dollar before the year is out. Any indication of such rapid depreciation will effectually close the European market. What induces the belief of the dearth of dormant capital here, in addition to our comparative high rate of interest, is the fact that nearly all our canals and railroads have been built with foreign capital. For some years prior to 1860 it was estimated that not less than six-

ty million annually of foreign capital were invested in our State bonds. If he has to depend upon *assignats*, any mode of currency largely in excess of the wants or convenient use of the nation, their certain fate is well known to all. They can serve only as a very short temporary expedient. The Secretary is not old enough to have witnessed it, but the experience of the last war with England gave no cause for confidence in our people for standing heavy war taxation. The writer well recollects that it was the opinion of intelligent men at that time, that if the war had lasted a year longer the Federalists would have got into power. The Secretary ought not to rely too much upon that source of revenue, whatever the enthusiastic coercives may tell him as to the present temper of the people on that subject. There seems no alternative against extreme pecuniary embarassment, but the reduction of the expenditures within the means of the Government.

The way to do this is to fall back upon something like the original plan of Gen. Scott for conducting the war, which was, after taking New Orleans, to make it altogether a defensive war—leaving it to time, the pressure of taxation, and the loss of trade, to restore the people of the South to their senses. This can be done with an army of about two hundred thousand men, which will be a reduction of two-thirds of the expense. Subsequent events would now require the retention of Beaufort, the taking of Pensacola, and the driving of the rebels from most of Tennessee.

In the opinion of some of our most intelligent men, this has always been and still is the only certain mode of obtaining a restoration of the Union. It is not only accompanied with no hazard of the ultimate success, but, as they have thought, it would also be the most expeditious. To obtain the national acquiescence in that plan, it is only necessary that its re-adoption shall be preceded by one or two victories on a large scale to wipe out the remembrance of the Bull Run disaster. It is evident from Mr. Seward's letter to Mr. Adams of 10th April last, that some such plan must have been the one unanimously agreed upon by the Cabinet up to that time. Indeed, something short of that would then have been approved by public sentiment. On the 11th April last the writer, in a publication then made, recommended a similar plan, but found little or no co-operation from any quarter. Some of those who are now among the intolerant, proscriptive coercives even rebuked him for intemperate zeal. It was then still doubtful whether the Administration meant to coerce payment of duties. The departure from the original plan, and adopting one of invading coercion, is deemed one of the most stupendous blunders ever committed. Its only parallel is to be found in the very similar one committed by the Lord North ministry, which lost the American colonies to the British crown. Had they contented themselves with holding New York, and a vigorous blockade, and for the rest trusting to time and conciliation instead of coercion, the result might have been reversed, leaving it to the force of mere increase of population in twenty or thirty years to have brought about an amicable separation.

The great benefit from the re-adoption of the plan, besides removing all danger of permanent separation and preventing an increase of sectional animosity, is that it will at once remove all pretext of necessity for inhuman measures or for violating the Constitution, and postpone indefinitely the great impending danger of its permanent destruction. The imminence of that danger can be appreciated from the ratification of all acts of the administration, the character of the measures pending before Congress, and especially from the declaration of principles and opinions made by leading members of both houses. A specimen of them is to be found in a recent speech made in the House by the Chairman of its Finance Committee. He said:

"The question recurs how can the war be carried on so as to save the Union. 'Universal emancipation must be proclaimed.' If any unforeseen emergency should arise endangering the existence of the republic, the section of the Constitution which says 'that the President shall take care

that the laws be faithfully executed,' creates him as much dictator, for the time being, as a decree of the Roman Senate made a consul dictator. * * * But when Congress assembled they would have the same full powers. If no other means were left to save the republic from destruction, *I believe we have power under the Constitution, and according to its express provision, to declare a dictator, without confining the choice to any officer of the Government.*"

