# REPORT

OF THE

# CHIEF OF THE DEPARTMENT

OF

# JUSTICE AND POLICE,

TO THE

# GOVERNOR AND EXECUTIVE COUNCIL.

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## PART I.

## ON THE POWERS OF THE CONVENTION.

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COLUMBIA, S. C.:
CHARLES P. PELHAM, STATE PRINTER.
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# REPORT.

*To His Excellency*, GOVERNOR PICKENS,
*Presiding over the Executive Council of South Carolina:*

SIR: In compliance with your requirement, that I should report to the Governor and Council the proceedings of the Department of Justice and Police, I respectfully report, that, though the acts of my Department proper, as well as the matters which have from time to time been assigned to me, have, in almost every instance, been the subject of previous consultation in the Council, and therefore I have but little of information to communicate, I acknowledge the propriety of the call. It is right that these proceedings should be formally spread upon the record.

The "Rules" established for my Department, adopted on the seventeenth January, prescribed it as my first duty "to construe the Ordinances of the several sessions of the Convention, and all Acts of the General Assembly, in relation to the duties and powers of the Executive Authority of the State." This, of course, makes me peculiarly responsible for the *competency* of "the Governor and Council, acting together," under the Ordinance of the Convention, to perform such acts as have beeen undertaken; for I have in no case entered a formal protest against any proceeding.

It is proper, then, that I should preface my report with some exposition of the principles on which I have construed the powers conferred upon the *Executive Authority*, to be exercised by the Governor and Executive Council, "*acting conjointly.*"

First, then, as to

## THE POWERS OF THE CONVENTION.

Did this CONVENTION have power, for certain purposes, and during certain exigencies, to create a *new form* of EXECUTIVE AUTHORITY for the State, and to confer on such Authority *new powers*, not hitherto vested in that Department? I answer to this, unquestionably, yes.

In the States Rights School of 1832 and '34 it was (with but one prominent exception) the received opinion that a CONVENTION, called in South Carolina, under the provisions of the Constitution, was, for every political

and legal purpose, the PEOPLE. It was considered as a means, provided by the Constitution itself, for *invoking the action of the ultimate* SOVEREIGNTY *of the State.* This SOVEREIGNTY, admitted to be in the PEOPLE in their *"aggregate and politic capacity,"* can only be exercised, practically, through a *convention,* and a CONVENTION became thus to be, theoretically, considered as the PEOPLE themselves. Hence the form of ordaining their decrees adopted by the Conventions of 1832, of 1852, and 1860, to wit: "WE, *the* PEOPLE *of South Carolina, in Convention assembled, do ordain and declare.*"

I am aware that in 1834, in the celebrated legal argument on the Oath of Allegiance, although *the advocates* of the States Rights School all maintained this doctrine, yet Judge HARPER gave the weight of his high authority to a view somewhat different. He maintained that a Convention, *though sovereign, absolute and illimitable,* for every purpose *within the range of objects for which they were assembled,* was, beyond these purposes, neither the people, nor did it represent the people. A great majority of States Rights men held, however, the opinion expressed in one of the reports of the day, which I myself had the honor to submit, an extract from which I will now insert, (at an interval of twenty-eight years,) as containing my *present opinion.*

"When this profound jurist (Judge Harper) says that a convention is limited by the purposes for which it was called, we admit that, *morally,* it is so limited, and that a delegate who but proposes a measure *for a purpose* not contemplated by the people when he was elected, is guilty of *moral treason.* But when Judge Harper assumes that the Judiciary, or any other constituted authority, has a right to inquire whether a measure adopted in Convention was or was not adopted in conformity with the intentions of the people, he ascribes to the Judiciary a right which we cannot admit that they possess. Is it not obvious that this gives the judges a practical control over a convention of the people? As in the case before us" (the Oath of Allegiance) "two judges decide that the people did *not* intend what the Convention believed, the Legislature believed, and what a great majority of the people themselves still believe, they *did* intend—and the will of the people is set at naught, and an Act of the Convention effectually nullified."

Judge Harper happily defines Sovereignty to be "that power which, "controlling all other constituted authorities, is itself not subject to the "control of any." He considers Sovereignty "as abiding in the people of "South Carolina."

He says, again, that this "is not that imaginary sovereignty of the people "which has been supposed to exist even in a despotic monarchy."

"'The Constitution,' continues he, 'has provided in what manner the "people shall be appealed to, viz: in a Convention called by two-thirds of "both branches of the Legislature.' Again, *they* (the people in convention) "'may abrogate any Act of the Government, and *all constituted authorities* "are bound to respect and *obey* their determination.' 'They' (the people in Convention) 'are responsible to opinion, they are bound by good faith, they "may be resisted by force, or subdued by superior power, but their acts are "not subject to the legal control of any constituted authority.'" This we conceive to be sound Republican doctrine. But how the learned judge can reconcile with this the right which he ascribes to the Judiciary, to decide whether a power exercised by this Convention has or has not been delegated by the people, we cannot perceive. We defy any one to point out a tittle of distinction, practical or in principle, between the control which Judge Harper would thus give to the Judiciary over a *Convention*, and that which it is admitted they have over the ordinary *Legislature*. They have no right, in regard to the *Legislature*, to do *more* than decide whether or not that body keeps within the pale of its authority—whether a power exercised by them has or has not been delegated to them by the people—and it is this, precisely, which Judge Harper claims for them in regard to a *Convention*. The people appear in their sovereign capacity, *only as assembled in Convention*—when so assembled, they are *sovereign* for EVERY PURPOSE, or, *practically*, they can be so for NONE. Grant to the Judiciary the right to question their acts, and you give them the power to limit and control. *In construction of law*, a CONVENTION is the PEOPLE, and its *every act*, as far as the judges have any concern with it, *the Act of the People*."

