ADVANCE SHEET– FEBRUARY 5, 2021

President's Letter

In this issue, we offer two 19th Century documents.

The first is a series of letters from Alexis De Tocqueville to his younger friend Arthur Gobineau written from 1843 to 1857 included in a collection of Tocqueville's writings edited, translated and published by the Hungarian emigre independent historian John Lukacs, who died last year at the age of 95. [A. Tocqueville, The European Revolution and Correspondence with Gobineau (J. Lukacs (ed.), New York: Doubleday Anchor 1959, pp. 190-94, 204-13, 221-23, 226-230, 290-95, 303-07]. Gobineau along with Houston Stewart Chamberlain is regarded as one of the most influential propagators of racism; his correspondence with Tocqueville is characterized by Lukacs as "a debate between those who, like Tocqueville, love liberty more than they dislike democracy, and others who, like Gobineau, dislike or fear democracy more than they love liberty," Gobineau being a representative of "radical conservatism." Tocqueville's letters are memorable not only for his indictment of racism but his moderation in respect of 'culture wars' and social democracy, his extraordinary prescience about the appeal of Gobineau's ideas in Germany, and his dislike of ideological thinking, both as respects race and as respects economics.

The second is a Court of Appeals brief by Baltimore's closest equivalent of Tocqueville, the Bar Library's founder George William Brown, in the case of *Mayor and City Council v. Howard*, 20 Md. 335 in 1863, almost the same time as Tocqueville's letters. It echoes the themes of Chief Justice Taney's opinion on suspension of habeas corpus in *Ex Parte Merryman*, arguing that Baltimore's police commissioners, who like Brown had been imprisoned by Presidential fiat in 1861, were nonetheless entitled to salaries for the remainder of their terms. The Court of Appeals (Judges Goldsborough, Bowie and Bartol) decided in favor of the Commissioners on statutory grounds, avoiding the constitutional question; the background of the case has recently been discussed by a University of Maryland law student, Matthew Kent, in an article entitled "Displaced by a force to which they yielded and could not resist", https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1026&context=mlh.

The related judicial opinion in this issue is the memorable dissenting opinion of Justices Scalia and Stevens in the 'terrorism' case of *Hamdi v. United States*, 542 U.S. 507(2004) vindicating the writ of habeas corpus and the principles of Chief Justice Taney's opinion in *Ex*

Parte Merryman. *Hamdi* was a 5-4 opinion, Scalia and Stevens being joined in a somewhat wishy-washy dissent based on the Due Process clause by Justices Ginsberg and Souter. The same issues arose in the case of *Padilla v. United States*, 542 U.S.426 (2004) in which Justice Breyer joined three of the *Hamdi* dissenters in dissent; Justice Scalia joined the majority allowing detention, but only on a question of venue. At this point, it was obvious that a Supreme Court majority existed denying the government power to detain American citizens without trial; the Obama administration avoided further tests by extraditing Hamdi to Saudi Arabia later in 2004 and belatedly according Padilla a proper criminal trial in which he was sentenced to less than the maximum penalty because of torture.

George W. Liebmann

BOOK ANNOUNCEMENTS

VOX CLAMATIS IN DESERTO by George W. Liebmann

This is a collection of 110 short 'op-ed' articles written over a 25-year period encompassing the unfortunate Clinton, Bush Jr., Obama and Trump administrations; included are a few longer pieces on welfare, reapportionment, Palestine, and civil rights 'consent decrees.' This collection is followed by book reviews of works by Gary Hart, Sarah Binder, Jack Balkin, Hillary Clinton, Gabriel Schoenfeld, Victor Klemperer, Lee Congdon, David Bernstein, Donald Rumsfeld, Susan Hertog, Frederik Logevall, Jonathan Fenby, Frank Costigliola, John Paton Davies, Constance Jordan, H. L. Mencken, Richard Evans, David O'Brien, and Jill Lepore and three longer essays on the original design of the United Nations, the Kennedy administration, and the after-effects of Naziism.

The collection expresses the views of a self- described iconoclast. To the extent that it has a unifying theme, it is found in Judge Learned Hand's eulogy of Justice Brandeis in 1943: "the herd is regaining its ancient and evil primacy; civilization is being reversed, for it has consisted of exactly the opposite process of individualization."

Available at Amazon.com: $9.95 for Kindle, $22.00 for 450 pp. paperback

By the same author:

The Last American Diplomat: John D. Negroponte and the Changing Face of US Diplomacy

"A detailed account of this remarkable career. [Liebmann's] book will be valued by all serious students of American foreign policy." *–Times Literary Supplement*

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"Liebmann's expertise in American government and its history is evident throughout. He makes the historical development of institutions come alive by putting faces and personalities on those who promoted them." *–William A. Fischel, Dartmouth College*

"Citing historical and contemporary critics, including Tocqueville, Theodore Lowi and Robert Wiebe, Liebman condems pluralistic government by interest groups in which in Lowi's words "there is no formal specification of ends and means...and therefore, no substance...only process. In place of this, Liebmann urges 'devolution,reciprocity of obligations, institution-building and predictability.'" *–Chronicles*

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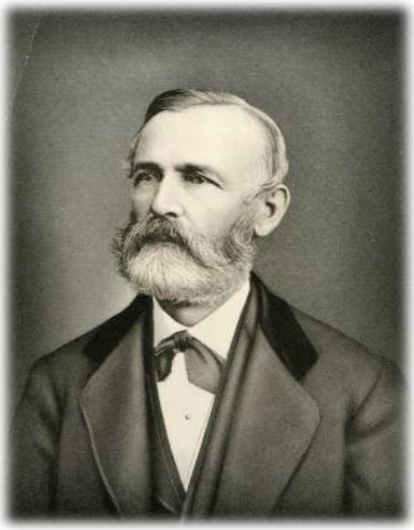
REPUBLICAN PRESS AT A DEMOCRATIC CONVENTION

Reports of the 1867 Maryland Constitutional Convention by the Baltimore *American and Commercial Advertiser*

with Annotations and Commentary
by John J. Connolly



Republican Press At A Democratic Convention: Reports Of the 1867 Maryland Constitutional Convention By The Baltimore American And Commercial Advertiser with Annotations and Commentary by John J. Connolly is a comprehensive volume of over 800 pages. It is currently available at the Bar Library for $50, a fraction of what is currently paid not just for law books, but for supplements to those books. Copies can be purchased through the Library's bookstore, which offers shipping and curbside pick-up. To place your order, telephone 410-727-0280 or e-mail us at jwbennett@barlib.org. As a Maryland lawyer there are two documents that you cannot know enough about, one being the Constitution of the United States and the other the Constitution of the State of Maryland. That said, how invaluable is a work that sets forth a substantial amount of information concerning the adoption of one of these documents. Yes, that is right, you should order your copy today!

Did A Penguin Just Predict Covid's End?

A few days ago, Punxsutawney Phil took a look around, saw his shadow, and now, six more weeks of Winter. In case you missed it, sorry to be the one to have to tell you. I remember when I was a kid and Rhea Feikin did the weather on channel 11 with a puppet. Today, all the stations talk about their advanced scientific methods for predicting the weather, but don't seem to be much more accurate than Phil or Ms. Feikin's puppet.

Wouldn't be nice if there was an animal that could predict when the never ending Winter of Covid was going to be over? At least if it was going to be soon. We can only hope that science is now providing us with the beginning of the end. Until that day, remember to keep your distance, wear your mask, wash your hands, take care and be well. I cannot begin to tell you how much I look forward to seeing each and every one of you again.

Joe Bennett

II

Tocqueville about the new social morality of our age

Tocqueville, 5 September 1843

Your letter, monsieur, arrived the day I left for the *conseil général.*[1] I found it upon my return. I want to answer you at once.

I shall ask you now to put all your books aside for a moment and to make a rapid mental survey of your recent readings and of your earlier studies, so as to answer this question in conversational form: What is there really *new* in the works or in the discoveries of the modern moral philosophers? By *modern* I mean not merely those of the last fifty years but those who immediately preceded them, those who belong to that generation which had decisively broken with the Middle Ages. Did they really see the obligations of mankind in such a new light? Did they really discover new motives for human actions? Did they really establish new foundations, or even new explanations, for human duties? Have they placed the sanctions of moral laws elsewhere? Through the darkness all I think I can rec-

[1] A sort of County Council for the Department of La Manche. Cf. E. L'Hommédé, *Un département français sous la monarchie de juillet. Le conseil général de La Manche et Alexis de Tocqueville.* Paris, 1933. (Unpublished correspondence.)

ognize is this: to me it is Christianity that seems to have accomplished the revolution—you may prefer the word change—in all the ideas that concern duties and rights; ideas which, after all, are the basic matter of all moral knowledge.

Christianity did not exactly create new duties or, to put it in other terms, it did not establish entirely new virtues; but it changed their relative position. Certain rude and half-savage virtues had been on the top of the list; Christianity put them on the bottom. The milder virtues, such as neighborly love, pity, leniency, the forgetfulness even of injuries had been on the bottom of the antique list; Christianity placed them above all others. Here was the first change.

The realm of duties had been limited. Christianity broadened it. It had been limited to certain citizenries; Christianity extended it to all men. It had been restricted and confirmed the position of masters; Christianity gave it to the slaves. Thus Christianity put in grand evidence the equality, the unity, the fraternity of all men. Here was the second change.

The sanction of moral laws had existed for this world rather than for the other. Christianity put the ultimate aim of human life beyond this world; it gave thus a finer, purer, less material, less interested, and higher character to morality. Here was the last change.

All of these things had been seen, shown, and preached before it came. But Christianity alone bound them together, making this new morality into a religion, and the minds of men were absorbed therewith.

We have lived with the rule of this morality for a long chain of centuries. Have we added much to it that is essential? This is what I do not see clearly. We may have put a few shades into the colors of the picture, but I do not see that we have added really new colors. The morality of our own time—the way I see it revealed through words and through action and through the ceaseless patter of our

loquacious society—our modern morality (and I am leaving aside what is being printed in fat volumes about this subject) may have reverted in some of its facets to the notions of the antiques, yet for the most part it has merely developed and expanded the consequences of Christian morality without affecting the essential principles of the latter. Our society is much more alienated from the theology than it is from the philosophy of Christianity. As our religious beliefs have become less strong and our view of the life hereafter less clear, morality has become more concerned with the legitimacy of material needs and pleasures. This is the idea that I think the followers of Saint-Simon expressed by saying that *the flesh must be rehabilitated.* It is probably the same tendency that, for some time now, appears in the writings and in the doctrines of our moral philosophers.

For this reason some people have now felt the urge to find the sanctions of moral laws in this life. They could no longer place them with absolute certainty in the life thereafter. From this came the doctrine of benevolent interest, about honesty paying dividends and vice leading to misery. The English Utilitarians are upholders of this new trend of ideas, ideas rather unfamiliar to the Christian moralists of the past.

Christianity and consequently its morality went beyond all political powers and nationalities. Its grand achievement is to have formed a human community beyond national societies. The duties of men among themselves as well as in their capacity of *citizens,* the duties of citizens to their fatherland, in brief, the public virtues seem to me to have been inadequately defined and considerably neglected within the moral system of Christianity. This seems to me the only weak facet of that admirable moral system, just as this seems the only strong facet of the moral system of the antique nations. Though the Christian idea of human brotherhood may seem to dominate contemporary minds, those public virtues have also advanced in the

meantime; and I am convinced that the moralists of the past hundred years are preoccupied with it far more than were their predecessors. This is due to the resurgence of political passions. They are, at the same time, causes and effects of the great changes we are now witnessing. Thus the modern world re-established a part of antique morality and inserted it within the moral principles of Christianity.

But the most noteworthy innovation of our modern moral teaching, to me, consists in the tremendous development and in the new form that is now given to two principles which Christianity had first put in grand evidence: the equal rights of every man to the goods of this world, and the duty of those who have more to help those who have less. The revolutions that displaced the old European ruling class, the general extension of wealth and education which has made individuals more and more alike have given an immense and unexpected impetus to the principle of equality, which Christianity had established in the spiritual rather than in the tangible material sphere. The idea that *all* men have a right to certain goods, to certain pleasures, and that our primary moral duty is to procure these for them—this idea, as I said above, has now gained immense breadth, and it now appears in an endless variety of aspects. This first innovation led to another. Christianity made charity a personal virtue. Every day now we are making a social duty, a political obligation, a public virtue out of it. And the growing number of those who must be supported, the variety of needs which we are growing accustomed to provide for, the disappearance of great personalities to whom previously one could turn with these problems of succor, now makes every eye turn to the State. Governments now are compelled to redress certain inequalities, to mollify certain hardships, to offer support to all the luckless and helpless. Thus a new kind of social and political morality is being established, a kind which the antique peoples hardly knew but which is, in reality, a combination of

some of their political ideas with the moral principles of Christianity.

Here, my dear Gobineau, is all that I can now distinguish through the fog that surrounds me. You see that I speak only of what I see in the habits of people; I am unable to say whether the same signs are registered in books or whether they reappear elsewhere. These reflections of mine are not supposed to give you a foundation or a basic framework, but rather an example of what I think we should search for. We have to find whatever new concepts of morality may exist. I have tried hard, while attempting to keep close to realities. Do my propositions strike you as true? Do you have others to propose? Do these modern moral theories justify them? My own mental habit has made me look exclusively for these newer things which might directly influence the actions of our contemporaries. But I cannot afford to neglect those different moralistic innovations, the new theses, new concepts, new explications which I might be permitted to call sterile fantasies, were it not for my academic affiliation[2] that obliges me to term them "interesting products of the human intellect."

Only after we shall have *outlined* whatever there is new in the moral doctrines and tendencies of our age will we begin to follow the consequences of these primary data in some detail. We should ascertain them before all. So, my dear collaborator, put your head in your hands and think about the above. What I ask from you is no longer the work of a student but of a master, yet I am certain that this does not surpass your powers. Once we have this foundation the rest of the work will be easier and at the same time much more interesting.

Should you have something to send me, dispatch it by stagecoach mails to Valognes, Hôtel de Louvre.

[2] A reference to his membership not in the French Academy but in the *Académie des sciences morales et politiques.*

Farewell, monsieur. Please trust the expression of my very genuine affection.

P.S. Don't destroy this letter, as I might wish to reread it someday when I finally get down to writing.

IV

Tocqueville about the endurance of Christian morality

Tocqueville, 2 October 1843

I had received, monsieur, your papers on Priestley and Bentham. They are very good papers, and they seem to fit the purposes of our planned work better than any of the previous ones you have done for me. I have thought that, beyond his big book on punishments and rewards,[1] Bentham may have written something more explicit and more philosophical about his utilitarian doctrines. Am I wrong in this?

I turn now to the long letter which you wrote me three weeks ago. I cannot answer it point by point. A book would be needed for that. I merely wish to point out the problems

[1] Reference to Bentham's *Rationale of Punishments and Rewards.*

that now exist between us and to try to direct our work accordingly.