This man, after the utterance of these sentiments, was neither called to order, hissed, nor kicked out of the House. Yet simultaneously with their utterance the Senate was trying one of its members for disloyalty, and his expulsion actually took place, because, among other things, he never voted for an appropriation for carrying on the war, that, according to the avowed opinions of Senators, being full proof of such disloyalty as to authorize his expulsion. If these are not rapid strides towards absolute despotism it is difficult to understand what would serve for proof of such tendency. No baser moral treason ever befouled human lips than the words uttered by this man, yet he received not the mildest rebuke, whilst his party in the Senate was treating it as a ground of expulsion, that a Senator did not vote in accordance with the views of the majority. All this, too, claimed to be said and done "under the Constitution, and according to its express provisions." Congress, with full power to expel members who do not vote to suit them, and to establish a dictator over us whenever it may choose to think it required by public safety!! This ranter after universal emancipation, this fanatic so eager for the freedom of negroes, is ready and willing, claims the power in Congress, to make slaves of his white countrymen!! He ought never to have been born an American. He is fit only to have been born a Russian serf, and kept a serf for life. He is the recorder of his own infamy. He has made himself the enduring mark for the unmoving finger of national scorn. With six hundred thousand armed men in the field, and these advocates of dictatorship in Congress, much the greatest of our national perils will begin when the rebellion has been suppressed. The reduction of the army beforehand is the only way to avoid that peril

A bill was presented to the House of Representatives, which is probably now pending before that body, for the purpose of confiscating all the property in the eleven seceding States at a single blow. It names a day, by which if the taxes apportioned by Congress on those States are not paid, the confiscation shall take effect, and the title become vested in the United States. This is an attempt, by a small cunning, to pettifog a confiscation and emancipation bill round the obstructions of the Constitution. The deviser of the scheme had seen sheriffs selling property for non-payment of taxes, without any judicial order for so doing, and not understanding why it can be so done without violating the Constitution, fancies he can slip his bill through the Constitution by the aid of that brilliant analogy. The ignorance of the Constitution betrayed in these times by men in high political station is really marvelous. The projector of this device wants to resuscitate the old Articles of Confederation, make a requisition on the States, and, for failure to comply, inflict this sort of summary punishment—a punishment for which there is not the slightest warrant, either in those Articles or the present Constitution. If he could be sent back for a day or two to a law school, he would there learn, that to get rid of the old mode of requisition upon the States, and to impose the tax directly upon the separate individual citizens, was a leading motive for adopting the Constitution, and that it does not permit any requisition by Congress upon the States. He has also some recollection from his reading of outlaws and outlawry, and suspecting, from the way the Constitution reads, he might not be able to get at a rebel or his property by way of punishment for treason without the instrumentality of the courts, by a single flourish of his legislative pen he outlaws some five million of our citizens, and then he thinks they will not be entitled to the protection of the Constitution or any other

law. He first puts them "out of the law," and then fires at them his tremendous confiscation blunderbuss. He is no petty larceny filcher from single men one at a time, but, with a most lofty ambition, at one fell swoop strips the people of eleven States of all their property, and vests it in the government. What a pity that such commendable ambition should be thwarted by that vexatious prohibition against bills of attainder!

The talented leader of the abolitionists out of Congress insists that the Constitution is already all gone, broken up and destroyed, and that for the present we can work along well enough without one, but as soon as we have leisure the nation must make a constitution. His friends in Congress seem to be acting upon his idea? One of them, a leading Senator, exclaimed in a speech lately, "By heaven, if I was your President, and you did not give me the necessary authority, I would usurp it, and you might help yourselves." What a beautiful constitution it will be that these men will give us?

The confiscation bill reported by the Senate committee is another pettifogging dodge to get round the Constitution, and punish treason with forfeitures, without the aid of courts and juries. It attempts to assimilate forfeiture for treason to forfeiture for smuggling, and directs the forfeiture to be enforced by a sort of proceeding in *rem*, without any sort of jury trial. This attempted trickery on the Constitution cannot avail; the courts will not lend their aid. That mode of punishing smuggling is a sort of anomaly in our jurisprudence, which, so far from justifying other steps in the same direction, is liable to great doubt as to its own constitutionality. If it had been seriously resisted in the first instance, it is doubtful whether it would have received judicial sanction. Following English precedent, without particular attention to the application of such precedent under our Constitution, it was treated as a *quasi* offence in the *thing* smuggled—like the old law of deodand, and not as an offence of the owner, or as an offence separable from his. With much plausibility it might have been supposed that such mode of procedure was a depriving the owner of his property by "due process of law," within the meaning of the Constitution, that being the established mode in England, notwithstanding the clause in *magna charta*, the same as that in our Constitution, against depriving a citizen of his property without due process of law. Let this conjecture be right or wrong, whatever the principle upon which such procedure is based, it manifestly admits no extension without impairing the sedulously guarded right of trial by jury. As to property lying in rebel States, the bill authorizes its confiscation and sale by any person the President may appoint, that person, of course, to be the judge of the guilt of the owner, thus constituting him both judge and jury.