"To subject the acknowledged will of a convention to the control of any other authority, is to deprive the people altogether of the means of expressing a *Sovereign* purpose, that is, a purpose which cannot, by any form of law, be disputed."

The report proceeds further, as follows:

"Sovereignty can correctly be predicated only of that power in the State which, possessing an ultimate control over all other constituted authorities, is itself subject to the control of none.

"Allegiance is due only to the Sovereign power, and is that paramount political obligation which binds the individual in a State to acknowledge and preserve unimpaired its Sovereignty.

"It is clearly distinguishable from the duty of *obedience* to delegated authority. It is, indeed, the source from which emanates the obligation of obedience to any other constituted authority than the Sovereign.

"Sovereignty delegates a portion of its power; Allegiance renders obedience to that power a duty.

"Sovereignty, from its definition, is necessarily single and indivisible, and Allegiance must be equally so.

"In South Carolina, entire, unimpaired Sovereignty bides in the PEOPLE of the State, and a citizen of South Carolina owes entire and unimpaired Allegiance to the PEOPLE of South Carolina, so long as he continues a citizen thereof. They, and they alone, have imposed upon him the duty of obedience to the Constitution of the United States. They can release him from the duty. They can transfer the duty. It exists by their fiat, and they alone are its fit interpreters."

"Thus far," says the report, "we speak the recorded opinions of South Carolina herself. Is the principle less fixed that *a Convention of the People is not subject to the legal control of any constituted authority?*"

Such, it was understood, were, in that day, the doctrines of Calhoun and McDuffie, of Hayne, Turnbull and Hamilton, of Colcock, Earle, Butler, Elmore, Player; of all, indeed, of the States Rights School. I mention the dead only, the living may speak for themselves. Indeed, State Rights, State Remedies, State Sovereignty, Allegiance to the State, would all be unmeaning phrases but for the acknowledged supremacy of a Convention of the People. It is the corner-stone of the edifice.

But whether the view contained in the *"Report"* or that of Judge HARPER be true, is immaterial in the present inquiry. A convention, according to both theories, is SOVEREIGN, and, therefore *above all constituted authorities,* WHEN ACTING WITHIN THE SPHERE INDICATED BY THE LEGISLATURE IN THE ACT WHICH ASSEMBLES THEM.

What, then, were the purposes for which the Convention was called together by the Legislature, to assemble on the seventeenth day of December, 1860? And does the creation of the EXECUTIVE COUNCIL *come within the scope of those purposes?*

First, what were the circumstances of the call? The telegraph had announced the election of Lincoln, and the Legislature determined at once to invoke the highest power known to our institutions—*a Convention of the People of the State.* Not as a subordinate ministerial agent, to enroll the decrees of the Legislature, but "for the purpose of *taking into consideration the dangers incident to the position of the State in the Federal Union established by the Constitution of the United States, and the measures which may be necessary and proper for providing against the same, and thereupon to take care that the Commonwealth of South Carolina shall suffer no detriment.*" A disruption of the ties which had hitherto bound us to our sister States was one thing contemplated. But the ultimate decision was left to the Convention, as the Sovereign Authority. It was, then, within the purposes of this Convention to *abrogate the Constitution of the United*

*States.* South Carolina, for a time, at least, *might stand alone*, and it must have been within the purposes of the Convention *to modify the State Constitution.* A new alliance was contemplated with other States, and it was within the purposes of the Convention to *ratify* a Provisional and Permanent *Constitution of the new Confederacy.*

These high powers have not been questioned, yet they are but *inferences* from the *general powers.* A WAR was certainly within the contemplation of some. Although secession was claimed as a right, not conflicting with any obligation under the Constitution of the United States, and, therefore, not revolutionary, it was apprehended that our claim to self-government might, like that of our forefathers of 1776, have to be vindicated by the *sword*, and that, practically, provision must be made *for the conduct of a* REVOLUTION of BLOOD. The Legislature declare, accordingly, that the Convention shall consider our "DANGERS"—*all* the "dangers" growing out of our position, including, I presume, the dangers of the WAR, which *might* be the consequence of secession, and "the *measures* necessary and proper for providing against the same." Have the apprehended "DANGERS" ceased? Are there no *further* "*measures* necessary and proper for providing against the same"? The Ordinance of the Convention for "strengthening the Executive Department during the exigencies of the present War," was manifestly *intended* as a "*measure*" FOR THIS VERY PURPOSE. But, as if to make assurance doubly sure, the Legislature declare, further, that the Convention shall "THEREUPON *take care that the Commonwealth of South Carolina shall suffer no detriment.*"

Now, conceding that the terms of the call of the Convention constitute the only "*limitation,*" on the powers of a CONVENTION, as held by Judge HARPER, can human language be contrived suggesting broader and more absolute powers than the above? And, "THEREUPON *to take care that the Commonwealth of South Carolina shall suffer no detriment.*" Is this the language of a LIMITATION of power? It is applied to a body representing the SOVEREIGNTY of the State—a body in all respects similar to that which gave being to our State Constitution—a body by whose fiat our Legislature, our Governor, and our Judiciary, have their existence. Is it not in effect a declaration, *in terms*, that the Convention to be called should have NO limitation on its powers?

It has been said that the "dangers" apprehended were *in the Union*, and the "measures" were only such as should provide against these. This is special pleading. The "dangers" were such as were incident to the "position of the State," then, of course, "in the Union," but which the Convention was specially intended to take out of the Union, and the "measures" were meant to provide against the "dangers" which might grow out of that position. Surely, the dangers which ensued have not yet ceased.

It is contended that secession was the measure adopted, and that this relieved us from all dangers "in the Union."