I must tell you that my opinions about Christianity are absolutely opposite to yours. Christianity, to me, is vastly different from what it seems to you. It is vastly different from what had preceded it, and we are much less removed from it than you say. Whenever I read the Gospels I cannot help being overcome by the deepest emotions. Many of its doctrines, and the most important ones, have always struck me as if they were absolutely new, and all of it is something entirely different from that body of philosophical and moral ideas which had previously governed humanity. I cannot understand how, when you read these admirable books, your spirit does not breathe with that superior sense of inner freedom which their pure and grand atmosphere evokes in my own. If one wishes to be critical of Christianity, it is better to keep always two things in mind.

The first is this: Christianity has come to our generation through centuries marked by much rudeness, ignorance, social inequality, and political oppression, during which time it was often a weapon in the hands of kings and of priests. We must consider Christianity itself and separate it from the historic vehicles in which it was often forced to travel toward us. Almost all of those exaggerations and abuses for which you—and often quite properly—reproach Christianity should be attributed to these secondary circumstances—this I could easily prove—and not to the code of Christian morality whose first principle is this simple maxim: love God with all your heart, and love your neighbor like yourself—and remember that every one of its laws and prophecies rests thereon.

The second thing that one should always remember is that Christianity is not a philosophy but a religion. There are, of course, certain doctrines that are necessarily part

and parcel of certain religions, and which are not the exclusive attributes of any one of them. Such are the *virtue attributed to faith, the utility of faith, the necessity of faith, the inadequacy of deeds without faith*—and their consequence is that certain amount of intolerance with the contemporary absence of which you seem so satisfied. These doctrines are inherent in all religions . . . and they are necessarily inseparable from all the good they bring us. Yet I am convinced that the eventual damage to human morality thereby caused is far less than what would result from moral systems that have emancipated themselves from religion altogether. The longer I live the less I think that the peoples of the world can ever separate themselves from a positive religion; and this growing conviction makes me less concerned with these inconveniences that are eventually inherent in every religion, including the best.

Most of those symptoms in which you claim to recognize a new morality seem to me only symptoms that have always accompanied the weakening of religious faith.

When there is no more faith in religion, it is logical that little attention should be paid to its moral precepts and that it will be judged merely by its external acts and forms. When the vision of the next world becomes obscure, it is again natural that people who are still unable to live without moral sanctions will try to find them on this earth and that they will thus create all these systems which may be different but which are all concerned with the doctrine of human interest.

And when the vision of eventual heavenly rewards is accordingly lost, it is again logical that people should be more and more attached to the only prospects that remain before them, to the benefits of this world.

I think that something similar may have happened during the decline of paganism, and that it is typical of the decline of all religions. The mass then comes forth and re-

veals its instincts, and it will find philosophers who will make doctrines to fit them.

I further tell you that I am not surprised at what is now called the *rehabilitation of the flesh.* It is possible that Christianity may have pushed the glorification of the spirit to excessive lengths. But this very tendency was a wonderful reaction against the Roman habits and forms of paganism. Don't you see the incomparable beauty of that rare, open struggle of the spirit against the ruling flesh? Even if Christianity was swept to spiritual excesses, entranced as it may have been by the grandeur of its own doctrines, I do not think that this is a very great danger. The inclinations of the majority of men pull them in a converse direction; they rehabilitate their own flesh without the need of philosophers.

As I am hastily jotting these different thoughts down, I must say that my aim is not to convince you but merely to make you understand where I differ from you. Most of the things that to you seem new apparitions of morality to me seem the natural and logical consequences of a weakened religious faith and of widespread doubts about the existence of the other world. I believe that similar circumstances in the past resulted in similar consequences.

Among these really new apparitions (and I think there may be a few attractive ones among them) the majority seem to derive directly from Christianity. They are only the applications of Christianity to a larger sphere, to other political forms, and to a very different social state. They are, briefly, the new consequences of an old principle.

You, then, consider the revolution of our times more original and more beneficent than I do. But you do see it, and this is the most important thing for the work we are trying to do. Most of the symptoms that you detect I see, too. Thus I think that this sort of epistolary conversation could lead to rather satisfactory results, as it should determine the direction of your future studies and the main

characteristics of the books that are noteworthy for our purposes. Christianity is the great source of modern morality. Everything that to you may seem contrary or even different from Christianity in our laws, customs, ideas, philosophies you should put in evidence. This is the first rule. For what I have to present is not contemporary morality but its eventual divergences from the principles of the past. This limited subject is, thus, immensely and desperately large. What, after all, does it *not* include? To describe the various manifestations may be even more difficult than to demonstrate the new principles themselves. One of these definite manifestations, the changes of civil and criminal justice in the last fifty years, alone could be described in a heavy book. Sometimes I feel that I should curse either the *Académie des sciences morales* for having confided this work to me or politics for keeping me from its eventual completion.

To come back to you. You say you are going ahead with your study of the British writers. Very good; as I told you earlier, your last studies on these writers seemed excellent. After them I think you would do well to return to your Germanies. In the first place there is a field where my efforts cannot ever equal yours, as I don't know German. In the second place I must say that I am not yet satisfied with the results in that field as they seem inconclusive for my main purpose, which is, above all, to find and show what there is really *new* and divorced from Christianity in these modern moral systems. Kant seems to me beyond, rather than within, Christianity. Are the more recent German authors different? I should ask you to inform me positively on this subject. I may not ask you to do the French writers as I know the writings which I need most and I can obtain them more easily.

What I need is less information about new ideas than about their different manifestations and applications, es-

pecially abroad, for they are often difficult for me to know. Let me take your own ideas for example.

You are right when you say that it is typical of our times to be interested in acts apart from beliefs. This is evident in the modern laws which confirmed equal rights and equal duties to all Christian sects. In France this has been now extended to the Jews. Legislation abroad must surely show less visible but, at any rate, considerable symptoms of the same tendency.

You say that charity has become public instead of private, and that thus it has become more enlightened and less directly involved. I may agree with you in part, but I do not deduce the same consequences therefrom. I see therein less a new principle than a more modern, civil, bureaucratic, and democratic manifestation of Christian doctrine. Evidence thereof lies in the modern practice of governments in accumulating funds to administer to the needs of various miseries, to extend, briefly, the necessary administrations of Christian charity. This charity is legal and *direct*. Anything similar in Germany should be observed and registered carefully.

Then there is a legal charity that is indirect and consists in offering to the poor facilities to help themselves. Such are savings funds,[2] asylums, and other institutions of this kind. The eventual existence of similar institutions abroad is material of capital importance for me.

The efforts of governments to extend more universal education; the obligations imposed for this purpose; consequently, the laws and regulations that aim to multiply the number of schools and their pupils, and give instruction of a more democratic nature; the books that influenced and pushed governments in that direction particularly belong to our subject.

[2] Note that the establishment of savings funds, the idea of facilitating thrift was still considered a charitable rather than a business enterprise in the early nineteenth century.

I am leaving prisons and penal laws aside; I should be able to do that myself.[3]

You say that the right to work is a new principle of our times (and I must interrupt to say that it emphasizes the idea of work less than did the Christian doctrine about *all men* being condemned, in one way or another, to work on this earth). Which are the modern books, French or foreign, where this idea stands formulated? Has there been any legislative attempt to make this idea into a law?

I could go on much longer about this subject. But it would serve no purpose now when you are not yet through with your study of the contemporary philosophers. When you conclude that, and I hope as soon as possible, we will revert to these more practical subjects. Even if you were to feel you could not enter into them in great detail, your collection of ideas and sources should alone be of great help to me.

I conclude this interminable letter by asking you to trust my indeed sincere affections.

V

Tocqueville about the superiority of Christianity

Tocqueville, 22 October 1843

My dear Gobineau, you are an amiable, intelligent, and unorthodox adversary with whom I do not want to battle. It

[3] Reference to his own studies on the penal system which had led to his American journey.

is typical of philosophical debates that neither of the participants emerges dissuaded from his original opinions. Thus it is best not to dispute; it saves effort. Particularly useless are philosophical battles waged by the pen. The possibilities of misunderstanding then actually increase. Thus your letter attributes to me ideas that are not mine, a misunderstanding which I could have immediately clarified during a personal conversation. For example: I am supposed to have said that Christianity was absolutely different from everything that had preceded it. I have never thought that and I don't think I said it. Some of its maxims certainly existed, scattered and inert, in Greek and Oriental books. The other day I found some even in the Laws of Manu, and others probably exist elsewhere. But Christianity chose, developed, ordered, bound together certain maxims and ideas, some part of which had been presented earlier in an isolated or obscure fashion, and made out of the whole an absolutely new regimen of morality. This is the line of my thought.

Another example: that there is nothing new in modern morality. Again you wrongly attribute an idea to me. I only believe that almost all that we call modern principles should be considered as new consequences drawn from the old Christian principles because of our present political and social conditions. I do not deny their existence; I merely contest the extent of their meaning. You will see here, my dear colleague, that my ideas ought not to discourage you. The only difference between you and me is that you have more ambition than I have. I limit myself to finding new consequences where you wish to discover absolutely new principles. You want to change the face of the world, nothing less. I am more modest.

Unfortunately there also exist more profound divisions between ourselves. You seem to contest the social function of religions. Here we assume truly antithetical positions. You say that the fear of God does not stop people from

murder. Even if this were true—and I doubt whether it is really true—what is the conclusion? Whether secular or religious, the function of law is not to eliminate crime (which is usually the product of deranged instincts and of such violent passions as will not be halted by the mere existence of laws). The efficacy of laws consists in their impact on society, in their regulation of matters of daily life, and in setting the general temper of habits and ideas. Laws, and especially religious laws, are thus so necessary that there never has been a people of any importance that could do without them. I know that there are many who now think that one day they may be able to do without this regimen, and every morning they keep looking eagerly for this new day. I think they are looking in vain. I should even be more inclined to believe in the coming of some new religion than in the continuation of the prosperity and greatness of modern societies without religion . . .

A last argument. While you are so severe with the religion which, after all, did so much to establish our leadership among the human race, it seems that you have a certain weakness for Islamism. This makes me think of another friend whom I met in Africa, where he had become converted to the Mohammedan religion. I was not impressed by this spectacle. I often studied the Koran when concerned with our relations with the Moslem populations of Algiers and the Orient. I must say that I emerged convinced that there are in the entire world few religions with such morbid consequences as that of Mohammed. To me it is the primary cause of the now visible decadence of the Islamic world, and though it may be less absurd than the polytheism of the antiques and its political and social tendencies are more to be feared, in my opinion, I still regard it as decadent compared to antique paganism. Here is something that I could easily prove if you were ever to entertain the painful thought of having yourself circumcised.

Forgive, my dear Gobineau, this useless banter. I wanted

to be very brief, and I am now beginning my fifth page. It was the pleasure of conversing with you rather than a desire to convince you that made me talk so much though I remain grieved about our disagreements. I like you too much to be indifferent as to whether you share some of my beliefs. Yet I find consolation in the knowledge that in the realm of finer sentiments we are and shall remain on the same side.

You ask me whether you should analyze Bentham on usury.[1] I do not need a detailed analysis. I think I know his essential thesis, which he pushes to unreasonable extremes, as is the habit of this type of person, though I do agree with some points. It would be enough to indicate briefly his principal premises and conclusions. I don't see the need to occupy yourself with his book on legislation.[2] I can do this easier as I am rather well acquainted with it. I am eagerly awaiting your analysis of the other British writers you mention.

Farewell, monsieur, and believe in my sincere and affectionate sentiments.

[1] Reference to the *Defence of Usury showing the Impolicy of the Present Legal Restraints on the Terms of Pecuniary Bargains.*
[2] Reference to the *Treatise of Civil and Penal Legislation.*

X

Tocqueville refutes early theories about race

Paris, 15 May 1852

My dear friend, I am late with this letter; my excuse is that the last ten days were taken up with the inconveniences of moving. However, I took time to read that chapter by Flourens which I had found in the second edition of his book, entitled *Histoire des travaux et des idées de Buffon,* in duodecimo; 1850, Chapter XIV, page 199. What I have to tell you about it is briefly this: Buffon and, after him, Flourens believe in the diversity of *races* but in the unity of the human *species.* The only reason they seem to give is the continuous procreation of the races among themselves, which, for natural scientists, should be complete and incontrovertible proof, since it is difficult to believe that God would have amused Himself by creating two physically almost similar species but then permitting their confusion through the effacement of His original line of demarcation. Without this clear separation a mixture of species would, in time, have produced common offspring which would sooner or later have replaced their original progenitors.

Flourens rightly notes that this secret faculty of reproduction demonstrates the fundamental unity of animaldom beyond their greatest physical differences while, at the same time, their greatest similarities mean nothing when the reproducing faculty is missing. Thus, despite their very different forms, bulldogs and lap dogs successfully mate, while horses and donkeys, similar to the point of potential visual confusion, are unable to produce but the seedless mule.

Mankind thus belongs to a singular species and, according to Buffon and Flourens, human variations are products of three secondary and external causes: of climate, of food, and of the manner of life.

The only thing that seems original to me in this chapter by Flourens is a discussion about that black subcutaneous substance which is supposed to exist under the skin of Negroes and about which Voltaire wrote, "Will our systematic mania confuse our minds to the point where we claim that a Swede and a Nubian belong to the same species when we see before our eyes the completely black *reticulum mucosum* of Negroes, the obvious cause of their inherent and specific blackness?"

Well, it now seems from the observations of Flourens that this same matter which he calls *pigmentary stratum* exists, in colors of varying intensity, in the American Indian and in a less pronounced but still very visible version in the Kabyl, in the Moor, and in the Arab, who belong to the white race, and that traces thereof exist even in Europeans.

Thank you for the interesting details about Germany. Because of my domestic revolution of the past few days I could not yet inquire about the existence of translations. Without translations all these works are dead letters to me. Let me know if you have other ideas or if you recall other books about the same theme. Please consider that I am less interested in the causes of the revolutionary spirit in Germany toward the end of the last century than in the breadth

and in the character of that spirit, in its symptoms and in the principal places of its appearance. Even mediocre German books should contain such information. Books written about Germany by foreigners during that period, travel books, even the evidences in public laws and in private memoirs, should be further enlightening for my purposes.

I shall leave here in fifteen days and return home to Normandy. After that please address your letters to Tocqueville, through Saint-Pierre-Église (Manche). I shall be there all summer. A thousand cordial greetings.

Do not fail to remember us to Mme. de Gobineau.

XII

Tocqueville about the monstrous fatalism of racial theories[1]

Saint-Cyr, près Tours, 17 November 1853

I owe you a number of excuses, my dear friend, for not having written you immediately and for having left your last letter unanswered for ten or twelve days despite my best intentions. My first failure resulted from certain embarrassments caused in my mind by the reading of your book and by my confused sentiments of criticism and praise. My fortnightly silence was, moreover, a consequence of my obligation to read a number of books I had borrowed from the Paris libraries which had to be re-

[1] Because of its central importance I decided, in this translation, to break the long arguments of this letter by more paragraphs. Elsewhere in this book paragraphing strictly accords with the original letters and texts.

turned. And now to the point. I shall proceed differently from others: I begin with the criticisms.