The author of the bill said in his speech, that the intention was, though the bill does not say so, to confiscate the real estate during the life of the owner, but the personal estate, including slaves, absolutely. He does not say where he finds authority for the distinction, nor does he give any reason for it. The Constitution, in giving power to Congress to punish treason, says: "*But no attainder of treason shall work forfeiture, except during the life of the person attainted.*" When it is recollected that, at common law, attainder worked forfeiture of all the offender's estate, both real and personal, the words of the Constitution furnish no room whatever for making any such distinction. The perishable quality of personality affords no sufficient reason for arbitrarily making such distinction; for the property can be sold and vested in permanent stock by order of court, the government being allowed to receive the interest, whilst the principal is reserved for the ultimate owners after the death of the offender. As to slaves there is no need for their sale, they not being deemed perishable property, and the law allowing a remainder after a life estate in them.

The attempt of the bill to divest the title out of the traitor and by force of its own action, "*ipso facto*," vest it in the government, falls directly within the prohibition against bills of attainder. It is a plain effort to usurp judicial magistracy, and inflict punishment directly by mere legislation.

As to the danger of a war with France, from driving the South to desperation, that is a topic which probably had better be hinted at only rather than publicly discussed. But it must not be overlooked. If we once get into such a war, no one can tell when it will cease. Kentucky, Missouri, and the other States occupying the upper waters of the great river, will never consent to let Louisiana go as the price of peace. They would force the nation into another war in less than a year after any peace made on that basis with any foreign or confederate power or powers whatever. That is a national possession which their ten million of hardy freemen will never surrender, whatever may be the suffering of their Eastern countrymen from a foreign war. This ought to convince the advocates of wholesale confiscation and emancipation that the ordering of beneficent Providence does not permit such enormous inhumanity either to a debased, despicable pigmy-minded fanaticism, or to the even worse diabolism of a raving vengeance.

The following extracts from the speech of a talented and leading Republican Senator, which have been commended as "noble words," corroborate entirely the main view of this and preceding pamphlets, and though it must be confessed that the action of the Honorable Senator has not always conformed to his precept, he shall be allowed to conclude the discussion:

"I do not place the power on the ground assumed in some quarters, that in times of war or rebellion the military is superior to the civil power; or that, in such times, what persons may choose to call necessity is higher and above the Constitution. Necessity is the plea of tyrants, and if our Constitution ceases to operate the moment a person charged with its observance thinks there is necessity for its violation, it is of little value. I hold that the military is as much subject to control by civil power in war as in peace.

"I want no other authority for putting down this gigantic rebellion than such as may be properly derived from the Constitution. It is equal even to this great emergency. The more we study its provisions, the more it is tried in troublous times, the greater will be our admiration and veneration for the wisdom of its authors.

"I am for suppressing this enormous rebellion according to law, and in no other way. We are fighting to maintain the Constitution, and it especially becomes us not to violate it ourselves. *How are we better than the rebels, if both alike set at naught the Constitution?* I warn my countrymen who stand ready to tolerate almost any act done in good faith for the suppression of the rebellion, not to sanction usurpations of power which may hereafter become precedents for the destruction of constitutional liberty.

"While fighting this battle for constitutional liberty, it behoves us to see to it that the Constitution receives no detriment at our hands. We will have gained but little in suppressing the insurrection, if it be at the expense of the Constitution. The chains that a bondman wears are none the lighter because they were forged by his own hands. Let us preserve the Constitution perfect in all its parts, with all its guaranties for the protection of life and liberty unimpaired."

Note.—Since the foregoing was written, the bill for seizing railroads, &c., has undergone considerable modification, but it still seems to be the intention to impress the employees into the army, and subject them to the rules and articles of war, with all their penalties.

APPENDIX.

Mr. Adams having died without producing his promised proof in favor of his position that the law of war superceded civil authority during war, some might believe that so eminent a man would not have uttered such a promise unless he could certainly make it good. But we are entirely relieved from any such presumption by the fact of his saying that the proof was to come from the law of nations. The following extracts are reproduced from the writer's pamphlet of 1842, to prove that the laws of nations, be they whatever they may, cannot possibly have any such effect.