But the Convention is enjoined "thereupon" (that is, after secession,) "to take care that the Commonwealth of South Carolina shall suffer no detriment." Detriment from what? I answer, the "*measures*" taken; which were, Secession and the formation of the Southern Confederacy. "Thereupon" WAR was made, and *war still continues.* Does war work no "detriment?" If it does, then it is the duty of the Convention to shield, as far as may be, the Commonwealth of South Carolina from such detriment.

The question as to the extent of the powers of the Convention of 1832 had been the subject of controversy. Dr. Cooper, in his compilation of the Statutes, had pronounced it still "an open question," as to *that* Convention; and the Legislature, as if to provide against any possibility of cavil *on this occasion*, so solemn and momentous, chose, in declaring the purposes of the *present Convention*, to translate the Latin phrase by which the SENATE of ROME HAD FOR CENTURIES CONVEYED DICTATORIAL POWER ON HER CONSULS. "DARENT OPERAM CONSULES, NE QUID RESPUBLICA DETRIMENTI CAPERET," was the language of the famous decree which conferred on Cicero and his compeer, for the suppression of Cataline's conspiracy, the power known as "*Ultimum*," or "*Extremun.*" A power which, Sallust tells us, "*often*" "it had been the *custom*" to confer, "IN ATROCI NEGOTIO," "*in a dangerous emergency*," as the translator has it. The translator says, "by it" (this decree) "the Republic was said to be ENTRUSTED TO THE CONSULS."

The phrase, originally selected for its aptness in conveying absolute and illimitable power, had become fixed in its interpretation, by its long use by the greatest nation of antiquity; and in THIS *language*, with its *construction* THUS *established* throughout the civilized world, the LEGISLATURE thought proper to express *the extent of the purposes to which the Convention were invited to address themselves.*

Unless the Legislature *said* one thing, while they *meant* another, they committed to this august body, during the exigencies of the time, *the fortunes of the Republic;* with power to act directly or through agencies—with the power to make and unmake Constitutions, provisional or permanent; and to create governments, general or partial—temporary, or until a new Convention shall order otherwise. In addition to the force of the *language* used, the *fact* that the Act, as first introduced, should have fixed *two years* as the period of duration for the Convention, indicates that something more than the Act of Secession and the adoption of Constitutions was intended. No one proposed a *shorter* duration than *two years;* and this

time, it was thought, *might not* give all the latitude which was requisite, and *it was stricken out.*

Surely, "*two years*" was a longer period than would have been suggested if the only business contemplated had been the Act of Secession and the adoption of a new Constitution. In my judgment, the duration was intended to be commensurate with the *necessities of the occasion* which called them together, whatever that period might be. Our *independence achieved and acknowledged*, and *peace restored*, the Convention will *then*, but *not until then*, be *functus officio*. To protract its existence beyond *this* period, would be that breach of "good faith" which would justify that resort to "force," which is the only remedy for usurpation in the SOVEREIGN. On the other hand, the Convention, in my opinion, would be derelict to their duty if they abandon the helm until the ship is safely in port.

Such was the call under which the voters of the State elected the members of the Convention.

However the fact may since have passed from the memories of some, the people, *at that time*, realized that the body about to be assembled would be charged with duties more grave, critical, and responsible than any which had ever hitherto devolved upon any constituted authority in this State. The circumstances under which the Convention was assembled—the terms of the Act under which the call was made—the received opinions of the majority of the people of the State as to the extent of the powers *inherent* in such a body, were sufficient to apprize the most dull that suffrage was being exercised on the most important occasion of their lives.

Accordingly, the people called forth their wisest and best men. There was no constitutional disqualification for a seat in the Convention—no abridgment of the people's unbiassed choice. Judges, Chancellors, public officers of all kinds, clergymen, all were eligible. The result was that the Convention, in the aggregate, has never been surpassed, in this or any other country, for intelligence, patriotism, and moral worth.

Most of the members were either men drawn from voluntary retirement, or those whose career and position in life were so far determined that the ordinary temptations of ambition were absent. A less self-seeking and more earnest body of citizens never assembled.

Such was the Convention, in theory and in fact, which passed the Ordinance under consideration.

There are two other errors in regard to limitations on Conventions, which need notice, though they would seem to destroy each other. It is contended by some that a Convention can neither legislate or perform any administrative act; and to sustain this view it is claimed that it has been the practice of Conventions to abstain from both. This is one position.

Those who take this position deny that the Convention can appropriate money or draw from the Treasury. This is all gratuitous assumption in point of principle, and erroneous in point of fact. Was it an act of usurpation, when the Convention, at its first session, ordered three regiments to be raised—two of regulars, by enlistment, and one of volunteers, commanded by Col. Gregg? Still more palpable, then, was the usurpation when they appropriated three hundred thousand dollars for building a gun-boat. The usurpation of the Convention began, according to this theory, as soon as the Act of Secession was ratified, has continued ever since, and has not been confined to those who favored the creation of the Executive Council. It is, in general, on grounds of expediency, wise that Conventions should abstain from all *ordinary* legislation, or exercise of *ordinary* executive power, where the Legislature and Governor can be at once called into action. But so far is it from being true that Conventions have on principle withheld from *all* action of this kind, that I venture the assertion that the Conventions throughout the now Confederate States all more or less took, for a time, a share of the management of affairs into their own hands.

Certainly, the Convention of Alabama, the proceedings of which I have before me, passed, immediately after an Ordinance of Secession, one "for the Military Defence of the State," another to "reorganize the Militia," with very many others of like character. The power which can *create* Governors and Legislatures may, *in emergencies*, perform the functions of either.

The other most extraordinary position, in direct conflict with the last, is the application of the law maxim to a Convention—*non potest delegatus delegare*—that is, that a Convention, exercising itself delegated authority, cannot delegate to others. The first position assumes that all government *must* be exercised *through delegated authority*, and the second, that it can *only* be exercised *directly*, and *cannot* be lawfully exercised *by delegated authority*.