They relate directly to your principal idea. I must frankly tell you that you have not convinced me. Every one of my objections persists. You may, nonetheless, be right in defending yourself from the charge of materialism. Your doctrine is rather a sort of fatalism, of predestination if you wish but, at any rate, very different from that of St. Augustine, from the Jansenists, and from the Calvinists (the very last are closest to your doctrines), since you tie predestination and matter closely together. You continually speak about races regenerating or degenerating, losing or acquiring through an infusion of new blood social capacities which they have not previously had. (I think these are your own words.) I must frankly say that, to me, this sort of predestination is a close relative of the purest materialism.

And be assured that should the masses, whose reasoning always follows the most beaten tracks, accept your doctrines, it would lead them straight from races to individuals and from social capacities to all sorts of potentialities.

Whether the element of fatality should be introduced into the material order of things, or whether God willed to make different kinds of men so that He imposed special burdens of race on some, withholding from them a capacity for certain feelings, for certain thoughts, for certain habits, for certain qualities—all this has nothing to do with my own concern with the practical consequences of these philosophical doctrines. The consequence of both theories is that of a vast limitation, if not a complete abolition, of human liberty. Thus I confess that after having read your book I remain, as before, opposed in the extreme to your doctrines. I believe that they are probably quite false; I know that they are certainly very pernicious.

Surely among the different families which compose the human race there exist certain tendencies, certain proper aptitudes resulting from thousands of different causes. But

that these tendencies, that these capacities should be insuperable has not only never been proved but no one will ever be able to prove it since to do so one would need to know not only the past but also the future. I am sure that Julius Caesar, had he had the time, would have willingly written a book to prove that the savages he had met in Britain did not belong to the same race as the Romans, and that the latter were destined thus by nature to rule the world while the former were destined to vegetate in one of its corners. *Tu regere imperio populos, Romane, memento,* said our old acquaintance Virgil. If your doctrine were to relate merely to the *externally* recognizable differences of human families and through these enduring characteristics assign them to differences in creation, it would still be far from convincing to me but at least it would be less fantastic and easier to understand. But when one applies it within one of these great families, for example, within the white race, then the thread of reasoning becomes entangled and loses itself. What, in this whole world, is more difficult to find than the place, the time, and the composite elements that produced men who by now possess no visible traces of their mixed origins? Those events took place in remote and barbaric times, leaving us nothing but vague myths or written fragments.

Do you really believe that by tracing the destiny of peoples along these lines you can truly clarify history? And that our knowledge about humans becomes more certain as we abandon the practice followed since the beginning of time by the many great minds who have searched to find the cause of human events in the influence of certain men, of certain emotions, of certain thoughts, and of certain beliefs?

If only your doctrine, without being better established than theirs, could serve mankind better! But evidently the contrary is true. What purpose does it serve to persuade lesser peoples living in abject conditions of barbarism or

slavery that, such being their racial nature, they can do nothing to better themselves, to change their habits, or to ameliorate their status? Don't you see how inherent in your doctrine are all the evils produced by permanent inequality: pride, violence, the scorn of one's fellow men, tyranny and abjection in every one of their forms? How can you speak to me, my dear friend, about distinctions between *the qualities that make moral truths operative* and what you call *social aptitude*? What difference is there between the two? After, for some time, one has observed the way in which public affairs are conducted, do you think one can avoid the impression that their effects are the results of the same causes which make for success in private life; that courage, energy, honesty, farsightedness, and common sense are the real reasons behind the prosperity of empires as well as behind the prosperity of private families; and that, in one word, the destiny of men, whether of individuals or of nations, depends on what they want to be?

I stop here: let me, please, rest at this point. There is an entire world between our beliefs. I much prefer to turn to what I may praise without reserve. Though I am no less vividly impressed with this than with what I expressed earlier, I must unfortunately be much shorter here as I cannot enter in detail into everything that I do approve in your book. Briefly I shall say that this book is far the most remarkable of your writings; that, to me at least, very great erudition is manifested by your researches and that there is great talent and extraordinary insight in the way you have employed their results. Those who approve your fundamental thesis or those who wish it to be true (and, in our days, after the wear and tear of sixty years of revolution, there are many in France who may want to believe in something similar) must read it with great enthusiasm since your book is well constructed; it proceeds straight to its conclusion, and it is argued most intelligently. I proved my sincerity in my strictures; please believe equally in the

sincerity of my praises. Your work has real and great value, and it certainly establishes you at the head of those who have proposed similar doctrines.

Having now written very rapidly and with a kind of *furia francese* (a racial quality, you would say), my hand is tired and I must ask you to let me stop here. At any rate, this is not a subject which can be easily treated in a letter. It is too complex and too vast, but we shall talk about it *abundantly* when we see each other. Tell me only: has the press mentioned your book yet? I get here an English and a German newspaper (I have audaciously put myself to learning German), but I economize at the cost of French newspapers, which, as I think I told you before, seem to have solved a problem held hitherto insolvable: there is less in them than if they were censored. I know of their contents only by hearsay. It seems that the *Débats* should be willing to review such an important book.

We shall be staying here until May. I should much like to see you in Paris at that time. They are leaving you buried too long in your Alps. I am grieved without being able to help. I am very well. I work much, and the days seem to fly. Farewell. Do believe in my sincere friendship.

P.S. Please do not fail to remember us to Mme. de Gobineau.

XXXIII

Tocqueville about the fatalistic and anti-Christian fallacy of racial theories

Tocqueville, par Saint-Pierre Église (Manche)
30 July 1856

This is a much delayed letter, my dear friend; I am certain that you will forgive my long silence once you know about the sad event which caused it. You may have heard about

my great misfortune of losing my father about the same time that your paper arrived and that I received your last letter, the one of May 1st. You may have seen enough of our family life and of the place which our good and dear father occupied in it to understand what a terrible tragedy his loss has brought to us. Almost immediately after his death we left Paris and came down to enclose ourselves in this retreat from where I am now writing.

Let me turn to you. Your paper interested me very much, and I do not doubt that it will produce the same effects on the *Académie*. It has already produced it on Mignet, who volunteered to read it in my absence. He could not do this yet because of the accumulation of overdue lectures, but I think that it will not be long delayed. All these details must be known to you from the letters of d'Avril, who continues to prove a truly devoted friend of yours. What he will not tell you is my own disappointment of being unable to read the paper myself and to have it preceded, as I had planned, by a short introduction about the author. The reasons for this inability are, alas, too evident.

Yet I confess that even without these reasons I should have been somewhat embarrassed to introduce within the body of the *Académie* the discussion which you desire. I could not do it without strongly attacking your ideas, something which I find quite repugnant. You know that I cannot reconcile myself to your theses in any way and my thoughts are so much *obsessed* on this point that the very reasons with which you are trying to make them more acceptable tend to confirm my opposition even more, an opposition which remains *latent* only because of my personal affection for you. In your penultimate letter you compare yourself to a physician who announces to his patient that he is mortally ill. You ask: What is immoral in that? My answer is that even though this act in itself may not be immoral, its consequences assuredly are most immoral and pernicious. If one of these mornings my doctor were to say to me: "My

dear sir, I have the honor to announce that you are mortally ill and, inasmuch as all of your vital organs are affected, I must add that there is absolutely no chance for you to recover," my first temptation would be to knock that doctor down. Thereafter I should think I would have no choice but either to pull the covers over myself and wait for the announced end or, if I possessed the temper which animated the circle of Boccaccio during the Florentine plague, to think of nothing else but to sample all the possible pleasures before this inevitable end, to burn, as they say, the candle at both ends. Or again, I could profit from this doctor's sentence by preparing myself for eternal life. But societies do not have eternal lives. Thus your doctor will certainly not number me among his clients. I must add that physicians, like philosophers, are often greatly mistaken in their prognostications; I have seen more than one person condemned by physicians who nevertheless became quite well subsequently and who angrily criticized the doctor for having uselessly frightened and discouraged him. Thus you will see, my dear friend, that though I am much disposed to admit the talents of the author I cannot uphold the validity of his ideas. Since I sincerely wish to attract attention to you I shall nonetheless do my best to bring about either a eulogy or at least a good critique by one of our colleagues. In the subsequent discussion I shall gladly insert a word which, though it may register my reserve about the book's thesis, will much emphasize the author's merits. But these things one cannot do from afar, and we will have to wait for their realization until winter.

You justly rankle at the silence with which your book is being treated in France. But it would be wrong for you to be much affected by this, since the main source of this silence lies in those general causes which I have already indicated to you and which do not at all diminish your stature. There is no place in France today for alive and enduring interest in any sort of intellectual achievement. Our

temper, so intellectual, especially during the past two centuries, is now going through a transformation which is manifest in lassitude, in disenchantment, in a dislike of ideas, in a love of statistics. This is caused by our political conditions. The present ruling class does not read and does not even know the names of writers. Now that it no longer plays a part in politics, literature has fallen in the eyes of the masses. How can you, then, expect a book like yours, full of transcendent philosophy, in four erudite volumes, to disturb the deep, lethargic somnolence which is now weighing down the French spirit? Twenty years ago people might have regarded your theses as a means of attacking the Church, and this (beyond the scientific merits of your book) would have furnished you with propagandists as well as with readers. But you must, of course, know how we have now become extremely devout. Every day the pastor of our village upholds from the pulpit the Christian virtues of the Emperor, his faith, his charity and the rest . . . as an example . . .[1] Granier de Cassagnac has become a communicant.[2] What else can I say? At this time when we are more exclusively than ever preoccupied with the material goods of this earth we advance every day along this road of sanctimoniousness. I assure you that even Mérimée himself, who boasts among intimates of not having been baptized, would not dare to publicly propose doctrines like yours. For it should be recognized that, despite the pat on the back you give to the Church and though you, perhaps in good faith, make great efforts not to put yourself outside her pale, the very essence of your theses is hostile to the Church. And nearly every one of the consequences that may be drawn from your theses are more or less opposed to her doctrines. Therefore you will find in France many people who will tell you, like Rémusat: "I

[1] The interruption occurs in the original manuscript.

[2] Bernard Adolphe Granier de Cassagnac (1806–1880), an intelligent but unscrupulous political and journalistic adventurer.

believe in what you say, but I prefer not to be the one to proclaim it," and you will hardly find anyone willing to champion you. Therefore I think that your book is fated to return to France from abroad, especially from Germany. Alone in Europe, the Germans possess the particular talent of becoming impassioned with what they take as abstract truths, without considering their practical consequences; they may furnish you with a truly favorable audience whose opinions will sooner or later re-echo in France, for nowadays the whole civilized world has become one. If in Britain and in America your book will meet with interest, the interest will only echo the ephemeral views of partisans. For those Americans whom you mention and who translated your book are known to me as perfervid leaders of the anti-abolitionist party. They translated the part of your book which suits their prejudices, the part which tends to prove that the Negroes belong to another, to a different and inferior race; but they suppressed the part which tends to argue that, like every other, the Anglo-Saxon race is also decaying. A book of real merit such as yours is destined to evoke considerable interest in the thoughts of thinkers of every nation but, except perhaps for Germany, it is not destined to interest the mass of readers in whose minds not more than the name may register.

You will know that I myself have returned to my writing profession in spite of the sad events I mentioned before. I have asked d'Avril to send you a copy of my book.[3] Until now I have certainly no reason to complain either of the public or of the press. Yet you will credit me with enough sense to know that I have illusions about this sort of success. I have written a short book; I took the only subject which even now is capable of electrifying public opinion to a certain degree, and which subject one is still permitted to discuss: the French Revolution. Until now its more visible

[3] *The Old Regime and the Revolution,* published a few weeks before.

history has been shown; I have turned it around to show what was beneath it. Certain passions, still alive, have grasped the occasion to attack or to praise me, from which a certain amount of noise has resulted. But I know very well that the readers interested in my book are those who are even more interested in the latest information on stock dividends. I am anxious to have your opinion about this book, which, even if it does not give me a durable reputation, has at least helped me to pass difficult times and to transform into good years the always so hard passage from an active career to retirement. I have come to enjoy very much the life which I am now leading; it is so salutary for my mind and health that I would find it difficult to abandon it if this were necessary. Having departed from politics both agitated and ill, particularly in the beginning I would have had a rather rough time had I not prepared this long writing task which has not only occupied but in a way electrified me. Here I am at the end of the ninth page. I shall not conclude without a cordial embrace for you and without asking that you remember us to Mme. de Gobineau. Rest assured that when I return to Paris I shall not forget your desire for an Academic discussion. I hope to bring it about. In your turn, write me please once in a while. Your letters give me great pleasure. Will your duties bring you closer soon?

A thousand good wishes.

XXXV

Tocqueville about the incompatibility of Christianity with doctrines of race

Tocqueville, 14 January 1857

Your letter of 29 November, which I received about a month ago, has certainly touched me deeply, my dear friend. What a terrible journey! My worst voyages are child's play compared to it. Were it not that I received a letter from d'Avril at the same time, informing me of the fortunate arrival of Mme. de Gobineau and of your daugh-

[7] The Count Joseph d'Haussonville (1809–1884) wrote a conservative *History of French Foreign Policy from 1830 to 1848.*

ter, I confess that your letter would not have assured me yet. I must say that I cannot understand how the cause which you describe could make you decide to precipitate your wife and your daughter into the perils of such a journey, in the middle of which you knew you had to leave them. I admire the temerity of Mme. de Gobineau, and I am happy and almost surprised at the success of her bravery. I now consider Mlle. Diane immortal. Your friends can tell you how much concerned I had been to see her leave. I admit that, knowing the frequent effects of the Orient on travelers of her age, I wondered whether I would see this charming child again, and that the image of M. de Lamartine's daughter[1] had occupied my imagination as I waved you farewell. But now she is safe from these dreadful dangers—many thanks to God.