"As to Mr. Adams's authority, the laws of nations, it is difficult to understand what bearing they can have upon a question of lawful power within this Union. They may define the rights of the conqueror and the duties of the conquered; but that is not what Mr. Adams means. He contemplates an unsuccessful or undetermined invasion merely, and says that "an invaded country has all its laws and municiple institutions swept by the board, and martial law takes the place of them," with an incidental power to both our own and the foreign commander to emancipate the slaves. Eminent as Mr. Adams is as an authority on the law of nations, yet his opinion must surely yield to that of the whole American people as expressed in their Declaration of Independence. This very mode of annoyance towards an enemy, by inciting a servile insurrection, is there denounced as contrary to the law of nations and the usages of civilized warfare. It is ranked in atrocity with that other infamous practice of the English Government, the allying itself with the scalping-knife and tomahawk. According to the better opinion, then, any invading foreign commander, who should issue such a proclamation as the one indicated by Mr. Adams, would thereby cast himself and those under his command out of the pale of the protection of the usages of civilized warfare. Much rather, therefore, would any commander of ours be considered as absolving himself from the protection of all law, by such a course, and subjecting himself to be rightfully shot by any one who chose so to rid the country of so infamous an incendiary.

"The American people have heretofore lived under the fond delusion that they had the exclusive privilege of making constitutions and laws for themselves, and that the combined will of all the nations of the earth could not rightfully add to or alter these laws in the smallest particular, so far as they operate within our own territory. Nor do the laws of nations themselves make any pretension to the power asserted by Mr. Adams in their behalf. There is no principle of international law better settled, probably none other about which there is less difference of opinion, than that the laws of one nation cannot operate within the territory of another; and, by consequence, neither can the combined laws of two, three, or twenty nations, so operate within the territory of another nation.

"There is a class of politicians in this country who have long been suspected of having no great love or admiration of our republican institutions, viewing them as a useless experiment which must ultimately give away to monarchical government, and therefore as rather impatient for the advent of some bold, great man sufficiently powerful to do away with the idle trumpery of a constitution,

and relieve us from the trouble of governing ourselves. I must confess it has been heretofore supposed that Mr. Adams did not belong to this school of politicians. But it seems he goes a great way beyond them. They were merely suspected of sighing for a domestic usurper. He is for subjecting our Constitution and laws to the mercy of a foreign invader also. He not merely concurs with Messrs. Buchanan, Berrien, and Jackson, in the right of a military man to usurp authority over the Constitution, when he thinks it necessary, and to keep it up as long as he thinks it necessary; but for fear an American commander would never have the temerity or iniquity to attempt what he has in view, he claims that the power rightfully belongs to a foreign invader also, having in his eye, no doubt, an invader in particular that never scrupled about means, however infamous, in the attainment of ends however iniquitous.

"If a foreign invader can strike dead in the hands of its owners four hundred millions' worth of property by his mere proclamation, though he be defeated and driven from our territory the next day, it is by a most precarious tenure, indeed, that we hold all which government was instituted to protect and guard. For Mr. Adams does by no means limit this power to a mere emancipation of slaves, but says it sweeps the whole Constitution by the board, and substitutes the invader's will in its place. He no doubt looks to that admired British Government for the invading commander who is by proclamation to emancipate the three millions of his black fellow-citizens. But he should remember that, though it be now the pleasure of that immaculate Government to preach a crusade against negro slavery, she was formerly the patron and even attempted to be the monopolizer of the slave-trade; that she even forced the slaves upon this country in despite the remonstrance of our fathers, as she is now attempting to force her opium upon the Chinese; that she may again change her views, drop her crusade against negro slavery, and preach a new crusade, as formerly, against the Protestant religion or any other cherished right of New England. Does that also lie at the mercy of her proclamations? Can she thus put down that religion, and put up the Catholic or any other in its place?