The ordinary and most appropriate sphere in which a Convention *usually acts, except* in "*atroci negotio*"—dangerous emergencies—is in the creation of governments, limited by constitutions prescribed by the Convention—that is, in delegating portions of their own powers; but a Convention may, in its discretion, proceed to exercise itself any power which it has authority to delegate.

Again: the assumption that to give validity to any action of a Convention intended *to alter* or *suspend* any part of the *Constitution of the State*, the ordinance must EXPRESS that a *repeal, alteration*, or *amendment is intended*, is gratuitous, and without reason. Where, I would ask, is any such principle laid down?

Like the LEGISLATURE, the CONVENTION may repeal or alter, by *implication*. The *last act* of either body is that to be looked to as the *exposition*

*of its will*, and as constituting the LAW, and everything conflicting is necessarily *repealed*, *suspended*, or *modified* into accordance with the *will last expressed*. In point of fact, it was well understood by the Convention that this Ordinance was a *suspension*, for the time being, of *some* of the provisions of the Constitution, and *it was so intended*. I am not aware that, within the Convention, there was any one who questioned *the power* of that body to pass the Ordinance.

I hold, then, that the Convention had the right, during the exigencies of the war, to add to the powers of the Executive by giving control of some matters which, under the Constitution, are committed to the Legislature, and to make the Executive, for some purposes, consist of five persons instead of one. In other words, I hold that the ORDINANCE creating the Council emanates from an authority as high and competent as that creating the CONSTITUTION, and that being the LATEST *expression of the will of this Sovereign Body*, it is, during its existence, *paramount to the Constitution*.

If this be so, we are to look to the Ordinance alone as the charter of our rights and powers.

The views upon the construction of the Ordinance I will submit to-morrow, as part second of my report.

Respectfully, your ob't servant,

I. W. HAYNE.

# REPORT

OF THE

South Carolina

# CHIEF OF THE DEPARTMENT

OF

# JUSTICE AND POLICE,

TO THE

# GOVERNOR AND EXECUTIVE COUNCIL.

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## PART II.

## ON THE POWERS OF THE GOVERNOR AND EXECUTIVE COUNCIL.

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# REPORT.

## PART II.

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*To His Excellency*, GOVERNOR PICKENS,
*Presiding over the Executive Council of South Carolina:*

I propose now to proceed to consider

THE POWERS OF THE GOVERNOR AND EXECUTIVE COUNCIL, ACTING TOGETHER, UNDER THE ORDINANCE OF THE CONVENTION.

First, take the title: It is an Ordinance "for *strengthening* the Executive Department *during the exigencies of the present war.*"

The powers of the Executive are *increased*, which could hardly be without *taking from* some other Department, and these *new* powers have reference to the *exigencies of the war.*

The powers conferred on the Governor and Executive Council, "acting together," are, first, to declare *martial law*, when, and where, and with such limitation, as the Governor and Council might think the exigency of public affairs required. This power, like Aaron's rod, might have been made to swallow all the rest. Martial law is despotism. It substitutes the will of the ruler for all other law, to the extent that martial law is declared. Martial law declared over the whole State, and its extent (that is, the subjects over which it should take control) defined, every power afterwards specified in the Ordinance might have been exercised. This great first power having been clearly conferred, has been to me a guide in determining the general intention of the Convention, and thereby construing all that follows. There is a power to arrest and detain disloyal and disaffected persons, whose being at large is deemed dangerous to the public safety; and to order and enforce such disposition and appropriation of private property for public uses as the public good requires. There is the power to *make* and cause to be executed all *orders*, *regulations* and *arrangements*, as they shall *from time to time* find expedient, in regard to the military, and for maintaining such efficient police as shall by them be thought necessary. The power to appoint agents, to draw money from the treasury,

to make nominations and appointments to military office, such as the Governor had hitherto done; to fill accidental vacancies in civil appointments until the Legislature meets—these powers, except filling accidental vacancies in office, *all* relate to the "*exigencies of the present war;*" and except the appointments to military offices, are *new* powers, not before possessed by the Executive; and, in express terms, are to END *with the close of the war,* and *disbandment of our troops.* (See Appendix, A.) During the war, and for purposes connected with its prosecution, they are very large.

Among the first measures in assertion of the extraordinary powers conferred, was the proposition contemplating the *seizure of silver plate* for the use of the State, introduced by your Excellency. The power, it appeared to me, to act on this subject was clearly delegated under the right "to order and enforce (subject to the owner's right to receive due compensation from the State) such disposition of private property, or appropriation thereof for public uses, as the public good shall appear to them to require." The Council never felt committed on the policy of acting finally on the matter, but voted merely for measures to ascertain the amount, reserving the right to act according to circumstances hereafter.

The resolution, introduced likewise by your Excellency, for forcing forward the manufacture of salt, was authorized under the power to make "regulations and arrangements" for the *support* of such portion of the population as might be called into service. Salt was an article of prime necessity, and there was danger that it could not be procured at all when wanted, unless something was done, as your resolution expressed it, "to force forward" the manufacture. Under the same power, I have supposed that the Governor and Council were authorized to purchase, and distribute at cost, among the families of troops in service, cotton cards, and to sell at cost such surplus salt as might be found in the commissary department.

Your Excellency introduced, on the same day, various resolutions, these two being a part of the series. The remainder of the series were referred, and some of them, in a modified form, were afterwards adopted. None of them were objected to *as being beyond the competency of the Governor and Council,* though they propose, I think, the largest powers which we have ever been called on to exercise.

I insert a copy of the resolutions, although not adopted, as illustrating the views entertained as to the *extent of our authority.*

"*Resolved,* That the one-half of every beat company in the State, to be determined by lot in each company, be ordered immediately to Camp Lightwood Knot, near Columbia, and there to be organized into companies, battalions and regiments. All officers to be appointed by this Council.