You have taken indeed seriously I do not know what facetious remark I may have made about your religion. This proves that one should not joke with friends who are three deserts and three oceans away, since in such a case a misunderstanding of a single word might not be corrected in less than a year's time. No, my dear friend, calm yourself; I have never taken you for a black hypocrite; as you say, I know you too well to have ever had such an opinion of you. God save me from that! I have taken you for one of those people, numerous in past and present and numerous even during the centuries of faith, who venerate the Christian religion and who are loyally devoted to it without unfortunately being absolutely convinced Christians. In such a spiritual state one does not consider oneself a hypocrite by paying many respects to such a generous and saintly religion (I am at least using religion in the sense in which it is one of the greatest instruments of morality and civilization which God ever decided to employ). Many

[1] Reference to Julie de Lamartine, the poet's only daughter, who died of a sudden illness during an Oriental journey at the age of ten.

of the finest minds of modern times have certainly been hypocrites in this way: I am speaking of those, above all, who have professed doctrines which to them seemed true but which to them, too, seemed contrary to Christian dogma and consequently dangerous to the souls of the remaining faithful if no efforts are made to mitigate such detrimental results. I put you among these rascals. Forgive me. I admit that I could not believe how you could fail to see the difficulty of reconciling your scientific theories with the letter and with the spirit of Christianity. About the letter: what is clearer in Genesis than the unity of the human race and the descent of all men from the same ancestor? About the spirit: is it not its unique trait to have abolished those racial distinctions which the Jewish religion still retained and to have made therefrom but one human race, all of whose members are equally capable of improving and uniting themselves? How can this spirit—and I am trying to use plain common sense—be reconciled with a doctrine that makes races distinct and unequal, with differing capacities of understanding, of judgment, of action, due to some original and immutable disposition which invisibly denies the possibility of improvement for certain peoples? Evidently Christianity wishes to make all men brothers and equals. Your doctrine makes them cousins at best whose common father is very far away in the heavens; to you down here there are only victors and vanquished, masters and slaves, due to their different birthrights. This is obvious, since your doctrines are being approved, cited, commented upon by whom? by slaveowners and by those who favor the perpetuation of slavery on the basis of radical differences of race. I well know that right now there are in the south of the United States Christian pastors and perhaps even good priests (though they are slaveowners) who preach from their pulpit doctrines which are undoubtedly analogous with yours. But be assured that the majority of Christians, consisting of those whose interests do not sub-

consciously incline them toward your ideas—be assured, I say, that the majority of Christians of this world cannot have the least sympathy for your doctrines. I am not even speaking of those materialistic opinions which, according to you, do not exist in your book. This may be so, but it is certain that the materialism of many people will nonetheless gain strength from it. Thus I confess that the reading of your book left doubts in me about the solidity of your faith, and that I have irreverently placed you among those men whose doubts do not keep them from treating Christianity with a true and profound respect and who do not believe that they are hypocritical when they endeavor to make their ideas as compatible as possible with the latter. You tell me that I am in error and that you have become an absolutely convinced Christian. May Heaven hear you! You will be the happiest man in this world, not to speak of the one hereafter; of this I am profoundly convinced, and you may be certain that no one will rejoice more in seeing you persevere along this road than I. Alas! it is not a road open to every mind; many who are sincerely searching for it did not yet have the good fortune of finding it. If I spoke badly (I do not recall it now) about the devout, it is only because I am revolted every day when I see petty people in their gossipy circles with their foolish affairs who are capable of every sort of despicable and violent action talking devoutly of their *holy religion*. I am always tempted to shout at them: "Rather than be Christians of this kind, be pagans with pure conduct, proud of your soul and with clean hands!"

I am descending from these levels to a very minor subject, to the *Institut*. I find that your chances are very good. Until recently our plans seemed to have had nearly insurmountable difficulties. Entry into the *Académie des sciences morales et politiques* must come through a section. The two logical sections for you, philosophy and history, seemed to me hardly accessible for many reasons which are too long

to be explained here. But a new state of things has arisen to give you very good chances. A year ago an almost invisible little *coup d'état* was directed against the *Institut,* and particularly against the *Académie des sciences morales et politiques.* We were saddled with ten additional colleagues under the name of a section of politics. Villemain[2] calls them the *garrison,* since they have entered the citadel by force in order to keep us under their eyes. As very few of these unacademic academicians have been *elected* according to the usual rules, we do not consider them colleagues and we show them little regard. But the same sentiments do not prevail for those members of the section who will be elected at each occasion of vacancy. A number of corresponding members, ten I think, have been created who will be elected and not nominated. Our plan would be to make you one of them. If the section presents you, you will be probably elected as we would have a majority for you within the *Académie.* The requirements are so broad that I cannot see how your study would not qualify in one way or another. The problem now is to be presented by the section. To Rémusat and to myself M. Lefèvre[3] seems to be the natural intermediary. D'Avril must have told you that, on our advice, he saw Lefèvre and was much pleased with him. Rémusat is very well disposed. I shall return to Paris in two weeks, and you can rest assured that I shall promote your affair vigorously and that I shall do my best to see it through.

[2] The *Académies* were, at that time, frequently called by contemporaries the last bulwarks of "intellectual Catholicism." Abel François Villemain (1790–1870), Permanent Secretary of the French Academy, had introduced Tocqueville in 1841.

[3] Jules Lefèvre, or Lefèvre-Deumier (1797–1857), a moderate Bonapartist scholar.

In the Court of Appeals.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, SAMUEL HINDES, AND OTHERS, *Appellants*,

vs.

CHARLES HOWARD, CHARLES D. HINKS, AND OTHERS, *Appellees.*

APPEAL FROM AN ORDER OF THE CIRCUIT COURT FOR BALTIMORE CITY, REFUSING TO GRANT AN INJUNCTION.

REPLY *of* GEO. WM. BROWN *and* FREDERICK W. BRUNE, *Counsel for* CHARLES D. HINKS, *and others, Appellees, to the Argument of* WILLIAM PRICE, *Counsel for Appellants.*

The Court not being ready to hear this case on the day assigned, directed the Counsel to print and file their arguments.

The material facts of this case, as set forth in the Bill of Complaint, filed by the Appellants, are as follows. On "the 27th of June, 1861, *the exercise of the functions* of the Police Commissioners of the City of Baltimore, (Defendants in this case,) was *suspended by the Government of the United States*, whereupon said Police Commissioners were *put off duty and practically discharged*, the entire Police force which they had established, and which was until then under their control, disbanded, and by authority of the Government of the United States, a Provost Marshal was appointed for the City of Baltimore, and by him an entirely new and distinct Police force was established."

The Act of 1862, chapter 111, passed on the 12th of February 1862, authorized the Mayor and City Council to pay the Provost Marshal of the United States all arrears of salary and wages then due to the officers and men serving under him, and revoked the power of the said Police Commissioners "to use, draw for, or disburse" any of the funds provided for Police purposes.

The Act of 1862, chapter 131, passed on the 18th of February 1862, created a new Board of Police Commissioners, and altered in various important particulars the previously existing Police Act

On the 20th of March, 1862, the Government of the United States withdrew its Police force from the City of Baltimore.

At the time when the first named Police Commissioners were put off duty, as alleged, there remained on deposit in the Farmers and Planters' Bank, subject to their control, about $8,700 of the Police fund. The Bill alleges that $2,800 of this fund still remain undrawn, and prays for an injunction to restrain Defendants from drawing, or paying out said balance, and for a decree that it may be paid to the Mayor and City Council of Baltimore. The Circuit Court refused to grant the Injunction.

By agreement of parties the following facts are added to, and made part of, the case. On the 6th of February, 1862, William H. Gatchell, Treasurer of said Commissioners, drew at Fort Warren a check on the fund in said Bank in favor of Charles D. Hinks, for the sum of $1,000, being for the salary accruing to Hinks, as one of the said Commissioners, from the 6th of August, 1861, to the 6th of February, 1862.

This check was presented for payment by Hinks at the counter of the Bank on the 8th of February, 1862, and payment thereof was refused, in consequence of a notification given to the Bank by the Mayor of the City of Baltimore.

The questions are 1st, whether the Injunction prayed for, should be granted; and 2d, whether Hinks is entitled to the payment of said check for his salary.

The Court is referred to the points made and authorities cited in our Brief already filed; and we shall here confine ourselves

to the grounds taken by the Counsel for the Appellants in his printed argument.

The Complainants have in their Bill stated their case in their own way, and must stand or fall by it as they have chosen to present it. No opportunity has been given to the Defendants to answer the Bill, or to furnish proof of facts.

The allegation in the Bill is that "the exercise of the functions of the Police Commissioners was suspended by the Government of the United States, whereupon said Police Commissioners were put off duty, and practically discharged." This is the bald statement. Neither the means by which this suspension was effected nor the reasons for it are assigned, and not even the plea of civil or military necessity is set up. No charge is made that the Commissioners were guilty of any misconduct; nor even that they harbored any improper or unlawful design. It is not alleged that the Government of the United States designed or attempted to interfere with the fund deposited by the Commissioners in Bank, or with the payment of their salaries, and in the absence of an express allegation no such purpose can be presumed. The mere suspension of the exercise of the functions of a public officer, and putting him off duty, without any cause assigned, does not work a forfeiture of either his salary or his office, even if the act be done by lawful authority. It is not stated by what department of the Government the functions of the Police Commissioners were suspended. The "Government of the United States," is an expression of vague and indeterminate meaning, and leaves in doubt both the source of the authority which is claimed for the act, and the agency by which it was accomplished. Was the act executive, legislative, or judicial? If executive, was it civil or military; by whom was it ordered, and by whom executed? In every constitutional Government all acts of such great and grave importance as the overthrow of the lawfully constituted Police authorities of a City, can only be accomplished by due process of law, formally inaugurated and regularly carried out. More especially is this

the case in a Government like ours, where the several States and the United States are clothed with separate and distinct powers clearly marked out and defined by written constitutions, and are equally sovereign in their respective spheres. Nothing can be more certain than that the Police powers within the respective States, belong to the States exclusively. The second article of the Bill of Rights of the State of Maryland declares, "That the people of this State ought to have the sole and exclusive right of regulating the *internal government and police thereof*." The Federal Government, in its whole scope and operation, was designed for national purposes only. For these objects large powers are granted to it, but these powers are carefully described, and to these it is confined. To guard against all danger of misapprehension on this point, it is expressly provided by the 10th Article of the Amendments to the Constitution, that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is then clearly the duty of the Complainants, who put their case entirely on the ground that the Police authorities of Baltimore were deprived of all rights under a law of the State of Maryland, by certain action of the General Government, to set forth distinctly what the nature of that action was and the occasion for its exercise, and to show by what constitutional or legal provision it is sanctioned. As they have wholly failed to do this, it is manifest that they have not succeeded in making out any case against the Defendants, and that the rights of the latter remain in all respects unimpaired under the laws of the State of Maryland, and unaffected by the alleged interference of the Government of the United States, whatever it may have been.

The Counsel for the Appellants has strangely endeavored to strengthen the Bill by allegations of fact which are wholly unsupported by any evidence produced in the case, and appear only in his printed argument. He alleges that the Chief Marshal of the Baltimore Police was in earnest sympathy with the mob

which attacked the Massachusetts troops on the 19th of April, that the evidence of this fact came abundantly to light a few days afterwards; that the Government requested the Police Board to remove this Chief Marshal, to put in his place some loyal man whom the Government could trust and would approve; that the Board declined so to do, and *thereupon* the President of the United States laid hands upon the whole Board, and sent them, with their Chief Marshal, as prisoners to Fort Warren.

But the Appellees are prepared to prove, that on the 19th of April, 1861, the Massachusetts troops were rescued from the attack of the mob by the Police authorities of the City, and by the Chief Marshal at the head of his force, and thereby saved from great loss if not from destruction, and that the Government of the United States never made a request of the Board of Police to remove the Chief Marshal. The Board remained in the discharge of their duties, as stated in the Bill of Complaint, until the 27th of June following, more than two months after the unfortunate occurrence of the 19th of April. If then the supension of the Board was the act of the President of the United States, as is alleged in argument, it could not have been for the reasons assigned.

Our argument has proceeded thus far on the theory that the allegation in the Bill that the functions of the Police Commissioners were suspended by the Government of the United States, is fatally defective and insufficient in not alleging legal grounds for such supension, and in failing to set forth the means or process by which it was effected, and also the particular department of the Government by which it was ordered.

Even if this Court could assume, as Mr. Price does, that by "the Government of the United States," the Bill intended to designate the President of the United States, the defect would not be remedied, for it is one of substance and not merely of form, because the President of the United States had no constitutional or legal power to order such suspension.

The argument of the counsel endeavors to meet this difficulty by boldly claiming that the President possesses in time of war, "a sum of human power more mighty than that of the Cæsars—more resistless than that of any king or potentate of the whole earth." This is his own language, and is here quoted, because nothing else could do justice to the enormity of the pretension.

To him it seems a trifle that the exercise of the functions of the Police Commissioners of the City of Baltimore was suspended, that their force was disbanded, and that they themselves were for many months confined in distant military prisons, and finally released without charge against them, or trial had. To him the sovereignty of the State of Maryland, which should cover as with a shield the humblest of its citizens, is nothing, the constitutional provisions which protect private rights and personal liberty are nothing, the guilt or innocence of the individual is nothing, and he offers up all as a sacrifice to executive power. "What the real delinquency of these gentlemen may have been, (he says) is nothing. They may have been guiltless of all design to embarrass the Government, or to take any part either open or covert in aid of the Rebels. If so, it makes the case an unfortunate one, but cannot alter the result. That is for the President to decide, and his decision is final."

Not content with justifying the particular act which he was employed to defend, he invites, and seems to anticipate a still more high handed exercise of executive power which he vindicates in advance. He says, "If a Governor of a State, to put a strong case, shall contrive with a Governor of a State, and these again with another Governor of a still different State, to frustrate the orders of the President to raise new levies of troops—or to intercept the advance of supplies for our armies in the field—or to discourage the raising of money for the pay of the soldiers—or to *contrive any obstruction* to the efficient discharge of the high duties cast upon him, or if the *President shall have reason to suspect such persons of such purposes*, it cannot

be doubted that he may arrest them one and all, *imprison them, or if need be, hang them.*"

The position assumed then, is that in time of war, the American President lawfully possesses an authority greater than that of the most despotic monarch, that he has unlimited power over the liberty and lives of the people, that his will is law, and that from his decision there is no appeal.

Authority for this extraordinary doctrine is claimed to be found in the Constitution of the United States, in a certain act of Congress, and in the decisions of the Supreme Court.

Mr. Price divides the powers of the President into primary and derivative. "The primary powers of the President—in regard to which he is independent of Congress; are (he says) to take care that the laws be faithfully executed, to preserve, protect and defend the Constitution of the United States—and that he may not lack the means of discharging these high and responsible duties, he is made Commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the service of the United States."

The derivative powers of the President are described as those which are, "derived to him through Congress." "These latter powers have reference to the calling forth the militia in the exigencies named, and to the organizing and arming the same when employed in the service of the Government."

On these enumerated powers is based the monstrous assumption, that absolute authority is vested in the President in time of war.

We shall briefly examine them in detail. The duty imposed on the President "to take care that the laws are faithfully executed," requires him to execute the laws which are made by the proper legislative authority. It is a contradiction in terms to say that it authorizes him either to make laws, or to violate them. The same duty is imposed on every executive officer in his own sphere, from the President of the United States, and the Governor of a State, to the Mayor of a City, and the Con-

stable of a ward. It is the duty of all these officers to see that the laws be faithfully executed.

The Constitution of the State of Maryland, Article II, sec. 10, requires the Governor of the State "to take care that the laws be faithfully executed," which is the very language used by the Constitution of the United States, with reference to the President. The Constitutions of many of the States, contain the same provision, in the same language, and, if not in the same yet in similar language, the same duty is imposed on the Governor of every State.

The absurdity of arguing that this language in the Constitution of a State, converts the Governor into an absolute despot, is manifest to all, but the absurdity of contending that the same language in the Constitution of the United States confers absolute power upon the President, is equally great.

The President in his oath of office is required to swear that he will "preserve, protect and defend the Constitution of the United States." This is a duty imposed, not a power granted. The duty is to be performed by obeying the Constitution, and the laws enacted under the Constitution, not by violating them. On this point, Mr. Webster said in the Senate of the United States, on the 7th of May, 1834, (Webster's works, vol. iv, p. 132.) "Would the writer of the protest, argue that the oath itself is any grant of power; or that, because the President is "to preserve, protect, and defend the Constitution," he is, therefore, to use what means he pleases, for such preservation, protection, and defence, or any means, except those which the Constitution and the laws have specifically given him? *Such an argument would be absurd.*" Yet this is precisely the argument of the Appellants' counsel.