"But, says Mr. Adams, this is not a mere theory; 'his doctrine has been carried into practical execution.' He cites us to the example of those eminent man-slayers and expositors of the law of nations, and of the usages of civilized warfare, Generals Morillo and Bolivar. He says they both did the thing in Columbia, though he does not explain how; after one had emancipated all the slaves, it was still left for the other to do. Neither has he done his argument all the justice he might, in favor of the might of military power, from the example of the best of those two eminent expositors. He forgot to tell us that Bolivar, after having emancipated the blacks, by virtue of the same martial law, enslaved the whites, and placed a crown on his own head. We of the South even, who are so much interested in the subject of slave property, would deem this a much more striking and convincing example of the extent of military power than that of the mere emancipation of slaves.

"How differently from his forefathers of Massachusetts does Mr. Adams consider the influence of foreign laws, and the overshadowing supremacy of military power. They say in their Constitution: 'The people of this Commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent.' He says they are controllable by the arbitrary will of a military chief, foreign or domestic; and that even their constitution is in subordination to the law of war and the law of nations. Their Provincial Congress, writing to the Continental Congress, in May, 1775, on the necessity of their 'taking up civil government,' said: 'As the sword in all free States should be subservient to the civil powers, and as it is the duty of the magistrate to support it for the people's necessary defence, *we tremble at having an army, although consisting of our own countrymen, established here, without a civil power to provide for and control them.*' This being in time of actual war, a war of revolution too, what a silly set of old-fashioned fellows that Provincial Congress must have been to be thus sighing for a civil government to control the army, they not knowing in their simplicity that it was the undoubted prerogative, by the law of nations, for the military to control the civil power in time of war. Fighting as they were for their lives and liberties, in the midst of an actual war

of revolution, they trembled at the idea of an army of even their own countrymen, because there was no adequate civil power to control it. So little of this fear of military sway is there in Mr. Adams, that he contends the military rightfully does and should overmaster and control the civil authority, in time of war from invasion or insurrection.

"In case of a slave insurrection, if the United States are called upon to fulfill the constitutional guarantee against domestic violence, Mr. Adams says the President, or one of his subalterns, may, at his discretion, in order to put an end to the insurrection, emancipate all the slaves. That is, when the slaves are committing violence to obtain their freedom, the President, in discharge of his duty, to aid in putting down that violence, may, by proclamation, emancipate the slaves. The slaveholders call in the Government to aid in keeping the slaves in bondage, and he may perform this duty by setting them free. Mr. Adams does not at all confine this sovereign power in the President or his subalterns to the mere particular of emancipating the three millions of his black fellow-citizens, but allows the full force of the analogy, that necessarily extends it to all other subjects of property, right, or constitutional guarantee. For instance, when Government interposed with its military power to suppress Shay's rebellion in Massachusetts, or the whisky insurrection in Pennsylvania, or the recent Suffrage insurrection in Rhode Island, the officer commanding the military power would have had the right to suppress the two first, by annulling the taxes which produced them, and the last, by granting free suffrage to everybody.

"Unable to find anything in the Constitution to authorize the Federal Government to interfere with the question of negro slavery, he is driven to a power *de hors* the Constitution, and conjures up this undefined and undefinable power of martial law. He at once sees that it will not do to treat the war power as subordinate to and flowing from the civil functionaries of the Government, for it must necessarily be only commensurate with the powers of those functionaries. He therefore resorts to the desperate shift of claiming it to be a power paramount to the whole Constitution. He boldly denies to the nation the right to declare as it has done, that the Constitution shall be the supreme law of the land; and asserts that martial law is paramount to all other law, not controllable by the will of the nation or any form of constitution. A grosser absurdity surely never entered the mind of an intelligent man, educated under a government having a written constitution."

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"What an admirable substitute is this newly discovered power for all those powers our fathers were silly enough to attempt to deny to the Federal Government by express constitutional prohibition; such, for instance, as the power to pass bills of attainder and *ex post facto* laws; to abridge the freedom of speech or the press; to hold men answerable for capital or infamous crimes, without an indictment; to deprive men of life, liberty, or property, without due process of law; and in criminal prosecutions to deprive them of the benefit of an impartial jury of the vicinage. It is an old and familiar tyrant's trick, to pinch the subject till he squeak, and then punish him for squalling. No government ever lacked the wit to create a rebellion when one was wanted. When once produced, where the need for bills of attainder or *ex post facto* laws; when the laws of war at once cast the lives and fortunes of the whole community into the hollow of the President's hand, or into that of any military minion he may send forth to deal out his own or party vengeance."