"*Resolved*, That one thousand tents be ordered for this encampment of a reserved State force, and that to aid in carrying out this organization, the Chief of the War Department be authorized, in conjunction with the Adjutant General, to order into immediate service all the extra aids recently appointed in every District, to reorganize and take a census of the militia of the State.

"*Resolved*, That the Chief of the War Department be authorized to appoint immediately two competent persons to take charge of the two powder-mills in the upper part of this State, and to take for the State all powder they may have on hand, together with all material, at proper valuation, and that any additional force be employed to put both mills in full operation for the State; and that all material suited for making powder that can be procured, be immediately obtained, in such manner as the Chief of the Military Department may direct.

"*Resolved*, That two competent persons be immediately appointed to control the Iron Works in York and Spartanburg, if necessary, and to use all their resources, with any additional labor required, to cast fifty cannon, twenty of which shall be twelve and six-pounders, suited for field service; ten twenty-four-pounders, ten thirty-two-pounders, and ten forty-two-pounders, and to have them mounted and ready for service as soon as possible.

"*Resolved*, That all gunsmiths and artizans in brass and iron be collected, and employed in such foundries and workshops as may be designated, for making and repairing all small arms that can be made; and to execute the above resolutions, the Chief of the War Department, in consultation with the Adjutant General, is authorized to employ and use such agents as he may think proper.

"*Resolved*, That one-half of all the cattle belonging to every person in the State shall be immediately taken, at a fair valuation, for the State, and receipts for the same be given, obligating the State for the amount, to draw six per cent. interest sixty days after date, and that such as are not fit or needed now to be killed, the owner of the same shall keep and fatten up, for proper compensation, until needed.

"*Resolved*, That one-half of all the flour now in the State, and one-half of all the wheat, be immediately taken, on proper valuation, for the State, and receipts for the same given, as in the above resolution, and that the Chief of Justice and Police be authorized to carry out these resolutions, in such manner as he may think best for the State.

*Resolved*, That all the troops now in the State, in actual Confederate service, for twelve months, be immediately called on to reënlist for the war, but not to be moved out of the State except by orders from this Council—this condition to be of force at the end of their present term of

enlistment, and that the Chief of the Military, in conjunction with the Adjutant General, be authorized to carry this out, in such manner as he may think best for the State.

"*Resolved*, That our Senators and Representatives in Congress be requested to urge immediately the adoption of measures necessary to establish a great Reserve Camp at or near Atlanta, Georgia, of at least one hundred thousand men, each State to furnish its proper quota, and all officers to be appointed by the President, with the consent of the Senate."

These resolutions contained the first proposition to bring a portion of the population of the State into service *by compulsion*, and for assuming on our part *the appointment of officers, both Field and Company.*

The right to do this I never doubted, under the power "to make and cause to be executed all such orders, regulations and arrangements as they (the Governor and Council) shall from time to time find expedient for bringing into service, organizing and supporting the whole or any part of the population of the State, to be employed in the public service." This grant of power, I think, was intended to give to the Council *full control* over the *organization* of any forces to be raised. But if there could be a doubt on this point, there is another Ordinance, passed by the same Convention, styled "An Ordinance in relation to a portion of the Militia," which is too explicit for controversy. It declares, in section first: "*That no part of the Militia law shall stand in the way of the Governor and Council to organize and call into service any portion of the Militia of the State, as may seem most expedient.*" From the same source I derive the authority of the Governor and Council to make all the orders, regulations and arrangements in regard to the military, which were afterwards adopted, whether in contravention or not of Acts of the Legislature.

Next in point of time came the regulations in regard to the distillation and sale of spirits.

Your Excellency must remember the representations from the upper country as to the overwhelming evil which was to follow the unparalleled investments made, and about to be made, in the business of distillation. The high price of whisky had induced such numbers to seek this new road to wealth, that a *famine*, it was thought, threatened the whole State. Money has been called the "sinews of war," but with us *breadstuffs* are preëminently so. I thought the evil came within the scope of our powers. By declaring martial law in regard to this particular subject-matter, it could certainly have been reached. But being unwilling to startle the community by an unnecessary declaration of martial law in prohibition of distillation from grain, I recommended the exercise of the power, as an incident to the power "to make and cause to be executed all such *orders, regulations*, and

*arrangements*, as they shall from time to time find expedient, for bringing into service, organizing, and *supporting*, the whole, or any portion of the population of the State to be employed in the public service, and also for maintaining such efficient *police* as shall by them be thought necessary." Your Excellency, with, I think, every member of the body, yielded ready acquiescence, and I was instructed to draw the resolutions. I looked to the end proposed, and considered that the accustomed agencies would best effect the object, and offered the resolution that it should be declared "a misdemeanor" to distil grain, and the distillery should be deemed "a nuisance," subject to abatement. This "regulation" and "arrangement" was thought the most expedient, and was accordingly adopted, and made an "order," by, I think, a unanimous vote. Our right to make a regulation in prohibition of distillation is too clear for controversy. If there is error, it can only be in the manner of enforcement, which is less prompt and summary than is usual in Executive orders. Thus far, however, it has worked well. So, again, as to the sale of spirits under circumstances to affect our troops. The evil had become so great, that there seemed to be an universal outcry—murders, brawls, fatal accidents among our troops, particularly while passing on the railroads, had become of frequent occurrence. The scenes exhibited were shocking to decency. The disposition to interfere was unanimous with the Council, and your Excellency warmly approved. I believed we had the power in this, as in the case of distillation, and proposed similar resolutions in regard to sales of liquor within reach of our troops on the line of railroads. In aid of these efforts, railroad companies were appealed to, to refuse the transportation of spirits, and they promptly responded. Never, in my experience, has the making of regulations so nearly approached to the attainment of the objects proposed, with the use of so little machinery in the enforcement. The cheerful, prompt, and efficient coöperation of the Railroad Directors merit our thanks and the approbation of the community.