The Constitution of Maryland, Article I, sec. 4, requires every officer of the State to take an oath to support the Constitution of the United States, and the Constitution of the State of Maryland. To support the Constitution, means to preserve, protect, and defend it, but no rational person ever imagined that all the

officers who take this oath are clothed with unlimited discretionary powers as to the means they may choose to adopt for that purpose.

The powers conferred on the President by the Constitution are carefully and distinctly enumerated and described, with the manifest design of confining him strictly to them, but if the duty of preserving, protecting and defending the Constitution and of taking care that the laws are faithfully executed, invests him with all the powers which he in his wisdom or folly may choose to consider necessary for those objects, the enumeration is superfluous and absurd, and serves only to create doubt and confusion. Nothing was necessary, except to declare that in time of war, the President of the United States, should be clothed with absolute power. If this were really the intention of the framers of the instrument, it is to be presumed, that they were wise enough, and honest enough to say so plainly. The fact, that they have not so said, is conclusive evidence that they did not so mean.

The Statute of February 28, 1795, whence Mr. Price deduces what he calls the "derivative powers" of the President, authorizes him to call forth the militia whenever the United States shall be invaded, or be in imminent danger of invasion. The Supreme Court in Martin vs. Mott, 12 Wheat 19, held that this act is constitutional, and that, under it, the President is the exclusive and final judge, whether the exigency has arisen on which the militia is to be called out, on the principle laid down by the Court, that "whenever a Statute gives a discretionary power, *to any person*, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the Statute constitutes him the sole and exclusive judge of the existence of those facts." This is the Statute which, as thus construed by the Supreme Court, is supposed by the Counsel for the Appellants, to confer dictatorial powers on the President. Any comment on such a position, seems to be unnecessary. The Statute and the decision speak for themselves, and

show only that a power has been conferred on the President by Congress, to call out the militia in case of actual or seriously threatened invasion, and that the President has been made the exclusive judge, as to whether the exigency has arisen. The power is special, not general, and is in strict conformity with the clause in the Constitution, which declares that Congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions."

The case of Luther vs. Borden, 7 Howard, 1, which is also relied on by the Counsel of Appellants, has little bearing on this case. When an attempt was made to establish a revolutionary government in Rhode Island, and to sustain it by armed force, the Legislature of the State acting under the government established by the charter of Charles II, in 1663, declared the State under martial law. By this charter, the right "to use and exercise the law martial," was provided for "in such cases only as occasion shall necessarily require." The Court held, that the Legislature had the power thus to protect itself from destruction by armed rebellion, and that it was the sole judge of the existence of the necessity. The Court say, "unquestionably a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order, and free institutions, and is necessary to the States of this Union as to any other government." The Act of February 28th, 1795, above referred to, provided that "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State, or of the executive, when the legislature cannot be convened, to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection." Upon the application of the Governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out

the militia to support his authority, if it should be found necessary to interfere. The only bearing of the decision on the powers of the President, is that it was held that Congress has delegated to the President by said Act the power to decide for the purposes of that Act, whether a government organized in a State, is the duly constituted government of that State; and that after he has decided this question, the Courts of the United States are bound to follow his decision. The case is no authority for the position assumed by Mr. Price, unless he can show, as he certainly cannot, 1st, That Congress has a right to declare martial law in the United States, and, 2d, that it has actually done so.

It is contended by the Counsel for the Appellants, that these "transcendent powers of the President," as he delights to call them, "are confined to times of insurrection, or invasion, or of imminent danger of invasion," or in other words, that they do not belong to him during peace, but spring spontaneously into existence on the outbreak of war. If this be so, it is very remarkable that the Constitution which is so clear, and explicit as to all other grants of power, should be so obscure in regard to the most important of them all. It is unaccountable that it should make no distinction between the powers, which belong to the President in time of war, and those which appertain to him during peace.

The Constitution confers on him the authority of Commander-in-chief, and this is all. At all times, both in peace and war, he is "Commander-in-chief of the army and navy of the United States," and he is Commander-in-chief "of the militia of the several States, when called into the actual service of the United States."

But although he is appointed to command, he is not authorized to call out the militia, unless he is empowered to do so by act of Congress. Congress alone can provide for calling out the militia, and for the following purposes: "to execute the laws of the Union, suppress insurrections, and repel invasions." It was not designed that the militia of the States should remain permanently in the service of the United States, but whenever

called out they are to remain under the command of the President. What human mind could infer from this that dictatorial powers were intended to be conferred upon him?

Larger powers are granted to the Governor of Maryland by the Constitution of the State. Article II, section 9, declares that, "The Governor shall be commander-in-chief of the land and naval forces of the State, and may call out the militia to repel invasions, suppress insurrections, and enforce the execution of the laws; but shall not take command in person without consent of the Legislature." And similar powers, with some variations, are vested in the Governors of all the other States.

It follows then that if the provisions of the Constitution and the Laws of the United States on which Mr. Price relies to establish absolute power in the President are adequate for that purpose, similar provisions in the Constitutions of the different States are sufficient to clothe the Governors also with absolute powers, and we, who supposed ourselves to be the freest people on earth, are the least so; for we are governed by a supreme despot at Washington, and the people of each State have beside, a petty despot in their own State Capital.

The only powers which a condition of war confers on the President beyond those which he possesses in time of peace, are such as belong to every commander-in-chief when actually in the field. The President has no war powers other than these. Whether a commander-in-chief be President, Governor, or simply General, he must, when directing the operations of an army in the field, have and exercise all the authority necessary for the conduct of the campaign, or the particular enterprise in which he is engaged.* Whenever and wherever a war is waged, there must be a commander-in-chief, and the laws of war give him ample control over the soldiers under his command, and large powers against the enemy which he is called on to subdue; but he is not placed above the laws and Constitution of his

* See on this point the able pamphlet of the Hon. B. R. Curtis, on Executive Power.

country, and has no right to interfere with its civil institutions. The civil magistrates, its people, its institutions and its laws, are all outside of and beyond his jurisdiction. So clear and fundamental was this principle considered by the founders of the State of Maryland, that it was made and still continues part of the Bill of Rights, which expressly declares, in the 27th Article, "That *in all cases, and at all times*, the military ought to be under strict subordination to and control of the civil power."

The case of Mitchell *vs.* Harmony, 13 How. 115, decided by the Supreme Court of the United States, sheds some light on this subject. The question was whether a commanding general in the field had a right to appropriate private property to the public service; and it was decided that such an appropriation might be made in case it should be rendered necessary by an immediate and pressing danger, or urgent necessity existing at the time, and not admitting of delay, but not otherwise. In delivering the opinion of the Court the Chief Justice said—"Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in time of war. And the question here is: whether the law permits it to be taken, to ensure the success of any enterprise against a public enemy, which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it. The case mentioned by Lord Mansfield in delivering his opinion in Mostyn *vs.* Fabrigas (1 Cowp. 180) illustrates the principle of which we are speaking. Captain Gambier of the British army, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia who were supplying the sailors with spirituous liquors, the health of the soldiers being injured by frequenting them. The motive was evidently a laudable one and the act done for the public service. Yet it was an invasion of the rights of private property and without the authority of law; and the officer who executed the order was held liable to an action, and

the sutlers recovered damages against him to the value of the property destroyed. This case shows how carefully the rights of property are guarded by the laws of England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States."

Private property then cannot be taken to ensure the success of a military enterprise, nor to prevent the health and discipline of troops being injured by the sale of spirituous liquors. It can only be taken in case it should be rendered necessary by an immediate and pressing danger, or urgent necessity existing at the time.

But the public rights of a great city and a sovereign State—not an enemy—are entitled to far higher consideration than private property. It has never been decided that a commanding general could deprive the cities and States of his own country of their political rights, on the plea of danger or urgent necessity.

In this case there is no allegation of danger nor of necessity. The State of Maryland was not an enemy of the United States, had not raised the standard of revolution, and had taken no steps to do so, but continued a member of the Union with all her rights to self government and privileges unimpaired. Nor did the City of Baltimore occupy a hostile attitude. On the 19th of April a serious riot had occurred in her streets in which both soldiers and citizens were killed. But the mob was quelled and perfect order and quiet restored by her own authorities without any assistance from the government of the United States. At no time was there any interference with the regular administration of the laws by the Courts, which continued always open.

The case of Carpenter, claimant, *vs.* the United States, decided in June, 1863, by Chief Justice Taney, in the Circuit Court of the United States, on an appeal from the District Court, fully sustains the views which we have endeavored to maintain. The question was, whether the Secretary of the Treasury could

prohibit a citizen of Charles county, in Maryland, from transporting to his home, without a permit, merchandize purchased in Baltimore. Under the Acts of Congress of 13th of July, 1861, and May 20th, 1862, this power was claimed by the Secretary, who established certain regulations, by one of which the shipment of goods like those in question, without a permit, was prohibited: and by another, goods were forfeited if any false statement were made or deception practiced in obtaining the permit.

The Chief Justice says of these regulations, "They are, in their nature and scope, legislative acts, changing the law as it stood before, not according to the judgment and discretion of the Legislature, but according to the discretion and judgment of the Secretary. They compel the inhabitants of a particular portion of the State, where the trade was formerly free, to exhibit to the officers of the United States an invoice of their purchases made for domestic use, compel them to take oaths not required by any previous law, to ask and obtain permission to carry home what they have purchased, to pay the collector for his permission, and inflict as a penalty the forfeiture of the whole of the goods mentioned in the permit, if the custom house officer is deceived in any one particular. These are serious and important alterations in the law, and if they can constitutionally be made, it must be done by legislative power, and not by an officer of the executive branch of the Government, whose duty it is to execute the law—not to make it. And I think that Congress did not intend nor attempt to authorize the regulations which the Secretary has prescribed, and that the construction he has given to these laws is an erroneous one.

"But if these regulations had been made directly by Congress, they could not be sustained by a Court of Justice, whose duty it is to administer the law according to the Constitution of the United States. For, from the commencement of the Government to this day, it has been admitted on all hands, and

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Missing from the record.

city for endurance; but no such imperial powers were found necessary, or ever had been claimed or exercised by any executive officer, State or Federal. If it had been intended to confer such powers on the President on the occurrence of any exigency whatever, neither the occasion itself, nor the extent of the authority, would have been left in doubt.

In adopting the Constitution, the people supposed that they were establishing a Government fortified with the most ample guarantees of liberty, and with grants of power to every department most carefully guarded and limited; and unless it be really so, they were grossly deceived and defrauded. If the vast powers now claimed for the President, had then been asserted as his prerogative, the Constitution would have been rejected with abhorrence. No one would have been bold enough to raise a voice in its defense.

The truth is that no such powers were ever supposed to lurk within the Constitution, either by those who prepared, or those who accepted it. If there had been a suspicion of their existence, the fact would somewhere appear in the debates of the Convention which formed the Constitution, or in the discussions which took place in the different States prior to its adoption; for the Constitution had enemies in every State, who placed in the strongest light before the people every objection that could be urged against it. But we find nothing of the kind.

The Counsel for the Appellant may well say, as he does, that "these transcendent powers of the President have remained from the adoption of the Constitution to the present time, nearly a sealed book to the Courts and the profession,"—not because wars had not been waged by the United States, nor because cases had not arisen and been discussed, and decided in the Courts involving the war powers of the President, but because the discovery of the existence of such latent powers in the Constitution required a description of reasoning, and the application of rules of interpretation, which have never yet received the

sanction of Courts of Justice in this or any other free country. But the seals have at last been broken, the oracle has spoken, and the new reading of the Constitution has been published to the world.

Fortunately the doctrines so long hidden, and now for the first time revealed, are so directly in opposition to the plain letter as well as the spirit of the Constitution, that they carry their condemnation on their face. They are anti-American, anti-republican, and slavish, and just so far as they are practically enforced, do they transport us as a people backward from the enjoyment of the blessings of constitutional liberty—the result of so many ages of struggle and sacrifice—to the barbarous methods of Asiatic despotism.

The authorities cited by Mr. Price, going to show that the official acts of an officer *de facto*, are sometimes regarded as valid, so far as the rights of third persons are concerned, in order to prevent the injustice which would otherwise follow, have no application to this case. This is a question involving not the rights of third persons, but the right of an officer duly appointed, to the payment of his salary out of the fund provided for the purpose. It never was held that the existence of an officer *de facto*, deprived an officer *de jure* of the salary belonging to his office, the duties of which he was ready and willing to perform.

The argument of Mr. Price discusses at length the right of the President to suspend the writ of habeas corpus. This right he maintains that the President possesses under the Constitution without the necessity of any legislation by Congress. And having established this right to his own satisfaction, he uses it as a stepping stone to reach the conclusion that the President is also clothed with the other "transcendent powers" which are claimed for him.

It has been decided by Chief Justice Taney, in the case of Merryman, that the President possesses no such power, and all

e attempts which have since been made to invalidate the thority of that decision, have only served to vindicate its rrectness and to illustrate the conclusiveness of the reasoning which it is sustained.

The great questions which have been discussed in this case, re not, however, necessarily involved in the point really at sue. Whatever may be the powers of the President or the overnment of the United States, it is sufficient to say, for the urposes of this case, that the *suspension* of the *exercise of the unctions of the Police Commissioners* by the government of the nited States, without legal process or cause assigned, and without even an attempt or intention either to remove them from office, or to stop their salary, cannot, on any principle of law, or justice, deprive them of the compensation to which they are legally entitled. And this view is sustained by the Acts of Assembly to which we have referred.

The act of 1862, ch. 111, does not entitle the Appellants to claim the fund in Bank, nor to ask for an injunction, nor does it deprive Hinks of his salary. It indeed directs payment to be made by the city to the force appointed by the Provost Marshal, but it does not remove these Commissioners from office. It repeals the article of the code which authorizes them to draw for or disburse money for police purposes, but does not attempt to invalidate any disbursements previously made or drafts previously drawn. Before this act was passed, the draft for the payment of the salary of C. D. Hinks had been drawn and duly presented for payment at the bank where the fund was deposited. This, as is shown by the authorities cited in our Brief, constituted an *appropriation* of the fund to the amount of the check, which the Legislature had no right to interfere with, and did not attempt to do so. It was not until afterwards, by the passage of the act of 1862, ch. 131, that the Commissioners were removed from office.

The act of 1860, ch. 7, which appointed these Commissioners by name, fixed their salary, and the acceptance of the office by them constituted a contract on the part of the State that their salary should be paid. This contract continued until the law was repealed. Until then, they were legally entitled to the office and to the salary pertaining to it. The fact that they were prevented from discharging the duties of the office by a superior force, did not in any matter affect or impair their rights.

SUPREME COURT OF THE UNITED STATES

YASER ESAM HAMDI AND ESAM FOUAD HAMDI, AS
NEXT FRIEND OF YASER ESAM HAMDI, PETITIONERS
v. DONALD H. RUMSFELD, SECRETARY
OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, dissenting.