Under the power "to *make* and *cause to be executed* REGULATIONS for an *efficient police*," I ventured to propose some amendments to a legislative Act which, by its *title* and *provisions*, was *purely* a POLICE REGULATION for the invaded districts. As to military regulations, I have shown that we had EXPRESS *authority* to "DISREGARD" *legislative enactments*. The regulation of the police being in the broadest terms committed to us, I deemed that we had the same power there. These have been termed "*legislative acts*." *Regulations* as to the military and police, have, for the time, necessarily, the *effect* of *laws*. Many orders and regulations from the Treasury Department, or the War Department, from the Adjutant General's office, are very like legislation, in form and substance. "Orders, regulations, and arrangements," so far as the subject-matter to which they refer is concerned, must

infringe upon, or rather must occupy, a common ground with "legislation" on the same subject. If the SOVEREIGN has delegated the right to *make these regulations*, the authority is rightfully exercised, call them by what name you will. According to the views I have presented, it rests alone with the Sovereign power—a Convention of the People, which metes out the powers of other constituted authorities—to determine what shall be the powers of the Executive Department, and what shall be the powers of the department called the Legislature. These matters, all of which met with the sanction of your Excellency, had, as I conceive, been committed to the *Executive Department*, as constituted by the Convention.

The next matter, which was, as you know, for some time under the anxious consideration of the Governor and Executive Council, was the prohibition of the exportation of cotton, except under certain restrictions, unless expressly sanctioned by the Confederate authorities. This measure, perhaps the most doubtful adopted, was approved by your Excellency and the whole Council, and did not originate with me. My reasons for approving have already been placed on the record, and a copy of the letter stating these reasons, by order of the Council was sent to Mr. Memminger, Secretary of the Confederate Treasury, and published in the papers. I append a copy of this letter to this report. (See Appendix, B.)

The establishment of a foundry for cannon, cannon equipage, balls and shell, and for the repair of small arms, with a nucleus for a small-arms manufactory in future, was, in express terms, within our powers. So as to the nitre plantation, now in satisfactory progress. So in regard to the importation of arms and medicines.

In the matter of the gun-boat, the Governor and Council acted under the direct authority of the Convention, by whom the specific appropriation was made.

The surveys of the Santee and Pee Dee, and mountain passes in this State and North Carolina and Tennessee, though they cost a small amount of money, were, as I conceive, within the general powers committed to us, as well as the action since taken, as the consequence of those surveys.

The two acts which have excited most dissatisfaction are the call for troops for the protection of Georgetown and the country above, after the abandonment of the Confederate forces, and the action of the Governor and Council with regard to a supply of negro labor in and near Charleston for building fortifications and harbor obstructions. Yet neither of these acts, surely, needs any defence on the score of *competency* on the part of the Governor and Council. The first was, in effect, to bring into service a portion of the population of the State, to be employed in public service, as we believed, of the most important character. Your Excellency's proposition on this subject was as follows:

"*Resolved*, That all the militia of Georgetown, Marion, Horry, and Williamsburg, be immediately ordered out and organized into companies, battalions, and regiments, with the best arms and equipments that can for the present be procured, and that one thousand tents be ordered for them.

"*Resolved*, That they elect their own company officers, and that this Council appoint field officers for this organization.

"*Resolved*, That they be rendezvoused near Georgetown, to protect property, and to endeavor to defend the country to the best of their ability, as it is intimated that all our troops in Confederate service will be ordered from that section of the State, and thus open Georgetown to the enemy.

"*Resolved*, That the Quartermaster and Commissary Generals be immediately instructed to provide proper transportation and supplies for said troops.

"*Resolved*, That orders be issued by the Chief of the Military Department to stop any further supplies being furnished to the Confederate troops from the State Commissary Department, and also that the same orders be issued to the State Quartermaster General.

"*Resolved*, That the Chief of the Military Department be charged with the execution of the foregoing resolutions."

The second, to wit: the impressment of negroes, was a disposition and appropriation (temporarily) of private property for public use. The last I shall touch on in another part of my report.

It has been objected that offices have been created. What offices? Col. Jones was employed to audit some difficult accounts, and to act for General Harllee in his absence on public business, at an expense of just one hundred and eleven dollars and eleven cents. Major Melton was made an assistant to the Adjutant General, the Council paying only his very moderate bill of expenses in Columbia. Mr. Arthur was made Secretary of our body without any compensation from the Treasury. Lieutenant Follin was given a military rank, without any addition to the salary given him by the Legislature as Clerk to the Adjutant General. An assistant to the Adjutant General was given for Charleston, at his request, with the rank and pay of captain. A Superintendent of the cannon foundry and manufactory of arms was absolutely necessary for such an establishment, and so as to the saltpetre plantation. Something was paid to some of the surveyors of the Santee, the Pee Dee, and the mountains, and temporary commissions given, though in two of these instances the valuable services of Mr. Niernsee were rendered gratuitously. Mr. James Tupper was made Central Secretary of the Commissions for the removal of negroes from the seaboard, and women and children from Charleston, at the request of a majority of

the Commissions; a very laborious office, in which he generously served without pay. The same gentleman has been recently appointed to examine and audit the accounts of this State with the Confederate Government, going back to the 20th of December, 1860, and he serves for the mere amount of expense incurred in the performance of duty. The Doctors Le-Conte have rendered valuable service in examining salt springs and lead mines, but they, too, have worked gratuitously. The Chief of the Military has a Clerk. I have a Clerk, at the rate of five hundred dollars per annum, and for a time had two Policemen in permanent employment, at fifty dollars per month. This comprises, I think, everything, and the Ordinance expressly gives the Governor and Council the right "*to constitute and appoint* SUCH AGENTS *as shall be necessary for the* MORE EFFICIENT *execution of the powers confided to them.*"

I am not aware that any of these appointments have been objected to by your Excellency.