Petitioner, a presumed American citizen, has been imprisoned without charge or hearing in the Norfolk and Charleston Naval Brigs for more than two years, on the allegation that he is an enemy combatant who bore arms against his country for the Taliban. His father claims to the contrary, that he is an inexperienced aid worker caught in the wrong place at the wrong time. This case brings into conflict the competing demands of national security and our citizens. constitutional right to personal liberty. Although I share the Court's evident unease as it seeks to reconcile the two, I do not agree with its resolution.

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, §9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the decision below.

I

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. Blackstone stated this principle clearly:

> "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities. . . . To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten;

> is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. . . . .To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner. For the law judges in this respect, . . . that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him." 1 W. Blackstone, Commentaries on the Laws of England 132-133 (1765) (hereinafter Blackstone).

These words were well known to the Founders. Hamilton quoted from this very passage in The Federalist No. 84, p. 444 (G. Carey & J. McClellan eds. 2001). The two ideas central to Blackstone's understanding - due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned - found expression in the Constitution's Due Process and Suspension Clauses. See Amdt. 5; Art. I, §9, cl. 2.

The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trial. See, *e.g.*, 2 & 3 Phil. & M., c. 10 (1555); 3 J. Story, Commentaries on the Constitution of the United States §1783, p. 661 (1833) (hereinafter Story) (equating "due process of law" with "due presentment or indictment, and being brought in to answer thereto by due process of the common law"). The Due Process Clause "in effect affirms the right of trial according to the process and proceedings of the common law." *Ibid*. See also T. Cooley, General Principles of Constitutional Law 224 (1880) ("When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal, with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted" (internal quotation marks omitted)).

To be sure, certain types of permissible *non*criminal detention - that is, those not dependent upon the contention that the citizen had committed a criminal act - did not require the protections of criminal procedure. However, these fell into a limited number of well-recognized exceptions - civil commitment of the mentally ill, for example, and temporary detention in quarantine of the infectious. See *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. 29, 36.37 (H. L. 1758) (Wilmot, J.). It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing. Cf. *Kansas* v. *Hendricks*, 521 U. S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment").

These due process rights have historically been vindicated by the writ of habeas corpus. In England before the founding, the writ developed into a tool for challenging executive confinement. It was not always effective. For example, in *Darnel's Case*, 3 How. St. Tr. 1 (K. B. 1627), King Charles I detained without charge several individuals for failing to assist England's

war against France and Spain. The prisoners sought writs of habeas corpus, arguing that without specific charges, "imprisonment shall not continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually." *Id.*, at 8. The Attorney General replied that the Crown's interest in protecting the realm justified imprisonment in "a matter of state . . . not ripe nor timely" for the ordinary process of accusation and trial. *Id.*, at 37. The court denied relief, producing widespread outrage, and Parliament responded with the Petition of Right, accepted by the King in 1628, which expressly prohibited imprisonment without formal charges, see 3 Car. 1, c. 1, §§5, 10.

The struggle between subject and Crown continued, and culminated in the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, described by Blackstone as a "second magna charta, and stable bulwark of our liberties." 1 Blackstone 133. The Act governed all persons "committed or detained . . . for any crime." §3. In cases other than felony or treason plainly expressed in the warrant of commitment, the Act required release upon appropriate sureties (unless the commitment was for a nonbailable offense). *Ibid.* Where the commitment was for felony or high treason, the Act did not require immediate release, but instead required the Crown to commence criminal proceedings within a specified time. §7 If the prisoner was not "indicted some Time in the next Term," the judge was "required. . . to set at Liberty the Prisoner upon Bail" unless the King was unable to produce his witnesses. *Ibid.* Able or no, if the prisoner was not brought to trial by the *next* succeeding term, the Act provided that "he shall be discharged from his Imprisonment." *Ibid.* English courts sat four terms per year, see 3 Blackstone 275.277, so the practical effect of this provision was that imprisonment without indictment or trial for felony or high treason under §7 would not exceed approximately three to six months.

The writ of habeas corpus was preserved in the Constitution .the only common-law writ to be explicitly mentioned. See Art. I, §9, cl. 2. Hamilton lauded "the establishment of the writ of *habeas corpus"* in his Federalist defense as a means to protect against "the practice of arbitrary imprisonments . . . in all ages, [one of] the favourite and most formidable instruments of tyranny." The Federalist No. 84, *supra,* at 444. Indeed, availability of the writ under the new Constitution (along with the requirement of trial by jury in criminal cases, see Art. III, §2, cl. 3) was his basis for arguing that additional, explicit procedural protections were unnecessary. See The Federalist No. 83, at 433.

II

The allegations here, of course, are no ordinary accusations of criminal activity. Yaser Esam Hamdi has been imprisoned because the Government believes he participated in the waging of war against the United States. The relevant question, then, is whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing *by aiding the enemy in wartime.*

A

JUSTICE O.CONNOR, writing for a plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released. *Ante,* at 10.11. That is probably an accurate description

of wartime practice with respect to enemy *aliens*. The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process.

As early as 1350, England.s Statute of Treasons made it a crime to "levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort, in the Realm, or elsewhere." 25 Edw. 3, Stat. 5, c. 2. In his 1762 Discourse on High Treason, Sir Michael Foster explained:

> "With regard to Natural-born Subjects there can be no Doubt. They owe Allegiance to the Crown at all Times and in all Places.
>
> . . . . .
>
> "The joining with Rebels in an Act of Rebellion, or with Enemies in Acts of Hostility, will make a Man a Traitor: in the one Case within the Clause of Levying War, in the other within that of Adhering to the King's enemies.
>
> . . . . .
>
> "States in Actual Hostility with Us, though no War be solemnly Declared, are Enemies within the meaning of the Act. And therefore in an Indictment on the Clause of Adhering to the King's Enemies, it is sufficient to Aver that the Prince or State Adhered to *is an Enemy*, without shewing any War Proclaimed. . . . And if the Subject of a Foreign Prince in Amity with Us, invadeth the Kingdom without Commission from his Sovereign, He is an Enemy. And a Subject of *England* adhering to Him is a Traitor within this Clause of the Act." A Report of Some Proceedings on the Commission . . . for the Trial of the Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases, Introduction, §1, p. 183; Ch. 2, §8, p. 216; §12, p. 219.

Subjects accused of levying war against the King were routinely prosecuted for treason. *E.g.*, *Harding.s Case*, 2 Ventris 315, 86 Eng. Rep. 461 (K. B. 1690); *Trial of Parkyns*, 13 How. St. Tr. 63 (K. B. 1696); *Trial of Vaughan*, 13 How. St. Tr. 485 (K. B. 1696); *Trial of Downie*, 24 How. St. Tr. 1 (1794). The Founders inherited the understanding that a citizen's levying war against the Government was to be punished criminally. The Constitution provides: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort"; and establishes a heightened proof requirement (two witnesses) in order to "convic[t]" of that offense. Art. III, §3, cl. 1.

In more recent times, too, citizens have been charged and tried in Article III courts for acts of war against the United States, even when their noncitizen co-conspirators were not. For example, two American citizens alleged to have participated during World War I in a spying conspiracy on behalf of Germany were tried in federal court. See *United States* v. *Fricke*, 259 F. 673 (SDNY 1919); *United States* v. *Robinson*, 259 F. 685 (SDNY 1919). A German member of the same conspiracy was subjected to military process. See *United States ex rel. Wessels* v. *McDonald*, 265 F. 754 (EDNY 1920). During World War II, the famous German saboteurs of *Ex parte Quirin*, 317 U. S. 1 (1942), received military process, but the citizens who associated with them (with the exception of one citizen-saboteur, discussed below) were punished under the

criminal process. See *Haupt* v. *United States*, 330 U. S. 631 (1947); L. Fisher, Nazi Saboteurs on Trial 80.84 (2003); see also *Cramer* v. *United States*, 325 U. S. 1 (1945).

The modern treason statute is 18 U. S. C. §2381; it basically tracks the language of the constitutional provision. Other provisions of Title 18 criminalize various acts of warmaking and adherence to the enemy. See, *e.g.*, §32 (destruction of aircraft or aircraft facilities), §2332a (use of weapons of mass destruction), §2332b (acts of terrorism transcending national boundaries), §2339A (providing material support to terrorists), §2339B (providing material support to certain terrorist organizations), §2382 (misprision of treason), §2383 (rebellion or insurrection), §2384 (seditious conspiracy), §2390 (enlistment to serve in armed hostility against the United States). See also 31 CFR §595.204 (2003) (prohibiting the "making or receiving of any contribution of funds, goods, or services" to terrorists); 50 U. S. C. §1705(b) (criminalizing violations of 31 CFR §595.204). The only citizen other than Hamdi known to be imprisoned in connection with military hostilities in Afghanistan against the United States *was* subjected to criminal process and convicted upon a guilty plea. See *United States* v. *Lindh*, 212 F. Supp. 2d 541 (ED Va. 2002) (denying motions for dismissal); Seelye, N. Y. Times, Oct. 5, 2002, p. A1, col. 5.

B

There are times when military exigency renders resort to the traditional criminal process impracticable. English law accommodated such exigencies by allowing legislative suspension of the writ of habeas corpus for brief periods. Blackstone explained:

> "And yet sometimes, when the state is in real danger, even this [*i.e.*, executive detention] may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing. . . . In like manner this experiment ought only to be tried in case of extreme emergency; and in these the nation parts with it[s] liberty for a while, in order to preserve it for ever." 1 Blackstone 132.

Where the Executive has not pursued the usual course of charge, committal, and conviction, it has historically secured the Legislature's explicit approval of a suspension. In England, Parliament on numerous occasions passed temporary suspensions in times of threatened invasion or rebellion. *E.g.*, 1 W. & M., c. 7 (1688) (threatened return of James II); 7 & 8 Will. 3, c. 11 (1696) (same); 17 Geo. 2, c. 6 (1744) (threatened French invasion); 19 Geo. 2, c. 1 (1746) (threatened rebellion in Scotland); 17 Geo. 3, c. 9 (1777) (the American Revolution). Not long after Massachusetts had adopted a clause in its constitution explicitly providing for habeas corpus, see Mass. Const. pt. 2, ch. 6, art. VII (1780), reprinted in 3 Federal and State Constitutions, Colonial Charters and Other Organic Laws 1888, 1910 (F. Thorpe ed. 1909), it suspended the writ in order to deal with Shay.s Rebellion, see Act for Suspending the Privilege of the Writ of Habeas Corpus, ch. 10, 1786 Mass. Acts 510.

Our Federal Constitution contains a provision explicitly permitting suspension, but limiting the situations in which it may be invoked: "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." Art. I, §9, cl. 2. Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I. See *Ex parte Bollman,* 4 Cranch 75, 101 (1807); *Ex parte Merryman,* 17 F. Cas. 144, 151.152 (CD Md. 1861) (Taney, C. J., rejecting Lincoln's unauthorized suspension); 3 Story §1336, at 208.209.

The Suspension Clause was by design a safety valve, the Constitution.s only "express provision for exercise of extraordinary authority because of a crisis," *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 650 (1952) (Jackson, J., concurring). Very early in the Nation.s history, President Jefferson unsuccessfully sought a suspension of habeas corpus to deal with Aaron Burr.s conspiracy to overthrow the Government. See 16 Annals of Congress 402.425 (1807). During the Civil War, Congress passed its first Act authorizing Executive suspension of the writ of habeas corpus, see Act of Mar. 3, 1863, 12 Stat. 755, to the relief of those many who thought President Lincoln's unauthorized proclamations of suspension (*e.g.,* Proclamation No. 1, 13 Stat. 730 (1862)) unconstitutional. Later Presidential proclamations of suspension relied upon the congressional authorization, *e.g.,* Proclamation No. 7, 13 Stat. 734 (1863). During Reconstruction, Congress passed the Ku Klux Klan Act, which included a provision authorizing suspension of the writ, invoked by President Grant in quelling a rebellion in nine South Carolina counties. See Act of Apr. 20, 1871, ch. 22, §4, 17 Stat. 14; A Proclamation [of Oct. 17, 1871], 7 Compilation of the Messages and Papers of the Presidents 136.138 (J. Richardson ed. 1899) (hereinafter Messages and Papers); *id.,* at 138.139.

Two later Acts of Congress provided broad suspension authority to governors of U. S. possessions. The Philippine Civil Government Act of 1902 provided that the Governor of the Philippines could suspend the writ in case of rebellion, insurrection, or invasion. Act of July 1, 1902, ch. 1369, §5, 32 Stat. 691. In 1905 the writ was suspended for nine months by proclamation of the Governor. See *Fisher* v. *Baker,* 203 U. S. 174, 179.181 (1906). The Hawaiian Organic Act of 1900 likewise provided that the Governor of Hawaii could suspend the writ in case of rebellion or invasion (or threat thereof). Ch. 339, §67, 31 Stat. 153.

III

Of course the extensive historical evidence of criminal convictions and habeas suspensions does not *necessarily* refute the Government.s position in this case. When the writ is suspended, the Government is entirely free from judicial oversight. It does not claim such total liberation here, but argues that it need only produce what it calls "some evidence" to satisfy a habeas court that a detained individual is an enemy combatant. See Brief for Respondents 34. Even if suspension of the writ on the one hand, and committal for criminal charges on the other hand, have been the only *traditional* means of dealing with citizens who levied war against their own country, it is theoretically possible that the Constitution does not *require* a choice between these alternatives.

I believe, however, that substantial evidence does refute that possibility. First, the text of the 1679 Habeas Corpus Act makes clear that indefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ. In the United States, this Act was read as "enforc[ing] the common law," *Ex parte Watkins*, 3 Pet. 193, 202 (1830), and shaped the early understanding of the scope of the writ. As noted above, see *supra*, at 5, §7 of the Act specifically addressed those committed for high treason, and provided a remedy if they were not *indicted and tried* by the second succeeding court term. That remedy was *not* a bobtailed judicial inquiry into whether there were reasonable grounds to believe the prisoner had taken up arms against the King. Rather, if the prisoner was not indicted and tried within the prescribed time, "he shall be discharged from his Imprisonment." 31 Car. 2, c. 2, §7. The Act does not contain any exception for wartime. That omission is conspicuous, since §7 explicitly addresses the offense of "High Treason," which often involved offenses of a military nature. See cases cited *supra*, at 7.

Writings from the founding generation also suggest that, without exception, the only constitutional alternatives are to charge the crime or suspend the writ. In 1788, Thomas Jefferson wrote to James Madison questioning the need for a Suspension Clause in cases of rebellion in the proposed Constitution. His letter illustrates the constraints under which the Founders understood themselves to operate:

> "Why suspend the Hab. corp. in insurrections and rebellions? The parties who may be arrested may be charged instantly with a well defined crime. Of course the judge will remand them. If the publick safety requires that the government should have a man imprisoned on less probable testimony in those than in other emergencies; let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages." 13 Papers of Thomas Jefferson 442 (July 31, 1788) (J. Boyd ed. 1956).