I shall proceed, in part three, to report upon the action taken on those matters which have come more particularly under my individual control.

Respectfully, your ob't servant,

I. W. HAYNE.

# APPENDIX.

## A.

### AN ORDINANCE

FOR STRENGTHENING THE EXECUTIVE DEPARTMENT DURING THE EXIGENCIES OF THE PRESENT WAR.

*We, the People of the State of South Carolina, in Convention assembled, do declare and ordain, and it is hereby declared and ordained*, as follows:

SEC. 1. Until the present war between the Confederate States of America and the United States shall have been terminated, and the forces raised in this State for the prosecution thereof shall have been disbanded, or until it shall be otherwise ordained by the People in Convention, the Governor shall be assisted, as is hereinafter directed, in the discharge of the duties imposed, and in the exercise of the powers conferred upon him under the Constitution and laws of this State, or the Ordinances of this Convention, by a Council, to be called the Executive Council, which shall consist of the Lieutenant Governor and three other citizens of the State, to be chosen by this Convention by a ballot, a majority of the votes cast at such election being necessary to a choice.

SEC. 2. The Governor and the Executive Council, acting together, shall have power to declare martial law to such extent, in such places, and at such times, as shall be required by the exigency of public affairs; to arrest and detain all disloyal or disaffected persons, whose being at large they shall deem inconsistent with the public safety; to order and enforce (subject to the owner's right to receive due compensation from the State) such disposition of private property or appropriation thereof for public uses as the public good shall appear to them to require; to make, and cause to be executed, all such orders, regulations, and arrangements, as they shall, from time to time, find expedient for bringing into service, organizing and supporting, the whole, or any part, of the population of the State, to be employed in the public service, and, also, for maintaining such efficient police as shall, by them, be thought necessary; to make, procure or employ arms, muni-

tions of war, and whatever else may be required for the defence of the State; to constitute and appoint such agents as shall be necessary for the more efficient execution of the powers hereby confided to them; for these purposes to draw money from the public Treasury, the Treasurers being bound to pay their draft from any money in the Treasury; to make all such nominations and appointments to military offices as the Governor has heretofore been authorized to make; to fill all offices and appointments where there is any vacancy for default of action by the Legislature or other appointing power, or for default of any provision by law of the mode of appointment, and to fill, until the next meeting of the People in Convention, any vacancy which may occur in the Council by reason of the death, resignation or removal from the State, of any one of the three members thereof chosen by the Convention.

SEC. 3. In the discharge of all his duties and the exercise of all his powers, not hereinbefore enumerated, the Governor is authorized to consult the Council, and to require, if need be, its advice in writing.

SEC. 4. The Governor and Executive Council may, at their discretion, arrange some or all of the business to be done by them, into different departments, assign each department to one or more members of the Council, and make rules for the management of a department or other business. Acts done by either of the departments, in conformity to rules or orders established by the Governor and Council, shall be valid, but shall be always subject to the control of the Governor and Council.

SEC. 5. The Governor shall have access to the books and papers of every department, and the opportunity of being, at all times, fully informed of the condition of its business; reports to him shall be made by the heads of departments, when he may require them; and he shall communicate to this Convention and to the General Assembly, at every meeting of either body, full information concerning the transactions of the Council and the condition of every department.

SEC. 6. If there should be a vacancy in the office of Governor, the Lieutenant Governor, having succeeded to that office, shall discharge the duties herein required of the Governor; and the President of the Senate, having succeeded to the office of Lieutenant Governor, shall become a member of the Executive Council.

SEC. 7. The Governor (or if he be necessarily absent, the Lieutenant Governor,) and any two of the members of Council elected by this Convention, shall be sufficient to constitute a quorum; and the concurrence of a majority of all present, there being a quorum, shall be required for the validity of any action in which the Governor and Council are required to act conjointly. If, by vacancies, the Council should be reduced to two or

only one, the Governor, for the time being, with those two or that one, shall be sufficient to fill the vacancies in the places of members chosen by this Convention, until the next meeting of the Convention.

SEC. 8. The Governor and Council shall keep a record of their proceedings, and for this purpose the Special Private Secretary of the Governor shall be their Secretary without additional pay. This record shall especially show the reasons for every arrest made by their authority. Any one of them shall have the privilege of filing and thus preserving as part of the record, his dissent from their action in any matter. On the first day of each meeting of the People in Convention, the record of all the proceedings of the Governor and Council had prior thereto, shall be laid before such Convention, and the said proceedings shall be subject to review, and to repeal, or such modification by the Convention as to it shall seem proper.

SEC. 9. The first meeting of the Governor and the Executive Council shall be had within seven days after the adjournment of the present sitting of this Convention, at a time and place to be fixed by the Governor, of which he shall give notice to each member. Afterwards their meetings shall be regulated by their own orders and adjournments.

SEC. 10. Each member of the Council shall receive an annual salary of two thousand dollars, payable quarterly out of the Treasury upon the draft or order of the Governor.

SEC. 11. The President of the Convention, if in his opinion the public exigencies shall require, or if he shall be requested in writing so to do by any twenty members of the Convention, shall by notice under his hand duly published, assemble this Convention, without delay, at a time and place to be by him fixed, and he shall appoint a Committee of five members of the Convention, a majority of whom, or the survivors or survivor of such majority, shall, in case of the death, resignation, or disqualification of the President, have the like authority and be under the like obligation to assemble the Convention and appoint a time and place for its meeting; but neither the President of the Convention nor any member of the said Committee shall be a member of the Executive Council.

[Certified copy.]