A similar view was reflected in the 1807 House debates over suspension during the armed uprising that came to be known as Burr.s conspiracy:

> "With regard to those persons who may be implicated in the conspiracy, if the writ of habeas corpus be not suspended, what will be the consequence? When apprehended, they will be brought before a court of justice, who will decide whether there is any evidence that will justify their commitment for farther prosecution. From the communication of the Executive, it appeared there was sufficient evidence to authorize their commitment. Several months would elapse before their final trial, which would give time to collect evidence, and if this shall be sufficient, they will not fail to receive the punishment merited by their crimes, and inflicted by the laws of their country." 16 Annals of Congress, at 405 (remarks of Rep. Burwell).

The absence of military authority to imprison citizens indefinitely in wartime.whether or not a probability of treason had been established by means less than jury trial. was confirmed by three cases decided during and immediately after the War of 1812. In the first, *In re Stacy*, 10 Johns. 328 (N. Y. 1813), a citizen was taken into military custody on suspicion that he was "carrying provisions and giving information to the enemy." *Id.*, at 330 (emphasis deleted). Stacy

petitioned for a writ of habeas corpus, and, after the defendant custodian attempted to avoid complying, Chief Justice Kent ordered attachment against him. Kent noted that the military was "without any color of authority in any military tribunal to try a citizen for that crime" and that it was "holding him in the closest confinement, and contemning the civil authority of the state." *Id.*, at 333-334.

Two other cases, later cited with approval by this Courtin *Ex parte Milligan,* 4 Wall. 2, 128.129 (1866), upheld verdicts for false imprisonment against military officers. In *Smith* v. *Shaw*, 12 Johns. 257 (N. Y. 1815), the court affirmed an award of damages for detention of a citizen on suspicion that he was, among other things, an enemy's spy in time of war." *Id.*, at 265. The court held that .[n]one of the offences charged against *Shaw* were cognizable by a court-martial, except that which related to his being a spy; and if he was an *American* citizen, he could not be charged with such an offence. He might be amenable to the civil authority for treason; but could not be punished, under martial law, as a spy." *Ibid*. "If the defendant was justifiable in doing what he did, every citizen of the *United States* would, in time of war, be equally exposed to a like exercise of military power and authority." *Id.*, at 266. Finally, in *M.Connell* v. *Hampton*, 12 Johns. 234 (N. Y. 1815), a jury awarded $9,000 for false imprisonment after a military officer confined a citizen on charges of treason; the judges on appeal did not question the verdict but found the damages excessive, in part because "It does not appear that [the defendant] . . . knew [the plaintiff] was a citizen." *Id.*, at 238 (Spencer, J.). See generally Wuerth, The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War, 98 Nw. U. L. Rev. (forthcoming 2004) (available in Clerk of Court's case file).

President Lincoln, when he purported to suspend habeas corpus without congressional authorization during the Civil War, apparently did not doubt that suspension was required if the prisoner was to be held without criminal trial. In his famous message to Congress on July 4, 1861, he argued only that he could suspend the writ, not that even without suspension, his imprisonment of citizens without criminal trial was permitted. See Special Session Message, 6 Messages and Papers 20-31.

Further evidence comes from this Court's decision in *Ex parte Milligan*, *supra*. There, the Court issued the writ to an American citizen who had been tried by military commission for offenses that included conspiring to overthrow the Government, seize munitions, and liberate prisoners of war. *Id.*, at 6-7. The Court rejected in no uncertain terms the Government's assertion that military jurisdiction was proper "under the 'laws and usages of war,'" *id.*, at 121:

> "It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." Ibid. ***1***

Milligan is not exactly this case, of course, since the petitioner was threatened with death, not merely imprisonment. But the reasoning and conclusion of *Milligan* logically cover the present case. The Government justifies imprisonment of Hamdi on principles of the law of war

and admits that, absent the war, it would have no such authority. But if the law of war cannot be applied to citizens where courts are open, then Hamdi's imprisonment without criminal trial is no less unlawful than Milligan's trial by military tribunal.

Milligan responded to the argument, repeated by the Government in this case, that it is dangerous to leave suspected traitors at large in time of war:

> "If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended." *Id*., at 122.

.....

1 As I shall discuss presently, see *infra*, at 17.19, the Court purported to limit this language in *Ex parte Quirin,* 317 U. S. 1, 45 (1942). Whatever *Quirin's* effect on *Milligan's* precedential value, however, it cannot undermine its value as an indicator of original meaning. Cf. *Reid* v. *Covert*, 354 U. S. 1, 30 (1957) (plurality opinion) (*Milligan* remains "one of the great landmarks in this Court's history").

Thus, criminal process was viewed as the primary means - and the only means absent congressional action suspending the writ - not only to punish traitors, but to incapacitate them.

The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal. In the Founders' view, the "blessings of liberty" were threatened by "those military establishments which must gradually poison its very fountain." The Federalist No. 45, p. 238 (J. Madison). No fewer than 10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime. Many safeguards in the Constitution reflect these concerns. Congress's authority "[t]o raise and support Armies" was hedged with the proviso that "no Appropriation of Money to that Use shall be for a longer Term than two Years." U. S. Const., Art. 1, §8, cl. 12. Except for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II. As Hamilton explained, the President's military authority would be "much inferior" to that of the British King:

> "It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy: while that of the British king extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature." The Federalist No. 69, p. 357.

A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.

IV

The Government argues that our more recent jurisprudence ratifies its indefinite imprisonment of a citizen within the territorial jurisdiction of federal courts. It places primary reliance upon *Ex parte Quirin*, 317 U. S. 1 (1942), a World War II case upholding the trial by military commission of eight German saboteurs, one of whom, Hans Haupt, was a U. S. citizen. The case was not this Court's finest hour. The Court upheld the commission and denied relief in a brief *per curiam* issued the day after oral argument concluded, see *id.*, at 18 - 19, unnumbered note; a week later the Government carried out the commission's death sentence upon six saboteurs, including Haupt. The Court eventually explained its reasoning in a written opinion issued several months later.

Only three paragraphs of the Court's lengthy opinion dealt with the particular circumstances of Haupt's case. See *id*., at 37.38, 45.46. The Government argued that Haupt, like the other petitioners, could be tried by military commission under the laws of war. In agreeing with that contention, *Quirin* purported to interpret the language of *Milligan* quoted above (the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed") in the following manner:

> "Elsewhere in its opinion . . . the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war . . . ." 317 U. S., at 45.

In my view this seeks to revise *Milligan* rather than describe it. *Milligan* had involved (among other issues) two separate questions: (1) whether the military trial of Milligan was justified by the laws of war, and if not (2) whether the President's suspension of the writ, pursuant to congressional authorization, prevented the issuance of habeas corpus. The Court's categorical language about the law of war's inapplicability to citizens where the courts are open (with no exception mentioned for citizens who were prisoners of war) was contained in its discussion of the first point. See 4 Wall., at 121. The factors pertaining to whether Milligan could reasonably be considered a belligerent and prisoner of war, while mentioned earlier in the opinion, see *id*., at 118, were made relevant and brought to bear in the Court's later discussion, see *id*., at 131, of whether Milligan came within the statutory provision that effectively made an exception to Congress's authorized suspension of the writ for (as the Court described it) "all parties, not prisoners of war, resident in their respective jurisdictions, . . . who were citizens of states in which the administration of the laws in the Federal tribunals was unimpaired," *id*., at 116.

Milligan thus understood was in accord with the traditional law of habeas corpus I have described: Though treason often occurred in wartime, there was, absent provision for special treatment in a congressional suspension of the writ, no exception to the right to trial by jury for citizens who could be called "belligerents" or "prisoners of war."***2***

But even if *Quirin* gave a correct description of *Milligan*, or made an irrevocable revision of it, *Quirin* would still not justify denial of the writ here. In *Quirin* it was uncontested that the petitioners were members of enemy forces. They were "admitted enemy invaders," 317 U. S.,at 47 (emphasis added), and it was "undisputed" that they had landed in the United States in service of German forces, *id.*, at 20. The specific holding of the Court was only that, "upon the conceded facts," the petitioners were "plainly within [the] boundaries" of military jurisdiction, *id.*, at 46 (emphasis added).***3*** But where those jurisdictional facts are *not* conceded - where the petitioner
.....

2 Without bothering to respond to this analysis, the plurality states that *Milligan* "turned in large part" upon the defendant's lack of prisoner-of-war status, and that the *Milligan* Court explicitly and repeatedly *said* so. See *ante*, at 14. Neither is true. To the extent, however, that prisoner-of-war status was relevant in *Milligan*, it was only because prisoners of war *received different statutory treatment* under the conditional suspension then in effect.
3 The only two Court of Appeals cases from World War II cited by the Government in which citizens were detained without trial likewise involved petitioners who were conceded to have been members of enemy forces. See *In re Territo*, 156 F. 2d 142, 143.145 (CA9 1946); *Colepaugh* v. *Looney*, 235 F. 2d 429, 432 (CA10 1956). The plurality complains that *Territo* is the only case I have identified in which "a United States citizen [was] captured in a *foreign* combat zone," *ante*, at 16. Indeed it is; such cases must surely be rare. But given the constitutional tradition I have described, the burden is not upon me to find cases in which the writ was *granted* to citizens in this country *who had been captured on foreign battlefields;* it is upon those who would carve out an exception for such citizens (as the plurality.s complaint suggests it would) to find a single case (other than one where enemy status was admitted) in which habeas was *denied*.

Insists that he is *not* a belligerent - *Quirin* left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release.***4***
.....

4 The plurality.s assertion that *Quirin* somehow "clarifies" *Milligan*, *ante*, at 15, is simply false. As I discuss *supra*, at 17.19, the *Quirin* Court propounded a mistaken understanding of *Milligan;* but nonetheless its holding was limited to "the case presented by the present record," and to "the conceded facts," and thus avoided conflict with the earlier case. See 317 U. S., at 45.46 (emphasis added). The plurality, ignoring this expressed limitation, thinks it "beside the point" whether belligerency is conceded or found "by some other process" (not necessarily a jury trial) "that verifies this fact with sufficient certainty." *Ante*, at 16. But the whole point of the procedural guarantees in the Bill of Rights is to limit the methods by which the Government can determine facts that the citizen disputes and on which the citizen's liberty depends. The plurality.s claim that *Quirin*.s one-paragraph discussion of *Milligan* provides a "[c]lear . . .

disavowal" of two false imprisonment cases from the War of 1812, *ante*, at 15, thus defies logic; unlike the plaintiffs in those cases, Haupt was concededly a member of an enemy force.

The Government also cites *Moyer* v. *Peabody*, 212 U. S. 78 (1909), a suit for damages against the Governor of Colorado, for violation of due process in detaining the alleged ringleader of a rebellion quelled by the state militia after the Governor's declaration of a state of insurrection and (he contended) suspension of the writ "as incident thereto." *Ex parte Moyer*, 35 Colo. 154, 157, 91 P. 738, 740 (1905). But the holding of *Moyer* v. *Peabody* (even assuming it is transferable from state-militia detention after state suspension to federal standing-army detention without suspension) is simply that "[s]o long as such arrests [were] made in good faith and in the honest belief that they [were] needed in order to head the insurrection off," 212 U. S., at 85, an action in damages could not lie. This "good-faith" analysis is a forebear of our modern doctrine of qualified immunity. Cf. *Scheuer* v. *Rhodes*, 416 U. S. 232, 247.248 (1974) (understanding *Moyer* in this way). Moreover, the detention at issue in *Moyer* lasted about two and a half months, see 212 U. S., at 85, roughly the length of time permissible under the 1679 Habeas Corpus Act, see *supra*, at 4.5.

In addition to *Moyer* v. *Peabody*, JUSTICE THOMAS relies upon *Luther* v. *Borden*, 7 How. 1 (1849), a case in which the state legislature had imposed martial law - a step even more drastic than suspension of the writ. See *post*, at 13.14 (dissenting opinion). But martial law has not been imposed here, and in any case is limited to "the theatre of active military operations, where war really prevails," and where therefore the courts are closed. *Ex parte Milligan*, 4 Wall. 2, 127 (1866); see also *id.*, at 129.130 (distinguishing *Luther*).

V

It follows from what I have said that Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus. A suspension of the writ could, of course, lay down conditions for continued detention, similar to those that today's opinion prescribes under the Due Process Clause. Cf. Act of Mar. 3, 1863, 12 Stat. 755. But there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and this Court's doing so.

The plurality finds justification for Hamdi's imprisonment in the Authorization for Use of Military Force, 115 Stat. 224, which provides:

> "That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." §2(a).

This is not remotely a congressional suspension of the writ, and no one claims that it is. Contrary to the plurality's view, I do not think this statute even authorizes detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as

to avoid grave constitutional concerns, see *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 575 (1988); with the clarity necessary to comport with cases such as *Ex parte Endo,* 323 U. S. 283, 300 (1944), and *Duncan* v. *Kahanamoku,* 327 U. S. 304, 314.316, 324 (1946); or with the clarity necessary to overcome the statutory prescription that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U. S. C. §4001(a).***5*** But even if it did, I would not permit it to overcome Hamdi's entitlement to habeas corpus relief. The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing. If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

.....

5 The plurality rejects any need for "specific language of detention" on the ground that detention of alleged combatants is a "fundamental incident of waging war." *Ante,* at 12. Its authorities do not support that holding in the context of the present case. Some are irrelevant because they do not address the detention of *American citizens. E.g.,* Naqvi, Doubtful Prisoner-of-War Status, 84 Int.l Rev. Red Cross 571, 572 (2002). The plurality's assertion that detentions of citizen and alien combatants are equally authorized has no basis in law or common sense. Citizens and noncitizens, even if equally dangerous, are not similarly situated. See, *e.g., Milligan, supra; Johnson* v. *Eisentrager,* 339 U. S. 763 (1950); Rev. Stat. 4067, 50 U. S. C. §21 (Alien Enemy Act). That captivity may be consistent with the principles of international law does not prove that it also complies with the restrictions that the Constitution places on the American Government's treatment of its own citizens. Of the authorities cited by the plurality that do deal with detention of citizens, *Quirin* and *Territo* have already been discussed and rejected. See *supra*, at 19.20, and n. 3. The remaining authorities pertain to U. S. detention of citizens during the Civil War, and are irrelevant for two reasons: (1) the Lieber Code was issued following a congressional authorization of suspension of the writ, see Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (1863), reprinted in 2 Lieber, Miscellaneous Writings, p. 246; Act of Mar. 3, 1863, 12 Stat. 755, §§1, 2; and (2) citizens of the Confederacy, while citizens of the United States, were also regarded as citizens of a hostile power.

It should not be thought, however, that the plurality's evisceration of the Suspension Clause augments, principally, the power of Congress. As usual, the major effect of its constitutional improvisation is to increase the power of the Court. Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections *it* thinks appropriate. It "weigh[s] the private interest . . . against the Government's - asserted interest," *ante,* at 22 (internal quotation marks omitted), and - just as though writing a new Constitution - comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a

"neutral" military officer rather than judge and jury. See *ante*, at 26.27. It claims authority to engage in this sort of "judicious balancing" from *Mathews* v. *Eldridge,* 424 U. S. 319 (1976), a case involving . . . *the withdrawal of disability benefits!* Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.