B. F. ARTHUR, *Clerk of Convention.*

## B.

EXECUTIVE COUNCIL CHAMBER,
COLUMBIA, S. C., April 4, 1862.

The following preamble and resolutions, adopted by the Governor and Council, have been ordered to be published:

* * * * * * * *

Whereas, information has reached the Governor and Council that sundry small vessels have from time to time carried from the port of Charleston cargoes of cotton, which the Governor and Council have reason to believe have found their way to the enemy, and which certainly have not brought back return cargoes of arms, munitions, or army supplies: Therefore,

*Resolved*, That during the continuance of the present blockade the exportation of cotton from any port in South Carolina is hereby prohibited, unless by the express permission of the Confederate or State authorities.

*Resolved*, That an agent, resident in the city of Charleston, be appointed, who shall be authorized to grant permission for the exportation of cotton on the terms hereinafter prescribed, to wit: Affidavit shall be made that no part of the cotton exported shall, with the consent or connivance of the exporter, find its way into the possession of the enemy; and bond, with good surety, shall be given that the full amount of the net proceeds of the sale of said cotton shall be brought back into the Confederate States in arms, munitions of war, or army supplies, unless prevented by successful interposition of the enemy.

[Extract from the Minutes of April 4.]

By order of the Governor and Council.

F. J. MOSES, Jr., *Secretary*.

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COLUMBIA, April 11, 1862.

The resolutions of the fourth of April, after lying over for two days, and the subject-matter undergoing discussion for several days previously, were unanimously adopted, the policy being approved by the Governor and every separate member of the Executive Council. We believed that we were but attempting, as far as it was in the power of the State authorities to do so, to carry out a settled policy, sanctioned by nine-tenths of the people of the Confederate States. We have been of opinion that the exportation of cotton, at all, was conceded to be an evil, so long as the blockade was

tolerated by neutral powers, but that our necessities were such as to make the *importation of "arms, munitions, and army supplies,"* and perhaps some other articles, an object so important that such importation more than *counterbalanced the evil* of a limited exportation of cotton. We desired, without in any degree interfering with the Confederate Government, to make the exportation and importation correlative. To effect this, we prohibit exportation, without *express permission* of the authorities of either one or the other of the Governments. The failure to prohibit by the Confederate Government is not an express permission. The custom-house clearance we have not considered as an express permission, unless the Goverment should *declare that it is so intended.* If it should so declare, we are foiled in our efforts, that is all. But if it does *not* so declare, we propose to prevent the exportation, unless by a special permission, according to the circumstances of each case, from the one authority or the other, or by a permission through an agent on the general terms specified in the second resolution.

Now, this can surely bring about no conflict between the *Governments.* As to the citizens claiming rights as secured by existing laws—that, I admit, is a different question. That is a question we supposed would be made; but unless the Confederate Government interferes in their behalf, we do not doubt either our power, or the propriety of its exercise.

Some months ago, you must remember, that Mr. Trenholm proposed to ship cotton, and had a vessel partly loaded for the purpose. Public opinion was, at that time, so general and decided in opposition to such exportation, that Mr. Trenholm, when appealed to, yielded to its force. He desisted for the time, and took the cotton from his vessel. I shall not now enter into the argument to show the grounds upon which this overwhelming popular sentiment rested. I expressed my views pretty fully through the papers at that time. Suffice it that, in the opinion of the Council, this sentiment is well founded. We believe the exportation of cotton, in any other than certain exceptional cases, to be injurious to the public interests. We are charged with high powers for protecting the public safety, and promoting the public welfare in the exigencies growing out of the present war. Among these powers are these: "to declare martial law; to arrest disloyal or disaffected persons, whose liberty we deem inconsistent with the public safety; to make such *disposition of private property*, or *appropriation thereof*, for public uses, as we consider that the public good requires." We are further charged with "procuring arms, munitions of war, and whatever else may be required for the defence of the State." Now, cotton about to be exported is "private property," about, as we believe, to be appropriated to *mischievous uses;* have we not the power to "dispose of" it in another

way? If, in our opinion, it is needed "to procure arms, munitions," and other things "required for the defence of the State," have we not the power so to appropriate it? If we have the power to seize, dispose of and appropriate the cotton for such purposes, can it be usurpation to declare that the *owner* shall so appropriate it, if he exports it at all? The mere paper declaration is *brutum fulmen* unless enforced. If called upon to enforce the declaration, then begins the exercise of real power. Of course this has been considered, and when we seize the cotton and vessel, and *appropriate them ourselves to procure arms*, by sending them ourselves to Europe, we will do no more than exercise a power clearly delegated.

This argument applies to the powers of the Governor and Council, under the Ordinance. As to the power of the State, does not the right of *eminent domain* give to a State the absolute right to appropriate all private property to public uses, subject only to the claim for compensation; more especially in times of war and public peril?

The simple resolution is no more than a Governor's proclamation. It may be bad taste to order what cannot be enforced, but as I have before said, it is only when *enforcement* is attempted that any substantial usurpation can exist. The *right to enforce*, in the way we propose, is, in my judgment, clearly in the *State*, and as clearly delegated by the State to the *Governor* and *Council*. I incline to think that any interference with the exercise of this right, by the Confederate Government, would be usurpation on their part. *But we do not propose to raise any question with that Government.* When that Government *orders*, or *asks*, or even *expressly permits* cotton to go out, we not only do *not* attempt to enforce prohibition, but we *declare, beforehand, our assent.*

I have written very hastily, but the subject I have considered.

If Mr. W. F. Colcock be in Charleston, please show him this letter, and ask him if he will accept the agency. He was appointed Agent simultaneously with the adoption of the resolution, and a copy of the resolution sent to him.

I am yours, truly,

I. W. HAYNE.

To C. R. Miles, Esq., District Attorney C. S.