Having distorted the Suspension Clause, the plurality finishes up by transmogrifying the Great Writ - disposing of the present habeas petition by remanding for the District Court to "engag[e] in a factfinding process that is both prudent and incremental," *ante*, at 32. "In the absence of [the Executive's prior provision of procedures that satisfy due process], . . . a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved." *Ante*, at 31.32. This judicial remediation of executive default is unheard of. The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody"); 1 Blackstone 132.133. It is not the habeas court's function to make illegal detention legal by supplying a process that the Government could have provided, but chose not to. If Hamdi is being imprisoned in violation of the Constitution (because without due process of law), then his habeas petition should be granted; the Executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him.

There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures - an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.

VI

Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla. Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different. Cf. *Johnson* v. *Eisentrager,* 339 U. S. 763, 769.771 (1950); *Reid* v. *Covert*, 354 U. S. 1, 74.75 (1957) (Harlan, J., concurring in

result); *Rasul* v. *Bush*, *ante*, at 15.17 (SCALIA, J., dissenting). Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained once prosecution is in progress or in contemplation. See, *e.g., County of Riverside* v. *McLaughlin*, 500 U. S. 44 (1991) (brief detention pending judicial determination after warrantless arrest); *United States* v. *Salerno*, 481 U. S. 739 (1987) (pretrial detention under the Bail Reform Act). The Government has been notably successful in securing conviction, and hence long-term custody or execution, of those who have waged war against the state.

I frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond my competence, or the Court's competence, to determine that. But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ - which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an "invasion," and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court. See 3 Story §1336, at 208.209.***6*** If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.

.....

6 JUSTICE THOMAS worries that the constitutional conditions for suspension of the writ will not exist "during many . . . emergencies during which . . . detention authority might be necessary," *post*, at 16. It is difficult to imagine situations in which security is so seriously threatened as to justify indefinite imprisonment without trial, and yet the constitutional conditions of rebellion or invasion are not met.

* * *

The Founders well understood the difficult tradeoff between safety and freedom. "Safety from external danger," Hamilton declared,

> "is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free." The Federalist No. 8, p. 33.

The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis - that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in

the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.

LEGAL SPECTATOR & MORE

Jacob A. Stein

AN EVENING WITH LOUIS ARMSTRONG

In the late 1950's, Doc Pressman's Randolph Pharmacy, located at 14th and Randolph streets in Washington, D.C., was a meeting place for a number of musicians. There were the locals, Jack "Jive" Schaffer, Roger Calloway, and Buddy Garrison, and also well-known jazz musicians who would occasionally drop in when they were in town. Doc Pressman was both proprietor and pharmacist in residence. He could be found behind a counter at the back of the store. There he was comfortable among his shelves containing thousands of pharmaceutical potions, drugs, vitamin pills, retorts, and odd-shaped glass containers. Doc believed in the therapeutic efficacy of vitamin pills, especially of vitamin E, which he believed, when taken every day in huge quantities, would cure anything. Whether Doc made an independent study or whether the salesman for Hance Bros. vitamin company brought this knowledge to his attention is now unknown and beyond the reach of further research. He was always

busy and cheerful. He moved pills very rapidly into small containers. He typed out labels. He actually prepared ointments from the original elements.

Doc, although licensed only as a pharmacist, drifted into the casual practice of medicine by treating a constituency suspicious of orthodox diagnostic techniques. Doc relied heavily on the *Merck Manual,* drug company handouts, hatha yoga, and Ouspensky's *In Search of the Miraculous*. Doc's musician clientele required a pharmacopoeia to help them stay up all night and remain awake all day. (Winston Churchill's physician, Lord Moran, wrote of a somewhat similar problem that Churchill had—he required pills to go to sleep and pills to stay awake.)

Doc purchased one of the first tape recorders manufactured after the war, and he committed his large jazz collection to tape. The tapes played continuously in the back of the store. Doc's favorite was Louis Armstrong's "Satch Plays Fats," the Louis Armstrong recording of Fats Waller songs.

Doc tacked to his small, cork bulletin board postcards from musician friends. Among the cards were several from Louis Armstrong containing affirmations of the remarkable qualities of vitamin E and evaluations of laxative samples that Doc had supplied for him.

One late afternoon in 1955, in the middle of June, Doc said in a casual way that I was to come along with him to meet Louis Armstrong, who was performing at an open-air theater in Washington that advertised itself as providing music "by the stars under the stars." Doc said he had word that "Pops" was running low and needed his medicine cabinet restocked. Doc filled a satchel with vitamin E, vitamin C, and assorted other pills and laxative samples, and I was actually on my way to meet one of the few men who

had gained lasting worldwide fame according to the precise terms he had chosen for himself.

We arrived early at the theater and found our way to the dressing-room area. There was no security. We heard the sound of warm-up music as we wandered around asking questions until we found Louis Armstrong's dressing room. I was apprehensive that Doc didn't know Louis Armstrong as well as he made it appear. Would we be just intruders? Doc knocked on the half-opened door of Louis Armstrong's dressing room. He was seated opposite a small table with a mirror above it. On the table were bottles of various pills, bottles of lotion, and bottles bearing the name Pluto Water. The trumpet was on the table, horn end down. He was wearing a bathrobe. He had a large white handkerchief tied up around his head like a hat. Black-rimmed eyeglasses rested on his forehead. He had not yet put on his pants. His white silk stockings were rolled down to his black shoes. He was carefully dabbing a cotton wad into a lubricant and then applying the cotton to his lips. A tape recorder played. Louis Armstrong, without getting up, gave Doc a warm, friendly, husky-voiced greeting. I saw at once that they were real friends, comfortable and relaxed in each other's company, nothing forced.

There was a general flow of conversation concerning Armstrong's recent goodwill tour under State Department sponsorship. He told a few stories concerning food and accommodations in out-of-the-way places. Doc pulled open the satchel to show the contents. Louis Armstrong looked in at the portable medicine chest with great curiosity and obvious satisfaction.

As we talked, I noticed a young man somewhere between eighteen and twenty years old peeking into the dressing room. He was holding the hand of a pretty young girl. The young man

caught Doc's eye, and then Armstrong turned around to see where Doc was looking. He saw the innocent young couple and invited them in. The young man was excited by this sudden turn of events. He told Louis Armstrong how thrilled he was to meet and talk to his favorite musician. Armstrong interrupted and asked how he was feeling. The startled young man replied that he was feeling fine. There followed Armstrong's discourse on the need for a good reliable daily laxative. He strongly recommended Swiss Kriss, the laxative he discovered in Sweden. He gave a handful of samples to the young man and woman and then turned again to dabbing his lips with the cotton swabs. The astonished couple withdrew. Doc and I saw that we should leave also because it was nearing show time.

As we were leaving, Louis Armstrong asked me if there was a song I would like to hear. I mentioned the 1932 recording of "That's My Home." He remembered it. He had not sung the song in years, but he was glad I mentioned it because it gave him a good test to see if he could do what he often said he could do—sing the words of just about all of the hundreds of songs he had ever sung. He said that the band would be plenty surprised to hear him start up "That's My Home," but they were all good fakers and they would be all right. He then asked Doc to give him a ride to the Annapolis Hotel after the show was over. We took seats in the audience to the left of the stage. As the curtain went up the band played "When It's Sleepy Time Down South." Louis Armstrong stretched his arms wide, smiled, and said, in a happy, low musical tone, hitting every syllable, "Good evening, everybody." The concert that followed included old favorites, "Blue Turning Gray Over You," "I'm Confessin'," "I Gotta Right to Sing the Blues," and "Saint James Infirmary Blues."

After an intermission the band returned, and four or five more songs rang out in that clear summer night. Then Louis looked in our direction, gave us a big stage wink, and trumpeted into "That's My Home." He played it through just as he did on my old 78 record. He then paused, took out his jumbo handkerchief, drew it past his lips, and sang both the verse and the refrain. As he finished he looked over at us, smiled triumphantly, and raised the trumpet into the air. It was a magic moment. Thomas Mann described those few persons with the unique power to entertain as the dispensers of the joy of life. It is they who by displaying beautiful lighthearted perfection kindle a precious painful feeling, tinctured with envy and wonder, and who can suggest, just for the moment, that the world is filled with wonderful possibilities. For it is they who produce such stuff as dreams are made on.

There were a few encore numbers and then again the strains of "When It's Sleepy Time Down South." Those of us in the know knew that the entertainment was over—a wonderful evening under the stars.

Doc and I waited outside Louis Armstrong's dressing room. He walked out smiling and said that he was sure glad he knew the words to "That's My Home." I was tempted to remind him of his recording of "I'm a Ding Dong Daddy" where he momentarily forgot the words but then made a quick recovery. In Doc's car he joked about the young couple in his dressing room. But he once again emphasized the importance of a good laxative, and he hoped the boy would try the samples. In his rooms at the Annapolis Hotel he had another tape recorder and dozens of tapes. He put on a tape of one of his concerts. He remarked how nice it would be to take a swim on a hot night like this. Doc asked if he was a good swim-

mer. Yes, he said, he was. It was easy to believe. He had an athlete's build and elegant posture.

Doc and Louis exchanged views on musicians, all diseases curable by patent medicines, Pluto Water, Jergens Lotion for the lips, vitamins, and tape recorders. In conversation, Louis Armstrong was much as he was on stage. He used his enormous range of facial expressions as punctuation. If he said something ironic, he rolled his eyes. If he said something a bit pretentious, he struck a pose of mock seriousness and then growled out deep-throated laughter. He sprinkled musicians' slang into his conversation and used affectionate nicknames for his friends. Doc was Pops. Despite his having just given a two-hour performance, he was filled with a playful energetic enthusiasm for each subject that came up.

The quality of Louis Armstrong's conversation has been the subject of testimony by a number of witnesses. Tallulah Bankhead said of it: "He uses words like he strings notes together—artistically and vividly." His slang, first picked up by musicians, turned up everywhere. He occasionally wrote an article about musicians' slang. After an hour or two, Doc stood up suddenly and announced that we were leaving. It was past two in the morning. Louis Armstrong wrote out a list of the pharmaceutical supplies he needed and told Doc where to send them.

During the ride home, Doc said he often thought of selling his drugstore and signing on as Louis's personal pharmacist. Doc did sell the store a few years later, but he did not travel with Louis Armstrong. He should have. Instead, he drove out to Las Vegas where the Washington, D.C., trumpet player Jack "Jive" Schaffer was making a good living at the Golden Nugget impersonating Louis Armstrong. Doc remained in Las Vegas several months. He must have spent lots of money. When he returned, I could see that

he was uneasy without the drugstore. Doc had no family, and the old-timers in the store were his family substitute. No store, no family. Also, Doc was a born salesman. No store, no customers. He also missed his medical practice.

Doc's interest in the metaphysical brought him to Yoga religious services. He learned to sit in the full lotus position. He believed that he was in contact with supernatural forces and that reincarnation was the logical explanation of life's haphazard distribution of misfortune, health, wealth, and sickness. When he withdrew from this earthly existence, he intended to return as a seagull jumping around the beach in Atlantic City, preferably near a cabana at the north end of the boardwalk. Doc's friends could see that he was not doing well. He was even heard to question the therapeutic value of vitamin E.

Within six months after Doc's return from Las Vegas, I found that kind, gentle, helpful man dead, all alone in his small apartment. What happened to all his tapes and those postcards sent to him by the musicians? They had all disappeared.

When I picked up Gary Giddins's 1988 biography of Louis Armstrong entitled *Satchmo*, I looked for Doc's name in the index. There is no index. Too bad such a good book so lovingly put together has no index. Although the book does not mention Doc, it does have a picture of Louis Armstrong in his dressing room with a big smile on his face, just as Doc and I saw him. Another picture shows the Armstrong collection of pharmaceuticals, including a bottle of Pluto Water and the Jergens Lotion. There are reproductions of several of Armstrong's postcards, just like the ones Doc tacked on the corkboard. Giddins has a few comments on Armstrong's Swiss Kriss evangelism and gives a theory to explain the obsession. He connects it with Armstrong's early life when he

could not afford proper food and what he did eat caused digestive problems.

Giddins tries, through words, to describe Louis Armstrong's incomparable trumpet playing and singing. The best Giddins does is fail with honor because words cannot convey the effect of Louis Armstrong's prodigious capacity to entertain. Louis Armstrong was one of the very few entertainers who imitated no one but left behind legions of imitators. Al Jolson (who billed himself as the World's Greatest Entertainer) and George M. Cohan (described as both the Prince of the American Theater and the Man Who Owned Broadway) are in the small circle of unique entertainers. Neither had Louis Armstrong's influence, which continues to affect jazz and jazz musicians. There are two biographies of Jolson and two of Cohan. At my last count, there are ten biographies of Louis Armstrong, and they keep coming. Giddins underlines Louis Armstrong's hold on musicians by quoting Bunny Berigan's statement that all a jazz musician needs when he goes on the road is a toothbrush and a picture of Louis Armstrong.

Giddins describes the work habits of Louis Armstrong during the last twenty years of his life. Those work habits were simple: He worked all the time. Every now and then one of his records became a big hit. "Hello Dolly" was the big hit of 1964, and it brought Louis Armstrong back to all the talk and variety shows. He was always unpredictable and spontaneous. He sprinkled his conversation with his own slang creations and neologisms. By the time things were well under way, he had his host of the moment converted to the "Satchmo" style. His lively intelligence and wit, along with the powerful effect of his personality, created a compelling quality impossible to withstand. Everyone felt qualified to do a very good Louis Armstrong.

In the late 1960s Armstrong fell ill, but he continued to work. He appeared on television shows in New York and Los Angeles despite his many serious illnesses, including heart trouble and ulcers. He celebrated his seventieth birthday at the Newport Jazz Festival and then had to be hospitalized. Despite the hospitalization, his calendar continued to fill up with dates long into the future. He had to cancel his appearances because of a second heart attack that put him back in the hospital. He returned home on May 5, 1971, and made plans to resume his schedule. He died at home, two months later, with plenty of good well-paying work on the books.

He had, as Duke Ellington remarked, been born poor, died rich, and hurt nobody on the way. And his melody lingers on. Just about every recording he made is still in print. "That's My Home" has been moved from the original 78 rpm to an LP, and now it can be found all done up on a compact disc.

The American Scholar

Jacob Stein took part in the Bar Library Lecture Series on January 21, 2009 with a presentation on "Perjury, False Statements & Obstruction of Justice." Generous with his time, Mr. Stein was generous in other ways as well as indicated by the language in the preface to the third volume of *Legal Spectator* from which the following was taken. Mr. Stein wrote "This book is not copyrighted. Its contents may be reproduced without the express permission of, but with acknowledgement to, the author. Take what you want and as much as you want." The works featured in the *Legal Spectator*, originally appeared in the *Washington Lawyer*, the *American Scholar*, the *Times Literary Supplement*, the *Wilson Quarterly*, and the ABA Litigation Section's publication. I want to thank Bar Library Board of Director Henry R. Lord for his time and efforts in reviewing the writings of Mr. Stein for inclusion in the *Advance Sheet*.